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MANDATORY MEDIATION IN THE LIGHT OF HIGH COURT DECISIONS IN TURKISH LAW

TÜRK HUKUKUNDA YÜKSEK YARGI KARARLARI IŞIĞINDA ZORUNLU ARABULUCULUK

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Anahtar Kelimeler

Zorunlu Arabuluculuk, Dava Şartı, İş Uyuşmazlıklarında ve Ticarî Uyuşmazlıklarda Arabuluculuk, Menfî Tespit Davası, İtirazın İptali Davası

Özet

Türk hukukunda 2017'de iş uyuşmazlıklarında, 2018 yılında ise ticarî uyuşmazlıklarda arabuluculuğa başvuru, dava açmadan önce zorunlu hale getirilmiştir. 2018 yılında aynı zamanda, Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu'na eklenen 18/A maddesi ile zorunlu arabuluculuk hakkında genel bir düzenleme de yapılmıştır. Bu çalışmada, söz konusu yeni kanunî düzenlemelerden sonra yüksek mahkeme kararlarına yansımış olan sorunlar ele alınmaktadır. Öncelikle kanun koyucu tarafından kullanılan "dava şartı olarak arabuluculuk" kavramının yerine "zorunlu arabuluculuk" kavramını neden tercih ettiğimiz açıklanmıştır. Kavram sorunundan sonra, yeni getirilen düzenlemelerin içeriği konusuna genel bir bakış yapılmıştır. Daha sonra Anayasa Mahkemesi'nin, iş uyuşmazlıklarında zorunlu arabuluculuk hükümlerinin anayasaya aykırılığı iddiası ile yapılan başvuruyu reddettiği kararı irdelenmiştir. Ardından da, itirazın iptali davası, menfi tespit davası, hem tüketici uyuşmazlığı hem de ticarî uyuşmazlık niteliğindeki davalar, davaların yığılması ve karşı dava bakımından arabuluculuğa başvurunun zorunlu olup olmadığı hakkında verilen Bölge Adliye Mahkemesi ve Yargıtay kararları işlenmiştir. Belirtilen yüksek mahkeme kararlarından yola çıkarak bu hususlarda zorunlu arabuluculuğa başvurunun mümkün olup olmaması hakkındaki kanaatlerimiz de belirtilmiştir.

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Mandatory Mediation, Cause of Action, Mediation in Labor Disputes and Commercial Disputes, Negative Declaratory Action, Action for Annulment of Objection.

Abstract

In Turkish Law, referral to mediation prior to bringing an action was made mandatory for labor disputes in 2017, for commercial disputes in 2018 and lastly, for consumer disputes in 2020. In 2018, with Article 18/A added to the Law on Mediation in Civil and Commercial Dispute, a general regulation was made regarding mandatory mediation. In this study, problems related to the decrees issued by the high court following the new legal regulations under question are addressed. To start, an explanation is provided of why we prefer the concept of "mandatory mediation" to that of the concept of "mediation as a cause of action", the latter of which is the concept used by legislators. After addressing this issue of concept, an overview of the content of new regulations is provided, followed by an examination of the Constitutional Court's decree on mandatory mediation in labor disputes in cases of rejection of application based on the allegation of contradiction of provisions for mandatory mediation in the constitution. In addition, the decrees of the Court of Appeal and Court of Cassation issued regarding whether referral to mediation is mandatory or not in terms of action for annulment of objection, negative declaratory action, actions having the quality of both consumer disputes and commercial disputes, concentration of actions, and counter-action were reviewed. Lastly, we offer opinions on whether referral to mandatory mediation on these matters is possible or not based on the issued high court decrees.

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I. INTRODUCTION

Legal regulations regarding mediation were first issued under Turkish law with the Law on Mediation in Civil and Commercial Disputes[1] no. 6325. The said law regulates the principles, process and minutes for voluntary mediation. In recent years, mediation in certain disputes has started to be made mandatory with the aim of reducing the number of actions in the field of private law and easing the workload of judiciary. Following the placement of labor disputes under mandatory mediation, commercial disputes were also added to this process. Current legislation refers to mandatory mediation as "mediation as cause of action".

In the present study, after examining the problems related to the concept of mandatory mediation, we turn our attention to the new legal regulations issued regarding mandatory mediation in labor, commercial and consumer law. Next, we address our opinions on the problems reflected in the decrees issued by the high court as the result of initial practices of mandatory mediation.

As mandatory mediation in disputes regarding labor law and commercial law have been shown to significantly reduce the workload of courts, the possibility of using the application of mandatory mediation in other disputes has attracted interest. Therefore, addressing the problems related to the procedural laws arising from the initial practices of mandatory mediation will help light the way for future legal regulations and practices.

II. THE PROBLEM OF CONCEPT

In current legislation, mediation in labor, commercial and consumer law disputes is referred to as "mediation as cause of action". There is no information on the justification of why this particular concept of mediation is preferred. Yet, it could be argued that the concept of "cause of action" as a quality of mediation has been preferred as a measure to prevent potential negative reactions from arising over the connotation of mandatory mediation.

With the regulations set in place, there are exceptions to the voluntary feature of voluntary mediation included in the Law on Mediation in Civil and Commercial Disputes. Referral to mediation prior to bringing an action in labor, commercial and consumer law disputes is a legal "obligation". The concept of "cause of action" only applies in terms of either making or not making this referral. Thus, "mandatory mediation" may be referred to as a special cause of action[2]. In our opinion, despite the current legislative use of the concept of "mediation as cause of action", mediation in disputes regarding labor, commercial and consumer law nonetheless has the quality of "mandatory mediation"[3]. Therefore, throughout this article, "mandatory mediation", as opposed to the legislative use of "mediation as a cause of action", was used.

III. OVERVIEW OF LEGAL REGULATIONS REGARDING MANDATORY MEDIATION

A. In Labor Disputes

In Turkish Law, the concept of mandatory mediation was first introduced in labor disputes under the new Labor Courts Law[4] no. 7036. Mandatory mediation in labor law disputes in extensively regulated under paragraph 22 of Article 3 of the Labor Court Law.

Labor disputes for which referral to mediation is mandatory generally involve actions litigated over the request of receivables and indemnities of workers or employers, reinstatement based on law, and personal or collective labor agreements (LCL Art. 3/I). On the other hand, referral to mediation for pecuniary and non-pecuniary damages arising from work accidents or occupational health hazards as matters of labor dispute, and declaratory actions, actions of objections and actions of recourse with respect to these have not been made obligatory (LCL Art.

