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ALTERNATIVE DISPUTE RESOLUTION METHODS IN TURKISH LAW AND MEDIATION

One of the priority directions of legal reform at the present stage of development is the improvement of the system of application of alternative means of dispute resolution, designed to effectively and promptly ensure the resolution of disputes arising in civil law and related spheres of society in the process of building a democratic rule of law. To resolve the issues of the dispute, the subjects, the participants must come to a compromise in order to satisfy the requirements for each other. This issue is relevant for all countries of the world, which, to a greater or lesser extent, carry out transformations of civil justice systems for various periods of time. In this regard, it is obvious that today, both in developed and developing countries, significant experience has been formed and accumulated in reforming this area, which can form the basis of similar transformations in Turkey and significantly contribute to facilitating ongoing reforms by avoiding other people's mistakes and using mechanisms to obtain positive results.

Key words: reform, disputes, civil law, subject, mediation.

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Түрік құқығындағы дауларды шешудің балама әдістері және медиация

Дамудың қазіргі кезеңіндегі құқықтық реформаның басым бағыттарының бірі демократиялық құқықтық мемлекет құру процесінде азаматтық құқықта және қоғам өмірінің сабақтас салаларында туындайтын дауларды тиімді және жедел шешуді қамтамасыз етуге арналған дауларды шешудің балама құралдарын қолдану жүйесін жетілдіру болып табылады. Дау мәселелерін шешу үшін субъектілер, қатысушылар бір-біріне қойылатын талаптарды қанағаттандыру үшін ымыраға келуі керек. Бұл мәселе әлемнің барлық елдері үшін өзекті болып табылады, олар азды-көпті әртүрлі уақыт кезеңдерінде азаматтық сот ісін жүргізу жүйелерін қайта құруды жүзеге асырады. Осыған байланысты, бүгінгі таңда дамыған және дамушы елдерде Түркиядағы осындай өзгерістердің негізін құрайтын және басқа адамдардың қателіктерін болдырмау және оң нәтиже алу тетіктерін пайдалану арқылы жүргізіліп жатқан реформаларды жеңілдетуге айтарлықтай ықпал ететін осы саланы реформалаудың айтарлықтай тәжірибесі қалыптасып, жинақталғаны анық.

Түйін сөздер: реформа, даулар, азаматтық құқық, субъект, медиация.

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Альтернативные методы разрешения споров в турецком праве и посредничество

Одним из приоритетных направлений правовой реформы на современном этапе развития является совершенствование системы применения альтернативных средств разрешения споров, призванной эффективно и оперативно обеспечить разрешение споров, возникающих в гражданском праве и смежных сферах жизни общества в процессе построения демократического правового государства. Для разрешения вопросов спора субъекты, участники должны прийти к компромиссу, чтобы удовлетворить требования к друг другу. Этот вопрос является актуальным для всех стран мира, которые в большей или меньшей степени в течение различных по продолжительности периодов времени проводят преобразования систем гражданского судопроизводства. В этой связи очевидно, что на сегодняшний день как в развитых, так и в развивающихся странах сформирован

и накоплен значительный опыт реформирования данной области, который может лечь в основу аналогичных преобразований в Турции и существенно способствовать облегчению проводимых реформ за счёт избегания чужих ошибок и использования механизмов получения положительных результатов.

Ключевые слова: реформа, споры, гражданское право, субъект, медиация.

Introduction

The term “Alternative Dispute Resolution” or “ADR” implies a wide range of dispute resolution mechanisms that are alternative to the consideration of disputes in the courts.

This term can be used to refer to various dispute resolution mechanisms, ranging from negotiations to reach a settlement agreement (facilitated settlement negotiations), in which the parties to the dispute are encouraged to conduct direct negotiations before resorting to other legal dispute resolution mechanisms, and to arbitration, which can be very similar to litigation.

The system of alternative dispute resolution (ADR) is a set of tools and mechanisms that form the procedures for resolving and out-of-court settlement of disputes arising between the subjects of legal relations. At the same time, the ultimate goal of using APC is to resolve the conflict at the lowest cost for all its participants.

