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Mediation for Civil Disputes in Turkish Law

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Abstract

"The Law on Mediation for Civil Disputes" was announced in the Turkish Official Gazette on 22.06.2012 and came into force on 22.06.2013. Mediation, as described in Article 2, shall mean the method used for the resolution of disputes, employing systematic techniques, carried out voluntarily and with the participation of an impartial and independent third person with specialty training, bringing the parties together to discuss and negotiate, and establishing a communication process between the parties in order to help them to understand each other and thus enabling them to work out their own solutions. In this article, I attempt to give brief information about The Law on Mediation for Civil Disputes such as, the purpose of this Law, basic principles concerning mediation, the rights and obligations of the mediators, the wages and expenses, prohibition of advertise for mediators, selecting the mediator, mediation activity, Completion of mediation, register of mediators.

Keywords: Mediation, civil dispute, mediator, principles of mediation, completion of mediation.

1. Introduction

The Law on Mediation for Civil Disputes was announced in the Turkish Official Gazette on 22.06.2012 and came into force on 22.06.2013. Before this legislation mediation can be used in Turkish civil law according to old Civil Procedure Law (HUMK) and new Civil Procedure law (HMK) which came into force on 01.10.2011. But mediation has officially become an option for the resolution of legal disputes between parties for the first time in the country's legislative history with this codification. (Polat, 2013,p.2)

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In this article, I attempt to give brief information about The Law on Mediation for Civil Disputes such as, the purpose of this Law, basic principles concerning mediation, the rights and obligations of the mediators, the wages and expenses, prohibition of advertise for mediators, selecting the mediator, mediation activity, Completion of mediation, register of mediators.

2. In General

Alternative dispute resolution (ADR) refers to a set of practices and techniques aimed at permitting the resolution of legal disputes outside the courts. Unlike adjudication or arbitration, *negotiation* does not require the participation of a neutral third party with decisional authority. Instead, the parties themselves have the responsibility for deciding the terms of any resolution. Negotiation is voluntary, in the sense that disputing parties are not ordinarily forced to negotiate with each other.(Mnookin, 1998, p.4)

Mediation involves the use of a third-party, but a mediator unlike an arbitrator or judge has no authority to impose a resolution on the parties. Instead, the mediator's goal is to facilitate negotiation and help the parties themselves to reach a mutually acceptable settlement of their own dispute. Mediation is typically a voluntary process where the parties themselves may choose the person who will act as the outside facilitator. (Mnookin, 1998, p.4)

3. Basic Principles Concerning Mediation

3.1. Voluntariness and equality

The parties shall be free to resort to a mediator, to continue or finalize the process, or to cease such process. The parties shall have equal rights, both in resort to the mediator and throughout the whole process.

The most fundamental principles of dispute resolution by means of mediation are the principles of voluntariness and equality. These principles stem from the nature of the method of resolution of disputes by mediation. Voluntariness with respect to resorting to mediation and continuing and concluding the process outside the State's jurisdiction makes this method successful. (Ozbek, 2014, p. 6)

The parties have equal rights when resorting to this dispute resolution method and throughout the process. This principle is a requisite of the right to a fair trial and due process also when disputes are being resolved before judicial bodies.

3.2. Confidentiality

Unless agreed otherwise by the parties, the mediator shall be liable to keep confidential the information and documents submitted to him/herself in the frame of the mediation activity or obtained otherwise, and the records kept by him/herself. Unless agreed otherwise, the parties shall also abide by this principle of confidentiality.

One of the most important reasons for the parties to prefer the resolution of a dispute by means of mediation outside the State's jurisdiction is their unwillingness to disclose their dispute to third parties.

3.3. Disuse of statements or documents

In case that a law suit is filed or the course of arbitration is applied, the parties, the mediator or a third person – including those involved in mediation – shall not be able to produce the following statements or documents as evidence, or to testify about them:

a) Invitation for meditation by the parties, or the demand of a party to participate in the mediation activity.

b) The opinions or proposals put forward by the parties for the resolution of the dispute by means of mediation.

c) During the course of the mediation activity, acceptance of the proposals put forward by the parties or of any fact or claim.

d) The documents prepared solely for the purpose of the mediation activity.

