ACCREDITATION OF THE MEDIATOR IN TERMS OF TURKISH LAW AND ITS ASSESSMENT IN TERMS OF THE UN SINGAPORE CONVENTION*

Türk Hukuku Açısından Arabulucunun Akreditasyonu ve BM Singapur Sözleşmesi Açısından Değerlendirilmesi

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ABSTRACT

The work initiated by the United Nations (UN) to harmonise international commercial mediation efforts and make their cross-border effects predictable has materialized both as a convention and as a model law.

The aim of this article is to compare the accreditation of mediators for the execution of settlement agreements under both the UN Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention)[1] and Turkish Law. As the practices of competent authorities regarding the implementation of the Singapore Convention have not yet been established, both in our country and in other participating nations, our objective is to provide a forward-looking perspective within the microcosm of our chosen research area.

In the first section of our study, we will examine the process of entry into force of the UN Singapore Convention for Türkiye. The second section will explore the qualifications required for mediators under Turkish Law. In the third section, we will delve into the qualifications necessary for mediators under the Convention. Finally, the fourth section will focus on the prioritized implementation and interpretation of the Convention due to accession of Türkiye. Our study will be concluded with a results

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1 It will be briefly referred to as the 'Singapore Convention' in this article.

section containing our findings and recommendations based on our national and international literature research.

Keywords: Mediation, registry of mediators, accreditation, settlement agreement, enforcement of settlement agreements, Singapore Convention.

ÖZ

Milletlerarası ticari arabuluculuk çalışmalarını yeknesaklaştırmak ve sınır ötesi etkilerini öngörülebilir kılmak amacıyla Birleşmiş Milletler (BM) tarafından başlatılan çalışma hem bir sözleşme hem de bir model kanun olarak somutlaşmıştır.

Bu makalenin amacı Arabuluculuk Sonucunda Yapılan Milletlerarası Sulh Anlaşmaları Hakkında Birleşmiş Milletler Singapur Sözleşmesi'ne ve Türk Hukukuna göre sulh anlaşmalarının icrası konusunda arabulucunun akreditasyonunu karşılaştırmaktır. Hem ülkemizde hem de diğer taraf ülkelerde Singapur Sözleşmesi'nin uygulanması konusunda yetkili makam uygulamalarının henüz şekillenmediği bu aşamada mikro alan olarak belirlediğimiz çalışma konumuzda bir projeksiyon oluşturmak hedeflenmektedir.

Çalışmamız dört bölümden oluşmaktadır; 1. bölümde 'BM Singapur Sözleşmesi ve Türkiye yönünden yürürlüğe girme süreci', 2. bölümde 'Türk Hukuku açısından arabulucu olma koşulları', 3. bölümde 'Singapur Sözleşmesi açısından arabulucu olma koşulları' ve 4. bölümde 'Türkiye'nin taraf olması nedeniyle Singapur Sözleşmesi'nin öncelikle uygulanması ve yorumu' konuları incelenecektir. Çalışmamız, ulusal ve uluslararası literatür araştırmalarımızın sonucunda vardığımız görüş ve önerilerin yer aldığı sonuç kısmıyla tamamlanacaktır.

Anahtar Kelimeler: Arabuluculuk, arabulucular sicili, akreditasyon, sulh anlaşması, sulh anlaşmalarının icrası, Singapur Konvansiyonu

INTRODUCTION

Along with the impact of globalisation, companies have evolved into multinational enterprises conducting operations in different countries and continents.[1] However, despite this rapid development, today there are no regulations such as International Trade Law or International Code of Obligations regarding the contracts that form the basis of international commercial relations.[2] Nor is there an International Trade Court to resolve issues.[3] The absence of an objective legal framework in international trade increasingly emphasizes the importance of the

1 May Olivia Silverstein, 'Introduction to International Mediation and Arbitration: Resolving Labor Disputes in the United States & the European Union' (2011) 1(1) Am U Lab & Emp L F 101, 102.

2 Cemal Şanlı, *Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları* (7th edn, Beta 2019) 10.

3 ibid.

will of the parties as per the contracts among them.[4] Recently, the concept of mediation has gained popularity as a preferred and amicable resolution method in international disputes.[5] The advantage of mediation is that it not only serves the function of resolving disputes, but it also plays a crucial role in the sustainability and development of international trade.

In support of this notion, Ware & Cole lists arbitration, negotiation, and mediation as the three major methods of alternative dispute resolution.[6] In the post-World War II era, arbitration, as a form of non-litigation dispute resolution, gained a considerable amount of attention; however, as time approached the 21st century, rising costs, delays, and procedural formalities have led to a search for other methods.[7]

I. THE UN CONVENTION OF SINGAPORE AND THE PROCESS OF ITS IMPLEMENTATION IN TÜRKİYE

The United Nations Commission on International Trade Law (UNCITRAL), a commission of the United Nations (UN) General Assembly,[8] is organised to ensure the representation of various states with different legal systems and varying degrees of economic development across different geographical regions. Among its many tasks, the primary mission of UNCITRAL is to regulate and modernise international trade through the harmonisation and unification of the national laws of states.[9] In this context, UNCITRAL serves as the legal backbone of the UN in the field of international trade.[10] The Singapore Convention is structured within UNCITRAL, and the history of its formation will be briefly summarized below.

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4 ibid 11.

5 Gülin Güngör, *Türk Milletlerarası Özel Hukuku* (2nd edn, Yetkin 2021) 328.

6 Stephen J. Ware and Sarah Rudolph Cole, 'Introduction: ADR in Cyberspace' (2000) 15(3) OHIO ST J ON DisP RESOL 589, 590.

7 Necla Öztürk, 'Arabuluculuğun Milletlerarası Özel Hukuk Boyutu: Genel Bakış' (2015) BATIDER, 31(2) 203, 203; Mediation process was initiated in an international dispute amounting to one billion US dollars, which could not be resolved for seven years and arbitration proceedings were ongoing, and it was concluded with a settlement in a short period of 3.5 days. The commercial dispute between Posco (South Korea) & FuelCell Energy (USA) was publicised since FuelCell Energy is traded on the US Stock Exchange. See Ng Xin Yi, 'Singapore Convention Week: Insights into a US$1B International Dispute' (simc.com.sg) <https://simc.com.sg/blog/2022/09/07/insights-into-a-us1b-international-dispute/> accessed 27 July 2023.

8 United Nations Commission On International Trade Law <https://uncitral.un.org/> accessed 16 July 2023.

9 Nadja Alexander, Shouyu Chong and Vakhtang Giorgadze, *The Singapore Convention on Mediation: A Commentary* (2nd edn, Wolters Kluwer 2022) para 0.07.

10 Corinne Montineri, 'The United Nations Commissions on International Trade Law (UNCITRAL) and the Significance of the Singapore Convention on Mediation' (2019) 20(4) Cardozo J Conflict Resol 1023, 1023-24.

Upon the proposal[11] made by the Government of the United States of America, the UN Commission on International Trade Law commissioned Working Group II in 2014 to carry out a study similar to the New York Convention on the enforcement of mediation settlement agreements.[12] Chaired by Natalie Y. Morris Sharma, Working Group II commenced its work, and after an intensive period of activity, successfully completed the Singapore Convention in 2018.[13] The result of the efforts by the UN, aiming to uniformise the work of international commercial mediation and to make its cross-border impacts predictable, has been consolidated as a convention and as a model law.[14]

Following extensive discussions and research, on 25 June 2018, during its 51st session, UNCITRAL unanimously approved the 'United Nations Convention on International Settlement Agreements Resulting from Mediation'.[15] Commonly

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11 The UNCITRAL work programme is established upon proposals from states or organisations; Hal Abramson, 'The New Singapore Mediation Convention: The Process and Key Choices' (2019) 20(4) Cardozo J Conflict Resol 1037, 1038; The proposal to establish an international convention has also been a topic of discussion in the literature. See: S. I. Strong, 'Beyond International Commercial Arbitration? The Promise of International Commercial Mediation' (2014) 45 Wash U J L & Pol'y 11, 11ff; There have also been critics of the proposal. Some commentators have labelled the proposal as the 'Mediators Full Employment Act'. See: Deborah Masucci, 'From Skepticism to Reality - The Path to Convention for the Enforcement of Mediated Settlements' (2019) 20(4) Cardozo J Conflict Resol 1123.

