

ISTANBUL ARBITRATION CENTRE'S NEW DISPUTE RESOLUTION METHOD: MEDIATION-ARBITRATION (MED-ARB) MECHANISM

Istanbul Arbitration Centre's (ISTAC) Mediation-Arbitration (Med-Arb) Rules came into force in November 2019. Med-Arb is a two-tier dispute settlement method, consisting of mediation and arbitration processes. Within the scope of the Med-Arb Rules, if a dispute arises between parties, parties will first try to resolve the dispute through mediation, and if they cannot settle through mediation, an arbitration proceeding will be initiated to ultimately settle the dispute. The Med-Arb Rules essentially regulate the procedural and practical rules that will apply to disputes which qualify for the mediation and arbitration processes.

Two-tier arbitration clauses such as mediation-arbitration clauses are already used in practice. However, to date, no written set of rules were published to regulate procedural and practical aspects of mediation-arbitration mechanism and brought into force by an institution specialized in alternative dispute resolution methods. In that sense, ISTAC broke a new ground by publishing the Med-Arb Rules and institutionalizing the mediation-arbitration mechanism.

For the Med-Arb Rules to be applicable in a dispute, parties should reach a consensus on the fact that they will primarily try to resolve their dispute by mediation, and if they cannot settle, an arbitration will be initiated to ultimately resolve the dispute. Such consensus may be reached by including a "Med-Arb" arbitration clause in the agreement executed by the parties. They may also agree on it after the dispute arises.

The Med-Arb Rules will apply to disputes, together with the ISTAC Mediation Rules and ISTAC Arbitration Rules as the Med-Arb Rules do not contain any specific provision regarding initiation of arbitration or mediation, appointment of mediators and arbitrators, and the other arbitration and mediation procedures. In this context, a Med-Arb process will be initiated upon one party's mediation application duly submitted in accordance with the ISTAC Mediation Rules. Following the

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mediation application, the ISTAC Board will appoint a mediator. The parties may also agree on a mediator. After the mediator's appointment, the mediation process will be carried out in line with the ISTAC Mediation Rules.

If the parties cannot settle through mediation at the end of the mediation process, the parties and the mediator will sign a document showing the parties' failure to settle. The parties will then be free to initiate an arbitration proceeding. However, under the Med-Arb Rules, the parties cannot initiate an arbitration proceeding prior to the completion of the mediation process and in any case, before the expiry of the eight weeks' term following the commencement of the mediation process. If a party does not comply with this requirement, the counter-party may request from the arbitrator (or arbitral tribunal) suspension of the arbitration proceeding and initiation/continuation of the mediation process. Once the arbitrator (or arbitral tribunal) decides to suspend the arbitration proceeding, the mediation process will proceed, and if the parties cannot settle through mediation, the arbitration proceeding will resume upon request. On a different note, the counter-party may claim the damages arising from the breach of the relevant Med-Arb agreement.

At the arbitration stage, the ISTAC Arbitration Rules will apply to the dispute. However, according to the Med-Arb Rules, persons that have participated in the mediation process, including the dispute's parties and the mediator, cannot use any statement or document listed in the Med-Arb Rules, as evidence, or be a witness to these statements or documents. Aforementioned statements and documents are listed in parallel with the Law no. 6325 on Mediation in Civil Disputes: (i) opinions and offers presented by the parties to resolve the dispute, (ii) suggestions made, or acceptances of a fact or an assertion made during mediation process, (iii) solutions offered by mediator, (iv) statements made by either party showing its acceptance or the possibility to accept mediator's offer, and (v) documents produced solely for the mediation process. In addition, to maintain objectivity, the appointed mediator cannot be appointed as an arbitrator for that same dispute's arbitration proceeding, unless the parties agree otherwise.

It is still too early to comment on the conveniences or the disadvantages that the Med-Arb rules will bring in practice. However, it is safe to say that Med-Arb mechanism offers the parties an alternative route by which they can resolve their disputes relatively faster.

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