Recent Developments about Unbreakable Deadlock in Consumer Disputes: Mediation and Solution Proposals

Introduction

The fair and swift resolution of consumer disputes serves the interests of not only the consumers, but also the businesses involved. Consumers purchase more when they are confident that they will be treated fairly in a potential dispute. Businesses, on the other hand, become economically inoperable and unviable following systematic violations against consumers and the rapid and fair enforcement of consumer rights. In short, all market players are better off in an environment where consumer disputes are handled fairly and expeditiously. Further, fair treatment of such disputes can help countries to boost their economies.

In Turkey, a two-tier system exists for the resolution of consumer disputes. Consumer arbitration boards have compulsory jurisdiction over consumer disputes falling under a certain annually determined monetary threshold (TRY10,390 for 2020). Parties are free to appeal board decisions before the consumer courts. Otherwise, board decisions are enforced as if they are court decisions. For all other disputes, parties must file a legal action before the consumer courts.

Consumer arbitration boards have jurisdiction over consumer disputes falling under the monetary threshold. Their decisions are subject to appeal before the consumer courts, which hold jurisdiction over all other consumer disputes above the monetary threshold.

The recent regulation under the Law numbered 7251 proposes that actions filed directly before the consumer courts be subject to mandatory mediation before proceeding to court adjudication. With this recent regulation, parties will need to exhaust mandatory mediation before having recourse to the consumer courts. The regulation excludes the jurisdictional scope of consumer arbitration boards and appeals against the decisions of such boards. It also provides certain exceptions as to mandatory mediation before lawsuits – namely, in case of disputes arising from consumer transactions over immovable assets and actions that fall under Articles 73/6 and 74 of Law 6502 on Consumer Protection. The latter category has a narrower scope than other disputes as these actions can be filed only by the ministry, consumer organisations and other public institutions and authorities. Thus, consumers will have to exhaust a mandatory mediation phase (unless an exception applies) before filing a lawsuit before the consumer courts.

This article examines Turkey's success with regard to the fair and swift resolution of consumer disputes and explores how this recent regulation can add to this success.

What can mediation offer and at what expense?

The 2018 judicial statistics (2019 data has yet to be published) announced by the General Directorate of Judicial Record and Statistics, a branch of the Ministry of Justice, show that 56,991 lawsuits were filed before the consumer courts in 2018. The total number of lawsuits, including those that were reversed by a higher court and returned to the first-instance courts, was 137,333. The consumer courts rendered a final decision in only 64,607 of these cases. In other words, the consumer courts reduced only 47% of their caseload. Moreover, the consumer courts took an average of 437 days to render a final decision. Considering that the overall average time taken by the Turkish courts to render a final decision is 283 days, the consumer courts took well above

average. Clearly, the consumer courts work slower than other courts due to their excessive caseload and other factors.

In 2018 29.15% of the lawsuits filed before the consumer courts consisted of appeals against decisions rendered by consumer arbitration boards. On the other hand, the registration and cancellation of deeds of immovable assets constituted only 4.19% of all cases. Therefore, 66.6% of all cases in 2018 would have first had to have undergone mediation had the recent regulation passed prior to 2018, provided that all of the conditions remained the same.

Similar statistics show that even more cases would have been subject to mandatory mediation when calculated merely based on lawsuits filed by consumers. However, 32,983 of all cases concluded in 2018 were filed by consumers. Of them, 5,074 were appeals against the decisions of consumer boards, whereas 1,188 were cases arising from the registration and cancellation of deeds of immovable assets. Therefore, if mandatory mediation was required prior to 2018, 81% of cases filed by consumers and decided by the courts in 2018 would have been subject to mandatory mediation before litigation.

One of the major purposes of mediation is to reduce the courts' caseload. As per the 2018 statistics, the consumer courts work slowly, and mediation as a cause of action would apply in 66% of all cases and 81% of those filed by consumers. Therefore, introducing mediation as a cause of action will clearly affect consumers the most. Further, certain disputes may be expected to be resolved through settlement and therefore reduce the courts' caseload.

