„Krytyka Prawa", tom 15, nr 4/2023, s. 213–232, ISSN 2080-1084, e-ISSN 2450-7938, © 2023 Authors.

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Resolution of Commercial Disputes by Mediation as an Alternative Method: A Legal Analysis for Turkey and Uzbekistan[3]

Submitted: 31.07.2023. Accepted: 30.08.2023

Abstract

Mediation is an institution that has been in demand in all modern legal systems for the last twenty years as a fast, reliable and inexpensive alternative method in the resolution of commercial law disputes. Turkey and Uzbekistan are in a continuous effort to ensure compliance with comparative law systems which are adopted by the EU and international legislation in the modern sense, including mediation. In Turkey's case, specialization and institutionalization targets were envisaged regarding mediation. Codification frameworks devoid of systematic planning were carried out in order to achieve these targets. Contrary to the concept of mediation, the areas where mandatory mediation applies have been expanded. On the other hand, for Uzbekistan's case, which accepted mediation six years after Turkey, in 2018, and did not adopt mandatory mediation, Turkey's disappointing mediation experience can be regarded as a lesson. This experience is valid not only for Uzbekistan but also for all legal systems that include mediation.

Keywords: Turkish mediation law, Uzbek mediation law, mandatory mediation, alternative dispute resolution, mediation in commercial disputes.

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[3] This article has been prepared in the framework of the studies conducted by Central Asian Legal Research Fellowship Program of Tashkent State University of Law.

„Krytyka Prawa", tom 15, nr 4/2023, s. 213–232, ISSN 2080-1084, e-ISSN 2450-7938, © 2023 Authors.

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Rozstrzyganie sporów biznesowych na drodze mediacji jako alternatywna forma rozstrzygania sporów – analiza prawna przypadku Turcji i Uzbekistanu[4]

Streszczenie

Mediacja to instytucja, na którą w ciągu ostatnich dwudziestu lat było zapotrzebowanie we wszystkich współczesnych systemach prawnych, jako na szybką, niezawodną i niedrogą alternatywną metodę rozstrzygania sporów biznesowych. Turcja i Uzbekistan w sposób ciągły podejmują wysiłek zachowania zgodności z porównywalnymi systemami prawnymi przyjętymi przez UE oraz współcześnie rozumiane prawodawstwo międzynarodowe, i dotyczy to również mediacji. W przypadku Turcji przewidziano cele związane ze specjalizacją oraz instytucjonalizacją mediacji. Przygotowano ramy kodyfikacyjne pozbawione systematycznego planowania, żeby można było osiągnąć zamierzone cele. W przeciwieństwie do samej koncepcji mediacji te obszary, w których ma zastosowanie obowiązkowa mediacja, zostały poszerzone. Z drugiej strony, w przypadku Uzbekistanu, który przyjął mediację sześć lat po tym, jak zrobiła to Turcja, w 2018 roku, i nie przyjął mediacji obowiązkowej, rozczarowujące doświadczenia Turcji, jeśli chodzi o mediację, można potraktować jako nauczkę na przyszłość. Doświadczenie to jest ważne nie tylko dla Uzbekistanu, lecz także dla wszystkich systemów prawnych, które uwzględniają mediację.

Słowa kluczowe: tureckie prawo mediacyjne, uzbeckie prawo mediacyjne, obowiązkowa mediacja, alternatywna forma rozstrzygania sporów, mediacja w sporach biznesowych.

[4] Niniejszy artykuł został przygotowany w ramach badań prowadzonych przez Central Asian Legal Research Fellowship Program Państwowego Uniwersytetu Prawa w Taszkiencie.

Introduction

Turkey, which has been in relations with the EU since 1959, and Uzbekistan, which carried out reform movements in the field of law after regaining its independence in 1991, were also affected by these developments regarding mediation in comparative law systems, such as the EU legislation. As a matter of fact, mediation has been included in the legislation of both countries. Turkey with the Law on Mediation of Civil Disputes No. 6325 (the Turkish Mediation Law) in 2012 and Uzbekistan with the Law on Mediation of the Republic of Uzbekistan No. 482 (the Uzbekistan Mediation Law) in 2018. Considering the disputes that are the subject of the laws of both countries and the areas suitable for mediation, it can be concluded that commercial disputes are the most suitable for this alternative resolution method.[5] As such, the resolution of disputes through mediation in a fast, safe and cost-effective manner greatly appeals to the expectations of the actors of commercial life.[6] However, it is also seen that there are significant differences between the legal systems of the two countries due to the preferences of the legislators, in that the use of mediation will be designated as voluntary or mandatory by making it a pre-condition of litigation, at least for certain disputes.

In addition to the difference pointed out, in this study, comparisons will be made between the legal systems of Turkey and Uzbekistan in the framework of the areas suitable for mediation, the principles that dominate mediation, the management of the mediation process and the results of mediation. For this reason, the principles applicable to the mediation and resolution of commercial disputes in both countries will be examined in separate sections. Then, the legal regimes of the two countries regarding mediation in commercial disputes will be compared by revealing both their areas of commonality and difference. In this way, the legal regimes of two friendly countries, one of which has adopted a modern, secular legal approach since 1923, and the other, which has continued its reform efforts for the modernization of law from 1991 to the present, will be examined and presented to the readers in terms of comparative law perspective.