[1] OG, 22.6.2012, No. 28331.
[2] For the view that mandatory mediation in Turkish Law is not a cause of action but rather, an impediment of action by its legal characteristic, see ATALI, Murat/ERDOĞAN, Ersin: "A New Model in Legal Dispute Resolution: Mandatory Mediation", Zeitschrift für Zivilprozess International, 23, 2018, p.249.
[3] ERDOĞAN, Ersin: "Mandatory Mediation Anticipated in Law Courts Law with no 7036, and Its Assessment in terms of Right to Legal Remedies", Journal of Legal Labor Law and Social Security Law, 14(55), 2017, p.1213.
[4] OG, 25.10.2017, No. 30221.

3/III)[5]. Mediation for these disputes in question is, however, not completely prohibited, as referral to voluntary mediation is optional[6].

In the case an agreement cannot be made by the end of the mediation process, it is mandatory that the original relevant final minutes, or a copy of these minutes approved by the mediator be attached to the petition of action. If this obligation is not fulfilled, a summons including the warning that it is required for the final minutes to be submitted to the court within a peremptory term of one week otherwise the action will be dismissed without prejudice is sent to the claimant by the court. If the requirements specified in this warning are not fulfilled, the action is dismissed without prejudice and without serving the petition of action to the other party. Finally, in cases where it is understood that the action had been litigated without referral to mediation, a dismissal of action without prejudice is decreed due to the absence of cause of action (LCL Art. 3/II).

In terms of referral to mandatory mediation, labor disputes related to personal labor agreements, collective labor agreements, or the law may arise. Labor disputes over the law do not necessarily pertain only to Labor Law; they may arise in relation to provisions of the Turkish Code of Obligations regarding contract of service (TCO Art. 393 etc.), the Press Labor Law or the Maritime Labor Law (LCL Art. 3/XX)[7].

In terms of action of reinstatement, being an action specific to labor law, regulation of mandatory mediation had also been made individually in Labor Law. According to the amendment[8] made in paragraph 1 of Article 20 of the Labor Law, "*In accordance with the provisions of the Labor Courts Law, a worker whose labor contract has been terminated is required to refer to mediation with the request of reinstatement within one month as from the service of notice of termination, under circumstances where there is allegation that no reason was indicated in the notice of termination, or that the indicated reason is not valid. In the case an agreement cannot be made by the end of the mediation activity, an action can be litigated in the labor court within two weeks as from the date of issuance of the final minutes. If the parties come to an agreement, the dispute may be referred to a special mediator instead of labor court within the same time period. In the case of dismissal of action without prejudice due to directly opening an action without referral to a mediator, the decree of dismissal is served to the parties ex officio. It can be referred to mediator within two weeks as from the ex officio service of the finalized decree of dismissal."*

In cases where there is no provision in the Labor Court Law, the provisions of the Law on Mediation in Civil and Commercial Disputes are applied to the extent it conforms to the quality of the case (LCL Art. 3/XXI).

B. In Commercial Disputes

Following the legislative institution of mandatory mediation in labor disputes, referral to mediation in commercial disputes, under the heading of "mediation as cause of action", was made mandatory under Article 5/A[9] of the Turkish Code of Commerce no. 6102. According to this new article "*(1) In commercial actions, being specified in Article 4 of this Law, or in other laws, it is cause of action to refer to a mediator prior to bringing an action for requests of receivable and indemnity whose subject is the payment of an amount of money. (2) The mediator concludes the application within six weeks as from her/his appointment. If necessary, this period may be*

[5] "*...According to paragraph 3/3 of Law no.7036, the provision in paragraph 1 states that mediation is not applied for actions of pecuniary and non-pecuniary damages arising from work accident or occupational health hazards, or for declaratory actions, actions of objections and actions of recourse with respect to these...*" Adana CA, 8. CD, 30.11.2018, M. 2018/3117, D. 2018/1924 [Lexpera Law Information System: https://www.lexpera.com.tr/ictihat, (Date of Access: 21.10.2019)].

[6] KÖME AKPULAT, Ayşe: Features of Trial at Labor Courts, Istanbul, 2018, p.360; ATALI/ERDOĞAN, p.245.

[7] KÖME AKPULAT, p.355; ÖZEKES, Muhammet: Pekcanıtez Procedural Law-Dinamik Kitap, https://www.lexpera.com.tr/dinamik-kitaplar/v-is-uyusmazliklarinda-zorunlu-dava-sarti-olan-arabuluculuk-9786051524832-1/1 (Date of Access: 28.01.2020), § 23, 5, B; ERDOĞAN, p.1214; ATALI/ERDOĞAN, p.245; ÇİL, Şahin: Mediation in Labor Disputes, Ankara, 2018, p.25; ÇİÇEK, Mustafa: Mandatory Mediation in Labor Law, 2. ed., Ankara, 2019, p.101; SENYEN-KAPLAN, E.Tuncay: Individual Labor Law, 9. ed., Ankara, 2018, p.43.

[8] Amendment made by Labor Court Law with no. 7036, OG, 25.10.2017, No. 30221

[9] The article was added to Article 20 of the Law on Procedure of Starting Legal Proceedings Regarding Pecuniary Claims Arising from Subscription Contract with no. 7155 (OG, 19.12.2018, No. 30630).

extended for at most two weeks by the mediator."

In the Turkish Code of Commerce, as distinct from the Labor Courts Law, procedural rules regarding mandatory mediation are not included, as the procedure to be applied in mandatory mediation in commercial disputes is subject to Article 18/A of the Law on Mediation in Civil and Commercial Disputes no. 6325[10]. Article 18/A, which was added to Law on Mediation in Civil and Commercial Disputes no. 7155[11], features a very long regulation of 20 paragraphs. As this article regulates the general provisions to be applied for mediation as cause of action (LMCCD Art. 18/A/I), legal regulations regarding mandatory mediation in cases of private law has been reserved (LMCCD Art. 18/A/XIX).

In the case an agreement cannot be made by the end of the mediation activity in commercial disputes, it is mandatory that the original of the relevant final minutes, or a copy of it approved by the mediator, be attached to the petition of action. In the case this obligation fails to be complied with, a summons issuing the warning that it is required for the final minutes to be submitted to the court within a peremptory term of one week otherwise the action will be dismissed without prejudice is sent to the claimant by the court. If the requirements stated in the warning are not fulfilled, it is decreed that the action be dismissed without prejudice and without serving the petition of action to the other party. In the case that the action has been proven to be litigated without referral to mediation, it is decreed that the said action is dismissed without prejudice due to absence of cause of action (LMCCD Art. 18/A/II).

