

## Mediation for Disputes in Private Law in Turkey

Süleyman Dost

Suleyman Demirel University, Faculty of Law, Isparta, Turkey

Email: suleyman.dost@hotmail.com

**DOI Link:** <http://dx.doi.org/10.6007/IJARBSS/v4-i10/1210>

**Published Date:** 07 October 2014

### Abstract

Any dispute arising in private law relations is solved by the states jurisdiction or an arbitrator. Parties can also apply to alternative dispute resolution which has non-judicial nature outside of these two pathways. For this purpose, Mediation Act in Law Disputes (MA) and other relevant regulations were made also in Turkey. In this article Mediation Act and other relevant regulations adopted in Turkey will be discussed in comparison. It will be made compare with the mediation arrangements of the some countries, in particular the UK, Austria, Germany and China have commercial and private law relations with Turkey. In the conclusion some recommendations and assessment will be made.

**Keywords:** Mediation, Alternative, Dispute, Resolution, Turkey, Private Law

### 1. Introduction

It can be said that a private law dispute can be settled in three different ways generally: State jurisdiction, arbitration and alternative dispute resolutions. The main alternative dispute resolutions are negotiation, objective preliminary assessment, case determination, short hearing, mediation and conciliation. (Brown & Marriott, 2011:1-13; Blake et al., 2013:14-18; Genn, 1999:14; Özbek, 2013:167; Özbay, 2006:461; Ildir, 2003:83). The method which is the most common among them and also accepted by Turkey is mediation.

As is known, mediation is non-judicial and voluntary solution mechanism. It is a remedy in which a neutral mediator helps parties of dispute to reach a solution and which reveals benefits of parties rather than rights of them. The mediator is not entitled to decide like a judge or arbitrator in this mechanism. (Brown & Marriott, 2011:154; Blake et al., 2013:129; Genn, 1999:15).

Alternative dispute resolutions and particularly mediation are recommended by international authorities. 2008/EC Directive on Certain Aspects of Mediation in Civil and Commercial Disputes (Mediation Directive) accepted by European Parliament and Council in Europe, Green Paper dated 2002 prepared by European Commission for Settlement of Alternative Dispute in Civil and Commercial Disputes are some of them. Also, United Nations prepared UNCITRAL Mediation Model Act in International Commercial Disputes for providing compliance and coordination in settlement of disputes in international field and encouraged states in this regard. In many countries like Austria, Germany, Bulgaria, Hungary and Slovakia,

regulations related with mediation were conducted within this scope. (Hopt & Steffek, 2013:5-9).

In parallel with these developments in the world, Mediation Act in Law Disputes No. 6325 was accepted on 7 June 2012 in Turkey. Then, Regulation of Mediation Act in Law Disputes, Ethics Rules of Mediation and Minimum Wage Tariff for Mediation were prepared. The Mediation Act entered into force on 22 June 2013 and mediator who passed the exam was registered into mediators' register in December 2013. In other words, mediation has been started to be implemented actually as of the beginning of 2014 in Turkey. Turkey's attempts to make legal arrangements for mediation are a positive step during the negotiation process with European Union.

It is possible to see that some applications corresponding to mediation were regulated in different acts before Mediation Act is accepted in Turkey. For example, Civil Procedure Act No. 6100 (Art.137), Act of Establishment on Family Courts No. 4787 (Art.7), Act of Establishment on Labour Courts No. 5521 (Art.7) state that competent courts will encourage parties amicable solution. (Kuru et al., 2011:534). In similar way, Attorneys' Act No. 1136 (Art.35/A). Grants conciliation power to attorneys. (Yılmaz, 2004:851). Act on Protection of Consumer No. 4077 (Art. 22/5-6) regulated that parties can apply to arbitration tribunal of consumer issues for some disputes. (Deryal, 2008:213). Act of Community Unions and Collective Bargaining Agreements No. 6356 (Art.50) mentioned about mediation in collective labor disputes. Expropriation Act No. 2942 (Art.13) adopted conciliation regarding procurement procedure (Günday, 2003:223) and Criminal Procedure Act No. 5271 (Art.253) adopted conciliation system regarding some criminal disputes. (Yenisey, 2005:110). In these listed methods, mediation concludes either with decision of mediator or judge, or negotiation method is applied. (Perçin, 2011:177-201). However, mediation which is commonly accepted all over the world and discussed in this article is completely different from these methods. Because disputes conclude with own decision of parties in mediation.

In this article, Turkish Mediation Act and the other relevant regulations accepted in Turkey will be addressed comparatively. Comparison will be done between mediation regulations of other some countries having commercial and private law relations with Turkey notably UK, Austria, Germany and China. In conclusion part, some considerations and recommendations will be given.

## **2. Scope and Definition**

### **2.1. Scope and Dispute Fitting to Mediation**

Turkish Mediation Act adopted to settle the private law disputes by way of mediation. However, any private law relation is not convenient for settlement through mediation according to the Act. This Act took the settlement of disputes arising from business and transactions on which parties can freely dispose within private law relations as a basis. The Act accepted that disputes arising from transactions having a foreign element can be settled through mediation. (MA, Art.1). In this context, commercial and contract law disputes, tort and consumer law disputes, employee-employer relations and property regime disputes may be listed as business and transactions on which parties can freely dispose. (Brown & Marriott, 2011:202; Blake et al., 2013:132). In the same way, disputes having foreign elements are convenient for settlement through mediation. (Alexander, 2013:133).

In Rationale of Mediation Act, it was stated that disputes on which parties cannot dispose freely and which are related with public order cannot be settled through mediation.

(Rationale, 7). The act explicitly addressed that disputes containing family violence claim are not applicable for mediation within this scope. (MA, Art.1). In the same way, disputes related with criminal law cannot be settled through mediation. Conciliation was accepted differently from mediation in the Act of Criminal Procedure for settlement of disputes arising from criminal law in Turkey.

Method which mostly resembles the Mediation in Turkey is conciliation implemented in disputes related with criminal law. While conciliation resembles mediation in nature, it has different features. Conciliation in criminal law is based on conclusion of dispute through agreement between offender and victim in mainly inquiry stage and exceptionally in prosecution stage in offences whose follow-up is based on complaint. (Yenisey, 2005:110).