In this regard, the ADR system grows out of the correlation of three basic positions of conflict resolution in conflictology – power, rights and interests.

The position of power assumes that the interests of one side are suppressed due to the power advantage of the other side. It can be physical strength, numerical or technical superiority, finances or status, etc. This approach provides a quick solution to the problem and ensures the achievement of results.

The trial initially involves a confrontation between the parties and often further disrupts the relationship between them. Often, the issuance of a court decision does not mean a valid resolution of the conflict, but on the contrary, it can provoke its escalation. Not only the loser, but also the winning side is not satisfied with the result achieved.

The interest-based approach assumes that in order to resolve a dispute, the parties try to determine what was the basis for the dispute and, if possible, satisfy those interests that were infringed.

In the modern world, ADR is most common in commercial law, but in a number of countries these mechanisms are also used in civil proceedings. ARS are a less formal procedure compared to the

procedure for considering cases in courts, they allow to significantly relieve the judicial system, while resolving the conflict that has arisen.

The main prerequisites for the use of ADR are:

- the parties to the conflict have a desire to preserve the existing relations between them by resolving the dispute through negotiations,

- the legal framework for conflict resolution does not make it possible to resolve the conflict in such a way that the solution is final and satisfactory for all parties,

- there is a need to resolve the conflict by the least painful means due to the need to preserve or terminate long-term relationships (for example, in family conflicts, conflicts with neighbors, in partnerships, etc.),

- between the parties to the conflict have multiple procedures or the conflict is complex,

- the situation requires a high level of confidentiality or separate discussion between the parties,

- the conflict affects the interests of more participants than only the direct parties to the conflict in the judicial process,

- the need to reduce the costs of dispute resolution,

- the parties want to resolve the conflict less formally,

- the parties want to resolve the conflict faster.

The position of law works where there is an application of the law in court, arbitration or arbitration court, any instructions, regulations, rules. In addition, this approach may include exerting pressure using the procedure of enforcement proceedings, business traditions, professional and ethical standards. In recent years, various countries have been working to create a uniform mediation model that can be applied in international child abductions. These countries continue these activities through some of their organizations and create mediation projects in accordance with The Hague Child Abduction Convention. We can show examples of these projects as the Reunite Project in the United Kingdom (<https://www.reunite.org/>) and the MiKK project in Germany (<https://www.mikk-ev.de/>). Thanks to these projects, mediation in disputes related to child abduction and, in some

cases, online mediation we see that the process is being operated.

Indeed, it is obvious that there are numerous benefits of using technology in mediation⁹¹. Online mediation brings them closer to each other rather than putting a distance between the parties. Decoupling between the parties, online mediation brings them closer to each other. Considering that the distances are determined according to the personal location of the parties, online mediation will provide or offer electronic proximity to the parties instead of putting a distance between the parties. Dec. Thus, the existence of the parties in different countries as the subject of disputes related to international child abductions is geographical the distance can be eliminated with the contribution of online communication tools. It is natural that concerns arise when negotiations are conducted online. Due to these concerns, online mediation has been criticized from many angles.

Currently, the geographical distance between the countries where the parties are located decisively as it increases, it is seen that even those who are skeptical about the contribution of online communication tools take a step back in some cases⁹². Since the adoption of the Law on Mediation in Legal Disputes No. 6325 of 22/6/2012 in Turkish legislation, alternative dispute resolution methods, in fact, and when they find their place in practice, do not enter into any competition with state judicial authorities, do not act in the function of interference with the right to judicial proceedings, do not create such functions as an exception, they continue to act as a method of dispute resolution (Pekcanitez 2015). In this sense, the current state of alternative dispute resolution methods is a well-established procedure, since the State provides funds in various and flexible ways that accompany the judicial proceedings without hindering the judicial application, sometimes even at a certain level.

Thus, mediation, which is common in the framework of alternative dispute resolution methods, is sometimes an additional adjective in terms of the nature of dispute resolution. Another point of view related to this is that, as the main goal and area of best practice of alternative dispute resolution methods, the absence of public order creates the possibility of decommunization, especially the will of the parties, in which more disputes can be resolved between the parties without increasing the presence and disagreements, as well as without increasing the burden of the court (Pekcanitez 2015).

