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The Impact of the Mediation Process on the Default of the Debtor

Efe Dırenisa*

Abstract

Mediation, as defined in Law No. 6,325 on Mediation in Civil Disputes, constitutes a voluntary method for resolving disputes involving the participation of an impartial third party with specialized training. The mediator employs systematic techniques to facilitate discussion and negotiation among parties, fostering communication and mutual understanding to reach a solution. Should parties fail to find a resolution independently, the meditation may propose one. The mandatory inclusion of meditation in certain types of cases since 2018 has elevated its status as a frequently applied alternative dispute resolution mechanism in our jurisdiction. However, this frequent application has brought to light concerns regarding areas not adequate in cases involving debtor default, a matter complicated by the absence of specific regulations. Consequently, divergent interpretations have emerged within legal practice, notably evident in the rulings of the circuit courts of appeals. While some argue that mediation does not result in default, others posit that it may. In conclusion, the verdict rendered by the Court of Cassation serves to reconcile the contradictory judgment issued by the civil chambers of the circuit courts of appeals. Although this issue has been examined in various aspects within judicial decisions, it has not received comprehensive attention in legal doctrine. For instance, the question of whether mediation constitutes default has not yet been examined, particularly regarding the precise moment at which a debtor is considered to be in default. Given the significant ramifications of default, understanding the impact of the mediation process is crucial. This study delves into why the mediation process does not result in debtor default, drawing upon insights from the verdicts of circuit courts of appeals and the Court of Cassation, while also examining a few perspectives on the matter and analyzing all pertinent approaches.

Keywords

Mediation, mediator, debtor, default, default of debtor, default interest

***Corresponding Author:** Efe Dırenisa (Assoc. Prof. Dr.), Turkish-German University, Faculty of Law, Department of Civil Procedure and Insolvency Law, Istanbul, Türkiye. E-mail: direnisa@tau.edu.tr ORCID: 0000-0002-2220-9468

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I. Concept of Debtor Default and Importance of Determining Default Date

Debtor default refers to the failure of the debtor to fulfill a debt by its due date as specified in the contract.[1] The determination of when default occurs holds considerable significance for several reasons. The Turkish Code of Obligations (TCO) imposes certain consequences for default. Upon the debtor's default, the creditor may demand specific performance of the obligation and seek compensation for any damage resulting from the delay in performance.[2] Article 118 of the TCO stipulates that a defaulting debtor is obligated to compensate the creditor for any losses and damages incurred due to the delay in performance unless the debtor can prove that they are not at fault for the default. Another significant consequence of debtor default is the transfer of liability for accidental damages to the debtor,[3] as outlined in Article 119 of the TCO. Under this provision, the defaulting debtor becomes liable for any accidental damage that occurs. In addition, defaulting on pecuniary debts entails further consequences. According to Article 120 of the TCO, a defaulting debtor is liable to pay additional default interest. This interest accumulates due to default in fulfilling the pecuniary debt.[4] Such default interest shall commence from the date of default and persist until the pecuniary debt is fulfilled.[5]

Generally, applications for collecting pecuniary debts are directed to a mediator. Thus, for pecuniary debts, particularly those stemming from commercial transactions, the determination of default and its date holds special significance within the mediation process. This significance is twofold. First, for pecuniary debts arising from commercial transactions, it is mandatory to engage a mediator before initiating legal action, as per Article 5/A of the Turkish Commercial Code (TCC). Second, the default interest rate applicable to commercial transactions has recently substantially increased. The "Communiqué on the default interest rate to be Applied in Late Payments in the Supply of Goods and Services and the Minimum Expense Amount that may be Requested for the Collection of Receivables," was issued by the Central Bank of the Republic of Turkey and published in the Official Gazette.[6] In this context,

1 Ahmet Kılıçoğlu, *Borçlar Hukuku Genel Hükümler* (26th, 2022) 874; Nami Barlas, *Para Borçlarının İfasında Borçlunun Temerrüdü ve Bu Temerrüt Açısından Düzenlenen Genel Sonuçlar* (Kazancı 1992) 15; Fikret Eren, *Borçlar Hukuku Genel Hükümler* (27th, Yetkin 2022) 1232; M. Kemal Oğuzman and Turgut Öz, *Borçlar Hukuku Genel Hükümler Cilt I (20th, Vedat 2022)* 474; Haluk Nami Nomer, Borçlar Hukuku Genel Hükümler (18th, Beta 2021) 399; Rona Serozan, Başak Baysal and Kerem Cem Sanlı, *Borçlar Hukuku Genel Bölüm* (8th, On İki Levha 2022) 301; Vedat Buz, *Borçlunun Temerrüdünde Sözleşmeden Dönme* (Yetkin 1998) 100; Hatice Esra Arap Saltoğlu, *Tam İki Tarafa Borç Yükleyen Sözleşmelerde Borçlunun Temerrüdü* (Seçkin 2022) 29; Mehmet Ayan, *Borçlar Hukuku Genel Hükümler* (12th, Adalet 2020) p. 467; Mustafa Alper Gümüş, *Borçlar Hukukunun Genel Hükümleri* (Yetkin 2021) 907.

