Mandatory or Voluntary Mediation? Recent Turkish Mediation Legislation and a Comparative Analysis with the EU's Mediation Framework

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I. INTRODUCTION

Litigation is a safe and widely–recognized way of resolving disputes in modern societies. An increase in the number of cases brought before courts, however, has resulted in lengthy judicial proceedings and created extra costs for all parties. The increase in the workload of courts raises questions regarding whether or not the quality of judgments handed down by judges can be maintained and the principle of access to justice preserved.[1] These concerns gave rise to the formation of alternative dispute resolution ("ADR") concepts globally. Today, one of the primary methods of ADR is mediation.

Mediation[2] is a process in which parties to a dispute are assisted by a neutral third party who guides the negotiation process and helps the parties reach an amicable solution.[3] In comparison to the other ADR mechanisms such as

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1. CARLOS ESPLUGUES & LOUIS MARQUIS, NEW DEVELOPMENTS IN CIVIL AND COMMERCIAL MEDIATION: GLOBAL COMPARATIVE PROSPECTS 2 (2015).

2. In some jurisdictions, the word "conciliation" is used rather than "mediation," despite the fact thatthis terminology is defined differently. When the jurisdictions of Bulgaria and the Czech Republic are taken as an example, mediators must not make any settlement proposals. *See generally* CARLOS ESPLUGES & SILVIA BORONA, GLOBAL PERSPECTIVES ON ADR 47 (2014). The UNCITRAL Model Law on International Commercial Conciliation also uses the word conciliation. However, Article 1.3 clearly states: "For the purposes of this Law, 'conciliation' means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ('the conciliator') to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute." For an explanation of the differences between mediation and conciliation, see Jacqueline M. Nolan–Haley, *Is Europe Headed Down the Primrose Path with Mandatory Mediation?*, 37 N.C. J. INT'L L. & COM. REG. 981, 1009–10 (2012); KLAUS J. HOPT & FELIX STEFFEK, MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE 1098 (2012); Anna Spain, *Integration Matters: Rethinking the Architecture of International Dispute Resolution*, 32 U. OF PA. J. INT'L L. 1, 11 (2010); Nancy Welsh & Andrea Kupfer Schneider, *The Thoughtful Integration of Mediation Into Bilateral Investment Treaty Arbitration*, HARV. NEGOT. L. REV. 71, 84–85 (2013).

3. Council Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, 24/5/2008 O.J. (L 136/6) 3(a) [hereinafter Directive 2008/52/EC] defines Mediation as "a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator." *See also* Neil Andrews, *Mediation: International Experience and Global Trends*, 4 J. INT'L & COMP. L. 1, 1 (2017).

arbitration, mediation is a fast, easy, and inexpensive[4] tool that allows parties to maintain control over the process and the agreement. Moreover, mediation provides parties with a friendly and confidential environment that facilitates the maintenance of their relationship post–settlement.[5] In addition, mediation can be pursued online "through the use of electronic communications and other information and communication technologies."[6]

Advances in ADR mechanisms accelerated legislative movement towards the development of rules regarding cross–border conflicts. The United Nations Commission on International Trade Law ("UNCITRAL") adopted the Conciliation Rules—drafted to offer parties an internationally harmonized, non–mandatory set of rules suited for international commercial disputes—in 1980.[7] Later, in 2002, UNCITRAL drafted a model law to support the application of conciliation procedures including: the exercise of evidence in future judicial or arbitral proceedings; the role of conciliators in subsequent court or arbitral proceedings; the process for the appointment of conciliators; and the enforceability of settlement agreements considering the needs of parties.[8]

Aside from UNCITRAL, the International Chamber of Commerce ("ICC") also drafted Mediation Rules[9] on the international level and founded the ICC International Center for ADR.[10] The Mediation Rules appendix, however, reveals that the requested administrative fees are excessive and beyond the practical aim and scope of mediation.[11]

Acknowledging ADR's ability to resolve cross–border disputes, the European Union took the next step in 2008 and adopted the 2008/52/EC Directive ("Directive") regarding certain aspects of mediation in civil and commercial matters.[12] The scope of the Directive only covers mediation of cross–border disputes in civil and commercial matters.[13] Moreover, the preamble states that

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4. For insight into the debates about whether mediation is a fast, easy, and inexpensive way of dispute resolution in international commercial disputes, see S.I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 45 WASH. U. J. L. & POL'Y 11, 15–16 (2014).

5. FOREST S. MOSTEN & ELIZABETH POTTER SCULLY, THE COMPLETE GUIDE TO MEDIATION: HOW TO EFFECTIVELY REPRESENT YOUR CLIENTS AND EXPAND YOUR FAMILY LAW PRACTICE (2d ed. 2015).

6. U.N. Comm'n Int'l Trade Law, *UNCITRAL Technical Notes on Online Dispute Resolution* 24 (Apr. 2017) http://www.uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf.

7. *See generally* G.A. Res. 35/52, Conciliation Rules of the United Nations Commission on International Trade Law (Dec. 4. 1980), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/conc-rules-e.pdf.

8. *See generally* U.N. Comm'n Int'l Trade Law, Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (2002), https://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf.

9. *Mediation Rules*, INT'L CHAMBER OF COMMERCE, https://iccwbo.org/dispute-resolution-services/mediation/mediation-rules/ (last visited Apr. 8, 2020).

10. *ICC International Centre for ADR*, INT'L CHAMBER OF COMMERCE, https://iccwbo.org/dispute-resolution-services/mediation/icc-international-centre-for-adr/ (last visited Apr. 8, 2020).

11. Despina Anagnostopoulou, *Electronic Contracts and E–Mediation in E.U. Law: Time for the E.U. to Extend E–Mediation for the Benefit of SMEs in B2B Transactions?*, 29 EUR. BUS. L. REV. 983 (2018). For information on costs and payment, see *Costs & Payments*, INT'L CHAMBER OF COMMERCE, https://iccwbo.org/dispute-resolution-services/mediation/costs-payment/ (last visited Apr. 8, 2020).

12. Directive 2008/52/EC, *supra* note 3, at (L 136/3) ¶ 5.

13. *Id*. at art. 1.

member states can adopt the provisions of the Directive in their own internal mediation processes.[14]

The Turkish legal system has not only followed the globally–accepted principles of mediation, it has also taken important steps regarding mandatory mediation. This Article begins with a focus on Turkish mediation laws, both voluntary and mandatory, to explore mediation practice in Turkey and question its success as a dispute resolution system. Next, this Article assesses EU legislation on mediation in civil and commercial disputes. Finally, this Article ends with a comparative analysis of the EU's mediation legal framework, a discussion of the new areas of law that Turkish legislators are planning to expand, and an examination of where Turkey stands in the age of digital ADR.

II. THE TURKISH MEDIATION SYSTEM

In order to evaluate the Turkish mediation system, it is necessary to understand voluntary mediation. After laying that foundation, the discussion turns towards recent developments regarding *mandatory* mediation.

