

## **TURKEY'S VIEW ON UNCITRAL DRAFT MEDIATION RULES**

Alternative dispute resolution methods, such as mediation, are not only less time-consuming and cost-effective than arbitration, but also offer a high degree of flexibility to the disputing parties and, therefore, allow to sustain long-term commercial relationships.

Turkey takes heed of the efforts aiming at making international commerce thrive. In order to sustain long-term commercial relationships; it is of utmost importance to solve commercial disputes in a speedy, flexible and cost-effective way.

Turkey has made significant progress in the employment of mediation in recent years. The Law on Mediation in Legal Disputes entered into force in 2013. At the beginning, mediation was applied voluntarily. Then it was made a prerequisite to be able to file a lawsuit for labor disputes in 2018, for commercial disputes in 2019, and finally for consumer disputes in 2020.

Making mediation a prerequisite for certain lawsuits has led to an increase in the awareness of the said institution among our citizens and the business world.

Since 2013, approximately 500.000 disputes have been resolved through voluntary mediation proceedings in Turkey. When it comes to the application of the mediation which is a prerequisite for filing a lawsuit, 1.4 million disputes have been subject to mediation since 2018. More than 60% of these applications have resulted in the agreement of the parties.

Moreover, Istanbul Arbitration Centre (ISTAC) was established in 2014 to provide arbitration and mediation services for both domestic and international commercial actors. In November 2019, it adopted Mediation-Arbitration (Med-Arb) rules, which combine characteristics of both mediation and arbitration.

In addition, Istanbul Chamber of Commerce Arbitration and Mediation Center (ITOTAM) has been providing mediation services since 2018 and recently has adopted Med-Arb Rules which is expected to enter into force as of March 2021.

Turkey attaches great importance to the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation) and believes in its prospective role in facilitating international commerce. In this context, Turkey as one of the first signatory countries, has started the ratification process of the Convention in 2020.

Turkey is content to see that the Draft UNCITRAL Mediation Rules are in line with the Singapore Convention on Mediation and the UNCITRAL Model Law on Mediation (2018).

Nevertheless, Turkey considers that there is still room for further discussions with regard to certain provisions of the draft.

We would like to provide two general comments before delving into our specific observations and suggestions on certain articles of the draft.

Firstly, we consider that the term “mediation” is used to refer to “mediation proceedings” in Article 2, Article 9 and Article 11. In this context, we would like to point out the necessity to replace the word “mediation” with “mediation proceedings” where appropriate in the draft to avoid any possible confusion and to better align the draft with the UNCITRAL Model Law on Mediation.

Secondly, as to the characteristics of the mediator, it was preferred to use the term “neutral” in some of the provisions while the terms “impartial and independent” used in others. “Impartiality” refers to performing the mediation function, in word or deed, free from favoritism or bias, and for the purpose of aiding a resolution of the dispute and not to benefit a particular party. However, “neutrality” refers to the mediator’s relationship, if any, with the disputants or the dispute. It seeks to avoid use of a mediator who, by reason of his or her relationships with one or more of the parties, may be prejudiced or biased for or against a party. Neutrality incorporates concerns with any conflict of interest of the mediator. In the light of these explanations, we believe that it would be appropriate to revise the draft text and evaluate the places where these terms should be used together or separately.

Our views on certain Articles of the draft are below.

#### **Article 1:**

As regards Paragraph 1, we are of the view that the basis upon which mediation is carried out needs to be further clarified. Article 1 of the Draft UNCITRAL Notes on Mediation (WP 1027 para 16-18) sets out “various basis”. We suggest to revise the paragraph to clarify what is meant by “basis” and to better explain whether all the basis upon which mediation is carried out is captured under paragraphs 16-18 of the Notes.

#### **Article 2**

It would be desirable to make a minor modification in the text to give certainty to the 30-day period. In that sense, we propose to add “by any means that provides for a record of its transmission” after the word “sent”. This kind of wording would facilitate ascertaining the date on which the invitation is sent.

In addition, Paragraph 2 provides for a written procedure for an invitation to mediation. On the other hand, Article 5 of the UNCITRAL Model Law on Mediation (Commencement of mediation proceedings) does not foresee such a written invitation procedure. In this context; clarification is needed for the term “written” in the annotations.