It is generally accepted that disputes related with criminal law are not convenient for mediation in comparative law. (Blake et al., 2013:24). For example, consumer, family, labor, patent and business disputes can be settled through mediation in UK. However, it is considered that public and criminal law disputes are not suitable for mediation. (Scherpe & Marten, 2013:408). Mediation is applied in administrative and criminal disputes in too constricted way in Austria, Germany and China. (Roth & Gherdane, 2013:295; Tochtermann, 2013:559; Pissler, 2013:987).

## **2.2. Definition of Mediation**

The commonly accepted definition of mediation all over the world is as follows: "Mediation is a procedure based on the voluntary participation of the parties, in which an intermediary (or multiple intermediaries). with no adjudicatory powers systematically facilitate(s). communication between the parties with the aim of enabling the parties to themselves take responsibility for resolving their dispute" (Hopt & Steffek, 2013:11; Spencer & Brogan, 2006:4; Brown & Marriott, 2011:154; Boulle, 2005:3).

Definitions that are similar to this common definition in the world were made for mediation in Turkey: It is an alternative dispute resolution in which a dispute which is not related with public order, on which parties can dispose is brought to an objective and independent third person who is defined as mediator voluntarily, this mediator gathers parties by applying a systematical technique and allows them to consider on dispute, negotiate and communicate and provides them to reach a solution. (Tanriver, 2006:165; Ildır, 2003:392; Şıpka, 2007:163). Also, a mediation definition was made in the Act in similar way to the definition given in doctrine. In the Act, mediation was defined as follows "dispute settlement method which brings parties together by applying systematical techniques, discussing and negotiating, realizes to establish a communication process between them for allowing them to produce their own solutions, which is conducted voluntarily and with the participation of an impartial and independent third person who took specialization training". (MA, Art.2-b). Similar definitions were made in countries which make legal arrangements regarding mediation notably UK, Austria, Germany and China. (Scherpe & Marten, 2013:368; Roth & Gherdane, 2013:250; Tochtermann, 2013:525; Pissler, 2013:967).

This definition made by the Act coincides with definitions made in the doctrine. Accordingly, mediator is the independent and impartial third person and the person who communicates for allowing parties of dispute to produce solution of their own in order to settle the dispute. The mediator applies systematical techniques, discusses and negotiates with parties, brings them together if required, enables them to understand each other. The mediator does not decide about dispute as in jurisdiction or arbitration. Mediation is a process balancing the benefits of parties, not a process for determining the fair or unfair person. The mediator

cannot develop a solution suggestion for parties and impose on them and cannot force them to agree on the developed solution suggestion. This mediation process which is conducted by hand of mediator is completely voluntary. (Rationale, 7).

### 3. Basic Principles Regarding Mediation

In the doctrine, voluntary participation, neutrality, impartiality and confidentiality are listed as basic principles concerning mediation. (Whatling, 2012:22-23; Brown & Marriott, 2011:158-168; Spencer & Brogan, 2006:84). The same principles were also accepted by Turkish Mediation Act. In addition to these, equality and execution of duty carefully were regarded among the basic principles of mediation.

#### 3.1. Voluntary Participation and Equality

It is seen that voluntary participation principle is generally adopted in regard to applying to mediation, maintaining and concluding the process in the world. (Spencer & Brogan, 2006:87). However, mediation encouragement system is applied together with voluntary participation principle in many countries like Australia, Russia and Japan. (Blake et al., 2013:3; Magnus, 2013:879; Davydenko, 2013:1170; Baum, 2013:1036). It is accepted in less countries that firstly it will be applied to mediation for some subjects or claims below a certain amount, if a solution cannot be found in this way, it will be applied to suitcase or arbitration. In these countries, application to mediation is a precondition for some suitcases. (Spencer & Brogan, 2006:263). For example, Germany firstly makes the application to mediation obligatory for some disputes. (Tochtermann, 2013:534). In UK and Austria, it can be said that application to mediation is completely voluntary. (Scherpe & Marten, 2013:375; Roth & Gherdane, 2013:251).

Another aspect of voluntary participation principle is that decision in settlement of dispute belongs to parties. Decision solving the dispute is the decision parties make by their own will, not the decision of mediator. This feature differs mediation from jurisdiction or arbitration. Because, decision concluding the dispute in jurisdiction or arbitration is decision of judge or arbitrator. Parties may be dissatisfied with this decision. But, it is possible to reach a solution by their own will of parties in mediation. (Brown & Marriott, 2011:161).

Turkish Mediation Act has adopted the principle of full *voluntary participation*. According to the Act, parties are free for applying to mediator, maintaining the process, concluding or withdrawing from this process. (MA, Art.3). Mediation process may start with a clause which may be inserted into agreement before dispute arises. Or, it can be applied to the mediator by free will of parties after dispute arises. (Spencer & Brogan, 2006:408). However, Turkish Legal System encourages mediation which is an alternative dispute resolution together with the principle of voluntary participation. (Tanriver, 2006:170; Rationale, 8). The Act regulated that court may clarify and encourage the parties in regard to application to mediator within this scope. (MA, Art.13). In similar way, Act of Civil Procedure states that judge will suggest to settle the dispute by way of mediation after the lawsuit.

The Act regulated equality principle together with voluntary participation in the same article. According to the Act parties have equal rights both when applying to mediator and throughout the entire process "in accordance with the principle of equality arms". Although mediation is not a judicial process, it is a dispute solution system. In the judicial process that is an obligatory way, there must be principle of equality as a fortiori in the mediation conducted voluntarily. For this reason, parties having equal rights in any stage of the process are suitable for the nature of mediation.

### 3.2. Execution of Duty Impartially and Diligently

*Impartiality* or neutrality is the most important and integral component of mediation activity. (Brown & Marriott, 2011:159). However, determination of content of impartiality is quite difficult. It is possible to say that neutrality is not being close to either of parties of dispute or being equal to both of them. (Spencer & Brogan, 2006:91; Özbek, 2013:209). The principle of neutrality is seen in all countries making legal arrangement related with mediation like UK, Austria, Germany and Belgium. (Scherpe & Marten, 2013:421; Roth & Gherdane, 2013:252; Tochtermann, 2013:561; Boulle & Nesic, 2010:354). In fact, neutrality is the common point of all dispute settlement methods. In this scope, the judge in judiciary, the arbitrator in arbitration, the mediator in mediation must act in an impartial manner. Although mediator is not entitled to decide about dispute in mediation, the key for trust of parties to the mediator during the execution of process is neutrality.

