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THE ISSUE OF WHETHER IT IS MANDATORY TO APPLY TO MEDIATION BEFORE REACHING THE INSURANCE ARBITRATION COMMISSION

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Abstract

There is no precise regulation in the legislation as to whether the mandatory mediation in commercial lawsuits will also prevail in applications made to the Insurance Arbitration Commission in commercial disputes. In this regard, a provision in the Law on Mediation in Legal Disputes no. 6325 has been interpreted differently in doctrine and insurance arbitral awards. According to this provision, "in cases where there is an obligation to resort to arbitration or another alternative dispute resolution method in special laws or there is an arbitration agreement, the provisions regarding mediation as a cause of action shall not be applied" (Art. 18/A (18)). At first glance, it can be thought that since arbitration in insurance is not a mandatory arbitration and an arbitration agreement is not concluded between the parties by applying to the Insurance Arbitration Commission, it is obligatory to resort to mediation before applying to the Insurance Arbitration Commission in commercial disputes. However, before applying to the Insurance Arbitration Commission, whether the application to mediation is mandatory should be answered by considering the legal nature, purpose, and distinctive features of arbitration in insurance. In this

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context, in this study, a conclusion has been reached by examining the opinions put forward, arbitral awards, and the Supreme Court decision.

Key Words

Alternative Dispute Resolution Methods • Arbitration in Insurance • Insurance Arbitration Commissio • Mediation • Mandatory Mediation

SİGORTA TAHKİM KOMİSYONUNA BAŞVURULMASINDAN ÖNCE ARABULUCULUĞA BAŞVURU ZORUNLULUĞU OLUP OLMADIĞI MESELESİ

Öz

Ticari davalar için mevcut olan zorunlu arabuluculuğun, ticari uyuşmazlıklar bakımından Sigorta Tahkim Komisyonu'na yapılan başvurularda da geçerli olup olmayacağı hususunda mevzuatta açık bir düzenleme yoktur. Bu konuda 6325 sayılı Hukuk Uyuşmazlıkları Arabuluculuk Kanunu'ndaki bir hüküm, öğreti ve sigorta hakem kararlarında farklı şekillerde yorumlanmıştır. Bu maddeye göre, özel kanunlarda tahkim ya da diğer bir alternatif uyuşmazlık çözüm yöntemine başvurma zorunluluğunun bulunduğu veya tahkim sözleşmesinin mevcut olduğu durumlarda, dava şartı arabuluculuğa dair hükümler uygulanmaz (HUAK m. 18/A (18)). Söz konusu düzenlemeye ilk bakışta, ticari uyuşmazlıklar bakımından Sigorta Tahkim Komisyonu'na başvurudan önce zorunlu arabuluculuğa başvurulması gerektiği düşünülebilir. Bunun sebebi ise sigorta tahkiminin zorunlu bir tahkim olmaması ve Sigorta Tahkim Komisyonu'na başvuru ile taraflar arasında bir tahkim sözleşmesi kurulmamasıdır. Ancak Sigorta Tahkim Komisyonu'na başvurudan önce arabuluculuğa başvurunun zorunlu olup olmadığı sorusuna sigorta tahkiminin hukukî niteliği, amacı ve özellik arz eden durumları dikkate alınarak cevap verilmelidir. Bu çerçevede çalışmada, konuya dair öğretide ileri sürülen görüşler, hakem kararları ve Yargıtay kararı incelenerek bir sonuca varılmaktadır.

Anahtar Kelimeler

Alternatif Uyuşmazlık Çözüm Yöntemleri • Sigorta Tahkimi • Sigorta Tahkim Komisyonu • Arabuluculuk • Zorunlu Arabuluculuk

INTRODUCTION

Alternative dispute resolution methods can play a role in resolving disputes between the party assuming risks and the insured or insurance beneficiary. These alternative dispute resolution methods differ from country to country. For example, in Germany there is an insurance

ombudsman to resolve disputes arising from insurance contracts[1]. In Turkey, instead of the insurance ombudsman institution, an arbitration method specific to insurance law has been created to settle disputes arising from insurance contracts. Accordingly, arbitration in insurance was set up as one of the alternative dispute resolution methods of these disputes[2]. Art. 30 of Insurance Law no. 5684 (IL) establishes the Arbitration Commission with the jurisdiction to receive requests for arbitration to provide fast, low-cost and straightforward resolution of disputes deriving from insurance contracts. As mentioned in the preamble of Insurance Law[3], the insurance arbitration system was formed on the model of ombudsman schemes existing in the international practice. To provide the proper functioning of such schemes within the scope of the Turkish legal system, the system was formed under the basic principles and procedures governing the domestic arbitration system regulated in the Code of Civil Procedure no.

