ADR and Domestic Courts in Albania

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Abstract

Practice has shown that the western democratic legal systems have developed several alternative dispute ways for resolving disagreements between the parties other that national courts. The article aims to explore and highlight the differences between peaceful means of conflict resolution and to provide a clear framework of the necessity of their promotion and further development. Depending on the different jurisdictions of the states, the opinion regarding the duties, rights and obligations of the parties in the process of ADR is different between each of this means and different regarding the domestic courts. In most legal systems the role of the conciliator, arbitrator or mediator it is simply to try to bring the parties together.

For example, the proposed possibility of arbitration to withdraw the disputes from the jurisdiction of national courts is extremely beneficial to investment attractiveness. All this led to the exponential growth of bilateral and regional agreements for the protection and promotion of foreign investment, where one of the main provisions is the possibility of transmitting disputes between investors and the state of international arbitration. The sources of the law of ADR lie in a number of international conventions, international model laws and model rules, and institutional rules. To these may be added domestic legislation, reports of awards and academic writings.

An arbitrator or mediator is described as 'a disinterested person, to whose judgment and decision matters in dispute are referred and must act in accordance with the rules

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of natural justice. Mediation practitioners point to a number of advantages which the mediation process has over the domestic court. In fact, it must be acknowledged that ADR usually takes place when at least one of the parties is unreasonable. Helping the parties to see the reason is a useful social role. The difference between this methods of resolving disputes would be so that the purpose of a conciliator, mediator or arbiter, would be to encourage the parties themselves to understand what benefits they can get from resolving the case out of court in which way they deem most appropriate.

Historical scientific methods are used in this research. The theory part it is presented with concrete cases from practice of both judicial and non-judicial ways of resolving conflicts, logical system, method of analysis and synthesis. In this paper as well are used formal-legal and comparative-legal methods. The writing is guided by the provisions of the conceptual theory of international arbitration law and domestic law. Research methods were used, of simple presentation of facts to argue the concrete point of view and the characteristics of the clarification of this research.

Key words: *ADR, judicial, methods, domestic, court, mediation, arbitration, law*

Introduction

In the system of separation of powers system, the courts are linked to the legislative and executive power of the obligation to enforce laws and other normative legal acts, as well as to the appointment of judges to their positions. The work of the judge is of special importance and he has a great responsibility. Excessive litigation will delay the process and will be less effective for delayed justice for citizens.

Article 41/2 of the Albanian Constitution says: Everyone has the right to a transparent and public process for the protection of the rights of the people. According to the Code of the Civil Procedure: judges try to resolve dispute amicably. Dispute resolution, in addition to court, is done with other alternative methods such as: negotiation, mediation and arbitration.[2] The state it is the regulator and the guarantor of the regular process in resolving disputes. Individuals seeks the achieve Justice by the Courts as a public good. The state has the duty to regulate all legal provisions for this function.

The judiciary must be understood as an essential element of modern developed state and on the other hand the courts have the competence to give binding decisions. Historically states do not have much interest in the civil judicial system, so it is important to note that good and deep reforms have consequences and they have not been successful so far. The sates has the obligation to be engaged in the

[2] Law No 9090 / 2003 has replaced 10385/2011, amended 26/2018 On mediation approximated with the EU Directive 2008/52 / EC.

modernization of the policy. According to the fact that the state plays the main role in overseeing and guaranteeing the standard of civil justice provided by private professionals of the field. Nowadays in Albania there are problems with the Courts: This because the civil process it is more expensive a lot more complex and leads to month and sometimes years of delays. So, individual get frustrated by not getting the justice on short time. This we can explain by a few reasons:

Many of the reforms are done wrong and they are not based on a concluded research of the professionals, lawyers, specialists (or evaluation). The Solution it is clearly and necessarily: Alternative dispute resolutions has to be promoted (less cost, no stress, no delays, a more effective and faster process) Cela E. (2022). Disputes-Arbitration is an alternative form of justice by the courts.

Arbitration as a concept is known in most legal systems but does not always take the same form in different countries. Inevitably, each different form reflects significant problems and sometimes a different approach to the entire legal system. In addition to the legal systems of civil law (*diritto scritto, droit ecrit*) and customary law systems, there are other legal systems, such as those of the former socialist countries, Islamic law and the countries of the Far East[3].