In cases where there is no provision in Article 18/A of the Law on Mediation in Civil and Commercial Disputes related to the case in question, the other provisions of this Law are applied to the extent they apply to the quality of the case (LMCCD Art. 18/A/XX).

For a commercial dispute to be subject to mandatory mediation, it is foremost required that the case be a commercial action (TCC Art. 4).Commercial actions constitute absolute commercial action or relative commercial action. Absolute commercial actions are actions regulated in the Turkish Code of Commerce without considering whether the parties are merchants or not; actions which are specified as being commercial in the Turkish Code of Commerce and are regulated in other law; and actions which are regulated as commercial actions in private law. Relative commercial actions, on the other hand, are actions deemed as commercial action provided that they are relevant to the operations of the business firm of the parties. In terms of mandatory mediation, the fact alone that a dispute is a commercial action is not sufficient. The subject of such a commercial action is required to be "action for receivables or damages" as it relates to the payment of an amount of money.

Actio pauliana, being an action peculiar to Enforcement and Bankruptcy Law, is not subject to mandatory mediation[12], as the subject of this action involves an act of disposal between the debtor and a third person and therefore can never be a commercial dispute. In cases where an *actio pauliana* is litigated for seizure, the creditor has the right to obtain their receivable through compulsory enforcement over the goods or rights that the debtor transfers to a third person, while in cases where an *actio pauliana* is litigated for bankruptcy, the goods that are the subject of the disposal for annulment are directed to the estate of the bankrupt party[13]. An *actio pauliana* is not an action regulated in the Turkish Code of Commerce, as it is neither an absolute commercial action nor a relative commercial action, on account that a receivable relevant to the business firms of both parties is not the subject in question[14]. For this reason, the court charged with trying cases of *actio pauliana* is the civil court of first instance[15]; save for cases that fall under Article 97/XVII

[10] BUDAK, Ali Cem: "Mediation as Cause of Action in Commercial Actions", MİHDER, 15(42), 2019/1, p.30.
[11] OG, 19.12.2018, No. 30630.
[12] ÖREN, Onur: "*Actio pauliana* is not within the Scope of Mandatory Mediation", Journal of Istanbul Bar Association, 93(4), 2019, p.76; ATALI, Murat/ERMENEK, İbrahim/ERDOĞAN, Ersin: Enforcement and Bankruptcy Law, Ankara, 2019, p.738; BUDAK, p.38; BUDAK, Ali Cem/KARAASLAN, Varol: Law of Civil Procedure, 3. Ed., Ankara, 2019, p.458. In the book published by the Ministry of Justice, we believe that it was incorrectly specified that *actio pauliana* is subject to mandatory mediation, see. KOÇYİĞİT/BULUR, p.68.
[13] ARSLAN, Ramazan/YILMAZ, Ejder/TAŞPINAR AYVAZ, Sema/HANAĞASI, Emel: Enforcement and Bankruptcy Law, Ankara, 2018, p.538; KURU, Baki: Guide of Enforcement and Bankruptcy Law, Ankara, 2013, p.1414.
[14] ÖREN, p.76.
[15] PEKCANITEZ, Hakan/ATALAY, Oğuz/SUNGURTEKİN ÖZKAN, Meral/ÖZEKES, Muhammet: Textbook of Enforcement and Bankruptcy Law, 6. Ed., Istanbul, 2019, p.558; KURU, p.1427; ARSLAN/YILMAZ/TAŞPINAR

of the Enforcement and Bankruptcy Law, cases of *actio pauliana* cannot be tried in a commercial court of first instance[16]. *Actio pauliana* does not fall under the jurisdiction of other private courts[17].

C. In Consumer Disputes

Mediation has only recently been made mandatory for consumer law disputes under Law no. 7251. Article 73/A was added to the Consumer Protection Code no. 6502 with the said addition of the amendment to the law[18].

Some consumer law disputes are beyond the scope of the legislatively enacted prescriptions for mandatory mediation. These are: a) Disputes under the jurisdiction of a consumer arbitration committee, b) Objections to the decisions of a consumer arbitration committee, c) Actions brought by consumer organizations, related public institutions and organizations, and the Ministry, ç) Actions pertaining to cessation of production or sales and seizure of property, e) Disputes involving both consumer transaction and rights *in rem* for immovable property.

Article 18/A of the Law on Mediation in Civil and Commercial Disputes no. 6325 is also applied to mandatory mediation in consumer law. However, the 11th paragraph of the mentioned article cannot not be applied against the consumer.

IV. PROBLEMS REFLECTED IN THE DECREES OF THE HIGH COURT

A. Constitutional Court's Judgement that Mandatory Mediation does not Violate the Constitution

Following the acceptance of mandatory mediation in labor disputes, action for annulment was litigated in Constitutional Court under the allegation that the relevant provisions breached the right to legal remedies and the right of access to court. Based on the following reasons, the Constitutional Court decreed in the rejection judgement[19] that the limitation made to the right to legal remedies as consequence of mandatory mediation in labor law does not violate the essence of the right using the following argument:

"*24. It cannot be said that obligation of referral to mediation affects the essence of the right to legal remedies unless said obligation causes an ineffective and inconclusive process that renders individuals' right to legal remedies impossible, or that renders realization of this right excessively difficult. As a result of being a cause of action, even if referral to mediation is mandatory, this obligation is only limited insofar as it is a referral to mediation, and it is clear that the wills of the parties are dominant in the functioning and result of the mediation process. The parties may end the process whenever they want, and they have the option to come to an agreement or not by the end of the process. In the case an agreement is not able to be reached, parties are able to seek judicial remedy for the resolution of dispute. In this respect, the Law, as it relates to the mediation process and its results, does not compromise the wills of the parties."*

In 2013, the Constitutional Court ruled in the action for annulment of the Law on Mediation in Civil and Commercial Disputes that the said Law not jeopardize the right to legal remedies as it is voluntary in nature and does not prevent parties from entering a suit of action in court[20]. Despite this ruling that mandatory mediation does not oppose the right to legal remedies, in court practice, the contradictions apparent in the rationale behind the ruling has led to much criticism of the doctrine of mediation.[21]. According to the opinions criticizing this ruling, making mediation

AYVAZ/HANAĞASI, p.539; MUŞUL, Timuçin: Enforcement and Bankruptcy Law, 6.Ed., V.II, Ankara, 2013, p.1769-1770; ATALI/ERMENEK/ERDOĞAN, Enforcement Bankruptcy, p.730; KARSLI, Abdurrahim: Enforcement and Bankruptcy Law, Istanbul, 2014, p.550.