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1 For detailed information about the insurance ombudsman system in Germany, see, GAL, Jens, "The German Insurance Ombudsman System", Alternative Dispute Resolution Systems Regarding Private Insurance, İstanbul, Sigorta Hukuku Türk Derneği, 2014, p. 9-44; BRUNS, Alexander, Langheid/Wandt, Münchener Kommentar zum VVG, 2. Auflage, 2017, sn. 88; ÖZDAMAR, Mehmet, "Alman Hukukunda Sigorta Ombudsmanlığı", BATİDER, C. XXIX, S. 3, 2008, p. 309-327, p. 310; YILDIRIM, Ferhat, "Alman Sigorta Hukukunda Ombudsmanlık", Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi, C. 12, S. 155-156, Temmuz Ağustos 2017, p. 77-95. In United Kingdom there is a financial ombudsman service which is also valid for insurance disputes. For further information, see, MENDELOWITZ, Michael, "Resolving Consumer Insurance Complaints in the UK – The Financial Ombudsman Service", Alternative Dispute Resolution Systems Regarding Private Insurance, İstanbul, Sigorta Hukuku Türk Derneği, 2014, p. 66-75.

2 YAZICIOĞLU, Emine/ŞEKER ÖĞÜZ, Zehra, Sigorta Hukuku, 4. Bs., İstanbul, Filiz Kitabevi, 2021, p. 207. Some scholars argue that insurance arbitration is an exceptional judicial remedy. See DOĞRUSÖZ KOŞUT, Hanife, "Ticari Uyuşmazlıklarda Zorunlu Arabuluculuk Sisteminin Sigorta Hukukundan Kaynaklanan Uyuşmazlıklara Uygulanması ve Sigortacılık Tahkimi ile Karşılaştırması", Sermaye Şirketleri Hukukunda Güncel Gelişmeler Sempozyumu, İstanbul, On İki Levha Yayıncılık, 2020, p. 9-47, p. 20. For further information about arbitration in insurance, see ÜNAN, Samim, "Turkish Special Arbitration Scheme for Claims Against Insurers", Alternative Dispute Resolution Systems Regarding Private Insurance, İstanbul, Sigorta Hukuku Türk Derneği, 2014, p. 111-120, p. 114 ff.

3 See the preamble, https://www5.tbmm.gov.tr/sirasayi/donem22/yil01/ss1364m.htm

6100 (CCP)[4]. That being said, arbitration in insurance is not the only alternative dispute resolution method available for settling disputes that may arise from an insurance contract in Turkey.

The other alternative dispute resolution accepted by Turkish law is mediation. Legal regulations regarding mediation were first came into force in 2012 with the Law on Mediation in Civil Disputes no. 6325 (LMCD)[5]. Meditation refers to resolving the dispute between the parties by mutual communication with the help of a mediator, who is an impartial and independent third person. Parties may voluntarily choose to resort to this method according to the mutually agreed procedures and principles[6]. In matters that the parties can freely dispose of, mediation may be applied depending on the parties' will (Art. 1, (2),

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4 See the Insurance Arbitration Commission's Annual Report, http://www.sigortatahkim.org.tr/files/FaaliyetRaporu_2020.pdf

5 See about the drafting process of the law, PEKCANITEZ, Hakan, "Hukuk Uyuşmazlıklarında Arabuluculuk Kanun Tasarısı'nın Tanıtımı", MİHBİR Toplantısı VI, Medenî Usûl Hukukunda Kanun Yolları ve Arabuluculuk Kanun Tasarısı, İzmir, 2007, Ankara, TBB Yayınları, p. 247- 264.

6 ÖZEKES, Muhammet, Pekcanıtez Usûl Medenî Usûl Hukuku, 15. Bs., İstanbul, On İki Levha Yayıncılık, 2017, p. 2813; EKMEKÇİ, Ömer/ÖZEKES, Muhammet/ATALI, Murat/SEVEN, Vural, Hukuk Uyuşmazlıklarında Arabuluculuk, 2. Bs., İstanbul, On İki Levha Yayıncılık, 2019, p. 17. For detailed information on the concept of mediation, see TANRIVER, Süha, Hukuk Uyuşmazlıkları Bağlamında Arabuluculuk, Ankara, Yetkin Yayınları, 2020, p. 39 ff.; ÖZBEK, Mustafa Serdar, Alternatif Uyuşmazlık Çözümü, 4. Bs., C. II, Ankara, Yetkin Yayınları, 2016 p. 1179 ff.; ÖZMUMCU, Seda, Uzak Doğu'da Arabuluculuk Anlayışı ile Türk Hukuk Sisteminde Arabuluculuk Kurumuna Genel Bir Bakış, 3. bs., İstanbul, On İki Levha Yayıncılık, 2013, p. 276 ff.; KILIÇOĞLU, Ahmet M., Arabuluculuk Sözleşmeleri, Ankara, Turhan Kitabevi, 2020, p. 11 ff. Mediation is defined in Art. 2 (1,b) of LMCD as follows: A method of voluntary dispute resolution system is carried out with the inclusion of an participation of an impartial and independent third person; who is specially trained to convene the related parties through systematic techniques and with the intent of helping such parties mutually to understand each other to come to an agreement through a process of communication. See ATALI, Murat/ERDOĞAN, Ersin, "A New Model in Legal Dispute Resolution: Mandatory Mediation", Zeitschrift für Zivilprozess International, 23. Band, 2018, p. 241-255, p. 244. See also, BELGİN GÜNEŞ, Derya, "Mandatory Mediation in the Light of High Court Decisions in Turkish Law", İnönü Üniversitesi Hukuk Fakültesi, 2020, C. 11, S. 2, 2020, p. 514-526, p. 515.