12 'Settlement of Commercial Disputes: Enforceability of Settlement Agreements Resulting from International Commercial Conciliation/Mediation' (27 November 2014) UN Doc A/CN9/WGII/WP187; Ergun Özsunay, 'Yeni Kabul Edilen Singapur Sözleşmesi'ne Genel Bakış: Arabuluculuk Anlaşmalarının İcra Edilebilirliği' (Singapur Sözleşmesi'nin Arabuluculuk Üzerine Yansımaları Sempozyumu, İstanbul, 56 Aralık 2019) 31, 32 <https://adb.adalet.gov.tr/Resimler/SayfaDokuman/1412021155535Singapur%20S%C3%B6zle%C5%9Fmesi%E2%80%99nin%20Arabuluculuk%20%C3%9Czerine%20Yans%C4%B1malar%C4%B1%20Sempozyumu.pdf> accessed 30 December 2022; Banu Şit Köşgeroğlu, *Milletlerarası Ticari Uyuşmazlıklarda Arabuluculuk Sonunda Varılan Anlaşmaların Singapur Konvansiyonu Çerçevesinde Taraf Devletlerde İcra Edilebilirliği* (Adalet, 2020) 25; Xiantao Wen (with an introduction by Susan Finder), 'Comparative Analysis at the Singapore Convention in Light of the New York and Hague Choice of Court Conventions' in Shahla Ali (ed), *Comparative and Transnational Dispute Resolution* (Routledge 2023) 166.

13 Natalie Y. Morris Sharma is regarded as the architect of the Singapore Convention in the literature due to her successful management and studies. See: Ergun Özsunay, 'Yeni Kabul Edilen Singapur Sözleşmesi'ne Genel Bakış: Arabuluculuk Anlaşmalarının İcra Edilebilirliği' (Singapur Sözleşmesi'nin Arabuluculuk Üzerine Yansımaları Sempozyumu, İstanbul, 56 Aralık 2019) 31, 32 <https://adb.adalet.gov.tr/Resimler/SayfaDokuman/1412021155535Singapur%20S%C3%B6zle%C5%9Fmesi%E2%80%99nin%20Arabuluculuk%20%C3%9Czerine%20Yans%C4%B1malar%C4%B1%20Sempozyumu.pdf> accessed 30 December 2022.

14 Ergun Özsunay, *Arabuluculuk Sonucunda Yapılan Uluslararası Sulh Anlaşmalarının İcrası Hakkında Singapur Sözleşmesi ve UNCITRAL Model Kanunu* (2nd edn, Aristo 2021) 5; Alexander, Chong and Giorgadze (n 10) para 0.52.

15 Edna Sussman, 'The Singapore Convention Promoting the Enforcement and Recognition of

known as the 'Singapore Convention',[16] it was officially adopted by the UN General Assembly through Resolution 73/198 on 20 December 20th 2018.[17]

The Convention aims to provide a uniform recognition and enforcement mechanism for international mediation settlement agreements, a demand long-sought by practitioners and academics alike.[18] Considered a reform-oriented development, the Singapore Convention was opened for signature on 7 August 2019. The signing ceremony witnessed the participation of representatives from 70 countries, with a total of 46 states including Türkiye eventually signed the Convention. Among the signatories are the world's two largest economies, the United States and China, along with three of Asia's largest four economies - China, India, and South Korea. As of the date of our completion of this study, 57 countries[19] have signed the Singapore Convention, and 14 countries[20] have ratified it. It is worth noting that international treaties come into force not upon signing but upon ratification, which is set as six months in the Singapore Convention.[21] With the submission of the third instrument of ratification (internal ratification process of Singapore, Fiji, and Qatar), the Singapore Convention came into

International Mediated Settlement Agreements' (2018) 3 ICC Dispute Resolution Bulletin 42, 43; Sibel Özel, 'Arabuluculuk Sonucunda Yapılan Milletlerarası Sulh Anlaşmaları Hakkında Birleşmiş Milletler Sözleşmesi: Singapur Konvansiyonu' (2019) 25(2) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi (Prof. Dr. Ferit Hakan Baykal Armağanı) 1190, 1194.

16 In our study, it will be referred to as the 'Singapore Convention', or 'Convention' in short.

17 UNGA Res 73/198 (20 December 2018) UN Doc A/RES/73/198.

18 Edna Sussman, 'The Singapore Convention Promoting the Enforcement and Recognition of International Mediated Settlement Agreements' (2018) 3 ICC Dispute Resolution Bulletin 42, 54; The Singapore Convention has universal potential for the enforceability of mediated settlement agreements in international commercial disputes. See: Miglė Žukauskaitė, 'Enforcement of Mediated Settlement Agreements' (2019) 111 Teisė 205, 214.

19 In alphabetical order; Afghanistan, Armenia, Australia, Belarus, Benin, Brazil, Brunei, Chad, Chile, China, Democratic Republic of the Congo, Colombia, Congo, East Timor, Ecuador, Eswatini, Fiji, Gabon, Georgia, Ghana, Grenada, Guinea-Bissau, Haiti, Honduras, India, Iraq, Iran, Israel, Jamaica, Japan (direct accession), Jordan, Kazakhstan, Laos, Macedonia, Malaysia, Maldives, Mauritius, Montenegro, Nigeria, Palau, Paraguay, Philippines, Qatar, Rwanda, Samoa, Saudi Arabia, Serbia, Sierra Leone, Singapore, South Korea, Sri Lanka, Türkiye, Uganda, Ukraine, United Kingdom, United States of America, Uruguay, Venezuela.

20 In alphabetical order; Belarus, Ecuador, Fiji, Georgia, Honduras, Japan, Kazakhstan, Qatar, Nigeria, Sri Lanka, Saudi Arabia, Singapore, Turkiye, Uruguay.

21 Art 14/(1) of the Singapore Convention; Elisabetta Silvestri, 'The Singapore Convention on Mediated Settlement Agreements: A New String to the Bow of International Mediation' (2019) 2(3) Access to Just E Eur 5, 6; Sibel Özel, 'Arabuluculuk Sonucunda Yapılan Milletlerarası Sulh Anlaşmaları Hakkında Birleşmiş Milletler Sözleşmesi: Singapur Konvansiyonu' (2019) 25(2) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi (Prof. Dr. Ferit Hakan Baykal Armağanı) 1190, 1208.

force on 12 September 2020.[22]

Türkiye was among the first countries to sign the UN Singapore Convention on 7 August 2019, when it was opened for signature. It has not deposited any reservations regulated by the Article 8 of the Convention. The ratification of 'United Nations Convention on International Settlement Agreements Resulting from Mediation' is found eligible by Law No. 7282[23] and approved by the Presidential Decree No. 3866 dated 21 April 2021. The effective date of the Convention was determined to be 11 April 2022.[24] Türkiye submitted its instrument of ratification to the United Nations Secretariat on 11 October 2021. Pursuant to Article 14 of the Convention, Türkiye became a party to the Convention on 11 April 2022, six months after the date of deposit.

The Singapore Convention is a multilateral treaty that provides an effective, uniform and consistent framework for the cross-border circulation of mediation settlement agreement documents concerning the resolution of international commercial disputes.[25] Beyond being a mere instrument for the enforceability of settlement agreements resulting from mediation, the Singapore Convention is designed as a springboard for mediation in the dispute resolution arena.[26] The Convention introduced a functional approach to recognition and enforcement.[27] Even if specific phrases such as recognition and enforcement are not used, their legal effects are detailed in the Convention.[28] In all member states of the Convention, the fulfilment of the settlement agreement concluded as a result of mediation is guaranteed by the mechanisms to be established in the competent state institutions. The Singapore Convention does not allow for *double exequatur* (dual enforcement), which would defeat the purpose of creating an effective and expedited enforcement mechanism.[29]

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22 Josèphine Hage Chahine and others, 'The Acceleration of the Development of International Business Mediation after the Singapore Convention' (2021) 32(4) European Business Law Review 769, 771; Alexander, Chong and Giorgadze (n 10) para 0.24.

23 Law No 7282, Date of adoption: 25 February 2021 (see Official Gazette of the Republic of Türkiye RG 11.03.2021/31420); Presidential Decree, No 3866 (RG 22.04.2021/31462).

24 Presidential Decree, No 5235 (RG 25.02.2022/31761).

25 Alexander, Chong and Giorgadze (n 10) para 0.01.

26 ibid para 0.34.

27 Natalie Y. Morris Sharma, 'Panel speech' (Singapur Sözleşmesi'nin Arabuluculuk Üzerine Yansımaları Sempozyumu, İstanbul, 5-6 Aralık 2019) 33, 36 <https://adb.adalet.gov.tr/Resimler/SayfaDokuman/1412021155535Singapur%20S%C3%B6zle%C5%9Fmesi%E2%80%99nin%20Arabuluculuk%20%C3%9Czerine%20Yans%C4%B1malar%C4%B1%20Sempozyumu.pdf> accessed 30 December 2022.