A. Voluntary Mediation

1. Legal Framework

The global acceptance of ADR mechanisms, the Turkish accession process to EU as well as the necessity to unify the laws in accordance with the EU's ADR legislative framework, the duration of judicial proceedings, and the workload of courts led Turkish Regulators to enact the Code on Mediation in Legal Disputes "Number 6325" ("Mediation Code") on June 22, 2012.[15] The Mediation Code was subsequently put into effect in 2013. In addition to this primary legislation, the Regulation on the Code of Mediation in Legal Disputes was published on January 26, 2013 and served as the nation's secondary legislation.[16] The Mediation Code introduced voluntary mediation in civil disputes and regulated the enforceability of mediation settlement agreements.[17] Moreover, the Civil Procedural Code Number 6100 of 2011 and the Mediation Fee Schedule annually regulated by the Ministry of Justice Department of Legal Affairs' Mediation Department govern mediation in Turkey.[18]

Article 1, which regulates the aim and scope of the Mediation Code, states that the " code governs the resolution of private law disputes, even if it contains foreign elements, arising out of businesses and transactions of parties of which they can freely dispose."[19] Article 2 of the Code, which sets forth definitions, clearly states that engaging in mediation is voluntary under Turkish law.[20]

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14. *Id*. at ¶ 8.
15. CODE ON MEDIATION IN LEGAL DISPUTES No. 6325 (June 7, 2012) (Turk.) [hereinafter MEDIATION CODE 6325].
16. CODE ON MEDIATION IN LEGAL DISPUTES No. 28540 (Jan. 26, 2013) (Turk.).
17. MEDIATION CODE 6325, *supra* note 15, at art. 1.
18. CODE OF CIVIL PROCEDURE (Feb. 4, 2011) (Turk.); CODE ON MEDIATION IN LEGAL DISPUTES No. 30995 (Dec. 12, 2019) (Turk.).
19. MEDIATION CODE 6325, *supra* note 15, at art. 1.
20. *Id.* at art. 2.

2. Execution of the Mediation Process

Under Turkish law, a party to a dispute in voluntary mediation can either apply for mediation before filing a lawsuit or during the court hearing.[21] Moreover, the judge may also inform parties about mediation and urge them to initiate the mediation procedure for their disputes.[22] The latter, however, is rarely seen in Turkish courts.[23]

Unless the parties agree to an alternative, a mediator is chosen by the parties.[24] In order to be a mediator, the mediator should be registered in the mediator registry maintained by the Ministry of Justice.[25] There are numerous requirements a person must fulfill to become a mediator, such as completing mediator education and successfully passing the relevant written examination.[26]

After the parties agree upon and choose a mediator, the mediator invites parties to a meeting.[27] If an agreement is not reached regarding the mediator, the parties shall decide on the procedure that will be applied during the mediation.[28] Hence, a significant degree of autonomy is afforded to the parties under the Turkish mediation framework. It should also be noted that parties often sign a contract with the mediator as soon as the mediator is appointed that states the conditions of the mediation procedure, as well as rights and obligations of the parties and the mediator. During the first meeting, the mediator typically makes an introductory speech clarifying the stages of mediation, his or her role as the mediator, and the rules of the procedure.[29] At that time, the mediator will also answer questions to address any uncertainties the parties may have.

It is clearly stated in Article 15 and 4 that judicial powers—such as rendering binding decisions—are only to be exercised by judges and shall not be exercised by mediators. When the parties cannot resolve their dispute using mediation, however, the mediator may propose solutions with respect to the characteristics of the dispute and interests of the parties.[30] The latter provision was recently added to the Mediation Code and gives mediators the power to suggest solutions.[31] Hence, the Turkish system accepted the facilitative mediation method where the mediator assists the parties, asks questions, and leads parties in finding an amicable solution without offering any recommendations.[32] Evaluative mediation, on the other hand,

21. *Id.* at art. 13.

22. *Id*.

23. Efe Kınıkoğlu & Yiğit Parmaksız, *Practical Law Q&A: Mediation in Turkey*, BRITISH CHAMBER OF COMMERCE TURKEY (Dec. 2019), https://www.bcct.org.tr/news/practical-law-qa-mediation-in-turkey/68731.

24. MEDIATION CODE 6325, *supra* note 15, at art. 14.

25. *Id.* at art. 19–20.

26. *Id.* at art. 20. In addition, other requirements include being a Turkish Citizen, a graduate of a law program, five years of work experience, full professional capacity, and an absence of any sentence related to criminal acts or actions. *Id.*

27. *Id.* at art. 15.

28. *Id.*

29. *Id.* at art. 11.

30. MEDIATION CODE 6325, *supra* note 15, at art. 15.

31. CODE ON MEDIATION IN LEGAL DISPUTES No. 30221 (Oct. 25, 2017) (Turk.).

32. The "facilitative versus evaluative" mediator dichotomy was first introduced by Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 25–46 (1996). For information about the debate between evaluative and facilitative mediation, see Marjorie Corman Aaron, *ADR Toolbox: The Highwire Art of Evaluation*, 14 ALT. TO HIGH COST LITIG. 62 (1996) (describing appropriate uses for mediator evaluation and

is much different from facilitative mediation.[33] In evaluative mediation, the mediator explains the weaknesses and strengths of the case to the parties and makes recommendations about the potential outcome of the dispute.[34]

At this point, the question of whether facilitative or evaluative mediation is preferred in the Turkish system arises. Although the new provision added to Article 15 of the Mediation Code empowers the mediator to propose solutions about the dispute, and thus can be considered to support evaluative mediation under Turkish law, Articles 2 and 4 of the Ethics Rules of Turkish Mediators state that the mediator shall not make any legal or professional recommendations to the parties.[35] Thus, the Turkish mediation system exists in the intersection of facilitative and evaluative mediation. The Turkish system has similarities with the Italian system that gives authority to the mediator to offer a formal proposal without the request of parties.[36] The Mediation Code gives similar authority to the mediator.[37]

When the mediation process ends with an agreement, parties also determine the scope of the settlement agreement that is later signed by the parties and the mediator.[38] In order to be able to enforce the terms of the agreement, parties should obtain an annotation from peace courts.[39] When the annotation is given for the enforcement of the agreement by the peace courts, it has the same effect as a judgment by the court.[40] Further, if the settlement agreement is signed not only by parties, but also the lawyers of the parties, the agreement has the same enforceability as a court judgment, even without the annotation from the civil peace courts.[41]

One of the most important consequences of reaching an agreement between parties is that once the parties sign the agreement, they may not file a lawsuit on the agreed upon terms.[42] This provision of the Mediation Code is against the Turkish Constitution and the principle of right to access justice.[43] Yet, there are some situations that arise while concluding the settlement contract in which parties might need to file a lawsuit regarding the subject of the dispute (such as in cases of fraud or duress). Therefore, the stated provision of the Mediation Code needs to be revised or annulled.

Mediation may not be an appropriate way to resolve some disputes. Parties may, at times, not agree on essential terms of the mediation, which leads to the

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recommending specific mediator strategies); James J. Alfini, *Evaluative Versus Facilitative Mediation: A Discussion*, 24 FLA. ST. U. L. REV. 919 (1997); John Bickerman, *Evaluative Mediator Responds*, 14 ALT. TO HIGH COST OF LITIG. 70 (1996); Kimberlee K. Kovach & Lela P Love, *Evaluative "Mediation Is An Oxymoron"*, 14 CPR INST. DISP. RESOL. 31 (1996); Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71 (1998).

33. There is also a third form of mediation called "transformative" mediation. In transformative mediation, mediators empower disputants to resolve their dispute and understand each other's needs, as well as the situation. *See* MICHAEL L. MOFFITT & ANDREA KUPPER SCHNEIDER, EXAMPLES AND EXPLANATIONS: DISPUTE RESOLUTION 89 (2d ed. 2011).

34. OMER EKMEKCI ET AL., HUKUK UYUSMAZLIKZLARINDA ARABULUCULUK 65 (2019).

35. TURKISH MODEL CODE OF CONDUCT FOR MEDIATORS AND MEDIATION, arts. 2 & 4.

36. HOPT & STEFFEK, *supra* note 2, at 681.

37. MEDIATION CODE 6325, *supra* note 15, at art. 15.3.

38. *Id.* at art. 8.1.

