

After Italy And Turkey, Azerbaijan Also Follows The Opt-Out Mediation Model

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Azerbaijan adopted the Law on Mediation on March 29, 2019. The Law is based on the principles of UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation and different CEPEJ guidelines on mediation. In addition, the Law follows the so-called opt-out mediation model (hereinafter "Opt-Out Mediation Model"), by requiring attendance at an initial mediation session before bringing an action concerning family, labor and business disputes.^[fn]The Mediation Law of the Republic of Azerbaijan, dated March 29, 2019, Art. 3.2 is available on <http://www.e-qanun.az/framework/41828>.^[fn] At such initial mediation session, the mediator explains to the parties the essence, advantages and rules of the mediation and holds joint and separate meetings with the parties. During the initial mediation session, the parties should decide whether they want to attend the subsequent mediation sessions.

Background

Before the adoption of the Mediation Law, Azerbaijani legislation almost did not refer to mediation and the concept of mediation was quite alien for the legal system in Azerbaijan. In addition, the general public, judiciary, business community and lawyers were generally not familiar with mediation or had a misperception about the nature of mediation.

In practice there were very few mediators offering mediation services in Azerbaijan and none of them were full-time mediators. The only known and recorded successful practice of mediation was a court-annexed mediation center set and implemented under a project financed by the World Bank, where newly-trained mediators mediated various cases received by a local court.

On the other hand, Azerbaijani courts are one of the fastest courts in the Council of Europe region^[fn]<https://rm.coe.int/european-judicial-systems-efficiency-and-quality-of-justice-cepej-stud/1680788228/>^[fn] and fees for attorneys and courts are extremely low. Accordingly, the parties did not have strong incentive to settle disputes out-of-court.

However, Azerbaijani courts are overwhelmed with huge number of incoming cases with very strict deadlines for adoption of decisions, which damages quality of judicial justice in Azerbaijan. Mediation could decrease number of incoming cases and thus contribute to the quality of justice, by allowing courts to concentrate more on other cases. It will subsequently also decrease enforcement cases (which are an important challenge for the Azerbaijani judiciary), as settlement agreements mutually agreed by the parties will mostly be performed voluntarily. In addition, as there is unpredictability and no established court practice in connection with litigation of most disputes, mediation will allow the parties to control their litigation risks and to avoid unpredictable outcomes of court proceedings.

The Mediation Law is expected to drastically change and shape the dispute resolution culture in Azerbaijan within a short period of time.

Substance of Mediation Law

The Law promotes the use of mediation in civil, commercial, family, labor and administrative disputes.^[fn]Sup. 1, Art. 3.1.^[fn] Under the law, mediators, mediation organizations and mediation training companies are going to be regulated by a self-regulating authority called the Mediation Council. After the establishment of the Council and the adoption of its relevant rules, only members of the Council will be authorized to act as mediators, mediation organizations and mediation training organizations.^[fn]lb. Art. 38.^[fn]

Any person not younger than 25 years, with higher education and 3-year work experience may become a mediator after obtaining initial mediation training certificate.^[fn]lb. Art. 10.1.^[fn] The Law also envisages certain incentives to apply to mediation (such as exemption from court fees) and deterrent tools to make parties attend the required initial mediation session (such as an obligation to cover the full expenses of the other party and fines).^[fn]lb. Art. 3.4 and 36.5.^[fn]

The Law also regulates how cases will be referred to mediation. In addition to the requirement to attend the mandatory initial mediation session concerning certain disputes, parties may voluntarily apply to mediation^[fn]lb. Art. 21.1.^[fn] and judges may refer parties to mediation with the consent of the parties.^[fn]lb. Art. 31.^[fn] The Law also quite in detail regulates the enforceability of mediation clauses in contracts. Similar to the mandatory initial mediation session, the Law states that in cases where there is an agreement to attend mediation before litigation or arbitration, the claimant shall apply to the mediator or mediation organization referred to in the agreement and such mediator or mediation organization shall appoint a mediation hearing and invite both parties. In case the agreement does not refer to a specific mediator or mediation organization, the claimant shall invite the respondent to mediation.^[fn]lb. Art. 21.8.^[fn] If the respondent fails to attend mediation, the respondent will be responsible not only for her or his portion of expenses, but for the full expenses of the initial mediation session and may in the future be fined for failure to attend such sessions (after relevant changes are made to the Administrative Offenses Code).

With regard to the enforceability of settlement agreements, the Law states that the parties shall implement the agreement voluntarily. In case one of the parties fails to implement the agreement voluntarily, then the other party may apply to court or a notary public through a simplified procedure to make the agreement an enforcement document (to be enforced by the enforcement officers).^[fn]lb. Art. 34.^[fn]

Expectations

The law is definitely expected to make significant changes to or even create something significant from an almost non-existent mediation industry in Azerbaijan.

As in many other countries with similar legal systems, Azerbaijan does not have a fertile environment for the natural and organic development of mediation within a short period of time. As already noted above Azerbaijani courts are one of the fastest courts in the Council of Europe region^[fn]<https://rm.coe.int/european-judicial-systems-efficiency-and-quality-of-justice-cepej-stud/1680788228/>^[fn] and fees for attorneys and courts are extremely low. Accordingly, such mandatory initial mediation requirement may be an opportunity to introduce mediation to the general public and help parties "taste" mediation for the first time. If successfully utilized this mediation model may create a mediation culture in Azerbaijan.

On the other hand, such an Opt-Out Mediation Model is a risky initiative - if it is not wisely, carefully and strategically used, this may not only be deemed as a redundant formality by the parties, but also cause parties to lose their trust in mediation with long lasting effect. Because of the fact that the Law requires claimants to attend an initial mediation session before bringing a claim concerning certain disputes as discussed above, it is crucial to implement mechanisms to ensure the quality of mediation services. By introducing such a requirement, the state implicitly takes indirect responsibility for the quality of such mediation services. If mediators and mediation organizations cannot provide mediation services of high quality, the mandatory initial mediation session will simply be viewed by parties and the public as a redundant pre-litigation formality and as a burden to access justice.

Such a requirement concerning mandatory first mediation session has proven very effective in the experiences of Turkey and Italy.^[fn]<http://mediationblog.kluwerarbitration.com/2019/01/30/turkish-mandatory-mediation-expands-into-commercial-disputes/> and <https://www.adigavriila.com/blog/opt-out-mediation-model-cuts-real-estate-litigation-in-italy-by-almost-50/>.^[fn] While the Azerbaijani legal system and perhaps culture may be more similar to Turkey and Italy than many other European countries, in Azerbaijan court proceedings are much shorter, simpler and less expensive than in Turkey or Italy. Accordingly, the experience of Azerbaijan should show whether the Opt-Out Mediation Model is efficient and effective, even when the court proceedings are very speedy and cheap.

Conclusion

In conclusion, it is worth noting that Azerbaijan is now at a crossroad, which will hopefully be strategically, wisely, carefully and cautiously used to introduce a mediation culture in Azerbaijan, not to damage the reputation of mediation and promote the Opt-Out Mediation Model worldwide.