2 For detailed information, see Kılıçoğlu, Borçlar, 894 ff.; Hatemi H and Gökyayla E, Borçlar Hukuku Genel Bölüm (5th, Filiz 2021) 297 ff.; Eren F, Borçlar Hukuku Genel Hükümler (27th, Yetkin 2022) 1246 ff.; Ayan M, Borçlar Hukuku Genel Hükümler (12th, Adalet 2020) 471 ff.; Buz, 104; Bilgehan Çetiner, Andreas Furrer and Markus Müller-Chen, *Borçlar Hukuku Genel Hükümler* (On İki Levha 2021) 631.

3 For detailed information, see Kılıçoğlu, *Borçlar*, 898 ff.; Hatemi and Gökyayla, 297 ff.; Eren, 1250 ff.; Ayan, 471 ff.; Buz, 105; Çetiner, Furrer and Müller-Chen, 633.

4 Kılıçoğlu, *Borçlar*, 900; Ayan, 472.

5 Kılıçoğlu, *Borçlar*, 900.

6 See the Official Gazette dated 2.1.2024 and numbered 32417.

the default interest rate regarding late payments to creditors in the exchange of goods and services among commercial enterprises if not regulated under the agreement or the relevant provisions that are invalid, stands at 48% annually. This circumstance underscores the substantial economic implications associated with whether default transpires through the mediation process or not.

II. Conditions for Debtor Default

Determining the date of default hinges on meeting the substantive conditions outlined by the law. The first condition required for debtor default is the existence of a due debt.[7] Article 117 of the TCO specifies this requirement as "the debtor of a due debt."

However, the mere existence of the due debt alone does not suffice for default to occur. Thus, as a rule,[8] the creditor must notify the debtor to fulfill their obligation. According to Article 117 of the TCO, debtor default is triggered by the creditor's notification. This notification serves as the creditor's call to the debtor to fulfill the performance obligation.[9] Moreover, filing a lawsuit against the debtor may also constitute notification.[10] In such circumstances, the legal doctrine states that debtor default occurs upon the service of the lawsuit petition to the debtor.[11] Furthermore, in legal doctrine practice, it is consistently acknowledged that initiating a lawsuit results in debtor default, enabling the creditor to request default interest from that moment onward.[12]

There is no formal requirement for notifications under the law.[13] However, a disputable issue arises regarding whether a formal requirement exists for notifications between merchants. According to the third paragraph of Article 18 of the TCC, notifications or warnings between merchants indicating default shall be served via a notary, registered mail, telegram, or registered electronic mail using a secure electronic signature. The prevailing stance considers these requirements not as formal requirements for validity, but rather as formal requirements for evidentiary

7 For detailed information, see Ayşe Havutçu, *Tam İki Tarafa Borç Yükleyen Sözleşmelerde Temerrüt ve Müsbet Zararın Tazmini* (İzmir 1995) 24; Oğuzman and Öz, 476 ff.; Barlas, 21 ff.; Eren, 1236; Mustafa Göktürk Yıldız, *Türk Borçlar Kanunu'nu Genel Hükümlerine Göre Borçlu Temerrüdün Şartları ve Sonuçları* (On İki Levha 2020) 4 ff.; Saltoğlu Arap, 39; Ayan, 467; Serozan, Baysal and Sanlı, 295 ff.; Buz, 101; Çetiner, Furrer and Müller-Chen, 624; Doruk Gönen, *Borçlar Hukuku Genel Hükümler* (Filiz 2021) 147.

8 See Barlas, 34.

9 Buz, 101 ff.; Havutçu, 25; Eren, 1237; Saltoğlu Arap, 44; also see Barlas, 34; Çetiner, Furrer and Müller-Chen, 626; Gönen, 147.

10 Arap, 44; Gümüş, 912; Oğuzman and Öz, 478; Yıldız, 39.

11 Çetiner, Furrer and Müller-Chen, 626; Gümüş, 912; Yıldız, 39.