39. Peace courts are the lowest civil courts in the Turkish judicial system. INTERNATIONAL BUSINESS PUBLICATIONS, TURKEY JUSTICE SYSTEM AND NATIONAL POLICE HANDBOOK VOLUME 1 CRIMINAL SYSTEM: STRATEGIC INFORMATION AND BASIC LAWS 71 (2016)

40. MEDIATION CODE 6325, *supra* note 15, at art. 18.2.

41. *Id.* at art. 18.3.

42. *Id.* at art. 18.2.

43. EKMEKCI, *supra* note 34, at 30.

termination of the process. In this case, the mediator creates a record, signed by all parties, that he or she then sends to the Mediation Department of the Ministry of Justice within one month.[44]

3. Limitation Period

It is crucial for the parties to a mediation to avoid failure due to the imposed limitation periods.[45] Therefore, good faith[46] would dictate suspending the limitation period during mediation. In evaluating this situation, Turkish legislators addressed mediation's effect on limitation periods.[47]

Under the revision of the Mediation Code, the time between the commencement of mediation and the end of mediation is not considered when calculating the applicable limitation period. In this regard, determining the exact time of commencement is important. It is stated in Article 16 that if the parties apply for mediation before filing a lawsuit, the mediation "process" starts from the date the parties are invited to the first meeting and ends when the mediation agreement is signed between the mediator and the parties.[48]

If the parties apply for mediation *after* filing a lawsuit before a court, the mediation process starts with: (1) the parties' acceptance of the court's invitation to mediation; (2) submission of a written legal statement to the court that the parties have reached an agreement to apply for mediation; (3) or a recording of statements by the parties about their agreement to mediate in the hearing record.[49]

There is no specific provision regulating the time frame of mediation. In other words, there is no statutory period within which the mediation must conclude. Obviously, time saving is one of the most important aims of mediation. Therefore, in the interests of the parties, the mediation period should not be extended beyond what is necessary to reach an agreement. Mandatory mediation regulations, on the other hand, provide a specific time period for the conclusion of the mediation process that will be explained below.[50]

4. Confidentiality

Confidentiality is one of the main reasons why parties opt for mediation instead of litigation. Since one of the main principles of litigation is publicity,[51] confidentiality in mediation is attractive, as it allows parties to disclose all kinds of information to find amicable solutions for their dispute.[52] That said, the mediation process might be frustrated if there is a risk that the information gathered during the

44. MEDIATION CODE 6325, *supra* note 15, at art. 17.4.

45. A limitation period is the set period that a legal action can be brought or a right enforced. Nigel Adams, *Limitation Periods: What They Are, Why They Matter & How to Avoid Their Unpleasant Consequences*, GOODMAN DERRICK LLP (Sept. 16, 2019), https://www.gdlaw.co.uk/site/blog/our-services/dispute-resolution/limitation-periods-litigation.

46. REINHARD ZIMMERMANN, THE NEW GERMAN LAW OF OBLIGATIONS: HISTORICAL AND COMPARATIVE PERSPECTIVES 817 (2005).

47. MEDIATION CODE 6325, *supra* note 15, at art. 16.1.

48. *Id*.

49. *Id*.

50. *Id.* at 4.2.

51. CONST. REP. TURK. art. 141 (1982).

52. EKMEKCI, *supra* note 34, at 99.

procedure may be disclosed in court proceedings if the mediation fails.[53] In an effort to avoid this risk, the Mediation Code regulates both the information disseminated in mediation and the duty of confidentiality.[54] Mediators are under the obligation of confidentiality regarding all documents collected, all statements made, and all information acquired during mediation procedure.[55] Unless otherwise agreed, parties and third parties who have been involved in the mediation process are also under the same confidentiality obligation.[56] In the event of a failed mediation, the parties in an arbitration or court proceeding are compelled to disclose: the invitation to mediation by the parties or a party's request to mediate; statements and offers made to conclude the dispute resolution process by means of mediation; party suggestions or the acceptance of the other party's claims or facts during the course of mediation; and documents that are collected solely for mediation.[57]

If the parties breach the confidentiality rule, they are subject to criminal sanctions set forth under the Mediation Code, which states that the punishment for the violation of the duty of confidentiality is up to six months in prison.[58] No provision exists regarding civil liability, however, and since parties can draft confidentiality clauses (and thus secure protection through contract law), no comprehensive set of rules are necessary as they. Even if the parties do not explicitly contract for confidentiality, the Turkish Code of Obligations allows for damages regarding breaches of confidentiality. Most mediators provide model confidentiality clauses to reduce the transactional costs to parties.[59]

5. Institutional Mediation

Institutional and ad–hoc mediations are also regulated under Turkish law. The Istanbul Arbitration Center ("ISTAC") and the Hacettepe University Arbitration Practice and Research Center ("HUTAM") are two prime examples of institutional mediation. ISTAC[60] and HUTAM[61] also have internal mediation rules to be addressed in the terms of the contract.[62] Still, the parties may operate under those Mediation Rules even if there is no prior mediation agreement or mediation clause between the parties. [63]

53. HOPT & STEFFEK, *supra* note 2, at 49.
54. MEDIATION CODE 6325, *supra* note 15, at art. 4.1.
55. *Id*.
56. *Id.* at art. 4.2.
57. *Id.* at art. 5.1(a)–(c).
58. *Id.* at art. 33.
59. HOPT & STEFFEK, *supra* note 2, at 49.
60. For the ISTAC Mediation Rules, see ISTANBUL ARBITRATION CTR. MEDIATION RULES, https://istac.org.tr/en/mediation/rules/ (last visited Apr. 8, 2020) [hereinafter ISTAC Mediation Rules].
61. For HUTAM Mediation Rules, see Hacettepe Üniversitesi Tahkim Uygulama Ve Araştirma Merkezi Arabuluculuk Kurallari, http://www.tahkim.hacettepe.edu.tr/arabuluculuk_kurallari.pdf (last visited Apr. 8, 2020) [hereinafter HUTAM Mediation Rules].
62. ISTAC Mediation Rules, *supra* note 60, at § I, art. 3; HUTAM Mediation Rules, *supra* note 61, art. 5/1.
63. *Id*.

6. Costs

The cost of mediation has two dimensions. First, mediator costs should be decided by the parties and the mediator in the very beginning of the process. Article 7 also regulates mediator's fees.[64] In the absence of an agreement, or unless otherwise agreed by the parties, the mediator's fee is determined according to the "Mediator's Minimum Fee Tariff"[65] set by the Ministry of Justice; fees and costs are equally shared between the parties.

The other dimension affecting cost is the mediation process itself. According to Article 18, if the mediation process is terminated due to the absence, without cause, of one party at the initial meeting, the absent party must bear all costs of litigation, even if that party succeeds in the subsequent litigation.[66] Italy accepted the same principle and regulated certain sanctions in the case of the absence of a party in the first meeting.[67] However, if both parties are present at the initial meeting, they have the opportunity to end the mediation process and file a lawsuit instead. This opportunity raised the number of mediations in civil cases to above 150,000 per year in Italy.[68]

If the parties do, indeed, reach a resolution by the end of the mediation, costs are distributed equally between parties.[69] In cases where mediation is terminated due to the absence of parties, or if the mediation meeting takes less than two hours and the parties cannot reach an agreement, the two–hour fee is paid by the Ministry of Justice.[70]

7. Statistics and Evaluation of Voluntary Mediation

The main aim of mediation is to provide a fast, cost–effective dispute resolution mechanism for the parties while also protecting parties' access to justice and reducing the workload of courts.[71] In recent years, the trend in the Turkish justice system is the use of alternative dispute resolution systems to bypass litigation to help minimize the workload of overburdened courts. The increased workload especially impacts young and inexperienced judges. Between January 2013 and September 2019, 191,624 disputes were resolved using voluntary mediation.[72] Of

64. MEDIATION CODE 6325, *supra* note 15, at art. 7.

65. In Hungary and the Netherlands, mediator fees are left to the free market. *See* HOPT & STEFFEK, *supra* note 2, at 38.

