

Resolution of IP disputes in Turkey: emerging trends of mandatory mediation and specialized courts for IP disputes

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Abstract

- Resolving IP disputes is a critical challenge within the intricate framework of global business and innovation. Turkey, amidst its evolving legal landscape, has shown considerable attention towards efficiently managing disputes linked to IP rights. Notably, Turkey has significantly transformed its approach to handling these issues by introducing specialized IP courts and embracing mandatory mediation as a resolution method.
- The adoption of mandatory mediation in Turkey marks a notable departure from traditional litigation approaches, aiming to expedite disputes and resolve them in a cost-effective manner. Additionally, the establishment of dedicated IP courts signals a deliberate shift towards adjudication grounded in specialized knowledge tailored to address the intricate nuances of IP conflicts.
- This article seeks to delve into the burgeoning trends and evolving practices surrounding IP courts and mandatory mediation to resolve IP disputes within the Turkish jurisdiction. By examining the historical foundations, legislative developments and practical applications of mandatory mediation in the context of IP disputes, this study aims to provide an insightful evaluation of the efficacy and feasibility of these mechanisms while exploring their implications for stakeholders.

I. Introduction

IP has emerged as a vital tool for stimulating innovation and advancing the expansion of domestic economies.¹ Its significance has risen notably, given that economic progress increasingly relies on industries driven by knowledge.² One requirement for integrating transitioning economies into the new economic framework is the establishment of efficient mechanisms to harness their intellectual assets, particularly those protected by IP rights.³ If IP owners cannot effectively and efficiently defend their rights with a predictable route to enforcement, the value and advantages of these rights are greatly diminished, leading to a decrease

in their impact on economic growth.⁴ Establishing effective IP enforcement mechanisms is critical as they foster an atmosphere conducive to the realization of IP's function of incentivizing innovation while ensuring fair advantages for both IP owners and users.⁵

The digital revolution has ushered in a multitude of opportunities, expanding access for innovators and creators to reach broader consumer bases through the internet.⁶ This has facilitated the introduction of innovative products, technology and creative content to new markets and audiences. Nevertheless, this revolution has also facilitated a broader and faster spread of items and materials that violate IP rights, making it frequently challenging for customers to differentiate between infringing goods

¹ Olga Gurgula et al., 'Specialised IP judiciary: what are the key elements to consider when establishing or reforming an effective IP court?' (2022) 71 *GRUR International* 206.

² *ibid.*

³ World Intellectual Property Organization, 'Economic Aspects of Intellectual Property in Countries with Economies in Transition' (2020). Available at https://www.wipo.int/edocs/pubdocs/en/wipo_pub_transition_8.pdf (accessed 14 July 2024).

⁴ Anna Shtefan and Olga Gurgula, 'The New Intellectual Property Court in Ukraine: Its Creation and Exclusive Jurisdiction' in Heiko Richter (ed) *Competition and Intellectual Property Law in Ukraine* (Berlin, Springer 2023).

⁵ European Commission, 'A Balanced IP Enforcement System Responding to Today's Societal Challenges' (Communication), COM (2017) 707 final.

⁶ *ibid.*

and authentic and lawful ones.⁷ These factors collectively contribute to a global surge in IP infringement. Thus, in numerous jurisdictions, the development of a resilient legal framework for IP has taken precedence, with a crucial component being the establishment of an efficient judicial system.⁸ Several nations, such as the UK, Germany, France, the Netherlands and the USA, have implemented specialized judicial entities dedicated to IP matters.⁹

Numerous legal reforms have been enacted thus far, yielding favourable outcomes for the dispute resolution system and other judicial mechanisms¹⁰ Nevertheless, persistent hurdles remain. Improving the conventional litigation system alone is insufficient to ensure the adequate legal safeguarding of IP rights within today's digitalized landscape. It necessitates establishing and enhancing an alternative dispute resolution (ADR) mechanism, enabling parties to resolve conflicts expeditiously.

Consequently, the widespread adoption of digitization has resulted in a rise in the occurrence and significance of IP violations, compelling nations throughout the globe to modify their legal systems with inventive approaches. In Turkey, the process of digital transformation has also required the implementation of compulsory mediation and the creation of specialist tribunals for IP. Efficiently resolving IP disputes is crucial for boosting innovation, safeguarding the rights of creators and creating a favourable climate for IP growth. This article seeks to examine the many aspects of IP dispute resolution in Turkey, with a specific focus on the enforcement of compulsory mediation and the establishment of specialist IP courts.

II. IP regulations and disputes in Turkey

IP rights refer to the rights individuals possess over the intellectual products created through their intelligence, thoughts and creativity.¹¹ IP rights encompass rights related to scientific, literary and artistic works, as well as rights over inventions, utility models, designs and trade marks.¹²

In Turkey, the first instance of copyright being conferred to writers occurred in 1850 through the Statute of Encümen-i Daniş.¹³ This organization, which functioned from 1851 to 1862, was dedicated to raising cultural awareness, translating scientific texts into Turkish and preparing publications.¹⁴ In 1857, the *Matbaalar Nizamnamesi* was introduced, a set of guidelines for printing establishments that granted lifetime copyright protection to authors and outlined censorship provisions.¹⁵ The regulation for intellectual and artistic works in Turkey was established with the implementation of the 'Copyright Law' on 8 May 1910. This significant legislation was Turkey's first official legal structure designed to safeguard creative works. This law survived until 1 January 1952, when Turkey became a party to the Berne Convention and the existing law was replaced by Law No 5846 on Intellectual and Artistic Works. The 1952 legislation, which greatly strengthened copyright protection in accordance with global norms, has undergone several revisions to accommodate changing legal and

technical environments.¹⁶ Significant revisions took place in 1983, 1995, 2001, 2004, 2007 and 2008, with each update enhancing and broadening the extent of copyright safeguard to tackle emerging difficulties and demands. In Turkish Law, the protection of IP rights in line with the Universal Declaration of Human Rights (Article 27)¹⁷ has found expression in the Constitution: 'Everyone has the right to freely learn and teach science and art, to disclose, to disseminate and to carry out all kinds of research in these fields'.¹⁸

The Turkish Industrial Property Law (IPL) traces its origins back to the patent and trade mark regulations of the late 19th century. The initial trade mark regulation in the Ottoman Empire was the 'Fabrika Ma'mulâtıyla Eşya-yı Ticariyeye Mahsus Alamet-i Farikalara Dair Nizamnâmesi' that was enacted on 10 September 1871.¹⁹ This regulation, commonly referred to as the *Alameti Farika Nizamnâmesi*, took effect in February 1872. Replacement legislation entered into force in 1888, drawing inspiration from the 1857 French Law.²⁰ The *Alameti Farika Nizamnâmesi* continued to be in effect until 3 March 1965, when it was replaced by Trade-mark Law No 551. The Law on *İhtira Berati* was established in 1879, showcasing an acknowledgement of patents and their legal framework.²¹

