

10 Key Questions About Mediation in Azerbaijan



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What is mediation?

Mediation is a process in connection with settlement of a dispute arisen between the parties on the basis of mutual consent and in a satisfactory manner for the parties through facilitation of mediator(s).

What kind of disputes will be subject to mediation?

Mediation will apply to the following types of disputes:

- civil and economic disputes (including disputes with foreign elements);
- disputes arising out of family relations;
- disputes arising out of labor relations (individual and collective labor disputes);
- disputes arising out of administrative relations;
- In case the above-mentioned disputes touch the rights of third parties, not participating at the mediation or the persons with no or limited functional capacity as determined by the courts, they can not be subject to mediation.

The following disputes arising out of family relations can be settled by mediation:

- conditions for continuation of marriage;
- manner of carrying out the parental rights and obligations;
- determination of the child's place of residence;
- the manner of maintenance of child or other family member without work capacity;
- other disputes arising out of family relations.

The Mediator shall get opinion of the relevant executive authority in respect of the disputes touching the interests of child. The mediator is obliged to inform the relevant executive authority in case there are circumstances that may endanger normal growth and development of a child or may damage his/her interests or there is a possibility of such circumstances during disputes arising out of family relations. The mediator can refuse from conducting the mediation process in the mentioned cases. The parties are obliged to submit the

settlement agreement affecting the growth, development and other interests of child to the relevant executive authority.

Who can be a mediator?

Individuals meeting the following requirements may be a mediator:

- to have higher education;
- to be at least 25 years old;
- to have at least 3 years of work experience;
- to complete the initial training for mediators and to obtain the relevant certificate.

The following individuals cannot be a mediator:

- persons with no or limited functional capacity as determined by courts;
- persons, in respect of whom there are final and binding court decisions about compulsory measures of medical nature;
- persons, whose conviction is not completed or not lifted.

An individual, who wants to be a mediator and meets the above-mentioned requirements gets the right to function as a mediator from the moment of becoming a member of the Mediation Council. Mediator can engage in any other activities not prohibited by the legislation of the Republic of Azerbaijan. As it is seen, the mediators do not need to be lawyers, which is reasonable considering that mediation is not the settlement of the dispute on the basis of law or deciding which party is right and which party is wrong under the law, but about mediating the negotiation between the parties to reach a mutually acceptable settlement. As such, mediation requires certain set of skills, which lawyers do not necessarily



have. It may be argued that in respect of certain issues, as determining whether the dispute can be mediated under the law and to draft a settlement agreement which would be valid and enforceable under the law, the mediators need to have some legal knowledge. It may be assumed that the training of the mediators would cover also these issues. Also, it should be noted the parties may still have their lawyers advise them in respect of legal points.

Is the mediation voluntary or mandatory?

In principle, mediation is of voluntary nature and conducted on the basis of the mediation agreement about the mediation concluded based on mutual consent of the parties. Mediation agreement can be concluded prior to the referral of the dispute between the parties to the courts or while the dispute is pending before the courts.

However, prior to referring the economic, family or labor disputes to the courts, the parties must participate at the initial mediation session. At the initial mediation session, the mediator explains the essence, advantages and rules of the mediation process to the parties, conducts joint and separate meetings with the parties. Then the parties decide whether or not they wish to proceed with the mediation process. In case the parties wish to proceed with the mediation, they conclude a mediation agreement. In case both or one of the parties do not wish to proceed with the mediation, the mediator terminates the mediation process and issues a certificate indicating impossibility of mediation. Afterwards, the parties may refer the dispute to the courts.

Thus, although the participation at the initial mediation session is mandatory in certain types of disputes, the parties may still opt out of mediation. This type of mediation is successfully applied in Italy since 2013. The reason for success of this type of mediation is that, when a certain option is provided as default, and the individual has to opt out, the percentage of using that option would be higher than the scenario when an individual has to opt in for a certain option. It is said that “you may be able to lead a horse to water, but you cannot make it to drink”. But the rationale behind the mandatory initial mediation session is that, the horse will probably drink the water, if given the chance.

Is mandatory initial mediation session contrary to the right of access to court?

The right of access to court is a fundamental human right protected under Article 6 of the European Convention on Human Rights. There is no case law of the European Court of Human Rights yet about the mandatory initial mediation session. However, the Court of Justice of EU had already decided a case about this issue. In *Rosalba Alassini v. Italia Telecom SpA*, the CJEU found that the principle of effective judicial protection did not preclude mandatory mediation as long as certain requirements are met:

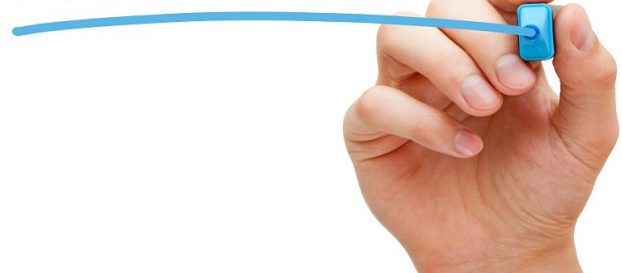
- the procedure must not result in a binding decision;
- it must not cause a substantial delay for purposes of bringing legal proceedings;
- the period for the time-barring of claims must be suspended for the duration of the settlement procedure;
- it must not give rise to costs (or only very low costs) for the parties;
- electronic means cannot be the only means by which the settlement procedure may be accessed; and
- interim measures must be possible in exceptional cases.