In Turkish Mediation Act, principle of neutrality was listed among obligations of mediator as well as *principle of care*. The principle of execution of mediation duty diligently was also accepted by German Mediation Act. (Tochtermann, 2013:560). Pursuant to Turkish Mediation Act, mediator has to perform the mediation task personally and carefully. (MA, Art. 9/1). In other words, mediator cannot transfer this duty to another mediator or persons working with him. Mediator has to perform this duty in neutral way by complying with impartial care obligation prescribed in acts. This situation is suitable for the nature of mediation. Since personality of mediator is at the forefront in the mediation, it should be avoided from behaviors damaging the neutrality.

Mediation Act adopted the principle of execution of the mediation process free from any kind of doubt related with neutrality. According to the Act, mediator must inform parties in case of existence of conditions and situation which raise doubt on neutrality of mediator or development/realization of these conditions later. If all of parties want to maintain the process despite this notice, mediator may continue mediation. (MA, Art.9/2).

The Act regulated that mediation process should be conducted within the principle of equality. According to the Act, mediator is liable to protect equality between the parties. (MA, Art.9/3). Equality is both basic principle of mediation and obligation of mediator. Equality means implementation of right and obligations foreseen in the Act for parties of dispute throughout the process. (Blake et al., 2013:142).

The act banned persons who had been charging as mediator in a dispute previously as a result of neutrality principle from undertaking a duty as attorney, judge, arbitrator or expert during jurisdiction process and suitcase opened regarding the same dispute afterwards. (MA, Art.9/4, Regulation, Art.12).

### 3.3. Confidentiality

Judicial processes are usually public by nature of constitutional or legal obligation. However, this publicity could damage commercial standing and relationships of parties who fall into dispute. Because, there are mutual accusations in judicial process. Therefore, parties may want to settle dispute through mediation conducted within confidentiality. (Spencer & Brogan, 2006:312). Thus, confidentiality should be essential and publicity should be exceptional during the mediation process. (Tıktık, 2013:12; Roth & Gherdane, 2013:277). Confidentiality principle is included into legal arrangements of all countries in which mediation is accepted like UK, Austria, Germany and Belgium. (Scherpe & Marten, 2013:397; Roth & Gherdane, 2013:299; Tochtermann, 2013:547; Boulle & Nesic, 2010:354).

Turkish Mediation Act also adopted the principle of confidentiality. The act regulated firstly aspect of confidentiality facing to mediator then aspect facing to parties. According to the Act, mediator is liable to keep information and documents and other records submitted to himself within the framework of mediation activity or otherwise obtained confidential, unless otherwise agreed among parties. Unless otherwise agreed, parties and representatives must comply with confidentiality in this regard. (MA, Art.4).

Pursuant to the Act, mediator is liable to keep information and documents submitted to himself as a rule or otherwise obtained confidential. However, parties may agree otherwise if they want clearly. Mediator will be under the obligation of secrecy unless there is a legal obligation or of exemption from witnessing in a jurisdiction within the framework prescribed by laws. In the event that mediator does not comply with this obligation, this mediator may be deleted from register or criminal penalty may be implemented. Also, mediator may have a legal responsibility due to breach of confidentiality principle. The basis of this liability is either tort or breach of contract. (Spencer & Brogan, 2006:432). On the other hand, parties and representatives, if any, must comply with confidentiality principle, unless otherwise agreed. A legal responsibility may arise in case of parties' breach of confidentiality principle. Also, Mediation Regulation regulated that sound and image recording cannot be taken during mediation activity. (Regulation, Art.6).

#### **3.4. Inability to Use Certain Statements or Documents**

During the mediation process different from jurisdiction or arbitration, parties should feel free so that dispute can be solved. Moreover, mediation process is not a legal activity. Therefore, certain statements or some documents submitted before mediation process does not start or during the process may have been used only for mediation. These statements and documents submitted in this non-judicial process cannot be used in the judicial process which will start afterwards. Similar implementations were accepted in countries where mediation is implemented like UK, Austria and Germany. (Scherpe & Marten, 2013:398; Roth & Gherdane, 2013:279; Tochtermann, 2013:548).

Turkish Mediation Act states that when a direct or indirect law suitcase is opened regarding a dispute for which mediation is performed or when it is applied to arbitration, some statements or documents cannot be submitted as evidence in this suitcase or arbitration and it cannot be acted as a witness about these. According to the Act, parties, mediator and third persons must comply with this prohibition regardless of whether they participate into mediation or not. In fact, this prohibition is continuation of confidentiality principle. However, parties may agree otherwise.

Statements and documents listed in the Act are as follows:

- a) Mediation invitation made by parties or participation will of a party into the mediation activity.
- b) Opinions and offers presented by parties for finalizing the dispute by way of mediation.
- c) Proposals presented by parties or acceptance of any fact or claims during the mediation activity.
- ç) Documents prepared only for mediation activity. Moreover, these statements and documents cannot be used as a evidence in the said suitcase regardless of their shape. (MA, Art.5).

The Act regulates that announcement of these statements and documents cannot be requested by another court, arbitrator or any administrative authority. Although these statements or documents may have been submitted as evidence, court or arbitrator cannot

decide according to these statements or documents. However, the said information may be announced to the extent which is ordered by a provision of act or required for the performance and execution of an agreement concluded at the end of mediation process. But any evidence submitted in a law suitcase and arbitration cannot become an unacceptable evidence since they are used only in mediation process without prejudice to the restrictions stated in the Act. (MA, Art.5).

#### **4. Rights and Obligations of Mediator**

The Act regulated the right and obligations of the mediator in detail. According to the Act, rights of the mediator are using the mediator title, requesting fee and expenses, interviewing and communicating with parties. Execution of mediation duty with care and in a neutral way, advertisement ban, clarification of parties, payment of subscription are listed among obligations of mediator.