Turkey's accession to the World Trade Organization and Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1995, along with the establishment of the Customs Union with the European Union (EU) in the same year, marked significant initial steps in the field of IP law.²² Following the obligations of the World Trade Organization/TRIPS and the EU-Turkey Association Council Decision 1/95, Turkish IP laws were rapidly harmonized with EU regulations and international treaties.²³ This led to the introduction of new laws for copyright and industrial rights. The outdated legislation on patents and trade marks was completely replaced, and significant reforms were made in copyright law. In 1995, new regulations were established to protect trade marks (Decree Law No 556),²⁴ patent utility models (Decree Law No 551),²⁵ designs (Decree Law No 554)²⁶ and geographical indications (Decree Law No 555)²⁷ in Turkey. These four Decree Laws (Decree Laws No 551, 554, 555 and 556) were in effect from 1995 until 2017. In 2017, the protection for trade marks, patent utility models, designs and geographical indications, previously covered by these Decree Laws, was consolidated under IPL No 6769.^{28,29}

The Turkish Grand National Assembly's initial comprehensive regulation focused on various industrial property rights, encompassing trade marks, patent utility models, designs, geographical indications and traditional products, excluding copyright

⁷ *ibid.*

⁸ Gurgula et al. (n 1).

⁹ *ibid.*

¹⁰ Serkan Kaya, 'Access to justice for consumers in Turkey: the need for enhancing consumer dispute resolution through online dispute resolution' (2022) 26 *Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi* 225 at 227.

¹¹ Kemal Oğuzman and Nami Barlas, *Medeni Hukuk* (Istanbul, 8th edn Vedat Kitapçılık 2012) 158.

¹² Rona Senozan, *Medeni Hukuk: Kişiler Hukuku* (Istanbul, Vedat Kitapçılık 2011) 205.

¹³ Nadide Güher Erer, 'A short history of copyright in the West, in the Ottoman Empire and in Turkey' (2014) 28 *Türk Kütüphaneciliği* 638 at 642.

¹⁴ *ibid.*

¹⁵ *ibid.*

¹⁶ Ernst E Hirsch, *Fikri Ve Sınai Haklar* (Ankara, Ankara Basım ve Ciltevi 1948) 2–4.

¹⁷ Art 27 of the Universal Declaration of Human Rights states 'Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits'.

¹⁸ Constitution of Republic of Turkey Art 27.

¹⁹ Hamdi Yasaman, *Sınai Mülkiyet Kanunu Serhi* (Ankara, Seçkin 2021) 27.

²⁰ *ibid.*

²¹ İlhami Güneş, *Sınai Mülkiyet Kanunu İçerisinde Uygulamalı Patent ve Faydalı Model Hukuku* (Ankara, Seçkin Yayıncılık 2022) 22; Cahit Suluk, Rauf Karasu and Temel Nal, *Fikri Mülkiyet Hukuku* (7th edn Seçkin Yayıncılık 2023) 60.

²² Merve Parlakyıldız and Alper Güvel, 'Fikri Mülkiyet Hakları ve Bu Hakları Korumanın Ekonomik Önemi' (2015) 8 *Niğde Üniversitesi İktisadi ve İdari Bilimler Fakültesi Dergisi* 29 at 31.

²³ Cahit Suluk, '6979 Sayılı Sınai Mülkiyet Kanunun Getirdiği Yenilikler', (2018) 4 *Ticaret ve Fikri Mülkiyet Hukuku Dergisi* 91 at 93.

²⁴ Official Gazette, 27 June 1995, No 22326, Decree Law No 556.

²⁵ *ibid.*, Decree Law No 551.

²⁶ *ibid.*, Decree Law No 554.

²⁷ *ibid.*, Decree Law No 555.

²⁸ Official Gazette, 22 December 2016, No 29944.

²⁹ Cahit Suluk (n 23) 92.

and other specific rights. The IPL was implemented to effectively tackle previous legal loopholes and challenges, particularly those related to the unexamined patent, commonly called utility models, and design systems. Significant advancements were made to the patent and utility model framework, ending the previous practice of granting unexamined patents. This crucial change eradicated a 7-year period during which uncertain patents were undeservedly protected. The design registration process was reformed to filter out trivial and non-novel designs, significantly reducing unnecessary legal disputes.

A recent update in trade mark law aimed to address the misuse of unused trade marks, ensuring that subsequent trade mark applications could only be rejected if the existing trade mark was actively used. The IPL emphasizes balancing the interests of proprietors and society by promoting innovation and competition and aligning with international agreements and EU regulations. With a keen focus on traditional characteristics and production methods, the law implements measures to safeguard traditional product names, distinguishing them from geographical indications. This comprehensive approach to IPL promotes economic and social development by fostering creativity and innovation.³⁰

The IPL came into force on 10 January 2017. It regulated trade marks, patents, utility models, designs, geographical indications and traditional product names. The legislator aimed to harmonize the Turkish IP system with the EU system and to address practical problems experienced in the field. This act represents a significant step in aligning Turkish industrial property regulations with international standards, ensuring effective protection and fostering an environment conducive to innovation and economic growth.

It is undoubtedly a part of this policy that the protection of IP rights includes the effective, fair and expeditious resolution of disputes that inevitably arise during the commercialization of these rights. Courts in Turkey continue to be regarded as the primary forum for resolving civil disputes. An indication of this issue is the excessively high number of unresolved civil cases (exceeding 3 million cases), which experience an unreasonable duration (see Table 1). The mean duration of a case in a court (not including appeal time) is 399 days for commercial disputes, 544 days for labour disputes and 466 days for IP disputes.³¹

III. Specialized IP courts and their functionality

IP disputes are classified as commercial cases under Turkish Commercial Code (TCC) No 6102.³² Consequently, disputes arising from IP laws fall under the jurisdiction of commercial courts. However, as noted in the TCC's recital, specialized intellectual and industrial property courts are designated to handle cases related to intellectual property law.³³ Since IP law is a specialized field, the Court of Intellectual and Industrial Rights was established in 2001 as a separate specialized court to deal with disputes arising from these rights. The competent courts for cases under the IPL are the intellectual and industrial rights civil courts and the intellectual and industrial rights criminal courts.³⁴ These specialized courts are established where deemed necessary by the Ministry of Justice, with a single judge operating at the level of a court

of first instance, following the positive recommendation of the Council of Judges and Prosecutors. The jurisdictional boundaries of these courts are determined by the HSK upon the Ministry's proposal, irrespective of provincial and district borders. At present, specialized courts are located in Ankara, Istanbul and Izmir.

