NEU PRESS

HUKUK FAKÜLTESİ DERGİSİ

Vol: 7 No: 2 Yıl: 2024 | Araştırma Makalesi | e-ISSN: 2667-4076

https://doi.org/10.51120/NEUHFD.2024.123

Mandatory Mediation Practices in Turkey and Current Developments

Burçin YAZICI [1*]

[1] Atatürk Üniversitesi Hukuk Fakültesi, Türkiye

Article Info

Article History

Received: 24.09.2023
Accepted: 03.04.2024
Published: 10.07.2024

Keywords:
Alternative dispute resolution, Turkish civil justice system, The Code on Mediation in Legal Disputes, Mandatory mediation, Voluntary mediation

ABSTRACT

In 2012, Turkey introduced a voluntary mediation process, which was subsequently succeeded by the introduction of mandatory mediation in 2018. The practice of mediation within the Turkish jurisdiction is expanding quickly: the number of mediators is growing rapidly, and disputes within the scope of mandatory mediation are prevalent. The enactment of the seventh judicial package in 2023 has led to noteworthy developments in the implementation of compulsory mediation. Despite the fact that Turkish society has the propensity to resolve disputes through litigation, the culture of negotiation has become prevalent since the implementation of the mandatory mediation process. However, it is a fact that society views mandatory mediation as an unnecessary waste of time and an ineffective method. This perception is a result of the inability to effectively convey the "mediation philosophy and culture of reconciliation" to society as a whole. This study seeks to reveal the success of mandatory mediation in Turkey by examining the system's fundamental dynamics. Furthermore, this study provides an overview of the Turkish mediation system, highlighting current advancements and offering suggestions for its improvement.

.

Türkiye'de Zorunlu Arabuluculuk Uygulamaları ve Güncel Gelişmeler

Makale Bilgisi

Makale Geçmişi

Geliş Tarihi: 24.09.2023
Kabul Tarihi: 03.04.2024
Yayın Tarihi: 10.07.2024

Anahtar Kelimeler:
Alternatif uyuşmazlık yöntemleri, Türk medeni yargı sistemi, Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu, Zorunlu arabuluculuk, İhtiyari arabuluculuk

ÖZET

Türkiye, 2012 yılında ihtiyari arabuluculuğa; 2018 yılında da zorunlu arabuluculuk uygulamalarına başlamıştır. Türkiye'de arabuluculuk hızla gelişmekte arabuluculuk mesleğine katılım hızla artmakta ve zorunlu arabuluculuk kapsamındaki uyuşmazlıklar yaygınlaştırılmaktadır. Zorunlu arabuluculuk uygulaması Türkiye için yeni bir kurum olmasına karşın hızlı bir gelişme göstermiştir. Zorunlu arabuluculuğa geçiş sürecinde toplumsal olarak dava alışkanlığının aşılmasındaki zorluklar, yargılama sürelerinin uzun yıllara yayılması ve hakimlerin ağır iş yükü nedeniyle yargı sisteminin üzerindeki ağır yükün azaltılması temel rol oynar. Türk sisteminde zorunlu arabuluculuk dava öncesi tamamlanması gereken bir aşama (dava şartı) olarak düzenlemiştir. 2023 Yılında kabul edilen yedinci yargı paketi ile zorunlu arabuluculuk uygulamasında önemli gelişmeler yaşanmıştır. Türk toplumu uyuşmazlıklarını dava yoluyla çözmeye eğilimli iken zorunlu arabuluculuk sürecinin kabulünden sonra müzakere kültürünün yaygınlaştığı görülür. Toplumda zorunlu arabuluculuğu gereksiz bir zaman kaybı, işe yaramayacak bir yöntem olarak algılandığı da bir gerçektir. Bu algı "arabuluculuk felsefesinin ve uzlaşı kültürünün" topluma yeterince aktarılamamasından kaynaklanır. Bu çalışma Türkiye'de zorunlu arabuluculuk uygulamasının kısa sürede elde ettiği başarıyı, sistemin temel dinamiklerine yer vererek ortaya koymayı amaçlar. Bununla birlikte çalışmada Türk arabuluculuk sistemi genel hatları ile ele alınırken güncel gelişmelere yer verilmiş, sistemin geliştirilmesine yönelik önerileri sunulmaya çalışılmıştır.

To cite this article:

Yazıcı, B. (2024). "Mandatory Mediation Practices in Turkey and Current Developments", *Necmettin Erbakan Üniversitesi Hukuk Fakültesi Dergisi*, Cumhuriyet'in 100'üncü Yılı Armağanı, s. 390-411. https://doi.org/10.51120/NEUHFD.2024.123

***Sorumlu Yazar:** Burçin Yazıcı, burcin.yazici@atauni.edu.tr

INTRODUCTION

The widespread utilization of extrajudicial methods for the resolution of disputes is perhaps one of the notable accomplishments of the modern age. Alternative dispute resolution (ADR) procedures refer to mechanisms that occur outside the jurisdiction of state courts but they are recognized and regulated as an acceptable alternative for litigation. In this context, modern mediation emerged during the second half of the 20th century, even though the concept of mediation in its traditional form traces back to antiquity.[1] Mediation was included in Turkish legislation in 2012. It is possible to say that the system has made significant progress since then. This advancement could primarily arise from the introduction of mandatory mediation in 2018.When describing mediation in Turkish law, it can be seen that the system gives great importance to the party's will.

Mediation can be defined in various ways. According to the Turkish legislation, mediation is defined as the following; The Code on Mediation in Legal Disputes (CMLD) (Act 2, 22.06.2012) (hereinafter Mediation Code) defines mediation as follows; *"A way of resolving disputes voluntarily and with the participation of an unbiased and independent expert who has received specialized training in systematic techniques. This expert brings the parties together to negotiate, provides a communication process between them to enable them to understand each other and generate their own solutions, and offers a solution in the event that the parties are unable to produce their own."*[2] Based on the definition, this method's execution and success are contingent on the parties' will. Whether mediation is voluntary or mandatory, this issue is unaffected, In terms of the resolution of the dispute, the parties' will is at the forefront in the process of mediation. However, it is difficult for parties in conflict to sit together at the same table. At this stage, a mediator with strong communication and negotiation skills can keep the parties at the same table.

The purpose of this study is to present the development and progress of mediation in Turkey in general terms. In addition, the mandatory mediation style adopted by the Turkish legal system will be introduced. The analysis focuses on the recent legal revisions and their impact on mediation legislation, following a discussion of the basic principles. The conclusion outlines the issues within the Turkish mediation system and presents our suggestions.

The seventh judicial package, which introduced numerous modifications to the Turkish judicial system, was approved in 2023. With this judicial reform, substantial modifications were made to the mediation statutes. Nevertheless, the system has a long way to go. Nevertheless, Turkish mediation practises have reached a certain level of success. In this study, an attempt has been made to convey the insights and suggestions gained from academic and practitioner perspectives.

I. DEVELOPMENT OF MEDIATION IN TURKISH LAW

Modern mediation arose from the Anglo-American legal system.[3] These advances were followed

[1] Hanks, Melissa. "Perspectives on Mandatory Mediation". *UNSW Law Journal*, V. 3, N. 35, 2012, p.929; Green, Eric D. Corporate Alternative Dispute Resolution, Ohio State Journal on Dispute Resolution, Vol. 1, Issue 2 (1986), pp. 203-298, p. 205, Bhatt, Niranjan. "Evolution and Legislative History of Mediation." GNLU Journal of Law Development and Politics, Vol. 1, No. 2, December 2009, p. 83; Ekmekçi, Ömer/Özekes, Muhammet/Atalı, Murat/Seven, Vural. *Hukuk Uyuşmazlıklarında Arabuluculuk*, II. Baskı, On iki Levha Yayınevi, İstanbul 2019, s. 37; Özbek, Mustafa Serdar. *Alternatif Uyuşmazlık Çözümü*, Yetkin Yayınevi, Ankara 2022, p. 722; Ildır, Gülgün. *Alternatif Uyuşmazlık Çözümü*, Seçkin Yayınevi, Ankara 2003, p.31; Kısmet Kekeç, Elif. *Arabuluculuk Yoluyla Uyuşmazlık Çözümünde Temel Aşamalar ve Taktikler*, 3rd Edition, Adalet Yayınevi, Ankara 2016, p.31; Yazıcı Tıktık, Çiğdem. *Arabuluculukta Gizliliğin Korunması*, On İki Levha Yayınevi, İstanbul 2013, p.15.