Moreover, as per the 2018 statistics, only 34 of all cases concluded in 2018 resulted in settlement. Thus, the ratio of disputes that resulted in settlement corresponds to 0.05% of all cases concluded in 2018. The procedural rule under the Civil Procedure Code 2011 as to judges' obligation to encourage parties to settle at the preliminary examination phase unfortunately seems to have been unsuccessful. Therefore, it is understandable that the legislature pushes parties to apply for mediation before filing a lawsuit. On the other hand, mandatory mediation is often criticised, with concerns that it could:

- place an extra burden on consumers;
- complicate the process;
- take more time; and
- force consumers to compromise and endure the present conditions without fully exercising their rights[1].

In particular, consumers who are inexperienced in understanding and implementing their rights may consent to receiving far less than the amount to which they are entitled at the mediation phase, rather than the full amount after a lengthy dispute. Similar situations arise in labour disputes.

[1] "Hukuk Muhakemeleri Kanunu ile Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun Teklifinin (2020) Değerlendirilmesi" by Prof Dr Hakan Pekcanıtez, Prof Dr Oğuz Atalay and Prof Dr Muhammet Özekes, 30 March 2020.

Certain disputes will be precluded from evolving into lawsuits by mandatory mediation, which may lead to statistical success. Nonetheless, statistics will never show the burden placed on consumers or the compromises they agree to when enforcing their rights.

Mandatory and voluntary alternative dispute resolution practices concerning consumer disputes in foreign laws

European Union encouraged the member states to adopt alternative resolution methods in consumer disputes, before entering horizontal regulations into force. The first decision manifesting the principles to be adopted in alternative resolution methods was the Recommendation 98/257/EC of 30 March 1998 on Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes. These principles were set forth as independence, transparency, adversarial, effectiveness, legality, liberty, representation. Secondly, the Recommendation 2001/310/EC of 4 April 2001 introduced other principles for out-of-court bodies involved in the consensual resolution of consumer disputes. In other words, the member states were encouraged to adopt principles framing mediation and other alternative dispute resolution mechanisms to which parties may voluntarily apply. After more than 10 years had passed over these Recommendations, 2013/11/EU Directive on alternative dispute resolutions in consumer disputes and Regulation (EU) No. 524/2013 on online dispute resolution for consumer disputes entered into force in 2013, both of which aimed to bring legal conformity into member states.

2013/11/EU Directive aimed to facilitate the access of member states to institutions and organizations offering qualified alternative dispute resolution to consumers regarding any kind of consumer dispute. Nevertheless, the Directive is without prejudice to national legislation making participation in alternative dispute resolution procedures mandatory before accessing to court. (Article 1, 2013/11/EU Directive). On the other hand, Regulation (EU) No. 524/2013 provides a system where consumers can submit complaints to traders through an interactive website, and these complaints are resolved through an alternative dispute resolution method such as mediation on a platform appointed by the system upon the parties' agreement. Similarly, this procedure is voluntary as well.

As 2013/11/EU Directive and legal systems in member states were brought into conformity, the member states listed the institutions and organizations managing the alternative dispute resolution procedures that are applicable for consumers. Several states such as Austria sorted these institutions under the relevant law, and adopted a close-list procedure. On the other hand, the majority of other member states, including France and Germany, granted authority to these institutions by way of approval, provided that they qualify the criteria specified under the Directive. Mediation Department established before the Directorate General for Legal Affairs of the Ministry of Justice handles all mediation processes in Turkey, regardless of whether they fall under the scope of Code numbered 6325 on Mediation in Civil Disputes or any other laws introducing mediation as a cause of action. Mandatory mediation as an alternative (!) dispute resolution mechanism in Turkey fall exclusively under the power of public authorities. A similar principle applies to consumer arbitration boards. Nonetheless, these systems, which constitute an alternative dispute resolution mechanism by nature, became the main dispute resolution methods rather than alternative ones, as they are now legally mandatory.