In areas without these specialized courts, the civil and criminal courts of first instance will handle relevant cases. The determination of which first instance courts and their jurisdictional areas will undertake these responsibilities is made by the HSK, upon the Ministry of Justice's proposal, again without regard to provincial and district borders. Typically, Court of First Instance No 1 is designated in regions with fewer than two courts, while Court of First Instance No 3 is designated in regions with more than two courts.

Simply creating specialist courts is inadequate. The judges for these courts should have training overseas before to their appointments. At present, judges in specialized courts are frequently appointed without prior specialized training. In addition, the prosecutors assigned to these courts do not possess specialized expertise in IP and industrial property issues. Merely labelling a court as 'specialized' does not guarantee its efficient functioning. Hence, it is imperative to provide ongoing and adaptable training for court officials. Furthermore, outside of Istanbul, Ankara and Izmir, similar instances should not be dealt with by regular lower courts, but rather by specialized regional courts. Implementing regional specialized courts instead of individual courts in each province would result in greater efficiency. Moreover, it is necessary to establish a specialized division within the Court of Cassation specifically designated to address legal conflicts related to IP.

Given the distinctive attributes of IP rights, it is common practice to consult expert witnesses in nearly every case. For the system to operate effectively, it is imperative that the individuals working in the field of IP possess a high level of expertise. It is worth noting that in numerous instances, particularly those pertaining to trade marks, expert referral may not be necessary. Judges in this field are required to have a deep understanding of the subject matter.³⁵

In 2022, these IP courts had a total of 10 423 cases. Among them, 5326 cases were carried over from the previous year, with 405 of these were reversed by higher courts, while 4629 are new case files (Table 1). Of these cases, 4064 were concluded and 6362 were transferred to the following year. In light of these data, when the number of cases received by the courts is compared with the number of cases decided, it can be inferred that without implementing a different measure, a decrease in the workload of the courts cannot be expected.³⁶

When the workload of these courts between 2017 and 2022 is analysed, the sudden increase in the number of cases filed in 2017 and later years draws attention.³⁷

It is possible to state that this sudden increase is related to the IPL, which was adopted on 22 December 2016 and entered into force on 10 January 2017. Trade marks, patent utility models, designs and geographical indications, which were previously protected by Decree Laws, were reorganized by the IPL and protected under a single law for the first time. It is probable that the rise in the number of cases can be attributed to the enhanced enforcement mechanisms and increased awareness resulting from the

³⁰ Suluk, Karasu and Nal (n 21) 61.

³¹ Republic of Turkey Ministry of Justice Statistics (2023), 142. Available at <https://adli.sicil.adalet.gov.tr/Resimler/SayfaDokuman/310520221416422021H%C4%B0ZMETE%C3%96ZELK%C4%B0TAP.pdf> (accessed 2 December 2023).

³² Official Gazette, 14 February 2011, No 27846.

³³ The Turkish Commercial Code, Recital, 2; Nesibe Kurt Konca, 'Yeni Türk Ticaret Kanunu'na Göre Asliye Ticaret Mahkemeleri' (2013) 4 *Türkiye Adalet Akademisi Dergisi* 79 at 99.

³⁴ Baki Kuru and Burak Aydın, *Medeni Usul Hukuku El Kitabı* (Ankara, Yetkin 2021) 1795.

³⁵ Suluk et al. (n 21) 55.

³⁶ Republic of Turkey Ministry of Justice Statistics (2023), 198. Available at <https://adli.sicil.adalet.gov.tr/Resimler/SayfaDokuman/310520221416422021HİZMETEÖZELKİTAP.pdf> (accessed 2 December 2023).

³⁷ *ibid.*

Table 1. Number of cases at the civil courts by types of court in 2022^a

Court types	Number of cases transferred from the last year	Number of cases brought this year	Number of cases reversed by the Supreme Court	Total	Number of cases judged during year	Number of court cases postponed to the next year	The average duration of the case
Commercial court of first instance	118 695	100 338	7527	226 560	108 044	118 026	399
Civil court of first instance	621 540	627 774	55 157	1 304 471	602 484	610 636	376
Labour court	394 087	224 382	30 160	648 629	266 385	382 244	544
Civil Enforcement Court	85 379	234 018	6880	326 277	246 532	79 745	124
Court of peace	270 618	1 079 465	5957	1 356 040	1 003 773	352 267	246
Land Registration Court	19 836	10 305	2167	32 308	12 923	19 385	564
Consumer Court	69 955	70 576	3445	143 976	72 130	71 846	354
Family Court	196 628	384 398	6696	587 722	371 520	216 202	198
Courts of IP and industrial property right	5326	4692	405	10 423	4061	6362	466
Total	1 782 064	2 735 948	118 394	4 636 406	2 688 342	1 948 064	280

^aRepublic of Turkey Ministry of Justice Statistics (2023), 198. Available at <https://adlisicil.adalet.gov.tr/Resimler/SayfaDokuman/310520221416422021HIZMETEÖZELKITAP.pdf> (accessed 2 December 2023).

implementation of the IPL. It should be noted, however, that the law did not bring about any significant structural alterations to the system. The situation has been significantly worsened by the digital revolution, which has enabled the fast and extensive dissemination of infringing goods and content.

When examining the average duration of a case in the IP courts (not include appeal time), it is noteworthy that this has increased from 357 days in 2021 to 466 days in 2022.³⁸

Among the lawsuits filed and settled in IP courts in 2022 (Figure 1), the first place was taken by trade mark lawsuits (3977) and the second place was taken by industrial design lawsuits (569). The statistics, as given in Figure 2, show that in IP courts, while 41 per cent of the cases were dismissed, only 26 per cent of them were fully accepted.³⁹

IV. Mandatory mediation for IP disputes

A. Legal framework of mandatory mediation in Turkish law

Across the world, mediation stands as the prevailing approach in ADR. Its application in legal disputes has surged due to the mounting expenses associated with legal proceedings and the accumulation of pending cases. Numerous governments and international bodies have implemented laws specifically for mediation. For instance, in 1975, Australia founded the Arbitration and Mediation Institute, while India enacted the Arbitration and Mediation Act in 1996.⁴⁰ The EU Mediation Directive mandated member states to integrate mediation within their legal frameworks.⁴¹ Despite mediation's fundamental principle of voluntary participation, various legal frameworks have emerged mandating involvement in

mediation either prior to or subsequent to initiating a case.⁴² Several states in the USA, including California, have implemented mandatory mediation programmes for child custody and visitation.⁴³ For many years, compulsory mediation has existed in Australia.⁴⁴

In Turkey, Law No 6325, known as the Law on Mediation in Civil Disputes (Mediation Law),⁴⁵ stands as the initial legislation governing mediation. This law outlines the procedures and principles for resolving civil disputes through mediation. It also delineates the rights and responsibilities of mediators, mediation services, the prerequisites for mediator registration and the standards for mediation training and educational institutions. This law specifically pertains to disputes where the parties have the discretion to resort to mediation, stemming from civil matters and proceedings, including those involving international elements. Until 2018, mediation in Turkey operated as a voluntary method of dispute resolution, involving an impartial and independent third party.

