To compel or not to compel: Is mandatory mediation becoming “popular”?

Kluwer Mediation Blog
November 19, 2018

Rafal Morek (DWF LLP)

Please refer to this post as: Rafal Morek, ‘To compel or not to compel: Is mandatory mediation becoming “popular”?’, Kluwer Mediation Blog, November 19 2018, http://mediationblog.kluwerarbitration.com/2018/11/19/to-compel-or-not-to-compel-is-mandatory-mediation-becoming-popular/

There are many well-known arguments for and against mandatory mediation. Neither of the two camps of its proponents and opponents appear willing to surrender. However, some recent developments signal that the proponents are now gaining the upper hand. While in the past mandatory mediation schemes were typical for some (but not all) of the common-law jurisdictions (such as Australia; see the recent post of Alan Limbury on this blog), an increasing number of countries with different legal traditions and current problems, are joining the club.
Only this year, new regulations pertaining to mandatory mediation have been introduced (or significantly amended) in among others: Greece (the Law 4512/2018 published on January 17th whose coming into force has been suspended until September 16th, 2019) Romania (the so-called “mandatory mediation attempt” introduced by the Parliament on June 26th), India (the “mandatory pre-institution commercial mediation” in the legislative reform of August 10th) or Turkey (more below).

Several other countries are discussing the potential introduction of different models of mediation which would be either compulsory, or provide for an “opt-out” option, cost sanctions or other regulatory solutions limiting the voluntary nature of mediation.

This trend, in particular in Europe, may be partly attributed to last year’s decision of the Court of Justice of the European Union (CJEU) in the *Menini and another v Banco Popolare Società Cooperativa* (Case C-75/16). The CJEU concluded that national legislation imposing mandatory mediation as a pre-condition to litigation is not precluded by the EU ADR legislative framework, provided that the parties are not prevented from exercising their rights of access to the judicial system.

Some other states appear to be preparing for broader use of mandatory mediation. The have become convinced by empirical data and research that contradicts the old argument “*you can you can lead a horse to water, but you can’t make it drink*”, and indicates that once at the mediation table, skilled mediators can guide even the most reluctant of parties to recognize opportunities for resolution. Some evidence suggests that there may be no significant difference in settlement rates between cases in which participating in mediation was at its beginning compulsory or voluntary (see e.g. the report “Quantifying the cost of not using mediation – a data analysis” produced by the European Parliament or the Civil Justice Council’s interim report published in October 2017 on “ADR and Civil Justice” in which it was observed that “in a surprisingly large number of cases “*where the parties” are in fact drawn into the [mediation” process, [they finally] become engaged and frequently settle*”). Finally, in many countries the attractiveness of mandatory mediation is appreciated on the background of slow or otherwise ineffective judiciary systems.

Turkey belongs to the group of countries which has recently decided on the most resolute measures in the field of mediation. Mediation was introduced as a voluntary method by the Law No. 6325 of June 22nd, 2013. As reported by Idil Elveris on this blog, from June 2013 until November 2017, the number of voluntary mediations reached 21,517, of which 19,292 ended in an agreement. Then, in October 2017, the Law No. 7036 introduced mandatory mediation in certain types of labor disputes. The obligatory character of the procedure is quite straightforward: If a claiming party fails to initiate a mediation procedure, the ensuing lawsuit will be denied on procedural grounds. If a responding party fails to attend the initial mediation meeting, it will pay litigation costs even if it later succeeds in the litigation.

The introduction of mandatory mediation is never free of controversy. In the case of Turkey, this was further related to the political events which occurred two years ago and their consequences. As commented by Idil Elveris, “*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*”.

In the latest episode of this saga, just a few weeks ago a legislative proposal was submitted to amend the Law No. 7036 to abolish the mandatory character of mediation, and to make it voluntary again.

It will be interesting to see whether Turkish mandatory mediation regulations will be amended again, and what the regulatory model will finally look like.

Whether we like mandatory mediation or not, we will see more and more regulatory “experiments” restraining the voluntary nature of mediation in the future.