12 See below.

13 Kılıçoğlu, *Borçlar*, 876; Barlas, 43; Nomer, 410; Havutçu, 27; Eren, 1238; Oğuzman and Öz, 478; Buz, 102; Yıldız, 15; Saltoğlu Arap, 49; Ayan, 469; Gönen, 147; Gümüş, 912.

purposes,[14] as supported by judicial decisions. The rationale behind this interpretation underscores its status as a form requirement for proof.[15]

As Article 117 of the TCO is not mandatory, parties reserve the right to stipulate that notification is unnecessary for default to occur.[16] In addition, specific regulations may apply to certain debts. As per the second paragraph of Article 117 of the TCO, if the parties mutually agree to duly notify the agreed-upon performance date, the debtor defaults upon the expiration of this time. In cases of tort, default occurs from the moment the tort transpires, whereas in cases of unjust enrichment, default is triggered from the date of enrichment. However, when unjust enrichment occurs in good faith, notification becomes necessary for default. Similarly, under Article 10 of the TCC, in the absence of any contrary contractual provisions, interest on commercial debts begins accruing at the end of the due date.[17]

In certain circumstances where notification is mandated for default, yet serving the notification proves to be unnecessary and futile, the default may occur without such notification.[18] This conclusion is reached by analogously applying the provision in the first paragraph of Article 124 of the TCO by analogy.[19] For instance, if the debtor explicitly declares their refusal to fulfill the debt, no notification of default is required.[20] Similarly, if this refusal is evident through the debtor's actions and their declaration, notification becomes unnecessary.[21]

In bilateral contracts, a special requirement sought for debtor default is the granting of additional time beyond general terms.[22] Article 123 of the TCO stipulates that in bilateral contracts, if one party defaults, the other party may grant either a reasonable extension for performance or request the court to grant such an extension.

14 Kılıçoğlu, *Borçlar*, 876; Saltoğlu Arap, 49; Oğuzman and Öz, 478 ff.; Gümüş, 912; Yıldız, 16. For counter-opinion see Ayan, 469; Eren, 1238; Sabih Arkan, *Ticari İşletme Hukuku (*28th, Banka ve Ticaret Hukuku Araştırma Enstitüsü, 2022), 172. For comparison between the old and new regulations, see Reha Poroy and Hamdi Yasaman, *Ticari İşletme Hukuku* (19th, Seçkin 2022)185 ff.

15 For instance, see Istanbul 13th Civil Chamber of Circuit Courts of Appeals, Dated 23.03.2023, Lawsuit File Number 2021/626, Decision Number 2023/520 (Lexpera).

16 Kılıçoğlu, *Borçlar*, 878; Saltoğlu Arap, 50; Gümüş, 920; Havutçu, 31.

17 Also see Article 117, II of the Turkish Code of Obligations.

18 Kılıçoğlu, *Borçlar*, 882; Eren, 1241; Oğuzman and Öz, 483; Saltoğlu Arap, 52; Barlas, 61 ff.; Haluk Bozovalı, *"İki Tarafa Borç Yükleyen Sözleşmelerde Borçlu Temerrüdünün Sonuçları"*, İstanbul Barosu Dergisi, C. 66, S. 1-2-3 (1992) 11 ff.; Çetiner, Furrer and Müller-Chen, 629; Yıldız, 50 ff.

19 Ayan, 470. See Serozan, Baysal and Sanlı, 299; Nomer, 413. Also see Havutçu, 31 with regard to the fact that expecting the service of the notification in such a situation shall be against the principle of honesty specified under Article 2 of the Turkish Civil Code.

20 Kılıçoğlu, *Borçlar,* 882; Oğuzman and Öz, 483; Nomer, 413; Yıldız, 50 ff.; Saltoğlu Arap, 52.

21 Gümüş, 9221

22 Kılıçoğlu, *Borçlar*, 886; Saltoğlu Arap, 53 ff.

III. Whether the Mediation Process Results in Debtor Default

A. Opinions Asserting that the Mediation Process does not Result in Default

The fundamental stance of opinions that indicates that the mediation process does not result in debtor default is based on Article 5 of Law No. 6,325, titled "Inadmissibility of Statements and Documents." According to this article, parties, mediators, or other third parties involved in the mediation process are prohibited from presenting the following statements and documents as evidence or testifying about them if a lawsuit is initiated or an arbitration proceeding is commenced regarding the dispute:

- Invitation to mediation is extended by the parties or a party's willingness to participate in the mediation process.
- Opinions and proposals by the parties aimed at resolving the dispute through mediation.
- Statements made by the parties or acknowledgments of facts or claims during the mediation process.
- Documents are created solely for the mediation process.

According to this article, documents generated during the mediation process are not admissible in civil lawsuits. Hence, for instance, a record indicating that the parties failed to agree during the mediation cannot be used in civil lawsuits. Consequently, it is not permissible to presume that the debtor defaults based on such a document.[23]

In a similar vein, another decision, adhering to the same principle, highlighted that an invitation to mediation does not constitute notification. The rationale behind this decision asserts that no invitation to mediation may specify the entire debt amount, and parties may seek a mediator even for indefinite debts.[24]

Furthermore, in a separate ruling, it was underscored that invitations to mediation or a party's inclination to participate in the mediation process are not admissible evidence under Article 5 of Law No. 6,325. Consequently, the mediation process, whether documented or through invitation, does not lead to debtor default.[25]

23 Ankara 7th Civil Chamber of Circuit Courts of Appeals, Dated 15.09.2021, Lawsuit File Number 2019/4047, Decision Number 2021/2282 (Lexpera).