66. MEDIATION CODE 6325, *supra* note 15, at art. 18. This kind of cost penalty is usually used in common law jurisdictions but is rarely seen in E.U. legal systems. Therefore, mediation is widely used in civil and commercial disputes in the United States, Australia, Canada, England, and New Zealand, but not practiced much in E.U. jurisdictions. *See* HOPT & STEFFEK, *supra* note 2, at 176.

67. Giuseppe De Palo, *A Ten–Year–Long "E.U. Mediation Paradox" When an E.U. Directive Needs to Be More . . . Directive*, EUROPEAN PARLIAMENT BRIEFING 1, 6 (2018), http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL_BRI(2018)608847_EN.pdf.

68. *Id*.

69. MEDIATION CODE 6325, *supra* note 15, at art. 7.2.

70. *Id.*

71. Anagnostopoulou, *supra* note 11, at 977.

72. IHTIYARI UYUSMAZLIKLARDA ARABULUCULUK ISTATISTIKILERI, http://www.adb.adalet.gov.tr/Sayfalar/istatistikler/istatistikler/ihtiyari.pdf (last visited Apr. 8, 2020).

those, 173,762 resulted in a settlement agreement.[73] In other words, only four percent of disputes ended without a settlement.

B. Mandatory Mediation

The types of disputes for which parties most frequently utilize voluntary mediation are, in order, labor disputes, receivables, and compensation claims.[74] Yet, approximately 1,500,000 civil cases are pending in the courts. On average, these claims take 404 days to resolve.[75] Ninety–six percent of labor disputes were resolved in one day or less through mediation procedure.[76] So, one can conclude that voluntary mediation was a positive step towards the right to a fair trial within a reasonable time.

1. Labor Disputes

The large backlog of pending court cases and long trial periods inevitably forces Turkish legislators to regulate mandatory mediation. Increased regulation represents an effort to increase the number of applications and, in turn, encourage the use of ADR overall. Although there are some debates regarding party autonomy, mandatory mediation avoids information asymmetries between parties.[77]

Since the nature of disputes within the jurisdiction of Labor Courts are suitable for negotiations, the Labor Courts Code ("LCC") was amended in late 2017 and put into action on January 1, 2018. Through this amendment, mediation became a pre–condition for the labor disputes before pursuing the dispute in the Turkish court system. In other words, if a party fails to apply mediation regarding a labor dispute outlined in the Code, and instead files a lawsuit, that lawsuit would be denied on procedural grounds. It is also stated in the preamble of the LCC that after voluntary mediation became regulated in Turkey in 2013, eighty–nine percent of disputes brought to mediation were labor disputes, and ninety–three percent of those ended with an agreement. Further, of the disputes that reached resolution, ninety–six percent were resolved in one day or less.[78] Disputes arising from labor receivables and compensation claims, individual or collective employment contracts, or re–employment claims are subject to mandatory mediation. On the other hand, claims for pecuniary and non–pecuniary damages originating from workplace accidents or occupational diseases, as well as any declaratory lawsuits, actions, objections, or revocation lawsuits regarding these damages, are considered unsuitable for mediation under the LCC.

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73. *Id*.
74. *Id*.
75. For information on Judicial Registration and Statistics, see http://www.adlisicil.adalet.gov.tr/Resimler/SayfaDokuman/2082019153842istatistik2018.pdf (last visited Apr. 8, 2020).
76. *See Preamble of Labor Courts Code*, TBMM MEVZUAT BILGI SISTEMI, https://mevzuat.tbmm.gov.tr/mevzuat/faces/maddedetaylari;jsessionid=qPcJEHLWpRW7tCV6n-J4L61Ebc9cGLDWHhVvXedPtNlcrhlSWNKp!-494178054?psira=129246 (last visited Apr. 8, 2020).
77. HOPT & STEFFEK, *supra* note 2, at 49.
78. *Preamble of Labor Courts Code*, *supra* note 76.

The constitutionality of mandatory mediation for labor disputes regulated in the LCC has been challenged in the Constitutional Court.[79] The Court ruled that mandatory mediation for labor receivables and compensation claims, as well as re–employment claims, are not unconstitutional because mediation is not a substitute for litigation. Instead, it is a system that shortens the trial periods, reduces the workload of courts, and provides the judicial system a means to process cases more effectively.[80]

The mediation procedures regulated in the Mediation Code and the LCC have similar provisions, except some distinctions such as period of process. It is stated in the LCC that mandatory mediation shall be concluded in three weeks, starting from the day the mediator is appointed.[81] In exceptional circumstances, the three–week period may be extended by one more week.[82] Circumstances which give rise to the extension are not enumerated in the Code. The question that arises at this point is what happens if the procedure cannot be completed in the limited period of time stated in the Code? In this case, it should be assumed that parties do not agree on the facts of the dispute, and the mediator should draw up and sign a record to be signed by the parties.

A mediator's appointment is crucial for the commencement of mediation. For mandatory mediation, the Mediation Department of the Ministry of Justice lists the names of the mediators that are already *registered* as mediators, according to their area of specialization, and sends the list to justice commissions in the courts first instance in the palace of justice. Commissions distribute the list to the mediation bureaus that are established in the courthouses to take applications and appoint mediators.[83]

An employer or an employee who wants to resolve their dispute by means of mediation as a pre–condition to litigation shall apply to the mediation bureau in the other party's domicile or in the place where business is done.[84] The Mediation Bureau then appoints the mediator from the list that is provided by the Mediation Department. However, instead of appointment of a mediator, parties may choose any mediator from the list. Application to the Mediation Bureau pauses the limitation and prescription periods until the end of mediation procedure.[85]

This provision, as written, might cause some problems for the parties. First, in practice, it is almost impossible for the parties to choose a mediator with their consent. Second, mediators who are appointed by incompetent mediation bureaus do not necessarily support a claim of incompetence. The other party may object to the competence of the mediation bureau in the first meeting, in which case the procedure pauses, and the peace courts decide which bureau has competence to appoint the mediator. Thus, this provision may lengthen the mediation process

79. *See* Tube Bilecik, *Turkish Mandatory Mediation Expands Into Commercial Disputes*, KLUWER MEDIATION BLOG (Jan. 30, 2019), http://mediationblog.kluwerarbitration.com/2019/01/30/turkish-mandatory-mediation-expands-into-commercial-disputes/?doing_wp_cron=1589946700.2330090999603271484375 (citing Constitutional Court, Dec. 11, 2018, E. 2017/178, K. 2018/82).

80. *Id*.

81. *Preamble of Labor Courts Code*, *supra* note 76, at art. 3/10.

82. *Id*.

83. MEDIATION CODE 6325, *supra* note 15, at art. 18.

84. *Preamble of Labor Courts Code*, *supra* note 76, at art. 3/5.

85. MEDIATION CODE 6325, *supra* note 15, at art. 18.

through invalid objections of the other party since the party who commences the mediation has no right to object.[86]

It should be also be stated that rules regarding mandatory mediation do not conform to the Turkish labor law and procedural law. For example, take a labor dispute. Assume both parties claim receivables, one of the parties commences the mediation procedure before the other, and the parties cannot agree or reach settlement at the end. The party that commenced the mediation files a lawsuit. Will the counter–party claim his receivables in the mentioned lawsuit, or should he apply to mediation since it is a pre–condition for litigation? Considering the interest of the parties and time–consuming effect of mediation in this instance, the counter–party should have the opportunity to submit a claim through lawsuit rather than engaging in a futile "re–mediation."