Since 2018, Turkey has mandated mediation for some cases and established it as a prerequisite for civil litigation. Within the framework of the Turkish Civil Procedure Law, the condition of litigation pertains to fundamental factors essential for assessing the merits of a case.⁴⁶ Failure to adhere to this requirement results in the dismissal of a lawsuit due to non-compliance with procedural formalities. Hence, initiating legal proceedings prior to completing the mandatory mediation process, as stipulated by the law, leads to the dismissal of lawsuits on procedural grounds. Article 18/A of the Mediation Law signifies the integration of mandatory mediation into substantive legal statutes,

³⁸ *ibid.*

³⁹ *ibid.*

⁴⁰ The Arbitration and Conciliation Act, 1996.

⁴¹ 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.

⁴² Wayne and Wicki, 'Mandatory Mediation in Australia's Civil Justice System' (2016) 45 *Common Law World* 214; Deepika Kinhal, 'Mandatory mediation in India—resolving to resolve' (2020) 2 *Indian Public Policy Review* 49 at 58.

⁴³ *ibid.*

⁴⁴ *ibid.*

⁴⁵ Official Gazette, 7 June 2012, No 28331.

⁴⁶ Turkish Civil Procedure Law Article 114.

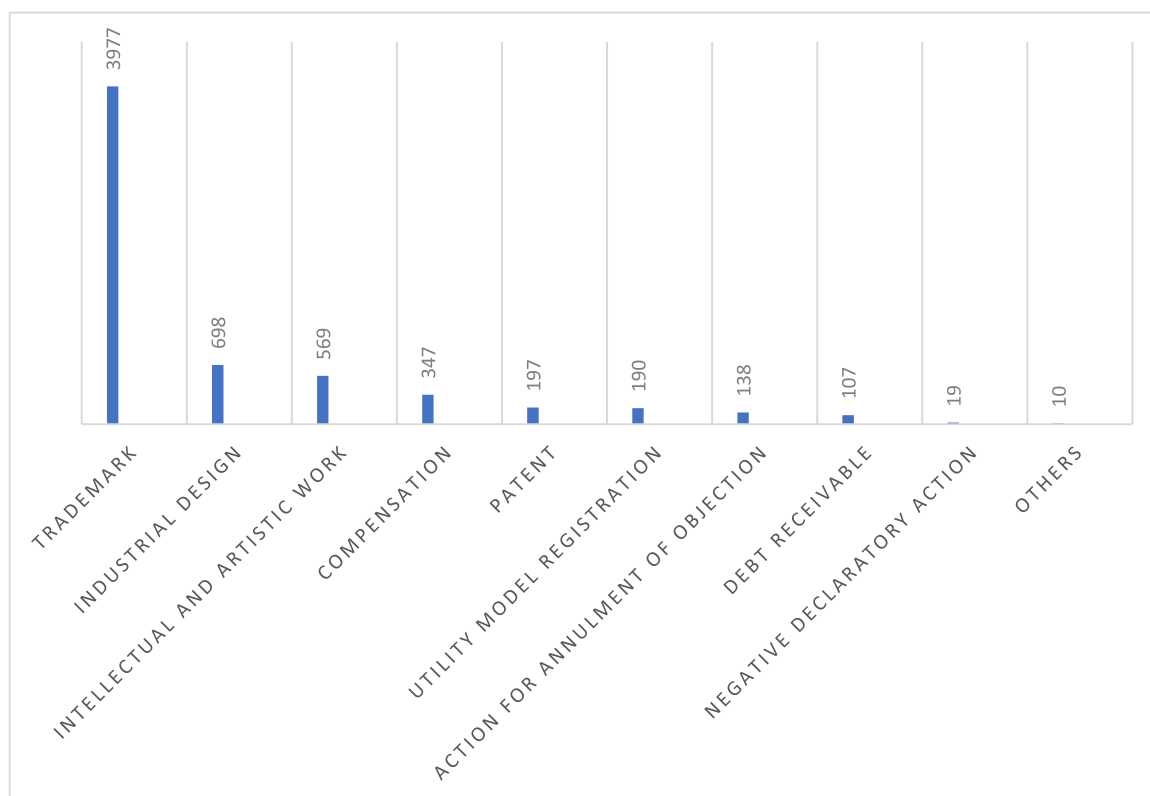


Figure 1. Case breakdown. Flowchart demonstrating the breakdown of cases analyzed in the study. Of note, patients who underwent bilateral joint arthroplasty surgery were counted as two cases for purposes of case count only and were omitted from efficiency analysis.

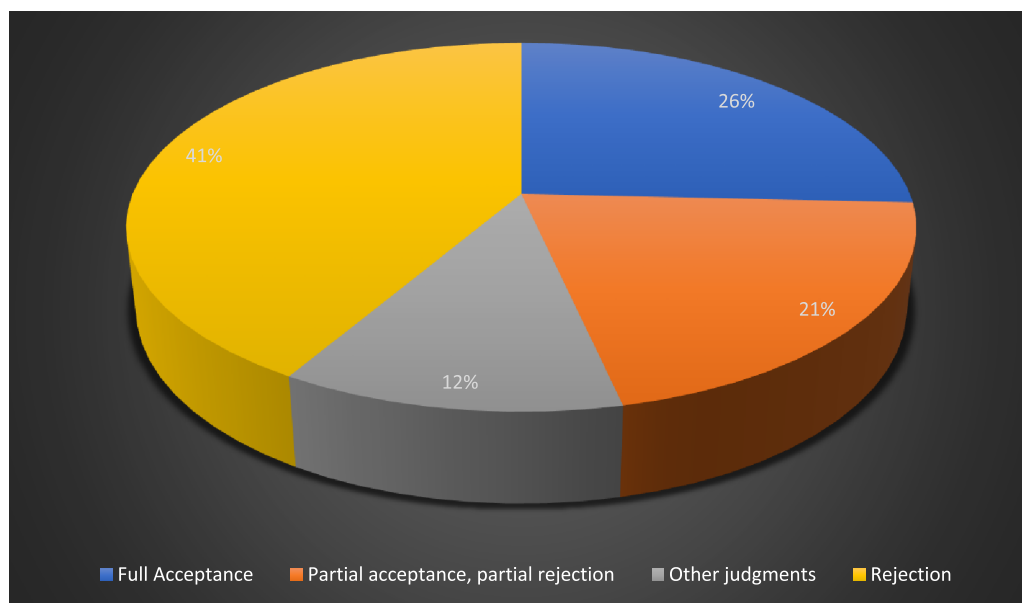


Figure 2. Case breakdown. Flowchart demonstrating the breakdown of cases analyzed in the study. Of note, patients who underwent bilateral joint arthroplasty surgery were counted as two cases for purposes of case count only and were omitted from efficiency analysis.

mandating parties to engage in mediation before initiating litigation for dispute resolution.⁴⁷ However, it is essential to note that in disputes where there is an obligation to resort to arbitration or any other ADR method according to special laws or where an

arbitration agreement has been concluded, the mandatory mediation requirements of litigation shall not apply (Article 18/A/XVIII Mediation Law).