Since the mandatory initial mediation session under the Azerbaijani law meets the above-mentioned criteria, it can be concluded that such a procedure is not contrary to the right of access to court. The people are not being denied access to court because mandatory mediation is not being ordered in lieu of going to court. Instead, the access to court is only delayed; the parties may initiate litigation if mediation fails.

How will the mediation be carried out?

Mediation process is conducted in accordance with this Law, standards and rules in connection with professional functioning of mediators, professional ethical conduct rules of mediators and other legislation, in a manner and under the term determined between the parties and the mediator. During the mediation process the mediator can have joint or separate meetings, cooperate with the parties, make written or oral suggestions. The mediator shall not carry out actions putting one of the parties in a superior position or restricting its rights and obligations. The parties can withdraw from mediation at any stage of mediation process, subject to the compulsory initial session described above. The parties can participate at the mediation process in person or through representatives. The parties can get the assistance of advocates, translators, experts and specialists in the relevant field at the mediation process. Other persons can also participate at the mediation process based on mutual consent of the parties. At the mediation process, the parties make oral or written suggestions concerning their positions and the terms of the settlement of the dispute and come to an agreement about the terms of the settlement of the dispute. The mediator may make oral or written suggestions for settlement of the dispute, which would not be binding for the parties.

MEDIATION





How long will the mediation take?

A mediation process may take up to 30 days. The duration of the mediation process can be prolonged for up to 30 more days based on mutual consent of the parties taking into account the complexity of the dispute. If the parties cannot reach an agreement within these time limits, the mediation will be terminated. Mediation process suspends the application of statutory time-limits for claims.

What would be the outcome of mediation process?

Mediation process may end in the following ways:

- The parties conclude a settlement agreement;
- The mediator decides that the settlement of the dispute upon mutual consent of the parties is impossible;
- Both parties or either of them reject the mediation;
- The maximum time-limit for the mediation process passes.

What is the settlement agreement concluded at the end of mediation and how will it be enforced?

Settlement agreement shall be concluded between the parties in written. The following information shall be stipulated in the mediation agreement:

- the date and place of the agreement;
- the parties to the mediation process;
- subject-matter of the dispute;
- information about the mediator and mediation organization, in case the mediation process is carried out through the mediation organization;
- the conditions accepted by the parties towards the settlement of the dispute, methods and time-limits for execution of those conditions;
- consequences of non-execution or mis-execution of the terms of the mediation agreement.
- other terms required by the Civil Code and other laws.

Settlement agreement is signed by the parties and mediator(s). Settlement agreement shall be provided on the date of

signing to the parties. Settlement agreement becomes binding for the parties from the moment of its conclusion. Unless other term is determined in the mediation agreement, it shall be voluntarily executed within 10 days after it becomes effective. Refusal from voluntary execution of settlement agreement shall be subject to liability stipulated in respect of the settlement agreements indicated in the Civil Code. Either party may apply to court or to notary for confirmation and mandatory execution of settlement agreement. In case the Settlement agreement is contrary to the provisions of the effective legislation and breaches the rights and interests of third parties, its confirmation and mandatory execution is rejected.

What would mediation cost?

Costs of the mediation process would include:

- fees paid to mediator and also bonuses in case of settlement of the dispute through mediation;
- incurred by mediator and (or) mediation organization in connection with conducting the mediation, including, expenses for accommodation, per diems and travels to the place of the examination of the dispute.

The amount of the fee paid to mediator or mediation organization is determined in the agreement concluded between the parties and mediator or mediation organization prior to start of the mediation process. Unless otherwise stipulated in the agreement for application of the mediation process, the expenses incurred for the mediation shall be borne equally by the parties. In case mediator refuses to conduct the mediation due to circumstances impeding his/her impartiality, then the mediator shall refund the amount paid by the parties.



Author's biography

Mr. Elnur Aliyev is a senior associate at BHM Law Firm. Elnur specializes in international business law, sports law, human rights and international dispute settlement. His previous experience includes working for three years as an assistant lawyer at the European Court of Human Rights and working as a senior lawyer at Baku 2015 European Games and Baku City Circuit (Formula 1 Azerbaijan Grand Prix).

Elnur Aliyev holds an LLM in International Business Law from Central European University and LLB in International Law from Baku State University.