Thus, procedural activity is provided for in accordance with article 3/1 of the Law on Mediation

in Legal Disputes, in which the parties can freely apply to the mediator, as well as refuse him at will, as well as in accordance with article 5/1 of the Rules of the Law on Mediation in Legal Disputes. Another basic principle of mediation is equality. About this HUAC M.3/2 and the Law on Mediation in Legal Disputes

His ruling mentions that he has equal rights throughout the 5/2 process. In the doctrine of alternative dispute resolution methods, some authors recognize as "types of solutions". Somehow, if we sort them, it looks like this;

In the doctrine of alternative dispute resolution methods, some authors also recognize 'solution types 3'. Somehow, if we list them, it is as follows;

1. Negotiation
2. Unbiased preliminary assessment,
3. Detection or detection of cases,
4. Short hearing,
5. Mediation-Arbitration.

Negotiation

By observing a common interest, the negotiation is carrying out the necessary communications to obtain the maximum benefit at the request of the stakeholders through the persons representing the parties. Rather, when a certain result is reached, negotiations are available in all alternative dispute resolution methods.

It is understood that the parties meet directly or with the contribution of their representatives, and a third person cannot contribute to such a meeting.

Unbiased preliminary assessment

In order to achieve a solution to the dispute, the parties, by a third party independent at the beginning of the dispute, the formation and subsequent development kayidedece about him and reaching an agreement on the patrol carried out by the presidency on a third party objective and the method of envisioning experienced alternative dispute resolution neutral pre-assessment method says .This method provides information and documents submitted by the parties in fact, the emergence of the dispute, the development and the future situation of what kind of process should be followed and how it can be met with, presented by an expert in the evaluation and preparation of a report for resolution. For this reason, the two parties have a new perspective on the dispute and come to a decision about the direction and method that they should follow.

Detection or detection of cases

In the method of detection or detection of cases, the case detectorist listens to the information submitted by the parties, evaluates and analyzes them.

In addition, if additional information is required from the parties and witnesses, October conducts separate interviews, undertakes to deepen, research and study the problem, and at the end of the activity also keeps a report with or without recommendations and presents it to the interested parties.

Short hearing

A short trial, impartial and independent third-party with the participation of Representatives binding supplies won't find a solution or a solution in a way to improve the function of mismatch, it's a problem almost internalizing and privacy to further review and evaluation with emphasis on an alternative method of conflict resolution.

Mediation-Arbitration

There is an opinion that this method has a mixed structure. The peculiarity of this method, which includes both mediation and arbitration, is that the parties first apply to mediation, and if the mediation process does not achieve the desired expectation (if it does not bring success), the dispute will now proceed by arbitration to resolve the dispute. For this reason, "mediation-arbitration" is the definition of a system in which mediation and arbitration are applied together.

The person who acts as a mediator during the dispute may then become the person who decides on the dispute as an arbitrator.

Results

In this article, I wrote (AUC/ADR-Alternative Dispute Resolutions), it was understood that mediation as an Alternative Dispute Resolution method in Turkish Law is a voluntary procedure for the parties as a rule, it is not binding and does not eliminate its burden in the state judicial system and does not compete with it if it is not satisfied. Although in a short time, since the law No. 6325 HUK was adopted, it should be recognized that there is a new legal procedure that is developing even from day to day and decisively needs constant use among both real and legal persons. Although this process has been on the agenda in developed states since the 1960-1970 century, we can say that this system has developed quite rapidly in a very short time in Turkish law. At this time, the point I have emphasized is that alternative Dispute Resolution methods such as Negotiation, Impartial preliminary assessment, Determination or determination of cases, Short hearing, Mediation-Arbitration are evaluated during a dispute and contribute to the dispute resolution function. The main mediation is that

the AUC is the most effective and most widely functioning during this time.

Mediation is the provision of the necessary activities and communication by a third party to the opposing parties in order to offer their own solutions and their own production by bringing together the parties who encounter disputes, aiming to keep in touch and negotiate, to understand each other Decisively.