LMCD). Disputes arising from the insurance contract are also among the issues that the parties can freely dispose of[7].

With the entry into force of the Labor Courts Law no. 7036, Law no. 7155 and Law no. 7251, mediation has became a mandatory dispute resolution for some disputes despite its initial optional nature. In related disputes, it is a cause of action[8] to apply to a mediator before bringing a lawsuit[9]. This means that the party who wants to file a lawsuit regarding the dispute arising from the insurance contract must first resort to mediation.

Some of the commercial disputes can be given as an example of those disputes subject to mandatory mediation. Some of the disputes arising from insurance contract between the parties have a commercial nature. The subject of this study is whether the mandatory mediation stipulated in commercial cases will also be applied in the applications made to the Insurance Arbitration Commission under Art. 5/A of Turkish Code of Commerce no. 6102. Opinons on the supposed mandatory nature of mediation for insurance disputes vary. Arbitral awards do not clarify the issue because of the inconsistencies in their findings. The purpose of this study is to explore whether it is obligatory

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7 See ERDEMİR, M. Aymelek, Sigorta Hukuku Uyuşmazlıklarında Tahkim, Ankara, Seçkin Yayıncılık, 2017, p. 154.

8 The cause of action can be defined as the condition whose existence or absence is absolutely necessary for an examination and decision on the case's merits. The causes of actions are requirements relating to the procedural law sought from the beginning to the end of the trial, which must be exercised by the court ex officio and can always be put forward by the parties. See, PEKCANITEZ, Hakan, Pekcanıtez Usûl Medenî Usûl Hukuku, C. II, 15. bs, İstanbul, On İki Levha Yayıncılık, 2017, p. 927; TANRIVER, Süha, Medenî Usûl Hukuku, 3. Bs., C. I, Ankara, Yetkin Yayınları, 2020, p. 635; ATALI, Murat/ERMENEK, İbrahim/ERDOĞAN, Ersin, Medenî Usûl Hukuku, 4. Bs., Ankara, Yetkin Yayınları, 2021, p. 320; BUDAK, Ali Cem/KARAASLAN, Varol, Medenî Usûl Hukuku, 4. Bs. Ankara, Adalet Yayınevi, 2020, P. 9 sn. 49; ARSLAN, Ramazan/YILMAZ, Ejder/TAŞPINAR AYVAZ, Sema/HANAĞASI, Emel, Medenî Usûl Hukuku, 6. Bs., Ankara, Yetkin Yayınları, 2020, p. 310; ATALI/ERDOĞAN, p. 247-248.

9 It is opined that the obligation to apply to a mediator is more like the preliminary objection than the cause of action. See EKMEKÇİ/ÖZEKES/ATALI/VURAL, p. 154. It is noted that this cause of action, which is limited to business, commercial and consumer disputes, does not have a legal and logical connection with the relevant disputes. See TANRIVER, Arabuluculuk, p. 143.

to resort to mandatory mediation before applying to the Insurance Arbitration Commission in commercial disputes within the framework of the provisions in force. For this purpose, the study first will analyse regulations regarding application to mediation before application to Insurance Arbitration Commission. It will then consider the discussions from the academic circles followed up by an analysis of the arbitral awards and supreme court decision delivered on the topic.

I. LEGAL REGULATIONS REGARDING APPLICATION TO MEDIATION BEFORE ARBITRATION IN INSURANCE

Art. 30 of the IL and Regulation on Arbitration in Insurance, which provide the basis for resorting to arbitration for insurance disputes, are silent on mediation as the other alternative dispute resolution.

Turkish Commercial Code, which embodies mediation as a cause of action in commercial cases by its Art. 5/A, do not satisfactorily clarify the best course of action because it does not make explicit reference to arbitration in insurance.

Law on Mediation in Civil Disputes, on the other hand, contains a specific reference to arbitration in its Art. 18/A (18). According to this provision, "in cases where there is an obligation to resort to arbitration or another alternative dispute resolution method in special laws or there is an arbitration agreement, the provisions regarding mediation as a cause of action shall not be applied". When Art. 18/A (18) of LMCD is analyzed literally, it is seen that the two cases listed are included in the scope of the exception and it is regulated that mandatory mediation will not be applied in these cases. These cases are; the obligation to resort to arbitration or another alternative dispute resolution method in special laws and the existence of an arbitration agreement between the parties. Whether there is an obligation to apply to mediation before applying to the Insurance Arbitration Commission should be determined according to this provision. In order to determine this matter, it should be examined whether there is an obligation to apply to the Insurance Arbitration Commission or whether there is an arbitration agreement in case of application to the Commission.

Pursuant to the Insurance Law, an application to the Insurance Arbitration Commission is not obligatory for both parties of the dispute[10]. It is possible and permissible for the parties to resort to judicial remedy or ad hoc or other institutional arbitration if they separately agree to it[11]. The Insurance Law also provides the opportunity to apply to the Insurance Arbitration Commission, especially to the insurant or the insured - as the person who benefits from the insurance contract - if he/she accepts it[12]. However, in order to do this, the insurance company must be included and a member of the insurance arbitration system within the Insurance Law and must pay the contribution fee by notifying the Commission in writing of this request[13]. For the disputes in the context of this paragraph, which originate from the compulsory insurances required by the related legislation, right holders shall benefit from arbitration procedure even if the related institution is not a member of the arbitration system. Accordingly, arbitration in insurance is not mandatory, and thus it is not included in the situation in Art. 18/A (18) of LMCD.

