Turkey signs the Singapore Convention: A New Era in Enforceability of Mediation Agreements in Foreign Countries

Authors: Gönenç Gürkaynak, Esq., Tolga Uluay and Doruk Altın, ELIG Gürkaynak Attorneys-at-Law

The mediation procedures have become a mandatory stage of commercial litigations in Turkish Law as of January 01, 2019. After only 4 months of practice, it appears that the success rate of mandatory mediation procedures is %65, according to the data published by the Mediation General Office of Justice Ministry of Turkey. As the national mediation procedure seems to be useful thus far, Turkey took a new step and signed the United Nations Convention on International Settlement Agreements Resulting from Mediation be known as the "Singapore Convention on Mediation" ("Convention"), which provides enforceability to international mediation agreements, on August 07, 2019 in Singapore.

I. Introduction

The Convention has been drafted by the United Nations Commission of International Trade Law ("Commission") and adopted by the General Assembly during the 62nd plenary meeting held on December 20, 2018. The main motivation of the Commission is "*to become an essential instrument in the facilitation of international trade and in the promotion of mediation as an alternative and effective method of resolving trade disputes*". Indeed, the mediation has always been a low-cost, swift and efficient way to resolve a dispute, in comparison to other dispute resolution methods, which can also be observed from the data obtained in Turkey, from a micro perspective.

Heretofore, the mediation agreement breaches were brought before different dispute resolution venues, such as Courts or arbitrative alternatives, if any respective clause was placed in the mediation agreement. Considering that mediation itself is a way to avoid dispute through mutual agreement of both parties on certain topics; the bringing breach of agreement to courts practically beats the purpose of mediation, as it brings litigation back on the table again. Henceforward, direct enforceability of the international mediation agreements in any event of breach might steer parties of a commercial relationship into mediation.

II. Scope of the Convention

The Convention is, basically, designed for the international mediation agreements concluded after a commercial dispute. However, the mediation agreements, even on commercial disputes, are still required to have some certain qualifications for the Convention to be applicable. Thus, the Convention is still inapplicable for commercial mediation agreements other than the ones described in the articleA1/1 of the Convention. Besides that, the mediation agreements, which are specifically

mentioned in Article 1/2 of the Convention are also excluded from the scope of the Convention and accordingly, the Convention cannot be applied on them.

a. Mediation agreements that are included to the Convention

The mediation agreements that are included into the scope have been clearly defined under Article 1/1 of the Convention. The qualifications required for applicability of the Convention have been described in the Article 2 of the Convention. With reference to the first article of the Convention, the parties are required to have the qualifications indicated below:

i. The agreement should be borne from a mediation process

The motion of "*mediation*" has been defined in Article 2/1(3) for the purpose of clarifying article 1/1. Accordingly, mediation has been described as a process during which the parties are trying to reach a mutual conclusion on the dispute with the assistance of a third party, the mediator. It has been specifically mentioned that the mediator is not entitled to impose a solution upon the parties. Accordingly, it can be understood that the mediator only has the authority to lead the parties to a mutually beneficial solution.

Mediation, on the other hand, has a slightly different definition in the Turkish Mediation Law numbered 6325 ("Mediation Law"), regulating that mediation is a process wherein the parties gathers to find their own solution through communicating with and understanding each other with the assistance of an objective and specialized mediator who can offer solutions when the parties are not able to find their own solution.

Comparing the mediation definitions in the Convention and the Mediation Law, it is seen that the understandings of two legislations are quite similar, except for the slightly broader authorities of a Turkish mediator due to the capacity to "offer" a solution. Other than this, the concept of mediation is regulated in a very similar way in both the Convention and Mediation Law.

ii. The agreement must be concluded in written form

A written agreement is one of the musts for applicability of the Convention. Therefore the Convention has a clear definition on the topic. While the wording implicates that the mediation agreement can only be written on paper, Article 2/1(2) provides that recordings of the content of the mediation agreement in any form is sufficient to fulfill this requirement. The tools that record the communication include electronic communication as well, provided that the information contained is accessible to be used as a subsequent reference later on.

When it comes to the Mediation Law, there is no particular wording that provides an obligation regarding written or any other form with respect to the mediation agreement. However, the

mediation process implied in Mediation Law stipulates almost every stage to be in written form. Having said that, the mediation process should be applied to, preceded and completed with separate written reports, signed by the parties and the mediator. Therefore, regardless of this issue not being clearly stipulated in Mediation Law, the written form can be deemed to be mandatory in Turkish mediation procedures and it is not acceptable to put down any record in any form, except written form.

iii. The agreement must be resolving a commercial dispute

The convention does not have a definition or explanation on what a commercial dispute is. Certain concepts are excluded from the scope of the Convention, from which can be derived what a commercial dispute is "not". However, as seen in Article 1/1 of the Convention, in assessment of whether a dispute can be considered "international", the locations of the place of business are regarded. Considering that "international" aspect of the dispute is the first and foremost condition for application of the Convention, which will be explained later on, it could be said that a commercial dispute is any dispute that pertains to the business affairs.

The definition of "commercial dispute", in other respects, is defined in Turkish Commercial Code, stating that every interaction related to a commercial undertaking is a commercial transaction. Accordingly, every dispute related to a commercial transaction is also considered as commercial dispute.

