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MEDIATION IN LABOUR LAW

In the sense of labour law, mediation is a peaceful way that allows employee unions and employer or employer unities to reach an agreement in relation to the disputes between the parties arising from their labour relations. Except for the official mediation activity in collective benefit disputes, mediation in the sense of labour law does differ from mediation in law disputes.

In law disputes, the concept of mediation, which is the most popular method applied as an alternative way of solving a dispute, is defined in Article 2 of Law of Mediation in Law Disputes Number-6325 put into practice in 2012.

Purpose of the study: Evaluating the establishment of mediation thought to be put into force to decrease the work load in Turkish Labour jurisdiction.

Research Methods: Examining the related literature and making comparisons by looking at the draft law of compulsory mediation in labour law.

A. Concept of Mediation

According to Code of Mediation in Civil Disputes, the concept of mediation is defined as follows: "Mediation is a method of solving disputes which gathers parties together to negotiate by applying systematic techniques, which helps establish communication between them to understand each other and to produce their own solutions and which is applied on voluntary basis with the participation of a third impartial, independent and expert party".

Depending on this definition, it could be stated that the mediator's basic duty is to bring the parties together and to establish communication between them. In other words, mediation has a function of facilitation communication between parties with the help of a third party to help them reach an agreement [9, page 56–63; 11, page 261]. Mediation is not a decision-making mechanism. Rather, it involves the participation of an objective third party which allows parties to produce their own solutions regarding the dispute [6, page 76–83]. In another saying, it is a mediation process executed to help the parties understand one another. Therefore, mediation allows finding a compromise with active participation of parties and aims at maintaining permanent peace. It also tries to make one party's demands reasonable for the other party as well as to find a solution without applying other costly and difficult ways like jurisdiction [5, page 96–103; 4, page 78].

One of the basic characteristics of mediation is that the decisions made by the mediator are not obligatory for the parties. The fact that mediation is not obligatory for parties, which fundamentally makes it different from arbitration, is that it allows parties to act more freely. In mediation, parties try to produce their own solutions by talking to each other. The mediator listens to the parties in the process and puts forward suggestions for them to solve the dispute and to find a common ground [8, page 492]. In arbitration, the third person listens to the parties, examines the cases and makes a decision obligator for the parties [8, page 492]. The features of arbitration and the mediator will be mentioned in detail later.

B. Duties, Characteristics and Responsibilities of the Mediator

1. Duties of the Mediator

Mediation is an organization that aims at solving the law dispute. Therefore, the most important duty of the mediator is to help parties produce their own solutions for cases which cause the dispute between them.

The mediator is supposed to hold interviews with the parties to solve the dispute. It is obvious that the mediator cannot understand the issue that causes the dispute between the parties. Depending on the dispute, the mediator could talk to the parties one by one or together. First, the mediator talks to the parties one by one to learn about the dispute and listens to their related demands. Following this, he or she informs the other party about their demands and asks for their views. Following these interviews, the mediator gathers the parties together to have them listen to each other. The most important duty

of the mediator is to gather the parties together as it is in arbitration. The meeting sessions, in which the parties will come together, should be organized in an impartial environment appropriate to both parties.

The mediator, just like a moderator, allows parties to talk to each other, to ask questions to one another and to express their demands mutually. During these talks, if necessary, parties could be provided with suggestions and views to solve the dispute. However, if the dispute is between two businessmen who are quite knowledgeable about the dispute, then the mediator will not need to suggest a solution [8, page 567–568]. In related discipline, it is a controversial issue whether the mediator and the arbitrator can put forward any suggestions. I think because mediation is applied to issues in civil law disputes regarding which parties can act freely and because the activity of mediation defined in Code of Labour Unions and Collective Labour Contract is a system of mediation — arbitration, the mediator's suggestions for solutions on which the parties can agree on will help them deal with the points that they might fail to recognize [7, page 504–508; 1, page 260].

Parties have the freedom to take into account these solutions suggested by the mediator. Mediation aims at having parties reach a mutual agreement, and if they cannot find a compromise as a result of the talks between them and if they do not find the mediator's suggestions appropriate, then the mediator's duty in relation to the dispute will end.

The mediator's suggestions could only be regarded as recommendations to solve the dispute. The mediator cannot suggest any legal actions for the parties to take. In such a case, the third party will not be a mediator but a lawyer and a legal counselor [9, page 512]. For this reason, the mediator should avoid giving information to the parties during the talks and listen to their demands and obtain information about the dispute.

After the interviews, which means end of mediation, the mediator should write down a statement showing how the session of mediation has ended [9, page 182]. This statement is formed according to three probable results of the mediation sessions. The first probability is that no result is obtained via the sessions and that there is no need for another session. In this case, the time and the place of the following sessions are determined and noted down in the statement by the mediator. The second probability is to reach an agreement. The points agreed fully or partly by the parties are determined, and a text showing the agreement is written down and signed by parties [9, page 155]. As for the third probability, if the parties do not reach agreement, the points of disagreement are noted down in the statement. The mediator should try to take notes regarding the sessions in the statement just like case records because he or she will later send a sample of the statement to Ministry of Justice — Department of Legal Affairs. If the parties reach an agreement, these interview records will play an important role while preparing the text of agreement.

Conclusions

Alternative dispute solution is mainly based on voluntariness. Parties cannot be forced to apply ways of solving disputes. Since alternative dispute solution (ADS) depends on parties' agreement, they cannot be obliged to find another solution in case of their disagreement on the solution.

In the process of jurisdiction, if one party applies, the other party inevitable has to participate in the process to protect his or her rights. In ADS, though there are exceptions, the two parties take part in the process if they want to. Arbitration (a controversial issue in terms of whether it is an alternative dispute solution or not), committee for consumer problems and compulsory mediation for labour disputes (currently a draft law) could be given as examples of these exceptions.

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