From 2018 to September 2019, a mediator was appointed in 641,965 labor disputes. Of those, 392,987 concluded with an agreement, and 199,679 were unresolved.[87] On the other hand, in 2018, 162,339 labor disputes lawsuits were filed. In 2017, before mandatory mediation was put into place, 227,449 disputes were filed as lawsuits. Statistics by the Ministry of Justice show that the average number of days spent on each case is still 629, which is almost two years.

2. Commercial Disputes

A. In General

Mandatory mediation regarding labor disputes achieved its goal in terms of the number of disputes resolved through mediation (although not necessarily for the protection of the rights of the parties) as it is set by the Ministry of Justice in just one year. As a result, legislators drafted a new provision in Article 5/A of the Turkish Commercial Code, Law 7155,[88] and mediation was introduced and extended as a pre–condition for litigation for commercial disputes regarding receivables and compensation claims. Law 7155 entered into force on January 1, 2019. It should be noted that regulation regarding mandatory mediation for commercial disputes will not be applied as of its effective date to the pending and continuing lawsuits.

Mandatory mediation is applied as a pre–condition to commercial lawsuits regarding receivables and compensation claims regulated in Turkish Commercial Code Article 4. Disputes concerning banks and financial institutions, including some disputes arising out of intellectual property rights, are regulated under the Turkish Commercial Code, involve merchants on both sides, and are related to commercial enterprises.

The procedural rules applied are the same as those in the mandatory mediation of labor disputes. Certain rules, however, are implemented differently considering the nature of commercial disputes. It is stated in the Turkish Commercial Code that

86. EKMEKCI, *supra* note 43, at 158.

87. *See İş Uyuşmazlıklarda Dava Şartı Arabuluculuk İstatistikleri (02.01.2018–19.12.2019)*, http://www.adb.adalet.gov.tr/Sayfalar/istatistikler/istatistikler/davasarti.pdf (last visited Apr. 8, 2020).

88. Abonelik Sözleşmesinden Kaynaklanan Para Alacaklarına İlişkin Takibin Başlatılması Usulü Hakkında Kanun, Resmî Gazete (Dec. 19, 2018), http://www.resmigazete.gov.tr/eskiler/2018/12/20181219-1.htm [From the Subscription Agreement Law on the Procedure for Initiative Follow–Up, Turkish Official Journal, issue No. 30630] [hereinafter TOJ 30630].

mediators shall finalize the mediation process within six weeks from the appointment of the mediator, and this period can only be extended for another two weeks in exceptional cases.[89] Therefore, the legislators extended the time period for mandatory mediation for commercial disputes given the nature of such disputes and their need for more time to reach resolution.

It is also crucial to note that prior to filing a lawsuit, interim injunctions or interim attachments can be granted by courts and prevent the period of limitation from running.[90] Moreover, in cases where arbitration or other alternative dispute resolution mechanisms are required by other codes, or in cases where there is an arbitration agreement between parties, provisions regarding mandatory mediation are not applied.[91]

B. Certain Commercial Disputes and Actions

Besides certain procedural rules, the negative declaratory actions for the commercial disputes subject to mandatory mediation have been greatly debated. Although the Turkish Commercial Code clearly states that mediation is applied as a pre–condition to commercial lawsuits including *receivables* and *compensation claims*, the booklets of the Ministry of Justice state that negative declaratory claims are subject to mandatory mediation[92] since declaratory actions are filed just before the actions for compensation or receivables and the judgments for compensation and receivables also include declaration.[93] Yet, this fact is not clearly stated in the preamble or the article itself.[94] Therefore, the Ministry of Justice should not act as a legislative organ and include negative declaratory actions as a pre–condition to commercial lawsuits. Moreover, in its most recent decision, the Istanbul Regional Court of Justice, as an appellate body, ruled that since the negative declaratory actions do not include receivables and compensation claims, they shall not be considered for mandatory mediation.[95]

Bankruptcy proceedings are regulated as commercial disputes under the Code of Enforcement and Bankruptcy.[96] They are not subject to mandatory mediation since the Mediation Code states that the scope of the Code covers only private law disputes that parties can freely dispose of.[97] Since parties in bankruptcy proceedings cannot freely dispose of their transactions, those disputes are directly outside of the scope of both voluntary and mandatory mediation.

Intellectual and industrial disputes are regulated as commercial disputes in Article 4 of the Turkish Commercial Code. Therefore, disputes arising out of intellectual and industrial rights—such as trademarks, patents, design, and utility models—that include receivables and compensation claims are subject to mandatory mediation. Hence, for claims regarding the nullity of intellectual and

89. *Id.* at art. 20.
90. MEDIATION CODE 6325, *supra* note 15, at art. 18.
91. *Id.*
92. TOJ 30630, *supra* note 88.
93. ILKER KOCYIGIT & ALPER BULUR, TICARI UYUSMAZLIKLARDA DAVA SARTI ARABULUCULUK, HUKUK ISLERI GENEL MUDURLUGU ARABULUCULUK DAIRE BASKANLIGI YAYINI 141–42 (2019).
94. CEYDA SURAL EFECINAR & MEHMET ERTAN YARDIM, TICARI UYUSMAZLIKLARDA ZORUNLU ARABULUCULUK 19 (2019).
95. Istanbul BAM 14. HD, 521/423 (Mar. 21, 2019), www.lexpera.com.tr.
96. CODE OF ENFORCEMENT AND BANKRUPTCY, art. 154/4 (Turk.).
97. MEDIATION CODE 6325, *supra* note 15, at art. 2.

industrial property rights, plaintiffs will be able to file a lawsuit without commencing mandatory mediation.

In some cases, there may be more than one claim (e.g., cumulative claims such as declaration, seizure on goods, and compensation may arise). In these situations, the claims should be separated; for the compensation claims, the mandatory mediation process should commence, and a lawsuit should be filed for the other claims.

C. Statistics

Although it has been only one year since this Mediation law entered into force, the available statistics have been published on the Ministry of Justice's Mediation Department website. From January 2019 to October 2019, 119,787 commercial disputes filed for mediation. Of those, fifty–seven percent of cases concluded with an agreement (57,525). Parties could not reach an agreement in 43,961 commercial disputes (forty–three percent).[98] Currently, it is not possible to analyze how the number of cases filed in commercial courts has been affected since the data is not publicly available.

3. Expected Fields of Mandatory Mediation

The Ministry of Justice is planning to extend mandatory mediation in the areas of consumer and family law. The Turkish Consumer Protection Law regulates some resolution procedures for consumer disputes. For example, the Consumer Protection Law regulates the application procedure of the Consumer Arbitration Committees for Consumer Problems, in which filing consumer disputes with a value of less than 10,390[99] Turkish Liras is mandatory.[100] The legal nature of the

98. ISTAC Mediation Rules, *supra* note 60.

99. Implementing Regulation on Consumer Arbitration Committees for Consumer Problems was enacted to regulate the implementation procedures and principles on the establishment and operation of arbitration committees for consumer problems (Art.1). According to Article 5 of Regulation on Consumer Arbitration Committees for Consumer Problems: "The Ministry of Trade shall establish minimum one arbitration committee for consumer problems at the provincial centers and the district centers to be identified by the Ministry of Trade for resolution of the conflicts that may arise during consumer related acts and practices." In Article 6, with regard to the applications, the competency of the arbitration committees for consumer problems shall be as follows:

a) The district arbitration committee for consumer problems with regards the conflict resolution applications, value of which is under 6.920 Turkish Liras;
b) The provincial arbitration committee for consumer problems with regards the conflict resolution applications, value of which is between 6.920 Turkish Liras and 10.390 Turkish Liras, in provinces under Metropolitan status;
c) The provincial arbitration committee for consumer problems with regards the conflict resolution applications, value of which is under 10.390 Turkish Liras, in provinces which are not under Metropolitan status;
d) The provincial arbitration committee for consumer problems with regards the conflict resolution applications, value of which is between 6.920 Turkish Liras and 10.390 Turkish Liras, in districts affiliated to the provinces, which are not under Metropolitan status.

