The effectiveness of alternative methods of commercial dispute resolution: a comparative analysis of arbitration and mediation

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ABSTRACT
Alternative dispute resolution (settlement) methods, including any kind of out-of-court dispute resolution, are gaining popularity in the Republic of Uzbekistan. This article discusses the general concept of alternative dispute resolution methods, their effectiveness, and distinctive features. The article is also devoted to comparing alternative dispute resolution methods such as mediation and arbitration. This analysis revealed the similarities and differences between the two procedures.

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ANNOTATION
Узбекистон Республикасида низоларни суддан ташкари ҳал этишнинг ҳар қандай турини ўз ичиға оладиган мукобил низоларни ҳал қилиш усуллари оммалашмоқда. Ушбу мақолада низоларни ҳал қилишнинг мукобил усулларининг умумий тушиччаси, уларнинг самарadorliги ва ўзига хос хусусиятлари муҳокама қилинади. Мақола, шунингдек, медиация ва арбитраж қаби низоларни ҳал қилишнинг мукобил усулларини таққослашга багишланган. Ушбу таҳлил орқали мазкур икки процедуралар ўртасидаги ўшашлик ва фарқлар кўриб чиқилди.

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Эффективность альтернативных методов разрешения коммерческих споров: сравнительный анализ арбитража и медиации

АННОТАЦИЯ

В Республике Узбекистан наблюдается растущая популярность альтернативных методов урегулирования споров, подразумевающих внесудебное их разрешение. В данной статье освещается общее понятие альтернативных способов разрешения споров, оценивается их эффективность и анализируются характерные особенности. Кроме того, проводится сравнение таких методов, как медиация и арбитраж, что позволяет выявить как общие черты, так и отличия данных процедур.

At the present stage of development of civil society, the tendency towards accelerated economic development is more clearly expressed, which, together with the formation of new international and domestic relations in the field of entrepreneurship, leads to an increase in the occurrence of civil legal conflicts. By implementing a certain algorithm, it is necessary to conduct an in-depth analysis and quickly resolve the dispute that has arisen to further preserve the partnership between the parties.

Until recently, appealing to the judiciary was one of the main and generally accepted ways to resolve a legal conflict between subjects of civil circulation. However, the workload of the judicial system, the length and cost of the judicial process, and the lack of flexibility and confidentiality in resolving disputes leads to the inappropriateness of using this instrument for protecting the rights and freedoms of subjects. In this case, the parties are given the opportunity to use non-state forms of resolving legal conflicts, which are provided for by current legislation, in other words, alternative methods of resolving or resolving disputes.

An analysis of practice shows that alternative dispute resolution in the Republic of Uzbekistan is only going through the initial stage of its development, especially negotiation and mediation methods of conflict resolution. It should be noted that the popularization of this phenomenon is facilitated by both the superior characteristics of alternative methods of resolving civil disputes compared to the judicial method of protecting violated rights, and the strengthening of the regulatory framework, for example, the adoption of the Law of the Republic of Uzbekistan of July 3, 2018 No.482 “On mediation”.

The Government of the Republic of Uzbekistan, realizing that the system for protecting the rights and legitimate interests of individuals and legal entities requires improvement, also adopted Resolution of the President of the Republic of Uzbekistan of June 17, 2020 No. 4754 “On measures to further improve alternative dispute resolution mechanisms,” which specifies the need to create a unified system of pre-trial dispute resolution in government bodies, transform mediation, arbitration courts and international arbitrations into effective alternative dispute resolution institutions that are trustworthy for citizens and entrepreneurs.
A number of legislative acts have provisions that promote the use of alternative dispute resolution methods in order to improve partnership relations. For example, if the plaintiff, before filing a statement of claim, did not comply with the claim procedure for resolving a dispute with the defendant, when this is provided for by law for this category of disputes or by agreement, then, in accordance with Article 107 of the Economic Procedural Code of the Republic of Uzbekistan, the court leaves the statement of claim without consideration.

