

Mandatory Mediation for Commercial Receivables

Mediation has become a must in commercial receivables actions and to this end some provisions of Turkish Commercial Code ("TCC") and Code of Mediation in Civil Disputes have been amended within the scope of Code of Commencement of Execution Proceedings in Monetary Receivables Arising from Subscription Agreements (the "Code") which became effective by being published in Official Gazette dated 19 December 2018 and numbered 30630. In this regard;

- By incorporating Article 5/A into TCC, the application for mediation before bringing a
 legal action has become mandatory for the actions -among those listed under Article 4,
 TCC- in which a request for compensation or payment of a certain amount is sought. In
 these cases, the application to mediation is regulated as a condition to bringing a legal
 action. The effective date of this piece of regulation is 01.01.2019.
- It is also stated by this article that any applications to mediators will be finalized within 6 weeks starting from the appointment of the mediator and that this time period can only be extended for another two weeks only under exceptional circumstances.
- By incorporating Temporary Article 12 into TCC, it is regulated that the relevant provisions as to the mandatory mediation of the Code are not to be applied as of its effective date to the pending lawsuits before first instance courts, regional civil courts and Court of Cassation.
- The 5th Section with the heading "Mediation as a Condition to Bringing a Legal Action" has been added to the Code of Mediation in Civil Disputes following its 4th Section and general provisions as to the mediation have been provided under its Article 18/A. Within the scope of the article, how the mediation procedure is to be conducted is regulated if this procedure is applicable as per the relevant codes which regulate the application to mediation as a prerequisite to bringing a legal action before court. The article also regulates how mediation costs will be distributed among parties and how mediators are appointed. This provision has become effective as of the publication date of the Code.
- In this regard, if parties to a dispute -that is subject to mandatory mediation- cannot reach to an agreement which eventually leads to a lawsuit before a court, the original copy of the final report of the mediation or its copy approved by the mediator must be presented to the court.

If it is not submitted to the court, a peremptory term of one week is granted to the claimant to submit the same. If the final report of the mediation is still not provided to the court even after the granted time period of one week, the legal action is rejected by the court without transmitting the lawsuit petition to the counter party. This piece of regulation is considered to be appropriate and in compliance with the rule of procedural economy. Indeed, both the court and the defendant would be saved time and resources for a lawsuit prerequisite to which was not met.

- Within the scope of this article, it is also regulated that the application to mediation must be made to the mediation bureau located in the same jurisdictional venue with the authorized court and that any application must be finalized within three weeks starting from the appointment of the mediator which is subject to an extension of one week under exceptional circumstances. As is explained above, this time period is regulated differently for commercial disputes in which the commencement of the time period allowed for the mediation is regulated in principle as six weeks starting from the appointment of the mediator which is subject to a two-week extension period under exceptional circumstances. One can interpret the difference as being originated from the difference in the nature of the disputes with commercial disputes being complex and extensive.
- Article 18/A provides special provisions as to the provisional injunction and provisional seizure before legal action is brought and as to the mandatory provisions of special codes requiring arbitration or other means of alternative dispute resolution mechanisms. In these cases;
 - If provisional injunction or provisional seizure is granted before legal action is brought -which is seen as a complementary proceeding to the seizure-, the allowed time frame to bring a legal action does not run from the application to mediation bureau until the final report is drafted. And,
 - If arbitration or other means of alternative dispute resolution mechanisms are required as per the special codes, provisions regulating mediation as a condition to bringing a legal action do not apply.

By virtue of the provisions of the Code and Code of Mediation in Civil Disputes the legal nature of the agreement document -which is drafted as a result of the mediation- and its enforceability before foreign courts raise some questions. Indeed, as per Article 18 of Code of Mediation in Civil Disputes with the heading of "agreement by the parties" envisages that if the parties come to an agreement as a result of the mediation, a document reflecting this agreement is to be signed by the parties and the mediator. For the agreement document to be enforceable, the parties must apply to civil court of peace in order to obtain enforceability decision. By doing so, the parties can enforce the decision reached as a result of the mediation as if it is a court decision.

It is to be noted that the same provision also regulates that if the agreement document that is signed by the parties is also signed by the parties' respective lawyers, the agreement document is considered to be a document bearing the same enforceability power that court decisions have without the parties having to obtain a decision from the civil court of peace in the first place.

In both cases, it is uncertain how this agreement document is to be enforced if one of the parties is a foreigner who does not abide by the terms of the agreement document and who does not have any assets in Turkey either. Because a recognition action before foreign courts would be needed under these circumstances for the enforcement of the agreement document in foreign countries and considering that the agreement document is neither a court decision nor an arbitral award, there might arise problems during the recognition of the agreement document.

Additionally, we find it necessary to express our concerns related to the problems associated with the conduct of the mediation that has been in place for a year for the labor law disputes -which is also a prerequisite to a lawsuit- in Turkey, which seem to endure in the future. Mediators usually decide on the date of the meeting without granting reasonable time to the counterparty for him to prepare to reach to a healthy evaluation on the application and get prepared for the process and without providing necessary information and documentation to the counter party, all of which we believe to be originated from the hectic nature of the process in practice. And these factors hinder the effectiveness of the process.

Also considering the complex and extensive nature of the commercial disputes, we also believe that necessary legislation should be enacted which foresees among other points that the counter party must be given appropriate time before the meeting and must be informed properly on the dispute. We hope that the follow-up legislations are enacted by pointing out the problems arisen in the practice which can be achieved by monitoring the conduct of mediation closely after the regulations become effective.



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