One last step before litigating your commercial receivables: mandatory mediation

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Introduction

In order to improve time and cost efficiency, in recent years the Turkish legislature has created legal initiatives to encourage private parties to settle through compromise rather than litigation. In this regard, mandatory mediation for commercial receivables has been recently introduced via the Law on Legal Procedures to Initiate Proceedings for Monetary Receivables arising out of Subscription Agreements (Law 7155) with new articles being added to the Commercial Code and the Law on Mediation in Legal Disputes 6325 (the Mediation Law).

Scope

Under Law 7155, a new Article 5/A has been added to the Commercial Code. As a result, an application for mediation has become mandatory for commercial actions listed under Article 4 of the Commercial Code or referred to in other codes before a legal action for compensation or payment of a certain amount can be made. Under the new Article 5/A, an application for mediation is a condition for bringing a legal action before the courts, meaning that a case will be dismissed by the court on procedural grounds if the claimant in a commercial action fails to fulfil this obligation. Article 5/A also states that applications to mediators must be finalised within six weeks from their appointment. This period can be extended for another two weeks only under exceptional circumstances. Article 5/A became effective as of 1 January 2019.

Law 7155 has also added a temporary Article 12 of the Commercial Code, which regulates that the code's provisions regarding mandatory mediation do not apply to pending lawsuits before first-instance courts, regional courts of appeal or the Supreme Court.

Further, Article 18/A of Law 7155 has introduced a new fifth chapter (Mediation as a Condition to Bring a Legal Action) to the Mediation Law. The article regulates how:

- mediation is regulated if applicable as per the relevant codes;
- mediation costs will be distributed among parties; and
- mediators are appointed.

Article 18/A is effective as of Law 7155's publication date.

The following conditions now apply to commercial disputes in light of the new provisions introduced to the Commercial Code and the Mediation Law:

- The parties having commercial receivables must apply to a mediator before they can bring a legal action to court regardless of the value of the dispute.
- If parties cannot reach an agreement and this eventually leads to a lawsuit, the original copy of the final mediation report or a mediator-approved copy must be submitted to the court,

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ideally together with the plaint petition. If the claimant fails to do so, the court will grant a one-week term for its submission. If the final report is still not submitted, the case will be rejected without notifying the plaint petition to the counterparty.

- Application to mediation must be made to the mediation bureau located in the same jurisdiction as the authorised court. The mediation bureau chooses mediators from its list of registered mediators. However, if the parties mutually agree on a different mediator, that mediator may also be appointed.
- Mediators are entitled to inform the parties and invite them to an initial meeting through any means of communication. Mediators must document the informing and invitation process.
- Article 18/A provides special provisions regarding provisional injunctions and seizures before legal actions can be brought and the mandatory provisions of special codes requiring arbitration or other means of alternative dispute resolution mechanisms. If a provisional injunction or seizure is granted before a legal action is brought – which is seen as a complementary proceeding to the jurisdiction of seizure – the permitted timeframe to bring a legal action runs from when the final report is drafted. Further, if arbitration or other means of alternative dispute resolution mechanisms are required, as per the special codes or arbitration agreements, provisions regulating mediation as a condition to bring a legal action do not apply.

Comment

Following the amendments to Law 7155 and the Mediation Law, the legal nature of agreement documents – which are drafted as a result of mediation – and their enforceability before foreign courts raise some questions. Indeed, as per Article 18 of the Mediation Law, if parties come to an agreement as a result of mediation, a document reflecting this agreement must be signed by the parties and the mediator. For an agreement document to be enforceable, the parties must apply to a civil court of peace to obtain an enforceability decision. By doing so, the parties can enforce the decision reached as a result of the mediation as if it were a court decision.

The same provision also regulates that if an agreement document signed by the parties is signed by the parties' respective lawyers, it is considered a document that bears the same enforceability power as a court decision 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 agreement documents will be enforced if one of the parties is based overseas, has no assets in Turkey and does not abide by the terms of the agreement document. Because an action before foreign courts would be needed under these circumstances for the enforcement of the agreement document in a foreign country (and considering that the agreement document is neither a court decision nor an arbitral award), some problems are expected to arise during the enforcement process.

In addition, the problems associated with mediation in Labour Law disputes – which is also a prerequisite to a lawsuit – raise a number of concerns. Mediators usually decide on the date of mediation meetings without granting reasonable time to the counterparties to prepare an evaluation on the application and without providing the necessary information and documentation to the counterparties. This appears to have originated from the hectic nature of the mediation process in practice and these factors hinder the effectiveness of mediation. Considering the complex and extensive nature of commercial disputes, legislation should be enacted which foresees, among other things, that counterparties must be given appropriate time before meetings and must be informed properly regarding the dispute. It is hoped that follow-up legislation will be enacted to remedy the problems that may arise in the practice by monitoring the conduct of mediation closely after the regulations come into force.

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