Under the Mediation Law, what constitutes mandatory mediation is only applied to participating in the mediation process

⁴⁷ Baki Kuru, 'Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu Tasansı Hakkında Görüş ve Öneriler' (2010) 16 *Medeni Usul ve İcra İflas Hukuku Dergisi* 237 at 240.

and attending the first session.⁴⁸ According to the Turkish Constitutional Court, the obligation to apply to mediation cannot be considered to be the essence of the freedom to seek rights, unless it causes an ineffective and fruitless process that makes it impossible or excessively difficult for individuals to seek their rights.⁴⁹ Although mediation is an obligation as a result of being a condition of litigation, this obligation is strictly confined to the initiation of mediation. The will of the parties is sovereign over the functioning and outcome of the mediation process.⁵⁰ They possess the liberty to cease the process at any juncture and hold the prerogative to decide whether an agreement will be reached upon its conclusion.⁵¹ Should the mediation fail to yield an agreement, the parties retain the option to resort to judicial remedies for the resolution of the dispute.

B. Scope of mandatory mediation in Turkish law

In Turkish law, the introduction of mandatory mediation for civil disputes was first approved in employee–employer disputes. The Code of Labour Courts, No 7036,⁵² was published in the Official Gazette on 25 October 2017, and its main provisions took effect on 1 January 2018. The Code aims at reducing the overburdening of labour courts by requiring the parties to seek mediation before filing a lawsuit in disputes originating from employee or employer receivables and compensation re-employment based on individual and collective labour agreements. The recent amendments to the Labour Courts Code, specifically in Article 3 of the seventh judicial package,⁵³ have introduced a compulsory requirement to forgo objections related to claims and compensations arising from labour disputes within the realm of litigation mediation. Furthermore, these amendments mandate the application of mediation in cases concerning negative clearance and restitution. It is a requirement of Article 3(2) of the Code to apply for mediation before taking a case to court. If the parties do not go to mediation before bringing the dispute to court, the court may lawfully refuse the application without taking any action due to the lack of cause action. Following the enforcement of mandatory mediation in labour disputes starting 1 January 2018, a total of 1 481 761 cases involving labour disputes were recorded between that date and 4 May 2022.⁵⁴ Among these filings, 822 735 cases concluded with a mutual agreement, while 592 522 cases did not culminate in an agreement.⁵⁵ Observations reveal that the compulsory mediation process in labour disputes has exhibited a success rate of 58 per cent.⁵⁶

Subsequent to the enactment of mandatory mediation regulations for labour disputes, the Turkish Parliament ratified Law No. 7155,⁵⁷ advocating mandatory mediation for commercial disputes involving money claims, compensation, annulment of objection,

negative clearance and restitution litigation.⁵⁸ This legislation took effect on 1 January 2019. Following the enforcement of this law, between January 2019 and May 2022, the count of mandatory mediations for commercial disputes totalled 483 702, with a successful resolution rate of 52 per cent among these mediated disputes.⁵⁹

The enactment of Law No 7251,⁶⁰ which amended the Civil Procedure Law and Certain Laws, introduced 'Article 73/A' titled 'Mediation as a prerequisite' to the Consumer Protection Law, No 6502, on 28 July 2020. This amendment stipulates that engaging in mediation is a mandatory prerequisite before initiating lawsuits pertaining to consumer disputes involving monetary claims equal to or exceeding TRY 66 000.⁶¹ Commencing in July 2021, compulsory mediation for consumer disputes was initiated. Between this inception date and May 2022, out of 150 297 dispute cases, 69 820 concluded with an agreement, while 63 339 did not reach a resolution. The proportional success rate during this period stood at 52 per cent.⁶²

Finally, since 1 September 2023, with the seventh judicial package,⁶³ Article 18/B added to the Law on Mediation in Civil Disputes, excluding disputes regarding the eviction of immovables, disputes arising from the rental relationship, disputes involving the sharing of movable and immovable property and the dissolution of a partnership, disputes arising from condominium ownership, disputes deriving from neighbour rights and disputes arising from agricultural production contract, which have been subject to mandatory mediation.

C. Mandatory mediation for IP disputes

There is no regulation in the Law on Intellectual and Artistic Works, the Law on IP or the Mediation Law on whether the disputes arising from IP are subject to mandatory mediation. Therefore, in accordance with the stipulations of Article 5/A of the TCC, which mandates mediation for certain commercial cases, and Article 4/1 of the TCC, which defines the scope of commercial cases, an assessment will be conducted to determine if disputes arising from IP are subject to mandatory mediation as a prerequisite.⁶⁴

According to Article 5/A of the TCC:

[i]n commercial disputes, being specified in Article 4 of this Code, or in other codes, it is pre-condition to refer to a mediator prior to bringing an action for requests of receivables, compensation, cancellation of objection, negative declaration and reclamation lawsuits whose subject is the payment of a certain amount of money.

In this context, for the mandatory mediation institution to become effective, firstly, the case must be of a commercial nature,

⁴⁸ Süha Tanrıver, *Hukuk Uyumazlıklarında Arabuluculuk* (Ankara, Yetkin Yayınevi, 2020) 144.

⁴⁹ Turkish Constitution Court Decision, 11/07/2018, E.2017/178, K.2018/82. Available at https://normkararlarbilgibankasi.anayasa.gov.tr/ND/2018/82?Donemler_id=2&EsasNo=2017%2F178&KararNo=2018%2F82 (accessed 2 December 2023).

⁵⁰ *ibid.*

⁵¹ *ibid.*

⁵² Official Gazette, 25 October 2017, No 30221.

⁵³ Available at <https://basin.adalet.gov.tr/kira-uyusmazliklarinda-zorunlu-arabuluculuk> (accessed 2 December 2023).