[16] "*...The purpose in cases of actio pauliana is to ensure collection of property transferred by the debtor prior to their seizure or bankruptcy to make them unavailable to the creditor in "opposition to rules of bona fide" through continuation with compulsory enforcement. By this characteristic of actio pauliana, it is not included among the commercial actions listed under the duties of commercial court...*" 17. CD, 9.5.2012, M. 2012/166, D. 2012/5920 (KURU, p.1427, fn. 43).

[17] KURU, p.1427.

[18] OG, 28.7.2020, No. 31199.

[19] CC, 11.7.2018, M. 2017/178, D. 2018/82 (OG, 11.12.2018, No. 30622)

[20] CC, 10.07.2013, M. 2012/94, D. 2013/89 (OG, 25.01.2014, No. 28893)

[21] ÖZEKES, Muhammet: "Assessment of Mandatory Mediation in terms of Right to Legal Remedies, and Principles of Mediation 'A Critical Approach to Mandatory Mediation'", International Symposium on the Development of Mediation, December 6-7, 2018, Ankara, 2019, p.128; EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p.148.

mandatory and regulating it as alternative to jurisdiction stand in opposition to the Constitutional Law and the right to legal remedies[22]. However, opinions in support of the ruling of the Constitutional Court on this subject argue that mediation simply enforces parties to refer to mediation, and that the limitation regarding right to legal remedies does not compromise the essence of the right, as it is not mandatory for parties to maintain the mediation process or to reach an agreement[23].

We believe that the Constitutional Court's reason justifying that mandatory mediation does not stand opposed to the Constitutional Law and the right to legal remedies as referral to it is voluntary constitutes a contradiction. Mandatory mediation leads to significant delays in the due process of law considering that individuals are not able to immediately benefit from the right of seeking legal remedy to a dispute. This condition also constitutes a hinderance to ensuring effective legal protection. In our opinion, mandatory mediation is contrary to the Constitutional Law with respect to the right to legal remedies.

B. On Whether Mediation is Mandatory or not in terms of Action for Annulment of Objection

In Turkish Law, a creditor can collect receivables by applying to the enforcement office regardless of whether there has been an enforcement proceeding with judgement or not. An order of payment is sent to a debtor after the request to issue enforcement proceeding, and if the debtor has no objection to order of payment, the enforcement proceeding becomes final. If the debtor has an objection to order of payment, the enforcement proceeding stops *ipso facto* (EBL Art. 66). If the creditor wants to continue the proceeding, the creditor has recourse to either rescission of objection or action for annulment of objection. A creditor in possession of one of the vouchers specified in Article 68 of the Enforcement and Bankruptcy Law can request rescission of objection from the enforcement court within six months from the notification of the objection. A creditor not in possession of any of these vouchers can bring an action for annulment of objection in general civil courts within one year of the notification of the objection (EBL Art. 67/I). In this action, if it is decided that the debtor's objection is illegitimate, the debtor is indemnified at the request of the other party to appropriate compensation, not less than twenty percent of the rejected or the accepted amount of the claim (EBL Art. 67/II). This indemnity is referred to as indemnity of denial of enforcement. Similarly, if the creditor's request is deemed illegitimate and malicious in the enforcement proceeding; the creditor is likewise indemnified.

Whether the action for annulment of objection will be referred to mandatory mediation constitutes a problem. There has been no direct ruling by the Court of Cassation or by the Court of Appeal on this subject. However, in rulings related to mandatory mediation in commercial disputes, the Court of Appeal has failed to address the issue of action for annulment of objection[24]. Based on this, it can be concluded that the Court of Cassation and the Court of Appeal will both be of the opinion that action for annulment of objection in labor disputes be subject to referral to mandatory mediation.

In labor law disputes, referral to enforcement without judgment can be made without first referring to mandatory mediation[25]. Likewise, mandatory mediation does not prevent enforcement proceedings from being entered for commercial disputes. Furthermore, according to doctrine, in labor disputes, it is required to first refer to means of mandatory mediation when the creditor opens an action for annulment of objection in order to able to continue with the proceeding in the case the debtor objects to the proceeding[26]. According to this view, if a dispute has been referred to mediation and if the minutes of the dispute were recorded prior to enforcement proceedings, the obligation of referral to mediation does not remain for an action for annulment of objection to

[22] ÖZEKES, Pekcanıtez Procedure, § 23, 5, A.

[23] ERDOĞAN, p.1236; KURT KONCA, Nesibe: "Cause of Action in Commercial Disputes (Mandatory) Mediation, http://www.ankahukuk.com/ticari-uyusmazliklarda-dava-sarti-zorunlu-arabuluculuk/ (Date of Access: 20.10.2019).

[24] "...*In this case, rejection by procedure is required for the action litigated with the request of annulment of objection for disputes having the quality of commercial dispute, where it is understood that the claimant had not referred to mediation prior to bringing an action, per paragraph 2 of Article 18/A of the LMCCD no. 6325*..." Ankara CA, 3. CD, 3.5.2019, M. 2019/856, D. 2019/834 [Kazancı Court Practices Information Bank: http://www.kazanci.com/kho2/ibb/giris.html, (Date of Access: 21.10.2019)].

[25] KÖME AKPULAT, p.364; EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p.195; ÖZEKES/ATALI, p.113; GÖKSU, Mustafa: Alternative Means of Solution of Dispute and Arbitration, Ankara, 2019, p.81; ÇİL, p.20; ÇİÇEK, p.94; TANRIVER, Süha: "Some Thoughts about Mediation as Cause of Action", TBBD, I.147, March-April 2020, p.122.

[26] KÖME AKPULAT, p.364; GÖKSU, p.81; ÇİL, p.17,20; ÇİÇEK, p.94; KOÇYİĞİT/BULUR, p.67.

be litigated in the future[27]. In terms of commercial disputes, it has been accepted in doctrine to refer to mandatory mediation prior to opening an action for annulment of objection[28]. However, according to a view asserted in the doctrine, action for annulment of objection is not an action subject to mandatory mediation, as it is not an action involving debt or indemnity by its legal characteristic[29].