However, it should be emphasized that these norms are fragmentary and declarative in nature. In national legislation there is no such concept as “alternative methods of dispute resolution”; there is no exhaustive list of conciliation procedures, just as there is no indication of the methods that are permissible or recommended in a particular conflict situation.

Speaking about the very definition of “alternative dispute resolution," its origin comes from the English language and generally means any type of out-of-court dispute resolution. Scientists present different interpretations of it, for example, G.V. Sevastyanov “under alternative dispute resolution he understands the right to choose any method of resolving a dispute not prohibited by law and resolving the conflict by the subjects of the disputed legal relationship themselves based on a specific situation” [1]. S.S. Sulakshin, in turn, understands alternative dispute resolution as “a method of extrajudicial influence on a conflict, the purpose of which is to eliminate the contradiction between the parties to the conflict or minimize the negative consequences of the conflict for its participants” [2].

Other representatives of the scientific community in their definitions rely not only on the term “method" of resolving a dispute, but also on terms such as “forms”, “mechanisms”, “procedures”, “types”. For example, the scientific and practical manual by N.I. Gaidaenko is called “Formation of a system of alternative mechanisms for resolving disputes: a conflict-free society as the basis for combating corruption” [3]. Despite the fact that scientists adhere to different interpretations of the definition of “alternative dispute resolution," they agreed that these terms are synonymous.

The alternative dispute resolution procedure has a number of distinctive features, such as:

1. The court is a link that facilitates the procedure for alternative dispute resolution, and not a body that resolves the conflict on the merits. This is expressed in recommendations to the parties involved in the case to choose one or another form of alternative dispute resolution, or the court can assist in the execution of decisions, for example, on the basis of Article 50 of the Law of the Republic of Uzbekistan dated October 16, 2006 No. 64 “On Arbitration Courts”, If the decision of the arbitration court is not executed voluntarily within the period established by the decision of the arbitration court, then it is subject to forced execution, which will be carried out based on a writ of execution issued by the competent court.

2. The systemic nature and interconnectedness of the actions of the parties who have chosen an alternative method of resolving the dispute are also a distinctive feature of this mechanism. Consistency is ensured by the chosen procedure for alternative methods of dispute resolution, for example, in arbitration, the parties and arbitrators are subject to the rules of arbitration [4]. The most important thing is to choose those alternative dispute resolution procedures that are not prohibited by law.
3. It is necessary to distinguish alternative dispute resolution mechanisms from various methods of “preventing” and “managing” a dispute. The dispute prevention procedure is a set of planning and analysis actions aimed at building relationships in such a way as to avoid a possible conflict, for example, partnership, which is the development of a strategy for the relationship of the parties, within the framework of specific contractual relations, aimed at resolving the problems that have arisen, the main goal of which is the harmonization of relations between the parties [5]. Dispute management is the practical actions of the parties to an already existing dispute, aimed at avoiding litigation, minimizing costs, choosing the most appropriate dispute resolution procedure, etc. [5]. Although the goal of dispute management, saving time and minimizing costs, is similar to some alternative dispute resolution methods, the latter are more aimed at resolving a dispute that has already arisen.

It is interesting, in our opinion, to compare two types of alternative methods of dispute resolution, namely commercial ones, which require the parties to enter into legal relations of their own desire: the procedure of mediation and arbitration.

Speaking about the mediation procedure, despite the fact that in the Republic of Uzbekistan it received legislative recognition only in 2018, both national and foreign scientists began to study this phenomenon long before this period.

E.I. Nosyreva understands mediation as the process of resolving disagreements between the parties with the help of a third independent participant – an intermediary (mediator) [6]. Sh.M. Masadikov believes that mediation is a way to resolve a dispute between the parties with the help of an impartial mediator who assists them in reaching a mutually acceptable agreement and does not have the right to make a decision [7]. The Law of the Republic of Uzbekistan of July 3, 2018 No. 482 “On Mediation” enshrines the following concept: “Mediation is a method of resolving a dispute with the assistance of a mediator on the basis of the voluntary consent of the parties in order to achieve a mutually acceptable solution.”