Another issue in this regulation is the existence of an arbitration agreement. In case of an arbitration agreement, there will be no mandatory mediation for commercial disputes[14]. The answer to whether

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10 PEKCANITEZ, Hakan/YEŞİLIRMAK, Ali, Pekcanıtez Usûl Medenî Usûl Hukuku, C. III, 15. Bs., İstanbul, On İki Levha Yayıncılık, 2017, p. 2616; YEŞİLOVA ARAS, Ecehan/YEŞİLOVA, Bilgehan, "Sigortacılık Tahkimi – Sigorta Tahkim Usulü ve Ayırdedici Özellikleri (Sigortacılık Kanunu m. 30)", Yaşar Üniversitesi Hukuk Faküktesi Dergisi, C. 8, 2013, p. 275-379.

11 ULAŞ, Işıl, "Sigortacılıkta Tahkim", Prof. Dr. Seza Reisoğlu'na Armağan, BATİDER, C. XXIV, S. 2, 2007, p. 239-266, p. 239-240; PEKCANITEZ/YEŞİLIRMAK, p. 2616; YEŞİLOVA ARAS/YEŞİLOVA, p. 290; ÇAKAN, Oya, Sigorta Tahkim Yargılaması ve Tahkime Elverişliliğin Değerlendirilmesi, Ankara, Seçkin Yayıncılık, 2021, p. 89.

12 YEŞİLOVA ARAS/YEŞİLOVA, p. 290.

13 YEŞİLOVA ARAS/YEŞİLOVA, p. 290.

14 However, if one of the parties to the dispute files a lawsuit in the state court despite the existence of an arbitration agreement, the court must dismiss the case since mediation is a cause of action and it is stated that it will be decided upon the petition before the other lawsuit conditions (Art. 18/A (2), LMCD). Because the existence of an arbitration agreement between the parties is regulated as a preliminary objection in the Code of Civil Procedure. The cause of actions are examined and decided before the preliminary objections. See, EMİNOĞLU, Cafer/ERDOĞAN, Ersin, Ticari Uyuşmazlıklarda İhtiyari ve Dava Şartı (Zorunlu)

an arbitration agreement will be concluded upon the application of the person in dispute with the insurance company to the Commission is closely related to whether there is compulsory mediation before the application to the Insurance Arbitration Commission. There is no unity in answering these issues. These views will be analyzed by categorizing below.

II. OPINIONS IN THE DOCTRINE ON WHETHER IT IS MANDATORY TO APPLY TO MEDIATION BEFORE ARBITRATION IN INSURANCE

A. OPINION THAT MEDIATION IS MANDATORY BEFORE ARBITRATION IN INSURANCE

Some scholars opined that it is obligatory to resort to mediation before applying to the Insurance Arbitration Commission in commercial disputes[15]. According to this view, mandatory mediation should be applied both to the court and to the Commission, since the purpose of making it mandatory to use mediation is to reduce the number of disputes before the courts and the Commission[16].

B. OPINIONS THAT MEDIATION IS NOT MANDATORY BEFORE ARBITRATION IN INSURANCE

Based on Art. 18/A (18) of LMCD, some scholars argue that, for insurance companies that are members of the Insurance Arbitration Commission, there is no obligation to resort to mediation before arbitration, where the insured and/or the person who benefits from the contract wishes to resort to arbitration[17]. However in cases where the

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Arabuluculuk, Ankara, Adalet Yayınevi, 2020, p. 127; DİNÇ, İlhan, Ticarî Davalarda Zorunlu Arabuluculuk, Ankara, Seçkin Yayıncılık, 2021, p. 430-435; SAYIN, Bartuğ, Ticari Dava Şartı Olan Arabuluculuk, ADR Serisi C. 1, Ankara, Yetkin Yayınları, 2021, p. 173. KOÇYİĞİT, İlker/BULUR, Alper, Ticari Uyuşmazlıklarda Dava Şartı Arabuluculuk, Hukuk İşleri Genel Müdürlüğü Arabuluculuk Daire Başkanlığı Yayını, 2019 p 65. For the opposite view see, TANRIVER, Arabuluculuk, p. 132.

15 BAĞATUR, Mehmet Çağrı/ÖGE, Hande, Sorularla Sigorta Tahkim, İstanbul, On İki Levha Yayıncılık, 2017, s. 69.

16 BAĞATUR/ÖGE, s. 69.

17 YAĞMUR, Setenay, "Sigorta Şirketleri Açısından Ticari Davalarda Zorunlu Arabuluculuk Uygulaması", Bilkent Üniversitesi Genç Hukukçu Araştırmacılar Sempozyumu, Ankara, 11-12 Ekim 2019, İstanbul, On İki Levha Yayıncılık, 2020, p. 649-668, p. 664; KOÇYİĞİT/BULUR, p. 65.

other party of the contract prefers to apply to the judicial courts instead of arbitration in insurance, the completion of the mediation process should be accepted as a cause of action[18].