In order to be able to determine whether an action for annulment of objection is subject to mandatory mediation or not, it is required to determine the legal characteristic of the action in subject. In Turkish law, the legal characteristic of an action for annulment of objection is a controversial issue in both doctrine and adjudication. According to a view asserted in doctrine[30], an action for annulment of objection is an action of performance, meaning that the collection of a receivable may also be the subject of a proceeding in an action for annulment of objection. An action involving litigation of debt within one year of objection of the debtor in enforcement proceedings is actually being referred to as an action for annulment of objection, and in contrast to normal legal proceedings involving debt, the debtor is charged with indemnity of denial of enforcement in the continuation of the proceeding. In this view, as an action for annulment of objection is an action for performance (action of debt) by its legal characteristic, it is required to also refer to mandatory mediation prior to the opening of this action.

According to another view on the legal characteristic of an action for annulment of objection[31], the action in subject is not an action for performance (action of debt), but rather, an action peculiar to enforcement law. In an action for annulment of objection, as distinct from an action of debt, the continuation of enforcement proceeding and enforcement denial indemnity is requested by the annulment of objection, and it is subject to a one-year period. According to this view, the debtor is not required to pay the receivable because the creditor whose action for annulment of objection is accepted then acquires the authority to request seizure. In the case this view is accepted, mandatory mediation is then not applied for an action for annulment of objection, as it is an action peculiar to enforcement law.

The legal characteristic of an action for annulment of objection has not adequately prescribed in the rulings of the Court of Cassation. While the Court of Cassation accepts the action for annulment of objection as an action for performance in some of its rulings[32], in others, it deems that the action for annulment of objection is not an action for performance, and that it is distinct from an action of debt in terms of its characteristic and results[33]. Furthermore, in some of the decisions of the Court of Cassation, it qualifies the case as an action of performance but states that in this action, it is only possible to annul the objection, not the collection of the receivables[34].

In our opinion, an action for annulment of objection is an action peculiar to the enforcement law, and it is not by its legal characteristic an action for performance. In an action for annulment of objection, the subject of the action is whether or not a proceeding should be continued by removing the objection of the debtor in terms of the amount of receivables. The decree of the court covers the order of continuation of proceeding regarding the amount pertaining to the action for annulment of objection when the action is accepted, but there is no decree regarding the collection of receivable as an action for performance. Considering these features, as the action for annulment of objection is not an action of debt by its legal characteristic, it should not be subject to mandatory mediation in either labor disputes or commercial disputes.

Moreover, if the creditor had referred to means of removal of objection at enforcement court for continuing the enforcement proceeding, then referral to mandatory mediation was not

[27] KÖME AKPULAT, p.364.
[28] BUDAK, p.22.
[29] YARDIM, p.103; TANRIVER, p.123.
[30] POSTACIOĞLU, İlhan. E.: Principles of Enforcement Law, Istanbul, 1982, p.180; YILMAZ, Ejder: "Legal Characteristic of Action for Annulment of Objection", Present for Prof. Dr. Saim Üstündağ, Ankara, 2009, p.608; KURU, p.271; ARSLAN/YILMAZ/TAŞPINAR AYVAZ/HANAĞASI, p.170; KARSLI, p.223.
[31] PEKCANITEZ/ATALAY/SUNGURTEKİN ÖZKAN/ÖZEKES, p.108; MUŞUL, p.401-403; ATALI/ERMENEK/ERDOĞAN, p.152.
[32] 15. CD, 21.11.2012, M. 2012/1902, D. 2012/7302 (Lexpera); 15. CD, 7.3.2019, M. 2018/2922, D. 2019/1003 (Lexpera); 3. CD, 28.3.2019, M. 2017/4781, D. 2019/2736 (Lexpera).
[33] 10. CD, 27.12.2018, M. 2016/2717, D. 2018/11306 (Lexpera); 10. CD, 20.2.2019, M. 2016/14103, D. 2019/1467 (Lexpera).
[34] 22. CD, 18.12.2018, M. 2018/6860, D. 2018/27613 (Lexpera).

sought. Since removal of objection is not an action, mandatory mediation would not apply in either labor law disputes or commercial law disputes[35].

C. On whether Mediation is Mandatory or Not in terms of Negative Declaratory Action

Negative declaratory action is a type of action that is requested from the court to determine the absence of a right or legal relationship. This action is generally regulated in Article 106 of the Code of Civil Procedure and in terms of the consequences of enforcement proceeding, in Article 72 of the Enforcement and Bankruptcy Law.

In commercial disputes, the problem of whether mandatory mediation should be applied or not for negative declaratory actions to be litigated in such disputes has emerged. The discussion here centers on the point of whether the expression of "receivable and indemnity requests whose subject is the payment of an amount of money" in Article 5/A of the Turkish Code of Commerce covers the negative declaratory action or not.

There is no consensus in doctrine on whether referral to mandatory mediation prior to opening negative declaratory action is required or not. According to one view of doctrine, mandatory mediation is not applied in negative declaratory actions, as there is no payment of a receivable or indemnity[36], while another view holds that referral to mediation is mandatory for negative declaratory action[37].

Here, it is important to first define the concept of subject of the action. The subject of action refers to the result that is desired by the action. In this respect, the subject of the action corresponds to the result of the request. In commercial disputes, the criterion required for mandatory mediation is that the subject of action be a request for receivable or indemnity involving the payment of an amount of money. The fact that the negative declaratory action is a commercial action is not sufficient for it to be subject to mandatory mediation. In our opinion, the subject of negative declaratory action is not the payment of an amount of money but rather, the determination of the absence of a right or legal relationship (CCP Art. 106/I), and therefore, mandatory mediation does not apply in this type of action.

Rulings issued by Courts of Appeal reveal differences of opinions on this subject. Some Courts of Appeal specify that negative declaratory action is not subject to mandatory mediation, as its subject is not the collection of receivables[38]. On the other hand, other rulings from Courts of Appeal indicate that negative declaratory action is subject to mandatory mediation, as it is relevant to payment of an amount of money[39]. There is also no consistency in the rulings issued

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[35] KOÇYİĞİT/BULUR, p.67; TANRIVER, p.123.

[36] PEKCANITEZ/ATALAY/SUNGURTEKİN ÖZKAN/ÖZEKES, p.131; ATALI/ERMENEK/ERDOĞAN, p.772-773; PASLI, Ali: "Assessment of Mandatory Mediation in terms of Business Firms and Trading Companies: Interpretation of Article 5/A of Turkish Code of Commerce", Mediation in Commercial Disputes, Ankara, 2019, p.18; YARDIM, p.100.