24 Ankara 9th Civil Chamber of Circuit Courts of Appeals, Dated 07.12.2021, Lawsuit File Number 2020/651, Decision Number 2021/3374 (Lexpera).

25 Ankara 30th Civil Chamber of Circuit Courts of Appeals, Dated 09.11.2021, Lawsuit File Number 2021/2937, Decision Number 2021/2891 (Lexpera).

B. Opinions Asserting that the Mediation Process Results in Debtor Default

The question of whether the mediation process leads to debtor default has been particularly examined in the context of employee receivables. It has been argued that the mediation process indeed results in default on such receivables. Notably, the decision outlined the following determination:

- According to the practice of the Court of Cassation, default may arise even if the rights of the employee are specified without stating a monetary value in a notification sent by the employee. The crucial factor for default lies in clearly delineating the receivable items.
- Throughout the mediation process, both employees and employers identify receivables by name during the discussion. Consequently, the date of the final mediation session is deemed the default date.[26]

Given the disparate ruling from circuit courts of appeals, an application was made to the Court of Cassation to resolve the inconsistency. The Court of Cassation addressed the discrepancy among the civil chambers by determining that the debtor defaulted on the date of the final record (indicating the parties' failure to reach an agreement) of the mediation process.[27] The rationale for this decision is as follows:

- The absence of a formal requirement for default notification under the law emphasizes the importance of delivering a declaration of intent to the debtor.
- The final mediation record cannot be considered an inadmissible document in a lawsuit under Article 5 of Law No. 6,325, which prohibits the use of certain documents in legal proceedings. Thus, the prohibition on confidentiality does not extend to the final mediation record.
- Applying mediation has a similar consequence to initiating a lawsuit, as it entails a demand dispute resolution through a third party outside the judicial system. This demand also includes the claim that receivables stated in the mediation application are due but unpaid and must be paid.
- The counterparty must be informed about the mediation application, fulfilling a requirement concerning default.
- Consequently, the final mediation record is deemed to include "a precise declaration of intent covering the request for the payment of receivables," directed at the counterparty informed of the mediation application by the applying party.[28]

26 Ankara 6th Civil Chamber of Circuit Courts of Appeals, Dated 30.06.2021, Lawsuit File Number 2020/1584, Decision Number 2021/1855 (Lexpera). Similarly, see Ankara 8th Civil Chamber of Circuit Courts of Appeals, Dated 23.09.2021, Lawsuit File Number 2019/2770, Decision Number 2021/2065 (Lexpera).

27 9th Civil Chamber of Court of Cassation, Dated 21.3.2022, Lawsuit File Number 2022/3222, Decision Number 2022/3813 (Lexpera).

28 Similarly, see 9th Civil Chamber of Court of Cassation, Dated 18.5.2022, Lawsuit File Number 2022/5485, Decision Number 2022/6290 (Lexpera). See Ahmet Kılıçoğlu, *Arabuluculuk Sözleşmeleri (2nd, Turhan 2020)*105 with regard to the

IV. Our Opinion

Our stance on the matter is founded on the understanding that the mediation process does not result in debtor default due to its confidential nature and the inadmissibility of documents generated during this process as evidence in lawsuits. To elucidate, the purpose and scope of the prohibition on the use of statements and documents from the mediation process shall be clarified.

This prohibition is stipulated under Article 5 of Law No. 6,325, which states that "the parties, mediator, or other third parties involved in the mediation process may not offer statements and documents stated below as evidence or testify regarding them if a lawsuit is initiated or an arbitration proceeding is commenced regarding the dispute:

a. Invitation to mediation made by the parties or the inclination of a party to participate in the mediation process.

b. Opinions and proposals by the parties for the resolution of the dispute through mediation.

c. Opinions asserted by the parties or the admission of a fact or claim during the mediation process.

d. Documents were drawn up solely for the mediation process.

(2) The provision in the first paragraph shall be applied regardless of the form of the statement or document.

(3) Disclosure of the information stated in the first paragraph may not be requested by the court, arbitrator, or any administrative authority. These statements and documents may not be evaluated as evidence, even if they were presented as evidence contrary to the provision in the first paragraph. However, the information in question may be disclosed if it is required by a statute or to an extent necessary for the application or enforcement of the agreement formed after the mediation process."

The purpose of prohibiting the use of statements and documents in the mediation process is to ensure that discussions during mediation are conducted comfortably and realistically.[29] This prohibition safeguards confidentiality by preventing the use

possibility that the debtor may fall in default with the record of the final mediation session.