##### **4.1. Using the Mediator Title**

According to the Act, only persons who are entered into register may act as mediator as a rule. These persons entered into the register have the right of using mediator title and powers provided by this title. Also, mediator must state this title during mediation activity. (MA, Art.6). The rule stating that only persons entered into register may act as mediator is seen in other countries like Austria. (Boulle & Nesic, 2010:353). In fact, there is no legal obstacle for a person who is not entered into register to act as mediator. However, mediation that is performed by such persons does not result in a legal outcome in meaning of Mediation Act. For example, court cannot give annotation of applicability on an agreement document issued at the end of such mediation.

##### **4.2. Mediation Fees and Expenses (and Legal Aid).**

Mediation is generally subject to fee in all countries where mediation system is used like UK, Austria and Germany. (Scherpe & Marten, 2013:386; Roth & Gherdane, 2013:268; Tochtermann, 2013:542). It is possible to see implementations in which mediation service is provided free of charge for some disputes as in China. (Pissler, 2013:973). Mediation fees are generally covered by parties. There are some countries where mediation fee is covered by state for some disputes like Australia. (Blake et al., 2013:136-137). Amount of the fee or lower limit is usually determined by professional organizations. (Roth & Gherdane, 2013:268).

According to Turkish Mediation Act, mediator has the right of demanding fee and expenses for mediation activities. Mediator may demand advance payment for fee and expenses. Unless otherwise agreed pursuant to the Act, mediator's fee is determined according to Minimum Wages Tariff for Mediator which is in force on date when the activity is concluded and fee and expenses are equally covered by parties. (MA, Art.7).

The Act foreseen some prohibitions related with mediation fee. According to the Act, mediator cannot get paid against intercession the specific people or recommending certain persons regarding the mediation process. Furthermore, Act regulate that the transaction contrary to this prohibition will be invalid.(MA, Art.7/3). In my opinion, this prohibition related with mediation having the nature of a private law relationship has a quite extensive coverage.

##### **4.3. Meeting and Communicating With Parties**

Contribution of mediator into the settlement of dispute varies from country to country. In historical development of mediation, facilitative mediation, evaluative mediation, directive

mediation, transformative mediation, narrative mediation and finally non-directive and client as expert mediation practices were offered or implemented. (Whatling, 2012:28-39; Blake et al. 153-156; Brown & Marriott, 2011:172). Apart from these, it was stated that mediator is the person managing the mediation process, assisting the communication between parties and encouraging the settlement of dispute. Also, it is mentioned about the following functions of mediator; creating favorable conditions for the parties, assisting the parties to communication, facilitating the parties' negotiations and encouraging the settlement of disputes. (Boulle & Nesic, 2010:12). Turkish Mediation Act does not adopt single method for mediator to negotiate with parties. According to the Act, "mediator may negotiate and communicate with each party separately or collectively. Parties may participate into these negotiations by their representatives." (MA, Art.8).

It was stated in the doctrine that mediator may negotiate with parties of dispute separately and collectively, mediator should gain confidence in parties and should take some sensitivities into consideration. Mediator enables parties to reach a solution by applying various communication techniques during the mediation process. At this point, it should be paid attention to technical and legal advice discrimination. Because mediator cannot give legal advice generally. (Brown & Marriott, 2011:190-193). However, it was stated that mediator should inform, give opinion and advice, make criticism and make evaluation for the settlement of dispute. (Boulle & Nesic, 2010:209-213).

Austria Mediation Act shows that what mediator cannot make during negotiation. (Roth & Gherdane, 2013:286). Turkish Mediation Act also adopted the same method. Mediator cannot provide parties with legal advices during the execution of process within this scope. He cannot develop a solution suggestion or suggestions' catalogue and cannot impose this on parties. He cannot force parties to agree on a solution suggestion developed during negotiation. (Regulation, Art.19). On the contrary, the role of the mediator during negotiations is not defined; it is only mentioned about facilitative, evaluative, transformative role of mediator in UK. (Scherpe & Marten, 2013:405). In Germany, mediator may offer a solution suggestion to parties. (Tochtermann, 2013:553).

#### **4.4. Neutrality**

The mediator is under the obligation to Act in neutrality during the mediation activities. Mediator has to avoid from attitude and behavior which will raise doubt about his neutrality. (MA, Art.9; Regulation, Art.8). This obligation was explained above in the part of principles dominating the mediation.

#### **4.5. Professional Competence**

One of the conditions sought in the mediator is to have knowledge and communication skills in regard to mediation. Also, mediator should continuously update these knowledge and skills. Nature of mediation entails benefiting from knowledge and experiences. (Blake et al., 2013:141; Ildir, 2003:90). In countries such as UK and Germany where mediation is applied, it was regulated that mediator should have adequate theoretical and practical competence for settling the dispute. (Scherpe & Marten, 2013:422; Tochtermann, 2013:561). Turkish Mediation Act targets to acquire these knowledge and communication skills during the compulsory mediation training. According to the act, mediator must have two groups of knowledge: Legal knowledge and know-how. Know-how is consisted of communication skills, psychology, body language, negotiation and meeting management, anger control and problem solving skills. (Regulation, Art.26). Also, mediator has to take an education of update eight hours every year.

#### **4.6. Advertisement Ban**

Promotion and advertisement are two of the most important elements of commercial and private law relationships. It is applied to advertisement and promotion for the person who wants to finalize a work in order to make his work easier. On the other hand, advertisement and promotion are banned in some field since they are not convenient for the nature of the work to be performed. For example, attorneys are subject to advertisement ban in Turkey. Unfortunately, Turkish Mediation Act adopted the advertisement ban in Attorney's Act for mediators. Pursuant to the Act, it is banned for mediators to make any kind of attempt and actions which may be regarded as advertisement for getting work and to use titles other than mediator, attorney and academic positions particularly on signboards and printed papers. (Act, Art.10; Regulation, Art.13). In my opinion, introducing advertisement ban for a process both having legal relationship and not having judicial nature is meaningless.

#### **4.7. Clarification of Parties**

Mediator is liable to inform parties about mediation process. He draws a route map of dispute, differentiates between the state of parties and benefits within this scope. He determines and defines the dispute and clarifies the parties of dispute about results of process. (Bouille & Nestic, 2010:71-81). Because generally parties may have knowledge of process and its results.