28 ibid.

29 Mustafa Serdar Özbek, *Alternatif Uyuşmazlık Çözümü* (5th edn, Yetkin 2022) 883; Alexander, Chong and Giorgadze (n 10) para 0.46; Sibel Özel, 'Arabuluculuk Sonucunda

In summary, the purpose of the Convention is to eliminate uncertainties regarding how a solution achieved through mediation in different countries will be recognized and enforced, thus promoting predictability and encouraging the use of mediation. It remains a subject of curiosity how much the Convention will enhance the culture of consensus in the field of international trade law and to what extent it will contribute to the revitalization of international trade.

II. CONDITIONS FOR BECOMING A MEDIATOR UNDER TURKISH LAW

Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu No. 6325 (Code on Mediation in Legal Disputes, hereinafter referred as 'Mediation Code', or briefly as the 'Code'), which is among the legislative activities required by the harmonisation process with the European Union acquis, entered into force on 22 June 2013 and introduced mediation as a new and alternative dispute resolution method to the Turkish Legal System. In Purpose and Scope Article 1/(2) of the Mediation Code, it has been decided that mediation would be applicable to private law disputes arising from transactions and actions over which parties could freely dispose of, including disputes with foreign elements. The Regulation on the Mediation Code came concurrently into force on 22 June 2013.

Article 2/(1)(a) of the Mediation Code defines a mediator as a real person who carries out mediation activities and is registered in the registry of mediators of the Ministry of Justice.[30] Article 20 of the Mediation Code outlines the prerequisites for registration in the registry of mediators, including being a Turkish citizen,[31] being a graduate of a law faculty and having a certain period

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Yapılan Milletlerarası Sulh Anlaşmaları Hakkında Birleşmiş Milletler Sözleşmesi: Singapur Konvansiyonu' (2019) 25(2) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi (Prof. Dr. Ferit Hakan Baykal Armağanı) 1190, 1195.

30 Serhat Sarısözen, 'Hukuk Uyuşmazlıklarında Arabuluculuk Kanun Tasarısının Getirdikleri, İcra Edilebilirlik Belgesi ve Arabuluculuğun Avukatın Tekel Hakkında Aykırılık Oluşturup Oluşturmadığı Sorunu' (2011) 15(1-2) EÜHFD 255, 260; Ömer Ekmekçi, Muhammet Özekes and Murat Atalı, *Hukuk Uyuşmazlıklarında İhtiyari ve Zorunlu Arabuluculuk* (Onikilevha 2018) 52.

31 Foreigners will not be able to mediate within the scope of the Mediation Code. See: Elif Kısmet Kekeç, *Arabuluculuk Yoluyla Uyuşmazlık Çözümünde Temel Aşamalar ve Taktikler* (3rd edn, Adalet 2016) 113; The capacity of the mediator to be a mediator is determined according to his national law. See: Güven Yarar, *Milletlerarası Özel Hukukta Arabuluculuk* (Onikilevha 2019) 133; Since the requirement of being a Turkish citizen is sought in the Code on Mediation in Legal Disputes, it does not seem possible for blue and turquoise card holders to become mediators. See: Güven Yarar, *Milletlerarası Özel Hukukta Arabuluculuk* (Onikilevha 2019) 133 footnote 376; If the mediator is a foreign national, there will be no mediation activity within the scope of the Mediation Code. See: Ezgi Kara, 'Milletlerarası Özel Hukuk Açısından Arabuluculuk' (Master's Thesis, Yeditepe Üniversitesi 2021) 94; Since the characteristic performance obligor of the mediator agreement will be the mediator,

of seniority in the profession,[32] not being convicted of crimes defined in the law, not being associated or affiliated with terrorist organisations, completing mediation training, being a real person[33] and being successful in the written exam[34] conducted by the Ministry of Justice.[35]

According to Article 6/(1) of the Mediation Code, 'Mediators registered in the registry have the right to use the title of mediator and the powers conferred by this title'. As stated in the rationale of Article 6,[36] parties can agree on a person who is not registered in the registry and has not received relevant training as a mediator on an ad hoc basis. However, this activity, conducted in accordance with the wishes of the parties, will not grant that person the title of mediator, nor will it confer the authorisations specified in the law. To be able to use the title of mediator and exercise the rights and powers associated with it, a person must be registered in the mediator registry.

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the law of the country where the workplace of the mediator is located will be taken as basis. See: Ezgi Kara, 'Milletlerarası Özel Hukuk Açısından Arabuluculuk' (Master's Thesis, Yeditepe Üniversitesi 2021) 94; According to Tanrıver, the reason why the performance of the mediation activity is exclusively reserved for Turkish citizenship is that the mediator's duty is associated with public service. See: Süha Tanrıver, *Hukuk Uyuşmazlıkları Bağlamında Arabuluculuk* (2nd edn, Yetkin 2022) 72; According to Article 6/(1) of İSTAC (İstanbul Tahkim Merkezi), 'Except the disputes consisting of a foreign element, the Mediators are persons chosen or appointed by the Board among the real persons registered to the mediation registry of the Ministry of Justice in order to serve for the resolution of the dispute.' <https://istac.org.tr/ISTAC-ARABULUCULUK-KURALLARI-20151026.pdf> accessed 27 March 2023; According to Article 70 of the Constitution of the Republic of Türkiye, 'Every Türkish citizen has the right to enter the public service'.

32 Süleyman Dost, 'Mediation for Disputes in Private Law in Turkey' (2014) 4(10) IJ-ARBSS 81, 96 <http://dx.doi.org/10.6007/IJARBSS/v4-i10/1210> accessed 22 July 2023; Güven Yarar, *Milletlerarası Özel Hukukta Arabuluculuk* (Onikilevha 2019) 134; For the view in the literature that the requirement of graduating from a law faculty to become a mediator should be abolished, see Ahmet M. Kılıçoğlu, *Arabuluculuk Sözleşmeleri* (3rd edn, Turhan 2022) 50; Mediation, which is one of the alternative dispute resolution methods, can also be performed by persons with different professional qualifications such as sociologists and psychologists in various countries. See: Michal Malacka, 'The Singapore Mediation Convention and International Business Mediation' (2023) 22(2) ICLR 179, 181.

33 Güven Yarar, *Milletlerarası Özel Hukukta Arabuluculuk* (Onikilevha 2019) 134; Ezgi Kara, 'Milletlerarası Özel Hukuk Açısından Arabuluculuk' (Master's Thesis, Yeditepe Üniversitesi 2021) 98; According to the Turkish Legal System, it is not possible for legal entities to be mediators. See: Ahmet M. Kılıçoğlu, *Arabuluculuk Sözleşmeleri* (3rd edn, Turhan 2022) 50.

34 There is no written examination requirement for law school graduates with 20 years of seniority in the profession.

35 The conditions for becoming a mediator and the quality of mediation training were the most criticised issues during the draft of the Code on Mediation in Legal Disputes. See: Malike Polat, *Milletlerarası Usul Hukukunda Arabuluculuk* (Yetkin 2010) 73.

36 <www5.tbmm.gov.tr/sirasayi/donem24/yil01/ss233.pdf> accessed 25 July 2023.

The rationale of Article 19 of the Mediation Code clarifies that the purpose of the registry of mediators is to regulate the use of the title of mediator and the powers arising from this title, as well as to make it possible to supervise mediators.[37] The Code primarily envisions the coordination of mediation-related institutions and organizations under the Department of Mediation, within the Directorate General for Legal Affairs, Ministry of Justice of Türkiye.[38]

Since the mediation activity carried out by a mediator not registered in the Turkish registry of mediators cannot be considered within the scope of the Mediation Code, the mediator and the parties will not have legal rights and obligations.[39] This is because, according to Turkish Mediation Code, mediators are obliged to register in the registry of mediators.[40] However, there is no local or higher court decision yet regarding the legal and criminal liabilities and consequences of conducting mediation without being registered in the registry or after being delisted from it.[41]

In Türkiye, facilitative mediation was initially adopted in the legislation. Later, the phrase 'capable of providing a solution in case the parties cannot reach a resolution' was added, and the powers of mediators were expanded to facilitate evaluative mediation.[42] The issue of whether evaluative mediation has been fully adopted or not is still a subject of debate in the literature.[43] Pursuant

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37 ibid.