[2] The Code on Mediation in Legal Disputes, Act 2, 22.06.2012, Rep. of Turkey Official Gazette

[3] Özmumcu, p. 820; Özbek, p. 700.

by European Union legislation. At the 1999 summit of the European Union, the Union called on member states to use alternative dispute resolution mechanisms to promote access to justice.[4] The Green Paper[5] on alternative dispute resolution methods in Civil and Commercial Law, which was accepted in 2002 within the European Union, was published. The EU Directive 2008/52[6] on Mediation in Legal and Commercial Matters was published in 2008. The Directive establishes the procedures for mediation in cases involving deportation issues throughout the member states of the European Union. However, the Directive does not regulate the legal norms at the national level; instead, it defers to the legal systems already in place within each country.[7] Member states have made justice reforms in their domestic legal systems and included mandatory mediation procedures in order to increase the use of mediation to resolve disputes. By passing the The Code on Mediation in Legal Disputes, Turkey has aimed to meet the requirements set forth by the EU acquis, as stated in the country's tenth development plan issued by the Strategy and Budget Directorate of the Presidency of the Republic of Turkey. [8]

Despite the fact that it is not a member of the European Union, Turkey has paid careful attention to these developments. As a result, it has incorporated, first voluntarily and then mandatorily, the practice of mediation into its domestic legislation. In addition to incorporating the mediation process within local legislation, Turkey has also signed international conventions. They include the New York Convention and the Singapore Convention. Turkey adopted "the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards" in 1991, and the "United Nations Convention on International Settlement Agreements as a Result of Mediation", which was signed in Singapore in 2019, commenced enforcement in 2021.[9]

Turkey became familiar with the mediation system via the Mediation Code[10], which went into effect in 2012. It was decided to publish the regulation in order to provide clarity on the immediate application of the law.[11] In order to execute and oversee mediation, a novel and amicable dispute settlement approach, and to advance the field, profession the Department of Mediation was founded under the General Directorate of Legal Affairs of the Ministry of Justice in 2012. The Department is responsible for extending mediation services, increasing public awareness, and developing mediation-related rules.[12] Because the Republic of Turkey is a unitary state, the rules and regulations adopted are enforced across the whole country.

Turkey has made significant progress since adopting mandatory mediation in 2018. The Turkish legal system views mandatory mediation as outside of the judicial system but rather as an integral component of that system. Turkey is attempting to swiftly expand its mandatory mediation system. With

---

[4] Yıldırımoğlu, Hakan. "Avrupa Ülkelerinde Ticari Arabuluculuk Uygulamaları", *İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi Hukuk Sayısı*, V. 21. N.44, 2022, p.948.

[5] Green Paper, published by the European Union for the purpose of discussing certain issues at Union level (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:green_paper) (Accessed: 11.03.2023).

[6] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008L0052 (Accessed: 19.12.2023).

[7] Yıldırımoğlu, p.950.

[8] The Tenth Development Plan of the Presidency of the Republic of Turkey, Strategy and Budget Presidency (2013-2018), see: https://www.sbb.gov.tr/wp-content/uploads/2022/08/Onuncu_Kalkinma_Plani-2014-2018.pdf (Accessed: 10.02.2023).

[9] The Legislation Concerning the Approval of the United Nations Convention on International Settlement Accords through Mediation, 11.03.2022, Rep. of Turkey Official Gazette.

[10] Mediation Law in Civil Disputes, 22.06.2012, Rep. of Turkey Official Gazette.

[11] The Regulation on Mediation in Civil Disputes was first published in 2012, but with the inclusion of mandatory mediation in the system in 2018, a new regulation covering the developments was issued.

[12]For other duties of the Department of Mediation established under the Ministry of Justice. https://adb.adalet.gov.tr/Home/SayfaDetay/gorevlerimiz01072020045628 (Accessed: 17.01.2023).

the recent enactment of the seventh judicial package, comprehensive changes were made to the Turkish legal system. The area of issues subject to mandatory mediation has been increased, and the mediation system has changed significantly. With the prevalent use of mandatory mediation, it is believed that the judicial system will function more effectively, efficiently, and quickly. [13]

A. Development of Voluntary Mediation in Turkish Law

The Mediation is a voluntary process.[14] According to Nolan Haley, the parties' desire to resolve their disputes through mediation (front-end participation consent) and reaching an agreement during the mediation process (back-end participation consent) are based on a voluntary basis.[15] Andrews identifies three key elements of voluntarism in mediation; "(1) parties should not be compelled to participate in mediation; (2) the process should be under their joint consensual control at all times; and (3) the results should be freely agreed upon".[16]

Mediation is also practised on a voluntary basis under Turkish legislation.[17] In the simplest words, the willingness of mediation implies that the disputing parties have the option to request for mediation or, if they do, to withdraw from the process at any stage before reaching a decision.[18] Therefore, appealing to mediation, continuing the procedure, completing the process, or terminating the process is dependent on the party's will.

With the 2012 enactment of the Mediation Code, attempts to resolve disputes through mediation began. At the same time, Turkish legal legislation began attempts to be harmonized with mediation. In this context, with the amendment made in the Code of Civil Procedure (CCP), the judge was obliged to direct the parties to mediation and to indicate this orientation and the statements of the parties in the court minutes (CCP a. 137, a. 140 and a. 320). However, according to Article 13[19] of the Mediation Code and Article 17[20] of its regulation, the parties are free to apply for mediation at any point prior to or during the course of the legal proceeding. The judge is required to provide this direction as a

[13]Koçyiğit, İlker/ Bulur, Alper. *Ticari Uyuşmazlıklarda Dava Şartı Arabuluculuk*, Hukuk İşleri Genel Müdürlüğü Arabuluculuk Daire Başkanlığı Yayınları, Ankara 2019, p.5.

[14]Model Standards of Conduct for Mediators, Standart I (September 2005) https://www.adr.org/sites/default/files/document_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf; Nolan-Haley, Jacqueline. "Mediation Exceptionality", *78 Fordham L. Rev*. 2009, p. 1247; Hanks, s.934; Vettorı, Stella. "Mandatory mediation: An obstacle to access to justice", *African Human Rights Law Journal*, N. 15, 2015, p. 356; Moore, Christopher W. *The Mediation Process, Nobel Publishing*, Translated from 4th Edition, Ankara 2016, p.8; Andrews, Neil. "Mediation: International Experience and Global Trends", 4 J. INT'L & COMP. L. 1, 1 (2017), p. 218; Özmumcu, Seda. "Karşılaştırmalı Hukuk ve Türk Hukuku Açısından Zorunlu Arabuluculuk Sistemine Genel Bir Bakış" (Genel Bakış), *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası*, V. LXXIV, N.2, 2016, p. 807; Özbek, p.1520; Kekeç, p.70; Tıktık, p. 35; Tanrıver, Süha. *Hukuk Uyuşmazlıklarında Arabuluculuk* (Arabuluculuk), Yetkin Yayınevi, Ankara 2020, p. 56; Özbay, İbrahim. "Alternatif Uyuşmazlık Çözüm Yöntemleri", *Erzincan Üniversitesi Hukuk Fakültesi Dergisi*, N. 10, 2006, p. 465; Karacabey, Kürşat. "Zorunlu Arabuluculuğun Hukukun Temel İlkelerine Aykırılığı ve Uygulanabilirliğine Dair Sorunlar", *Ankara Barosu Degisi*, N. 1, 2016, p. 458.

[15] Nolan Haley, p. 1251.

[16] Andrews, p. 220.

[17] Ekmekçi/Özekes/Atalı/Seven, p.150; Cengiz, Dilek. "Principles of Mandatory Mediation in Commercial Disputes in Turkish Law with Determinations and Comments on its Applications", *Annales de la Faculté de Droit d'Istanbul*, N. 70, 2021, p 2. The Turkish legislation is likewise founded on this concept. The requirement is explicitly stated in Article 3/1 and Article 2/b of the The Code on Mediation in Legal Disputes.

[18] Moore, p. 8; Tanrıver, Arabuluculuk, p. 65; Ildır, p. 88; Göksu, Mustafa. Alternatif Uyuşmazlık Çözüm Yolları ve Tahkim, Seçkin Yayınevi, Ankara 2021, p.30; Yazıcı-Tıktık, p. 36.

[19] Mediation Code a. 13: "The parties may agree to resort to mediation before or during the trial. The court may also enlighten and encourage the parties to apply to a mediator. Unless otherwise agreed, if the proposal of one of the parties to apply to the mediator is not answered positively within thirty days, this proposal is deemed to have been rejected."

[20] Mediation Code Reg. a. 17: "If the parties declare that they will apply to a mediator together after the lawsuit is filed, the trial is postponed by the court for a period not exceeding three months. This period may be extended up to three months, for once, upon the joint application of the parties."

requirement of the procedure during the preliminary examination phase. Additionally, The parties may reach a compromise for mediation either before or after the preliminary examination phase of the trial.[21]

In November 2013, when Turkey's first professional mediator began his career, the Turkish legal system began allowing parties to voluntarily participate in mediation. As of May 2022, 860,072 cases were resolved amicably via the scope of voluntary mediation, whereas 11,503 were not. There will have been a total of 963,990 cases that have been voluntarily mediated between now and May 2022, and 860,072 of these cases will have resulted in agreements. Voluntary mediation has an almost 99% success rate as a dispute resolution method.[22] Just in the year 2022 alone, 417,000 conflicts were resolved via the use of voluntary mediation. [23] The number of requests for voluntary mediation that have been submitted in the past year is almost exactly half of the total number of requests that have been submitted since 2013. This statistic demonstrates that voluntary mediation is making progress in Turkey on a daily basis and is gaining acceptance from the country's populace.