[37] KOÇYİĞİT/BULUR, p.67-68; BUDAK, p.33; KURT KONCA, p.1.

[38] "…*According to Article 5/A of the TCC, referral to mediation prior to bringing an action regarding receivable and indemnity requests whose subject is the payment of an amount of money is a cause of action. The subject of the action (object of demand) is determined based on the result of request in petition of action. In cases where the result of the request is the collection of receivable or indemnity referral to mediator is a cause of action.*
Negative declaratory actions are not assessed within this scope, as there is no request for collection of an amount of receivable in negative declaratory actions. In other words, there is no obligation of referral to mediation in negative declaratory actions which have the characteristic of commercial action…" Istanbul CA, 14. CD, 21.3.2019, M. 2019/521, D. 2019/423 (MİHDER, 15(42), 2019/1, p.282-284); "…*Concrete cases of negative declaratory action are as specified above. The legistlation views mediation as cause of action in terms of receivable and indemnity requests whose subject is the payment of an amount of money. As the action under question is a negative declaratory action, there is no obligation to refer to mediation* …" Istanbul CA, 16. CD, 9.5.2019, M. 2019/1086, D. 2019/1021 (Lexpera); "…*As the decrees to be made as the result of negative declaratory actions will not include a provision of performance, there is no obligation of referral to mediation for opening negative declaratory actions*..." Ankara CA, 20. CD, 29.11.2019, M. 2019/1498, D. 2019/1230 (had not been published).

[39] "…*Even if the claimant had asserted that s/he their case does not fall within the scope of mediation as mandatory cause of action in the negative declaratory action under question, considering that a payment of an amount of money is being sought by clearly emphasizing the subject of action and not the result of request by the regulation specificed in Article 5/A of the TCC, and considering that negative declaratory actions are actually relevant to payment of an amount of money, it is required to accept that this case is within the scope of mediation as a cause of action. Since the purpose of the legislation governing this issue would be compromised and confusion would arise in practice if it were not accepted to be within the scope of mediation as cause of action, the courts have ruled that these negative declaratory actions fall within the scope of manditory mediation as cause of action and therefore can be dismissed without prejudice*

by the Courts of Appeal regarding negative declaratory action in labor law[40].

The conflict between the contradictory rulings of the Courts of Appeal must be resolved by the Court of Cassation. As a matter of fact, the 19th Civil Department of the Court of Cassation ruled that it is not necessary to refer to mediation before bringing an action in commercial negative declaratory actions, and that mediation does not qualify as a cause of action[41]. In summary, the Supreme Court of Appeals justifies that there is no negative declaratory action within the scope of TCC Art. 5/A, that its application cannot be expanded through interpretation in the face of the clear regulation of the law, and that legislation deliberately excludes the negative declaratory action from the scope. In our opinion, the decision of the Court of Cassation stating that mandatory mediation cannot not be applied before bringing a negative declaratory action is correct and in line with our above-stated opinion.

This ruling issued by the Court of Cassation relates only to mandatory mediation in commercial disputes. In our opinion, the decision made by the Court of Cassation is valid only for negative declaratory actions regarding commercial disputes. The reason for this is that in the legal regulations on mandatory mediation for both commercial and consumer disputes, there is no statement that excludes negative declaratory action. Therefore, it should be mandatory to refer to mediation in commercial and consumer disputes before filing a negative declaratory action.

D. On whether Mediation is Mandatory or Not for Commercial Actions which are also Consumer Transactions

In the rulings issued by the Courts of Appeal, there are contradictions on whether mandatory mediation should be applied or not in disputes involving consumer transactions in terms of both commercial action and Consumer Protection Law.

The Courts of Appeal, in one of its rulings, stated that mandatory mediation would be applied regardless of whether the dispute is a commercial action or a consumer transaction[42]. Yet, in another ruling issued by a Court of Appeal, it was stated that as disputes pertaining to contracts have the characteristic of consumer transaction, it continues to be deemed as a consumer transaction – even in cases where a dispute has the characteristic of a commercial action –

when claimant has failed to refer to mediation…" Istanbul CA, 19. CD, 28.6.2019, M. 2019/1734, D. 2019/1521 (Lexpera); *"...In the dispute, as it is understood that the action is a negative declaratory action litigated based on a bill of exchange, that bills of exchange are regulated in the Code of Commerce, that these types of actions have the characteristic of commercial action in accordance with Articles 3 and 4/1-a of the TCC, that the parties had not referred to mediation as a cause of action for actions regarding receivable and indemnity requests whose subject is the payment of an amount of money in commercial actions, the court was not incorrect to rule for dismissal without prejudice due to absence of cause of action*…" Erzurum CA, 27.3.2019, M. 2019/531, D. 2019/549 (Budak, p.32).

[40] "*...In law, there is no regulation related to referral to mediation as a cause of action in negative declaratory actions. The ruling for dismissal of action without prejudice by absence of cause of action due to failure to refer to mediation was proper...*" Gaziantep CA, 9.7.2019, M. 2019/1107, D. 2019/1478 (Lexpera); "*...it has been observed that the action has the characteristic of a negative declaratory action in the sense that there is no receivable of employer arising from the labor contract, that it is a dispute that falls within the scope of Article 3 of the Labor Courts Law no. 7036, dated January 01, 2018, which regulates mediation as a cause of action, that the action had been litigated by the claimant without referral to mediation, and that there is no incorrect action in the dismissal of action without prejudice due to the absence of cause of action...*" Bursa CA, 9. CD, 14.6.2019, M. 2019/1516, D. 2019/1294 (was not published).

[41] 19. CD, 13.2.2020, M. 2020/85, D. 2020/454 (Lexpera).

[42] "…*The dispute that is the subject of action relates to the collection of a loan receivable arising from a personal loan contract, and it has the characteristic of a banking transaction. …private law disputes arising from consumer loans are deemed as commercial actions, without the requirement to seek mediation.*

On the other hand, the dispute between the parties has the characteristic of a consumer transaction. The legal characteristics of consumer transaction are regulated in the CPL no. 6502.