At this stage, we believe it would be accurate to argue that, despite lack of a clear definition in the Convention, a commercial dispute can be understood as "any dispute in relation to a commercial undertaking in concordance with Turkish Commercial Code".

iv. The dispute must be international.

Article 1/1 provides a detailed structure on what "international dispute" is. The element of "international" has been divided into two prongs.

The first is the parties' having places of businesses in different State. The second is the parties' having places of businesses in the same State, with two optional additional conditions being met. That is to say; if the substantial part of the obligations under the mediation agreement is performed in a State different than the place of business, the dispute is considered as an international one. On the other hand, if the subject matter of the meditation agreement is most closely connected to a place other than the place of business, then this would suffice for the dispute to be deemed international, as per the Convention.

Having those requirements compared to Turkish Civil Private International Law, it is seen that the internationality element has been regulated in a very similar to the Turkish Civil Private International Law.

b. Mediation agreements that are not included to the Convention

Article 1/2 of the Convention introduces several circumstances topics where the Convention will not be applied. To begin with, the first principle - as explained above – is the mediation agreement being concluded as a result of a commercial dispute.

Besides the first principle, the Convention does not include in its purview the mediation agreements that are concluded as a result of disputes that are related to (i) personal, (ii) family, or (iii) household transactions of either party. This issue is important since, in Turkish Law, if one party is merchant, then the transaction is deemed to be a commercial one too. The Convention however excludes such transactions from its scope. In addition, mediations agreements concluded as a result of family law, inheritance law or employment law related disputes are excluded from the purview of the Convention as well.

Article 1/3 of the Convention excludes mediation agreements on certain specific matters as well. That is to say; if a mediation agreement has been approved by a court or concluded in the course of a court proceeding, the Convention is not applicable to those mediation agreements. In the same vein, if the mediation agreement is enforceable as a judgement, the same goes for those mediation agreements as well. Finally, the mediation agreements that are recorded and enforceable as arbitral award cannot be subjected to the Convention either. Put succinctly any mediation agreement that has ever been made subject to any dispute resolution method is excluded from the purview of Convention.

III. Legal Outcome of the Convention with Respect to Enforceability of Mediation Agreements

The Convention renders the mediation agreements having the characteristics explained above enforceable under the procedural rules of the enforcing State and conditions laid down in the Convention.

To be able to enforce a mediation agreement, the party relying on to the mediation agreement must provide a signed copy of the settlement agreement and necessary evidence documenting that the agreement has been concluded as a result of a mediation process. The Convention provide few examples to these evidence, such as mediator's signature on the mediation agreements, and not stated as *numerus clausus* and can be tailored according to the conditions of the present case. The competent authority can always require any necessary document in order to verify that the requirements of the Convention are met, as per Article 4/4 of the Convention.

The Convention will be applicable to the mediation agreements that are issued after the Convention enters into force, i.e. six months after deposit of the third instrument of ratification, acceptance, approval or accession, which is already completed done by 45 signatory States.

Grounds for refusal of enforcement: The party against whom the mediation agreement is being enforced can object to enforcement of the mediation agreement, provided that;

i. Either party of the mediation agreement was under some incapacity,
ii. The mediation agreement to be enforced is null and void,
iii. The mediation agreement to be enforced is not binding or final,
iv. The mediation agreement to be enforced has been subsequently changed,
v. The obligations of the mediation agreement have already been performed,
vi. The obligations of the mediation agreement are not clear or comprehensive,
vii. The enforcement of the mediation agreement would be contrary to the terms of the mediation agreement itself,
viii. If the mediator made a serious breach of the standards that are applicable to the mediator or the mediation, without which breach that party would not have entered into the mediation agreement, and
ix. There is a doubt on the mediator's impartiality or independence that has a material impact or undue influence on a party without which failure that party would not have entered into the mediation agreement.

The competent authority on the other hand can refuse the enforcement in case;

i. The enforcement would be a contrary to the public policy of the enforcing State
ii. The subject matter is cannot be subjected to the mediation as per the local laws of the enforcing State.

IV. Effects of the Convention to Turkish Law

Turkey is adopting a position encouraging mediation to lower litigation-related costs and time spent on long and complex litigation procedures. To that end Turkey signed the Convention on August 7, 2019 and the Convention will be deemed to be a part of Turkish Law after its due ratification.

In comparison of the Convention and mediation regulations in Turkish Law, it is evident that the provisions are very similar each other with respect to legal understanding, overall system and motions. Further, the Convention provides that enforcement actions will be taken according to the State's local law in compliance with the conditions of the Convention.

As a result of the Convention, there will be no need to file cases based on breach of contract to enforce mediation agreements and the mediations agreements that have the qualifications and characteristics explained will directly be enforceable under Turkish legal system. Then again Turkish Enforcement Law has several different types of enforcement procedures and the Convention does not impose any method of enforcement, leaving this issue to the States. As this is the case, in Turkey these mediation agreements should be enforced as a Court decision, which is the procedure applied to the mediation agreements signed by both the parties and their attorneys and concluded as a result of mandatory mediation procedures. Also Article 4/5 of the Convention provides that the competent authority of the enforcing State should act expeditiously and the most expeditious method in Turkish Law regarding the enforcement procedures is the one allowed for the court orders.

Article contact: Gönenç Gürkaynak, Esq. Email: gonenc.gurkaynak@elig.com

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