B. Development of Mandatory Mediation in Turkish Law

Although one of the central principles of mediation is that participation in mediation is voluntary, several legal systems have developed that mandate participation in mediation. When mandatory mediation practises are reviewed, it is seen that the system is applied in three different ways.[24] The first method is Frank E.A. Sander's categorical approach. When using this procedure, certain disputes must first go through mandatory mediation before a lawsuit may be filed. The discretionary system is the second type of mandatory mediation method, and under this model, participation in mediation is typically encouraged by the court.[25] The third kind of mandatory mediation is quasi-mandatory mediation.[26] In this strategy, the mediation procedure is not required, but it is encouraged owing to the adverse effect on litigation expenses of not engaging in mediation.[27]

Every country's internal dynamics shape how they arrive at the decision to implement mandatory mediation. In this way, it is possible to say that Turkey is going through a transition process similar to the Italian system.[28] The Italian judicial system's impasse necessitated the implementation of a definitive and mandatory method of mediation.[29] Although Turkey included mediation into its domestic law in 2012, the adoption of the procedure and the reduction of litigation have not reached the intended level. Because of the strong cultural norm of engaging in lawsuits, Turkish culture has a strong habit of litigation.[30] To such an extent that going to court over the issue is considered as a form of intimidation. Even a speech exists to describe this circumstance: "*I will drag you down to the courts*!" Therefore it is abundantly evident that it will be challenging for peaceful solutions to be accepted and propagated in

[21] Özmumcu, *Genel Bakış*, p.834; Tanrıver, *Arabuluculuk*, p.111.

[22] https://adb.adalet.gov.tr/Resimler/SayfaDokuman/9052022162348ihtiyari%20%2004.05.2022.pdf (Accessed: 14.03.2023).

[23] https://publish.twitter.com/?query=https%3A%2F%2Ftwitter.com%2Fadalet_bakanlik%2Fstatus%2F1609504836998799360&widget=Tweet (Accessed: 16.03.2023).

[24] Sander, Frank E.A. "Another Wiew of Mandatory", *Dispute Resolution Magazine*, V.13, N.2, 2007, p. 16; Hanks, p. 930; Özmumcu, *Genel Bakış*, p. 808; Azaklı Arslan, Betül, *Medeni Usul HukukuAçısından Zorunlu Arabuluculuk*, Yetkin Yayınları, Ankara 2018, p. 32.

[25] Sander, p. 16.

[26] For the practice of semi-mandatory and compulsory mediation, you can look at the example of Australia. See Waye, Wicki. "Mandatory Mediation in Australia's Civil Justice System", *Common Law World*, V.45, N. 2-3, 2016, p. 214.

[27] Hanks, p.931.

[28] Özel, Sibel. "Zorunlu Arabuluculuğun Adalete Erişim Hakkı Çerçevesinde İrdelenmesi", *Public and Private International Law Bulletin*, V. 40, N.1, 2020, p. 874; Özmumcu, *Genel Bakış*, p. 812.

[29] De Palo, Giuseppe/Harlkey, Penelope. "Mediation in Italy: Explormg the Contradictions", *Negotiation Journal*, N. 21, 2005, p.470-471; Hanks, p.936; Özmumcu, *Genel Bakış*, p. 812.

[30] Özbek, p. 191.

such a culture. Nonetheless, mandatory mediation has been established, taking into consideration the role of peaceful solutions to societal peace and the judicial system's heavy caseload.[31]

While Turkey was striving to propagate peaceful solutions, it created provisions to ensure that the right to access to the justice is not hampered. When developing the principles of the mandatory mediation system, Turkey intended to follow the European Union Directive 2008/52. Directive 2008/52 a.14 of the European Union states: "*Nothing in this Directive should prejudice national legislation making the use of mediation compulsory or subject to incentives or sanctions provided that such legislation does not prevent parties from exercising their right of access to the judicial system. Nor should anything in this Directive prejudice existing self-regulating mediation systems in so far as these deal with aspects which are not covered by this Directive.*"[32] While the European Union leaves the requirement of mediation to the initiative of member states, it says that this obligation should not impede access to justice.[33] Turkey, although not being an EU member, pledges to carry out the mediation procedure without impairing people's fundamental rights.

Under Turkish legislation, the only steps that constitute mandatory mediation are submitting an application to participate in the mediation process and attending the initial session.[34] Because the parties are not required to adhere to the process or to agree on a proposal for an agreement while the mandatory mediation process is ongoing, the method of mandatory mediation that the Turkish system has adopted should be recognised as not interfering with the right to access justice.[35] An application was made to the Turkish Constitutional Court with the claim that compulsory mediation would hinder the right to access justice. In the decision of the Turkish Constitutional Court, the mediation institution was not regulated as a dispute resolution method that would replace the courts; It stated that mediation is not a judicial activity in that it is different from the authority to resolve disputes that belong to the courts. The Turkish Constitutional Court additionally decided in a judgment that requiring mediation as a prerequisite for litigation does not restrict the freedom to seek rights because it does not impede access to the state justice. The pertinent judgement is as follows:

"*The obligation to apply for mediation cannot be considered to affect the essence of the right to seek justice unless it results in an ineffective and pointless procedure that makes it impossible or extremely difficult for persons to pursue their rights. As a litigation condition, the application to mediation is an obligation. However, this obligation is confined to the application to mediation, and it is apparent that the parties' will governs the operation and result of the mediation process. The parties have the option to cancel the process at any time, and they also have the option of reaching an agreement at the end of the procedure. If the parties are unable to settle their differences via negotiation, they may seek judicial intervention. In this regard, it is clear that the mediation process and its conclusion are subject to the parties' free choice, as required by the Law.*"[36]

While Turkey has made mediation mandatory, it has regulated this requirement as a condition for

[31] Kurt Konca, Nesibe. "Arabuluculukta Özel Uzmanlık Alanına İlişkin Bazı Değerlendirmeleri", *Adalet Dergisi*, N.68, 2022, p. 385.
[32] Andrews, p. 233.
[33] Özmumcu, *Genel Bakış*, p.811; Yıldırımoğlu, p. 949.
[34] Tanrıver, *Arabuluculuk*, p.144; Özbek, p. 1563.
[35] Tanrıver, *Arabuluculuk*, p. 144; Tıktık, p. 39. This system has been criticized by arguing that compulsory mediation in Turkish law will hinder the right to access to justice or delay the access to justice even if it does not prevent it. For criticism in this direction See; Ekmekçi/Özekes/Atalı/Seven, p.149; Özmumcu, *Genel Bakış*, p.838; Özbek, p.1544.
[36] Const. Court, 11/07/2018, E.2017/178, K.2018/82, §.21-24, https://normkararlarbilgibankasi.anayasa.gov.tr/ (Accessed: 05.03.2023).

civil litigation. In Turkish civil procedure code, the condition of litigation refers to the elements whose presence or absence is sought in order to evaluate a case's merits (CCP a. 114). The sanction for noncompliance with this requirement is the dismissal of the lawsuit for failure to comply with the formal requirements (procedure). Therefore, if the parties submit a lawsuit before concluding the mediation process, as required by the lawsuit, their lawsuits will be dismissed for procedural deficiencies. The aforementioned regulation was regulated by Mediation Code a. 18/A; as a result, mandatory mediation was adopted in the applicable substantive law statutes, and it became obligatory to apply to the mediation process prior to filing a lawsuit regarding disputes.[37] İn other words, a condition of litigation is a positive (necessary) or negative (must be excluded) factor essential for civil courts to investigate the merits of a dispute. In Turkish law, the Code of Civil Procedure governs litigation procedures. Nevertheless, in certain instances, several laws have special case conditions. With the addition of Article 18/A to the Mediation Code in 2018, the application of mediation in some disputes is governed by a special condition outside of the procedural law.

In a case, the existence or nonexistence of the litigation condition is personally evaluated by the judge, and the absence of this condition may be asserted at any stage of the case by the parties (Code of Civil Procedure, a. 115).[38] The plaintiff must submit last minute or a copy approved by the mediator to the petition, indicating that no agreement was reached at the conclusion of the mediation process (Mediation Code a. 18/A-2). If this criterion is not met, the court sends the plaintiff an invitation with a warning that the last minute must be completed within one week or the case will be dropped pursuant to procedural law. If the criteria for the warning is not met, the case is dismissed on procedural grounds without notifying the opposing party of the petition. If a lawsuit is filed without mediation, the case is dropped without action (Mediation Code article 18/A-2) owing to the absence of a lawsuit condition.[39] If this condition is not complied with, the trial will be overturned in Court of Appeal (CCP art. 353, 1/a-4) and the Supreme Court (CCP art. 371, 1/b).

However, an opinion[40] in the Turkish doctrine has argued that the obligation to apply for mediation is not a condition of litigation in the technical sense, and that this regulation can be accepted as a first objection. According to this view, it is recommended that the parties pursue mediation before filing a lawsuit. Failure to do so may result in the opposing party raising this as their initial objection at the start of the legal proceedings. Another view in the doctrine argues against the generalization of mediation as a requirement for litigation and cautions against its widespread adoption as a standard condition of litigation.[41] While mandatory mediation has been implemented in Turkish legislation as a prerequisite before initiating legal proceedings, it might be seen as a procedural need for litigation. Failure to meet the litigation requirement may result in the lawsuit being dismissed. However, seeking mediation might provide an alternative avenue for resolving the dispute and present new alternatives. Given the legislator's intention to broaden the scope of required mediation, it is important to anticipate that the use of mediation will become a prerequisite for all types of legal disputes. In our opinion, as the social acceptance of mediation continues to rise, this situation will shift from being a requirement to becoming a common and widely practiced preliminary step.