See https://www.resmigazete.gov.tr/eskiler/2014/11/20141127-8.htm (last visited May 27, 2020).

100. Judiciary of Turkey Law on Consumer Protection, art. 68 (2011), http://www.judiciaryofturkey.gov.tr/Consumer-Protection-Law-is-available-on-our-website.

dispute resolution process of the Consumer Arbitration Committees for Consumer Problems has been debated in Turkish law. For example, *Atali* considers this process to be mandatory arbitration since application to the committee is mandatory and its decisions are binding.[101] On the other hand, *Budak* states that this procedure *cannot* be defined as mandatory arbitration because, first, parties cannot choose the arbitrators in the Consumer Arbitration Committees, and second, arbitration is a consensual method of dispute resolution and thus cannot be mandatory in nature. Therefore, Considering the definition and nature of arbitration, the dispute resolution mechanism of the Consumer Arbitration Committees should be accepted as a *sui generis* way of dispute resolution under Turkish law.[102]

Moreover, application to the Consumer Arbitration Committees for Consumer Problems can be made through the "tuketici.gov.tr" or "turkiye.gov.tr" websites. After the application, all other procedures should be completed as stated in the Regulation on Consumer Arbitration Committees for Consumer Problems Article 6, not via online procedure.[103] Hence, it can be stated that a partial online dispute resolution ("ODR") system is utilized for consumer disputes in the Turkish system.[104] In fact, a dispute resolution procedure other than litigation has been in force for consumer disputes for almost fifteen years. Although this process is mandatory within the monetary limits regulated in the Consumer Protection Law, consumer disputes might be the most appropriate area for the mandatory mediation regulation.

4. Singapore Mediation Convention

The Mediation Code is silent about the execution of mediation agreements where one of the parties does not reside in Turkey. Turkey did, however, sign the United Nations Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention").[105] The Singapore Convention has not been ratified in Turkey yet, but it would be an important step for the maintenance of international business relationships.

On June 26, 2018, UNCITRAL approved the Singapore Mediation Convention and amendments were made to the Model Law on International Commercial Conciliation ("Model Law"). The Singapore Convention promotes mediation as a dispute resolution method for cross border disputes. Article 1 clearly states that the Singapore Convention only applies to mediation agreements concluded in writing by parties to resolve an international commercial dispute.[106] Note that the scope of

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101. *See* Murat Atali, *6502 Sayili Kanun'un Tuketici Sorunlari Hakem Heyetlerine Iliskin Hukumlerinin Degerlendirilmesi*, 1 PROF. DR. EJDER YILMAZ'A ARMAGAN 412 (2014).

102. Ali Cem Budak, *6502 Sayili Tuketicinin Korunmasi Hakkinda Kanun'a Gore Tuketici Hakem Heyetleri*, 16 DOKUZ EYLUL UNIVERSITESI HUKUK FAKULTESI DERGISI 77–103 (2017).

103. Mehmet Polat Kalafatoglu, *Yabanci Unsurlu E–Tuketici Uyusmazliklarinin Internet Uzerinden Cozulmesi (Online Dispute Resolution) Konusunda Gorus, Dusunce ve Oneriler*, 34 BATIDER 329 (2018).

104. *Id*.

105. *See* Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross–Border Recognition and Enforcement of Mediated Settlements*, 19 PEPP. DISP. RESOL. L.J. 1–60 (2019); Eunice Chua, *The Singapore Convention on Mediation—A Brighter Future for Asian Dispute Resolution*, 9 ASIAN J. INT'L L. 195, 195–205 (2019).

106. G.A. Res. 73/198, ¶ 1, United Nations Convention on International Settlement Agreements Resulting from Mediation (Dec. 20, 2018). The term "international" is explained in the same article as:

the Singapore Convention is restricted to *commercial disputes*[107]; disputes relating to consumer, family, inheritance, and employment law are excluded.[108] Moreover, settlement agreements that are enforceable as judgments, or that have been recorded and are enforceable as an arbitral award, are not within the scope of the Singapore Convention.[109]

The Singapore Convention allows parties to enforce a settlement agreement in accordance with its rules of procedure. The Convention guides parties on the requirements to enforce a settlement agreement.[110] Article 4 enumerates the requirements that need to be met in order to rely on the settlement agreement:

> (a) The settlement agreement signed by the parties;
> (b) Evidence that the settlement agreement resulted from mediation, such as:
> (i) The mediator's signature on the settlement agreement;
> (ii) A document signed by the mediator indicating that the mediation was carried out;
> (iii) An attestation by the institution that administered the mediation; or
> (iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

The requirements in Article 4 provide several options and give wide powers to the competent authority in the meaning of collecting evidence that the settlement agreement resulted from mediation.[111]

The competent authority may refuse to grant relief if the conditions stated in Article 5 are met.[112] The Singapore Convention is similar to the New York Convention, as it lists the grounds for acceptance and refusal. All grounds stated in Article 5 are optional; a court can provide relief even if one of the conditions for refusal exists.[113]

> a) At least two parties to the settlement agreement have their places of business in different States; or
> b) The State in which the parties to the settlement agreement have their places of business is different from either:
> (i) The State in which a substantial part of the obligations under the settlement agreement is performed; or
> (ii) The State with which the subject matter of the settlement agreement is most closely connected.

107. *Id.*
108. *Id.*
109. The reason for excluding enforceable judgments is the existence of The Hague Convention on Choice of Court Agreements. The reason for excluding arbitral awards is The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
110. *See* Chua, *supra* note 105, at 198 (stating that "Article 6 of the EU Directive [on Mediation] does not set out a procedure for enforceability, but instead prescribes two essential requirements in broad terms. First, Member States must ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. Second, the content of the agreement must not be contrary to the law of that State and the law of that State must provide for its enforceability.").
111. *Id.*
112. G.A. Res. 73/198, *supra* note 106, at ¶ 5.
113. Schnabel, *supra* note 105, at 42.

In August 2019, forty–six Countries signed the Singapore Mediation Convention including Turkey. However, EU countries such as Switzerland and Russia are still not parties to the Convention. Mediation can be broadly implemented in cross–border dispute resolution. Nevertheless, it will only be effective after critical states sign the agreement and become subject to the Convention.[114]

III. EUROPEAN UNION MEDIATION LEGAL FRAMEWORK

A. Mediation in Civil and Commercial Matters

After issuing the Green Paper[115] on alternative dispute resolution in civil and commercial law to initiate consultations and to promote the use of Mediation,[116] the EU adopted the Directive on Mediation in 2008. The Directive focuses on civil and commercial disputes, as well as cross–border mediation.[117] The Member States have a duty to implement provisions of the Directive into their national laws within three years from the time of adoption.[118] The Directive provides minimum regulatory standards for Member States, so each state implements the Directive according to national preferences. One of the main goals of the Directive is to promote better access to justice in Europe and to achieve a balanced relationship between mediation and judicial proceedings.[119]

The Directive says that Member States shall ensure the enforcement of the written agreement created at the end of a mediation between parties unless the content of the agreement is contrary to the laws of the Member States.[120] Exceptions regarding the enforcement of the agreement are broad, which may result in non–uniform laws as to the enforceability of agreements in Member States.