38 Ömer Ekmekçi, Muhammet Özekes and Murat Atalı, *Hukuk Uyuşmazlıklarında İhtiyari ve Zorunlu Arabuluculuk,* (Onikilevha 2018) 39; Süha Tanrıver, *Hukuk Uyuşmazlıkları Bağlamında Arabuluculuk* (2nd edn, Yetkin 2022) 186; Article 19/(1) of the Code on Mediation in Legal Disputes states that 'The Department shall keep a register of persons authorised to mediate in private law disputes. The information regarding the persons included in this register shall also be announced electronically by the Department.'

39 Ferhat Büyükay, *Arabuluculuk Anlaşma Belgesi ve İcra Edilebilirlik Şerhi* (Adalet 2018) 72; Orhan Dür, *Arabuluculuk Faaliyeti ve Arabulucuların Hak ve Yükümlülükleri* (2nd edn, Adalet 2018) 340 footnote 150; Ezgi Kara, 'Milletlerarası Özel Hukuk Açısından Arabuluculuk' (Master's Thesis, Yeditepe Üniversitesi 2021) 30.

40 Elif Kısmet Kekeç, *Arabuluculuk Yoluyla Uyuşmazlık Çözümünde Temel Aşamalar ve Taktikler* (3rd edn, Adalet 2016) 113; Orhan Dür, *Arabuluculuk Faaliyeti ve Arabulucuların Hak ve Yükümlülükleri* (2nd edn, Adalet 2018) 453ff; Özlem Bora, *Arabuluculuk Sözleşmesi* (Turhan 2020) 89; Ezgi Kara, 'Milletlerarası Özel Hukuk Açısından Arabuluculuk' (Master's Thesis, Yeditepe Üniversitesi 2021) 30; Ahmet M. Kılıçoğlu, *Arabuluculuk Sözleşmeleri* (3rd edn, Turhan 2022) 51.

41 Orhan Dür, *Arabuluculuk Faaliyeti ve Arabulucuların Hak ve Yükümlülükleri* (2nd edn, Adalet 2018) 464.

42 Özlem Bora, *Arabuluculuk Sözleşmesi* (Turhan 2020) 89.

43 Evaluative mediators clarify the weaknesses and strengths of the parties and encourage the parties to make assessments that are more realistic. See: Christopher W. Moore, *The Mediation Process* (4th edn, Jossey-Bass 2014) 52; Bektaş Kar, İş Yargılaması Usulü (expanded 2nd edn, Yetkin 2018) 137; According to Dür, A transition has been made from the interest-based

to paragraph 17/(6) of the Regulation on the Mediation Code, the mediator is allowed to propose a solution based on interests only, not on rights. In this regard, it is difficult to assert that a fully evaluative mediation model has been adopted. It can be said that Mediation Code embraces a limited evaluative mediation model.[44]

According to Turkish law, a mediator must be impartial, meaning they should be equally distant from the disputing parties, not have interests that could compromise their neutrality, and not engage in discussions with one party without the knowledge of the other party.[45] In alignment with the mediation system of Türkiye and its social and cultural values, *Türkiye Arabulucular Etik Kuralları* (Turkish Mediation Code of Ethics, hereinafter referred as 'Code of Ethics') have been established and published.[46] These ethics principles include obligations to uphold equality, the right to make one's own decision, impartiality, avoidance of interest conflicts, ensuring the quality of the process, performing duties diligently, confidentiality, professional competence, the use of the title, advertising and promotion, and requesting fees and other expenses for mediation services, and the development of mediation practices In our opinion, the mediator's obligation to inform, regulated in Article 2/(3) of the Code of Ethics, includes the obligation to disclose whether the mediator is registered or not.

Article 7 of Code of Ethics regulates professional competence, and according to paragraph 7/(3), 'Knowledge and skills acquired through education, mediation experience, awareness of gender, socio-economic and cultural differences are important elements necessary for the professional competence and development of a mediator.' The issue of professional competence is not regulated in the Mediation Code or its Regulation, and no reference is made to the Code of Ethics. While criteria such as professional seniority, mediation training, and passing a written exam are among the registration requirements for the mediator

passive mediation approach to the rights-based evaluative active mediation process. See: Dür (n 42) 23-24; Bora (n 43) 28; Although various mediation models potentially fall within the definition of mediation described in Article 2/(3) of the Singapore Convention, the element of non-imposition of a third party solution is decisive here. See: Alexander, Chong and Giorgadze (n 10) 159 footnote 70.

44 Leyla Akyol Aslan, '6325 Sayılı Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu'nun 15'inci Maddesi ile Arabulucunun Çözüm Önerisi Getirebilmesine Olanak Sağlayan Yeni Düzenlemenin Değerlendirilmesi' (2018) 13(145) Terazi Hukuk Dergisi 29, 38.

45 Elif Kısmet Kekeç, *Arabuluculuk Yoluyla Uyuşmazlık Çözümünde Temel Aşamalar ve Taktikler* (3rd edn, Adalet 2016) 61-62; Doğa Elçin, *Milletlerarası Ticari Tahkim Hukukunda Sulh* (Turhan 2019) 16.

46 Turkish Mediation Code of Ethics was prepared by the Ministry of Justice, Directorate General for Legal Affairs, Department of Mediation and was reviewed and accepted by the Mediation Board. <https://adb.adalet.gov.tr/Resimler/SayfaDokuman/1512021075717T%C3%BCrkiye%20%20Arabulucular%20%20Etik%20Kurallar%C4%B1.pdf> accessed 18 July 2023.

registry, there is no separate regulation on professional competence. According to paragraph 7/(1) of the Code of Ethics, 'If the mediator does not possess the professional competence required in the concrete dispute and is unable to meet the reasonable expectations of the parties, he/she should reject the mediation offer and withdraw from the mediation at whatever stage.' However, the issue of withdrawal from the mediation process due to professional incompetence is covered neither in the Mediation Code nor its Regulation.

III. ASSESSMENT OF THE CONDITIONS FOR BECOMING A MEDIATOR FROM THE PERSPECTIVE OF THE SINGAPORE CONVENTION

1. Assessment from the perspective of the Definition of Mediation

The Singapore Convention does not provide a specific definition of a mediator or the conditions for becoming one. However, it is possible to deduce the meaning of mediation from Article 2(3).[47] According to this article:

> 'Mediation' means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ('the mediator') lacking the authority to impose a solution upon the parties to the dispute.[48]

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47 For the report and paragraphs of UNCITRAL Working Group II on Article 2/(3) of the Convention, see: (19 February 2018) UN Doc A/CN9/934 3032, (11 October 2017) UN Doc A/CN9/929 43, (30 September 2016) UN Doc A/CN9/896 39-47, (10 February 2016) UN Doc A/CN9/867 121, (17 September 2015) UN Doc A/CN9/861 21; Alexander, Chong and Giorgadze (n 10) para 2.2.

48 Nuray Ekşi, 'Turkish Translation of the United Nations (Singapore) Convention on International Settlement Agreements Resulting from Mediation' (2020) 9(1) UTTDER 203, 208; The same definition is adopted on the official website of the Department of Mediation, the Directorate General for Legal Affairs, Ministry of Justice of Türkiye <https://adb.adalet.gov.tr/Resimler/SayfaDokuman/612021141924Singapur%20Konvansiyonu%20T%C3%BCrk%C3%A7e.pdf> accessed 03 January 2023; It was considered that describing mediation as a 'structured/organised' process would exclude processes that take place entirely in informal settings or only in the form of negotiations. See: Report of WGII (Dispute Settlement) on the Work of its 65th Session, (Vienna, 12-23 September 2016) (30 September 2016) UN Doc A/CN9/896 42; It was reiterated that the terms 'structured/organised' are not commonly used and can be understood differently. See: ibid UN Doc A/CN9/896 43; During the negotiations of the Singapore Convention, some delegations made suggestions to include the concepts of 'structured' and 'organised' process in the definition of mediation, but the suggestions are not found acceptable. See: Ellen E. Deason, 'What's in a Name: The Terms Commercial and Mediation in the Singapore Convention on Mediation' (2019) 20(4) Cardozo J Conflict Resol 1149, 1164; The Singapore Convention will not apply to settlement agreements reached without mediation. See: Gary B. Born, *International Commercial Arbitration* (3rd edn, Wolters Kluwer 2021) pt 2 ch 23.01 para [E][1] footnote 60.