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5 S. Tanrıver, *Hukuk Uyuşmazlıkları Bağlamında Alternatif Uyuşmazlık Çözüm Yolları ve Özellikle Arabuluculuk, Makalelerim*, Yetkin Publicactions, 2nd ed., 2022, pp. 2 and 3.

6 A. Yeşilırmak, *Temel Arabuluculuk Eğitimi Katılımcı El Kitabı, Modül 2, Arabuluculuk Nedir?*, Arcs Press, 3rd ed., 2021, p. 27.

 DOI: 10.7206/kp.2080-1084.648

Resolution of commercial disputes by mediation in turkish law

Legal basis

In Turkish law, the sources constituting the legal regime regarding the resolution of commercial disputes through mediation can be counted as Turkish Mediation Law, the Regulation on the Law of Mediation in Civil Disputes (Mediation Regulation) and Article 5A of the Turkish Code of Commerce No. 6102 (Turkish Commercial Code). Turkish Mediation Law was published in the Official Gazette on 22 June 2012 and entered into force on 22 June 2013, one year after its publication. The Turkish Mediation Law, consisting of 38 articles, has been amended four times, most recently in 2018. Considering that these amendments directly concern 17 articles in total and that they occurred four times in a short period of 5 years from 2013 to 2018, it must be admitted that the studies carried out to prepare the Turkish Mediation Law were not entirely successful. Factors that played a role in this failure can be listed as follows. The legislator preferred to make a compilation and translation law instead of an original law. Uncertainties that caused serious questions about mediation were not resolved when the law was made, and it was left to the practitioners to respond to these unresolved issues. Authorized institutions of the Ministry of Justice preferred working with lawyers and scientists within a narrow framework to prepare the law and mediation processes. In point of fact, as of today, it is stated by the Minister of Justice that there will be another schedule of amendments to the Turkish Mediation Law regarding mediation in disputes arising from rental law, with a new judicial reform package.

The Turkish Mediation Law and the Mediation Regulation, which came into force based on this Law, are the legal bases that become valid for all private law disputes suitable for mediation, whether commercial or not. In other words, as a principle, mediation in commercial disputes is not subject to a different legal regime than non-commercial disputes. Therefore, under which conditions other private law disputes are suitable for mediation, the same conditions and criteria are considered valid for commercial disputes. On the other hand, with Article 5A added to the Turkish Commercial Code with Law No. 7155 on 6 December 2018, a crucial and radical regulation specific to mediation in commercial disputes was brought into effect. This regulation included the mandatory use of mediation in commercial cases involving claims for receivables and compensation, in other words, making the use of mediation a pre-condition of litigation. The point that distinguishes commercial disputes from other private law disputes in terms of the legal regime regarding mediation is that, in some commercial cases, the exception

to the principle of voluntariness is realised, and the fact that the compulsion in mediation is adopted as distinct, exceptional and contrary to the universal acceptance of mediation law.

Commercial disputes eligible for mediation

Commercial Disputes Having the Character of Private Law

The prerequisite for commercial disputes to be suitable for mediation, is that the dispute must have a private-law character. Disputes with a public law character concerning commercial law may arise from both the Turkish Commercial Code, and other sources of legislation regulating commercial law relations. To give an example, Article 562 of the Turkish Commercial Code is specific to the definitions of crime and the determination of the punishments in the application of joint stock and limited companies, and the criminal law disputes arising from this article are not suitable for mediation even though they are related to commercial law. Article 62 of the Cooperatives Law regulates the penal responsibilities of the members of the cooperative board of directors and auditors. Although the criminal law disputes arising from the aforementioned article mainly concern commercial law, they are unsuitable for mediation.[7]

Commercial Disputes Must Arise from Relations and Transactions on Which the Parties Can Dispose Freely

All commercial disputes with a private law character are not considered suitable for mediation. The Turkish Mediation Law has given validity to a criterion specific to mediation law regarding eligibility. This criterion is that disputes must arise from relations and transactions that the parties can freely dispose of. For this reason, the parties can come together for a solution, depending on the nature of the relations and transaction that is the source of the dispute. However, a question mark arises at this point. Which disputes may be regarded as the results of the relations and transactions that the parties can freely dispose of? Do these conflicts have anything in common? What are the criteria sought for the parties to dispose of the relation and transaction freely? The concept of public order may help answer these questions. Disputes concerning public order do not arise from relations and transactions that the parties can freely dispose of and therefore are not suitable for mediation. However, more than the public order criterion is needed to answer the above questions. At this point, the principle of *ex officio* examination can be accepted

[7] I. Koçyiğit, A. Bulur, *Ticari Uyuşmazlıklarda Dava Şartı Arabuluculuk*, Ministry of Justice Directorate General for Legal Affairs Publications, 2019, p. 16.