Depending on the different jurisdictions of the states, the opinion regarding the duties of the arbitrator is also different. According to some, the task of the arbitrator is simply to come up with a decision, while according to some others it is to decide on the decision equally, is based on the principle of natural justice. But the term arbitration covers a variety of mechanisms both in theory and in practice. Arbitration in fact aims to meet an important need not only at the national level (rule of law), but also internationally. There has been extensive discussion in the Doctrine as to the nature of arbitration. Various theories have been developed. One theory is that, since arbitration derives from a clause or agreement, its nature is contractual - contractual theory.

Another theory is that since arbitration proceedings are judicial, its nature is jurisdictional - the theory of jurisdiction. These theories were further institutionalized in the courts as auxiliary resources in the process of establishing the norms of the arbitration procedure.

Efficiency of Arbitration over Courts

It is a private court composed of one or several arbitrators to whom the parties, by mutual agreement, entrust the resolution of their dispute, whose decision is final and binding on the parties.

[3] Likewise, arbitration procedures which are not regulated by legal provisions are not treated as arbitration in some legal systems.

When the parties voluntarily decide to resolve their dispute that has arisen or may arise in the future through arbitration or through mediation procedure; so as a general rule - the jurisdiction of state courts to resolve these dispute is excluded.

Ordinary courts are excluded when they find that the Arbitration Agreement is invalid or impossible to implement.

Arbitration

- The arbitral process is consensual, based on an agreement between the parties;
- includes arbitrator and administrative costs;
- informal even though this is decided through arbitration rules;
- the final settlement of the dispute is decided by the arbitrators or the sole arbitrator;
- focusing on past events and circumstances used to determine factual or legal matters;
- the solutions are limited to the initial agreement of the parties and are usually limited to monetary costs or security measures;
- in a three-person panel, each party shall appoint one arbitrator and the two arbitrators shall appoint the presiding arbitrator, all of whom shall be appointed to adjudicate a dispute;
- arbitrators review cases through written submissions but also in a hearing through a due process of law;
- the key role in arbitration is played by lawyers in the representative role of the parties, where the parties themselves have a secondary role;
- The arbitrator is the master of his own procedure;
- The arbitrator must act in accordance with the rules of natural justice;
- An arbitral award is binding upon the parties.

Advantages

- More access to justice;
- The parties have procedural freedom;
- Cost and time efficiency;
- Confidentiality;
- Neutrality;
- Final and enforceable decision;
- Predictability;
- Expertise;
- Flexibility;
- Finalization.

The arbitrators must be independent and impartial in accordance with codes of ethics and conduct. A breach of that duty may result in the arbitrator being challenged and eventually removed by the court, or by the arbitration institution concerned. It may also lead to the annulment of the award.

Most international arbitration rules provide power in the arbitrator to act as an 'amiable compositor'. This gives the arbitrator power to act not only in accordance with rules of law, but also with principles of equity.

Court Procedures

Several factors are responsible:

The developed nations of the world were making new advances and breakthrough in technology and inventions. The rise in economic, especially commercial activities, has necessarily resulted in the increase of commercial contracts the breach of which creates disputes which have to be resolved. These disputes being business in nature require quick resolution which the adjudication process of the Courts do not ensure.[4]

Court procedure has become rather expensive and bogged down with procedural delay, especially with its system of appeals. These are some of the circumstances that have led to the gradual moving away from court litigation to arbitration in the area of business disputes. Other factors have also led to greater leaning towards arbitration in international transactions as we shall see shortly (Slos, D. 2009).

Advantages

- At the end of the process there is a final decision, which is binding
- Procedural rules are designed to ensure a fair legal process
- Judges are trained and professional
- Judges are obliged to respect the legal framework and protect the rights of individuals

Disadvantages

- The litigation is costly
- Delay until the final decision
- Opportunity to break the relationship between the parties
- The parties have no control over the process and the outcome

[4] At the level of the United Nations regime, Article 33 of the UN Charter obliges parties to any dispute, "the continuance of which is likely to endanger the maintenance of international peace and security", to seek a solution by, inter alia, arbitration.

- The parties do not have the opportunity to elect a judge
- Process severity and outcome uncertainty
- Corruption
- High costs
- Delays
- Not efficient
- Judicial reform is being implemented
- Budget for the implementation of this reform

Cross-sectoral strategy of justice - DCM 773, dated 2.11.201698 mil Euro (2017-2020) for the implementation of the reform; 467 intermediaries - except 63 of them are active; Mediation provided as a service till in Albania remains limited.

