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ORIGINAL ARTICLE

EMPATHIZING WITH PRUDENT MERCHANTS: DOES THE CURRENT MENTALITY APPLIED IN MEDIATION PRACTICES TAKE ON TOO MUCH? A PROPOSAL FROM ARTICLE 97 OF THE HIGHWAY TRAFFIC LAW NO. 2918

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Abstract
The essay scrutinizes the challenges arising from the current compulsory mediation application for merchants under the principle of prudent merchants in Turkish Commercial Law. It highlights the necessity for an upgrade in the mediation process to address existing issues effectively. By focusing on the problems associated with mandatory mediation, the proposal advocates for regulatory enhancements to improve the overall mediation experience for merchants operating within the commercial realm.

Keywords
Prudent Merchants, Mediation, Commercial Law.

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1. INTRODUCTION

Merchants operating under the principle of prudent merchants encounter a multitude of obligations under Turkish Commercial Law just because of their title as per the Article 20 of Turkish Commercial Code (TCC) No. 6102, a.k.a. the principle of prudent merchants. According to this provision, "a Merchant who has performed work or services related to their commercial enterprise for a person, whether a merchant or not, may charge appropriate fee. Additionally, the merchant shall be entitled to interest on advances made and expenses incurred, from the date of payment." This provision imposes quite wide debt and obligations, such as being subjected to bankruptcy and acting as foresighted businessman.[1] In addition to legal obligations, trading, by its very nature, involves risks due to heterodox policies and consequently, unpredictable trading conditions.

The focus is on achieving certainty and predictability in commercial transactions, essential pillars of commercial law. With the increasing popularity of mediation as an alternative dispute resolution method, particularly in commercial disputes, there arises a need to reassess its application and impact on merchants. This introduction sets the stage for examining the current mediation practices and their implications on prudent merchants in commercial settings. Therefore, what merchants looking for are certainty and predictability, which are also one of the main columns of commercial law. This is, for instance, why the law specifically regulates the lapse of time as "the statute of limitations stipulated in the laws establishing commercial provisions cannot be changed by contract, unless there is a contrary regulation in the Law." Even though such instances can be multiplied, this article specifically argues the ambiguity stemming from Article 5/A of the TCC, which has recently been enacted.

In fact, there has been a mediation institution for a very long time, where a similar institution is envisaged in accordance with Article 35A of the Legal Protection Act no. 1136. During the mediation process, this institution could also be carried out under the supervision of a lawyer, based on the relevant article of the law. However, awareness of mediation, which is an alternative dispute method that has started to be implemented voluntarily in Turkey since 2013, is bound by law and allows disputes to be resolved with less expense and in a faster time, has increased in recent years and its use has become widespread. Then, the process was further encouraged, and with the introduction of the lawsuit requirement system, first in labour disputes in 2018, in commercial disputes in 2019[2]and finally in consumer disputes in 2020, a mechanism for resolving disputes in accordance with the will of the parties was introduced. Doctrinal debates still continue on this issue. However, since the application had to take shape in a very short time, it also contains some problems, especially from commercial law perspective.[3]

So much so that different dispute resolution mechanisms, namely national or international arbitration methods, etc., are already applied for commercial disputes. In other words, commercial disputes of large amounts were mostly resolved through arbitration clauses included in contracts and the ar-

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1 Mustafa Alper Gümüş, '6102 Sayılı Türk Ticaret Kanunu (TTK) m. 18/2'de Yer Alan "Basiretli İş Adamı (Tacir) Davranışı" Ölçütünün İyiniyetin (TMK m. 3) Varlığının Belirlenmesindeki İşlevi' (2016) 22(3) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 1221-1240; Ozan Can, Basiretli Tacir (Basiretli İş İnsanı) Gibi Hareket Etme Yükümlülüğü (Adalet 2022); Tekin Memiş, 'Fikri Mülkiyet İhlallerinde Basiretli Tacir Kavramı – Yargıtay Karar İncelemeleri' in Fikri Mülkiyet Hukuku Yıllığı 2010 (Onikilevha 2011) 344-377.