⁵⁴ Statistics on Mediation in Labour Disputes. Available at <https://adb.adalet.gov.tr/Home/SayfaDetay/arabuluculuk-istatistikleri07012021034403> (accessed 2 December 2023).

⁵⁵ Available at <https://adb.adalet.gov.tr/Home/SayfaDetay/arabuluculuk-istatistikleri07012021034403> (accessed 2 December 2023).

⁵⁶ *ibid.*

⁵⁷ Official Gazette, 6 December 2018, No 30630.

⁵⁸ Serkan Kaya and Meltem Karatepe Kaya, 'Emerging trends of resolving commercial disputes through mandatory mediation in Turkey' (2021) 32 *International Company and Commercial Law Review* 591.

⁵⁹ Statistics on Mediation in Commercial Disputes (2023). Available at <https://adb.adalet.gov.tr/Resimler/SayfaDokuman/9052022162356ticaret%20%202004.05.2022.pdf> (accessed 2 December 2023).

⁶⁰ Official Gazette, 22 July 2020, No 31199.

⁶¹ Serkan Kaya and Çağatay Serdar Şahin, 'Mandatory mediation for consumer disputes: unintended consequences of mandatory mediation' (2023) 34 *International Company and Commercial Law Review* 26–41.

⁶² Statistics on Mediation in Consumer Disputes (2023). Available at <https://adb.adalet.gov.tr/Resimler/SayfaDokuman/9052022162356ticaret%20%202004.05.2022.pdf> (accessed 2 March 2024).

⁶³ Official Gazette, 28 March 2023, No 32154.

⁶⁴ Serkan Kaya and Emrullah Kervankıran, 'Fikir ve Sanat Eserleri Kanunu Kapsamında Ortaya Çıkan Uyumazlıkların Medeni Usul Hukuku Perspektifinden Değerlendirilmesi' (2024) 29 *Dicle Üniversitesi Hukuk Fakültesi Dergisi* 229 at 249.

and secondly, the case must involve a claim for debt or compensation. Thus, the legislator did not intend for all commercial cases to fall within the scope of mediation; limitations regarding mandatory mediation in commercial cases have also been imposed.

As outlined in Article 4 of the TCC, commercial cases are categorized into two groups: absolute commercial cases and relative commercial cases. Absolute commercial cases encompass legal actions stemming from matters delineated within the TCC, irrespective of the parties' merchant status. This includes actions specified in the TCC and other legal statutes and actions recognized as commercial transactions within private law. Relative commercial lawsuits are acknowledged within the commercial domain if they pertain to the operations of the commercial enterprises of the parties. Furthermore, mandatory mediation is required for legal disputes not explicitly detailed in Article 4 of the TCC involving merchants on both sides of the conflict and disputes concerning the commercial ventures of said parties.

Upon reviewing Article 4 of the TCC, it becomes evident that two distinct criteria are employed to classify disputes as commercial cases. Firstly, a dispute qualifies as commercial litigation when encompassed within a legal framework explicitly defining it. Secondly, the dispute must have a direct link to the commercial pursuits of one or both parties. Hence, the concept of commercial activity holds a significant weight in determining whether a dispute falls under the purview of commercial litigation.

Furthermore, certain disputes arising from relevant sections of the Turkish Civil Code concerning pawnbrokers, specific regulations and laws governing banks and financial institutions are also recognized as commercial lawsuits. These particular disputes are subject to mandatory mediation as well.

Regarding IP disputes, the legislator explicitly states in TCC Article 4/1 that disputes arising from IP will be classified as commercial cases only if they are associated with the commercial operations of one party. In the realm of IP disputes, the mandatory requirement for resorting to mediation necessitates not only that these cases possess a commercial nature but also that they fall within the specified limitations concerning their subject matter.⁶⁵

In order to improve the clarity and comprehensiveness of this discourse, it is imperative to specify the categories of cases that are subject to mandatory mediation within the domain of IP law. Inconsistencies are evident in the current Court of Cassation precedents regarding this issue, particularly among distinct chambers.

The 11th Civil Chamber of the Court of Cassation has previously addressed the subject of compulsory mediation in IP disputes that encompass both financial and non-financial demands. In case 2019/4851, judgment 2020/2732, dated 10 June 2020, the Chamber dealt with a litigation that involved allegations of trade mark infringement and claims for both monetary and non-monetary compensation. The lawsuit was rejected by the lower court due to procedural reasons, since the plaintiff had not commenced obligatory mediation for the monetary claims. Nevertheless, the Court of Cassation reversed this ruling, highlighting that according to Article 110 of the Civil Procedure Law, obligatory mediation is not necessary for combined claims where separate claims are brought together in a single case. The matter was sent back to the lower court to be further examined.

In a separate case with the reference number 2019/3611, judgment 2020/4734, dated 4 November 2020, the 11th Civil Chamber

once again reversed a lower court's decision to reject a complaint that involved both financial and non-financial allegations about copyright infringement. The Chamber restated that where non-monetary claims are present alongside monetary ones, the case is free from the required mediation requirement. This reinforces the validity of Article 110 in such cases.

The Chamber addressed a comparable copyright dispute in a subsequent case with the reference number 2020/933 and judgment number 2020/5776, which was issued on 09.12.2020. Although the procedural dismissal was overturned by the Chamber, the result was not unanimous but rather obtained by a majority. The minority opinion proposed that the lower courts should have distinguished between the monetary and non-monetary claims, utilizing obligatory mediation for the monetary claims, and proceeded with the non-monetary claims based on their merits. The divergence of views within the Chamber underscores the continuous discourse and the developing legal principles regarding the convergence of compulsory mediation and IP disputes in Turkey.

The Court of Cassation's rulings highlight the importance of avoiding dismissing cases that involve both monetary and non-monetary claims only based on procedural grounds, such as the absence of required mediation. Nevertheless, the conflicting perspectives within the legal system indicate that this particular field of law is still evolving, and future judgments may either strengthen or clarify the existing approach. While the legal community anticipates a conclusive outcome, these rulings are expected to significantly influence the use of compulsory mediation in IP conflicts in the coming time.

1. Mandatory mediation for disputes arising from intellectual and artistic works

In IP law, the creator holds economic and moral rights over the work. These rights, not pertaining to classical property ownership due to their intangible nature, are absolute rights and can be asserted against everyone.⁶⁶ Violating the creator's economic and moral rights constitutes infringement, inherently a breach of law. The existence of such infringement against these rights in itself constitutes a violation of law. Law No 5846 on Intellectual and Artistic Works protects these rights, allowing the rights holder to assert various claims through legal action in case of an actual violation or a threat of violation of any of these rights. Consequently, based on the nature of the infringement in a specific case, rights holders can initiate actions for cessation of infringement (injunction), prevention of infringement, claims for both material and moral damages and actions for the transfer of profit resulting from unauthorized representation. These legal actions are often filed together depending on the circumstances of the case.⁶⁷ Disputes arising from the Law on Intellectual and Artistic Works manifest themselves within commercial lawsuits, at least insofar as they concern a commercial enterprise. In this regard, if these disputes fall within the scope specified in TCC Article 5/A-1 and are suitable for mediation, they become subject to mandatory mediation.