Moreover, an action that has the characteristic of a consumer transaction does not hinder the acceptance of a dispute as an absolute commercial action. The concept of consumer transaction and the concept of commercial action are two different concepts, and different results have been associated with both concepts. The commercial action characteristic of private law disputes that have the characteristic of consumer transaction does not remove the consumer transaction characteristic of the transaction. According to Article 83/2 of the CPL, the presence of a regulation in other laws regarding transactions in which one of the parties is a consumer does not hinder this transaction from being deemed a consumer transaction or from having applied the provisions of Law no. 6502 regarding duty and authority. According to this regulation, in the case a transaction is a consumer transaction, the transaction will remain a consumer transaction, even if there exists a regulation in other legislation regarding the same consumer transaction, and in the case of the opening of an action, the court in charge will be the consumer court…" Ankara CA, 3. CD, 3.5.2019, M. 2019/856, D. 2019/834 (Kazancı).

pursuant to Article 83/2 of CPL, which is not subject to mandatory mediation[43].

In doctrine, there are different views on this issue. According to one view[44], even if consumer courts are charged with handling consumer transaction disputes, mandatory mediation can be applied if a commercial action is also involved. According to this view, since commercial actions are not always handled in the commercial court of first instance, whether the action is a commercial action or not should be determined without considering which court is in charge. On the other hand, in doctrine, it has been argued that since consumer transaction disputes will not be deemed as commercial action within the scope of CPL they are not subject to mediation[45].

In our opinion, mandatory mediation cannot be applied for disputes that have the characteristic of both consumer transaction and commercial action. First, the concept of "commercial action" is a concept relevant to the duty of courts. If a legal transaction is a "consumer transaction", it means it is subject by law to a consumer arbitration committee, or a consumer court. It is here that a conflict arises around the issue of which of the two courts with special jurisdiction is responsible for handling such cases. In accordance with the regulation of Article 83/II of the CPL, keeping the quality of consumer transaction at the forefront, it is required that such disputes be resolved at a consumer arbitration committee or at a consumer court, even if they are commercial actions. Consequently, as referral to mandatory mediation is required prior to opening an action, in a dispute judged to be a consumer transaction, referral to mandatory mediation is not possible per the rules of duty to which relevant action is subject. For this reason, it is required that the contradictions among the rulings issued by the Courts of Appeal be removed by the Court of Cassation (Law with no 5235 Art. 35).

E. Mandatory Mediation in case of Concentration of Actions

A concentration of actions ensues when a claimant puts forward more than one claim against the same defendant in the same lawsuit petition. These types of actions are especially seen in cases involving receivables of workers. For instance, after termination of a labor contract, a worker may request her/his receivables of severance and notice pay, remuneration of annual leave, and weekend and overtime work remuneration in a single action. When referring to mandatory mediation prior to bringing an action, it is required to specify each of the requested receivables. For actions litigated later on, the receivables specified in the request for action and the receivables specified in the dispute minutes of the mandatory mediation process must match, otherwise, bringing an action for a receivable not negotiated during mandatory mediation gives rise to separation of action and dismissal without prejudice for the receivable in question (LCL Art. 3/II, final sentence).

The Court of Appeal, in one of its rulings, agreed with the ruling issued by the court of first instance on the dismissal of action without prejudice due to absence of cause of action for a case involving a receivable –for which there was no request in the minutes of mediation- that was made subject to action along with other receivables[46]. On the other hand, in doctrine, for such a case,

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[43] "…*Actions involving dispute arising from installment sales contracts are regulated under Article 17 and other articles that follow in the CPL. As such actions will be addressed at consumer courts, it is not possible to deem the action in question as a commercial action. For the action to be deemed a commercial action, the subject of dispute has to be relevant to the business firms of both parties. As actions in which one party is a consumer cannot be deemed a commercial action, they are not included within the scope of mediation as cause of action.*
In accordance with the provisions of Article 83 of the CPL,… it has been clearly emphasized in justification as the mandatory provision of law that having regulation in other laws regarding a transaction in which one of the parties is a consumer will not hinder that transaction from being accepted as a consumer transaction, and will not hinder the referral of the consumer to consumer arbitration committees or to consumer courts. As a dispute cannot, legally speaking, be both a consumer transaction and a commercial at the same time, in cases involving a consumer transaction, it is obligatory to apply the provisions of the consumer law of mediation characteristic in accordance with Article 2 of the CPL.
For these reasons, mediation as a cause of action –being regulated in Article 5/A of the TCC and having the characteristic of private law- is required to be applied for commercial actions within the scope of this private law. As mediation -as cause of action in commercial actions- is a mandatory legal term, and as it is regulated for the law to which it applies, its application in actions and affairs having the characteristic of consumer transaction within the scope of the CPL as well as in consumer transactions involving commercial affairs cannot be considered…" Antalya CA, 3. CD, 5.7.2019, M. 2019/1038 D. 2019/1088 (Lexpera)

[44] KOÇYİĞİT/BULUR, p.126; PASLI, p.16; ATALI/ERMENEK/ERDOĞAN, p.770; ATALI/ERDOĞAN, p.247.

[45] EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p.306; YARDIM, p.98.

[46] "...*In this case, it was understood that the claimant party had referred to mediation regarding her/his request of severance pay, remuneration of annual leave, overtime work, national holiday, general holiday and subsistence*

referral to mandatory mediation regarding requests not originally referred to mediation should be made a prejudicial issue, and the action should be continued in the future as per the minutes of the mediation[47].

In cases where the parties had not referred to mandatory mediation, in our opinion it is not proper for it to be deemed as a cause of action that is not able to be completed by the relevant court. Considering the regulation directing the parties to an alternative dispute resolution method, direct dismissal of action without prejudice in cases where this has not been fulfilled is a very harsh response[48], as Art. 115/II of the CCP grants the parties time to meet the condition of the regulation. Moreover, even if the action had been litigated without first referring to mandatory mediation, according to the CCP Art. 115/II, the parties are allowed a specific period of time to remedy this deficiency. However, it can be argued that law-makers were concerned that if recourse to a court of law was accepted most individuals would prefer this option before referring to mediation. Under the current regulation, the number of actions litigated has significantly decreased. Yet, in our opinion, the regulation should allow for the completion of a cause of action for requests that had not been referred to mediation, as opposed to dismissing the action without prejudice.