4. Resort to a mediator

The parties may agree on resorting to a mediator, before filing a law suit or during the course of a law suit. The court may also inform and encourage the parties to resort to a mediator. Unless agreed otherwise, should the proposal of one of the parties to resort to a mediator be not answered within thirty days, then such proposal shall be considered to be declined.

Unless agreed on another procedure, the mediator or mediators shall be selected by the parties.

5. Mediators

Only the registered mediators can take a part in mediation in Turkish law. The Department of Ministry shall keep the register of the persons who attained the authority to mediate in private law disputes.

The conditions which are sought for registry in the register of mediators:

a) Being a Turkish citizen,

b) Having at least five years experience and undergraduate law degree,

c) Being fully competent,

d) Having no criminal record except intentional offences,

e) Completing the mediator training and passing the written and practical examination carried out by the Ministry.

6. The Rights and Obligations of the Mediators

6.1. Using the title

The mediators entered in the mediators' register are entitled to use the title 'mediator', and to enjoy the authorities granted by this title.

6.2. Demanding the wages and expenses

The mediator has the right to demand for wages and expenses in return of the activity she/he carried out. The mediator may also demand an advance for the wages and expenses. Unless agreed otherwise, the wage of the mediator shall be determined according to the Mediation

Minimum Wage Tariff in effect on the date of completion of the activity; and again unless agreed otherwise, the wages and expenses shall be covered equally by the parties.

6.3. Negotiating and communicating with the parties

The mediator may negotiate or communicate separately with each party or jointly with both parties. The parties can participate these meetings through their attorneys.

6.4. Carrying out the duty in a careful and impartial manner

The mediator shall personally carry out his/her duty in a careful and impartial manner. The mediation activity requires the preservation of the confidence of both parties. This is only possible when the mediator is impartial and treats both parties equally; otherwise, the process can not function properly.

6.5. Prohibition of advertise

The mediators are prohibited from any attempt or action that might be considered as advertisement, especially from using any title other than the title 'mediator', 'attorney-at-law' and their academic titles on their signboards and printed papers, for the purpose of attracting business.

It is also a general principle advocate law.

6.6. Informing the parties

The mediator shall be liable to duly inform the parties on the principles, process and outcomes of mediation at the beginning of the mediation activity.

The parties with sufficient information about the process will better appreciate the process, thus leading to the healthier execution of this process. The liability of the mediator to inform the parties is absolute at the beginning; in addition, the mediator has to inform and enlighten the parties within the process when necessary.

7. Mediation

After being selected, the mediator will invite the parties to the first meeting at the soonest possible date. Due to its nature, mediation has a flexible structure. Therefore, it is not bound by strict and solid rules. As a result of this, the parties may freely decide on how the mediation activity will be carried out, and on the procedure to be followed.

If the parties, resort to a mediator after filling a lawsuit, the court will postpone the proceedings for a period of three months, and if it will not be possible to obtain any results within this period, then it will be prolonged for another three months again upon the application of the parties. This means that resorting to a mediator will have an effect of postponing the proceedings with specified periods. (Ulukapi, 2014, p. 745)

If the parties reach an agreement at the end of the mediation process, The scope of the agreement reached as the result of the mediation activity shall be determined by the parties; in case of

preparation of an agreement document, this document shall be signed by the parties and the mediator.

8. Conclusion

Instead of the resolution of the disputes by means of law suits, resolution of the disputes with reconciliation of the parties with their own wills is preferred with respect to the preservation of social peace. The comprehensive and efficient functioning of such methods will contribute to the attenuation of the workloads of the courts (Ozbek, 2014, s.1)

The alternative dispute resolution methods are not in competition with the judicial system, nor is the aim to abolish the means to have recourse to judicial methods. The aim is the simpler and easier resolution of the disputes, without impairing the absolute sovereignty of the state's judiciary power.

The alternative dispute resolution methods are not limited. There are alternative dispute resolutions suitable for every country and their sociological facts. However, mediation is the most common and most successful method among the alternative dispute resolution methods.

After The Law on Mediation for Civil Disputes, Turkish law has legal arrangements about medication. But medication is a voluntary process in Turkish Law. For this reason, the purpose of this regulation can be provided only if people and the advocates have enough knowledge on advantages of mediation. The government and the academicians have to make great effort to provide this awareness.

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