# Turkey introduces new legislation regarding mandatory mediation for commercial disputes

Orçun Çetinkaya and Burak Baydar summarise the likely impact of the new laws

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**Turkey has recently adopted new legislation requiring application to mandatory mediation for commercial disputes before filing a lawsuit.**

The Law on Starting Legal Proceedings for Monetary Receivables Arising from Subscription Agreements, numbered 7155, published in the Official Gazette, numbered 30630 and dated 19 December 2018, introduced new provisions to the Turkish Commercial Code, numbered 6102 ("**TCC**") and to the Law on Mediation in Civil Disputes, numbered 6325 ("**Mediation Law**").

The mediation requirement is regulated as a compulsory prerequisite for filing a lawsuit according to the new legislation entering into effect as of 1 January 2019. Correspondingly, parties to a commercial dispute pertaining to monetary receivables must firstly apply for mediation before filing a lawsuit in the local court. They will be allowed to file a lawsuit only if they fail to reach an agreement at the end of the mediation process. Otherwise, the case will be dismissed on procedural grounds.

## 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 are 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, involving 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 above-mentioned commercial disputes, mediation is stipulated as a compulsory prerequisite before filing a lawsuit. According to Article 18/A-2 of the Mediation Law, in case of filing without applying to mediation first, courts must dismiss the case on grounds of absence of prerequisite without any further examination. This is not to be construed in a way that means parties cannot apply for mediation with regards to disputes outside this scope. In these cases, parties have the option to resolve their present disputes by means of voluntary mediation and if parties chose to file a lawsuit instead of resorting to mediation, the case cannot be dismissed on grounds on nonfulfillment of the mediation precondition.

In this context, 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 respective codes will not lapse until the preparation of the final record by the mediator.

Pursuant to Article 18/A-18 of the Mediation Law these mandatory mediation provisions will not be applied

- 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.

Similarly, mediation is not mandatory with regards to non-contentious proceedings, concordatum, or enforcement proceedings without judgement.

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.

## Consequences

Mandatory mediation is regulated as a prerequisite for filing lawsuits concerning commercial disputes. As per Article 115 of the Code on Civil Procedure, numbered 6100 ("CCP"), the existence of these preconditions will be considered *ex-officio* by the court, and parties to the dispute can argue the non-existence of such precondition at any stage of the proceeding.

In line with these general provisions set forth under the CCP, Article 18/A-2 of the Mediation Law dictates that when 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.

## Procedure

According to Article 18/A of the Mediation Law, the mediation application 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 unless parties agree on the identity of the mediation amongst themselves.

As per Article 5/A of the TCC, the mediator will complete the mediation process within six weeks beginning from the appointment, and this period can be extended for maximum 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, that party will be burdened with the total cost of the proceedings, even if the court rules in its favour.

If the parties reach an agreement, the necessary expenses of the mediation will be paid by the parties equally, unless decided otherwise. In case they fail to settle, the party that the court rules against will be burdened with these expenses. However, the mediator's fee 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.

## Conclusion and controversial topics

The new regulation is important as it serves as an alternative dispute resolution method that could potentially resolve commercial disputes without bringing them before courts. Consequently, they could decrease the workload of the courts and shorten the length of the litigation while allowing the parties to settle their disputes to their benefit in a cost- and time- efficient manner, therefore increasing flexibility and confidentiality, as well as efficiency.

It is important to note that there is a debate surrounding these regulations with regard to 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 will only be applied for lawsuits regarding receivables and compensation claims. It is also argued that these new regulations should be applied to other actions concerning monetary disputes, particularly negative declaratory actions, given the purpose and objective of the regulations. Since the legislation has been recently introduced, the scope of the mandatory mediation requirement will be determined based on case law and practice of the Court of Cassation. ■

> **IT IS ALSO ARGUED THAT THESE NEW REGULATIONS SHOULD BE APPLIED TO OTHER ACTIONS CONCERNING MONETARY DISPUTES**