Alternative dispute resolution mechanisms offered for consumers in EU-member states are not limited to mediation. In addition to that, there are also ombudsman services, negotiation, arbitration, and hybrid systems including a mix thereof. Practice of these concepts differs in each country. Therefore, it is better to examine examples from several countries rather than trying to draw a general conclusion.

In the UK – *once a member of the EU*-, dispute resolution mechanisms are established on sectoral basis. For instance, *Deposit Protection Service* holds rental deposits of tenants until the end of lease agreements, and renders binding decisions through a completely online platform on disputes arising from rental deposits during evacuation. Dispute resolution mechanism offered by the system is voluntary, and each party may opt to bring the dispute before court[2]. For example, when a tenant claims GBP 1,000.- of the rental deposit from the system after evacuation, and the landlord wants to deduct GBP 600.- due to damage on the leased property, the system immediately transfers GBP 400.- to the tenant, and requests evidence such as statements, and photographs from the parties by online means. The service decides on the dispute within 28 days, and transfers the cost proportionally to the parties. Parties are free to appeal against the decision before courts. *Deposit Protection Service* is similar to consumer arbitration boards in Turkey as a decision mechanism, but differs from them in nature of having automatic enforcement of decisions.

Similarly, *Financial Ombudsman Service* is introduced for disputes emerging from financial services, such as banking or insurance, provided to consumers in the UK. The system is particularly significant in terms of participation and binding nature of decisions. According to this, financial companies are obliged to participate in the dispute resolution initiated upon the consumer's complaint. Consent is only sought on consumer side[3]. In addition to that, the system is financed by the companies operating in financial sector, such as banks[4]. On the other hand, the system's decisions are binding for businesses offering financial services, whereas they are not binding for consumers who are not happy with the decisions[5]. Consumers are free to have recourse to court regarding the decisions they are not content with. Last but not least, the system is not only entitled to render its decisions based on law but also on equity and fairness. The rendered decisions may include apologies, or improvement of credit ratings, in addition to monetary deeds.

EU countries have similar examples: In Germany, there is an arbitration board examining disputes arising from airway services (*söp_Schlichtungsstelle für den öffentlichen Personenverkehr e.V.).* As per German law, airway companies are obliged to become a member of this board, or any other institutions authorized likewise, and participate in dispute resolution mechanism provided under these authorities. In the Netherlands, an alternative dispute resolution institution *("Stichting Geschillencommissies voor Consumentenzaken")* covering more than 50 sectors at one centre is established to the contrary of Germany and the UK. Applicable rules to each sector vary before the institution, however, as a common feature, member businesses must participate in the dispute resolution mechanism before the institution and abide by the result. A significant feature of the system is that where the member company does not abide by the decision, the institution's decision

2 See https://www.depositprotection.com/custodial-terms-and-conditions/

3 See http://www.legislation.gov.uk/ukpga/2000/8/part/XVI

4 See https://www.financial-ombudsman.org.uk/faqs/rules-powers-information-us/financial-ombudsman-service-funded

5 See https://www.financial-ombudsman.org.uk/who-we-are/make-decisions

is enforced from the institution's budget. In other words, there is a guarantee fund which ensures that consumers are paid their receivables.

Besides, there are also systems where participation in the introduced dispute resolution mechanisms is voluntary for businesses. For instance, participation is voluntary for businesses, and decisions are not binding in Finland. However, compliance rate of businesses with decisions is reported to be quite high. Similarly, participation by businesses in proceedings before a commission ("*Tarbijavaidluste Komisjon*") established in Estonia is voluntary, however, those who fail to abide by the rendered decision are disclosed and included in a black list.