29 Ömer Ekmekçi, Muhammet Özekes, Murat Atalı and Vural Seven, *Hukuk Uyuşmazlıklarında Arabuluculuk (*2nd, On İki Levha 2019) 37; Süha Tanrıver, *Hukuk Uyuşmazlıkları Bağlamında Arabuluculuk (2nd, Yetkin 2022)* 69; Mustafa Serdar Özbek, *Alternatif Uyuşmazlık Çözümü* (5th, Yetkin 2022) 677 ff.; Erol Tatar, *"Hukuk Uyuşmazlıklarında Arabuluculuk Kanun Tasarısı Üzerine Bir Değerlendirme",* Yargıtay Dergisi, C. 35, S. 3, 2009, 261; Yasemin Işıktaç, *"Türk Arabuluculuğunda Etik Modeli ve Etik İkilemler", Hukuk Uyuşmazlıklarında Arabuluculuk Sempozyumu I, (Ed: Yasemin Işıktaç)* (Sümer 2014) 63; Seda Özmumcu, *Uzak Doğu'da Arabuluculuk Anlayışı ile Türk Hukuk Sisteminde Arabuluculuk Kurumuna Genel Bir Bakış (6325 sayılı Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu Çerçevesinde) (3rd, On İki Levha 2013)*, 165; Seda Özmumcu, *Arabuluculuk Modelleri (On İki Levha 2021)* 80; Melis Taşpolat Tuğsavul, *Türk Hukukunda Arabuluculuk (6325 Sayılı Hukuk Uyuşmazlıkları Kanunu Çerçevesinde)* (Yetkin 2012) 135. See Betül Azaklı Arslan,

of confidential discussions, proposals, and documents submitted or created during negotiations as evidence against the parties in potential future litigation.[30] Without such protection, parties may refrain from making candid statements or sharing documents during mediation out of fear that these may be used against them in civil lawsuits.[31] This reluctance could hinder the realization of the benefits expected from the mediation process, potentially impeding the achievement of a win/win outcome. [32]

Article 5 of Law No. 6,325 has been invoked in judicial decisions to justify why the mediation process does not result in default. It is essential to determine whether the record of the final mediation session falls within the purview of Article 5. According to Article 5, "documents drawn up solely for the mediation process" are deemed confidential. Consequently, the record of the final mediation session qualifies as a document created exclusively for mediation activities, making it confidential. However, confidentiality alone does not prevent the occurrence of default. It is imperative to examine this matter from various perspectives.

First, examining the purpose of the prohibition is crucial. As stated above, the fundamental purpose of this prohibition is to provide an environment of trust during negotiations within the mediation process, ensuring that parties act genuinely and comfortably. While this prohibition relates to the external behaviors of the parties, default is an internal state. A significant aspect of default is the debtor's awareness of the claim for fulfilling the performance owed. The debtor must be aware that they are being requested to fulfill a performance that they have undertaken. Therefore, it cannot be argued that this internal state, namely knowing and understanding, can be disregarded due to confidentiality. In such an instance, expecting service of default notification would contravene the principle of good faith.

Second, the use of the record of the final mediation session is not always prohibited. Confidentiality of the record can be waived to some extent. For instance, if the mediation process concludes without an agreement, the record of the final mediation session serves as the sole evidence of this outcome. Therefore, parties are obligated to prove compliance with procedural requirements using this record. In such cases, parties cannot claim that this document should not be used due to confidentiality concerns.

Medenî Usûl Hukuku Açısından Zorunlu Arabuluculuk (Yetkin, 2018) 56 on how the confidentiality principle generates an environment of trust in the mediation process. Also see Tanrıver, *Alternatif*, 158; Emre Kıyak, *Dönüştürücü Arabuluculuk – Problem Çözücü Arabuluculuk ile Uyumlaştırılması* (Seçkin 2018) 33 regarding the importance of the confidentiality in terms of the alternative dispute resolution methods. See Castillejo Peetsch, p. 25 regarding the affirmative impact of the confidentiality on the impartiality of the mediator.

30 Ekmekçi, Özekes, Atalı and Seven, p. 37.

31 Cafer Eminoğlu and Ersin Erdoğan, *Ticari Uyuşmazlıklarda İhtiyari ve Dava Şartı Arabuluculuk* (Adalet 2020) 54 ff.

32 Eminoğlu and Erdoğan, 55 ff.

Even if, for a moment, it is assumed that default has not occurred due to confidentiality, it does not preclude the possibility of default in certain circumstances where a notification is required, yet serving the notification is deemed unnecessary and futile. For instance, if the debtor explicitly declares their refusal to fulfill the debt, no default notification is necessary. Similarly, if the debtor's behavior indicates that their refusal to fulfill the debt notification is unnecessary. If the mediation process for debt collection concludes without an agreement, it signifies that the debtor has obtained from fulfilling the obligation they have undertaken. In such cases, seeking an additional notification for debt payment would be inappropriate because the debtor has already made it clear through their behavior that they will not fulfill the debt. Consequently, it would be appropriate to consider that the debtor defaulted based on their behavior under the rules of substantive law.