Thus, the ADR procedures in the current doctrine constitute the following benefits:

1. To calculate the time of the parties with court costs during the case.
2. To contribute in reducing the workload of the court.
3. Increase the confidence of the parties in the justice system.
4. To provide appropriate solutions on the requests of individuals.
5. Continuation of values in business contacts and relations of the parties engaged in other relations.
6. To introduce to society the existence of practices in dispute resolution or a more efficient alternative to litigation.

It is an important development that some statements about the operation of the online mediation process are included in the Guide. Although it is not detailed, the fact that the issue is addressed under many headings and the use of this route is considered as an option depending on the nature of the concrete event shows that an approach that encourages the central authorities of the states to use this route has been adopted in the Manual. Considering the statements made on this subject, the Guide recommends that the parties meet face-to-face in the same environment, if possible, as many expert mediators have indicated references.

However, it concluded that if it is "appropriate and impossible" for both parties to be physically present at the mediation session, the possibility of long-distance, i.e. online, mediation or indirect mediation may also be considered.

We can understand the expression "if it is not appropriate and possible" for both parties to be physically present at a mediation session contained in the guide as follows: Face-to-face mediation may not be "appropriate" in terms of time or expense, as well as in terms of the circumstances of the concrete event it may not be "possible". That is to say, Mediation negotiations can be carried out by electronic mail, video call over the Internet, phone call, so that the process is more it will progress quickly. The rapid progress of the process will eliminate the uncertainty associated with the child's

condition. If the parties urgently agree on the return of the child to his habitual residence, the child will be able to return without achieving social integration with the place where he was abducted, or if the parties agree that he will stay in that place, the child will be able to achieve social integration more quickly and establish his habitual residence in the country where he was abducted. Shortening the process by

using online mediation instead of extending the process with face-to-face negotiations, it will serve to protect the superior benefit of the child, which is also the main purpose of the contract.

In the online mediation process, additional cost items such as accommodation, meals, domestic transportation arising from the face-to-face mediation process are not included.

References

<https://www.reunite.org/>

<https://www.mikk-ev.de/>

Kucinski, Using Technology in Mediating, s. 313 vd. 92 Bkz. Cunha, s. 173; Martin, s. 400; Van Arsdale, Suzanne: "User Protection in Online Dispute Resolution", Harv. Negot. L. Rev. 2015, vol. 21, no. 1, s. 110; Bu konuda

Pekcanitez H., s. 15; Tanrıver S., Sosyolojik Bir Bakış, s. 821 vd; Tanrıver S., Alternatif, s.152; Özekes M., Pekcanitez, H. Usûl, C.III s. 2806; Özekes M., Arabulucu, s. 42; Özbek S., Alternatif, s.191 vd.; Özbek S., Adalete Ulaşma, s. 137 vd.; Kaplan Y., s.116; Kekeç K., s.13; Taşpolat Tuğsavul, s. 24; Ildır G., s. 26 vd.; Biçkin İ., s. 35.

Pekcanitez H., s.15; Tanrıver S., Sosyolojik Bir Bakış, s.822; Özekes M., Arabulucu. s. 42. Yazıcı Tıktık, s. 6;

Ekmekçi Ö., Özekes M., Atalı M., Seven V., s.8.

Ekmekçi Ö., Özekes M., Atalı M., Seven V.: Hukuk Uyuşmazlıklarında Arabuluculuk, Bası, İstanbul 2019.

Kekeç E.K.: Arabuluculuk Yoluyla Uyuşmazlık Çözümünde Temel Aşamalar ve Taktikler, 3 B., Ankara 2016.

Özbek S.: Alternatif Uyuşmazlık Çözümü, Ankara, 2004.

Ildır G.: Alternatif Uyuşmazlık Çözümü, Ankara, 2003.

Pekcanitez H.: Alternatif Uyuşmazlık Çözümleri (HPD., 2005/5, s.12-16).

Tanrıver S.: Medeni Usûl Hukuku, C. I,2. B, Ankara 2018. (Tanrıver-Usûl).

HUAK: 6325 Sayılı Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu.