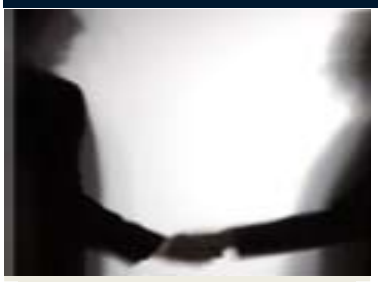

TURKEY'S BRAND NEW SELF-JUSTICE SYSTEM

Turkey's judicial system has undergone many reforms over the past decade, such as a new Criminal Code, Commercial Code, Code of Obligations and Civil Procedure Code. Until June 2012, the most prominent change in the judicial system was the new Civil Procedure Code (the "**CPC**"). However, the impact of the Law of Mediation for Civil Conflicts (the **"Mediation Law"**),[1] enacted in June 2012, may surpass that of the CPC.

After the Mediation Law, the Regulation on Mediation for Civil Conflicts (the **"Regulation"**)[2] was passed in January 2013. Both the Mediation Law and the Regulation set forth the fundamentals of the mediation process, while also regulating the institutional structure to be established within the current judicial system. However, since the initial announcement of the draft Mediation Law, there have been many discussions and debates within public platforms. Many people, especially attorneys, argued against the draft, even claiming that the draft Mediation Law will bring back the Ottoman cadi *(kadılık)* system. This argument was the result of the definition of "mediator" in the draft Mediation Law, which was as follows: *"Turkish citizens, who have graduated from a four-year university and received special training for mediators"*. On the other hand, many people supported the proposed mediation system, based on the expected effectiveness and speed of the procedures as well as the low cost of mediation itself.

The Mediation Law provides for the establishment of a Mediation Board, a Department of Mediation and a Mediators Registry within the Ministry of Justice's General Directorate of Civil Affairs. The purpose of these institutions is to provide uniformity of quality, consistency and a public authority in mediation. In accordance with Provisional Article 1 of the Mediation Law, these institutions were established within two months following the law's publication in the Official Gazette. Currently, the Department of Mediation has started providing licenses to institutions that have submitted applications to provide mediation education to lawyers that seek to become a mediator.

The primary steps for the Mediation Law were taken with an amendment to Article 35A of the Attorneys Law in 2001. Under this article, attorneys may invite the other party in a dispute to negotiations for mediation (i) upon the client's request; (ii) prior to the first hearing if a lawsuit has been filed; or (iii) at any time if a lawsuit has not been filed.

Mediation is defined in Article 2 of the Mediation Law as follows:

> *"A method of dispute resolution, voluntarily chosen and realized by the participation of an independent and impartial third party having specialized education, who brings the parties together in order to engage in negotiations by practicing systematic methods and who provides the establishment of the*

[1] Published in the Official Gazette numbered 28331 and dated 22 June 2012.
[2] Published in the Official Gazette numbered 28540 and dated 26 January 2013.

communication process between them, permitting them to understand each other and to assure that, in this manner, they find solutions by themselves."

The Mediation Law prescribes a very basic mechanism for mediation. Under the law, the parties may agree to resolve the dispute through mediation before filing a lawsuit or, if a lawsuit has already been filed, they may decide to settle the dispute through mediation at any time prior to the court's rendering its final decision. According to Article 13 of the Mediation Law, the court may also apprise the parties of mediation and encourage them to refer their dispute to a mediator. Unless otherwise agreed, a party's request for mediation will be deemed rejected if this request is not explicitly accepted by the other party within 30 days following the request. Once the request for mediation is accepted, the parties can appoint the mediator(s) with mutual consent, if they have not agreed on any other procedure for the appointment of the mediator(s).

Under the Mediation Law, the mediators are not required to be attorneys, but must have practiced their profession for at least five years subsequent to their graduation from law school. Further, they must pass an exam provided by the Ministry of Justice and be registered with the Mediators Registry, after they attend the mediation education provided by law schools, the Turkish Union of Bar Associations or the Turkish Academy of Justice. Under Article 33 of the Regulation, a written exam will be held twice a year and those who pass this written exam will also be required to pass a practical exam.

The mediator conducts the negotiations with the purpose of reaching a settlement. However, it is important to note that in this system, the mediator is neither empowered to render a decision nor to exercise any kind of judicial powers. The system itself provides a mechanism for the resolution of a dispute by and between the parties; not by a third party. The mediator's only function is to supervise the parties during negotiations.

The Mediation Law is applicable to private law disputes, including those having foreign elements. The practice area of mediation is not restricted; in other words, the parties may apply this alternative dispute resolution method to any kind of dispute, except disputes of a public law nature.

The preamble of the Mediation Law puts forward many advantages of mediation, to be considered within the framework of the Turkish judicial system. First, mediation is an inexpensive solution as the parties will only be obliged to pay fixed fees and stamp duty. Second, it is a time-efficient system (if implemented correctly) for dispute resolution. Finally, this alternative dispute resolution method is expected to decrease the courts' workload.

In addition to the above, there are many additional aspects of mediation that make it preferable for the parties of a dispute, as an alternative to courts or arbitration. One of the most important reasons is confidentiality. Although the mediator is only authorized to lead and supervise the negotiations, he has the right to collect evidence to conduct the process. In this case, the parties are ensured that these documents and materials will remain confidential and if the dispute cannot be resolved through mediation, this documentation will not be directly subject to a prospective lawsuit before the courts or an arbitral tribunal. The mediator is obliged to keep any material, statements, evidence, offers and even the admissions undisclosed; so are the parties. These could neither be submitted to the court/arbitral tribunal nor requested by the court or arbitral tribunal as evidence.

It is worth noting that this confidentiality obligation is ensured with a penalty of imprisonment between six months to two years for any person who breaches this obligation, including but not limited to the mediator and his/her clerks, secretary and trainees. The main purpose of this principle is to make the parties feel confident during the negotiation sessions. In order to prevent any misunderstanding, the last paragraph of Article 5 of the Mediation Law provides that admissions, mediation requests, suggestions, acknowledgments and documents that have been prepared only for mediation; and evidence and materials used in the mediation negotiations cannot be submitted as evidence during the course of a lawsuit or an arbitration.

Another important aspect of the Mediation Law is related to the statute of limitations. As stipulated under Article 16 of the Mediation Law, if the parties refer their dispute to a mediator, the statute of limitation for filing the lawsuit before the courts will be suspended. Likewise, if the parties commence mediation procedures subsequent to the filing of a lawsuit, the lawsuit will be suspended for three months. This term can be extended to six months upon the parties' mutual request.

Mediation procedures may be concluded with a settlement, or the parties may terminate the process together or individually without any resolution. If the parties reach a settlement and sign a settlement agreement at the end of the mediation, this settlement agreement can be annotated by the court hearing the enforcement lawsuit in order to be enforceable. This annotated settlement agreement will be deemed directly enforceable and can be enforced through a special enforcement proceeding.

If the mediation system works properly in Turkey, this mechanism will probably be the most preferable alternative for the resolution of disputes arising from commercial relations. Time will tell the extent to which Turkish companies and merchants will accept this dispute resolution method as a good alternative to courts.

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