The development of arbitration in the Republic of Uzbekistan began earlier than mediation, since having formed an authoritative and highly qualified arbitration, the image of the state acquires a worthy appearance in the national and international business environment. The first step in this direction was compliance with various international agreements, for example, on December 22, 1995, the Republic of Uzbekistan acceded to the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. Further, the adoption of the Law of the Republic of Uzbekistan of October 16, 2006 No. 64 “On Arbitration Courts” and the creation in 2011 of the International Commercial Arbitration (Arbitration) Court at the Chamber of Commerce and Industry of the Republic of Uzbekistan, as well as the Law of the Republic of Uzbekistan dated February 16, 2021 No. 674 “On International Commercial Arbitration”, served as an important stage in the development of arbitration proceedings in the country.

What is meant by the mediation procedure and arbitration (arbitration) proceedings, what are their differences? The mediation approach to dispute resolution consists of the participation of a mediator, one or more, whose main task is to identify points of contact between the interests of the parties and assist them in finding a mutually beneficial solution [101]. A mediator can only be a neutral and impartial third party who will mediate between the parties to the conflict, helping them to hear each
other and build a constructive dialogue. The activities of a mediator can be carried out on a professional or non-professional basis [8]. He does not make a decision on the merits of the dispute; he only helps the parties come to a decision that will suit both parties.

Moving on to arbitration (arbitration proceedings), in a general sense it refers to the process of resolving a dispute and making a decision by a court. In the Republic of Uzbekistan there is an arbitration court, which is a non-state body that resolves disputes arising from civil legal relations, including economic disputes arising between business entities [9]. In addition to the arbitration court, international commercial arbitration operates on the territory of the Republic of Uzbekistan as an alternative out-of-court form of resolving commercial disputes arising between entities with a foreign element.

Below, a number of similarities and differences between mediation and arbitration (arbitration proceedings) will be given, identifying the key features of each procedure:

– both the mediation procedure and arbitration proceedings are methods of alternative dispute resolution between the parties;

– arbitration (arbitration proceedings) is the process of resolving a dispute by an arbitration (arbitration) court and making an arbitration (arbitration) decision by the court. In turn, mediation is a method of resolving disputes with the assistance of a mediator based on the voluntary consent of the parties in order to achieve a mutually acceptable solution;

– speaking about third parties, the mediation process involves a mediator who facilitates the adoption of a decision that suits both parties, while arbitration involves resolving a dispute by an arbitrator, and arbitration proceedings by an arbitrator;

– arbitration (arbitration proceedings) excludes the participation of the court in resolving the dispute, but the mediation process does not exclude it;

– the mediation process ends with the conclusion of a mediation agreement by the parties to the dispute, while the result of arbitration is an arbitration decision, and arbitration proceedings – a decision of the arbitration court;

– both the mediation agreement and the arbitration decision (arbitration proceedings) have the properties of binding and enforceable.

From the above it follows that arbitration (arbitration proceedings) is characterized by greater certainty than the mediation procedure. However, as E.N. Ivanova states: “Currently, mediation is not very popular in resolving commercial disputes, which are more likely to move into the realm of judicial and arbitration proceedings. But mediation gives new opportunities to business; partners can conduct commercial negotiations with the help of an impartial specialist instead of participating in a formal process and receiving an abstract solution” [10].

To summarize, it cannot be argued that alternative dispute resolution methods are always used as a counterweight to the traditional court system [102]. Often, they act as a complementary mechanism, that is, if a compromise is not reached out of court, subjects can subsequently resort to the protection of violated rights in court. The parties are given an alternative choice based on the advisability of using one or another conflict resolution mechanism.

In the business environment, subjects are increasingly aware of the need to reduce the level of conflict in the process of civil disputes and improve the quality of trusting relationships between partners, which raises the need to spread the use of alternative methods of conflict resolution in practice.
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