We Have the Law! We Signed the Convention! What's next?

Kluwer Mediation Blog
September 30, 2019

Sophie Tkemaladze (Resolve / New Vision University)

Please refer to this post as: Sophie Tkemaladze, 'We Have the Law! We Signed the Convention! What's next?', Kluwer Mediation Blog, September 30 2019, http://mediationblog.kluwerarbitration.com/2019/09/30/we-have-the-law-we-signed-the-convention-whats-next/

Law of Georgia on Mediation was adopted by the Parliament of Georgia on September 18, 2019 with 93 votes in favor and 0 against. A little over a month before adoption of the Law, on August 7, Georgia signed the Singapore Mediation Convention, being one of few countries from the region, or even the continent, to do so.

Here is why, in my view, these two events are important:

Singapore Mediation Convention – the initiation of the Convention itself was driven not so much by the need to have the mediated settlement agreements internationally enforceable (as we know, majority of settlement agreements are enforced voluntarily). Rather, as the working group reiterated during the panel discussion in Singapore, it was driven by the need to make mediation more popular among the potential users; having in place the Convention diminishes the barrier to agreeing to mediation in the first place as it provides a positive answer to the question, whether the settlements reached through mediation will be enforceable. Thus, its indirect (and important) target is not so much what results out of the mediation process, rather what happens before the process – the agreement to mediate. Similarly, in my view, the fact that Georgia signed the Convention is more important in the context of raising Georgia's profile and establishing its place high on the list of "ADR-friendly" countries, as well as promoting mediation among the Georgian and regional businesses – the users. Of course the ensuing obligations and practices that will follow after Georgia ratifies the Convention will have consequences of their own. It is hoped that the capacity building and education activities associated with implementation will follow, will minimize the risks and lead to better awareness and support for the process.

Law on Mediation – I share the logic noted in Charlie Irvine's June 10 blog, that legislation encourages/influences judges who in their own turn encourage/influence the legal profession and the latter encourages/influences its clients – users of the process. At the same time, having the legislation provides the parties with certainty of a framework for confidentiality, statute of limitation, enforceability and otherwise gives legitimacy to the process. Thus, in principle, putting in place these guarantees should positively affect development of mediation in the country.

Below are the main features of the new Law:

- The Law applies to two types of mediation: 1. when it is triggered on the basis of agreement of the parties, and 2. when it is triggered on the basis of either parties' agreement or court order under the Civil Procedure Code of Georgia after the party lodges a claim – so called "court mediation";
- It establishes a Legal Entity of Public Law – Georgian Association of Mediators. The latter will set the standards for accreditation of mediators and will maintain a list of accredited mediators;
- It makes the agreement to mediate enforceable;
- The Law guarantees suspension of limitation period during mediation proceedings and confidentiality of the process (with certain exceptions, some – controversial); It also enshrines the principles of self-determination, voluntariness, good faith, equality of the parties and independence and impartiality of a mediator along with setting the obligation to disclose any potential conflict;
- Med-Arb and Arb-Med (with one and the same person wearing the two hats) is, as a default, not allowed. The default rule may be changed by express written agreement of the parties made after the respective dispute (in mediation or arbitration) arises;
- The Law provides for enforceability of settlement agreements resulting from mediation; for now, only those agreements will be enforceable which have been reached as a result of engagement of the "listed" mediator. It does not yet incorporate the regime of Singapore Mediation Convention. It is anticipated that amendments will be made later, when Georgia ratifies the Convention;
- The Law provides that "court-mediation" will be financed by state budget (i.e. it will be free for the parties), however the High Council of Justice (HCOJ), the main judicial body in Georgia, may set a different rule for remuneration of mediators based on the value in dispute; Besides, the Mediation Program developed by the HCOJ shall define how many cases should a mediator engaged in court-mediations conduct on *pro-bono* basis;
- Most provisions of the Law come into effect on January 1, 2020;
- In addition, the related legal act – Civil Procedure Code of Georgia, provides:
    - A financial incentive – a party can pay 1% (instead of "regular" 3%) of the value of the claim if he/she refers the dispute to court-mediation; 70% of the court fees paid shall be returned to the party in case of settlement reached as a result of mediation;
    - The pool of cases that can be referred to mediation by the order of the judge (irrespective of parties' agreement) has been widened and includes: family, neighborhood, inheritance, labor, low value loan, non-property disputes.

What's Next?

A lot.

I do not mean to provide a comprehensive list or recommendations. Only a few non-exhaustive points:

- The Law itself provides for a list of things to be done, including the duty of the HCOJ to compile a list of the "first pool of mediators" who will form the association, approve its charter and elect its executive board; The association will then have a comprehensive "to-do" list: developing the certification program of mediators, maintaining the list of accredited mediators, developing and adopting the code of ethics, raising funds, etc.;
- Courts throughout Georgia will have to launch mediation centers/programs; judges will need to be trained in why and how to refer the parties; that is particularly important in view of a large category of disputes that can be referred to mediation on "mandatory" basis; their capacity will also need to be enhanced in the context of enforcement of mediated settlement agreements;
- Most importantly, the courts (and the Association) will need to develop a monitoring and evaluation system that will allow learning what works and what does not work, make informed choices and adjust the practice or even the Law, if needed;
- Lawyers will need to be trained not only in how to represent clients in mediation but some work will need to be done to develop and adopt the billing schemes that encourage and reward use of efficient dispute resolution methods;
- Ideally, state institutions should start "to walk the talk", i.e. develop dispute management systems that encourage early diagnosis of disputes, their early management and consensual resolution. Nothing will be as powerful to trigger change in the culture as examples and experiences from those who advocate for the change;
- I wrote about the significance of raising next generation of skilled lawyers in my first blog, hence will not expand on the importance of student education anymore;
- Presently there is support from international organizations (donors: EU/UNDP, USAID) to assist in making progress in some of these areas; it will be important for this support to continue for some time… at the same time, it will be important particularly for the judicial authorities and the future Association to start ensuring sustainability and financial stability of their programs and activities.

So yes, adoption of the Law and signing of the Convention is a good start; it is only a start though. A long, exciting and challenging path is yet ahead.