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Mediation condition in commercial lawsuits

With the Law published in the Official Gazette dated 19 December 2018 and numbered 30630, mediation was brought as a condition to file a lawsuit for commercial receivables. Within this scope, some provisions of the Turkish Commercial Code ("TCC") and the Law on Mediation in Civil Disputes ("HUAK") have been amended.

Before mentioning about these changes, it is useful to mention about mediation institute. Mediation is a way of dispute resolution which is implemented in Europe and U.S over 40 years. It is a process in which the problem is solved by mutual negotiation with a mediator and the parties who have a dispute that may be the subject matter of a lawsuit. The most important result of this definition is the difference of duties between the court and mediation. Because judgment of a dispute in a court is given by the judge. However, the mediator does not have such an authority in the mediation system.

The mediator acts as a bridge between the parties of a dispute by using various communication techniques, allowing parties to settle among themselves.

After this short definition, statements and list of amendments of different laws are stated below:

- **HUAK dated 07.06.2012 and numbered 6325**
- **İşMAhK dated 12.10.2017 and numbered 7036**
- **article: 3 Mediation as cause of action**
- **Law dated 06.12.2018 and numbered 7155**
- **article 20: TCC article 5/A**
- **article 21: TCC provisional article 12**
- **article 22: HUAK article 3/1 last sentence**
- **article: HUAK article 18/A**

In accordance with the Article 5/A of the Turkish Commercial Code, it is obligatory to apply to the mediator before the lawsuit is filed about the claims and compensation claims, which are the payment of some money in the cases mentioned in the Article 4 of the same code. In this spot it would be useful to explain what condition in lawsuit means. Condition in lawsuit means existences or absence of some conditions which are required for the judgment on the merits of the case. There is going to be no judgment on the merits of the case in the situation of not applying to the mediation primarily for the disputes which are stated in the law.

AFOREMENTIONED LAWSUITS IN THE ARTICLE 4 OF THE TURKISH COMMERCIAL CODE	
Absolute Commercial Cases	The commercial cases specified in the Turkish Commercial Code Article 4/1 and special laws, regardless of whether the parties are merchants and whether the business concerns a business enterprise.
Relative Commercial Cases	Both parties are commercially involved, and in the case of a trader, both parties are considered commercial.
Cases affirmed as a commercial case even though only one party is related to the commercial enterprise	Commercially accepted cases, although only one party is related to a commercial enterprise - committal, bailment and intellectual property cases which are related only one party's enterprise.

Absolute Commercial Cases as per the Article 4/1 of the TCC:

a) Matters Settled in the TCC
b) The Turkish Civil Code article 962-969 related to those involved with mortgage lending
c) Turkish Obligation Law

- Article 202-203 related to the acquisition of the assets or business combination and deformation of businesses
- Article 444-447 related to the restriction of competition
- Article 487-501 related to publishing agreement
- Article 515-519 related to letter of credit and order of credit
- Article 532-545 related to commission agreement
- Article 547-554 related to commercial agents, commercial representatives and other merchant assistants
- Article 555-560 related to transfer
- Article 561-580 related to safekeeping contracts

d) Code regarding Intellectual Property Law
e) Special provisions related to stock exchange, exhibitions, fairs and markets and other places particular to warehouse and trade
f) Legislative regulations related to banks, other credit institutions, financial institutions and loans
g) Apart from there, cases affirmed as a commercial case according to the special provision

- Cooperatives Law (art. 99), Bankruptcy and Enforcement Law (art.154), Financial Leasing Law (art.31), Commercial Enterprise Pledge Law (art.22)

Frequently Asked Questions:

How long does the mediator have to conclude his/her appointed dispute?
According to the TCC Article 5/A, it is determined that the application to the mediator will be finalized within six weeks from the date of the appointment of the mediator. This period can only be extended by the mediator in compulsory cases for two weeks.

From which date the compulsory mediation on the commercial cases comes into force?
According to the provisional Article 12of the TCC, related provisions of mediation as cause of action will be not applied to the pending cases in the courts of first instance, regional courts of justice and supreme court as of the date of code enter into force.

How does the court examine the mediation as cause of action?
According the Article 18 of the HUAK, if the parties can't reach an agreement at the end of the mediation process, the original copy of the final report of the mediation or its copy certified by the mediator must be submitted to the court by the claimant. If it is not submitted to the court, a peremptory term of 1 week will be given to the claimant to submit the original copy of the final report or its copy certified by the mediator; otherwise the case will be dismissed on procedural grounds by the court.

How to proceed, if there is an Arbitration Agreement?
Related provisions of compulsory mediation will not be applied to the situations where special provisions exist in other codes such as arbitration or obligation to apply for alternative dispute resolution. Also related provisions of compulsory mediation will be not applied when an arbitration agreement exists by and between the parties**.**

What will be the term of litigation in case of provisional seizure or temporary injunction before the case?
From the date of application to the mediation office till the last report, term of litigation does not proceed in case of provisional seizure or temporary injunction before the case.

Is the mediation compulsory for negative declaratory action?
In regard to the doctrine, it is contradictive that mediation is compulsory for negative declaratory action or not. In terms of law, we understand that mediation is compulsory for action of performance, whereas it is not compulsory for negative declaratory action due to the nature of those cases. However according to guidebook published by the Department of Mediation, mediation is compulsory for negative declaratory action.

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