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ALTERNATIVE DISPUTE RESOLUTION PERSPECTIVES IN THE REPUBLIC OF ARMENIA

In this article, the main problems of ADR mechanisms in the Republic of Armenia were raised. The main mechanisms being used in Armenia are arbitration and mediation, which do not have massive awareness. The main issues for mediation are the absence of a standing committee of mediators' qualification and that judges do not direct disputes to mediation.

It is suggested to establish a standing committee and a public policy to raise awareness on mediation. The main issues about arbitration are the lack of awareness and trust from society. It is suggested to take steps to ensure the independence and impartiality of arbitral tribunals. ADR perspectives in the Republic of Armenia are the implementation of other types of ADR mechanisms such as negotiations and expert determination, and e-arbitration. The main advantages and disadvantages of e-arbitration are analyzed.

Key words: ADR, arbitration and mediation, arbitral tribunal, negotiation, expert determination, e-arbitration.

Introduction

In many parts of the world, the adoption of alternative dispute resolution (hereinafter referred to as "ADR") processes was premised on creating better access to justice for citizens, particularly those with lesser means[1]. ADR's foundational link with access to justice is in relation to justice as a process for resolving disputes and justice in relation to equality of access and equitable outcomes. It is widely believed that expanding the use of alternative dispute resolution mechanisms will significantly reduce the courts' workload and improve the efficiency of dispute resolution and reduce corruption risks in general. In the legal system of the Republic of Armenia, the concept of "alternative method of dispute resolution" does not exist, and only some of the alternative methods of dispute resolution are used. In the recent past, there were intermediary courts in Armenia, which were essentially arbitration courts. These could be either permanent or created to settle a specific dispute (ad hoc). However, the implementation of those decisions was carried out voluntarily.

Currently, among the alternative dispute resolution methods in the Republic of Armenia, arbitration, financial system mediator, and mediation are accepted. However, several other ADR methods can also be effective and time-consuming if used correctly, such as negotiations and expert determination.

What is more important for the future development of ADR in Armenia is legal obstacles and execution. The main issue with this is that ADR is relatively new in the Armenian legal system, and the legal background is not developed as much as needed. As a result of lack of awareness and trust, arbitration and mediation are not used by most of society. We believe that the Armenian legal system needs major amendments to legal acts and respective events raising trust towards ADR in Armenia. We will suggest necessary amendments in the following chapters of this article.

To further understand the current status and demand of alternative dispute resolution mechanisms in Armenia we believe it is essential to understand what the term means. Robert H. Mnookin defines it as "a set of practices and techniques aimed at permitting the resolution of legal disputes outside the courts."[2]. However, there is also a debate on the term "alternative". The central criticism associated with the term ADR rests of the use of the word "alternative: which suggests a firm distinction between ADR processes and traditional litigation. Concerns have been expressed that the word "alternative" not only cloaks a looseness of meaning but that it can be positively misleading. Sir Laurence Street, the former Chief Justice of New South Wales, suggests that: "It is not in truth "Alternative". It is not in competition with the established judicial system... Nothing can be alternative to the sovereign authority of the court system. We can, however, accommodate mechanisms that operate as Additional or subsidiary processes in the discharge of the sovereign's responsibility. These enable the court system to devote its precious time and resources to the more solemn task of administering justice in the name of the sovereign[3]. In general, we consider the substantiation of this interpretation acceptable, and it will be a good idea to come up with a better term for "alternative" such as "Additional."

History of alternative dispute resolution in Armenia and the issue of public trust and awareness

The existing mechanisms for alternative dispute resolution (ADR) in Armenia have a relatively short history. The arbitration system was introduced in 2006, when the RA Law #55-N on "Commercial Arbitration" (hereinafter referred to as the Arbitration Law) was adopted, replacing the previously existing system of arbitral tribunals with a commercial arbitration system. The Arbitration Law is based on the UNCITRAL Model Law on International Commercial Arbitration, and accordingly, the Republic of Armenia is considered a UNCITRAL Model Law on International Commercial Arbitration country. The Republic of Armenia has been a member of the 1958 New York Convention "On the Recognition and Enforcement of Foreign Arbitral Awards" (hereinafter, referred to as the New York Convention) since 1998[4]. While, the mediation system was the first introduced in Armenia in 2015 when regulations on mediation with the participation of a licensed mediator were incorporated into the RA Civil Procedure Code. Relations concerning mediation were regulated in more detail by adopting the 2018 RA Law #351-N on "Mediation" (hereinafter referred to as the Law on Mediation). In addition, on 26.09.2019, the RA signed (but has not yet ratified) the United Nations Convention on International Settlement Agreements resulting from mediation, although the provisions of this Convention apply only to agreements reached as a result of mediation (conciliation) in another State[5].