According to another view, there is no obligation to apply to a mediator before arbitration in insurance in commercial disputes because the application made to the Commission is a declaration of will for the acceptance of the arbitration agreement[19].

According to another view that mediation is not mandatory before arbitration in insurance, considering that mediation is an alternative dispute resolution method, it would not be appropriate to stipulate the condition of applying to mediation before another alternative resolution method or arbitration[20]. Unless there is a legal provision to the

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18 YAĞMUR, p. 664.

19 ERBAŞ AÇIKEL, Aslıhan, "Deniz Ticareti ve Sigorta Hukuku Uyuşmazlıkları Bakımından Zorunlu Arabuluculuğun Değerlendirilmesi", Ticari Uyuşmazlıklarda Zorunlu Arabuluculuk, Seçkin, Ankara 2019, p. 43-52, p. 49; KARASU, Rauf, "Sigorta Tahkimi İle İlgili Güncel Sorunlar ve Çözüm Önerileri", TAAD, Yıl: 7, S. 26, Nisan 2016, p. 49-69, p. 64; DEKAK, Mehmet Tuğberk, Sigorta Tahkimde Yargılama Usûlü, Ankara, Yetkin Yayınları, 2019, p. 62. The explanations of another opinion claiming that an arbitration agreement has been established with an application to the Insurance Arbitration Commission are as follows: Leaving aside the flexible procedures in the laws (Art. 412, CCP; Art. 4, Code Of International Arbitration no. 7983 (CIA)), the written form requirement -in the form of validity-- is a widely accepted issue for arbitration agreements. In Turkish law, arbitration in insurance has added a new and different method to this form requirement. Accordingly, in order to benefit from the arbitration facility in insurance, there is no need to have any arbitration record in the insurance contract between the parties or, as it is infrequent, the parties do not need to conclude an arbitration agreement after the dispute has arisen. If the insurance company is a member of the Insurance Arbitration Commission, then only the application of the insured or the insured beneficiary to the Commission is sufficient for settling the dispute through arbitration. The arbitration agreement herein is not through an arbitration clause; instead, it is concluded after the dispute has arisen, which is similar to an arbitration agreement in this respect, but with the acceptance of the public offer announced by the insurance company beforehand. The aforementioned acceptance brings up a very different outcome compared to classical arbitration agreements. Accordingly, the jurisdiction of the arbitrators is not any dispute arising from the insurance contract between the parties; only the dispute subject to the application of the insured or the insurance beneficiary included. See. YEŞİLOVA ARAS/YEŞİLOVA, p. 300.

20 YARDIM, Mehmet Ertan, "Ticari Uyuşmazlıklarda Zorunlu Arabuluculuğa Başvuru", Ticari Uyuşmazlıklarda Zorunlu Arabuluculuk, Ed. Ceyda Süral

contrary[21],a mediator or arbitrator should not end the procedure because mediation has not been applied[22]. Considering that mediation is a cause of action, it is possible to apply for mediation only before a lawsuit to be heard in court (in the technical sense)[23]. In this sense, there is no requirement to resort to mediation before the insurance arbitration procedure[24].

There are other scholars, based on the literal interpretation of the Law, argue that it is obligatory to resort to mediation before arbitration in insurance. However, by making a teleological interpretation on this issue, they argue that the application to mediation should not be required before arbitration in insurance in commercial disputes[25]. According to this view, in determining whether arbitration in insurance falls within either of two cases regulated in Art. 18/A (18) of LMCD, there is no obligation to apply to the Insurance Arbitration Commission first[26]. Therefore, the first exception does not apply to arbitration in insurance. The second exception is not in question in arbitration in insurance since there is no arbitration agreement between the parties in arbitration in insurance[27]. To apply to the Commission, the insurance company, which is a party to the dispute, must be a member of the Commission and the risk in a matter of dispute must occur after membership[28]. An arbitration agreement is not required to apply to the Commission. Therefore, in practice, no arbitration agreement is made

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Efeçınar, Mehmet Ertan Yardım, Ankara, Seçkin Yayıncılık, 2019, p. 89-110, p. 100; TAŞKIN, Melda, Krediye Bağlı Hayat Sigortası Sözleşmesi, İstanbul, On İki Levha Yayıncılık, 2019, p. 431; MEMİŞ, Abdullah Berat, Ticari Uyuşmazlıklarda Zorunlu Arabuluculuk Usûlü, Ankara, Seçkin Yayıncılık, 2020, s. 69.

21 On the contrary, the provision is contained in Art. 20 of LL. According to this provision, even in cases where the parties have a special arbitrator agreement, mediation must be sought first. See YARDIM, p. 101 fn. 26.

