Turkey: Mandatory Mediation Is The New Game In Town

Kluwer Mediation Blog
March 3, 2018

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Please refer to this post as: Idil Elveris, 'Turkey: Mandatory Mediation Is The New Game In Town', Kluwer Mediation Blog, March 3 2018, http://mediationblog.kluwerarbitration.com/2018/03/03/turkey-mandatory-mediation-new-game-town/

On 12 October 2017, the law numbered 7036 on labour courts was adopted making mediation mandatory in certain types of labour disputes in Turkey. Accordingly, a claim for the collection of receivables or compensation either by the employer or employee or for the reinstatement of an employee, must first be filed before a mediation bureau. If the party fails to do so, the ensuing lawsuit will be denied on procedural grounds. Mediation bureaus are established in major court houses and it is their job to take the application and appoint a mediator (through an automated system). They do not perform the function of a front office. It is the mediator who administers the claim, contacts the parties and then proceeds with mediation.
In order to encourage parties to attend the mandatory mediation process, the law adopted an important fee-shifting mechanism. If a party fails to attend the initial mediation meeting, it will pay litigation costs even if it later succeeds in the subsequent litigation. Meanwhile, an application to mandatory mediation pauses the limitation period. The mediator must complete the process within three weeks and in exceptional circumstances can have an additional week. Disputes which have been resolved in mandatory mediation cannot be later brought before a court. Once an agreement is reached, the ensuing agreement is enforceable as a judgment if signed by both the parties and their lawyers. If not, and the parties do not later deliver the promised actions in the agreement, the enforceability process in court may only take into consideration whether the subject matter of the dispute was subject to mediation and the agreement reached was enforceable.

The government pays the mediator according to a tariff for up to two hours if the parties fail to reach an agreement. However, if the parties successfully resolve the dispute they will contribute to the mediator's fees in equal measure.

The path to mandatory mediation

Mediation started in Turkey on a voluntary basis with the introduction, on 22 June 2013, of the law numbered 6325 concerning mediation in civil law disputes. This paved the way for a mediation system by which parties were free to resort to a mediator as long as they had a civil law dispute the outcome of which could be determined through party agreement. Disputes such as divorce, child custody or immovable property were considered of a public order nature, resolution of which required a court decision rather than party agreement. Therefore, they could not be subject to mediation. In addition to voluntariness, the law established the usual tenets of mediation such as confidentiality, impartiality and equality.

From June 2013 until November 2017, the number of voluntary mediations reached 21,517, 19,292 of which ended with an agreement. Given that the pending number of civil cases before the courts is a couple of million, the proportion of cases for which mediation is used is low. In terms of the subject matter, however, 90% of voluntary mediations involved labour law disputes. This fact and the desire to promote mediation as a cost effective and fast method to resolve disputes were the main reasons why mandatory mediation was first adopted in labour disputes. Indeed, as of the date of its entry into force on 1 January 2018 until 15 February 2018 the number of labour disputes that have been filed before mediation bureaus reached 37000, 6500 of which have been already successfully resolved while 2800 of which have not. This shows that in less than two months, the total agreement numbers in mandatory mediation amounted to almost one quarter of the total agreements reached under voluntary mediation over a period of four years.

While all these developments may be viewed positively, mandatory mediation was adopted without the benefit of a pilot project. Therefore, dozens of discussion groups were created with mediators, educators and Ministry of Justice officials as members. The goal was to monitor and streamline the mandatory mediation practice while sharing information. The immediacy of online communication allowed best practices to be identified and early intervention into many wrong and unethical practices as they arose. This hands-on approach was necessary as the government wants to demonstrate early success in mandatory mediation to then justify its expansion into new areas such as commercial and consumer disputes.

Challenges

The government is in desperate need of quick fixes to the ever-growing judiciary problem of Turkey. In addition to the usual problems of delay and ensuing costs, the failed coup attempt in 2016 saw the suspension of over four thousand judges and prosecutors that constituted one third of the judicial personnel. New and inexperienced judges cannot make up for the lost experience as well as the ever-growing case numbers. This creates a danger to view mediation as a panacea to all the problems of the judicial system. This is unrealistic as human rights and other structural inequalities continue to require the attention of the judiciary.[fn]Claims arising from labour accidents or labour related illnesses were excluded from mandatory mediation as Turkey continues to rank high in work related deaths and accidents (see here).[/fn]

At the same time, ethical problems plague some of the current mediations. For instance, employers are prone to retain one mediator as "theirs" and to ask for her or his appointment in all cases filed against that employer. Similarly, lawyers who refer their client to mediation do not see a problem to then mediate the same dispute themselves if this is disclosed to the other party who agrees to such an arrangement. Some mediators are only interested in getting the two hour fee and do not engage in any meaningful administering activity, turning the process into a "tick box" exercise. These examples show that there is a lack of understanding about the basic tenets of mediation as well as the fact that ethical rules not only exist to guide mediators and protect parties but also to build public trust in mediation. The current ethical rules, taken from the ABA Model Rules of Mediation, are being revised to hopefully respond to these problems through the introduction of a disciplinary mechanism for mediators.

Another danger is that mediation may become the "new litigation" since it is reserved only for lawyers. This creates the risk of the legalization of the debate and practices. Already, sample mediation documents found on the website of the Ministry of Justice resemble court transcripts.

Further, the mediation field is under the risk of being overregulated. The government oversight body, the Mediation Division ("the Division"), established at the Ministry of Justice, keeps the registry of mediators, conducts exams, provides permission for training and certification, and promotes and monitors the overall mediation policy. Its desire to initially promote mediation at all costs led to permissions being issued to an indeterminate number of training institutions that mushroomed all over the country. Consequently, the number of registered mediators is today 7471 [fn]Almost as high is the number of non-registered mediators at 5974. Thousands await a new mediation exam to take place to be registered.[/fn]. Given that there was no mediation to talk about in Turkey five years ago, the fact that the total number of mediators today equals 10% of all lawyers in the country could be seen as a success. However, it is becoming increasingly clear that the quality of training varied greatly, contributing to the ethically problematical practices of today. This initial attitude is now being replaced by a stringent one and this time the standardization of trainings is sought through textbook and module preparation. For instance, to claim expertise in labour law, the Division determined that 48 hours was necessary with further regulation of which subjects to teach and for how long. Further, it commissioned materials including the case scenarios that now must be taught in all trainings.

The upside of this extensive government intervention into a field driven by party autonomy has been that the Division has promoted mediation extensively also in circles that are less penetrable by the civil society or the business community such as the actors of the judiciary or governmental institutions. Judges and government lawyers were trained so they referred parties to mediation or established commissions to participate in mediations. The authority of the state also helped to reach out to the business community as well as to labour organizations. The Division convened meetings, seminars and panels to explain the benefits of mediation while also undertaking many public promotion activities like the creation of public ads and the inclusion of mediation as a topic in prime time TV series. This continuous engagement created such momentum that today everybody in the legal profession has more or less heard about mediation. Given all this, mandatory mediation seems to be the new game in town for years to come. Whether the above described challenges will be overcome remains to be seen.