 DOI: 10.7206/kp.2080-1084.648

as another criterion. Commercial disputes in which the *ex officio* examination principle is valid do not arise from relations and transactions that the parties can freely dispose of. This proposition is also true, but more is needed in terms of eligibility for mediation. In our conclusion, it is a rule and criterion specific to mediation law to originate from relations and transactions that the parties can freely dispose of. It is impossible to explain it only with the concept of public order or the principle of *ex officio* examination. It is necessary to make an assessment specific to mediation law and thus determine whether the eligibility for mediation is realized. On the other hand, it is almost impossible to determine which commercial disputes are suitable for mediation by listing the types of cases and their names. For this reason, if a court decision is needed to resolve a dispute, it should be accepted as the most reasonable method to accept that this dispute arises from the relations and transactions that the parties can freely dispose of.

Within the framework of all these explanations, disputes involving a claim for compensation against the members of the board of directors by the legal entity of the joint stock company, and a claim for receivables arising from a contract with both parties being merchants, are considered suitable for mediation as they arise from an affair that the parties can freely dispose of. On the other hand, it is clear that disputes arising from the request for the annulment of a decision taken at the general assembly meeting of the joint stock company, or the request for the dismissal of a manager in a limited company for justified cause, are not suitable for mediation, because these disputes do not arise from a relationship that the parties can freely dispose of and that a court decision must be provided for the resolution of the disputes.

The Foreignness Element of Commercial Disputes Does Not Make a Difference

Provided that the first two conditions are met, whether a commercial dispute carries the element of foreignness or not does not make a difference in eligibility for mediation. The element of foreignness may occur in terms of the parties to the dispute and the source, subject or place of the dispute. For this reason, the presence of a company with foreign capital registered in a foreign country, which is one of the parties of a commercial dispute suitable for mediation, will not constitute an obstacle resolving the commercial dispute through mediation.[8] In other words, resolving a dispute in which both parties are foreign or are even of different origin, commercial companies may be subject to the mediation process in Turkey under

[8] S. Selçuk, *Tüketici Uyuşmazlıklarında Arabuluculuk Dava Şartı*, "Journal of Antalya Science University Faculty of Law" 2020, 16, p. 1193.

the supervision of a mediator registered in the Mediation Registry of the Ministry of Justice of the Republic of Turkey.

Whether the Parties to Commercial Disputes are Real or Legal Persons Does Not Make a Difference

Provided that the first two conditions of the commercial dispute are met, the fact that the parties to the dispute are real or legal persons does not make any difference in eligibility for mediation. Both parties can be real or legal persons.[9] Even if the parties are legal persons, the existence of a private law legal person or a public law legal person does not make a difference in the suitability of the commercial dispute for mediation. In actuality, public legal entities may constitute a party to private law disputes.[10] The service procurement contract between a municipality and a cleaning company is a transaction that the parties can freely dispose of. A dispute concerning a claim arising from such a contract is a commercial private law dispute. For this reason, a commercial dispute such as this is suitable for mediation.

Making application to mediation a pre-condition of litigation in commercial disputes (mandatory mediation)

Essentials of Mandatory Mediation in Commercial Disputes

In 2018, Article 5A, which is related to commercial cases, was added to the Turkish Commercial Code with Law No. 7155. The essentials of mandatory mediation in commercial disputes were regulated in this article. In addition, Article 18A of the Turkish Mediation Law, which can be applied to all mandatory mediation applications, took its place among the articles that regulate the essentials and practice of mandatory mediation in commercial disputes.[11] According to these two articles (the Turkish Commercial Code's Article 5A, the Turkish Mediation Law's Article 18A), it is obligatory to resort to mediation before the commercial lawsuits that will be the subject of compensation or receivables. Otherwise, the court rejects the lawsuit due to a lack of necessary and required procedure.[12] Therefore, it is a prerequisite that prior to such a lawsuit, to first apply for mediation and complete the mediation process, in terms of commercial lawsuits whose subject is receivables and compen-

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9 H. Albayrak, *Eşitlik Ve Tarafsızlık İlkelerinin Zorunlu Arabuluculuk Bağlamında Yeniden Değerlendirilmesi Zorunluluğu*, "Journal of Social Sciences of Gaziantep University" 2018, Special Issue of Ethics, p. 14.

10 B. Azaklı Arslan, *Arabuluculuk Faaliyetinin Niteliği Bakımından Arabulucunun Hukukî Sorumluluğu*, "Journal of Akdeniz University Faculty of Law" 2018, 1, p. 197.

11 A. Bozer, C. Göle, *Ticari İşletme Hukuku*, Institute of Banking and Commercial Law Publishing House, 7th ed., 2021, p. 188.

12 M. Yasan, *Ticari İşletme Hukuku*, Seçkin Publishing House, 3rd ed., 2021, p. 98.

 DOI: 10.7206/kp.2080-1084.648

sation claims.[13] The mediator must complete the application within six weeks. If necessary, the mediator can also use an additional two weeks.[14]

While the legislator regulates mandatory mediation as an exception to voluntary mediation, which is the rule in commercial disputes, it has adopted a legal regime where this exceptional obligation does not apply to all commercial cases but only to compensation and receivable cases, in which mandatory mediation is a litigation condition for the jurisdiction in such cases.[15] However, it must be admitted that in the practice of mediation, question marks have arisen as to whether negative clearance cases can be qualified as claims for receivables.[16] These question marks have led to different approaches, both in doctrine and court decisions.[17] The issues under discussion regarding litigation mediation do not only consist of negative clearance cases. Discussions and question marks about many issues in terms of procedural law, such as joinder of parties to litigation, partial lawsuit, backlog of lawsuits, counterclaims and change of parties, continue to exist.[18] The legislator should have resolved these discussions while preparing the Article 5A of the Turkish Commercial Code.[19] In other words, a careless law-making technique was adopted. It has been shown that, according to the pending draft enactment in the Grand National Assembly of Turkey, negative clearance cases are also included in the scope of mediation, which is a pre-condition of litigation.[20]

Evaluation of the Mandatory Mediation System in Commercial Disputes

Although it is against the characteristics of mediation, the legislator's acceptance of the mandatory mediation system for specified commercial disputes is criticised today, not least because the right to access justice is blocked, and the combination of mediation and obligation is against the spirit of mediation. There is some degree of truth in these criticisms. What is the reason for the acceptance of mandatory mediation in commercial disputes? What did the legislator aim to do? Although it is stated in the Justification of the Law that the prompt and effective resolution of

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13 C. Akil, *Ticari Uyuşmazlıklarda Dava Şartı Olarak Arabuluculuk Hakkında Usul Hukuku Bakımından Bazı Değerlendirmeler*, "Law and Justice Review" 2020, 41, p. 311.

14 H. Eryiğit, *Ticari Dava Şartı Olan Arabuluculuk Başvurularında Nispi Ticari Davanın Tespiti*, "Journal of Medipol University Faculty of Law" 2021, 2, p. 267.

15 İ. Dinç, *Ticari Davalarda Zorunlu Arabuluculuk*, Seçkin Publishing House, 2nd ed., 2021, p. 219.

16 R. Ayhan, H. Çağlar, M. Özdamar, *Ticari İşletme Hukuku…*, p. 83.

17 B. Toraman, *Takip Hukukuna Özgü Bazı Davaların Dava Şartı Arabuluculuğa Tâbi Olup Olmadığı Sorunu*, "Journal of Çankaya University Faculty of Law" 2020, 1, p. 3152.

18 B. Toraman, *Takip Hukukuna Özgü Bazı Davaların Dava Şartı…*, p. 3164.

19 R. Ayhan, H. Çağlar, M. Özdamar, *Ticari İşletme Hukuku Genel Esaslar*, Yetkin Publishing House, 13th ed., 2020, p. 80.

20 C. Akil, *Ticari Uyuşmazlıklarda Dava Şartı Olarak Arabuluculuk Hakkında Usul Hukuku Bakımından Bazı Değerlendirmeler*, "Law and Justice Review" 2020, 41, p. 317.

commercial disputes with the least cost is possible through mediation, the main reason lies elsewhere. The hidden purpose is to increase the statistics concerning mediation practices due to the excessive workload of the courts in dealing with commercial cases, and the fact that current mediation practices do not satisfy the expected demand in commercial disputes from the commercial and legal circles.[21] There are other mechanisms to be applied to reduce the courts' workload, such as raising the quantitative and qualitative standards of the justice service.[22]

Mandatory mediation of commercial disputes has had a positive, albeit limited, effect in Turkish legal practice. As a matter of fact, according to the statistical data of the period from 1 January 2019 which was the date of the beginning of the implementation of mandatory mediation in commercial disputes to 4 May 2022, shared by Mediation Department in Ministry of Justice, 52% of the 483,702 processes carried out as the mandatory mediation resulted in an agreement.[23] According to these statistics, 48% of the files were completed with disagreement. However, a calculation method was used that led to question marks in the data shared by the Ministry. Because although 227,196 of 483,702 total files resulted in agreement, the rate was shown as 52%. In addition to this, although 205,836 files resulted in disagreement, the rate was expressed as 48%. The Mediation Department chose not to reflect the uncompleted mediation processes in the total number of files to the statistics. This approach of the Department raises doubts about transparency and authenticity. On the other hand, it should not be ignored that 227,196 files were resolved in a period of approximately 3.5 years without going to the courts, resulting in an agreement. In this way, it contributed to the reduction of the heavy workload of the courts and to the establishment of an increase in social harmony. In addition, in the 205,836 files that resulted in disagreement, awareness about mediation was raised, at least in terms of the parties to the dispute, and communication channels were established to resolve the dispute through amicable ways in the future.

Nevertheless, making an institution that serves to increase levels of social peace and harmony such as mediation to be mandatory for this purpose, should be considered unfair to the mediation institution itself. On the other hand, it must be stated that mediation practices are not preferred in commercial disputes because

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21 İ. Ermenek, *Dava Şartının Arabulucu Tarafından Kendiliğinden Dikkate Alınması Sorunu ve Bu Kapsamda Yapılan Hataların Düzeltilmesi*, "Journal of Cassation Court" 2020, 4, p. 1032.

22 E. Erdoğan, *7036 Sayılı İş Mahkemeleri KanunundaÖngörülen Zorunlu Arabuluculuk ve Hak Arama Özgürlüğü Açısından Değerlendirilmesi*, "Legal Journal of Labour and Social Security Law" 2017, 55, p. 1230.

23 https://adb.adalet.gov.tr/Resimler/SayfaDokuman/9052022162356ticaret%20%20%2004.05.2022.pdf (access: 17.05.2023).

of the voluntary nature of mediation.[24] The main reason mediation is not sought after is the need for more social awareness that the most favourable area for mediation is commercial disputes. The biggest share in this failure is the Mediation Department of the Ministry of Justice, the public authority related to the management, supervision and regulation of the mediation institution in Turkey. Because the Mediation Department has not taken realistic measures to promote the mediation institution and increase social awareness. It must be emphasized that, instead of gaining trust of legal professionals and society on mediation, mandatory mediation was designed and it was aimed to increase the statistical data of mediation practices virtually. Benefiting from different opinions on issues such as the development of the mediation institution and the determination of strategies were not respected, on the contrary, only a group of loyal officials, academicians and practitioners who put forward similar opinions were preferred as the academic and legal environment. It has deemed it appropriate to exclude academics and practitioners who have spent many years on mediation in the regulation of mediation practices and trainings, the authorization of educational institutions, and the writing of training books. The Ministry of Justice, which prefers to work and cooperate only with certain circles, while conducting legal studies and mediation training, preferred to ignore the competent academicians and mediation practitioners engaged in academic studies at this institution. In conclusion, this is the main reason for the underlined failure.

Resolution of commercial disputes by mediation in Uzbekistan law

Legal basis

Various dispute-resolution methods in different countries are intertwined with their culture and religion, and Uzbekistan is not an exclusion. Citizens in Uzbekistan have sought resolution of their disputes by referring to an elder person (*Aksakal*) of their community for centuries.[25] This Uzbek tradition of conciliation continues and is now undertaken by the local Mahalla Councils. Mahalla is a unique social element of Uzbek society. It is a territorial unit that includes households situated on the same street or district. Mahalla Councils are headed by a chairman elected

[24] E. Erdoğan, *7036 Sayılı İş Mahkemeleri…*, p. 1222.

[25] F. Ibratova, *The Role and Importance of the Principle of Voluntariness in the Process of Mediation in the Settlement of Disputes in Uzbekistan*, Interdisciplinary Conference of Young Scholars in Social Sciences, 2021, p. 308–315, https://www.openconference.us/index.php/ysc/article/view/100/91 (access: 17.04.2023).

by the residents.[26] These councils, among other functions, manage disputes between neighbours and also divorce disputes.[27] According to legal scholars, mediation is widespread in modern conditions and is important as a method of conflict resolution.[28] In our legal system, the institution of mediation is regulated by the adoption of the Law on Mediation. This Law was adopted on 3 July 2018. The Law on Mediation entered into force on 1 January 2019 and created a legal framework for the functioning of mediation in Uzbekistan.[29] The Law has introduced mediation into the national legal system and defined its scope of application. The Law on Mediation aims to create legal conditions for the development of alternative dispute resolution, to reduce the amount of work that falls on the court system and in addition to that, create a Resolution on Measures to Further Improve Alternative Dispute Resolution Mechanisms on 18 June 2020[30]: Regulation on the Formation and Maintenance of the Register of Professional Mediators by the Ministry of Justice of the Republic of Uzbekistan was established on 1 January 2019, and a mediator training programme by the Ministry of Justice of the Republic of Uzbekistan on 1 February 2019, which also provide legal documents to support mediators in the society.[31]

Resolution on Measures to further improve alternative dispute resolution mechanisms included solving disputes about violations of rights, and freedoms and interests protected in law by individuals and legal entities as a result of illegal actions (decisions) or inaction of state bodies or officials and applying the main tasks of mediation in state bodies[32]. However, in these legal documents, commercial disputes are not mandatory in any terms regarding resolution with respect to the mediation process[33].

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26 Iqtisodiy Protsessual Huquq. Darslik, Mualliflar Jamoasi, TSUL Publications, 2019, p. 37.

27 F. Ibratova, *The Principle of Voluntariness*, p. 311.

28 For a detailed information about the development of alternative dispute resolutions in Uzbekistan: K. Hober, Y. Kryvoi (et al.), *Law and Practice of International Arbitration in the CIS Region*, Wolters Kluwer, 2016, §. 11.

29 S. Masadikov, *Mediation in Uzbekistan*, https://mediationblog.kluwerarbitration.com/2020/02/10/mediation-in-uzbekistan/ (access: 22.04.2023).

30 https://lex.uz/docs/-4859436 (access: 11.05.2023).

31 https://lex.uz/docs/4185961 (access: 11.05.2023).

32 S. Khamzakhonov, A. Ravshanov, *The Role of the Institute of Mediation in the Development of Uzbekistan Civil Legal Relations*, International Conference on Advance Research in Humanities, Sciences and Education, Sydney Australia, 15 August 2022, Vol. 4, Iss. 4(4), https://confrencea.org/index.php/confrenceas/article/view/273/273 (access: 20.05.2023), p. 141, https://confrencea.org/index.php/confrenceas/article/view/273/273) (access: 20.05.2023).