The attempt to choose mediation as a dispute resolution mechanism does not prevent parties from initiating judicial or arbitral proceedings by the expiry of limitation or prescription periods during the mediation process.[121]

Other than the public policy of the Member States and the cases where it is deemed necessary for the enforcement of settlement agreements, the mediator and the other parties involved in the administration process of mediation are under the obligation to not disclose any information in a judicial or arbitral proceeding that arose out of or in connection with mediation.[122]

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114. *Id.* at 60.

115. *Green Paper: Alternative Dispute Resolution in Civil & Commercial Law*, COMM'N OF THE EUROPEAN COMMUNITIES (Apr. 19, 2002), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002DC0196&.

116. Directive 2008/52/EC, *supra* note 3, at (L 136/3) ¶ 2.

117. *Id.* at (L 136/6) 1.

118. *Id.* at (L 136/8) 12. According to Article 12 of the Directive, about time of adoption, the only exception is Article 10, which is about the information on competent courts and authorities. It is stated that the date of compliance shall be 21 November 2010 at the latest for Article 10.

119. *Id.* at (L 136/6) 1.

120. *Id.* at (L 136/7) 6.

121. *Id.* at 8, 1.

122. Directive 2008/52/EC, *supra* note 3, at (L 136/7) 1, 7.

Article 5.2 of the Directive encourages Member States to implement mandatory mediation in order to increase use of the mediation mechanism. The issue of mandatory mediation is also considered by the European Court of Justice ("ECJ") in *Alassini v. Telecom Italia SpaA*.[123] The ECJ held that a national law requiring mandatory mediation is in conformity with EU law.

In 2011, three years after the adoption of Directive, the impact and results of the Directive were examined in a study.[124] Outcomes of the study showed that European jurisdictions were far from establishing mediation systems.[125] Although the study showed that mediation is a cost–effective tool, concerns about mediation's professionalism, quality of services, and the legal environment remain obstacles to widespread adoption of the process.[126]

Another study completed and published in 2014[127] ("Rebooting Study") sought to find out the reasons why mediation was not accepted as a viable dispute resolution mechanism among Member States. The Rebooting Study included the opinions of at least 816 experts from twenty–eight Member States[128] and showed that pro–mediation policies, regardless of whether legislative or promotional, cause weak mediation performance. Experts essentially suggested introducing "mitigated" mandatory mediation to increase the use of mediation in the EU.[129]

In 2011, Italy implemented mandatory mediation with a decree. Then, in 2013, the Parliament implemented a code regarding the application of mandatory mediation. Italy accepted the opt–out model where parties are obliged to enter into the mediation process but are not compelled to end the mediation process with an agreement.[130] In other words, parties can end the process in the very first meeting without cost or delay.[131] In Italy, mandatory mediation involves civil and commercial disputes arising out of property rights, division of property, inheritance law, family agreements, lease, loan, rent, compensation arising from medical liability, damages resulting from defamation through the press or other publicized means, banking and insurance contracts, and financial contracts.[132] Moreover, parties are also required to attempt mediation in agrarian disputes before commencing litigation.[133] In the Italian legal system, the number of mediation clauses that are attached to the contracts or articles of corporations are increasing in number over time.[134]

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123. ECJ Joined Cases C–317/08 and 320/08 Alassini v. Telecom Italia SpA (2010) ECR J–02213. *See* HOPT & STEFFEK, *supra* note 2, at 175.

124. Giuseppe De Palo, Ashley Feasley, & Flavia Orecchini, *Quantifying the Cost of Not Using Mediation—A Data Analysis* (2011), http://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19592/20110518ATT19592EN.pdf.

125. *Id*. at 3.

126. De Palo, *supra* note 67, at 3.

127. Giuseppe De Palo et al., *Rebooting the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Legislative and Non–Legislative Measures to Increase the Number of Mediations in the E.U.* (2013), EUROPEAN PARLIMENT THINK TANK, http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOLJURI_ET(2014)493042 (last visited Nov. 9, 2019).

128. *Id*.

129. *Id.*

130. Andrews, *supra* note 3, at 238.

131. *Id.*

132. HOPT & STEFFEK, *supra* note 2, at 25.

133. *Id*.

134. Monica De Rita, *Mediation in Corporate Disputes in Italy*, 14 EUR. CO. L. J. 90 (2017).

Germany is another jurisdiction where mandatory mediation is accepted in neighbor disputes, family affairs, small claims (maximum of € 750), labor, and defamation disputes.[135] Other than the listed disputes, mediation is voluntary for commercial disputants. In the last ten years, the dispute management approach of German corporations changed, and there has been a clear move toward applying mediation to corporate disputes.[136] Studies show that the larger the corporation, the more often mediation is used.[137] Inclusion of mediation clauses in corporation articles, partnership agreements, and employment contracts can continue to increase the number of applications to mediation.[138]

In Norway, mediation is mandatory for family disputes to protect the rights of the children.[139] Greece also accepted the mandatory mediation concept in certain areas such as car accidents, stock exchange cases, intellectual property disputes, and overdue payments to lawyers.[140]

B. Mediation in Electronic Consumer Disputes

In 2013, in order to solve disputes between consumers and traders, the EU adopted the Directive on Alternative Dispute Resolution for Consumer Disputes[141] ("Directive on Consumer ADR"). The preamble of the Directive on Consumer ADR states that the Directive covers all disputes arising from sales or service contracts. The aim of the Directive is to ensure access to simple, efficient, fast, and low–cost ways of resolving domestic and cross–border disputes, thereby boosting consumer and trader confidence in the market. The preamble states: "The access should apply to online as well as to offline transactions and is particularly important when consumers shop across borders."[142] The Directive does not apply to complaints between traders against consumers or disputes between traders. Nevertheless, the Directive does not prevent Member States from adopting similar provisions to solve such disputes through ADR.[143] Belgium, Germany, Luxembourg, and Poland have all adopted such provisions in their national laws.[144]

Moreover, after the adoption of the Directive on Online Dispute Resolution for Consumer Disputes,[145] an ODR system was developed to provide a web–based platform that offers simple, efficient, fast, and low–cost out–of–court solutions to

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135. GIUSEPPE DE PALO & MARY B. TREVOR, E.U. MEDIATION LAW AND PRACTICE (2012); Peter Tochtermann, *Mediation in Germany: The German Mediation Act Alternative Dispute Resolution at the Crossroads*, *in* MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE 673 (2013).

136. For the empirical findings and the study series on corporate conflict management in Germany, see Ulla Glaesser, *Corporate Mediation in Germany*, 14 EUR. CO. L. J. 81–85 (2017).

137. *Id*. at 84.

138. *Id.*

139. HOPT & STEFFEK, *supra* note 2, at 25.

140. Meidanis Seremetatiks, *Mediation in Greece*, GREEK LAW DIGEST (May 3, 2019), http://www.greeklawdigest.gr/topics/alternative-dispute-resolution-mediation/item/306-mediation-in-greece.

141. Directive 2013/11/EU, of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, O.J. (L 165/63).

142. *Id.* at ¶ 4.

143. *Id.* at (L 165/64) ¶ 16.

144. Anagnostopoulou, *supra* note 11, at 987.

145. Regulation 524/2013, of the European Parliament and of the Council of 21 May 2013 on Online Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC O.J. (L 165/1).

disputes arising from online transactions.[146] The platform essentially accepts complaints from consumers against traders in all Member States. However, if a Member State's legislation allows traders to make complaints against consumers arising out of online transactions in the ODR platform, disputes should be solved only via that platform.

