

Kluwer Mediation Blog

Turkish Mandatory Mediation Expands Into Commercial Disputes

Tuba Bilecik (Resolve Mediators and Dispute Resolution Experts) · Wednesday, January 30th, 2019

January is the time of the year when we all reflect on the past experiences and set goals for the unfolding new year. From a mediation perspective, 2018 marked major positive developments in Turkey. Turkish mediation practice is developing quickly through the implementation of mandatory mediation. Rafal Morek mentions in his [blog post](#) how mandatory mediation became a trend in several countries including Turkey in 2018. Following the successful implementation of mandatory mediation provisions for employment disputes, the Turkish Parliament has recently passed Law 7155 introducing mandatory mediation for commercial disputes regarding receivables and compensation claims. The new law was published in the Official Gazette on 19 December 2018 and came into effect on 01 January 2019.

A Brief History

Mediation has come a long way in Turkey since the first Mediation Legislation, Law 6325, took effect in 2013. Law 6325 introduced voluntary mediation in civil disputes and regulated the enforceability of mediation settlement agreements. In late 2017, Turkey adopted Labour Courts Law 7036, which compels the parties to try mediation before their dispute can be heard by the court with no obligation to settle. Law 7036 took effect on 01.01.2018 and applies to a wide range of employment disputes.

Since the number of employment disputes makes up an important part of civil litigation in Turkey, the introduction of mandatory mediation has been a tipping point as it requires many employees and employers (mostly companies) the chance to experience mediation for the first time.

Labour Courts Law 7036, which introduced mandatory mediation for the first time in Turkish Legal System has been the subject of significant criticism in the early days. Opponents argue that mandatory mediation curtails voluntariness, one of mediation's core principles, and therefore compromises party empowerment. Another argument against the law is that a mandatory process will create a legal obstacle for access to justice.

An answer: while the obligation under the law requires parties to participate in mediation before going to court, parties still have the right to refuse to settle during the mediation process and can end the process whenever they wish. Therefore, any settlement reached is voluntary but is not a legal requirement.

First Year Results

It has been 1 year since the first implementation of mandatory mediation for employment disputes. The Turkish Ministry of Justice Mediation Division reports that 67% of 297,147 cases that were assigned to mediators have settled so far. According to the Turkish Ministry of Justice the number of employment cases filed in courts in 2018 has dropped by 70% in comparison to the same period in 2017. These statistics show that Law 7036 provides the parties an immediate and effective alternative to reach settlement while providing a filter for the legal system to reduce the number of cases going to courts.

Mandatory mediation has introduced the parties to a safe process to resolve their dispute, with the help of a third party neutral, and still be in charge before going to court and losing control. High rates of settlement in mandatory mediation and the remarkable reduction in cases filed in courts tell us that the parties have been taking advantage successfully of the law. The outstanding results of the program generated within the last year has not only reduced the case loads but has also promoted a culture of resolution. Even the unwilling, doubtful actors, once they have participated in a mandatory first session, started to see the process in a more positive light. These results have encouraged and helped create the expansion of mandatory mediation for commercial disputes.

Process

According to the new legislation, the process for commercial cases will be similar to the one for the employment cases as explained by Idil Elveris in her [blog post](#) on March 3, 2018:

Fees: if the parties do not settle, the mediator's fee for the first two hours will be paid by the government. If the parties reach a settlement or use the mediator's help beyond 2 hours, unless otherwise agreed, they are jointly responsible for mediator's fees. All fees will be calculated according to the minimum tariff.

Once a commercial case is assigned to a mediator, under the new law the mediator has to complete the process within 6 weeks. Under exceptional circumstances this period can be extended up to 2 more weeks.

The Labour Courts Law 7036 has also brought a cost sanction for the parties who fail to participate in the mandatory first session. If the mediation fails because one party does not participate in the mandatory first session without a valid reason, the absent party will be required to pay the total cost of litigation, even in a case where the court ruling is in their favor. The new law about commercial disputes which took effect on 01.01.2019, adopts this cost sanction in the Law 6325 as a general provision which will apply to all disputes subject to mandatory mediation.

The Constitutionality of Mandatory Mediation

The constitutionality of the Labour Courts Law 7036's mandatory mediation provisions was challenged and brought before the Turkish Constitutional Court. The Constitutional Court dismissed the request for annulment of certain provisions of the Labour Courts Law 7036. The decision was published on 11 December 2018, the summary of the reasoning on certain provisions is as follows:

Legal requirement for mediation: The Constitutional Court emphasized in the decision that mediation is an appropriate dispute resolution mechanism which offers the parties the opportunity

to resolve their disputes swiftly, less costly and with mutual satisfaction which will help parties avoid long and arduous trial processes as well as serving for increased efficiency of judiciary by reducing the caseload of courts.

Cost sanctions: Examining the contested provision of Labour Courts Law 7036 imposing the legal costs on the party refusing to participate in the mandatory first session without a valid excuse, the Constitutional Court has made, in brief, the following assessments: the cost sanction aims to bring functionality to the establishment of mediation, and this purpose is consistent with the constitutional principle requiring the judiciary to conclude trials as quickly as possible and at minimum cost.