Indeed, the validation of the aforementioned considerations is contingent on the absence of an agreement between the parties regarding the confidentiality rule during the mediation process. Article 5 of Law No. 6,325 is not mandatory, meaning that parties have the autonomy to agree that Article 5 regarding confidentiality shall not be applied.[33] In such instances, it is no longer tenable to assert that the mediation process does not result in default based on Article 5 of Law No. 6,325. Since confidentiality has been waived by the parties, documents generated during the mediation process and the legal consequences thereof are deemed admissible. Consequently, in this context, it should be acknowledged that the mediation process does result in default.

Following the determination that the mediation process results in default, the subsequent inquiry is to determine the timing of when default occurs. Several time frames may be relevant in this context:

- The moment of application to a mediator.
- The moment of delivery of the invitation to mediation to the debtor.
- The moment of holding the mediation meeting.
- The moment of recording the final mediation session reflects that the parties have not reached an agreement.

All the aforementioned possibilities shall be examined separately.

Regarding the application for mediation, it is a procedural requirement to apply to the mediation bureau or the chief office in places where no mediation bureau is established, as outlined in Article 18/A/IV of Law No. 6,325. Does such an application per se result in the default of the debtor? According to substantive law, default occurs

33 For detailed information, see Çiğdem Yazıcı Tıktık, *Arabuluculukta Gizliliğin Korunması* (On İki Levha 2013)58 ff.; İsmail Aydın, *Ticari Davalarda Dava Şartı Olarak Arabuluculuk* (On İki Levha 2022) 26; Ferhat Yıldırım, *"Avusturya Hukuk Uyuşmazlıklarında Arabuluculuk Federal Kanunu (ZivMediatGJnun Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu Işığında İncelenmesi", Uluslararası Arabuluculuk Sempozyumu (Ed: Ferhat Yıldırım)* (Seçkin 2018) 83.

when the debtor is requested to fulfill their obligation. In other words, the debtor must be aware that they are being asked to fulfill their obligation. However, at the moment of application to a mediator, the debtor cannot be aware that they are being asked to fulfill their obligation. Moreover, since it is not mandatory to specify the amount of the receivable when applying to a mediator, the debtor cannot know how much of the debt is requested from them. Therefore, from this perspective, it can be stated that the application does not result in the debtor defaulting.[34] Furthermore, it is noteworthy that our legal practice handles similar situations in the context of lawsuits. Judicial decisions have established that the initiation of a lawsuit results in default for the defendant. For instance, according to a decision, default interest is calculated from the date of the lawsuit's initiative since default occurs when the lawsuit is filed and the amount specified.[35] In addition, default occurs on the date of amendment for any amendments made to the lawsuit, rather than upon the service of the amendment petition.[36] Consequently, default interest is calculated from the date of amendment.[37] However, in legal doctrine, the defendant defaults upon the service of the lawsuit petition, not at the moment of the lawsuit's initiation.[38]

In our opinion, the perspective outlined in the doctrine aligns with the TCO, as it asserts that the defendant becomes aware of the obligation to fulfill their performance upon being served with the lawsuit petition. Consequently, it becomes imperative to regard the moment of the defendant's default as coinciding with the service of the lawsuit petition. However, upon examining the ruling of the Court of Cassation, which establishes that default occurs at the initiation of the lawsuit, it is reasonable to anticipate the application of the same rationale and outcome to mediation proceedings. Notably, mediation, being a procedural prerequisite preceding the commencement of a lawsuit, presents a scenario in which consequences analogous to those of the lawsuit, particularly concerning default, may arise. Therefore, based on the Court

34 See Talat Canbolat, *"İş Hukuku Bakımından Arabuluculuk" Arabuluculuğun Geliştirilmesi Uluslararası Sempozyumu (Ed: Ersin Erdoğan)* (Ankara 2018) 107 regarding the occurrence of default upon the application to mediation for employee's receivables. The author did not provide a justification in this regard.

35 15th Civil Chamber of Court of Cassation, Lawsuit File Number 2015/3941, Decision Number 2016/2525, Dated 3.5.2016 (Lexpera).

36 9th Civil Chamber of Court of Cassation, Lawsuit File Number 2015/10055, Decision Number 2015/15212, Dated 28.4.2015 (Lexpera).

37 17th Civil Chamber of Court of Cassation, Lawsuit File Number 2010/1636, Decision Number 2010/4118, Dated 3.5.2010 (Lexpera).