---

[37] Kuru, Baki. "Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu Tasarısı Hakkında Görüş ve Öneriler", *Medeni Usul ve İcra İflas Hukuku Dergis*i, V.16, N.2, 2010, p.240.

[38] Arslan/Yılmaz/Taşpınar Ayvaz/Hanağası, p.310; Atalı/Ermenek/Erdoğan, p.316.

[39] Supreme Court Assembly of Civil Chambers 9, T.09.02.2022, E. 2022/821 K. 2022/1540; Tanrıver, Süha. "Dava Şartı Arabuluculuk Üzerine Bazı Düşünceler" (Düşünceler), *Türkiye Barolar Birliği Dergisi*, N. 147, 2020 p.112; Özmumcu, *Genel Bakış*, p.834.

[40] Ekmekçi/Özekes/Atalı/Seven, p.154.

[41] Tanrıver, Arabuluculuk, p. 119.

An additional consequence of the compulsory mediation method was identified as the imposition of specific requirements on the non-participating party. The Mediation Law was amended in 2018 with the inclusion of Article 18/A-11[42], which aims to encourage active participation of the parties in the mediation process. According to this amendment, if a party fails to attend the first meeting without good reason, the mediator will record this situation in the final minutes. The conclusion is required to ensure that the party that is not present is held accountable for particular costs in later proceedings. According to Mediation Law 18/A-11, it is acknowledged that if a party is absent in the final minutes but is later found to be partially or fully justified in future proceedings, they will not be responsible for the costs of the proceedings and will not receive a lawyer's fee. If neither party attends the initial mediation meeting, they will be responsible for covering their own costs, regardless of the validity of their case. This case was deemed an exception to the overall regulation concerning the liability for the expenses of the legal processes outlined in Article 326 of the Code of Civil Procedure. Nevertheless, following a recent decision by the Constitutional Court, the aforementioned article has been invalidated, and the decision to nullify it will take effect after a period of nine months, starting on January 18, 2025. The Constitutional Court invalidated this law, which promotes the parties' participation in the initial obligatory mediation session, by concluding that it contradicts Articles 13, 35, and 36 of the Constitution[43]. The decision's justification stated that Article 18/a-11 of the Mediation Law aims to guarantee the involvement of both parties in the mediation process. However, it was concluded that the a fee outlined in the article places an unexpected financial burden. As a result, the equitable balance between public interest, property rights, and the right to access the court is disrupted for the party who fails to attend the first meeting. Once the cancellation judgement takes effect, the party that did not participate in the mediation process will no longer be responsible for the expenses of the proceedings.

Which types of disputes are subject to mandatory mediation and how it is implemented vary from country to country. By examining models of mandatory mediation, Turkey has attempted to identify which system is most suited to its own social structure. In this context, the mandatory mediation methodology implemented in Turkey is the categorical approach model. In fact, the issues of litigation for which mediation is mandatory have been identified. As a first step, mediation of employee-employer disputes has become mandatory. Because, throughout the voluntary mediation procedure, the majority of agreements were reached in this dispute area. With the 2018 enactment of the Labor Courts Law, the application to a mediator has become a prerequisite for filing cases seeking employee or employer assets and pay based on individual or collaborative labour agreements and reemployment. This practise was then followed by commercial conflicts in 2019 and consumer disputes in 2021.

With the law number 7445, which was enacted on March 28, 2023 and is known as the seventh judicial package, the scope of mandatory mediation was expanded. With the exception of disputes arising from eviction of immovables, mediation is now mandatory in disputes arising from the rental relationship, disputes regarding the allocation of movables and immovables and dissolution of partnership, disputes arising from the Condominium Law, and disputes arising from the right of neighbours. Furthermore with the passage of Law No. 7442 on March 23, 2023, the Law on Agriculture was amended to include mandatory mediation for disputes originating from contracted agricultural relationships. Despite the fact that both laws were enacted in March 2023, the starting date was set for

[42] Mediation Code a. 18/A-11; "In the event that the mediation activity ends due to the failure of one of the parties to attend the first meeting without a valid excuse, the party that did not attend the meeting is stated in the last minute and this party is held responsible for the entire cost of the trial, even if it is partially or fully justified in the case. In addition, no lawyer's fee shall be awarded in favor of this party. In cases to be filed after the mediation activity ended due to the failure of both parties to attend the first meeting, the litigation expenses incurred by the parties are left on their own responsibility."

[43] Const. Court, 14/03/2024, E.2023/160, K.2024/77, https://normkararlarbilgibankasi.anayasa.gov.tr/ (Accessed: 19.04.2024).

September 1, 2023 so that the necessary preparations could be made.

In mandatory mediation, favourable outcomes are achieved rapidly. 129,969 labour conflicts, 58,735 business disputes, and 43,482 consumer disputes were resolved within the framework of mandatory mediation in 2022, according to a statement released by the Mediation Department.[44] The intent of the legislator is to implement the mediation procedure prior to filing a lawsuit in cases where the parties can amicably resolve their dispute. According to the eleventh development plan published by the Strategy and Budget Presidency of the Republic of Turkey, it is intended to expand mandatory mediation practises.[45] In light of this, it is reasonable to predict that the scope of mandatory mediation in the Turkish civil justice system will expand in the future years. In the next years, moreover, efforts are being made to include family law and administrative law disputes within the scope of mediation. According to Sandler, success is assured if the process that begins with modest pilot programmes is continued forward by eliminating flaws. [46]

II. IDENTIFICATION OF DISPUTES SUITABLE FOR MEDIATION IN TURKISH LAW

Before determining the scope of mandatory mediation in Turkish law, it is necessary to identify which disputes are amenable to mediation. To be resolved by mediation, a dispute must be available to mediation. In the Turkish legal system, disputes suitable for mediation (including those with foreign elements) are private law issues arising from works or transactions that the parties can freely dispose of (Mediation Code a.1/2). In mediation law, it is assumed that mediation will be utilized for disputes regulated by private law.[47] For a private law issue to be subject to mediation, the parties must be able to voluntarily dispose of a legal transaction that is the subject of the dispute. In other words, disputes that the parties may freely dispose of imply that the parties can acquire a legal result of their own volition without the necessity for a judicial judgement.[48] The areas where the parties' will is rendered ineffective typically pertain to issues falling under the purview of public order, disagreements with potential consequences for third parties, and disputes necessitating an unequivocal judicial decision.

The concept of public order is significant in determining the extent of issues that can be settled through mediation. In the Turkish legal system, the public policy regulates the extent to which parties may freely dispose of transactions.[49] Public policy can be defined as a notion formed in accordance with the fundamental dynamics of society, which can be dealt with differently by each legal system.[50] The term “public policy” refers to a set of rules that are designed to maintain the welfare, peace, health, and

---

[44] https://twitter.com/adalet_bakanlik/status/1609504836998799360?s=48&t=CuuEs1gWo8PhpsWphFWu3Q (Accessed: 16.02.2023).

[45] The eleventh development plan of the Presidency of the Republic of Turkey, Strategy and Budget Directorate (2019-2023), see. https://www.sbb.gov.tr/wp-content/uploads/2022/07/On_Birinci_Kalkinma_Plani-2019-2023.pdf (Accessed: 20.03.2023).

[46] Sandler, p. 16.

[47] According to the classical distinction that has been accepted since Roman law, law is examined in the distinction of public law and private law. In this context, disputes arising from private law are the conflicts between persons that are desired to be expressed.

[48] Ildır, p. 40; Tanrıver, Arabuluculuk, p.59; Özbek, p. 1500; Budak, Ali Cem/ Karaaslan, Varol. Medeni Usul Hukuku, Filiz Yayınevi, İstanbul 2023, p. 508; Ekmekçi/Özekes/Atalı/Seven, p.48; Atalı, Murat/ Ermenek, İbrahim/Erdoğan, Ersin. *Medeni Usul Hukuku*, Yetkin Yayınevi, Ankara 2022, p.386; Azaklı Arslan, p. 105; Bulur, Alper. 6325 *Sayılı Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu ve Uygulaması Hakkında Değerlendirmeler, Ramazan Arslan'a Aramağan C. I*, Yetkin Yayınevi, Ankara 2015, p.500.

[49] Ekmekçi/Özekes/Atalı/Seven, p.50; Bulur, p.500.

[50] Dayınlarlı, Kemal. *Milli Milletlerarası Kamu Düzeni ve Tahkime Etkileri*, Adalet Yayınevi, Ankara 1994, p.7; Ildır, p.41.

safety of people who are living in a society as a whole.[51] In Turkish law, high court judgements affect public order, and in practise, these decisions can be changed by the judge based on the facts of each specific case.[52] Divorce, for example, is not suitable for mediation in the Turkish judiciary since it is a conflict which must be decided by the court and is governed by public policy.[53] For example, the mediation of family disputes has played an important role in the expansion of mediation in Anglo-Saxon legal systems and European countries.[54] a divorce may result in the use of non-traditional strategies for conflict resolution.[55] Family law conflicts in the Turkish civil legal system, in our opinion, should be included in the scope of mediation as soon as possible. Because the courts should not be used to address problems stemming from familial relationships.