2 Mustafa Yavuz, 'Ticari Uyuşmazlıklarda Dava Şartı Olarak Arabuluculuk' (2019) 5(15) Gümrük ve Ticaret Dergisi 52-61.

3 İbrahim Ermenek ve Betül Azaklı Aslan, 'İcra ve İflas Hukuku Açısından Ticari Davalarda Arabulucuya Başvuru Zorunluluğu (TTK m. 5/A)' (2020) 148 Türkiye Barolar Birliği Dergisi 135-196; Gültekin Can, 'Ticari Davalarda Arabuluculuk Düzenlemesinin Kapsamı ve Bazı Tartışmalı Hususlar' (2019) 93(6) İstanbul Barosu Dergisi 174.

bitration board established in a third country. In addition, empirical benefits have been observed in terms of contributing to the solution of mediation, the litigation requirement for commercial disputes involving a certain amount of money. However, just as there were advantages brought by this process, there were also "ignored" disadvantages.

There is a misconception that mediation process is a free model supported by the State. Indeed, if parties cannot reach an agreement, the mediator fee will be funded by the Ministry of Justice. On the other hand, parties shall pay a success fee to the mediator amounted 6 percent of the dispute fee (for the first 200,000 TL) when they cut a deal. Of course, there is no such thing as a free lunch, however such an amount cannot be regarded as inconsiderable. It is worth noting that to reach a deal, mediation process is not must-follow. Parties may negotiate and reach an agreement freely.

To mention about a dispute in terms of private law issues, at least one of the parties must be in default. Default of the debtor is defined in Article 117/1 of the Turkish Code of Obligations (TCO). Accordingly, the debtor of an overdue debt falls into default upon the notice of the creditor. The relevant provision also stipulates that there is no need for a separate warning for overdue debts. To put it in the most general sense, the performance of the performance must be possible for the debtor to be in default, that is, the performance must still be possible even though the obligation has not been fulfilled by the debtor on its due date.[4] To sum up, to push the debtor into default, giving notice to the debtor is must for undue debts. However, a notice is a unilateral statement of will, which includes the creditor's request for the debtor to perform the debt. The creditor must clearly disclose his intention to demand the debt in the notice and warn the debtor that he will be responsible for the consequences of default if he does not fulfil the obligation on time. As a rule, this notice is not subject to any form of validity. However, an exception to this provision is provided for in the trade legislation for traders.

2. RESOLUTİON ADVİSORY

Indeed, caution is specifically listed in the TCC. According to Article 18/3, "notifications or cautions between merchants regarding putting the other party in default, terminating the contract, rescission of the contract are made through a notary, registered letter, telegraph or registered e-mail system using a secure electronic signature." As can be seen, applying the mediator is not stated in this provision. However, in practice, applying to a mediator is considered a warning. One of these practices could be seen in the below-mentioned case:

"Considering that the caution is not subject to a form requirement and that the plaintiff party clearly requested the collection of receivables during the mediation negotiations, it must now be accepted that the plaintiff's request is in the nature of a caution during the mediation negotiations".[5]

Such a practice undoubtedly puts merchants in a difficult situation and can be abused. As identified, parties claiming to be creditors can submit their demands by applying to mediation. The problem we identified here is that the issue becomes even more unsolvable after being brought to the mediator. This is because companies encounter unforeseen receivable claims, which they have not previously informed of. Hereupon, these companies will have two options: (i) the company in subject may reach an agreement. Such an agreement comes with a cost of mediator; (ii) the company in subject may not deal with the complainant. In this scenario, the complainant will go to litigation, which also comes with a cost of judgement fees. However, there is another ignored option. We must consider the case that what if the company have been informed before the mediation process. There might be an oppor-

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1 Fikret Eren, Borçlar Hukuku Genel Hükümler (Yetkin 2018) 1120; Selahattin Sulhi Tekinay, Sermet Akman, Haluk Burcuoğlu ve Atilla Altop, Borçlar Hukuku Genel Hükümler (Filiz 1993) 912; Haluk Tandoğan, Borçlar Hukuku (Vedat 2008) 469.

2 Diyarbakır Regional Courts of Appeal, 8th Legal Chamber, E.2019/48, K.2019/53, 11/12/2019.

tunity for the company to deal before the mediation process. However, it would be too late when the claimant applied to mediator. For company in subject, there is a two-edged sword: dealing with the claimant by paying mediator fee; and making no deal and paying administrative/legal fee. Therefore, the mediation process, which is based on voluntary principles, can turn into a mechanism that pushes companies to not reach an agreement.