Improving and encouraging the mediation process - nothing about domestic or international arbitration, other than drafting a new law which has not yet been approved.

- People decide voluntarily about the rules of procedure
- They have flexibility
- Pay less in regards to resolving the dispute
- The process is friendlier than in the courts

Not all disputes have a standard, while in the courts there is a standard that leads to precedent setting. People have the right to go to court, but they have the right to give up from the court.

- Strain Greek Refineries and Stratis Andreadis v. Greece (1994) (ECHR set a minimum of procedural guarantees under Article 6/1 of the ECHR);
- Lithgou & others v. UK (1986) every trial panel and not just state courts, but also bodies set up to deal with a number of specific cases;
- Bramelid & Malmstrom v. Sweden (1979) - The state should provide a mechanism to check the fairness and correctness of arbitration proceedings;
- Suda v. Czek Republic (2010) - Applicant may not be required to submit to an arbitration for which he has not previously agreed;
- Suovaniemi & other v. Finland (1999) - waiver of an applicant's rights to an impartial judge should be seen as effective for the purposes of the Convention;
- Tabanne v. Switzerland (2016) - the applicant voluntarily and without obligation waives the opportunity to file a dispute in the ordinary courts Cela E. (2021).

ADR - International and European Standard

ADR- Negotiation, Mediation and Arbitration

The sources of the law of arbitration lie in a number of international conventions, international model laws and model rules, and institutional rules such as those of the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA). To these may be added domestic legislation, reports of awards and academic writings.

According to the New York Convention of 1958, States parties should unify internal arbitration rules - UNCITRAL model, the ICC rules (mandatory procedures). Geneva Convention of 1961 states that: States Parties shall develop their own domestic law relating to arbitration for the settlement of cross-border trade disputes(https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/). ICSID Convention- Investment disputes referred to bilateral agreements, European Community - ADR priority and development; Tampere 1999- call for alternative and extrajudicial proceedings (https://icsid.worldbank.org/resources/rules-and-regulations).

2002 - The Commission presents the Green Paper on ADR;

2008- Directive 2008/52 / EC "On some aspects of mediation in civil and commercial matters";

2013-Directive 2013/11 / EU "About consumer ADR";

Digital Agenda for Europe 2010 (COM (2010) 245) Consumer Protection-improvement of ADR system for e-commerce;

Regulation 524/2013 (ODR);

New EU legal system CADR have a great potential to provide not only an effective solution, but also fast and cheap among consumers and traders;

Independence and impartiality; transparency of proceedings; effectiveness; legality and justice Cela E. (2021).

Mediation[5]

The parties in mediation process have procedural freedom. This means that the parties may organize their proceedings as they like and may choose an adversarial or inquisitorial procedure as they like.

[5] Law No. 10 385, dated 24.2.2011 "On Mediation in settlement of disputes" (amended by law no. 81/2013, dated 14.2.2013, no. 26/2018, dated 17.5.2018). The parties have procedural freedom.

Advantages

- The parties have procedural freedom;
- Costs of parties in the process;
- The parties together with the mediator decide on the level of formality;
- The final settlement of the dispute is decided by the parties themselves, accepting or not the proposal of the mediator, which simply facilitates the negotiations between the parties;
- The variety and number of elections depends on the will of the parties;
- there are no designated authorities as the parties themselves negotiate the dispute directly;
- There is no relationship between the designated authorities and the parties, as there are no designated authorities;
- the key role in the process is played by the parties.

Trade, investment, consumer disputes - ADR solution with the will of the parties to the dispute

The result of mediation is not only reaching an agreement, but also the relation between the parties after the process; public institutions are more responsible to the public interest than private individuals a well we should pay attention that, Public authorities do not intend to be efficient but private entities does etc.

Disadvantages

- Mediation does not adequately safeguard the legal rights of the disputants;
- It lacks the procedural safeguards which attend in court trial;
- A failed mediation simply adds to delay and increased costs in finally resolving the dispute;
- Its consensual nature makes it a vulnerable process;
- Mediation is not suitable for certain types of disputes which involve, for example, serious crimes, sexual offences and constitutional infringements;
- mediation detracts from the case law jurisprudence which underpins the common law, since no precedents are established in mediations.