Certain contracts are subject to formal regulations under Turkish law. Contracts regarding the transfer of real estate are one of them. The formal form requirement stipulates that the contract must be done in the presence of legal authorities. Whether or not disputes governed by formal norms are suited for mediation was debatable. However, with the seventh judgment package, which added Article 17/B to the Mediation Code, eliminated this uncertainty and explicitly stipulated that disputes involving the transfer of real property or the establishment of limited real rights on real property are suitable for mediation. Although the transfer of the immovable subject of the dispute takes place officially, the dispute is amenable to mediation because the parties' transfer intent is based on their free will and it is a dispute that can be resolved through mediation.

In accordance with the general idea of mediation, a dispute's appropriateness for mediation is determined by its origin.[56] It refers to the parties' ability to resolve their disputes in line with their wills.[57] To a large extent, mediation is used to resolve legal and commercial disputes involving money receivables resulting from private law interactions. However, not all legal and commercial disagreements involving the assertion of a money claim are appropriate for the mediation process. The determination of the situations where mandatory mediation is required in Turkish legislation is handled in a disorganized way. Article 1/2 of the Mediation Code establishes a broad framework for the application of mediation in legal disputes. Specifically, it applies to the resolution of civil law disputes that arise from business or transactions, where the parties have the freedom to make decisions, including those involving foreign affairs. Nevertheless, conflicts that involve accusations of domestic violence are not suitable for mediation. The specific areas in which mandatory mediation is implemented are delineated through the amendments incorporated into their respective legislations. For instance, Article 3 of the Labour Courts Law governs the resolution of employee-employer disputes through mediation. However, Article 18/B, which was added to the Mediation Code, stipulates that several additional disputes now require mandatory mediation as a prerequisite for litigation. Consequently, conflicts that are required to undergo compulsory mediation are handled in a chaotic manner in the Turkish legal system. A critique within the doctrine clearly highlights the lack of a comprehensive and unified

[51] Günday, Metin. *İdare Hukuku*, İmaj Yayınevi, Ankara 2017, p. 525; Gözler, Kemal/Kaplan, Gürsel. *İdare Hukuku Dersleri*, Ekin Yayınevi, Bursa 2020, p.582; Çağlayan, Ramazan. *İdare Hukuku Dersleri*, Adalet Yayınevi, Ankara 2021, p.278; Tanrıver, Düşünceler, p. 131.

[52] Bulur, p.500.

[53] Ildır, p. 41; Bulur, p. 500.

[54] Dür, Orhan. Arabuluculuk Faaliyetleri ve Arabulucunun Hak ve Yükümlülükleri, Adalet Yayınevi, Ankara, 2017, p. 289; Azaklı Arslan, 107.

[55] Emery, R. E., Sbarra, David, Grover, Tara, (2005). Divorce mediation, Research and Reflections, Family Court Review, 43(1), p. 23; Renee R. Cochard, Divorce Mediation, p. 9 Resource News 11 (1985). file:///C:/Users/USER/Downloads/9ResourceNews11.pdf E.T. 18.12.2023; Özmumcu, p. 824.

[56] Toraman, p.1031.

[57] Ildır, p.42.

approach in mandatory mediation disputes.[58] There are still discussions in practise about whether issues are subject to mandatory mediation, despite the fact that the regulations included in the laws include outlining the scope of disputes subject to mandatory mediation. In this regard, although it is impossible to evaluate the disputes separately, it is necessary for the Mediation Department, in collaboration with academicians and mediators, to define the scope of disputes and declare them at regular intervals. Otherwise the implementing mediators will continue to move forward based on the incorrect application information they obtained from the internet and whats app correspondence.

III. SCOPE OF MANDATORY MEDIATION IN TURKISH LAW AND CURRENT DEVELOPMENTS

In Turkish law, the introduction of the "obligation to apply to a mediator first" in the resolution of disputes was first approved in employee-employer disputes in 2018, followed by commercial disputes in 2019 and consumer disputes in 2021. Expanding the practise of mandatory mediation as a consequence of the implementation of Turkey's legal policy, the seventh judicial package adopted in 2023 also included new areas of dispute. The purpose of mandatory mediation is to resolve disputes quickly and inexpensively. Mandatory mediation is anticipated to end the dispute from the ground up and thus contribute to social peace.

A. Mandatory Mediation for Labor Disputes

From the beginning of the voluntary mediation process in November 2013, when the first mediator was registered, until the adoption of compulsory mediation in 2017, it was found that 89% of the civil disputes were employee-employer disputes, and 93% of those disputes resulted in settlements.[59] On the other hand labour law conflicts are so prevalent that they account for about one-seventh of the court system.[60] Given these considerations, the initial application area of mandatory mediation has been identified as labour law conflicts.[61]

Since 2018, when Law No. 7036 on Labor Courts was enacted, parties to labour disputes have been required to participate in mediation first. Article 3 of the Labor Courts Law states, "*In cases filed with the demand of employee or employer receivables and compensation based on the law, individual or collective labour agreement, and reemployment, application to a mediator is a prerequisite for action*." The nature of the problems that come within the jurisdiction of labour courts is suitable to a negotiated resolution. Since the implementation of mandatory mediation in labour disputes on January 1, 2018, a total of 1,481,761 files have been the subject of labour disputes between that date and May 4, 2022. Of these applications, 822,735 have resulted in an agreement, while 592,522 have resulted in there being no agreement. It has been noticed that the mandatory mediation procedure in labour disputes has

[58] Ekmekçi/Özekes/Atalı/Seven, p.129. Comparing legal systems reveals that statutes clearly enumerate the disputes that are subject to required mediation or non-mandated resolution. As an illustration, Article 15/a of the German Code of Civil Procedure (Gesetz zur Durchsetzung und Anwendung der Deutschen Zivilprozessordnung) outlines the specific disputes that are required to go through mediation, all within one article. See. Yıldırım, Ferhat, "Karşılaştırmalı Olarak Alman ve Türk Hukukunda Arabuluculuğa Konu Yönünden Elverişliliğin İncelemesi", *Sakarya Üniversitesi Hukuk Fakültesi Dergisi*, V.1, N. 2, 2013, p.93-118, https://www.jurix.com.tr/article/4367 Accessed.T . 27.12.2023.

[59] For the Minutes of the Turkish Grand National Assembly See. https://www5.tbmm.gov.tr/sirasayi/donem26/yil01/ss491.pdf (Accessed: 21.03.2023).

[60] Ministry of Justice Statistics of Justice 2015-2022, https://adlisicil.adalet.gov.tr/Resimler/SayfaDokuman/29032023141410adalet_ist-2022cal%C4%B1sma100kapakl%C4%B1.pdf (Accessed: 21.03.2023).

[61] Kurt Konca, Nesibe. "Ticari Uyuşmazlıklarda Dava Şartı (Zorunlu) Arabuluculuk", *SETA Perspektif Dergisi*, N. 225, 2018, p. 2; For the Minutes of the Turkish Grand National Assembly See. https://www5.tbmm.gov.tr/sirasayi/donem26/yil01/ss491.pdf (Accessed: 21.03.2023).

resulted in a success rate of around 60% of the time. With the additions made to the Labour Courts Law in a.3 of the seventh judicial package, it is now mandatory to waive objections regarding claims and compensations arising from labour disputes within the scope of litigation mediation, and to apply mediation in cases of negative clearance and restitution.

B. Mandatory Mediation for Commercial Disputes

Following the tremendous success of mediation, which is a litigation requirement in labour disputes, the scope was expanded and a mandatory mediation system for commercial disputes was implemented. In 2019, the addition of Article 5/A to the Turkish Commercial Code No. 6102 mandated mediation in commercial disputes. Pursuant to the aforementioned article, it is required to apply to mediation before initiating a lawsuit in claims for receivables and compensation for the commercial amount of money.[62]

In the official reports published by the mediation department, it is seen that 483,702 dispute files were opened in the period from January 2019, when the compulsory mediation practice in commercial disputes began, to May 2022, and 227,196 of these files resulted in agreement and 205,836 in non-agreement. When viewed proportionally, there is a 52% agreement and 48% disagreement rate in commercial disputes where compulsory mediation is applied.[63]

The seventh judicial package has expanded the scope of mediation within the context of commercial disputes. Therefore, the contentious questions regarding whether they fall within the scope of mandatory mediation in practise have been clarified. Article 5/A of the Turkish Commercial Code has been amended to replace the phrase “about receivables and compensation claims for payment of Money” with “money claims, compensation, annulment of objection, negative clearance, and restitution litigation.” Thus, parties are now obligated to participate in mediation in commercial case, in case of objection to the existence of a receivable, for the cancellation of the objection, negative clearance and restitution case.

C. Mandatory Mediation in Consumer Disputes

The addition of article 73/A to the Code on Consumer Protection marked the beginning of mandatory mediation for conflicts involving consumers. In consumer courts, it is mandatory to seek mediation before initiating a lawsuit. However, some disputes are excluded from this scope.[64] A dispute that falls within the jurisdiction of a consumer court arises from a consumer transaction or an actual practice against the consumer. Within this particular context, it is necessary to start to the mediation process in instances where conflicts arise from consumer contracts, compensations, and issues pertaining to outstanding debts. Consumer disputes do not necessarily involve money claims. Compulsory mediation should also be applied before filing a lawsuit in disputes such as the return or delivery of goods that do not include money, or the provision of services.[65] Mandatory mediation in

[62] Özbek, p.1562; Akil, Cenk. “Ticari Uyuşmazlıklarda Dava Şartı Arabuluculuk Hakkında Usul Hukuku Bakımından Bazı Değerlendirmeler”, *Türkiye Adalet Akademisi Dergisi*, N. 41, 2020, p.308.