When the economic rights of the author over their work are infringed upon, the injunction action to cease infringement is regulated explicitly under Article 68 of the Law on Intellectual and Artistic Works. Accordingly, the author, in case of infringement of

⁶⁵ Cafer Eminoğlu and Cansu Korkmaz, 'Marka Hakkına Tecavüzden Doğan Uyuşmazlıkların Arabuluculuğa Elverişliliği' (2022) 26 *Erzincan Binali Yıldırım Üniversitesi Hukuk Fakültesi Dergisi* 291 at 292.

⁶⁶ Ünal Tekinalp, *Fikri Mülkiyet Hukuku* (İstanbul, 5th edn Vedat Kitapçılık 2012) 6 at 7.

⁶⁷ Levent Yavuz et al., *Fikir ve Sanat Eserleri Kanunu Yorumu* (Ankara, 2nd edn Seçkin 2014) 1881; Şafak N Erel, *Türk Fikir ve Sanat Hukuku* (3rd edn Yetkin Yayınları 2009) 345; Ayşenur Şahin, *Fikri Hukukta Eser Sahibinin Mali Haklarının Korunması* (Vedat Kitapçılık 2010) 183.

their reproduction rights, can demand the destruction of reproduced copies, duplication films, moulds or similar tools used for reproduction if these unauthorized copies have not yet been circulated or can demand their delivery at a price not exceeding the production cost or, in the case of a contract, can claim three times the amount specified in the contract.

The general injunction action regulated under Article 66 of the Law on Intellectual and Artistic Works, the action for determining infringement and the injunction action in case of infringement of moral rights specified under Article 67 are not within the scope of mandatory mediation. This is because the subject matter of the claims that can be raised under the mentioned articles does not fall within the limitation envisaged for mandatory mediation; hence, mediation cannot be sought for such claims. However, mandatory mediation may be applicable if claims for debt and compensation are asserted alongside the injunction for infringement.⁶⁸

Article 68 of the Law on Intellectual and Artistic Works discusses the triple fee claim, which is an important provision regarding the use of works without a contract. This argument is made when someone has used a creative work without permission, thereby violating one of the rights that come with that work, without entering into a legal agreement with the owner of those rights. The provision requires the payment of a specific sum of money, which is determined by multiplying the remuneration that would have been owed under a valid contract by three.

The triple fee claim is commonly seen as a civil penalty rather than a means of compensating the rights holder for their actual damages. The main objective of this is twofold: to impose penalties on the party that has infringed and to act as a powerful deterrent against any future infringements. The punitive aspect is essential as it highlights the commitment to uphold and protect IP rights, regardless of whether the rights holder has suffered any measurable harm.

When considering mandatory mediation, it is important to take into account the significance of the triple fee claim. Disputes that can be resolved through mutual agreement between the parties are typically subject to mandatory mediation. Nevertheless, the triple fee claim's punitive nature may make it difficult to reach a resolution. Unlike compensatory claims, which seek to restore the injured party to their original position, the triple fee claim is intended to impose a penalty on the infringer. This feature is more in line with punitive damages, which are typically not open to negotiation or compromise in mediation settings.

Therefore, it can be argued that the triple fee claim mentioned in Article 68 is not covered by mandatory mediation.⁶⁹ Given its nature as a civil penalty aimed at preserving the integrity of IP rights, it is not subject to free negotiation or resolution by the parties involved. Understanding this distinction is crucial to maintaining the strong deterrent effect of the triple fee claim, which in turn strengthens the legal protection provided to creators and rights holders.

2. Mandatory mediation in trade mark disputes

In cases concerning claims for debt and compensation related to the payment of a certain amount of money within commercial

disputes, which is subject to mandatory mediation (TCC Article 5/A/I), mediation is also mandatory in disputes arising from such claims within industrial property rights. For instance, claims for compensation resulting from the trade mark owner's extreme negligence or intentional wrongdoing, as well as claims for partial or full reimbursement of payments made under contracts established and executed prior to the decision to nullify or cancel, are subject to the mandatory mediation requirement as a prerequisite for legal action. According to Article 27/3 of the IPL, the retroactive impact of invalidity and cancellation decisions does not apply to court decisions that have already been finalized and implemented in trade mark infringement lawsuits filed prior to the decision. It also does not affect contracts that were made and carried out before the decision. Although mediation is obligatory for these types of claims, the nullity and retroactive annulment rulings do not have a retrospective effect on court judgments that have already been completed or contracts that have been signed.⁷⁰ However, not all disputes in the field of IPL are suitable for mediation. Although mediation is encouraged even in disputes arising from the opposition to the publication of the trade mark registration application, mediation cannot be applied for every dispute at this stage.⁷¹ For example, in case of existence of the absolute grounds for refusal of trade mark registration stipulated in the first paragraph of Article 5 of the IPL, since the authority must reject the registration application ex officio and the absolute grounds for refusal are not among the issues that the parties can freely dispose of, the dispute arising from the objection to the registration application is not suitable for mediation.⁷²

To better visualize the application of mandatory mediation, the Table 2 outlines whether significant disputes arising from trade mark law are subject to this requirement:

3. Mandatory mediation in patent disputes

According to Article 5/A of the TCC, receivables, compensation, cancellation of objection, negative declaration and reclamation lawsuits whose subject is the payment of a certain amount of money regulated in the IPL are subject to mandatory mediation. Therefore, in compensation claims that the patent holder initiates alleging infringement of patent rights, the plaintiff is obliged to first resort to mediation.⁷³ Should the plaintiff intend to file a lawsuit in court, it is mandatory to attach to the lawsuit petition the final record, indicating that mediation was sought by the plaintiff and no agreement was reached at the conclusion of the mediation activity.

Compensation lawsuits based on patent rights can be initiated independently or with requests such as the determination, cessation or termination of infringement.⁷⁴ As each of these requests qualifies as a separate lawsuit, in such cases, where one lawsuit is subject to mandatory mediation, while the other is not, it would not be permissible for mandatory mediation to apply selectively.⁷⁵

To better visualize the application of mandatory mediation, the Table 3 outlines whether significant disputes arising from patent law are subject to this requirement:

⁶⁸ Seyma Işık Yaşlı, 'Fikir ve Sanat Eserleri Kanunu'nda Düzenlenen Ref Davasının Dava Şartı (Zorunlu) Arabuluculuk Kapsamında Değerlendirilmesi' (2023) 1 KLÜHFD 456–457.