Examples in European countries are similar to the extent that alternative dispute resolution methods are free of charge for consumers. Nonetheless, businesses and consumers are subject to different rules in benefitting from the services offered by authorities providing alternative dispute resolution. Participation in the systems, binding effect of decisions, and implementation thereof on consumers and businesses are significantly different. As an extreme example, *Financial Ombudsman Service* in the UK is funded by the finance sector, participation in its alternative dispute resolution system is mandatory. In the meantime, decisions are binding on consumers if they are in their favour, whereas consumers may opt to have recourse to courts if they are not satisfied. In short, banks and finance institutions are expressly left weak against consumers through services funded by themselves. On the other hand, in countries like Finland and Estonia, there is a flexible policy in favour of businesses in terms of participation and binding effect of decisions. As a general tendency, disputes are subject to different authorities specialized in various fields, based on their subjects (finance, property rent, etc.).

Turkey's consumer dispute resolution efforts compared to developed legal orders

With the enactment of the Law 7251, participation in alternative dispute resolution for consumer disputes will be mandatory for both consumers and businesses in Turkey. The Ministry of Justice will cover the first two hours of this service in favour of consumers.

This reflects the depth of alternative dispute resolution methods for consumer disputes in Turkey. On the other hand, consumer arbitration boards have no specialisation. In out-of-court resolution methods, no distinctions in terms of participation and the binding effect of decisions in favour of consumers and no constitutional or legal basis are provided. Decisions rendered by consumer arbitration boards are binding on both consumers and businesses and participation in mediation will be mandatory for both. The fact that consumers are inexperienced in using legal remedies and often face difficulties accessing lawyers are neglected. In addition, the government funds most of the process.

The fact that consumer disputes are resolved by the courts within an average of 427 days is effectively a form of low-interest commercial credit for businesses that often breach their contracts. Businesses often agree with advocates at advantageous conditions on a lump-sum basis or employ advocates, which lowers the legal costs per case to such a degree that it is impossible for consumers to benefit. Businesses, with the help of their advocates, take most decisions granted by arbitration boards in favour of consumers to the courts and file urgent requests for a provisional stay of enforcement.

All of the above are reasonable causes for consumers to abstain from approaching the courts and businesses to resolve consumer disputes outside the courts. The recent regulation does not

consider what happens in the event of a consumer dispute deadlock. Businesses need only not settle during mediation in order to postpone the resolution of a dispute. In such cases, there are no efficient judicial remedies for businesses, as disputes will be brought before the courts that are overwhelmed by their caseload.

Potential Solutions

As per the statistics announced by the Ministry of Trade[6], of the 547,235 applications filed before the consumer arbitration boards in 2019, 267,003 concerned the retail sector and 123,753 concerned the financial services sector. Consumer arbitration boards may be subject to specialisation for these two sectors, which take the lion's share of all applications. Therefore, specialised officers can be appointed to specialised chambers of consumer arbitration boards after necessary regulations have been introduced. The courts' caseload may be reduced by increasing the monetary threshold for disputes to be settled by specialised consumer arbitration boards.

However, the positive discrimination in favour of consumers may also be considered. In this regard, decisions of consumer arbitration boards or other alternative dispute resolution authorities may be deemed binding on businesses and discretionary for consumers. Disputes may also be governed through online platforms by way of enabling a portal on the e-government system, as currently adopted for consumer arbitration boards, to allow consumers to reach these services. Financial burdens, additional tax and contribution margins to be incurred when implementing the proposals may be distributed among businesses based on their size.

All of these proposals aim to give an affirmative answer to the question of whether reaching a settlement with consumers is economically advantageous for businesses. The enactment of the regulation and mediation as a cause of action would not give an affirmative answer to this question. At most, the mandatory mediation would allow businesses to inform consumers of what to expect if a dispute turns into a lawsuit and convince them to agree to settle for a lower amount than that to which they are entitled.

[6] See https://tuketici.ticaret.gov.tr/yayinlar/istatistikler