22 YARDIM, p. 101.

23 YARDIM, p. 101.

24 YARDIM, p. 101.

25 EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p. 395 vd. ; EMİNOĞLU/ERDOĞAN, p. 391-393.

26 EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p. 395.

27 EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p. 395; TAŞKIN, p. 431.

28 EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p. 395-396.

between the parties to the insurance contract[29]. In light of these explanations, it can be said that the parties must apply to mediation as a cause of action before the applications to be made to the Insurance Arbitration Commission[30]. However, when a teleological interpretation is made, it can be said that since arbitration in insurance is a special case, the legislator intends to keep arbitration out of the mandatory mediation system, although the legal regulation is deficient[31]. In addition, considering the regulatory purpose of mediation as a cause of action, the applications to be made to the Insurance Arbitration Commission, which is an exceptional alternative dispute resolution method in Turkish Law, must be within the exception[32]. This is because, like mediation as a cause of action, arbitration in insurance is an alternative dispute resolution method[33]. In the preamble of Art. 5/A of the TCC on this issue, it is stated that by making it mandatory to apply to a mediation, it is purposed to settle these disputes in a much shorter time, with less expense and under the will of the parties[34]. In this respect, considering that the applications made to the Insurance Arbitration Commission have to be concluded within four months, the application can be made with a low application fee compared to the state jurisdiction. The parties' will is at the forefront as it is an alternative dispute resolution method. Mediation as a cause of action and arbitration in insurance serve the same purpose. Therefore, applications to the Insurance Arbitration Commission must be exempted from the mediation as a cause of action[35]. Applying to a mediator is regulated as a cause of action under the Art. 5/A of the TCC[36]. According to this opinion, what is meant here is the case before the state court[37]. There is no purposive justification for the contrary interpretation[38]. However, if it is accepted that the

29 EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p. 396.
30 EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p. 396; EMİNOĞLU/ERDOĞAN, p. 392.
31 EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p. 396.
32 EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p. 396.
33 EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p. 396.
34 EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p. 396.
35 EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p. 397.
36 EMİNOĞLU/ERDOĞAN, p. 393.
37 EMİNOĞLU/ERDOĞAN, p. 393.
38 EMİNOĞLU/ERDOĞAN, p. 393.

applications to the Insurance Arbitration Commission by making a literal interpretation are considered mandatory mediation, it will be necessary to examine each application[39]. This is because not every application made to the Insurance Arbitration Commission is in the nature of a commercial lawsuit[40]. Making this distinction will cause many unique problems to arise in practice. For example, it is clear that applications that are made against the assurance account are not commercial lawsuits within the scope of Art. 4 of the TCC[41]. On the other hand, the majority of the applications made to the Commission are based on compulsory traffic insurance[42]. Nevertheless, the vast majority of these applications are applications made by the prejudiced third parties by using their right to file a lawsuit[43]. There is no insurance contract concluded between the injured third parties and the insurance company[44]. In addition, the source of the claim rights of the prejudiced third parties is the strict liability of the operator regulated in the Highway Traffic Law and the compulsory traffic insurance[45]. On the other hand, the strict liability of the operator is essentially a tort liability and does not lead to a commercial lawsuit on its own[46]. Because the provisions regulated in the Highway Traffic Law are not in the nature of commercial lawsuits[47]. In this respect, applications made by third parties using their right to file a lawsuit directly in compulsory traffic insurance can not be considered commercial lawsuits as a rule[48]. As is understood from such examples, it is necessary to examine whether the dispute is in the nature of a commercial lawsuit according to the nature of the application made in each insurance contract[49]. This is not always an effortless task and may lead to differences in practice and loss of time for

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39 EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p. 397.
40 EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p. 397.
41 EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p. 397.
42 EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p. 397.
43 EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p. 397.
44 EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p. 397.
45 EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p. 397.
46 EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p. 397.
47 EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p. 397.
48 EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p. 397.
49 EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p. 397.

applicants[50]. For these reasons, it would be the most appropriate solution to accept that the provisions on mediation as a cause of action in arbitration in insurance will not be applied[51].

III. INSURANCE ARBITRATION COMMISSION AWARDS ON WHETHER IT IS MANDATORY TO APPLY TO MEDIATION BEFORE ARBITRATION IN INSURANCE

In commercial disputes, when the awards of the Insurance Arbitration Commission on whether mediation is mandatory before arbitration in insurance are examined, it is seen that mediation is not mandatory in most of the awards. In these awards, it is seen that although the dispute arising from the insurance contract has a commercial nature, the condition of applying to mediation is not sought, and the arbitrators decide on the merits of the dispute.

However a few awards state that it is obligatory to apply to mediation before arbitration in insurance. One of the few awards[52] of the Insurance Arbitration Commission, which ruled that mediation is mandatory before arbitration in insurance, was based on remarkable grounds.

In the arbitral award, we have pointed out, first it has been determined that the subject of the dispute is commercial, and it is stated that mandatory mediation must be valid as a rule. In the arbitral award later, Art. 18/A (18), LMCD, which was regulated as an exception to mandatory mediation, was evaluated. According to the arbitral award, this regulation of the legislator that mediation will not be mandatory in cases where there is a contractual or legal obligation to the arbitration procedure is suitable for supporting mediation as an alternative dispute resolution method. Because there is no point in guiding the parties to mediation if there is a solution made mandatory by the legislation or by choosing a party, compared to the general courts for faster and other reasons. As a matter of fact, in Art. 116 of the CCP, the legislator gave the relevant party the right to put forward a preliminary objection,

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50 EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p. 397.