In the definition, it is underlined that what is important is not the label given to the process, but the essence of the process itself.[49] According to this definition, mediation does not encompass adjudicative processes like arbitration, but it does cover facilitative mediation and advisory dispute resolution processes.[50] As can be seen, the definition of mediation in the Singapore Convention is extremely broad[51] and flexible. This is due to the fact that the Singapore Convention aims to harmonise and unify the internal laws of the contracting states, by introducing uniform rules.

The definition of mediation in the Singapore Convention incorporates four key features of the UNCITRAL Model Law definition of mediation.[52] First, mediation is treated as an umbrella concept that includes variations in regional and national practices.[53] Second, the motive for the process is irrelevant.[54] In other words, it may result from the choice of the parties, the court's encouragement, a legal obligation, or a contractual agreement.[55] Third, the primary purpose of mediation is the resolution of disputes.[56] Fourth, mediation involves the assistance of a third party who lacks the authority to make binding decisions.[57]

According to the Singapore Convention, at one end of the spectrum, there are situations where the mediator merely brings the parties together, and the rest of the negotiation and agreement process is carried out by the parties themselves. At the other end of the spectrum, there are situations where the mediator actively participates in the process and can even propose solutions when the parties cannot reach an agreement on their own.[58] Throughout the Singapore

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49 Alexander, Chong and Giorgadze (n 10) para 2.28.

50 ibid 132 para 2.26.

51 Banu Şit Köşgeroğlu, *Milletlerarası Ticari Uyuşmazlıklarda Arabuluculuk Sonunda Varılan Anlaşmaların Singapur Konvansiyonu Çerçevesinde Taraf Devletlerde İcra Edilebilirliği* (Adalet 2020) 40.

52 Ellen E. Deason, 'What's in a Name: The Terms Commercial and Mediation in the Singapore Convention on Mediation' (2019) 20(4) Cardozo J Conflict Resol 1149, 1163.

53 ibid.

54 ibid.

55 ibid.

56 ibid.

57 ibid (n 53); The Singapore Convention covers dispute resolution processes with both facilitative and advisory recommendations of the mediator, but does not cover outcome-determining processes such as arbitration. See: Nadja Alexander and Shouyu Chong, 'An Introduction to the Singapore Convention on Mediation - Perspectives from Singapore' (2018) 22(4) Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement 37, 41.

58 Talat Kaya, 'Singapur Sözleşmesi ve Uluslararası Ticari Arabuluculuk Sonucunda Ortaya Çıkan Sulh Anlaşmalarının Tanınması ve İcrası Meselesi' (2019) 25(2) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi (Prof. Dr. Ferit Hakan Baykal Armağanı) 979, 990.

Convention, particularly in Articles 1, 4, and 5, the concept of mediation is frequently referred to, and no limitations or specific definitions or provisions regarding the mediation model are provided. On the contrary, when examining Article 2(3), which defines mediation, and considering the entire text of the Convention, it becomes evident that an extremely broad definition is made.

2. Assessment in terms of the Presence of a Third Party or Parties

In the framework defined by the Singapore Convention, the key point in mediation is that parties resolve their disputes through the assistance of a third party.[59] The definition of mediator adopted by the Convention only emphasises certain characteristics such as impartiality and independence[60] and third party.[61] Any document of agreement concluded by the parties with the assistance of a third party,[62] which does not have the power to impose a solution, is considered within the scope of the Convention.[63] In other words, the Convention anticipates that an assistant to the parties may be qualified as a mediator as long as they lack the authority to impose a solution upon the parties to the dispute.[64]

3. Assessment in terms of Methodology and Nomenclature

According to the definition in Article 2/(3) of the Singapore Convention, mediation is a procedure in which the parties to a dispute, regardless of the wording used[65] or the procedure followed,[66] endeavour to reach an amicable

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59 Sibel Özel, 'Arabuluculuk Sonucunda Yapılan Milletlerarası Sulh Anlaşmaları Hakkında Birleşmiş Milletler Sözleşmesi: Singapur Konvansiyonu' (2019) 25(2) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi (Prof. Dr. Ferit Hakan Baykal Armağanı) 1190, 1196.

60 Article 5/(1)f of the Singapore Convention.

61 Article 2/(3) of the Singapore Convention.

62 In order to emphasise the requirement that the mediator shall not impose a solution is limited to the mediation process, it was suggested to add the phrase 'at the time of mediation'. Since the mediator would only be able to impose a solution only after taking office as an arbitrator, especially in mediation-arbitration processes, the addition was considered unnecessary and was not accepted. See: Report of WGII (Dispute Settlement) on the Work of its 68th Session (New York, 5–9 February 2018) (19 February 2018) UN Doc A/CN9/934 para 32.

63 Ersin Erdoğan, 'Milletlerarası Arabuluculuk Anlaşma Belgelerinin İcrasına İlişkin BM Sözleşmesinin (Singapur Sözleşmesi) Değerlendirilmesi' in Ersin Erdoğan (ed), *International Symposium on Enhancing Mediation (6-7 December 2018, Ankara)* (Pozitif Matbaacılık 2018) 189, 192 <https://testapi.aybu.edu.tr/admin/genel/GetFile?id=4db24fd3-a751-44f4-bc2e-71cd8758aeba.pdf> accessed 30 December 2022.

64 Elisabetta Silvestri, 'The Singapore Convention on Mediated Settlement Agreements: A New String to the Bow of International Mediation' (2019) 2(3) Access to Just E Eur 5, 7.

65 It does not matter whether the activity in which the parties to the dispute take part is called mediation or not. See: Güven Yarar, *Milletlerarası Özel Hukukta Arabuluculuk* (Onikilevha 2019) 156; Özel (n 60) 1196.

66 It does not matter what the procedure is called and it does not matter what is at the basis

settlement with the assistance of a third person or persons[67] who are not authorised to impose a solution on the parties to the dispute.[68] According to the Singapore Convention, it does not matter what the process is called or the procedure used.[69] What matters is the presence of a third party who does not have the authority to impose a solution on the dispute and that the parties themselves decide on their own dispute.[70] The definition of mediation also emphasises the consensual nature of mediation.[71] There is no distinction between mediation within the scope of application of the Convention being ordered or recommended by a court or arbitral tribunal, or being mandatory or voluntary.[72] The Singapore Convention focuses on the outcome of the mediation process rather than how it commences.[73] As rightly pointed out by some delegates during the drafting process of the Singapore Convention, mediation is practised differently in different countries, and since no form of mediation is wrong, the settlement agreement reached as a result of mediation should be enforced.[74]

4. Assessment in terms of Mediator Accreditation

The Singapore Convention does not require the mediator to be accredited by a professional mediation institution or otherwise.[75] The parties to the dispute have the freedom to choose as mediator a professional mediator of an accredited organisation or any other person who possesses the knowledge and skills to fulfil the duties of a mediator.[76]

For a settlement agreement to be included within the scope of the Convention,

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of the recourse to mediation. See: Köşgeroğlu (n 52) 39; Edna Sussman, 'The Singapore Convention Promoting the Enforcement and Recognition of International Mediated Settlement Agreements' (2018) 3 ICC Dispute Resolution Bulletin 42, 59.

67 There is no indication of the mediator's 'assistance' in the Singapore Convention. See: Alexander, Chong and Giorgadze (n 10) para 2.49.

68 According to Yarar, Article 2/(3) of the Singapore Convention is based on the classical definition of mediation. See: Güven Yarar, *Milletlerarası Özel Hukukta Arabuluculuk* (Onikilevha 2019) 156; Article 1.3 of the 2018 UNCITRAL Model Law provides a similar definition. See: Ergun Özsunay, *Arabuluculuk Sonucunda Yapılan Uluslararası Sulh Anlaşmalarının İcrası Hakkında Singapur Sözleşmesi ve UNCITRAL Model Kanunu* (2nd edn, Aristo 2021) 50.

69 Silvestri (n 65) 7.

70 Köşgeroğlu (n 52) 40.

71 Alexander, Chong and Giorgadze (n 10) para 2.45.

72 Özel (n 60) 1196.

73 Alexander, Chong and Giorgadze (n 10) para 2.38.

74 Allan J. Stitt, 'The Singapore Convention: When Has a Mediation Taken Place (Article 4)?' (2019) 20(4) Cardozo J Conflict Resol 1173, 1174.