33 S. Abduvoitov, *Legal Basis and Prospects of Development of Mediation in the Republic of Uzbekistan*, "Society and innovations" 2020, Special issue 1, p. 294.

 DOI: 10.7206/kp.2080-1084.648

Commercial disputes eligible for mediation

The provision in Article 3 of the Uzbek Mediation Law allows participants to solve legal problems, including commercial disputes. According to this provision, mediation can resolve private law disputes arising from civil law relations, including those in connection with business activities,[34] as well as individual labour disputes and disputes arising from family law relations, unless otherwise provided by law. However, disputes involving types of crimes, criminal cases, state-body related disputes are unsuitable for mediation. Based on this provision, it is possible to determine which of the commercial disputes will be suitable for mediation.[35] Additionally, in a commercial dispute, the element of foreignness would constitute an obstacle in terms of eligibility for mediation.[36] A list of disputes appropriate for mediation would include contract disputes, corporate disputes, intellectual property disputes, insurance disputes, real estate disputes, debt collection disputes, employment disputes, and partnership and joint venture disputes can also be counted.[37]

Voluntariness as an absolute principle

In the mediation process, voluntariness is a fundamental aspect that refers to the voluntary participation of the parties involved and their willingness to engage in the process to reach a mutually acceptable resolution. According to Article 7 of the Uzbek Mediation Law, mediation is used in the case of mutual voluntary will of the parties, expressed in an agreement on the use of mediation.[38] Parties to mediation have the right to refuse to use mediation at any stage.[39] The parties are free to choose questions to discuss a mutually acceptable agreement.[40] Forced reconciliation during a mediation procedure is prohibited.[41] The voluntary agreement between the parties is codified in the form of documents which formally confirm the voluntary agreement. In particular, the mediation agreement is recognized as

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34 F. Ibratova, *Bankruptcy of a Liquidated Business Entity: Problems and Solutions*, "Norwegian Journal of Development of the International Science" 2021, 58/2, p. 47.

35 X.D. Abduvali O`g`li, *Hozırgı Kunda Nızolarnı Hal Qılıshnıng Muqobıl Usulı Va Tamoyılları*, "Journal of Integrated Educatıon And Research" 2023, Iss. 2/C, p. 22.

36 https://lex.uz/docs/4407205 (access: 14.05.2023).

37 I. Salimova, *Nizolarni Hal Qilishning Muqobil Usullari. O`quv Qo`llanma*, TSUL Publications, 2022, p. 44.

38 S. Abduvoitov, *Legal Basis and Prospects of Development…*, p. 295.

39 Q.Q. Matkarimov, F.Y. Xudayberganova, *Fuqarolık Sudlov Faolıyatıda Medıatsıyanı qo 'llashnıng Protsessual Xususıyatları va Bunda Advokatnıng Medıator Sıfatıdagı Ishtırokı*, "Journal of Oriental Renaissance: Innovative, Educational, Natural and Social Sciences" 2022, 2(4), p. 506.

40 N.O. Nurmamatov, Q.Q. Matkarimov, *Nızolarnı Hal Etıshda Medıatsıya Instıtutınıng O'rnı va Ahamıyatı*, "Journal of Oriental Renaissance: Innovative, Educational, Natural and Social Sciences" 2022, 2(4), p. 693.

41 F. Ibratova, *The Role and Importance of the Principle of Voluntariness…*, p. 313.

the most important document in this process.[42] The influence of the voluntary principle among the parties continues even after the end of the mediation procedure, during the period of the mediation agreement.[43] According to Article 29, part 3 of the Law on the Mediation of the Republic of Uzbekistan, dated 3 July 2018 No. ZRU-482, a direct order is set out that mediation consent is a mandatory implementation of the parties in the prescribed manner and accordance with the terms provided for in it. Concerning the mediator, the rule of voluntariness manifests itself in the possibility of refusing to conduct the procedure at any time.[44] It should be emphasized that voluntary consent is due to the work of the principle of loyalty and high professionalism of the mediator.[45] In other words, if a dispute can be the cause of mediation, the mediator has the right to assist the parties in resolving it; there are exceptions when the mediator does not have the necessary competence to conduct mediation according to such criteria as (for example, a family conflict, where a special mediation model is needed), or in the event of a conflict of interest that makes it impossible to maintain loyalty.

Evaluation of turkey and uzbekistan legal systems in terms of mediation in commercial disputes

Evaluation of the legal regime in turkey in terms of pros and cons

It can be accepted that mediation, which has a 10-year practice in Turkey, has reached a satisfactory level in terms of technical requirements. The enactment of a law specific to mediation, the preparation of a regulation for the implementation of this Law, the establishment of the Mediation Board and the Mediation Department as a separate department in the Ministry of Justice, the authorization of the Department of Mediation for the processes related to mediation, in particular for assignments, inspection, supervision, training and examination of mediators can, on paper, all be determined as positive developments.

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42 I. Salimova, *Nizolarni Hal Qilishning…*, p. 46.

43 F. Ibratova, *Legal Problems of the Concepts Legality, Justification and Justice by Judicial Acts*, "Middle European Scientific Bulletin" 2021, 16, p. 192.