As clearly stated above, the ADR mechanisms have a very short history in Armenia. That is probably why these mechanisms do not operate as expected and within their full potential. As it is relatively new for Armenian society, one of the significant problems with ADR is that the society is unaware of its existence and has little understanding of its entire concept. This has many reasons, but mostly it is because of ineffective public policy and executing infrastructure. Some of the issues on public awareness are that:

1. For arbitration, society is not aware of it, and the operating arbitration courts are not developed/trusted at all.

2. For mediation, judges in Armenia don't direct parties to use mediation, and most often, the parties are not aware of such a legal procedure. According to research conducted in 2020, there are some possible reasons for this problem:

1) Judges do not take mediation seriously as an ADR measure.

2) There is professional "competition", presumably, there is a misconception that if a judge cannot reconcile the parties, the mediator will also not be able to do so.

3) The content of the obligation to explain the essence of mediation is not clearly defined, also no liability is defined for judges who do not fulfill this obligation[6].

We believe that a well-planned public policy is needed to solve the abovementioned problems. The best solution is to make social advertisements, campaigns and create easy-to-understand guidelines on how mediation works and, of course, conduct training and seminars for judges in order to explain the importance of mediation and the benefits for the judicial system as thanks to meditation, the workload of the judiciary will become less. The judges will have more time to concentrate their attention on more complex cases where mediation or other ADR mechanisms will not work.

Current problems and perspectives of mediation in Armenia

As mentioned above, mediation is regulated through 2018 "Law on Mediation" of Armenia. Hence, practically the history of mediation is 3 years old, and it's a concise period to identify the implementation results. The main problems are related to its practical obstacles.

One of the main practical issues is that mediators should be licensed to be able to practice mediation. However, such an evaluation happened only once in 2015, and after that, no mediators were qualified so. This is an issue because some of the mediators quit their practice and the quantity of acting mediators is just a few. Often there are no free mediators to take a case, or they do not choose it as a priority over their other positions, which brings us to our second point – mediators do not get paid for the first 4 hours of mediation, and there is no motivation for them to conduct negotiations. We believe that there is a need to establish a standing committee for mediators' qualification and determine the procedure of its activities. Such a committee will be responsible for the annual qualification of the candidates of mediators and will conduct training and seminars to make sure the knowledge and skills are up to date.

The other improvement that can be made is making the mediation hours chargeable for it to be considered a priority by more specialists. According to the 167th article of the Civil Procedure Code of the RA, after performing the procedural actions specified in

paragraph 6 of part 1 of the article, the court may appoint up to four hours of free mediation, if there is a high probability of the dispute ending with reconciliation. The state can pay this amount, and if no agreement is reached, the party losing the lawsuit can be held responsible for refunding the cost. In any case, the mediator's activities should not be considered secondary activities, and serious attention should be given to make them more desirable by professionals.

Current problems and perspectives of arbitration in Armenia

One of Armenia's most significant arbitration issues is that there is no public trust towards arbitral tribunals. Independence and impartiality of the Arbitration court is a fundamental principle. As it is commonly perceived, it is "of fundamental importance that justice not only be done but should manifestly and undoubtedly be seen to be done," as Lord Hewart CJ said[7]. As far as the definition of the two fundamental requirements is concerned, "an impartial arbitrator, by definition, is one who is not biased in favor of, or prejudiced against, a particular party or its case, while an independent arbitrator has no close relationship - financial, professional, or personal - with a party or its counsel." Thus, those two concepts are usually seen as the two sides of the same coin[8].

The lack of mechanisms, criteria, and guidelines for revealing the conflict of interests of arbitrators is a big problem in Armenia. Although, according to the law, each institution must have its own rules of conduct for arbitrators, in a small market like Armenia, where there is a high probability that the arbitrator examining the case and the party's representative will have a conflict of interest, more stringent and legislative solutions are needed[9]. There are many cases when the head of the arbitration institution, most of the arbitrators included in the list of arbitrators of the same institution, and the parties' representatives applying for arbitration work in the same law firm. For example, there is a massive issue with the financial arbitral tribunal of Armenia. Given that financial arbitration (hereinafter referred to as FAC) was established by the RA Bankers Association, its independence and impartiality have been a subject of numerous discussions and studies.

Several provisions allow us to state, that in the classical sense, the FAC is a typical example of a pocket Arbitration court that has a close relationship with its founder and protects his interests, so there are a number of problems in terms of its independence and impartiality. In its legal form FAC is an institution, which means that it has its activities and management characteristics and a close relationship with the founder. Members of the Bankers Association are banks and they created the Association to protect their interests. Financial arbitration operates based on the Charter approved by the RBA (Art. 62.2 of Civil Code). The RBA is responsible for the FAC's obligations (Art. 62.4 of Civil code), so we can conclude that the SBA is interested in the proper activities of the FAC and can interfere with the FAC's actions.

