

Turkey: Mandatory Mediation for Commercial Disputes

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Turkey introduced new legislation which came into effect on 1 January 2019 providing for mandatory mediation as a prerequisite for commercial disputes before pursuing the dispute via the Turkish court system. The Law on Starting Legal Proceedings for Monetary Receivables Arising from Subscription Agreements No 7155 published in the Official Gazette No 30630, dated 19 December 2018, introduced new provisions to the Turkish Commercial Code No 6102 ("**TCC**") and the Law on Mediation in Civil Disputes No 6325 (the "**Mediation Law**").

As per the recently adopted legislation, parties to a commercial dispute pertaining to monetary receivables cannot bring their case before a court unless the mandatory mediation process is completed and a final report is issued by the mediator putting forth the parties' failure to settle the dispute. The parties must firstly apply for mediation; otherwise, the case will be dismissed on procedural grounds without further examination of its merits.

The scope of mandatory mediation

The mandatory mediation requirement will apply for acts and operations deriving from private law at the parties' free disposal, in other words, matters that can be solely settled by a judge cannot be subjected to commercial mediation.

According to the recently introduced article 5/A of the TCC, it is mandatory to apply for mediation with regards to commercial lawsuits regulated under article 4 of the TCC and other legislation concerning monetary receivables and compensation claims. As per article 4 of the TCC, lawsuits arising from the following are considered as commercial lawsuits and within the scope of the mandatory mediation:

- issues regulated under the TCC;
- certain articles of the Turkish Code of Obligations;
- relevant articles of the Turkish Civil Code regarding pawn brokers;
- certain regulations under intellectual property legislation and legislation concerning banks and other financial institutions.

In addition, mediation is mandatory for issues and lawsuits that are not expressly stated under article 4 of the TCC that involve parties that are merchants on both sides of the dispute and disputes concerning the commercial enterprises of said parties.

With regards to cases that are within the scope of the abovementioned commercial disputes, mediation is prescribed as a compulsory prerequisite before filing a lawsuit. According to the Mediation Law's article 18/A-2, if such cases are filed without applying to mediation first, the courts must dismiss the case on grounds of

absence of prerequisite without any further examination. With regards to lawsuits outside the abovementioned scope, parties can still choose to resolve their disputes through voluntary mediation. However, since mediation is not mandatory in these instances, filing a lawsuit without applying for mediation cannot be construed as a reason to dismiss the case at hand on procedural grounds due to non-fulfillment of the mediation precondition.

Similarly, mandatory mediation is not a prerequisite for provisional remedies such as interim injunction and interim attachment requests, however, as per the newly introduced article 18/A-16 of the Mediation Law, if such requests are granted by courts of first instance prior to filing a lawsuit, the term of litigation (two weeks and seven days respectively) stipulated under the Code on Civil Procedure No 6100 (CCP) and the Code of Execution and Bankruptcy No 2004 (CEB) will not lapse until the preparation of the final record by the mediator.

Pursuant to article 18/A-18 of the Mediation Law, if mandatory arbitration or alternative dispute resolution methods are prescribed for certain disputes under special laws or in the event of the existence of an arbitration agreement between the parties, these mandatory mediation provisions will not be applied.

Finally, as per provisional article 12 of the TCC, mandatory mediation will not be applied with regards to cases pending before courts of first instance, regional courts of justice and the Court of Cassation as of the date of these regulations' entry into force.

Effect of the new regulations on litigation

Under article 115 of the CCP, the existence of the precondition of mediation will be taken into consideration ex officio by the court and the parties to the dispute can argue the nonexistence of such precondition at any stage of the proceedings.

In line with these general provisions set forth under the CCP, article 18/A-2 of the Mediation Law dictates that if a lawsuit is brought before the court without applying to mandatory mediation, the case will be dismissed on procedural grounds without any further examination of the merits of the case.

As per article 18/A-15 of the Mediation Law, during the period between the application to the mediation bureau and the preparation of the final report by the mediator, limitation periods and final terms will be suspended.

The mediation procedure

According to article 18/A of the Mediation Law, mediation applications will be made to the mediation bureau within the jurisdiction of the competent court with regards to the subject of the dispute at hand and a mediator will be selected by the mediation bureau from a list presented to the relevant presidency of justice commissions unless the parties agree on a mediator ranked within the list.

Upon the appointment of the mediation by the mediation bureau, the mediator can call the parties for an initial meeting during which the other party can put forth a jurisdiction plea regarding the jurisdiction of the mediation bureau and, in this instance, the case will be sent to the competent civil court of peace where the competent mediation bureau will be determined within one week and a new mediator will be selected.

As per article 5/A of the TCC, the mediation process will be completed within six weeks beginning from the appointment of the mediator, and this period can be extended for maximum of two weeks if deemed

necessary by the mediator.

According to article 18/A-11 of the Mediation Law, if mediation fails due to one party's non-participation in the first mandatory session held by the mediator without a valid reason, this situation will be recorded in the final report by the mediator and such party will bear the total cost of the proceedings even if the court rules in its favor.

If the parties reach an agreement, the necessary expenses of the mediation will be paid by the parties equally, unless decided otherwise, and if the parties fail to settle these, expenses will be borne by the party against whom the court rules. However, in the event that the parties fail to reach an agreement, the mediator fees for the first two hours will be paid from the budget of the Ministry of Justice.

As per article 18/A-2 of the Mediation Law, if the parties fail to reach a settlement, the plaintiff must include the final report prepared by the mediator displaying that the parties have duly carried out the mediation process but failed to reach an agreement and a lawsuit can be filed before the competent courts of first instance.

In the event that the parties reach an agreement, a document of understanding will be signed by the parties and the mediator in accordance with article 18 of the Mediation Law. The parties can request an annotation regarding the enforceability of the document of understanding from the competent civil court of peace. As per article 18/4 of the Mediation Law, the document of understanding that is signed by the mediator and the parties along with the parties' attorneys does not require an annotation of enforceability. The document of understanding that is signed by the parties with an enforceability annotation or signed by the mediator and the parties along with their attorneys will be deemed to serve as a court judgment and can be enforced in the same manner. Consequently, the parties will not be able to file a lawsuit on the same subject.

Final notes

There remains some debate surrounding these new rules and, in particular, the scope of mandatory mediation as defined under article 5/A of the TCC. While the text of the article suggests that this new requirement can only be applied for lawsuits regarding receivables and compensation claims, it is also argued that these new provisions should be applied to other actions concerning monetary disputes, particularly negative declaratory actions and recognition and enforcement of foreign court judgments given the purpose and objective of the regulations.

In our view, arguing that a final foreign court decision must be subject to mandatory mediation would undoubtedly be against the prohibition of *revision au fond* which precludes courts from reviewing the substance of the decision rendered by a foreign court. This prohibition is expressly acknowledged in Turkish law by the Turkish Court of Appeal's General Assembly on the Unification of Judgements' decision which is binding for all Turkish courts of all levels.¹

Such prohibition, which is binding for courts on all levels, would be *a fortiori* binding for mediators. These issues would surely be discussed in time by case law and practice of the Court of Cassation.

The new legislation, once it has been fully established, will provide a time and cost-efficient alternative dispute resolution method for parties while decreasing the workload of the courts.

Note

¹ Turkish Court of Appeal's General Assembly on the Unification of Judgements' decision dated 10 February 2012, No 2010/1 E, 2012/1 K.

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