F. Mandatory Mediation in terms of Counter-Action

Another procedural problem encountered in terms of mandatory mediation involves the issue of counter-action. Counter-action is an action that is litigated within the response period of the original action and is linked with the original action (CCP Art. 132). An action litigated without a counter-action is separated from the original action and proceeds as an independent action. For this reason, if the subject of the counter-action is a dispute that falls within the scope of mandatory mediation, it is required to refer to this means prior to opening the counter-action. However, in this case the possibility of missing the period of opening commercial disputes arises. When a referral to mandatory mediation is made within the period of opening a counter-action, the counter-action opening period, which is subject to statutory limitation, will not continue in the period starting from application to mediation office until the drawing-up of the final minutes (LMCCD Art. 18/A/XV; LCL Art. 3/XVII); Otherwise, it would result in limiting the right to legal remedies for the counter-action[49]. Therefore, if referral to mediation is made within two weeks as from the notification of the reply petition to the defendant, the time for bringing a counter action will not be compromised. In this case, the judge must wait for the outcome of the mandatory mediation process.

In the rulings issued by the Courts of Appeal, the following criterion is being used in the determination of whether the term of referral to mandatory mediation has been fulfilled or not in terms of counter-action. If it is understood from the minutes of mediation where agreement has not been reached for a dispute in which the original action prompted a counter-action not yet negotiated, it is deemed that the terms of mandatory mediation had been fulfilled for counter-action[50]. On the other hand, if there is no determination regarding the request in counter-action in the non-agreement minutes drawn-up for the original action, and if it had not been additionally referred to mandatory mediation, the term of mandatory mediation for the counter-action is

allowance, but that s/he had requested severance pay, remuneration of annual leave and wage receivables in her/his file of action, that in the final minutes of mediation, the mediator specified the subject of dispute as one (severance pay, remuneration of annual leave, overtime work, national holiday and general holiday, and subsistence allowance) arising from the relationship between worker and employer, that there was no request in the final minutes of mediation for wage receivables and thus the claimant had not fulfilled the mandatory action of referring to mediation regarding her/his wage receivable, it is proper for the court to rule for dismissal of action without prejudice for wage receivable pursuant to Articles 3 and 7 of Law no. 7036, and pursuant to Articles 110 and 115 of Law no. 6100..." Ankara CA, 6. CD, 16.4.2019, M. 2019/1303, D. 2019/852 (Lexpera).

[47] ÖZEKES/ATALI, p.115; EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p.193.

[48] ÖZMUMCU, Seda: "Overview of Mandatory Mediation System in terms of Comparative Law and Turkish Law", Journal of Istanbul University School of Law, 74(2), 2016, p.834. For mandatory mediation in commercial disputes, and similar criticism in terms of LMCCD Art. 18/A see BUDAK, p.26.

[49] EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p.191.

[50] "*...In the request of notice pay –being the subject of negotiations in mediation- in the counter-action litigated by the employer, there is no cause of action for additional mediation...*" Istanbul CA, 29. CD, 15.11.2018, M. 2018/4331, D. 2018/1628 (had not been published).

deemed as not being fulfilled[51]. From these rulings, it is understood that the Courts of Appeal have not rescinded the requirement for fulfillment of term of mandatory mediation for counter-actions.

In the doctrine, regarding requests for counter-action, if in the referral to mandatory mediation the original action had been negotiated and finalized, it is deemed that the term of referral to mandatory mediation had been actualized for the counter-action as well[52]. In our opinion, in determining whether the term of mandatory mediation had been actualized or not for cases involving a counter-action, it is proper to examine whether the request of the counter-action is included or not in the mediation non-agreement minutes relevant to the original action.

V. CONCLUSION

In 2017, referral to mediation was made mandatory prior to bringing an action in labor disputes, and in commercial disputes in 2018. Even if this means is being referred to as "mediation as cause of action" in legal regulations and some research studies, it should, for all intents and purposes be referred to as "mandatory mediation", considering its legal characteristic.

The Constitutional Court ruled that mandatory mediation is not in conflict with the Constitution. However, due to the contradictions is rulings it has issued regarding voluntary mediation and the significant delays mandatory mediation brings to the right to legal remedies, in our opinion, mandatory mediation stands opposed to the Constitution. Even if we believe that mediation should not be mandatory, it is nonetheless important to objectively examine the problems arising from the current legal regulations.

First, considering the legal characteristic of action for annulment of objection in terms of enforcement law, this action should not be within the scope of mandatory mediation. Moreover, in cases where negative declaratory actions are the subject of commercial disputes, these actions are not within the scope of mandatory mediation, as they do not meet the term of payment of an amount of money.

In the case a dispute is both a consumer dispute and a commercial dispute, again mandatory mediation should not be applied. This is because in a direct action involving a dispute of both a consumer and commercial nature, the said dispute should not be litigated by mandatory mediation, but rather, by a consumer court, as it has a broader scope than that of a commercial court.

In the case of concentration of actions, if a dispute involves multiple requests for which referral to mediation has not been made for each one, it would be proper to give the claimant the opportunity to complete the cause of action by providing them additional time to refer to a mediator, instead of dismissing the entire action without prejudice for requests for which no referral was made.

Regarding counter-actions, it is required to refer to mandatory mediation if possible. From the minutes of a mandatory mediation entered into for the original action, if it is understood that the parties could not come to an agreement regarding the request of the counter-action, it should be deemed that the term of mandatory mediation had been fulfilled for the counter-action.

Mandatory mediation, which has been made a cause of action by legislation, has been regulated as a cause of action, which in cases where the terms of the case do not exist at the beginning, these said terms cannot be completed later. However, in our opinion, it would be more appropriate to arrange the referral to mandatory mediation as a cause of action that can be completed even in situations where the terms have not been present at the beginning of the case. Since mandatory mediation is not used before bringing an action, it should not be prevented from entering the merits of the case. This situation can be resolved by referring to the CCP Article 115/II in the relevant regulations. Thus, if the referral to mandatory mediation is brought to the

[51] "*...Defendant employee had referred to mediation for requests with respect to remuneration of national holiday, general holiday, overtime work, sick leave, and premium receivable, and the minutes regarding non-agreement of the parties had been added to the action started by the employee. Claimant employer had requested notice pay in the counter-action. Notice pay is within the scope of receivable of worker or employer arising from personal labor contract, and referral to mediation prior to opening of action is mandatory. The defense that the legal problem between the parties had been referred to mediation does not relieve the employer from this liability, as it is not among the requests subject to mediation, and as the termination is not within the scope of mediation...*" Ankara CA, 6. CD, 16.4.2019, M. 2019/820, D. 2019/755 (was not published).

[52] KÖME AKPULAT, p.370.

agenda during the trial of the case, such as in cases of concentration of actions and counter case, it would be possible to remedy the lack of cause of action within the same case.

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