The Report on "the Rule of Law and Justice Through Arbitration Following the Example of FAC (hereinafter Report) published in 2014 assessed this situation as a possible case of bias. "Trust and faith in the relationship between the RBA and the FAC, as well as legislation, allow us to conclude that the FAC may be biased in resolving disputes between an institution created by financial organizations and these organizations."[10].

We fully agree with the opinion expressed, and because such a bond exists, FAC will not act against the interests of its founder in case of disputes, which already indicates the limited independence of this arbitration court and in some instances, possible biased decisions.

Such a narrative of FAC prevents society from applying to it. We believe that we need independent arbitral tribunals so that society will be sure that there is no possibility that the tribunal will somehow be biased.

The other issue with the arbitration in Armenia is that the arbitration clause in agreements is not considered an exclusive agreement that excludes the dispute in court. According to the current legal regulations, the court of the first instance leaves the claim or application without examination if, before the end of the time limit set for the submission of a response to the claim, the defendant refers to the arbitration agreement between the parties to submit the dispute to the arbitral tribunal, provided that the possibility of applying for arbitration based on the agreement still exists[11].

We believe such regulation is ineffective if we strive to develop ADR in Armenia and make it as trustworthy as possible. The non-mandatory nature of the arbitration clause gives arbitration a secondary role, and the arbitration clause is not being taken seriously. Such an opinion derives from the principle of the parties' free will, and if such an agreement is reached, then appropriate legal mechanisms should be created to ensure each party's right to arbitration.

Future of ADR in Armenia

The promotion of Alternative Dispute Resolution

(ADR) mechanisms is strongly linked to the idea of justice in the 21st century. Armenia is not an exclusion and steps shall be taken to increase the use of mechanisms in Armenia as well. Using ADR to dispute resolution will be very good for Armenia's society and will change the narrative from winning/losing to compromising and efficiency. ADR is necessary to ensure that access to justice is not served late and the business interests, for example, are still actual. Armenia is a developing country with a sensitive economy, and in order to promote business transactions and major contracts, we need to establish fast, accessible, and efficient mechanisms.

Current Armenian regulations only consider arbitration and mediation as methods of ADR. However, there are other effective methods that can greatly impact dispute resolution practice in Armenia. As of now, negotiations and expert examinations can be implemented as ADR methods to help decrease the workload of the judiciary. Negotiation allows the parties to meet in order to settle a dispute. The main advantage of this form of dispute settlement is that it allows the parties to control the process and the solution.

Expert determination is also a handy mechanism which is described as an alternative process to court litigation or arbitration in which an appointed expert decides an issue (issues) in a binding way[12]. In expert determination, the parties appoint an expert in the relevant field to reach a binding decision on an issue that is often technical or legal.

In regards to arbitration, one of the main reasons for lawyers' resistance to advising clients to include arbitration clauses in commercial contracts or agree to arbitration had been the absence of an appeal mechanism on arbitrators' awards. According to the 34th article of the law on "Commercial Arbitration" of the RA, the decision of the arbitrary tribunal may be declared invalid by the court in specific cases established by the same article, except for this method are no ways of appeal for arbitral awards. This may cause the feeling of uncertainty towards arbitral awards and prevent society from using this. We believe there should be amendments to the current regulations, and a mechanism of appeal should be added.

The 21st century has proved that IT can significantly impact almost every aspect of our life, and ADR is not an exception. The concept of e-arbitration is being considered widely nowadays, especially after the world faced a significant pandemic such as Covid-19. In the 21st century, people use e-arbitration instead of face-to-face arbitration to make the process as efficient and fast as possible.

The idea of e-arbitration was firstly introduced in 1996 when arbitration was conducted by solely using electronic proceedings[13]. L. Markert and J.Burghardt define e-arbitration *as the predominant use of information technology for the arbitral process, whereby particularly the conduct of evidentiary hearings, but also the formation of the arbitration agreement and the rendering of arbitral awards in electronic form constitute pertinent, but not constitutive, elements*[14].

E-arbitration was widely used during the Covid-19 pandemic also in international arbitral tribunals such as ICSID and others. The use of IT for e-arbitration has the following aspects:

First, and most apparent, information technology is used for written communication. According to an International Chamber of Commerce (ICC) Commission Report published in 2017 regarding "Information Technology in International Arbitration" (ICC Commission Report 2017), once the arbitral tribunal is constituted, written communication between and among the parties, the arbitrator(s) and the administering body often takes place exclusively in electronic form, with e-mail being the means of choice[15].

Second, arbitral participants may transmit or store documents using cloud-based file-storing applications. Several case-management applications have been developed and made available by major arbitral institutions to satisfy the needs of arbitral practice[16].