44 F. Ibratova, *Terms in Civil Law and Their Application in Legal Protection of Citizens in the Republic of Uzbekistan*, "Teise Vilnius University Press Scholarly Journal" 2009, 71, p. 185.

45 F. Ibratova, *The Role and Importance of the Principle of Voluntariness…*, p. 312.

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According to the data of the Department of Mediation, 963,990 voluntary mediation files from 2013 to 4 May 2022,[46] 483,702 mediation files in mandatory commercial law disputes from 2019 to 4 May 2022,[47] 1,481,761 mandatory labour law disputes from 2018 to 4 May 2022,[48] 150,297 mandatory consumer law mediation files were completed from 2021 to 4 May 2022.[49] As can be seen from the statistical data, mediation has been applied to resolve around 3,000,000 disputes, and over 2,000,000 disputes have been settled through mediation. Therefore, when an evaluation is made within the framework of the data given by the Ministry, Turkey's mediation adventure should be described as a success story, at least as a first impression.

On the other hand, it is only possible to make an assessment in a different direction when considering the intended purpose of incorporating the institution of mediation into the legal system. Although commercial disputes are the most suitable area for mediation regarding the characteristics of commercial relationships, voluntary mediation is in fact rarely seen in commercial life. Instead of concentrating on the main reason for this and making radical arrangements to eliminate this problem, making mediation mandatory in certain commercial disputes and thus ensuring that mediation practices increase statistically can be considered as an unrealistic and unsustainable approach of the legislator.

In order to ensure that mediation practices in commercial disputes become widespread, as a practice in the first instance, trust in mediation must be established for all actors of commercial life. This trust can be possible thanks to the effort of the Ministry of Justice, the Mediation Department, which is the authorized institution in the regulation and supervision of the mediation institution. However, in the current period, the Mediation Department prefers to develop the institution with academicians and professionals within a narrow framework. Adequate promotional activities and incentives have yet to be applied to raise awareness in the relevant segments of society, regarding the benefits that mediation will bring to commercial life. The uncertainty with respect to which commercial disputes are subject to mediation, were not resolved when the law was made. These uncertainties were left to be resolved by the courts, doctrine and practitioners, leading to instability in the legal practice.

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46 https://adb.adalet.gov.tr/Resimler/SayfaDokuman/9052022162348ihtiyari%20%2004.05.2022.pdf (access: 17.05.2023) (Statistics given by Ministry of Justice).

47 https://adb.adalet.gov.tr/Resimler/SayfaDokuman/9052022162356ticaret%20%20%2004.05.2022.pdf (access: 17.05.2023) (Statistics given by Ministry of Justice).

48 https://adb.adalet.gov.tr/Resimler/SayfaDokuman/9052022162402i%C5%9F%20%20%2004.05.2022.pdf (access: 17.05.2023) (Statistics given by Ministry of Justice).

49 https://adb.adalet.gov.tr/Resimler/SayfaDokuman/9052022162402i%C5%9F%20%20%2004.05.2022.pdf (access: 17.05.2023) (Statistics given by Ministry of Justice).

Extending the scope of commercial disputes subject to mandatory mediation over time is another mistake of the Turkish legislator. Because, in this way, a handicap arises in terms of legal security and certainty. It must be admitted that regulating numerous significant amendments in the legal regime specific to an alternative resolution method, such as mediation in such a short period, is a handicap in terms of the stability and security of the mediation institution. This handicap is caused by the legislator's populist approach that responds to short-term needs.

In light of all these evaluations, the 10-year adventure of mediation, especially in commercial disputes in Turkish law, should be described as a story of failure. So, what should it be? What should be done is to prevent the spread of mandatory mediation, and particularly to ensure that it is eliminated by narrowing the scope of mandatory mediation in time. Taking measures to increase trust in mediation and social awareness are also among the steps that should be preferred. By removing mediation from being an institution where only certain circles close to the Ministry of Justice have a say, to include all relevant groups in the development process of mediation, particularly if they have conducted scientific studies on mediation, have been involved in the practice for a long time and have adopted different views, are other measures that need to be taken.

Evaluation of the legal regime in Uzbekistan in terms of pros and cons

Uzbekistan has undertaken extensive legal reforms to align its legal system with international standards and best practices. These reforms have included amendments to various laws, the establishment of specialized courts, and efforts to enhance judicial independence.[50] These changes have created a more favourable legal environment for businesses and investors. Secondly, the encouragement of investment and the development of a business-friendly climate are also Uzbekistan has taken steps to attract foreign investment by implementing policies that foster business development. This policy includes simplifying procedures for starting and operating businesses, improving intellectual property protection, and offering tax incentives. The legal framework supports economic growth and encourages entrepreneurship. Thirdly, focusing on the Rule of Law helps to improve mediation legislation, in which the government of Uzbekistan has emphasized the importance of the rule of law and the protection of individual rights.[51]

[50] S. Abduvoitov, *Legal Basis and Prospects of Development…*, p. 296.

[51] S. Khamzakhonov, A. Ravshanov, *The Role of the Institute of Mediation…*, p. 141.