38 Sabri Şakir Ansay, *Hukuk Yargılama Usulleri* (7th, Güzel Sanatlar Matbaası 1960) 218; Necmeddin B. Berkin, *Medenî Usul Hukuku Esasları* (Hamle 1969) 92; Necip Bilge and Ergun Önen, *Medenî Yargılama Hukuku Dersleri* (3rd, Sevinç 1978) 446; Baki Kuru and Burak Aydın, *Medenî Usul Hukuku El Kitabı C. I* (2nd, Yetkin 2021) 477; Baki Kuru and Burak Aydın, *İstinaf Sistemine Göre Yazılmış Medenî Usul Hukuku Ders Kitabı (8th, Yetkin 2023)*, 172; İlhan E. Postacıoğlu and Sümer Altay, *Medenî Usûl Hukuku Dersleri* (8th, Vedat 2020) 422; Hakan Pekcanıtez, *Pekcanıtez Medenî Usûl Hukuku, C. II* (15th, On İki Levha 2017) 1181; Hakan Pekcanıtez, Oğuz Atalay and Muhammet Özekes, *Medenî Usûl Hukuku Ders Kitabı* (11th, On İki Levha 2023) 252 ff.; Ramazan Arslan, Ejder Yılmaz, Sema Taşpınar Ayvaz and Emel Hanağası, *Medenî Usul Hukuku* (9th, Yetkin 2023) 354; Murat Atalı, İbrahim Ermenek and Ersin Erdoğan, *Medenî Usûl Hukuku* (6th, Yetkin 2023) 379; Şanal Görgün, Levent Börü and Mehmet Kodakoğlu, *Medenî Usûl Hukuku* (12th, Yetkin 2023) 276; for counter-opinion, see Saim Üstündağ, *Medenî Yargılama Hukuku C. I-II* (7, 2000) 492. Also see Mustafa Reşit Belgesay, *Hukuk Usulü Muhakemeleri Kanunu Şerhi* (İstanbul Üniversitesi 1939) 410.

of Cassation's verdict from 2021, it is affirmed that the application to the mediation bureau triggers the default of the debtor.[39]

We have elaborated on why the act of applying to a mediator does not automatically result in the default of the debtor. Another crucial aspect to underscore is whether serving an invitation to mediation to the counterparty results in default. This issue has been partially discussed in legal doctrine. In this context, according to *Çil, "*the act of serving the application to the counterparty is not explicitly stipulated by the Law or the Regulation. There is no requirement to notify the counterparty regarding the specific receivables claimed in the application letter. Therefore, it cannot be conclusively argued that the mediation application alone results in default in the lawsuit initiated subsequently due to the counterparty's failure to attend mediation meetings. However, it is pertinent to consider the opinion that mediation, in a procedural requirement before litigation, should result in default for the debtor. An example illustrating this point is within the realm of labor law: when an employee requests their "legal rights" without specifying their receivables, this action may result in default for the employer under the specific rules of labor law. Due to the inherent economic and social dominance of employees over employees and their control over accounting systems, employers are typically empowered to determine the compensation owed to employees. Consequently, if it is determined that the employer was aware of the employer's mediation application, mere notification can be considered adequate to establish default on the part of the employer."[40]

According to Law No. 6,325, the contact information of the involved parties is submitted to the designated mediator by the bureau. Applying this contact information as a reference, the mediator has the authority to conduct necessary inquiry ex-officio. Subsequently, the mediator uses all available means of communication to inform the parties about the appointment and extend invitations to the initial meetings. Furthermore, the mediator is responsible for documenting the processes of informing and inviting the parties, thereby certifying these actions (Art. 18/A, VII).[41] Notably, there is no explicit regulation regarding the form or content of the mediator's invitation. Thus, the invitation is not bound by any specific format.[42] However, the invitation's content typically includes information regarding the dispute, the mediator process, its implications, the legal basis concerning the matter, and the consequences of failing to

39 4th Civil Chamber of Court of Cassation, Lawsuit File Number 2021/18933, Decision Number 2021/4438, Dated 13.9.2021 (Lexpera). See Küçükkaya, p. 314 on how this verdict is wrong since the application to mediation does not mean initiating a lawsuit.

40 Şahin Çil, *İş Uyuşmazlıklarında Arabuluculuk Uygulamaları,* Unpublished Paper(quoted from Ekmekçi, Özekes, Atalı and Seven, p. 235). It has been observed that this opinion is found to be accurate in the doctrine. See Ekmekçi, Özekes, Atalı and Seven, p. 234.

