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## COMPULSORY MEDIATION: AN IMPORTANT CHANGE IN THE PROCEDURE FOR RESOLVING THE COMMERCIAL DISPUTES IN TURKEY

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### *Introduction and Summary*

In 2018 the mediation was made compulsory in Turkey for the labour claims as the labour claims used to keep the courts extremely busy and it was considered also as a testing area for the mediation institution to prove itself and in case of success it was going to be introduced to other types of claims as well. And as a result, compulsory mediation procedure entered into force on 01.01.2019 for commercial disputes too.

According to the new regulations, for a commercial claimant disputes without first making an application to a mediator, a commercial lawsuit cannot be filed. So mediation is now the first procedural step to follow. Only if mediation does not work, then the parties could move on to the next level by lodging the claim with the court.

The mediation procedure is intended to be easier, faster and far less costly than court proceedings with special care regarding the confidentiality and effective time use.

In this article a general outlook will be given in the form of answers to the most common questions regarding compulsory mediation in the procedure for resolving the commercial disputes in Turkey.

## **Q & A**

**Is the mediation Court-run? How does procedure work including the appointment of the mediators? Are the mediators chosen by the parties or appointed by the Court?**

The mediation is not Court-run, but the appointment of the mediator is made by the official authorities from a list of the mediators within a specific jurisdictional area. If the parties agree on a specific mediator from the same list of the mediators, then the official authority appoints that mediator.

The claimant needs to apply to the Mediation Office in the Court-house and in case there is no Mediation Office in a specific local Court-house then the application shall be made to the authorized Clerk's Office at the Court-house.

**How long is the mediation expected to take?**

Once a mediator is appointed by the Mediation Office (or the authorized Clerk's Office) for a commercial dispute, the mediator shall have six weeks to conclude the mediation process. In case of the necessity, the mediator could extend this period by a period of maximum two weeks.

**What are the possible outcomes of the mediation process in case of failure to reach the parties or absence of the parties in the first mediation meeting?**

Some of the possible scenarios and the results are as follows:

- a. If the mediator cannot reach the parties or the parties do not attend to the mediation meetings, the mediator shall finish the mediation procedure and prepare a final report to present the situation to the Mediation Office (or the authorized Clerk's Office).
  
- b. Provided that the mediation procedure is finished because of one of the parties' absence from the first meeting without a legitimate reason, the absent party shall be defined in the final report and the absent party shall be responsible for all the Court costs once the same claim is handled and concluded by the Court even if the absent party wins or loses the court proceedings and they will not be awarded a statutory legal fee as well.
  
- c. If both of the parties do not attend to the first mediation meeting and the mediation procedure is finished as a result of the both parties' absence, each party shall be responsible for their own Court expenses in case the same claim is lodged with the Court.

**What would be the result of none following compulsory mediation?**

If a commercial claim is submitted to the Court without following the compulsory mediation procedure, the Court will dismiss the claim due to the lack of the fulfilment of the procedural condition of commencing compulsory mediation.

**What is the meaning of the Court's dismissal of the claim as a result of not applying to the mediation first before filing the claim at the Court?**

Once the Court dismisses the claim on the basis that the claimant did not commence the compulsory mediation procedure, the dismissal decision shall constitute a procedural rejection of the claim. This shall not have any meaning as to the claim's merits and it is going to constitute only procedural results. What this means is that the claim shall be considered as unclaimed. This could be costly if the claim is coming towards a time limit. Therefore, a special care should be taken while bringing a commercial claim and be careful not to miss the compulsory mediation in a time when there is a short time left from the time limit for the submission of the commercial claim.

**Are the mediators experienced commercial professionals? How effective is mediation in resolving disputes?**

The mediators are law school bachelors who took a course and pass a test and verbal exam to become certificated mediators. This tells us that the commercial mediators shall be furnished with the tools to handle the mediation process but this clearly does not mean that they are going to be experienced commercial professionals. Some of them could be so some of them not. Based on their track record the experienced ones will be distinguished in time.

The mediators proved that they were effective in some of the labour law disputes between the employees and employers. But this may not be a sufficient example to able to foreseen the mediation institution's capacity to conduct mediation effectively in commercial disputes considering the complexity of the commercial disputes. We need to wait and see.

**Is the process confidential, or can any statements made in the mediation be used in proceedings if the mediation fails?**

The mediation bases on confidentiality. Unless the parties agree differently the mediator cannot disclose any information, document or any other type of recording that have been presented or collected by them. Moreover, the parties or any other person who attended the mediation meetings have to abide by the confidentiality unless there is an agreement to the otherwise.

Further to the above, it is important to note that any offer or admission of a claim or a fact cannot be used in the court or arbitration proceedings against one another unless an Act orders the disclosure of such admission or such disclosure is necessary to execute the agreement that has been reached as a result of the mediation procedure.