 DOI: 10.7206/kp.2080-1084.648

The statistical data obtained regarding the mediation practices in Uzbekistan give reasonable clues about the development of the institution so far and how it will develop in the future. According to the statistics provided by the Ministry of Justice of the Republic of Uzbekistan, there are 1,128 accredited mediators in the Register of professional mediators (April 2023).[52] In another statistic supplied by a PhD thesis, the use of mediation in cases of action proceedings in civil courts can be listed as:

- In 2020, 150 claims were left without consideration in connection with the conclusion of a mediation agreement.
- In 2021, 1,160 claims were left without consideration in connection with the conclusion of a mediation agreement.
- In 2022, 3,256 claims were left without consideration in connection with the conclusion of a mediation agreement.[53]

According to another statistic related to the use of mediation in cases of action proceedings in commercial courts:

- In 2020, out of 92,527 cases considered, 435, which is 0.5 percent of the total number of claims, were left without consideration in connection with the conclusion of a mediation agreement;
- In 2021, out of 117,349 cases considered in 2013, which is 1.7 percent of the total number of claims, they were left without consideration in connection with the conclusion of a mediation agreement;
- In 2022, out of 113,359 cases considered, 3,561, which is 3.1 percent of the total number of claims, were left without consideration in connection with the conclusion of a mediation agreement.[54]

Efforts have been made to strengthen the judiciary, enhance access to justice, and ensure equal protection under the law. These initiatives build trust in the legal system and promote a fair and just society. In addition, the development of international investments and cooperation has not only contributed to the economy, but also helped to modernize the legal system of Uzbekistan[55]. It has entered into agreements with various countries and international organizations to enhance legal frameworks, exchange best practices, and promote legal harmonization. This

52 https://adliya.uz/uzb (access: 28.07.2023).

53 S. Maripova, *The Use of Mediation in Civil Proceedings: A Comparative Legal Analysis*, Doctoral (PhD) Dissertation Abstract on Legal Sciences, Tashkent 2022, p. 6.

54 Ibidem.

55 X.D. Abduvali O`g`li, *Hozırgı Kunda Nızolarnı…*, p. 24.

cooperation facilitates cross-border transactions and provides opportunities for knowledge sharing[56]. Considering the disadvantages of the mediation process in dispute resolution, some problems can be seen. Initially, while legal reforms have been undertaken, the full implementation and enforcement of the new legal framework may face challenges. Ensuring consistent application of laws and regulations throughout the country can be a complex task that requires extensive ongoing efforts and capacity-building measures. The next problem is that although efforts have been made to enhance judicial independence, ensuring full autonomy and impartiality of the judiciary remains an ongoing challenge. The influence of other branches of government and external factors on the judicial system can hinder the effectiveness and credibility of the legal system. Thirdly, despite reforms, legal awareness and access to justice may still be limited in certain regions or amongst particular segments of the population. Enhancing legal education, promoting legal literacy, and improving access to legal services and resources all require further attention. In conclusion, Uzbekistan's legal regime has made significant progress in recent years, promoting investment, protecting individual rights, and aligning with international standards. However, challenges still need to be addressed in implementation, judicial independence, legal awareness, and regulatory burden. Continued efforts to address these challenges can further enhance the effectiveness and credibility of the legal system, fostering a more favourable environment for economic growth and development.

Conclusion

Reforms related to mediation, which is an alternative dispute resolution method, have significant positions among the codification efforts of Turkey, which gained the EU candidacy status in 1999, and Uzbekistan, which regained its independence in 1991, to ensure compliance with international law. Turkey adopted mediation in its legislation six years before Uzbekistan and subsequently set targets for completing the institutional structure related to this alternative dispute resolution method. These targets were determined as specialization and institutionalization. In addition, resorting to mediation in the resolution of certain disputes has become a pre-condition of litigation. Exceptions to voluntarism have been legalized, which is one of the most characteristic principles of mediation in labour law, consumer law, tenancy disputes and commercial law disputes. The Turkish legislator has expanded the scope of mandatory mediation so much that voluntary mediation

[56] S. Abduvoitov, *Legal Basis and Prospects of Development…*, p. 297.

 DOI: 10.7206/kp.2080-1084.648

has become the exception, and mandatory mediation has become the rule. This is an unignorable handicap for Turkish mediation. In addition, necessary steps have been taken quickly to achieve both specialisation and institutionalisation goals. Perhaps the stages that should have taken place in 20–30 years were attempted to be completed in 3–4 years. Another handicap about Turkish mediation has emerged for this reason. On the other hand, Uzbekistan strictly adhered to the principle of voluntarism in mediation, including commercial law disputes. Uzbekistan did not pursue a preference for mandatory mediation to spread mediation practices and reduce the workload of the courts. It must be admitted that the approach adopted by Uzbekistan is preferable. Although the objectives of institutionalisation and specialization of mediation have been adopted by Uzbekistan as well, it is an appropriate choice not to take unsystematic and hasty steps to achieve these objectives. To put it briefly, there are lessons that Uzbekistan should take from the mediation story that emerged in Turkey, which we can unfortunately describe as unsuccessful and disappointing.

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