[63] https://adb.adalet.gov.tr/Resimler/SayfaDokuman/9052022162356ticaret%20%20%2004.05.2022.pdf (Accessed: 22.03.2023).

[64] Although there is a consumer dispute, the disputes that are excluded from the scope of compulsory mediation are as follows; Disputes within the scope of the duty of the consumer arbitration committee (for the year 2023, it is obligatory to apply to the arbitral tribunal for disputes below 66.000 Turkish Liras), objections to the decisions of the consumer arbitration committee, the cases specified in the 73/6 of the Law on Consumer Protection and the cases specified in the 74th article of the same law. Mediation is not obligatory in disputes that are in the nature of a consumer transaction and arise from the same property.

[65] Özbek, p.1195.

consumer disputes started in July 2021. From this date until May 2022, 69,820 of the 150,297 dispute files resulted in agreement and 63,339 in non-agreement. Proportional success rate was 52%.[66]

D. Mandatory Mediation for Rental Disputes

With the seventh judicial package, Article 18/B added to the Mediation Code, excluding disputes regarding the eviction of immovables, disputes arising from the rental relationship have been subject to mandatory mediation. The lease contract is regulated in the provisions of the Turkish Code of Obligations a. 299. In instances of rent-related disputes stemming from legal and contractual matters, the mediation procedure will be utilised prior to initiating litigation. Rental disputes may arise in diverse manners. For example, the adaptation of the rental price to the changing economic conditions, the determination of the rental period, the responsibility for the defect in the rented, eviction etc. However, the law recognizes an exception in terms of eviction, which is a tenancy dispute. Accordingly, evictions realized within the framework of enforcement proceedings without judgment regulated in the Execution and Bankruptcy Law are not within the scope of this obligation. This regulation has taken effect on September 1, 2023.

E. Mediation Obligatory in Disputes Regarding the Division of Movables and Immovables and the Ending of Partnership

The seventh jurisdiction mandates mediation in disputes involving the sharing of movable and immovable property and the dissolution of a partnership with Mediation Act a. 18/B. Article 698 of the Turkish Civil Code governs the distribution and dissolution of a partnership based on common ownership. The termination of shared possession of a movable or immovable asset necessitates the division of the asset among the parties involved. Each stakeholder may propose dissolution of the partnership (provided that the property is not specialised for a particular purpose). Before filing a complaint in relation to these disputes, mediation is mandated as a prerequisite. This regulation has taken effect on September 1, 2023.

F. Mandatory Mediation in Disputes Originating from the Condominium Law

With the Mediation Code a. 18/B within the scope of the seventh judicial package, mediation has become obligatory in disputes arising from condominium ownership. Disputes may arise due to the flat owners not fulfilling their obligations in accordance with the Property Ownership Law or due to the elimination of common expenses and damages. For example, disputes arising from the maintenance and expenses of the main immovable or the disputes that may arise due to an advertisement placed on the exterior of the main immovable are within the scope of this law. This regulation has taken effect on September 1, 2023.

G. Mandatory Mediation for Disputes Involving Neighbor's Relationships

With the adoption of Mediation Code a.18/B, mandatory mediation is now required in disputes deriving from neighbour rights within the scope of the judicial package. The framework for the Turkish Civil Code a. 737 neighbourly privileges is established. This means that when employing the authority granted by immovable property, everyone has a responsibility to restrain themselves from acting in a way that may cause harm to their neighbours. According to the law, things that constitute exuberance include creating commotion by emitting smoke, mist, dust, or odour in excess of the local customary

[66] https://adb.adalet.gov.tr/Resimler/SayfaDokuman/9052022162408t%C3%BCketici%20%2004.05.2022.pdf (Accessed: 25.03.2023).

limit, or causing disturbance by shaking. Within the scope of the seventh judicial package, it has become mandatory to apply for mediation in neighbourly disputes. This regulation has taken effect on September 1, 2023.

H. Mandatory Mediation for Agricultural Contractual Relationship Disputes

Within the scope of the seventh judicial package, the Agriculture Law was amended with the passage of Act No. 7442 on March 23, 2023. Agricultural production contract is the contract that protects the producer's and buyer's mutual interests in regards to the agriculture to be produced before production begins. In the event of a dispute between the parties to this contract, mediation is mandatory prior to initiating court proceedings. This regulation has taken effect on September 1, 2023

IV. EXECUTION OF THE MANDATORY MEDIATION SYSTEM IN GENERAL

In order to be registered in the mediation professional registry; citizens of the Republic of Turkey must have full legal capacity, have completed a bachelor's degree in law, have not been convicted of some disgraceful crimes in the law, and have successfully completed the mediation training and examination. Mediation is allowed for faculty of law graduates with five years of experience. Under the existing framework, the profession of mediation is carried out exclusively by lawyers and other public officials who have received law degrees (academics, employees in public institutions). Mediation is a separate and distinct profession. Although it is natural for lawyers to carry out this role, psychologists, sociologists, and personal development experts should be able work in areas of expertise where negotiating and communication skills are necessary rather than legal knowledge. In Turkey, for example, mediation in family law is voluntary. If this area is included in mandatory mediation in the following years, other professional groups should be able to get into the mediation profession. Because communication and negotiating training are not included in the faculty of law's curriculum, lawyers who graduate from these faculties prepare for the mediation process only via their legal knowledge and personal efforts. Although lawyers are provided with mediation training, it is only on a limited basis. While the scope of mandatory mediation expands year after year, the profession's development should not be ignored. The legislator is at a crossroads in the road in the mediation profession and has to make a choice. If only law school graduates will be able to practice this profession, communication and negotiating skills, as well as legal knowledge, should be taught as required courses in law schools. If this training is deemed insufficient, communication and negotiating skills should be used as the foundation for the mediation profession, and other professional groups should be given opportunities.

The principal requirement for the appointment of a mediator under Turkish law is the mediator's expertise in the dispute. The system has been formed on the basis that mediators acquire specialised training in dispute resolution. Three main categories and seven specific areas of specialisation have been established in the Turkish system.[67] Main areas of specialisation include labour law, commercial law, and consumer law. In the seventh judicial package, the number of general areas was increased to seven, and rental law, distribution law, condominium law, and neighbourhood law were classified as general areas. Construction law, banking and finance law, sports law, insurance law, energy and mining law, health law, and intellectual property rights law are among the specialisations.[68] Mediators who have received training in general and particular specialities are included on the specialisation list in the

[67] Areas of expertise are specified by the Mediation Department. See. https://adb.adalet.gov.tr/Resimler/SayfaDokuman/7102020163604arbuzm.pdf (Accessed: 28.03.2023).

[68] Specialization trainings are given by many training institutions. The trainings based on here are those given by the Union of Turkish Bar Associations. https://sertifikaliegitimler.barobirlik.org.tr/Home/UzmanArabuluculuk/ (Accessed: 21.03.2023).

Ministry of Justice's Department of Mediation system. The lists are compiled by the mediation department based on the areas in which the specialists are interested in working. Therefore, it is identified in which fields each region's expert mediators are located, and the files are then sent to those expert mediators who are listed on these lists. For instance, mediators can mediate in labour disputes if they have specific training in labour law and are listed on the registry.

The mediator should start the process by determining the method of negotiation. The mediator should conduct the process by taking into account the type of the dispute, what the parties want, and the methods and rules that are needed to conclude the dispute quickly. In a process that started with the establishment of voluntary mediation, the Turkish system has adopted the facilitative mediation model.[69] However, with the transition to mandatory mediation, it has become possible to apply the evaluative mediation model.[70] Hence, in line with Paragraph 2 of the Mediation Code[71] in 2017 and Article 17/6[72] of the new Mediation regulation released in 2018, the mediator was authorized to offer a solution. The mediator seeks agreements based on the parties' respective interests. Nonetheless, If it is clear that the parties can not come up with a way to solve the problem, the mediator may also suggest an interests-based solution. The mediator cannot force the parties to approve the proposed solution. However, at the beginning of the negotiations, it should be noted that the mediator cannot propose a solution to the parties at the beginning of negotiations. The mediator can only propose a solution if the negotiation process is blocked while it is still ongoing. Consequently, the facilitating mediation model has not been completely abandoned, but the application of the evaluative mediation model has been made possible by the new regulation.

It is preferable that the parties participate in face-to-face meetings during the mediation process.[73] Nevertheless, the video conference method of mediation processes was preferred and widely used during the Covid-19 pandemic. Despite the decline in the effect of the epidemic process, it is preferred that negotiations be conducted via teleconference or videoconference, particularly because the parties are not in the same city, transportation is challenging in large cities, and it causes significant time loss.[74]

At the end of the negotiation, the mediator writes in the last session's minutes whether or not the parties came to an agreement and how the process was completed. This report describes how the process was conducted, which communication methods were used to reach the participants, which disputes were negotiated, and what solutions were reached. However, the initiative for what will be written in the last minute rests with the parties. With the seventh judicial package, the mediator is required to send the

---

[69] Özmumcu, Seda. *Arabuluculuk Modelleri (Modeller)*, On İki Levha Yayıncılık, İstanbul 2021, p.35.