The Act prescribes the obligation of clarifying the parties about the mediation process for the mediator. According to the Act, mediator is liable to clarify the parties about fundamentals of mediation, process and results duly at the beginning of the mediation process. (MA, Art.11, Regulation, Art.14). Although Mediation Act prescribes to fulfill this obligation at the beginning of the process, it should be performed in every stage of process due to nature of mediation. For example, in the event that a situation raising doubt about neutrality of mediator arises in the middle of the process, mediator has to inform parties about this regard. The obligation of mediator to clarify parties and giving legal advice should be differentiated from each other. Mediator has to inform the parties of dispute about mediation process and results. However, mediator cannot give legal advice and suggestion. (Ildir, 2003:90).

#### **4.8. Payment of Subscription**

Turkish Mediation Act prescribed entrance fee and annual fee for the mediators enrolled into mediation registry during the enrollment into registry. According to the Act, these fees are charged into general budget as income. (MA, Art.12). Austria and Germany adopted enrollment into registry and subscription system for mediators. (Roth & Gherdane, 2013:303; Tochtermann, 2013:563). Whereas, there is accreditation system bringing occupational knowledge and experience forward in UK. (Scherpe & Marten, 2013:424).

### **5. Mediation Process**

#### **5.1. Application to Mediator**

Similarity is generally seen in time of applying to the mediator in all countries. If dispute can be settled through mediation, parties may apply to mediator before suitcase is opened or after suitcase is opened. (Blake et al., 2013:133). According to Turkish Mediation Act, parties may agree for applying to mediator before the suitcase is opened or during the suitcase. (MA, Art.13/1). In case of application to the mediator before the suitcase related with dispute is opened, matters like period of mediation or invitation only concern parties. However, in case of application to mediation after the suitcase is opened, this condition will affect the suitcase process. Unless otherwise agreed pursuant to the Act, if a positive response is not given to the offer of either party for applying to mediation within thirty days, this offer is deemed to having been rejected. (MA, Art.13/2). In the same way, in the event that parties declare that

they will apply to mediator collectively after the suitcase is opened, jurisdiction is postponed not more than three months by the court. This period may be extended up to three months upon collective application of parties. (MA, Art.15/5).

Turkish Mediation Act prescribed that court may clarify and encourage parties about application to mediator after the suitcase is opened. (MA, Art.13/1). In Germany, the court invites parties for settling the dispute through mediation. (Tochtermann, 2013:529). Turkish Mediation Act adopted the encouragement system in regard to application to mediation. However, the obligation of applying to mediation is prescribed for some disputes or disputes below a certain amount in some countries. For example, application to mediation prior to the suitcase is compulsory in Switzerland and Liechtenstein. (Roth & Gherdane, 2013:260).

### **5.2. Selection of Mediator**

The common practice for selection of mediator is to select the mediator by parties in countries like UK, Austria and Germany. (Scherpe & Marten, 2013:404; Roth & Gherdane, 2013:285; Tochtermann, 2013:551). Turkish Mediation Act also adopted the same method. According to the Act, mediator or mediators is/are selected by parties unless otherwise agreed. (MA, Art.14). However, parties may agree on another method for the selection of mediator, if they want.

### **5.3. Execution of Mediation Activity**

Although there are different practices in regard to execution of mediation process among countries, the main lines of process show similarity. (Brown & Marriott, 2011:375-403). It is possible to say that mediation is consisted of five stages: Determining the framework of dispute, identification of dispute matters, negotiation with parties, finding a solution and preparation of agreement document. (Roth & Gherdane, 2013:288). Turkish Mediation Act also determined the mediation process with main lines and prescribed that the method to be used in the process may be agreed by parties on condition that it is not contrary to compulsory legal rules. According to the Act, mediator invites parties to the first meeting within the shortest period after he is selected. Parties may agree on the method of mediation freely on condition that it is not contrary to compulsory legal rules. (MA, Art.15/1-2).

If parties do not agree on the method of mediation, the Act states that mediator shall conduct the mediation process according to procedure and principles which he will determine on his own. In this case, mediator has to take nature of dispute, wills of parties and settlement of dispute quickly into account. (MA, Art.15/3). Mediation legislations of UK, Austria, Germany and China adopted the same method. (Scherpe & Marten, 2013:406; Roth & Gherdane, 2013:288; Tochtermann, 2013:554; Pissler, 2013:979).

Mediation is not a judicial activity due to its nature. Mediator is not the person who settles the dispute by deciding like a judge or arbitrator. As a natural result of this, the Act banned the use of some power by mediator. According to the Act, transactions which may be conducted only by judge and use the judicial authorization cannot be conducted by mediator. (MA, Art.15/4). For example, since investigation transactions, reconnoiter or application to the expert are works having the judicial nature, mediator cannot perform these works. (Rationale, 13, Regulation, Art.13).

Mediation process is not a judicial process. For this reason, it is possible to include third persons into mediation process with the consent of parties. (Scherpe & Marten, 2013:407; Roth & Gherdane, 2013:292; Tochtermann, 2013:555). Since parties conduct the suitcase personally or by their attorneys during the judicial process, they can participate into mediation process personally or by their attorneys as a fortiori. (MA, Art.15/6).

**5.4. Commencement of Mediation Process and Effect on Terms**

Mediator has some duties before the mediation process commences, during the process and mediation lasts. (Blake et al., 2013:137-140). According to Mediation Regulation, mediator firstly determines that whether dispute is convenient for mediation or not, then informs parties about itself and process. He should solve the matter of mediation fee and expense firstly. He conducts the process in a neutral way, with care and personally. He protects the equality principle. He provides parties to agree. If agreement is provided, agreement document is issued. If agreement is not provided, he issues a minute by stating the reason. He sends a copy of minute to Head of Mediation Department after the process. (Regulation, Art.19-22).

It is important to determine which moment the mediation process started. (Brown & Marriott, 2011:179). Turkish Mediation Act bind legal results to the mediation process. According to the Act, period passed from the commencement of mediation process to the end cannot be taken into account in calculation of timeout (MA, Art.16/2). Pursuant to the Act, the commencement moment of the process varies by the application to mediation process before or after the suitcase is opened.

