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MANDATORY MEDIATION ERA IN COMMERCIAL LAWSUITS

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Highlights of this issue

THE PROVISIONS OF CONCORDAT ARE CHANGING

MANDATORY MEDIATION ERA IN COMMERCIAL LAWSUITS

As the functionality of the mandatory mediation in labor disputes has been observed, the applicability of this method to other disputes has been brought to agenda. Accordingly, requirement of mandatory mediation for commercial lawsuits has been brought by virtue of the bill of law dated 13/11/2018. The bill of law has been approved by the commission on 15/11/2018 and it became law on 06/12/2018 (Law) by the Grand National Assembly of Turkey on 6/12/2018 (Law).

Pursuant to the Law, “application to the mediator before initiating a lawsuit arising from a compensation claim or a debt subject to the payment of a certain amount of money” was designated as a condition to initiate commercial lawsuits listed in Article 5 of the Turkish Commercial Code.

On the other hand, parallel amendments to the Mediation Law have been set forth. According to the Mediation Law, the parties may terminate the mediation process in a positive or negative way within three (3) weeks after the appointment of a mediator from the mediation list. This period may be extended maximum for one (1) week and the mediation process will be finalized at the end of a four (4)-week period.

According to the current mediation procedure; the party who does not attend to the mediation meeting without an excuse is held liable for the litigation expenses, even if he/she partially or totally succeed in the lawsuit. Therefore, this procedure will also be applicable to commercial disputes with the entry of the Law into force. Especially considering the amount of expert fees in commercial cases, it can be said that the mediation process is important for both parties in terms of the costs of litigation.

The term of litigation for commercial lawsuits shall be ceased within the period from the application to the mediation office until the date of issuance of the last report by the mediator.

Another exceptional important point is that in case any special law (lex specialis) requires to apply for alternative dispute resolution methods such as arbitration; mediation shall not be considered as a pre-condition to initiate the relevant lawsuit.

It is believed that the pre-condition of mediation will not have an effect on the preliminary injunction and provisional attachment procedures that are frequently applied in commercial disputes. Otherwise, the preliminary injunction and provisional attachment procedures may become meaningless due to the mediation procedure, which will cause the debtor to be aware of the process.

The relevant provisions will come into force on 01/01/2019 and there will be no mandatory mediation for pending cases.

THE PROVISIONS OF CONCORDAT ARE CHANGING

The amendments to Concordat procedure, which has been in our lives for nearly nine (9) months, has led to serious discussions since the first day of its entry into force. Therefore, it is envisaged to bring the amendments related to the designation of the concordat commissar and the changes like “assured audit report” instead of the “financial analysis report” added to the concordat application with the Law.

Pursuant to the foregoing amendments, it is set forth that the “assured audit report” which is brought instead of the “financial analysis report”, must be prepared according to the Turkey Auditing Standards. According to the Law, the “assured audit report” which is prepared in accordance with the Turkey Auditing Standards will be submitted to the court instead of the “financial analysis report” included in the preliminary project of concordat.

Another issue within the scope of the Law is related to the commissar’s appointments and the qualifications of the commissars. One of the three commissars assigned for the concordat procedures must be selected from the independent auditors authorized and approved as responsible auditor by the Authority with the Law.

According to the Law, in case it is understood that the debtor acts to harm step creditors” this will be considered as a circumstance where the rejection of the concordat application in final respite is required. With the foregoing amendment, it is aimed to prevent the attempts of hiding assets of the debtors from the creditors by way of the concordat process.

Aforementioned Law will directly affect commercial life. Especially with the changes in relation to the concordat process; it is expected for the creditors to have more controlled concordat process and for the debtors who really need the concordat to take sufficient and healthy actions.

Answers. Not theories.

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