75 Alexander, Chong and Giorgadze (n 10) para 2.52.

76 ibid.

it is not a requirement that it complies with any national law (such as being made by a mediator registered in a registry, adhering to specific mediation rules, etc.). Similarly, it is not necessary for the agreement document to have been cancelled in a manner that would have consequences in other relevant legal systems.[77] The parties and the mediator conduct the process by taking into account the legal system of a particular country and shall bear the sanctions for violating the rules of that country.[78] However, such violations would not impede the recognition and enforcement of the agreement documents in other countries.[79] In this framework, it can be said that settlement agreements are stateless under the Convention.[80]

Regarding the validity of the settlement agreements, apart from the conditions stipulated in the Singapore Convention, the law chosen by the parties is taken into account.[81] Invalidity cannot be claimed on the grounds that it does not meet the other conditions required in the relevant country.[82] Thus, reasons such as the mediator not being registered in the official registry or the settlement agreement not being concluded through a notary public cannot be claimed.[83]

The concept of recognition is not used in the Singapore Convention; the term legal remedy is used to cover both the concepts of recognition and enforcement.[84] In Article 5 of the Singapore Convention, the grounds for refusal to apply for legal remedy are listed in a limited manner, and these reasons can be divided into two categories; (i) reasons to be examined upon the objection of the parties (Art.5/(1)), and (ii) reasons to be examined ex officio (Art.5/(2)).

The grounds for refusal to be examined upon objection of the parties include; 1) if one of the parties to the settlement agreement is incapacitated, or 2) if the settlement agreement is null and void or not operative or enforceable under the law of the state to which the settlement agreement is governed by, or, if there is no law governing the parties, then pursuant to Article 4 by the law of the competent authority to which the request is made, or 3) if it is not binding or final

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77 Erdoğan (n 64) 193.

78 ibid.

79 ibid.

80 Silvestri (n 65) 7; Erdoğan (n 64) 193; Timothy Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements' (2019) 19(1) Pepp Disp Resol LJ 1, 22; Ezgi Kara, 'Milletlerarası Özel Hukuk Açısından Arabuluculuk' (Master's Thesis, Yeditepe Üniversitesi 2021) 124; Mustafa Serdar Özbek, *Alternatif Uyuşmazlık Çözümü* (5th edn, Yetkin 2022) 882.

81 Erdoğan (n 64) 199.

82 ibid.

83 ibid.

84 Mehmet Kara, 'Arabuluculuk Sonucunda Yapılan Milletlerarası Sulh Anlaşmaları Hakkında Birleşmiş Milletler Konvansiyonu (Singapur Konvansiyonu)' (Master's Thesis, Başkent Üniversitesi 2022) 43.

under the terms of the settlement agreement, or 4) if the settlement agreement has been subsequently amended, or 5) if the obligation subject to the settlement agreement has been performed, or 6) if the obligation subject to the settlement agreement is not clear or comprehensible, or 7) if the granting of relief would be contrary to the terms of the settlement agreement, or 8) if there has been a serious breach by the mediator of the standards applicable to the mediator or to mediation, and, had that breach not occurred, the party would not have entered into the settlement agreement, or 9) if there are grounds to believe that the mediator displayed a lack of impartiality or independence, and the failure to disclose the circumstances that give rise to such a belief, which was likely to have had a significant impact on a party entering into the settlement agreement, and, had the circumstances been disclosed, a party would not have entered into the settlement agreement.

The *ex officio* grounds for refusal are 1) contravention of the public order of the state where the relief is sought, or 2) the subject matter of the dispute is not amenable to mediation under the law of the state where the relief is sought. The grounds for refusal to apply for legal remedy in the Singapore Convention are not absolute grounds for refusal, and the competent authorities of the contracting states have the right of discretion in this regard.[85]

As we have examined in detail above, the issue of professional competence is not regulated in the Code of Mediation and its Regulation. Since there is no regulation on professional competence, the issue of professional qualifications alone will not be one of the reasons for refusing access to legal remedies under the Singapore Convention.

The state to which the legal remedy is applied cannot introduce new conditions, nor can the competent authority of the state to which the legal remedy is applied require conditions other than the terms of the Convention.[86] For example, it will not be required that the mediation process be conducted by a registered mediator or the mediator taking part in every stage of the mediation.[87] In other words, requirements such as mediators not being licensed in a particular jurisdiction, mediation not being conducted under certain rules or by certain institutions are not among the grounds for refusal of judicial recourse under Article 5(1)(b)(i) of the Singapore Convention.[88]

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85 Aysel Çelikel and Bahadır Erdem, *Milletlerarası Özel Hukuk* (17th edn, Beta 2021) 859.

86 Kara (n 85) 72.

87 ibid.

88 Timothy Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements' (2019) 19(1) Pepp Disp Resol LJ 1, 44; Alexander, Chong and Giorgadze (n 10) para 4.02.

5. Assessment in terms of Institutional and Ad-Hoc Mediation

International commercial mediation can be conducted either as ad-hoc mediation, which means it can take place without being affiliated with any organization, or as institutional mediation.[89] Examples of international organizations that offer institutional mediation include the International Chamber of Commerce (ICC) [90] and the International Centre for Settlement of Investment Disputes (ICSID)[91].

For the Singapore Convention, there is no distinction or significance between mediation conducted within an institutional framework or in an ad-hoc manner.[92] Working Group II, during the convention preparation process, preferred not to devalue mediation conducted outside of institutional structures or other approaches that benefit from the flexibility of mediation (even mediation conducted in a pub).[93]

6. Assessment in terms of Standards Applicable to Mediation

There have been numerous efforts to ensure that mediation is conducted within certain standards. An example is the European Parliament and Council Directive 2008/52/EC (EU Directive) on certain aspects of mediation in civil and commercial matters.[94] The EU Directive provides recommendations on flexibility, effectiveness, impartiality, confidentiality, and competence principles.[95] The International Mediation Institute (IMI), a voluntary organisation, works towards the development of globally applicable standards in mediation.[96] An example for these efforts is the IMI's Code of Professional Conduct for Mediation, revised in 2017.[97] IMI has also initiated a review of ethical standards

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89 Doğa Elçin, *Milletlerarası Ticari Tahkim Hukukunda Sulh* (Turhan 2019) 15.

90 <https://iccwbo.org> accessed 08 February 2023.

91 <https://icsid.worldbank.org> accessed 08 February 2023.

92 Shouyu Chong and Felix Steffek, 'Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention: Private International Law Issues in Perspective' (2019) 31(special issue) SAcLJ 448, 459.

93 Timothy Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements' (2019) 19(1) Pepp Disp Resol LJ 1, 16.

94 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, Official Journal of the European Union (24 May 2008) L136/3 <https://eur-lex.europa.eu/eli/dir/2008/52/oj> accessed 06 September 2023.

95 Lola Akin Ojelabi, 'The Challenges of Developing Global Ethical Standards for Mediation Practice' in Shahla Ali (ed), *Comparative and Transnational Dispute Resolution* (Routledge 2023) 114.

96 ibid 115.

97 ibid.

in light of the Singapore Convention.[98] There is a trend towards certification or accreditation to enhance the professionalism of mediation processes on an international level.[99] Prominent mediation credentialing institutions include the Singapore International Mediation Institute (SIMI) and the Hong Kong Mediation Accreditation Association Limited (HKMAAL).[100] In the realm of institutional mediation standards, international organizations such as Singapore International Mediation Centre (SIMC), Japan International Mediation Center (JIMC) and International Chamber of Commerce (ICC) are also active.[101]

While the Singapore Convention remains silent on matters of quality, it does raise the issue of mediation standards stipulating that a state party may reject a request on the grounds of a serious breach of valid mediation standards.[102] The standards applicable to the mediators and mediation, such as equal treatment of the parties, independence, impartiality, etc are included in the own mediation regulations of the countries.[103] In order to reject the application for judicial remedy, a serious violation of standards that would have led to the conclusion of a settlement agreement is required, not just any breach of the standards.[104] This also applies if the mediator fails to disclose to the parties to the dispute circumstances that justifiably raise doubts about their impartiality and independence.[105] In cases where undisclosed matters are significant and would have led the concerned party not to enter into the settlement agreement, the execution of the reached settlement may be refused.[106] In our opinion, the mere fact that the mediator is not accredited will not be interpreted as a serious breach of standards on its own.

7. Assessment in terms of Public Order

Article 5/(2)(a) of the Singapore Convention recognises as a ground for refusal that the enforcement of the settlement agreement concluded as a result of mediation is contrary to the public order of the state party. The approach regarding the exceptional and narrow interpretation of the concept of public

98 ibid 116.

99 Nadja Alexander, 'International Comparative Mediation Law, Hong Kong and Singapore in Perspective' in Shahla Ali (ed), *Comparative and Transnational Dispute Resolution* (Routledge 2023) 138.