It is further acknowledged that even where a deal is not reached, the process of mediation allows the parties the opportunity to clarify their interests and, thus, help with the eventual resolution of the dispute. In a matter of comparing mediation with arbitration, an agreement to enter into arbitration will be enforced by the courts, whereas an agreement to enter into a mediation will generally not be enforced by the courts. This is because in mediation, the parties are free to leave at

any time. Arbitration has the quality of delivering a final and binding award. The arbitrator has the legal authority to make a binding award, but the mediator has not. Whereas arbitration is subject to an extensive statutory regime, mediation is generally not so regulated.

Negotiations

Among the claimed advantages are the following:

- consensual nature of the mediation process;
- personal involvement of the parties in the process;
- the parties' participation in arriving at mutually acceptable solutions;
- savings in time and money;
- deceleration of emotional stress;
- creation of a less intimidating atmosphere;
- maintenance of a continuing relationship;
- risk-free involvement in the process;
- acceptable win-win outcomes, as opposed to win-lose outcomes;
- freedom to put as many issues as possible on the table;

Negotiation procedures are free of charge; the parties decide on the level of formality, the final settlement of the dispute is decided by the parties themselves; the final purpose is the interests of the parties and their future relationship; the variety and number of solutions depends on the will of the parties; the mediator is appointed with the consent of both parties to facilitate negotiations on the matter; the mediator works directly with the parties to find a solution acceptable to both parties; the key role in the process is played by the parties through active participation in the process.

Reconciliation and Mediation as two out-of-court peaceful means of resolving conflicts

This procedure consists of an attempt by a third party, appointed by the litigants, to reconcile them either before going to court (either in court or arbitration), or afterwards. The attempt to reconcile is generally based on telling each side the opposite sides of the dispute, in order to unite each party and reach a solution, which will usually be found between the positions of both parties.

Conciliation procedures can take various forms and in some legal systems which are presented in a modern way. However, in essence, even with this new

look, we are always presented with a traditional reconciliation, the merits of which are undoubtedly indisputable when the parties are persuaded to become more reasonable. In fact, it must be acknowledged that litigation usually takes place when at least one of the litigants is unreasonable. Helping the parties to see the reason is a socially beneficial role of reconciliation. Conciliation, because of its importance, is mentioned in the most recent Arbitration Conventions. The 1965 Washington Convention provides that a conciliation committee shall be set up, at the request of a Contracting State, or of an entity of a Contracting State, and governs its procedure:

Article 34. (1) It is the duty of the Commission to clarify matters in dispute between the parties and to try to conclude agreements between them on terms acceptable to both parties. To this end, the Commission may recommend the parties at any stage of the proceedings and from time to time. The Parties shall cooperate in good faith with the Commission in order to enable the Commission to carry out its functions and to pay more serious attention to its recommendations. (2) If the parties reach an agreement, the Commission shall draw up a report noting the issues in the dispute and record that the parties have reached an agreement. If, at any stage of the proceedings, it appears to the Commission that an agreement between the parties is unlikely, it will close the proceedings and draw up a report noting the submission of the dispute and recording the failure of the parties to reach an agreement. If a party fails to appear or participate in the proceedings, the Commission shall close the proceedings and draw up a report stating that the party has failed to attend or participate. Article 35. Unless the parties to the dispute otherwise agree, neither party to a conciliation proceeding shall have the right in any other proceeding, whether before arbitrators, or in a court or tribunal, to invoke or rely on any expressed views or statements or acceptances or offers of solutions made by the other party to the conciliation proceedings, or report or any recommendation made by the Commission. The first part of the rules of the International Chamber of Commerce (1988) ICC, dedicated to reconciliation, opened with a clear statement in its favor: settlement is a desirable settlement of disputes of a commercial nature.

However, an attempt to resolve is not a prerequisite of arbitration. The first of the various provisions of the ICC (1988) rules on compliance stated: Article 5 - The conciliator shall conduct the conciliation process as he sees fit, guided by the principles of impartiality, equality and justice.By agreement of the parties, the conciliator shall designate the place of conciliation.The conciliator may at any time during the conciliation proceedings request a party to provide him / her with additional information that he / she deems necessary. ICC Rules of Conciliation and Arbitration 1975:

Article 1. Any business dispute of an international character may be the subject of a request for settlement by amicable settlement through the Administrative

Conciliation Commission established at the ICC International Chamber of Commerce. Each National Committee may nominate from one to three members of the Commission, from among its nationals residing in Paris; they will be appointed for a term of two years by the President of the International Chamber of Commerce. *The difference between the two methods of resolving disputes would be so that the purpose of a conciliator would be to encourage the parties themselves to understand what benefits they can get from resolving the case out of court in which way they deem most appropriate.* In fact, if a real distinction is to be made between these two peaceful methods of resolving conflicts, it is alleged to lie in giving the third party the authority to come up with a binding solution.