⁶⁹ *ibid*; Hasan Kadir Yılmaztekin and Zeliha İnce, 'DavaŞartı Arabuluculuk Ekseninde Bazı Fikri Mülkiyet Hukuku Uyuşmazlıkları' (2019) 14 *Terazi Hukuk Dergisi* 2177; Nihat Taşdelen, 'Ticari Uyuşmazlıkların Çözümünde Alternatif Bir Çözüm Yolu Olarak Arabuluculuk' (Ankara, Yetkin 2021) 425–426.

⁷⁰ Cafer Eminoğlu and Cansu Korkmaz, 'Marka Hakkına Tecavüzden Doğan Uyuşmazlıkların Arabuluculuğa Elverişliliği' (2022) 26 *Erzincan Binali Yıldırım Üniversitesi Hukuk Fakültesi Dergisi* 291 at 305.

⁷¹ *ibid* 306.

⁷² *ibid* 306.

⁷³ Uğur Çolak, *Türk Patent Hukuku* (Ankara, Adalet 2022) 1240.

⁷⁴ *ibid* 1242.

⁷⁵ *ibid* 1243.

Table 2. Whether significant disputes arising from trade mark law are subject to mandatory mediation^a

Type of Case	Subject to mandatory mediation
Action for the fulfilment of financial obligations arising from a co-existence agreement or compensation for damages resulting from such agreements	Yes
Action for the establishment, invalidity or nullity of a co-existence agreement	No
Action to determine the recognition of a well-known trade mark	No
Action against registration by an agent or representative without the trade mark owner's consent	No
Action for the fulfilment of financial obligations arising from a trade mark licence agreement or compensation for damages resulting from such agreements	Yes
Action for the establishment, invalidity or nullity of a trade mark licence agreement	No
Action for the nullity of a trade mark	No
Action for the cancellation of a trade mark	No
Action for compensation due to damages caused by severe negligence or bad faith of the trade mark owner during registration	Yes
Action for the refund of amounts paid under contracts established and executed before the nullity or cancellation of the trade mark	Yes
Action for the seizure of goods at customs resulting in damages	Yes
Action against decisions of the Turkish Patent and Trademark Office's Re-Examination and Evaluation Board	No
Action for compensation against the Turkish Patent and Trademark Office for damages caused to third parties by its decisions	Yes

^aYılmaztekin and İnce (n 69).

In cases concerning infringement on industrial rights, mediation is not obligatory for the identification, cessation and restoration of the status quo ante requests.⁷⁶ Specifically, where these cases involve claims for a specific amount of licensing fees and do not include compensation claims, it is permissible to file a lawsuit directly. However, mediation must be pursued before initiating legal proceedings if compensation is sought due to infringement. Similarly, mediation is not mandatory in cases contesting decisions made by the Turkish Patent and Trademark Office where no compensation is sought.⁷⁷ In cases involving usurpation where the demand is for the determination of rightful ownership, mediation should not be mandated. Nevertheless, mediation is still

⁷⁶ Onur Sanı, 'Sinaî Mülkiyet Kanununda Düzenlenen Sinaî Haklardan Doğan Uyuşmazlıklara Dava Şartı Arbuluculuğun Uygulanması' (2019) 18 *İstanbul Kültür Üniversitesi Hukuk Fakültesi* 345 at 381.

⁷⁷ *ibid* 382.

Table 3. Whether significant disputes arising from patent law are subject to mandatory mediation^a

Type of case	Subject to mandatory mediation
Action for determination of compensation in exchange for the use of the invention or in case of acquisition by the patentee	Yes
Action for determination of the payment to be made by the monopolist to the patent holder upon acquisition of the business or facility where the invention is being used	Yes
Action for patent usurpation	No
Compensation lawsuit by the patent applicant from the state during the period of confidentiality of inventions in a secret patent category	Yes
Action for the performance of obligations arising from a patent licence agreement and compensation for damages resulting therefrom	Yes
Compensation lawsuit in case of determining the unauthorized transfer or licensing of rights derived from a patent application or patent	Yes
Action filed for the establishment, invalidity or nullity of a patent licence agreement	No
Compensation lawsuit filed in cases where a patent application is withdrawn or rejected or where a court has ruled the patent rights as invalid	Yes
Compensation lawsuits arising from compulsory licensing	Yes
Action for the cancellation of compulsory licensing	No

^aYılmaztekin and İnce (n 69).

required if a lawsuit does not fall within the scope of mandatory mediation and involves a specific claim for receivables or compensation.

V. Conclusion

Turkey's strategic initiative in addressing IP disputes through the implementation of mandatory mediation and the establishment of specialized courts stands as a progressive step towards fortifying the protection and resolution mechanisms for IP rights. Turkey's decision to integrate mandatory mediation into the resolution of IP disputes signifies a strategic endeavour to streamline legal procedures, alleviate the burden on judicial systems and foster an environment conducive to amicable settlements. In addition, the establishment of specialized IP courts demonstrates a purposeful shift towards resolving disputes based on specialized expertise, effectively addressing the complex aspects of IP problems.

Law No 7155 does not explicitly define the specific IP disputes where mandatory mediation shall be applied, lacking precise delineation in this regard. However, for an IP dispute to fall within the scope of mandatory mediation, it must pertain to legislation concerning IP law, possess a commercial nature and involve monetary claims such as receivables or compensation, objections for annulment, negative determination or restitution lawsuits arising from IP rights.

There continues to be ambiguity regarding the determination of the scope of disputes falling under the mandatory mediation requirement stipulated in Article 5/A of the TCC concerning commercial cases. The reason for this uncertainty lies in the attempts to discern the effect of mandatory mediation when the claims asserted, though pertaining to a receivable, are based on demands other than mere performance. This ambiguity arises from the endeavour to ascertain the impact of such claims on mandatory mediation, despite their association with a receivable but being contingent on demands beyond mere performance. Mandatory mediation can clearly specify the types of disputes to be covered. In addition, in the event that there is more than one request, if one is within the scope of mandatory mediation and the other is outside the scope, the court should eliminate

the uncertainties about whether mediation is a condition for litigation.

Given the lengthy court proceedings in Turkey, it is essential to increase the use of alternative methods like mediation. However, to promote mediation effectively, it is crucial to make the process appealing rather than mandatory. This can be achieved by highlighting its benefits through extensive use of mass media and state support, which can help overcome resistance and prejudice. Efforts should focus on informing all relevant institutions, organizations and the public about the mediation process. Furthermore, engaging key stakeholders such as professional associations, especially chambers of commerce and encouraging active participation from judges and lawyers are essential steps for fostering support for mediation.