**What are the mediation costs and fee structure of mediators?**

One of the intentions to put the mediation procedure into practice is to cut down the costs in comparison to the other dispute resolution procedures and it is intended not to incur costs especially as much as the court proceedings. It may be speculative to try to give a clear idea about the mediation costs but the mediation institution is exempted from many charges and tariffs that the court proceedings are subject to and therefore the mediation in commercial disputes are expected to be far less costly than the court proceedings.

As for the mediators' fees, there is a tariff that is updated every year. According to such tariff, for the commercial disputes the fee structures for the mediators are twofold:

- a.** If the claim cannot be measured by a monetary figure then the mediator's fee will be determined on hourly basis pursuant to a recently published tariff. Such fee structure will be 330 per party-per hour for the first three hours and the following hours will be TRY 255 per party-per hour.

b. Provided that the claim could be measured by a monetary figure then the mediator's fee will be determined according to the agreed sum to be paid to the claimant as a result of the mediation procedure which will be in line with the following structure:

<b>Amount of the sum</b>	<b>If one mediator is involved</b>	<b>If more than one mediators are involved</b>
For the first TRY 35,000	%6	%9
For the following TRY 45,000	%5	%7,5
For the following TRY 80,000	%4	%6
For the following TRY 240,000	%3	%4,5
For the following TRY 600,000	%2	%3
For the following TRY 750,000	%1,5	%2,5
For the following TRY 1,250,000	%1	%1,5
For the part of the sum exceeding TRY 3,000,000	%0,5	%1

**How will the fees and costs be charged?**

According the new regulations the fees and costs could be shared differently based on different situations which are as follows:

a. If the parties reach an agreement to resolve the dispute as a result of the mediation procedure, the mediation fee will be incurred according to the official tariff for mediation and unless the parties agree differently the fees will be equally shared by them.

**b.** Provided that the mediation cannot be processed because the parties cannot be reached to conduct the mediation or no mediation meeting could be held because the parties do not attend the mediation meeting or if the meetings take less than two hours and no agreement could be reached at the end to resolve the dispute, the mediation fees will be determined according to the hourly rates and be paid by the Ministry of Justice. The fees that are paid by the Ministry of Justice will be added on the Court expenses after the claim is submitted to the Court and once the Court delivers the final decision, such costs will be discharged from the party which loses the Court proceedings.

**c.** If the meetings take more than two hours and still no agreement could be reached at the end to resolve the dispute, the mediation fees for the part that exceeds the first two hours will be determined according to the hourly rates and be equally shared and paid by the parties. The part of the fees that corresponds to the first two hours will be added on the Court expenses after the claim is submitted to the Court and once the Court delivers the final decision, such costs will be discharged from the party which loses the Court proceedings.

**d.** The costs that will be made by the Mediation Office are going to be shared by the parties if the parties reach an agreement to resolve the dispute after the mediation procedure. In case of none agreement despite the mediation the costs shall be paid by the Ministry of Justice but this will also be part of the Court expenses and when the Court delivers its final decision for the claim, it will also be discharged from the party which loses the Court proceedings.

**Are there any particular procedures and timescale involved?**

The claimant needs to apply to the Mediation Office within the time bar limit for their claim and the time bar will stop and does not count as of the application date until the end of the final report that will be written by the mediator.

**If a matter is coming up towards a time limit, how can a client ensure that they have not become time-barred, if there is insufficient time to mediate the dispute before the time limit expires?**

From the date of applying the Mediation Office until the date when the final report of the mediation procedure the time limit for the claim is stopped and does not count.

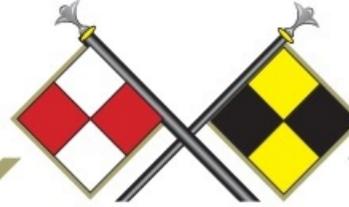
**Is there a clear list of types of claim/disputes which would fall within this new requirement? Will it have any impact on security arrests or attachment?**

There is no list but it will comprise all commercial disputes under the Turkish Commercial Act (maritime claims are part of this Act also) and any other commercial actions that are defined so by other Acts.

The attachment and arrest applications will remain the same to be pursued and handled according to the legal configuration before the introduction of the compulsory mediation but following the attachment/arrest decision (on a vessel) the substantive claim needs to be first submitted to the mediator. During the mediation period the time bar for the submission of the substantive claim to the Court shall stop and does not count.

**How the compulsory mediation will affect compulsory or contractual arbitration as another alternative dispute resolution method?**

Provided that arbitration is made compulsory to be commenced for a claim in a specific Act or there is a contract between the parties to resolve the dispute in arbitration or there is an arbitration clause in a specific contract from which the dispute stemmed, the compulsory mediation regulations shall not apply to these parties and they will be able to follow the arbitrary proceedings as the alternative dispute resolution method instead of compulsory mediation.



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