### **Article 3**

According to Paragraph 1, one or more mediators can be appointed with the agreement of the parties. However, the Article does not touch upon the procedure that would apply to the situations in which mediators are unable to perform their duties properly due to illness, resignation etc. In this regard, it would be advisable to tackle this issue in an additional paragraph.

Paragraph 3 (b) provides that “The parties may agree that the selection shall be made directly by the selecting authority, in which case the parties shall subsequently appoint the selected mediator.” This wording comes to mean that the appointment of a mediator directly selected by the selecting authority is subject to confirmation by the parties. We are of the view that this provision should be revised to make sure that it is in line with Article 6 (3) of the UNCITRAL Model Law on Mediation (2018) which provides:

“(b) The parties may agree that the appointment of one or more mediators be made directly by such an institution or person.”

Paragraph 6 addresses the impartiality and independency of mediators. We suggest adding a separate part to the text that provides for a statement of independence, impartiality and availability to be signed by the mediator before accepting his/her appointment. Model statements of independence, impartiality and availability could be made available in the annex to the draft rules.

### **Article 4**

We suggest adding the following sentence to the text of the article to make sure that the Article accords with Article 7(4) UNCITRAL Model Law on Mediation (2018): “However, the mediator may, at any stage of the mediation proceedings, make proposals for a settlement of the dispute.”

Alternatively, it would be preferable to consider that the mediator at least should be able to offer a solution proposal in cases where parties cannot reach an agreement after all systematic

techniques allowing parties to produce their own solutions are applied. In this regard; we suggest adding a separate paragraph to Article 4 that reads: “the mediator assists the parties to understand each other and thereby supports the establishment of a communication process between them to produce their own solutions for the dispute. However, in case it turns out that the parties cannot reach a solution, an offer can be made by the mediator for the settlement of the dispute.” Thus, in case the parties are obstructed to produce their own solutions, the mediator should be able to offer a final solution proposal.

In addition; including the conduct of remote mediation meetings upon parties’ mutual consent in Paragraph 3 would be in line with the recent developments in the field.

### **Article 5**

The term “relevant party” in Paragraph 3 may cause confusion as it is not clear which party it refers to. Therefore, we are of the view that further clarification is needed for the said term in the annotations.

We are also of the view that the wording “is expected to” in Paragraph 3 should be replaced by “shall” to restrict the mediator’s discretion in terms of keeping the relevant information confidential.

### **Article 9**

Article 15(b)-(d) of the 1980 Conciliation Rules stipulate the written declaration of the parties or the conciliator for the termination of conciliation proceedings. Similarly, the term “declaration” in Article 9(b)-(d) of the draft mediation rules should be amended as “written declaration”. This would create certainty and help determining the exact termination date of the mediation proceedings, which might affect the initiation of other dispute settlement mechanisms.

Paragraph (d) regulates the termination of mediation proceedings by a declaration of the mediator because further efforts to mediate are no longer justified or the required deposits are not paid. Since the reasons for termination of mediation proceedings in Article 9 (d) are completely different from each other, we consider that these reasons should be placed in separate paragraphs as stated below:

“(d) By a declaration of the mediator, after consultation with the parties, to the effect that further efforts at mediation are no longer justified;

(e) in the situation referred to in Article 11(5), on the date of the declaration; or

(f) ….”

In addition, we are of the view that the mediator’s written declaration should involve an explanation as to why further efforts to mediate are no longer justified.

### **Article 11**

We support retaining the term “reasonable in amount” in Paragraph 1 as it is compatible with Article 17 of the 1980 UNCITRAL Conciliation Rules.

In addition, paragraph 1(c) states that the term “costs” includes also the cost of any expert advice requested by the mediator. Since there is not any reference to experts in the draft rules, it would be appropriate to add a paragraph regarding experts to Article 4 – “Conduct of mediation”

### **Article 12**

Turkey supports the view that the mediator can act as an arbitrator only if parties expressly consent to it. In this regard, we suggest the following reformulation:

“The mediator can act as an arbitrator upon the express consent of the parties in any arbitral, judicial proceedings in respect of the dispute that is related to the mediation. The parties shall not present the mediator as a witness in any such proceedings”