100 ibid.

101 Alexander, Chong and Giorgadze (n 10) para 5.72.

102 Ojelabi (n 96) 115; The New York Convention does not contain a provision on the status, duties and rights of arbitrators, leaving the issue to national laws. See: Gary B. Born, *International Commercial Arbitration* (3rd edn, Wolters Kluwer 2021) pt 2 ch 13.02 para [A] 3017-3018.

103 Özel (n 60) 1203.

104 ibid.

105 ibid.

106 ibid.

order, as seen in the 1958 New York Convention, [107] is acknowledged to apply also for the enforcement of the international settlement agreement concluded as a result of mediation.[108] A state party may not refuse the execution of a settlement agreement on the grounds that the operation of licensed mediators is a matter of public order.[109]

IV. PRIORITY APPLICATION OF THE SINGAPORE CONVENTION DUE TO ACCESSION OF TÜRKİYE AND THE INTERPRETATION OF THE SUBJECT MATTER OF THIS STUDY

Firstly, it would be beneficial to determine the place of international treaties in the hierarchy of Turkish norms. In Türkiye, while international treaties are a source of international law, they are also a source of domestic law.[110] According to Article 90, paragraph 5 of the 1982 Constitution of the Republic of Türkiye (hereinafter referred as 'Constitution'):

> International treaties duly put into force shall have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In case of disputes arising out of differences between international treaties on fundamental rights and freedoms duly put into force and laws on the same subject, the provisions of international treaties shall prevail.

The meaning of the phrases 'concerning fundamental rights and freedoms' and 'shall prevail' in the relevant article is unclear.[111] Based on the idea that 'fundamental rights and freedoms' are equivalent to 'fundamental rights and liberties', then virtually all rights and liberties within the scope of Articles 12-74 of the Constitution would be covered.[112] According to Erkan, since the Singapore Convention is related to fundamental rights and freedoms in terms of 'freedom to seek rights' regulated under Article 36 of the Constitution, paragraph 5 of Article 90 of the Constitution will be applicable.[113] This is because the Singapore Convention aims to ensure the fulfilment of the rights arising from the settlement

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[107] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) regulates the rules and procedure for the recognition and enforcement of international arbitral awards. For detailed information, see: Gary B. Born, *International Commercial Arbitration* (3rd edn, Wolters Kluwer 2021) pt 3 ch 26.01 5786ff.

[108] Özel (n 60) 1204.

[109] Erdoğan (n 64) 201; Özel (n 60) 1204; Kaya (n 59) 1003; Schnabel (n 94) 54.

[110] Kemal Gözler, İnsan Hakları Hukuku (2nd edn, Ekin Basım 2018) 113.

[111] Rona Aybay, 'Uluslararası Antlaşmaların Türk Hukukundaki Yeri' (2007) 70 TBB Dergisi 187, 200.

[112] ibid 202.

[113] Mustafa Erkan, *Arabuluculuk ve Singapur Sözleşmesi* (Onikilevha 2020) 265.

agreement signed by the parties as a result of the mediation process.[114] According to paragraph 1 of Article 36 of the Constitution, which regulates the freedom to seek justice, 'Everyone has the right to claim and defend himself as a plaintiff or defendant before the judicial authorities and to a fair trial by using legitimate means and remedies.' In our opinion, while 'before the judicial authorities' concept in the regulation may include special means of seeking rights, such as arbitration, we believe that it does not encompass mediation. This is because mediation is not a judicial activity. Fundamental rights and freedoms are listed between Articles 17 and 74 in the Constitution, and there is a possibility that almost all treaties may be related to these rights and freedoms.[115] If there is any doubt as to which treaties are related to fundamental rights and freedoms, the *exceptiones sunt strictissimae interpretationis* (principle of narrow interpretation of exceptions) should be applied, and broad interpretation should be avoided.[116]

In addition to the constitutional regulation, pursuant to Article 1/(2) of the law no. 5718 *Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun* (Private International Law and Procedural Law), treaties are among the sources of private international law.[117] There is no regulation on mediation in this law. Although mediation is not within its scope, the principle of reserving the right to implement international treaties applies. As a later dated and special legal provision, the Singapore Convention will have priority over the Mediation Code. As can be seen, even if the Singapore Convention is not considered as a treaty arising from the freedom to seek rights, it will be applied primarily both as a provision of subsequent law and as a provision of special law.

In accordance with the constitutional systems of states, international conventions enter into force and become a source after ratification by the legislature.[118] According to the Turkish Legal System, international conventions have the ability to be applied before national laws.[119] Given these reasons, the Singapore

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114 ibid.

115 Gözler (n 111) 115.

116 ibid.

117 According to Article 1 of the Private International Law and Procedural Law No. 5718, not only the conventions on human rights, but all conventions related to international law take precedence over the laws. See: Işıl Özkan, 'Uluslararası Hukuk - Ulusal Hukuk İlişkileri' (2013) 8(special issue) Journal of Yaşar University 2127, 2170 <https://dergipark.org.tr/tr/pub/jyasar/issue/19146/203212> accessed 25 June 2023; Güngör (n 6) 24.

118 Ziya Akıncı, *Milletlerarası Özel Hukuk* (Vedat 2020) 16; Cemal Şanlı, *Milletlerarası Özel Hukuk* (9th edn, Beta 2020) 17; Çelikel and Erdem (n 86) 42; Ergin Nomer, *Devletler Hususi Hukuku* (23rd edn, Istanbul 2021) 72; Vahit Doğan, *Milletlerarası Özel Hukuk* (8th edn, Savaş 2022) 14.

119 Ziya Akıncı, *Milletlerarası Özel Hukuk* (Vedat 2020) 16; Cemal Şanlı, *Milletlerarası Özel Hukuk* (9th edn, Beta 2020) 17ff; Çelikel and Erdem (n 86) 45; Ergin Nomer, *Devletler Hususi*

Convention is an international source that has priority over the Mediation Code.

The correct interpretation of international conventions, which bring together states with different cultures, different legal regulations and sometimes different understandings of concepts inside a circle, is a crucial issue. If the question arises as to whether international conventions can be interpreted by national courts, from the Turkish perspective, their interpretation falls within the jurisdiction of our national courts.[120] The Vienna Convention on the Law of Treaties[121] is the only treaty that contains rules on the interpretation of treaties.[122] Since Türkiye is not a party to the Vienna Convention on the Law of Treaties, it is not binding for Türkiye. However, the provisions of the Convention are binding since they do not lose their customary law characteristics.[123] In other words, even though Türkiye is not a party to the Vienna Convention on the Law of Treaties, it is a source that can be taken as a basis for the interpretation of the Singapore Convention, since it is applicable as a rule of customary law.

Although good faith is a valid principle in all areas of international law, it has a special importance in the law of treaties.[124] Article 31(1) of the Vienna Convention on the Law of Treaties recognises it as a general rule of interpretation.[125] The same article stipulates that the treaty shall be interpreted in its entirety and in

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Hukuku (23rd edn, Istanbul 2021) 71ff; Güngör (n 6) 25ff; Vahit Doğan, *Milletlerarası Özel Hukuk* (8th edn, Savaş 2022) 14.

120 İlhan F. Akın, 'Milletlerarası Antlaşmaların Milli Mahkemeler Tarafından Yorumlanması' (1960) 25(14) İstanbul Üniversitesi Hukuk Fakültesi Mecmuası 94, 103.

121 The Vienna Convention on the Law of Treaties was opened for signature in Vienna on 23 May 1969 and entered into force on 27 January 1980. See: Mukaddes Korkmaz Sürer, 'Viyana Andlaşmalar Hukuku Sözleşmesi'ne göre Andlaşmaların Yorumu' (PhD Thesis, Anadolu Üniversitesi 2023) 48.

122 Sürer (n 122) 44; According to Bayındır, it is the turning point of the law of treaties. See: Ümit Barış Bayındır, *Milletlerarası Andlaşmaların Evrimsel Yorumlanması* (Onikilevha, 2021) 11.

123 Sürer (n 122) 48; Ümit Barış Bayındır, *Milletlerarası Andlaşmaların Evrimsel Yorumlanması* (Onikilevha, 2021) 9-10; The Convention on the Law of Treaties has codified the rules of customary law. See: Sürer (n 122) 150; According to the generally accepted view in the doctrine on Articles 31 and 32 of the Vienna Convention on the Law of Treaties, it is a codification of the rules of customary law on interpretation. See: Selcen Nur Kışla, *Uluslararası Yatırım Andlaşmalarının Yorumlanması* (Adalet, 2022) 127-28; In its *Guinea-Bissau v Senegal* Judgment, the International Court of Justice considered that Articles 31 and 32 of the Vienna Convention on the Law of Treaties can be seen as a codification of the rules of customary law. See: *Guinea-Bissau v Senegal* (1991) I.C.J. Reports 53 para 48 <www.icj-cij.org/sites/default/files/case-related/82/082-19911112-JUD- 01-00-EN.pdf> accessed 18 July 2023.