[70] Özmumcu, *Modeller*, p.38; Aslan, Leyla Akyol. "6225 Sayılı Hukuk Uyuşmazlıklarında Arabuluculuk Kanununun 15'inci Maddesi ile Arabulucunun Çözüm Önerisi Getirebilmesine Olanak Sağlayan Yeni Düzenlemenin Değerlendirilmesi", *Terazi Hukuk Dergisi*, N. 14, 2018, p. 37-38; Kaya, Sedat. "7036 Sayılı İş Mahkemeleri Kanunu Çerçevesinde Bireysel İş Uyuşmazlıklarında Zorunlu Arabuluculuk", *Erzincan Binali Yıldırım Üniversitesi Hukuk Fakültesi Dergisi*, N. XXII, 2018, p. 221.

[71] In 2017, the phrase "The one who can also offer a solution if it turns out that the parties are unable to produce a solution" was added to article 2 of the Mediation Law.

[72] In 2018, Article 17/6 of the Mediation Regulation states: "While conducting the mediation process, the mediator strives for the parties to reveal their basic interests and needs and to reach an interest-based agreement in this direction. The mediator cannot propose a solution at this stage. However, if it is revealed that the parties are unable to find a solution, the mediator may propose a solution based on interests. However, it cannot force the parties to accept a solution proposal or a set of proposals."

[73] The Mediation Department prefers face-to-face negotiations and takes recommendations in this direction.

[74] The Court of Appeal decided that there is no legal obstacle for the mediator to establish video communication with the parties through electronic systems pursuant to Mediation Code a. 24(3) "Appointment of the mediator in mediation as a condition for litigation", which states that "The mediator shall inform the parties about the appointment by using all means of communication to the best of his/her knowledge and shall invite the parties and their lawyers, if any, to the first meeting together; Court of Appeal, (Ankara), 6.HD,04.02.2020, 2019/4092 E., 2020/304K., www.lexpera.com.tr, (Accessed: 18.03.2023).

session's last minutes to parties who did not attend. Accordingly, the mediator should provide the necessary explanations to the parties regarding the last minute and its conclusions, and if the parties are not ready, he should inform the parties who are not present through various communication channels. The aforementioned regulation adequately protects the parties' right for lawful hearing.

The last minute serves as the formal document, and the mediator is obligated to keep a copy of it for five years (Mediation Code Reg. a.20/4). After the completion of the process, the mediator is required to submit a copy of the last minute to the Mediation Department through the mediator portal no later than one month after the completion of the process.

Supreme Court, has acknowledged that there would be some legal consequences as a result of the last minute.[75] As a consequence of this, if the dispute that is the topic of the mediation has not been in default previously, the date that the final mediation report is drafted will be deemed the date that the default occurred. In other words, it should be accepted that the mediation last minute contains an intent statement in which the party requesting mediation addresses the disputed demands explicitly and precisely. The most crucial outcome of this circumstance is that it will define the commencement date of interest in terms of receivables claims.

If a settlement is reached through mediation, the agreement document must be issued alongside the last minutes. Although the law does not require the mediator to arrange the agreement document, in practise, mediators draught the agreement document. Because the agreement document is a contract and the document's scope is influenced by the parties' shared intent. This document outlines the parties' dispute settlement agreement.

The agreement document is given considerable importance in the Turkish judiciary. The civil court of peace's annotation makes the parties' and mediator's agreement a verdict. Nevertheless, if the parties participated in the process alongside their lawyers and signed the agreement document alongside the mediator, the agreement document is deemed a verdict without the need for an annotation of enforceability. With the seventh judicial package, the extent of circumstances that do not require a court annotation has been expanded. As an appropriate decision, the agreement document prepared with the participation of the lawyers of the parties and the mediator in commercial disputes has been allowed to be considered as a judgment document without obtaining an annotation of enforceability from the court.

What is meant by considering the agreement document as a writ document is that the agreement document and the "writ" that definitively ends the future dispute for the parties both have the same power. The law accepts the agreement document obtained by the parties through the mediation agreement as equivalent to the court order. Thus, the parties will not be able to file a lawsuit on the same subject about the issues they have agreed on, and the dispute will end definitively and for the future. If the demands attached to the writ and document in the nature of a writ are not fulfilled by the obliged parties, they are fulfilled by the force of enforcement.

If the creditor has a judgment or a document in the form of a judgment during the enforcement process, it is not possible for the debtor to object to this document. For this reason, if the agreement document obtained during the mediation process has turned into a document that has the quality of a verdict, an advantage is gained in the forced execution. However, the agreement document must contain an enforceable performance obligation. An enforceable annotation cannot be obtained from the court

[75] Supreme Court, Assembly of Civil Chambers 9, 21.03.2022, 2022/3222E., 2022/3813K., www.lexpera.com.tr, (Accessed: 16.03.2023).

based on an agreement document that does not contain an enforceable performance obligation, and no enforceable enforcement can be applied.

As a rule, it is not obligatory to obtain an enforceable annotation based on the agreement document. In practice, there is no need for an enforceability annotation by applying to the court, since the parties mostly fulfill their obligations specified in the agreement document. However, when the performance obligation is not fulfilled, one of the parties requests from the court that heard the case, if the mediator was taken from the civil court of peace in the place where the mediator worked before the lawsuit was filed, by applying to mediation after the lawsuit was filed.

With the seventh judicial package mandates obtaining an annotation of enforceability for some disputes. These disputes are the law of rent, the law of dissolution of partnership, the law of condominium and the law of neighborhood. While the legislator makes it obligatory to take an annotation of enforceability in terms of these disputes, the aim is to ensure that the courts can audit the content of the agreement document. As a matter of fact, it is important whether the agreement document prepared within the scope of these disputes is suitable for forced execution and mediation, and whether it is made in accordance with the restrictions in the law in cases requiring the official form requirement. Court supervision ensures that the rights and interests of the parties are protected while preventing possible grievances. Within the scope of the new regulation, if the content of the enforceability annotation agreement document is related to the real estate, the place where the real estate is located, and in terms of other agreement documents, the place where the mediator works is the civil court of peace.

V. EVALUATIONS AND CONCLUSION

We are pleased to report that the success rate of Turkish mandatory mediation practises exceeds 50%. Nonetheless, there is no doubt that this rate is the result of a force, and the system is susceptible to enhancement in certain respects. Mandatory mediation practises are the result of parties being compelled to compromise, and in some instances, parties in a power imbalance are compelled to do so, as they are inherently coercive. Nevertheless, mandating mediation does not guarantee agreement. In this regard, rather than viewing reconciliation as a duty, efforts should be made to strengthen social peace. Mandatory mediation decreased the burden of the judiciary and resulted in a swift and final resolution of the parties' disputes. However, the reduction of judicial duty is not the objective of mediation, but rather the result. As a form of amicable conflict resolution, mediation seeks an enduring peace in society.

However, due to its social and economic difficulties and some challenging government policies, Turkey is moving further and further away from social peace and reconciliation. As a result, legal obligations are viewed as obstacles that must be overcome. The efforts of the mediator and the maintenance of faith in the justice system are required to dispel this notion. Although it is a mandatory pre-litigation procedure, the mediator will be successful if he or she increases the parties' faith in the process and establishes a secure environment for reconciliation. In reality, the application of political constraints on the justice system and the years-long duration of the prosecution cause parties to reach an agreement during the mandatory mediation procedure.

The spread of mediation has been advantageous in terms of fostering a culture of reconciliation in society. Nevertheless, reconciliation requires considerable effort. The mediator should carefully conduct his activities and exert effort to achieve negotiation success. In the Turkish system, it is observed that mediators are also lawyers and that they perform their mediation duties in their spare time. The

success of the process is negatively impacted by the clumsy and careless performance of these lawyers. Nevertheless, mediation is a distinct profession. During mediation, lawyers should be neutral when advocating. While Turkey has prioritised expanding the mediation system, it has neglected the development of the profession. It is necessary to train mediators who can conduct a risk assessment, write a report on the issue, and offer solutions to the parties. For the sake of the development of the profession, mediation should be performed exclusively by mediators who work for mediation offices. Thus, mediators who devote their expertise and time to this work canfacilitate the development of effective solutions. Moreover, under our existing legal framework, party lawyers do not have the right to receive any payment while the mediation procedure is underway. Consequently, party lawyers may choose not to actively participate in the mediation process due to this predicament.

The key requirement for the advancement and widespread acceptance of mediation in Turkish law is not the change of legislation, but rather a fundamental shift in cultural attitudes. While it is possible to enact legislation to promote and require broad mediation, it is crucial that we prioritise the development of our negotiation abilities. The importance of excellent communication and negotiation skills should be ingrained in our minds since childhood, and one way to achieve this is by incorporating courses on these subjects in schools.