41 See Mustafa Serdar Özbek, *Arabuluculuk ve Tahkim Mevzuatı (Yetkin 2022)*, 637 for the sample invitation letter.

42 Ekmekçi, Özekes, Atalı and Seven, p. 93; for the different situation in the State of Baden Württemberg, see Taşpolat Tuğsavul, 56.

respond affirmatively or attend the meetings.[43] The content of a mediation invitation is unlikely to trigger a default on the part of the debtor, particularly if the exact amount of the receivable is unspecified.[44] Conversely, if the invitation's content is comprehensive and explicitly outlines the amount of the receivable and the nature of the relationship giving rise to it, default may indeed be triggered. Notably, although invitations for mediation are generally deemed inadmissible in lawsuits under Article 5 of Law No. 6,325, the principles regarding the documentation of the final mediation session remain applicable to such invitations. Consequently, an invitation for mediation may result in default under specific circumstances.

In circumstances where the mediator's invitation does not result in default, it becomes necessary to establish the default date. There are two potential options: default may occur either on the date of the mediation meeting or on the date of the final mediation session record, which could be on a different date from the meeting. It is deemed that default has transpired if the creditor explicitly demands their receivable and specifies the amount during the mediation meeting. This declaration by the creditor serves as notification, and given that no special form is required for notifications, default is considered to have occurred. The final date for default determination in the mediation process is the date when the record of the final mediation session is formalized. As previously mentioned, this record may also result in default concerning the debt outlined within it.

These principles regarding default also apply to the voluntary mediation process since both processes operate under the same framework. In voluntary mediation, one party may notify the other of their mediation proposal through a notary. In such cases, default unquestionably arises if the party requesting their receivable does so while sending such notification.[45]

Conclusion

In conclusion, the mediation process extends its influence beyond procedural law, significantly impacting substantive law as well. The impact of the mediation process on substantive law has been regulated under various articles of Law No. 6,325. For instance, there are special provisions regarding statutes of limitations and preclusive

43 Ekmekçi, Özekes, Atalı and Seven, p. 93.

44 It has been observed that mediators in practice do not have information on the subject matter of the dispute. Haznedar has explained this situation as follows: "Another matter is this: We closely observe that when you receive an invitation regarding the mediation and call and ask the mediator, "What this dispute is about?", the mediator actually does not have information and that s/he invites the parties to the meeting without information. However, the practice in this manner is also against the legislation, since the mediator shall communicate with the applicant first, and once s/he has full information regarding the subject matter of the dispute, then s/he shall invite the parties to a meeting, there is also a problem in this regard." (Haznedar İ. M, *"Bankacılık Sektörü Yönünden İdari Davalarda Zorunlu Arabuluculuk", Farklı Bakış Açılarından Ticari Davalarda Dava Şartı Olarak Zorunlu Arabuluculuk Sempozyumu (Eds: Ufuk Tekin/Yasin Barış Özelci),* (Banka ve Ticaret Hukuku Araştırma Enstitüsü 2021) 9).

45 Öztek, p. 22.

time requirements. However, there is no special regulation concerning the default of the debtor. This legislative gap has contributed to uncertainty within legal practice regarding whether the mediation process triggers default. Through the examination of this uncertainty, the following conclusions have been established:

1. The confidentiality and inadmissibility of documents in the mediation process, as regulated under Article 5 of Law No. 6,325, have often been cited as rationales for arguing that the mediation process does not result in debtor default. However, it is essential to clarify that this article cannot serve as a justification for the absence of default. Article 5 primarily addresses the external statements made by parties and ensures that discussions during mediation occur within a comfortable and safe environment. However, the default of the debtor is an internal state, a legalization that the debtor is required to fulfill the obligations they have undertaken. This awareness is immutable, and the confidentiality of the mediation process does not eliminate it. Consequently, it has been concluded that the mediation process can result in debtor default.
2. The mediation process, particularly concerning mediation as a procedural requirement, commences upon the submission of an application to the mediation bureau and concludes upon the creation of the final mediation session record. It is crucial to determine precisely when the default of the debtor transpired within this timeline.
3. The act of applying for mediation does not trigger a default on the part of the debtor, as the exact amount of receivable is not required to be specified in the mediation application. Even if the exact amount is specified in the application, the debtor may not be aware of its submission. Therefore, default does not arise solely due to the application for the mediator.
4. Following the submission of the mediation application, the mediator proceeds to issue the invitation to the parties for a meeting. For such an invitation to the debtor to be considered a notification, a requirement for default, it must expressly detail the nature of the relationship giving rise to the receivable, its amount, and the creditor's request for the receivable. An invitation for mediation covering these essential elements indeed triggers default. Conversely, if these elements are absent from the invitation, it does not result in default on the part of the debtor.
5. Both the mediation meeting and the record of the final mediation session may result in the default of the debtor. Notably, the confidentiality of the mediation process does not prevent default from occurring. Furthermore, expecting notification after the record indicates that the parties have not reached an agreement, which could contravene the principle of good faith. By explicitly and unequivocally expressing their refusal to fulfill their obligation, as

indicated by the records acknowledgment of the lack of agreement, the debtor has explicitly notified the debtor that they will not fulfill their performance. In this context, further notification to the debtor for payment becomes unnecessary.

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