In case of application to mediator before the suitcase is opened, mediation process starts to pass as from the date when parties are called for meeting and an agreement is concluded between parties and mediator in regard to continuation of process and this is documented in a minute. In case of application to mediator after the suitcase is opened, this process starts to pass as from the date when parties accept the mediation call of court or parties declare to the court in written that they agreed on application to mediator apart from the hearing or these declarations are written into minute in the hearing. (MA, Art.16/1).

As is seen, it may be applied to mediation before or after the suitcase is opened. In case of applying to mediation before the suitcase is opened, mediation term concerns only parties. This term has no positive or negative effect on the course of suitcase to be opened afterwards. However, if parties declare that they will apply to mediator collectively after the suitcase is opened, jurisdiction is postponed not more than three months by the court. This term may be extended up to three months upon collective application of parties. (MA, Art.15/5). This term is granted for preventing parties to apply to mediation for the purpose of extending suitcase process. In case of applying to mediation after the suitcase is opened, similar maximum terms are seen in countries like UK, Austria and Germany. (Scherpe & Marten, 2013:384; Roth & Gherdane, 2013:262; Tochtermann, 2013:541).

**5.5. Termination of Mediation**

Mediation is naturally terminated with the agreement between parties. Apart from this, mediation process is terminated in case of disagreement between parties, understanding of dispute which is not suitable for mediation afterwards, death of either party. Turkish Mediation Act also states that the mediation process will be terminated in the following cases:

- a) Agreement between parties.
- b) Termination of mediation process by mediator
- c) Termination of mediation process by either party
- d) Termination of mediation process by parties collectively.
- e) Understanding of dispute which is not suitable for mediation. (MA, Art.17/1). Similar reasons terminate the mediation in countries like UK, Austria, Germany and China. (Scherpe & Marten, 2013:407; Roth & Gherdane, 2013:292; Tochtermann, 2013:556; Pissler, 2013:981).

At the end of mediation activity, agreement, disagreement between parties or how the mediation activity is concluded is documented in a minute. This document to be issued by mediator is signed by mediator, parties or their attorneys. If this document is not signed by parties or their attorneys, it is only signed by mediator on condition of stating the reason. (MA, Art.17/2). In fact, it is impossible to sign the minute in case of death of either party.

Which points will be entered into the minute to be issued at the end of mediation activity apart from the finalization of activity is determined by parties. The mediator makes necessary explanations to parties in regard to this minute and its results. (MA, Art.17/3).

In case of termination of mediation activity, mediator has to keep notification made to himself regarding this activity, available documents and minute for five years. Mediator sends a copy of the last minute he issued at the end of mediation activity to General Directorate within one month as from the termination of mediation activity. (MA, Art.17/4).

### **6. Agreement of Parties and Legal Nature of Agreement Document**

The most important part of mediation process is consisted of agreement document. This document is a private law contract in which there is offer and acceptance due to its legal nature. (Tuğsavul, 2013:144; Spencer & Brogan, 2006:348). According to Turkish Mediation Act, this document gains decision capability if annotation is given by the competent court. Legal nature of agreement document may vary from country to country.

Mediation is a voluntary dispute settlement method. For this reason, scope of agreement concluded at the end of mediation activity is determined by parties. In case of issuance of agreement document, this document is signed by parties and mediator. (MA, Art.18/1). Here, agreement document and mediator's minute should be differentiated from each other. Mediator has to issue a minute regardless of how mediation process is terminated. However, every mediation process may not conclude with an agreement.

The act regulated that an applicability annotation may be requested for agreement document issued at the end of mediation from the court. In case of issuance of annotation, this agreement document is regarded as decision. (MA, Art.18/2). In Austria and Germany, document for which annotation is given by court has the capability of decision. (Roth & Gherdane, 2013:275; Tochtermann, 2013:545). However, parties should give consent collectively in order to regard mediation agreement as having decision nature in UK. (Scherpe & Marten, 2013:396).

Turkish Mediation Act regulated that which court may grant applicability annotation. Pursuant to the act, if it has been applied to mediation before the suitcase is opened, granting annotation regarding the enforceability of agreement may be demanded from the court to be determined by duty and power rules about the original dispute. If it is applied to mediation during the suitcase, granting annotation for enforceability of agreement may be demanded from the court in which suitcase is pending. (MA, Art.18/2).

Pursuant to the Act, granting enforceability annotation is a peaceable jurisdiction work. Therefore, examination may be performed over file. However, in disputes regarding family law which is eligible for mediation, examination is performed with hearing. But this examination to be performed by court is not related with process. The scope of this examination is limited with whether content of agreement is suitable for mediation and compulsory execution or not. It may be appealed to this decision. (MA, Art.18/3).

### **7. Responsibility and Sanctions**

Although mediation process is not still a judicial way, it is a remedy having legal outcomes. For this reason, in case of breach of some rules regarding the process, there should be some sanctions. These sanctions vary from country to country. Generally, common practice is to

expose the mediator to legal and criminal responsibility. (Roth & Gherdane, 2013:301). Breach of contract or tort may form the basis of legal responsibility. (Spencer & Brogan, 2006:431). Turkish Mediation Act also prescribed administrative sanction in addition to legal and criminal responsibility. According to the Act, mediator is subject to deletion from mediation registry as an administrative sanction and to prison sentence responsibility as criminal sanction (in case of breach of confidentiality). Also, a third sanction is legal (compensation). Responsibility which is subject to general provisions although Mediation Act does not regulate it.

### **7.1. Deletion from Mediators' Registry**

Deletion from mediators' registry is an administrative sanction. According to the Act, Head of Mediation Department warns in written the mediator who does not fulfill the obligations prescribed by the Act. In case of failure to obey this warning, it is requested from Council to delete the name of mediator from registry after his defense is taken. (MA, Art.21/2). The mediator may be deleted from mediators' registry in the event that he does not fulfill the obligations prescribed by the Act such as notably confidentiality, neutrality, execution of duty with care, advertisement ban, payment of subscription.