However, nothing prevents the parties from giving such authorization to a conciliator or mediator. The doctrine suggests that in this broader authority, rather than in an internal distinction between conciliation and mediation, one can perhaps see a real difference between the two terms. In most legal systems the role of the conciliator or mediator is simply to try to bring the parties together. An analysis of the various International Conventions on Arbitration shows that there is a preference for the place where the decision is issued.The 1927 Geneva Convention deals with decisions given in the territory of another contracting state. The 1958 New York Convention deals with the recognition of judgments given in the territory of a state other than the one in which recognition is sought. The 1961 Geneva Convention refers to the states in which, or under the law of which the decision was given.

Conclusions

International courts have developed tools to strengthen the impact of their decisions that must be accepted in domestic courts. Civil justice is not provided only by state authorities. The state has failed to provide an efficient judiciary, provide a budget for the courts, and implement long-term reforms that guarantee an effective judiciary. People need flexibility, speed and as little cost as possible as a guarantee of a smooth process. Fatigue with the courts and strengthening of the ADR. The principle of due process in the ADR as well as in court. A realistic vision in the organization and functioning of ADR. In parallel, efforts to strengthen civil justice as a public good, which meets the expectations of the social purpose in the effective execution of individual rights, which is healthy in a society. On the other hand, the interpretation of international Law by Domestic Courts proves the growing role of domestic courts in the interpretation of international law and the complex relation between each other.

Albania is in the phase of implementing justice reform. There is no strategy for promoting and strengthening ADR in Albania. An assessment of the situation so far needs to be made to realize a strategy for the future.

References

Aust. H., The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence, Oxford University Press 2016.

Stone A., Grisel S. & F., The Evolution of International Arbitration Judicialization, Governance, Legitimacy, Oxford University Press 2017.

Bermann, George A., Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts, Springer 2017.

Cela E. (2021) Judicial institutions, ADR reform and their necessity in the Albanian reality, Jus & Justicia 15, 128-138, ISSN 2223-8654.

Cela E. (2022) A Summary of Alternative Dispute Resolutions, European Journal of Economics, Law and Social Science, Vol. 6, No. 1, 40-51 ISSN 2520-0429.

Cela E. (2016). Principles of resolving investment disputes of international arbitration courts. Jus & Justicia 13, 89-101, 2223-8654.

Cela E. (2015). Aspects of the protection of human rights in relation to the settlement of disputes in international arbitration. Jus & Justicia 12, 101-107, 2223-8654.

Cela E., (2017). The influence of international law on national law. ICES IV – 2017., 978-9928-214-97-3.

Kola F. Alternative dispute resolution, Tirana, DeaPrint 2015.

Zurn Ch. F., Deliberative Democracy and the Institutions of Judicial Review, Cambridge University Press, 2007.

Born G. B., International Arbitration: Law and Practice. Kluwer Law International, The Netherlands 2016.

Hepburn J., Domestic law in international investment arbitration. Oxford University Press 2017.

Bercovitch J., Jackson R., Conflict Resolution in the Twenty-first Century: Principles, Methods, and Approaches, University of Michigan Press 2009.

Gjuzi J., Stabilization Clauses in International Investment Law: A Sustainable Development Approach. Springer 2018.

Omari L., Principles and institutions of public law, Tirana 2015.

Slos D., The Role of Domestic Courts in Treaty Enforcement: A Comparative Study Cambridge University Press, 2009.

https://icsid.worldbank.org/sites/default/files/documents/ICSID%20Convention%20English.pdf

Law No.8687, dated 9.11.2000 On the accession of the Republic of Albania to the "European Arbitration Convention".

Law No. 10 385, dated 24.2.2011 "On Mediation in settlement of disputes"

https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/

https://icsid.worldbank.org/resources/rules-and-regulations