In 2019, the EU adopted Regulation 1150 on Promoting Fairness and Transparency for Business Users of Online Intermediation Services.[147] This Regulation applies to the following:

> [O]nline intermediation services and online search engines provided, or offered to be provided, to business users and corporate website users, respectively, that have their place of establishment or residence in the Union and that, through those online intermediation services or online search engines, offer goods or services to consumers located in the Union, irrespective of the place of establishment or residence of the providers of those services and irrespective of the law otherwise applicable.[148]

Providers of online intermediation services should facilitate mediation by identifying at least two public or private mediators with whom they are willing to engage.[149] Article 12, which regulates the mediation itself, states that "any attempt to reach an agreement through mediation on the settlement of a dispute in accordance with this Article shall not affect the rights of the providers of online intermediation services and of the business users concerned to initiate judicial proceedings at any time before, during or after the mediation process."[150]

After regulating the consumer complaints against traders, the next step of the EU Commission should be the extension of mediation frameworks of ODR for business–to–business commercial disputes.

IV. THE TURKISH MEDIATION SYSTEM: A COMPARATIVE ANALYSIS

In recent years, the increase in the number of lawsuits filed in the court of first instance and high courts of a poorly–functioning judicial system has raised interest in mediation. In many ways, mediation has become a panacea of all the problems of the Turkish judicial system.[151] Mediation and other forms of ADR are considered to be an escape from contradictory court judgments that have taken place for quite a long time. However, the Turkish approach to mediation is not only against the rule of law and contradictory to the right to access justice, but also at odds with the general principles of mediation utilized elsewhere. Although statistics show that

146. *Id.* at ¶ 8.
147. Regulation 2019/1150, of the European Parliament and of the Council of 20 June 2019 on Promoting Fairness and Transparency for Business Users of Online Intermediation Services O.J. (L 186/57).
148. *Id.* at 1.
149. *Id.* at ¶ 40.
150. *Id.* at 12.
151. Idil Elveris, *Turkey: Mandatory Mediation is the New Game in Town*, KLUWER MEDIATION BLOG (Mar. 3, 2018), http://mediationblog.kluwerarbitration.com/2018/03/03/turkey-mandatory-mediation-new-game-town/.

Turkish mandatory mediation has curtailed formal litigation, particularly in labor disputes, it is the duty of government to make the judiciary system function and provide access to justice. Instead, the government has effectively delegated its powers to other institutions by activating new dispute resolution mechanisms.[152] In any case, mediation *has* relieved courts and judges.

The healthy functioning of mediation depends on the quality of the mediators. Mediators who joined the mediator registry between 2013 and 2017 number almost 10,000, and in November 2019, 5,000 mediators were certified with a written exam. The candidates are graduates of law schools with at least five years of professional experience and are trained in various Ministry of Justice programs.[153] If the Turkish system can choose eligible, impartial candidates—i.e., candidates that are fair to both parties and competent about the dispute—to act as mediators, it can increase the application of mediation within the country and improve the perception of justice among stakeholders. The impartiality of the mediator became more important after a new provision was added to the Mediation Code giving power to the mediator to recommend solutions about the dispute. Therefore, especially in the context of mandatory mediations regarding labor disputes, mediators should carefully consider the protection of employee rights.

One of the main obstacles in the system are the procedural rules regarding the meetings of parties. In most cases, mediators determine the date of the mediation meeting without giving the counter–party reasonable time to get prepared for the details of the dispute and evaluate the process.[154] As a result, procedural provisions drastically influence the effectiveness of mediation and should be revised to grant appropriate time for the opposing party to complete all necessary arrangements before the meeting. Ethical standards also factor into the need to avoid any kind of partial acts of mediators. In Turkish practice, some employers occasionally choose the same mediator for every case filed against him or her.[155] When there are repeat players, the impartiality of mediators is brought into question. Hence, there is a need for some detailed provisions imposing sanctions on mediators who act against ethical principles.

When the EU Directive and Turkish mediation regulations are compared, it is apparent that Turkish legislators distinctly and carefully assessed the provisions of the Directive, and both EU and the Turkish systems are in accordance with each other, even though the Directive regulates cross–border disputes. Turkish legislators follow the Italian System, which basically provides parties an immediate and effective dispute resolution method for mandatory mediation. Although Italy is the pioneer legal system regarding mandatory mediation, and Turkey followed Italian rules during the legislation process, the areas that are subject to mandatory mediation in Turkish law are not in accordance with the Italian system. Neither labor nor all the commercial disputes are in the scope of mandatory mediation in Italy. Therefore, the Turkish mandatory mediation system is unique among all continental European legal systems. After the establishment of proper mediation culture in Turkey, and the subsequent drop in the number of cases filed in litigation as a result of mandatory mediation, Turkey should consider adding the necessary

152. EKMEKCI, s*upra* note 43, at 110.

153. MEDIATION CODE 6325, *supra* note 14, at art. 20.

154. Rıza Gümbüşoğlu & Asena Aytuğ Keser, *Mandatory Mediation for Commercial Receivables*, GUN & PARTNERS (Dec. 27, 2018), https://gun.av.tr/mandatory-mediation-for-commercial-receivables/.

155. Elveris, s*upra* note 151.

amendments and returning to voluntary mediation. Even if mandatory mediation is permanently accepted in Turkish law, some monetary limits comparable to the German legal system should be introduced.

EU law accepted the ODR system for complaints of consumers against traders. However, in Turkey, only a partial ODR system has been applied. Therefore, required platforms should be established since consumer disputes seem to be the most appropriate area for mandatory mediation.

Nonetheless, the scope of mandatory mediation in Turkey only includes labor and commercial disputes, which will not be enough to noticeably reduce the workload of the judiciary system. Consequently, the Ministry of Justice is planning to extend mandatory mediation in the areas of consumer and family laws. Before extending the scope of mandatory mediation regulations and subjecting new *topics* of law to mandatory mediation, the necessary time should be given for the development and settlement of the mediation *procedure* in Turkey. For the good of the parties to future disputes, the failures of the system need to be corrected, the professionalism and experience of mediators should be improved, and a healthy mediation culture should be established.

V. CONCLUSION

Discrepancies in Turkish judicial decisions, heavy workload of courts, duration of lawsuits, national political situation, and developments regarding ADR methods in the EU law have forced legislators to regulate voluntary, then mandatory mediation in Turkey. The Mediation Code is generally in accordance with the EU Directive. Statistics show that the implementation of mandatory mediation, especially in labor disputes, is a big success.

Nevertheless, the procedural rules regulating the commencement and course of mediation need to be revised. Mediator impartiality and training are crucial to the success of the mediation process, particularly in commercial disputes. Therefore, it is time for standardization of training. Moreover, before extending the scope of mandatory mediation, necessary time should be given for the development and the settlement of the mediation procedure and culture in Turkey.

The recent Turkish approach to mediation is not only against rule of law and right to access justice, but also contrary to the general principles of mediation employed elsewhere. Although statistics show Turkish mandatory mediation curtailed the number of cases (particularly labor cases) filed in litigation, the government should not shirk its duty to the judiciary system and its subjects by way of delegating its powers to other institutions.

Turkey should consider adding the necessary amendments and returning to voluntary mediation as a dispute resolution mechanism after the establishment of proper mediation culture in Turkey and the resulting drop in litigation. Even if mandatory mediation is permanently accepted in Turkish law, some monetary limits that are comparable to the German legal system should be introduced.