### **7.2. Prison Sentence in case of Breach of Confidentiality**

Prison sentence is a criminal responsibility. One of the most important elements of mediation is confidentiality. For this reason, sanction is prescribed for the breach of confidentiality in countries like Austria in which mediation is applied. (Roth & Gherdane, 2013:302). Pursuant to Turkish Mediation Act, a person who causes damage on benefit of a person protected legally by acting contrary to confidentiality obligation is punished with prison sentence up to six months. The act binds inquiry and prosecution of these crimes to complaint. (MA, Art.33). Here, the Act prescribed this sanction for everybody violating the confidentiality rule without making mediator or party discrimination.

### **7.3. Compensation Responsibility**

Indemnity responsibility is a legal responsibility. In all countries where mediation is applied, generally legal responsibility of mediator is accepted. (Hopt & Steffek, 2013:73). Contradiction to contract or tort forms the basis of this responsibility. In case mediator breaches the mediation contract concluded with parties of dispute, there is a legal responsibility. (Boulle & Nestic, 2010:71-81). According to general provisions of law of obligations, if mediator breaches the mediation contract, (if also there are defect, damage and causal link) parties of dispute may demand compensation from mediator.

## **8. Bodies Related with Mediation**

Turkish Mediation Act placed importance on mediation process and created some bodies related with mediation. These are training institutions which will give mediation training, Head of Mediation Department which was founded within the body of Ministry of Justice and Mediators' Council. Also, here it should be mentioned about mediators' registry.

### **8.1. Training Bodies**

In countries where mediation is accepted, generally persons can act as a mediator after the mediation training. (Hopt & Steffek, 2013:83). Turkish Mediation Act defined the mediation training as a training which is taken after faculty of law is completed and includes basic knowledge, communication techniques, negotiation and dispute settlement methods, behavior psychology regarding the execution of mediation activities and other theoretical and practical knowledge which will be shown in the regulation. (MA, Art.22). Austria Mediation Act prescribes a training having similar content. (Roth & Gherdane, 2013:303).

Mediation training is given by faculty of law in the universities having faculty of law in its body, Turkish Bar Association and Turkish Justice Academy. These bodies must get permission from the Ministry of Justice for giving training. List of bodies for which permission is given is published in electronic environment. (MA, Art.23). These bodies are liable to submit report regularly every year. (MA, Art.26). Also, they are audited by the Ministry at any time. (Regulation, Art.47-50). Training permissions of training bodies which lost the authorizations prescribed in the Act are cancelled by the Council. (MA, Art.27).

### **8.2. Head of Mediation Department and Mediators' Council**

In countries where mediation is applied, generally there is a body for conducting the mediation activity better and providing coordination with other bodies. For example, Civil Mediation Council was accepted in UK (Blake et al., 2013:144). and Advisory Committee for Mediation was accepted in Austria. (Roth & Gherdane, 2013:312). Turkish Mediation Act also prescribes two important bodies concerning mediation process. These are Head of Mediation Department and Mediation Council. (MA, Art.28).

Head of Mediation Department founded within the body of Ministry of Justice is consisted of one chairman, investigation judge in adequate number and other personnel. (MA, Art.29). Head of Department was founded for conducting the mediation activity regularly and efficiently and performing the coordination and secretary services among institutions. Also, it fulfills the other duties listed in the Act. (MA, Art.30).

Mediation Council is consisted of representatives of various body and occupational institutions. The council was founded for guaranteeing the independency and neutrality of mediation activities and mediators. (MA, Art.31). The main duties of the council are: to determine basic principles regarding mediation services and mediation code of practice, to determine basic principles and standards for mediation training and for examination to be held at the end of this training, to determine rules regarding the audit of mediators and to verify Minimum Wage Tariff for Mediator. (MA, Art.32).

### **8.3. Mediators' Registry**

There is mediators' registry in some countries where mediation is applied. For example, entering into registry is compulsory for a person to act as a mediator in Austria. For entering into the registry, completing 28 years old, professional competence and reliability are sought. (Boulle & Nesic, 2010:353; Roth & Gherdane, 2013:307).

According to Turkish Mediation Act, mediation activity is only performed by mediators recorded into mediators' registry. Mediators' Registry is kept by Head of Mediation Department. (MA, Art.19). A person must fulfill the following conditions for entering into mediators' registry: to be a Turkish citizen, to be graduated from faculty of law having at least five years of seniority in its occupation, to have full competence, to not being sentenced for a deliberate offence, to complete mediation training and to pass the written and applied examination held by Ministry. (MA, Art.21).

As seen above, a person who wants to be a mediator must graduate from faculty of law pursuant to the Act. But, there is no obligation of being a lawyer for being a mediator in many countries. (Clark, 2012 101). It is not true for seeking the condition of being lawyer for mediation in which dispute settlement skill is at the forefront. (Dost, 2009:534-543). Also, mediator has to take continuation training in many countries where mediation is applied. (Blake et al., 2013:144).

### **9. Conclusion**

The most preferred method among the alternative dispute settlement ways is mediation. In Turkey, necessary legal arrangements were made in regard to mediation. Within this scope,

Mediation Act, Mediation Regulations, Minimum Wage Tariff and Mediation Codes of Conduct were accepted.

These arrangements accepted in Turkey are generally suitable for the nature of mediation. However, in order to implement mediation more effectively and efficiently, it is possible to make the following suggestions:

1-The condition of being graduated from faculty of law for being a mediator should be removed. Because mediation is dispute settlement method having judicial outcomes not a judicial method.

2-Fee for mediation should be left for the will of parties. Because the relationship between mediator and parties is a private law relationship. Only general framework of mediation fee may be drawn in the Act. Also, mediator can be paid against suggesting other persons for mediation.

3-Mediator's advertisement ban should be removed.

4-The confidentiality matter in mediation should be discussed again and in case of breach of confidentiality, sanction should be limited with participants of mediation process.

5-Society should be informed of benefits of mediation and necessary training and promotions should be conducted for placing dispute settlement culture through mediation.

### References

Alexander, Nadja, (2013). Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulatory Reform. Klaus J. Hopt & Felix Steffek (Ed.), *Mediation Principles and Regulation in Comparative Perspective*, (p.131-204). Craydon: Oxford University Press.

