

Implementation of Mandatory Mediation in IP Disputes: Court of Cassation Issues Contradictory Decisions

Background

An implementation problem occurs when monetary and non-monetary claims are raised together in IP cases, since the code introducing mandatory mediation does not provide a specic rule for disputes combining both monetary and non-monetary claims in a single case. In such scenario, one of the following three options must be applied by the courts:

- passing through mandatory mediation and entering into the merits of the case for all claims;
- dismissing all claims based on procedural grounds; or
- separating the claims based on the mandatory mediation requirement.

Recent decisions

Recent decisions by the Turkish Court of Cassation provide insights into this controversial topic, but do not end the discussion entirely since the lower courts and the Court of Cassation itself had contradictory opinions. In a case including non-monetary claims based on copyright infringement and compensation, the IP Court dismissed the case since mandatory mediation was not sought for the monetary-related part of the case before ling the action. The plaintiff's appeal before the Regional Court of Appeal was rejected. Upon further appeal by the plaintiff, the Court of Cassation reviewed the matter and held that the lower courts cannot rule that there was a lack of procedural step when monetary and non-monetary claims are led together. It thus overturned the lower courts' decisions (Merit No 2019/3611 E, Decision No 2020/4737 K, 11 Civil Chamber of the Court of Cassation, 4 November 2020). The same reasoning was used by the Court of Cassation in another decision rendered a few months previously (Merit No 2019/4851 E, Decision No 2020/2732 K, 11 Civil Chamber of Court of Cassation, 10 June 2020). In a more recent decision containing non-monetary claims for copyright infringement and compensation, the IP Court once again dismissed the case on procedural grounds based on a similar reasoning and the Regional Court of Appeal rejected the defendant's



appeal. Upon further appeal, the Court of Cassation stated once again that the lower courts should have reviewed the case on the merits without referring to the mandatory mediation requirement (Merit No 2020/933 E, Decision No 2020/5776 K, 11 Civil Chamber of Court of Cassation, 9 December 2020). However, in contrast to its previous decisions, the Court of Cassation rendered this decision by a majority rather than unanimity. In the dissent, it was stated that the lower courts should have separated the claims and checked the mandatory mediation requirement as a cause of action for the monetary claims, and should have entered into the merits of the non-monetary claims. In this last decision, the Court of Cassation remarked that the code contains no specic rule for cases including both monetary and non-monetary claims. There is thus a legal gap, which was conrmed by the Court of Cassation. Since the court lled this gap and there was an opposing view, a more detailed and solid reasoning will be needed in future decisions. The court should also ensure that it provides unanimous decisions, since these will provide guidance to the lower courts, IP practitioners and the doctrine.

Comment

Until the courts can adopt the same approach, it is recommended to apply for mandatory mediation in cases including both monetary and nonmonetary claims before ling an action. Otherwise, there is a risk that the case will be dismissed on procedural grounds. If the Court of Cassation's dominant opinion becomes accepted and established by case law, a legislative change/amendment may also be discussed to bring the legislation into line with the jurisprudence and II the legal gap.