Mediation is not in competition with judiciary

The Constitutional Court also highlighted the difference between mediation and court system. Mediation is not a trial process but an alternative dispute resolution process without the use of any adjudicatory power. The Constitutional Court has ruled that the way mediation has been regulated does not interfere with the use of judicial power but adds to its efficiency. The holding states there is no violation of article 9 of the Turkish Constitution which requires judicial power be exercised by independent and impartial courts on behalf of the Turkish Nation.

Conclusion

The Constitutional Court's approach highlights that if every dispute goes to courts, it will result in an increase in case loads and length of trials, which can be against the parties' interests. Mandatory mediation does not constitute an obstacle to access justice and the parties remain free to choose litigation as a way to resolve their disputes. However it offers the parties an opportunity to settle and an opportunity for the legal system to reduce the case load and increase efficiency.

From a business perspective, mediation framework gives the parties an increased ability to resolve problems efficiently and effectively without losing control of the outcome to a judge or arbitration tribunal. Unlike court proceedings, mediation allows business people to explore a wide range of remedies, reduce the time and cost spent to resolve their dispute, protect their relationships and reputations in a confidential setting.

Mediation offers flexibility, confidentiality, speed and parties' autonomy, in order to serve as a basis for finding a solution that will satisfy the commercial interests. These qualities of mediation are often sought after by and make it an invaluable process for businesses.

The legislative development bringing mandatory mediation in commercial disputes have been mostly met with positive reactions from the legal and business community. Unlike a few years before, lawyers started to embrace mediation as an alternative to courts. Many universities and local bar associations are now providing mediation advocacy trainings. Moreover, many lawyers are now convinced that mediation is an attractive alternative career, thousands of them have been trained within the last year and waiting to take the next exam to be conducted by the Turkish Ministry of Justice to qualify as mediators.

Next Step

With the new legislation, around 250,000 commercial disputes are expected to go through mediation as a precondition to litigation. Given that commercial and employment disputes have

significant differences, the results in the commercial field are yet to be seen. While the vast majority of mediations that take place are still mandatory, there is an increasing trend to use voluntary mediation. The Turkish government shows strong commitment to integrate mediation into the legal system. Improving the alternative methods of dispute resolution and enhancing the effectiveness in practice is expected to be an important element of the judicial reform strategy. Until now, the development of mediation in Turkey has been mainly driven by government initiatives. In the light of the latest developments, I am wondering if we will feel the gravity of private mediation initiatives more in 2019.

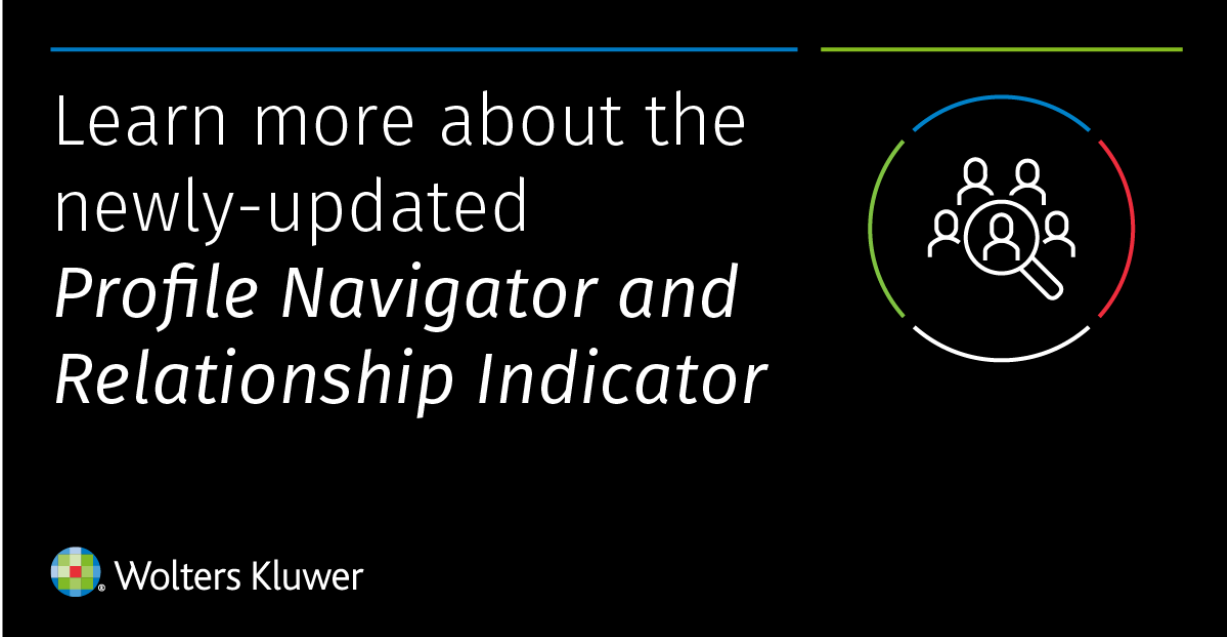
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The graphic features a black background with white text and a circular icon. The icon depicts a group of stylized human figures, with one figure in the center being magnified by a magnifying glass. The background is accented with horizontal lines in blue and green.

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