51 EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p. 397-398.

52 See, Insurance Arbitration Commission Dispute Arbitral Award, D. 29.09.2021, N. 2021/164120, Arbitral Award N. 2021/142073 (The arbitral award is not published).

considering the existence of the obligation to apply to arbitration depending on the agreement between the parties, and gave the authority to demand that the dispute not be seen in the state judiciary. According to the arbitral award, arbitration in insurance does not fall into one of the two situations regulated as an exception in the article. Namely, Art. 30 (I) of IL "The person who has a dispute with the institutions that are members of the insurance arbitration system can benefit from the arbitration procedure even if there is no special provision in the contract that is the subject of the dispute"[53]. By stipulating the principle of arbitration in insurance, it pointed out the feature of the insurance company that does not need an arbitration agreement, and that it depends on the insurance company being a member of the system. And with the phrase "may be benefited" it has ruled that the application to this procedure is optional. Since there is no arbitration agreement or condition between the parties, there is no contractual application obligation as well. Because, in arbitration in insurance procedure, the authority to arbitrate arises from the insurance company being a member of the arbitration system. There is no arbitration agreement between the parties that establishes a contractual obligation. In compulsory insurances, the possibility of filing lawsuits without the insurance company being a member of the system does not mean a contractual or legal application obligatory to arbitration. In these cases, although the insurance company is not a member of the system, the beneficiaries can apply to the insurance arbitration procedure without being a member of the system. For these grounds, it was ruled that there was an obligation to apply to mediation before applying to the Insurance Arbitration Commission, and therefore the application was dismissed because of the violation of the mandatory rule.

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[53] Also see the Insurance Arbitration Commission's Annual Report, http://www.sigortatahkim.org.tr/files/FaaliyetRaporu_2020.pdf.

IV. SUPREME COURT DECISION ON WHETHER IT IS MANDATORY TO APPLY TO MEDIATION BEFORE ARBITRATION IN INSURANCE

There is only one supreme court's decision that we could find out on whether it is mandatory to apply to mediation before arbitration in insurance[54]. In its decision, the Supreme Court primarily pointed to Art. 18, LMCD, which regulates two exceptional cases in which mediation as a cause of action is not applicable. Later, the Supreme Court referred to the obligation to apply to the insurance establishment before applying to the Insurance Arbitration Commission, regulated in Art. 30 (13), IL. According to this provision, "to be able to apply to the Commission, the person who falls into a dispute with the insurance establishment shall make necessary applications to the insurance establishment regarding the subject matter of the dispute and shall document that his or her claim is entirely or partially rejected. It is also possible to apply to the Commission if the insurance establishment does not reply in written form within fifteen working days from the application[55]." According to the supreme court, for the application to the Insurance Arbitration Commission, the condition of applying to the insurance company is regulated as a cause of action. A decision must be made considering the fact that it is not mandatory to apply to mediation and that applying to a mediator is not a cause of action.

V. OUR POINT OF VIEW

Some scholars have based the fact that it is not mandatory to apply to mediation before reaching the Insurance Arbitration Commission in commercial disputes on the existence of the rule that mediation as a cause of action will not be applied in case of the existence of the arbitration agreement in Art. 18/A (18) of LMCD[56]. In our opinion, an arbitration agreement will not be concluded between the parties by applying to the Insurance Arbitration Commission. In this case, it is only

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54 See SC. 4. CC, D. 30.06.2021, N. 2021/3476, Decision N. 2021/3999 (https://karararama.yargitay.gov.tr/)

55 Also see the Insurance Arbitration Commission's Annual Report, http://www.sigortatahkim.org.tr/files/FaaliyetRaporu_2020.pdf

56 See chapter B of section III.

the case to apply to the Insurance Arbitration Commission, which is one of the possibilities foreseen in the legislation to settle the dispute between the parties. The use of this opportunity in the Law does not mean that a contract has been concluded. Hence, a person in conflict with the member establishments of the insurance arbitration system may still benefit from the arbitration procedure even if there is no special provision in the related contract according to Art. 30 (1) of IL. This provision means that there is no need for an arbitration agreement to apply for arbitration in insurance.

Accordingly, there is no explicit legal provision on the basis that mediation is not mandatory before applying to the Insurance Arbitration Commission in commercial disputes. Thus, it is necessary to examine the legal nature, purpose, and distinctive features of arbitration in insurance in order to determine whether the application to mediation is mandatory before applying to the Insurance Arbitration Commission in commercial disputes. Arbitration in Insurance is an alternative dispute resolution method where disputes deriving from insurance contracts are resolved by the arbitrator or arbitration committees before the Insurance Arbitration Commission. One of the main purpose of this procedure is to resolve the disputes arising from the insurance contract by experts in a much shorter time and with relatively more minor costs than the state jurisdiction. Considering the nature of arbitration in insurance, imposing mandatory mediation before arbitration in insurance will delay the resolution of the dispute if the parties can not reach an agreement. In addition, imposing another alternative dispute resolution method before an alternative dispute resolution method contradicts the existence and purpose of regulation of alternative dispute resolution methods[57].