Third is using video conferencing mechanisms when, for example, witness examination is needed.

Some authors doubt e-arbitration for confidentiality issues, but we can firmly state that advanced modern technologies enable fully end-to-end encrypted video conferencing solutions to ensure everything is confidential and controllable.

The main advantage of implementing the e-arbitration procedure is that it is cost-effective, speedy, trustworthy, and efficient.

The main disadvantage can be the validity of an online agreement reached through e-arbitration via e-mail. To understand the issue of the validity of e-contracts, we should first determine the definition of a contract. According to the 450th article of the Civil Code of the RA a contract may be entered into in a written form upon signature of parties through drawing up a single document, *as well as through exchanging information or ? communication (document) via means of … electronic or other communication which make it possible to confirm its authenticity and accu-*

rately establish that it comes from the contracting party. When concluding a contract via electronic communication, unless other requirements regarding the form of such contract are prescribed by law, an electronic document not protected by an electronic digital signature shall have the same legal effect as any document signed by hand by a given person. Hence, it can be concluded that the agreement reached through e-arbitration will not have validity issues.

Moreover, recently the Ministry of Justice has presented the law amendment package, which determines the definition of e-contracts. This amendment package is intended to add a new paragraph according to which e-contracts concluded via login, use, or exchange of information in an electronic portal shall be considered as properly concluded. Such an amendment will cut all doubts about the issue of the validity of e-arbitration agreements.

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Արման Հակոբջանյան
«Վարդանյան և գործընկերներ» ՍՊԸ, իրավաբան

ԱՄՓՈՓՈՒՄ

Վեճերի այլընտրանքային լուծման հեռանկարները Հայաստանի Հանրապետությունում

Այս հոդվածում քննարկվում են Հայաստանի Հանրապետությունում վեճերի այլընտրանքային լուծման (այսուհետ՝ ՎԱԼ) մեխանիզմների հիմնական խնդիրները: Հայաստանում կիրառվող հիմնական մեխանիզմներն են՝ արբիտրաժը և միջնորդությունը, որոնք զանգվածային տեղեկացվածություն չունեն: Միջնորդության հիմնական խնդիրներն են միջնորդների որակավորման մշտական հանձնաժողովի բացակայությունը և այն, որ դատավորները վեճերը չեն ուղղորդում միջնորդության:

Առաջարկվում է՝ ստեղծել մշտական հանձնաժողով և հանրային քաղաքականություն՝ միջնորդության վերաբերյալ իրազեկվածության բարձրացման համար: Արբիտրաժի հիմնական խնդիրը հասարակության կողմից տեղեկացվածության և վստահության պակասն է: Առաջարկվում է քայլեր ձեռնարկել արբիտրաժային տրիբունալների անկախությունն ու անաչառությունն ապահովելու համար: ՎԱԼ հեռանկարները Հայաստանի Հանրապետությունում ՎԱԼ մեխանիզմների այլ տեսակների գործարկումն են, ինչպիսիք են՝ բանակցությունները, փորձագիտական որոշումը և էլեկտրոնային արբիտրաժը: Վերլուծված են էլեկտրոնային արբիտրաժի հիմնական առավելություններն ու թերությունները:

Հիմնաբառեր- *ՎԱԼ, արբիտրաժ և միջնորդություն, արբիտրաժային տրիբունալ, բանակցություններ, փորձագիտական որոշում, էլեկտրոնային արբիտրաժ:*

Арман Акобджанян
Юрист в “Варданян и партнеры” ООО

РЕЗЮМЕ

Альтернативные перспективы решения споров в Республике Армения

В этой статье затронуты основные проблемы механизмов АРС в Республике Армения. Основными механизмами, используемыми в Армении, являются арбитраж и посредничество, о которых мало кто знает. Основными проблемами для медиации являются отсутствие постоянного комитета по квалификации медиаторов и то, что судьи не направляют споры в медиацию.

Предлагается создать постоянный комитет и государственную политику по повышению осведомленности о медиации. Основные проблемы, связанные с арбитражем, это недостаток осведомленности и доверия со стороны общества. Предлагается принять меры для обеспечения независимости и беспристрастности арбитражных судов. Перспективы АРС в Республике Армения - реализация других видов механизмов АРС, таких как переговоры и экспертное заключение, а также электронный арбитраж. Проанализированы основные преимущества и недостатки электронного арбитража.

Ключевые слова*: АРС, арбитраж и посредничество, арбитражный суд, переговоры, экспертное заключение, электронный арбитраж.*

Ընագիրը ներկայացվել է 25.11.2021թ.
Ընդունվել է տպագրության 03.12.2021թ.
Հոդվածը երաշխավորել է տպագրության (գրախոսվել է) իրավաբանական գիտությունների թեկնածու Վ. Կարապետյանը