The reason for this is that when a mediator is used when there is not even a dispute yet, all friendly relations between the parties are replaced by a dispute. In fact, the moment when the dispute arises should be determined as the moment of application to the company, not the moment of application to the mediator. In other words, when the claimant goes to mediation without applying to the company, there is no dispute or default yet. The mediator must also act on a dispute to mediate, but there is actually no dispute until the request reaches the company. This study emphasizes that what needs to be done is to emphasize that the mediation process will make sense after the concrete dispute occurs.

This study was written on the suitability of extending a regulation of insurance law, which is currently applied especially for highway traffic insurance, to the general commercial law. According to Article 97 of the Highway Traffic Law, titled "direct claim and right of action",

"The injured party must make a written application to the relevant insurance institution before going to court, within the limits stipulated in the compulsory liability insurance. If the insurance company does not respond to the application in writing within 15 days at the latest from the date of application, or if there is a dispute as to whether the response does not meet the request, the injured party may file a lawsuit or apply to arbitration within the framework of Law no. 5684."

As seen, this provision obligates complainant to apply to the insurer as "cause of action" before filing a lawsuit for compulsory liability insurance (also for voluntary liability insurance pursuant to Article 100 of the relevant law. According to this, the injured party must make a written application to the relevant insurance institution before acting within the limits specified in the compulsory liability insurance. If the insurance institution does not respond to the application in writing within 15 days at the latest from the application date, or if there is a dispute that the response given does not meet the request, the injured party may file a lawsuit or apply for arbitration.

From a further thought, one may argue that this reflects the duty to give information of insurant and should be regarded as exceptional for only insurance law conflicts. Therefore, as per the rule on "restrictive interpretation of exceptions", this needs to be considered by predesignated events. Therefore, it is not possible to impose an obligation to apply to the company before the mediator by directly referring to such a provision. This issue must be regulated by law. Another method is to wait for practitioners, and especially the courts, to confirm that a dispute has arisen before applying to mediation. However, this will be very difficult to implement as it will require changing the currently developed practice. For this reason, it is essential to make an addition to Article 5A, which was later added to the Turkish Commercial Code, and impose a condition that an application must be made to the company first and that no response is received within a certain period, or a negative response is received.

All in all, ideally, companies should be informed of claims before mediation, allowing them to resolve issues without mediator involvement. The current practice forces companies into a dilemma, potentially pushing them away from settlements. The study suggests that mediation should occur after a concrete dispute arises. This is likened to Article 97 of the Highway Traffic Law, which mandates a written application to the insurer before litigation. This approach ensures that disputes are clearly defined before mediation. Extending this principle to general commercial law would require regulatory changes. Specifically, adding a provision to Article 5A of the TCC could mandate initial applications to the company before mediation. This would help define disputes more clearly and prevent unnecessary mediation, fostering a more effective and fair dispute resolution process.

3. Conclusion

Article 97 of the Highway Traffic Law No. 2918 stipulates that the right holders who want to benefit

from compulsory liability insurance must make a written application to the insurer before filing a lawsuit. It has been accepted by the established jurisprudence of the Supreme Court chambers. In cases where this application is made, there is a defence that the application is made with an incomplete or improper document, it is clear that the deficiency in the document claimed to be improper can be completed in any case.

The obligation to resort to mediation should not violate the essence of the freedom to seek justice unless it causes an ineffective and inconclusive process that makes it impossible or extremely difficult for people to seek their rights. In this context, in our opinion, the relevant practice means that an issue that has not yet been a matter of dispute for the debtor companies turns into a dispute.

As a conclusionary remark, this paper proposes the view that applying to a mediator and submitting requests should not be considered as a caution. To put it another way, the essay advocates for a critical examination of the role of mediation in commercial disputes involving merchants. While mediation offers benefits such as cost-effectiveness and timeliness, there are inherent drawbacks that need to be addressed. The proposal suggests re-evaluating the perception of mediation as a cautionary measure and emphasizes the importance of clarifying the moment when disputes arise to ensure a more effective mediation process. By considering regulatory adjustments and enhancing clarity in the mediation process, a more balanced and efficient dispute resolution mechanism can be achieved for merchants operating under the principle of prudent merchants in Turkish Commercial Law.

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