Another reason why mediation should not be mandatory before applying to the Insurance Arbitration Commission is the obligation to apply to the insurance company, which is regulated explicitly in Art. 30 (13) of IL. The purpose of this provision is to make a final attempt at reconciliation with the insurance company before the applicant takes the

[57] For the view in this direction in the doctrine, see also chapter B of section III.

relevant dispute to arbitration[58]. In this way, before the arbitration, the insurance company will submit its proposal for the settlement of the relevant dispute, and if the applicant is satisfied with the relevant offer, the dispute will be resolved[59]. If an application is made directly to the Insurance Arbitration Commission without making an application to the insurance company, the application must be rejected because of the violation of mandatory rule[60]. The application of the insured or insurance beneficiary to the Insurance Arbitration Commission may result in the resolution of the dispute. Before arbitration in insurance, which is an alternative dispute resolution method, such a communication between the parties in which the dispute can be resolved is obligatory. It would not be appropriate to require mandatory mediation, which is another alternative dispute resolution method.

If it is accepted that there is an obligation to apply to mediation before arbitration in insurance commercial disputes, many procedural discussions will come to the fore before the dispute is resolved. This is because, not all disputes arising from the insurance contract are commercial. Determining whether the said disputes are commercial or not will lead to loss of time and cause different decisions in practice[61].

We think that mediation should not be mandatory before applying to the Insurance Arbitration Commission in commercial disputes based on the above reasons as supported by the Supreme Court[62]. On the other hand, as we pointed out above, some arbitral awards interpret the provisions of the legislation literally and make decisions that mediation is mandatory before arbitration in insurance in commercial disputes[63]. Some scholars believe that this situation can be overcome by making a

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58 Özdamar, Mehmet, "Sigorta Hukukunda Uyuşmazlıkların Çözümünde Tahkim Sistemi", Gazi Üniversitesi Hukuk Fakültesi Dergisi, C. XVII, 2013, Sa. 1-2, p. 831-855, p. 847.

59 DEKAK, p. 81.

60 See that the condition of applying to the insurance company is the cause of action, SEVEN, Vural, "Mahkemeye-Tahkime Başvurmadan Önce Sigorta Şirketine Başvuru Zorunluluğu", İzmir Barosu Dergisi, Mayıs 2018, p. 95-129, p. 124.

61 For the view in this direction in the doctrine, see also chapter B of section III.

62 For the aforesaid decision, see section V.

63 For the aforesaid arbitral award, see section IV.

teleological interpretation[64]. Considering that some of the arbitrators in practice make their decisions without making any teleological interpretation, we believe that it would be appropriate to make a precise regulation in the Law[65]. This new regulation should clarify that it is not obligatory to apply to mediation before applying to the Insurance Arbitration Commission in commercial disputes. In this way, it would be prevented to avoid loss of rights and fulfill insurance arbitration purposes.

CONCLUSION

The party that has a dispute arising from the insurance contract with the member institution of the insurance arbitration system may apply to the state jurisdiction or arbitration in insurance to settle the dispute. If there is compulsory insurance, the insurance company does not need to be a member of the system (Art. 30 (1), IL). If the dispute is in the nature of a commercial lawsuit and the application is made to the state judiciary, it is obligatory to resort to mediation first as per Art 5/A of TCC. If the application is made to the Insurance Arbitration Commission, not to the state judiciary, the question on whether mediation is mandatory arises. To answer this question, Art. 18/A (18) of LMCD should be reviewed. This Article states that, "in cases where there is an obligation to resort to arbitration or another alternative dispute resolution method in special laws or there is an arbitration agreement, the provisions regarding mediation as a cause of action shall not be applied". Since arbitration in insurance is not a mandatory arbitration and an arbitration agreement has not been concluded between the parties by applying to the Insurance Arbitration Commission, it may be thought that it is obligatory to resort to

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64 EKMEKÇİ/ÖZEKES/ATALI/SEVEN, p. 396; EMİNOĞLU/ERDOĞAN, p. 392. See also chapter B of section III.

65 Hence it has been added to the Law on Consumer Protection No. 6502 (LCP) with the amendment of Law No. 7251, where mandatory mediation will not be valid in disputes falling under the jurisdiction of the consumer arbitration committee (Art. 73/A, (1), a, LCP). Although the consumer arbitration committee's legal nature and application area are different from the Insurance Arbitration Commission, it would be appropriate to make a precise regulation similar to Art. 73/A, (1), a, LCP for arbitration in insurance for the reasons we have explained above.

mediation before applying to the Insurance Arbitration Commission in commercial disputes. There are opinions in the doctrine which are supported by arbitral awards in this direction. However, considering that arbitration in insurance is an alternative dispute resolution method and aims to resolve the dispute in a short time, it would not be appropriate to require another alternative dispute resolution method before arbitration in insurance. Moreover, it is obligatory to apply to the insurance company before the Insurance Arbitration Commission application (Art. 30 (13), IL). Since there is a possibility of resolution of the dispute during this communication, mandatory mediation should not be required in addition. Also, determining whether the dispute is commercial or not to determine the application area of mandatory mediation is objectionable as it will lead to new discussions and different practices. Thus, the Supreme Court has rightly ruled that mediation is not mandatory before applying to the Insurance Arbitration Commission in commercial disputes. However, it would be appropriate to make a precise legal regulation to uniform arbitral awards in practice.

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