124 Alexander, Chong and Giorgadze (n 10) para 0.27.

125 Vienna Convention on the Law of Treaties (1969) Article 31/(1): 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'; Alexander, Chong and Giorgadze (n 10) para 0.27.

the light of its subject matter and purpose. In fact, in the field of international law, various approaches to treaty interpretation have been adopted, with four categories generally standing out;[126] objective (literal) interpretation, subjective (historical) interpretation, teleological (purposive) interpretation and systematic interpretation. All these four interpretative approaches are adopted in Articles 31 and 33 of the 1969 Vienna Convention on the Law of Treaties.[127] In short, from the perspective of the Law of Treaties, no single approach is sufficient on its own.[128]

In terms of the qualifications and accreditation of the mediators, which is the subject of our study, it would be appropriate to consider all these interpretative approaches together. Especially when literal and purposive interpretations (the purposes summarised in the Preamble[129] of the Convention) are taken into account, it will be seen that, unlike Mediation Code, mediation under the Singapore Convention is not subject to a particular mold or restriction.

Under the Singapore Convention, it is not a requirement for mediation to have been conducted in accordance with Mediation Code for the agreement between the parties to be enforceable.[130] This significant detail is also mentioned in the official webpage of the Singapore Convention with regard to Türkiye.[131]

Even if the settlement agreement in a mediation process conducted under the Mediation Code is an international commercial settlement agreement, it will not be considered within the scope of the Singapore Convention, since it is a document in the nature of a judgement according to Article 18 of the Mediation Code and can be enforced in Türkiye.[132] This is because Article 1/(3)(a)(i) of the Singapore Convention stipulates that the Singapore Convention does not apply to 'settlement agreements that have been approved by a court or concluded in the course of proceedings before a court'[133] and Article 1/(3)(a)(ii) stipulates

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126 For detailed information, see: Sürer (n 122) 29ff; Selcen Nur Kışla, *Uluslararası Yatırım Andlaşmalarının Yorumlanması* (Adalet 2022) 115ff.

127 Sürer (n 122) 30.

128 ibid 152.

129 From Singapore Convention Preamble; '… the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations, ...'.

130 Özel (n 60) 1197-98; Köşgeroğlu (n 52) 89 footnote 153; Erkan (n 114) 24.

131 'The execution in Turkey of a settlement agreement reached as a result of a mediation that is not made within the scope of the provisions of the Mediation Law may be subject to the provisions of the Singapore Convention.' <www.singaporeconvention.org/jurisdictions/turkey> accessed 23 March 2023.

132 Özel (n 60) 1198.

133 The Singapore Convention may apply to the settlement agreement resulting from mediation

that the Singapore Convention does not apply to 'settlement agreements that are enforceable as a judgment in the State of that court'. A notable provision can be found in Article 18/(4) of the Mediation Code:

> Except for cases where obtaining an enforceability annotation is compulsory under the laws, the settlement agreement signed by the parties, their lawyers and the mediator, and for commercial disputes, by the lawyers and the mediator, shall be deemed to be a document in the nature of a judgement without requiring enforceability annotation.

In our opinion, settlement agreements deemed as enforceable documents under Article 18(4) of the Mediation Code fall outside the scope of the Singapore Convention. In the event that a settlement agreement resulting from mediation is approved by a court or is adjudicated during court proceedings, it will fall within the scope of Article 1(3)(a)(i) of the Mediation Code and the Convention will not be applicable.[134] The fact that the settlement agreement is enforceable as a judgement in court pursuant to Article 1/(3)(a)(ii) is an additional requirement for exclusion under Article 1/(3)(a).[135] On the other hand, since a mediation settlement agreement in Türkiye that can be executed as an enforcement document is not so enforceable in another country, it may fall under the scope of the Singapore Convention in that country.[136]

Even if the settlement agreement reached through mediation conducted in a foreign country in accordance with its own national mediation law or under an institution is deemed as a document enforceable as an award in that country, since it cannot be enforced as such in Türkiye, its execution can be requested within the framework of the Singapore Convention.[137]

Article 16/(2) of the Mediation Code stipulates that the statute of limitations shall be suspended from the commencement of the mediation process and the statute of limitations shall not be taken into account.[138] In a mediation that falls within the scope of the Singapore Convention but not within the scope of the CLC, the statute of limitations shall not be suspended and the limitation periods shall not be taken into account.

Article 18/(4) of the Mediation Code stipulates that, except for legal obligations, the settlement agreement signed by the parties, their lawyers and the mediator in

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if it has not been authorised by the court and if it does not meet the requirements of the other exceptions to the Convention. See: Alexander, Chong and Giorgadze (n 10) para 1.34.

134 Alexander, Chong and Giorgadze (n 10) para 1.35, para 1.40.

135 ibid 74, para 1.41.

136 Özel (n 60) 1198.

137 Özel (n 60) 1199; Vahit Doğan *Milletlerarası Ticaret Hukuku*, vol. 2 (2nd edn, Savaş 2023) 64-65.

138 Ahmet M. Kılıçoğlu, *Arabuluculuk Sözleşmeleri* (3rd edn, Turhan 2022) 96.

commercial disputes shall be deemed as a document in the nature of a judgement without seeking a certificate of enforceability. In a mediation activity that falls within the scope of the Singapore Convention but was not carried out within the scope of the Mediation Code, it will not be possible for the settlement agreement to be deemed as a document in the nature of a judgement.

The *Arabuluculuk Asgari Ücret Tarifesi* (Minimum Fee Tariff for Mediation or 'Tariff' in short) regulates the fees of mediators, and Article 2/(1) of the Tariff[139] stipulates that only mediators registered in the registry of mediators will benefit from this tariff. Therefore, in mediations falling under the Singapore Convention but not conducted under the Mediation Code, unless otherwise agreed by the parties, the mediator cannot benefit from the minimum fee schedule.

CONCLUSION

Pursuant to Article 2/(a) of the Mediation Code No. 6325, those who can mediate within the scope of the law are real persons who are registered in the registry of mediation organised by the Ministry of Justice. Currently, there is a mediation accreditation system in Turkey that requires mediators to comply with certain conditions.

When comparing the mediator definition in the Mediation Code No. 6325 to the one defined in the Singapore Convention, it becomes evident that these two concepts do not completely overlap. In terms of being a Turkish citizen, being a lawyer, applying systematic techniques, having specialised training and being registered in the registry of mediators, the Mediaton Code has interpreted mediation in more restrictive patterns within the Turkish legal framework. On the other hand, the Singapore Convention does not foresee any registration and accreditation obligation.

However, if we look at the bigger picture, it is possible to say that the Singapore Convention is largely compatible with the Turkish legal system.[140] In this context, adapting the Convention to Turkish Law is not expected to pose significant challenges.[141] Although there are no major differences between the Singapore Convention and the Turkish mediation legislation, it is inevitable to experience double standards in matters such as statute of limitations and limitation periods, accreditation system, registry of mediators, the qualification

[139] Article 2/(1) of the 2024 Minimum Fee Tariff for Mediation states that 'The mediation fee stipulated in this Tariff is the equivalent of the monetary payment made by the parties to the dispute to the person registered in the mediators' registry, who conducts the mediation activity, in return for the labour and effort he/she has spent, in order to ensure that the dispute is resolved through mediation.' (see Official Gazette of the Republic of Türkiye RG 29.12.2023/32414).

[140] Ergun Özsunay, *Arabuluculuk Sonucunda Yapılan Uluslararası Sulh Anlaşmalarının İcrası Hakkında Singapur Sözleşmesi ve UNCITRAL Model Kanunu* (2nd edn, Aristo 2021) 38.

[141] ibid.

of a document in the nature of a judgement, and minimum fee tariff. For the aforementioned reasons, it would be a prudent step to align the legislation with the Singapore Convention and resolve any ambiguities to prevent potential loss of rights. Another way to address uncertainties is for the commercial court of first instance, which is accepted as the competent authority in Türkiye, to interpret the Singapore Convention[142] by thoroughly understanding its spirit and considering its status as a primary source.

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