Baum, Harald, (2013). Mediation in Japan: Development, Forms, Regulation and Practice of Out of Court Dispute Resolution. Klaus J. Hopt & Felix Steffek (Ed.), *Mediation Principles and Regulation in Comparative Perspective*, (p.1011-1094). Craydon: Oxford University Press.

Blake, Susan & Browne Julie & Sime Stuart, (2013). *The Jackson ADR Handbook*, Craydon: Oxford University Press.

Boulle, Laurance, (2005). *Mediation: Principles, Process, Practice*, Chatswood: LexisNexis Butterworths.

Boulle, Laurance & Nestic, Miryana, (2010). *Mediator Skills and Techniques: Triangle of Influence*, England: Bloomsbury Professional.

Brown, Henry J. & Marriott, Arthur, (2011). *ADR Principles and Practice*, London: Sweet & Maxwell.

Clark, Bryan, (2012). *Lawyers and Mediation*, Glasgow: Springer.

Davydenko, Dmitry, (2013). Mediation in Russia: Regulation and Practice. Klaus J. Hopt & Felix Steffek (Ed.), *Mediation Principles and Regulation in Comparative Perspective*, (p.1167-1200). Craydon: Oxford University Press.

Deryal, Yahya, (2008) *Tüketici Hukuku*, (2. Baskı), Ankara: Seçkin Yayınevi.

Dost, Süleyman, (2009). Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu Tasarısının Uluslararası Ticari Uyuşmazlıklar Bakımından Karşılaştırmalı Bir Değerlendirmesi. *Uluslararası Davraz Sempozyumu (24-27 Eylül 2009): Küresel Diyalog Bildiriler Kitabı*, (p.534-543). Isparta.

Ethics Rules. See for text of Ethics Rules: <http://www.adb.adalet.gov.tr/>

Genn, Hazel, (1999). *Mediation in Action: Resolving Court Disputes without Trial*. London: Calouste Gulbenkian Foundation Publishing.

Günday, Metin, (2003). *İdare Hukuku*, (8. Baskı), Ankara: İmaj Yayınları.

Hopt, Klaus J. & Steffek, Felix, (2013). Mediation: Comparison of Laws, Regulatory Models, Fundemantal Issues, Klaus J. Hopt & Felix Steffek (Ed.), *Mediation Principles and Regulation in Comparative Perspective*, (p.3-130). Craydon: Oxford University Press.

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

Kuru, Baki & Arslan, Ramazan & Yılmaz, Ejder, (2011). *Medeni Usul Hukuku*, Ankara: Yetkin Yayınları.

Magnus, Ulrich, (2013). "Mediation in Australia: Developments and Problems" Klaus J. Hopt & Felix Steffek (Ed.), *Mediation Principles and Regulation in Comparative Perspective*, (p.869-908). Craydon: Oxford University Press.

Minimum Wage Tariff for Mediation. See for text of Minimum Wage Tariff: <http://www.adb.adalet.gov.tr/>

Özbek, Mustafa S., (2013). *Alternatif Uyuşmazlık Çözümü*, Ankara.

Özbay, İbrahim, (2006). Alternatif Uyuşmazlık Çözüm Yöntemleri, *EÜHFD*, C.X, S.3-4, (p.459-475).

Perçin, Gizem Ersen, (2011). Alternatif Uyuşmazlık Çözüm Yöntemlerinden Arabuluculuğun Hukuksal Düzenlemelerdeki Yeri, *İstanbul Üniversitesi Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni*, C.31, S.2, (p.177-201).

Pissler, Knut B., (2013). Mediation in China: Threat to Rule of Law?. Klaus J. Hopt & Felix Steffek (Ed.), *Mediation Principles and Regulation in Comparative Perspective*, (p.960-1009). Craydon: Oxford University Press.

Regulation for Turkish Mediation Act. See for text of Regulation: <http://www.adb.adalet.gov.tr/>

Roth, Markus & Gherdane, David, (2013). Mediation in Austria: The European Pioneer in Mediation Law and Practice. Klaus J. Hopt & Felix Steffek (Ed.), *Mediation Principles and Regulation in Comparative Perspective*, (p.249-332). Craydon: Oxford University Press.

Scherpe, Jens M. & Marten, Bevan, (2013). Mediation in England and Wales: Regulation and Practice. Klaus J. Hopt & Felix Steffek (Ed.), *Mediation Principles and Regulation in Comparative Perspective*, (p.365-454). Craydon: Oxford University Press.

Spencer, David & Brogan Michael, (2006). *Mediation Law and Practice*, Cambridge: Cambridge University Press.

Şıpka, Şükran, (2007). Hukuk Uyuşmazlıklarında Arabuluculuk Kanun Tasarısının Değerlendirilmesi, *İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi*, Y.6, S.12, 2007/2, (p.163-175).

Tanrıver, Süha, (2006). Hukuk Uyuşmazlıkları Bağlamında Alternatif Uyuşmazlık Çözüm Yolları ve Özellikle Arabuluculuk, *TBB Dergisi*, S.64, (p.151-178).

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

Tochtermann, Peter, (2013). Mediation in Germany: The German Mediation Act-Alternative Dispute Resolution at the Crossroads. Klaus J. Hopt & Felix Steffek (Ed.), *Mediation Principles and Regulation in Comparative Perspective*, (p.521-584). Craydon: Oxford University Press.

Tuğsavul, Melis Taşpolat, (2013). *Türk Hukukunda Arabuluculuk*, Ankara: Yetkin Yayınları.

Turkish Mediation Act. See for text of Turkish Mediation Act: <http://www.adb.adalet.gov.tr/>  
Turkish Mediation Act Rationale (Rationale). See for text of Rationale: <http://www.tbmm.gov.tr/>

Whatling, Tony, (2012). *Mediation Skills and Strategies: A Practical Guide*. London: Jessica Kingsley Publisher.

Yenisey, Feridun, (2005). *Ceza Muhakemesi Hukukunda Uzlaşma*. İstanbul: Arıkan Yayınları.

Yılmaz, Ejder, (2004). Avukatın Uzlaşma Sağlama Yetkisi (Avukatlık Kanununun m.35/A), *Prof. Dr. Baki Kuru Armağanı*, Ankara: TBB Yayınları.