We believe that prioritizing the successful execution of mediation is of greater significance than its extensive adoption. Efficiently implemented and productive mediation practices have the potential to become widely adopted, regardless of whether they are mandatory or not. Hence, it is imperative to reassess the systemic laws governing mediation practitioners within the framework of Turkish law. During mediation training, theoretical instruction is limited to just recapping the participants' previous legal knowledge at the undergraduate level. Instead, there should be a focus on practical courses and training that aim to enhance communication skills, conciliation, and negotiation skills.

Conflict of Interest

There is no conflict of interest.

Author Contributions

The authors did not specify the contribution rate.

REFERENCES

Akil, Cenk. “Ticari Uyuşmazlıklarda Dava Şartı Arabuluculuk Hakkında Usul Hukuku Bakımından Bazı Değerlendirmeler”, *Türkiye Adalet Akademisi Dergisi*, N. 41, 2020.

Andrews, Neil. “Mediation: International Experience and Global Trends”, 4 J. INT’L & COMP. L. 1, 1 (2017), pp.217-252.

Arslan, Ramazan/Yılmaz, Ejder/Taşpınar Ayvaz, Sema/Hanağası, Emel. *Medeni Usul Hukuku,* Yetkin Yayınevi, Ankara 2020.

Akyol Aslan, Leyla. “6225 Sayılı Hukuk Uyuşmazlıklarında Arabuluculuk Kanununun 15’inci Maddesi İle Arabulucunun Çözüm Önerisi Getirebilmesine Olanak Sağlayan Yeni Düzenlemenin Değerlendirilmesi”, *Terazi Hukuk Dergisi,* N. 14, 2018.

Atalı, Murat/Ermenek, İbrahim/Erdoğan, Ersin. *Medeni Usul Hukuku*, Yetkin Yayınevi, Ankara 2022.

Azaklı Arslan, Betül. *Medeni Usul Hukuku Açısından Zorunlu Arabuluculuk*, Yetkin Yayınları, Ankara 2018.

Bhatt, Niranjan. "Evolution and Legislative History of Mediation", GNLU Journal of Law Development and Politics, vol. 1, no. 2, December 2009, pp. 83-95.

Budak, Ali Cem/ Karaaslan, Varol. *Medeni Usul Hukuku*, Filiz Kitabevi, İstanbul 2023.

Bulur, Alper. *6325 Sayılı Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu ve Uygulaması Hakkında Değerlendirmeler, Ramazan Arslan'a Armağan, C. I*, Yetkin Yayınevi, Ankara 2015.

Cengiz, Dilek. "Principles of Mandatory Mediation in Commercial Disputes in Turkish Law with Determinations and Comments on its Applications", *Annales de la Faculté de Droit d'Istanbul*, N. 70, 2021.

Çağlayan, Ramazan. *İdare Hukuku Dersleri*, Adalet Yayınevi, Ankara 2021.

Dayınlarlı, Kemal, *Milli Milletlerarası Kamu Düzeni ve Tahkime Etkileri*, Adalet Yayınevi, Ankara 1994.

De Palo, Giuseppe/Harley, Penelope. "Mediation in Italy: Explormg the Contradictions", *Negotiation Journal*, N. 21, 2005.

Dür, Orhan. Arabuluculuk Faaliyetleri ve Arabulucunun Hak ve Yükümlülükleri, Adalet Yayınevi, Ankara, 2017.

Ekmekçi, Ömer/Özekes, Muhammet/Atalı, Murat/Seven, Vural, *Hukuk Uyuşmazlıklarında Arabuluculuk,* On iki Levha Yayıncılık, İstanbul 2019.

Emery, R. E., Sbarra, David, Grover, Tara, (2005). "Divorce mediation, Research and Reflections", Family Court Review, 43(1), pp. 22-37.

Göksu, Mustafa. Alternatif Uyuşmazlık Çözüm Yolları ve Tahkim, Seçkin Yayınevi, Ankara 2021.

Gözler, Kemal/Kaplan, Gürsel. *İdare Hukuku Dersleri*, Ekin Yayınevi, Bursa 2020.

Green, Eric D. Corporate Alternative Dispute Resolution, Ohio State Journal on Dispute Resolution, Vol. 1, Issue 2 (1986), pp. 203-298.

Günday, Metin. *İdare Hukuku*, İmaj Yayınevi, Ankara 2017.

Hanks, Melissa. "Perspectives on Mandatory Mediation", *UNSW Law Journal,* V. 35, N. 3, 2012.

Ildır, Gülgün. *Alternatif Uyuşmazlık Çözümü*, Seçkin Yayınevi, Ankara 2003.

Karacabey, Kürşat. "Zorunlu Arabuluculuğun Hukukun Temel İlkelerine Aykırılığı ve Uygulanabilirliğine Dair Sorunlar", *Ankara Barosu Dergisi,* 1, 2016.

Kaya, Sedat. "7036 Sayılı İş Mahkemeleri Kanunu Çerçevesinde Bireysel İş Uyuşmazlıklarında Zorunlu Arabuluculuk", *Erzincan Binali Yıldırım Üniversitesi Hukuk Fakültesi Dergisi*, XXII, 2018.

Kısmet Kekeç, Elif. *Arabuluculuk Yoluyla Uyuşmazlık Çözümünde Temel Aşamalar ve Taktikler*, Adalet Yayınevi, Ankara 2016.

Koçyiğit, İlker/Bulur, Alper. *Ticari Uyuşmazlıklarda Dava Şartı Arabuluculuk,* Arabuluculuk Daire Başkanlığı Yayınları, Ankara 2019.

Kurt Konca, Nesibe. "Arabuluculukta Özel Uzmanlık Alanına İlişkin Bazı Değerlendirmeleri", *Adalet Dergisi,* (68), 2022.

Kurt Konca, Nesibe. "Ticari Uyuşmazlıklarda Dava Şartı (Zorunlu) Arabuluculuk", *SETA Perspektif Dergisi,* N. 225, 2018.

Kuru, Baki. "Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu Tasarısı Hakkında Görüş ve Öneriler", *Medeni Usul ve İcra İflas Hukuku Dergisi*, V. 16, N. 2, 2010.

Moore, Christopher W. *The Mediation Process,* Nobel Publishing, Translated from 4th Edition, Ankara 2016.

Nolan Haley, Jacqueline. "Mediation Exceptionality", *Fordham L. Rev,* 78, 2009.

Özbay, İbrahim. "Alternatif Uyuşmazlık Çözüm Yöntemleri", *Erzincan Üniversitesi Hukuk Fakültesi Dergisi*, V.10, 2006.

Özbek, Mustafa Serdar. *Alternatif Uyuşmazlık Çözümü*, Yetkin Yayınevi, Ankara 2022.

Özel, Sibel. "Zorunlu Arabuluculuğun Adalete Erişim Hakkı Çerçevesinde İrdelenmesi", *Public and Private International Law Bulletin,* V. 40, N. 1, 2020.

Özmumcu, Seda. "Karşılaştırmalı Hukuk ve Türk Hukuku Açısından Zorunlu Arabuluculuk Sistemine Genel Bir Bakış", *İstanbul Üniversitesi Hukuk Fakültesi Dergisi,* V. LXXIV, N. 2, 2016.

Özmumcu, Seda. *Arabuluculuk Modelleri*, On İki Levha Yayıncılık, İstanbul 2021.

Pekcanıtez, Hakan, *Pekcanıtez Usul V. II*, On İki Levha Yayıncılık, İstanbul 2017.

Pekcanıtez, Hakan/Atalay, Oğuz/Özekes, Muhammet. *Medeni Usul Hukuku*, On İki Levha Yayıncılık, İstanbul 2022.

Renee R. Cochard, Divorce Mediation, p. 9 Resource News 11 (1985) file:///C:/Users/USER/Downloads/9ResourceNews11.pdf E.T. 18.12.2023

Sander, Frank E.A. "Another Wiew of Mandatory", *Dispute Resolution Magazine*, V. 13, N. 2, 2007.

Tanrıver, Süha. "Dava Şartı Arabuluculuk Üzerine Bazı Düşünceler", *Türkiye Barolar Birliği Dergisi*, N. 147, 2020. (Düşünceler)

Tanrıver, Süha. *Hukuk Uyuşmazlıkları Bağlamında Arabuluculuk*, Yetkin Yayıncılık, Ankara 2022, (Arabuluculuk).

Yazıcı Tıktık, Çiğdem. *Arabuluculukta Gizliliğin Korunması*, On İki Levha Yayıncılık, İstanbul 2013.

Vettori, Stella. "Mandatory Mediation: An obstacle to access to justice", *African Human Rights Law Journal*, N. 15, 2015.

Waye, Wicki. "Mandatory Mediation in Australia's Civil Justice System", *Common Law World*, V. 45, N. 2-3, 2016.

Yıldırım, Ferhat, "Karşılaştırmalı Olarak Alman ve Türk Hukukunda Arabuluculuğa Konu Yönünden Elverişliliğin İncelemesi", *Sakarya Üniversitesi Hukuk Fakültesi Dergisi*, V.1, N. 2, 2013, p.93-118, https://www.jurix.com.tr/article/4367 E.T.12.09.2023

Yıldırımoğlu, Hakan. "Avrupa Ülkelerinde Ticari Arabuluculuk Uygulamaları", *İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi*, V. 21, N. 44, 2022.