Privatising dispute resolutions and its limits- alternative dispute resolutions or state courts?[1]

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Abstract

Every government should provide to its citizens means for the adequate protection of their individual rights and freedoms. The means are the courts to which the citizens have the right of access and the state has to pay for the civil justice and manage to reform the court system. Nowadays, consumers and investors around the world try to resolve their disputes in a speedy and effective manner. Consequently, civil justice plays a crucial role in the life and culture of a state and provides the legal structure for the economy to operate effectively and at the same time has the function of providing authoritative and peaceful resolution of justice enabling social justice, economic stability and social order. Currently, consumers and investors are requesting an impartial and independent court to give effective solutions for their internal disputes or cross-border disputes. Therefore, states around the world are involved in periodical reforms, spending a lot of monies that usually are paid from the taxpayers. Despite the continuing request for improvement, consumers still have difficulties in accessing speedy and effective solution to their disputes through a fair trial under the constitutional principles or international law. Therefore, around the world the question arises, whether state authorities would not be more suitable guarantors of the public interest than law firms and other profited-oriented operators in the market.Consequently, alternative dispute resolution (ADR) has been introduced as a mechanism, which

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gives a solution to these predicaments, helping to complement the shortcomings of state adjudication. If a state doesn't manage to reform the court system then ADR can become an effective remedy. Overall, privatising dispute resolution means to comprise the mechanism for dispute resolution regarding commercial and investment arbitration, consumer ADR, and online dispute resolutions for consumers. As the privatization of ADR has proliferated, the ECtHR has found the ADR as an effective mechanism as long as it guarantees fair trial under the article 6/1 of the Convention (ECHR). In addition, recent EU legislation requires each member state to have a consumer dispute resolution body for all consumer disputes, trying to establish the EU platform on online dispute resolution. Also, the international legal framework provides the possibility that the investors to have an arbitration clause in their contract. Although it might seem that there is a total privatisation of the dispute resolution, there is a limit indeed. ADR mechanism, even concurring the state courts still remained interfaced by the possibilities to apply for the annulment of the arbitral award or its non-recognition. Although Albania has invested a lot of monies in the court reform it has failed to provide effective and speedy trials to investors and consumers. The court system remains corrupt and not effective in guaranteeing a due process. Therefore, ADR is seen increasingly as an effective mechanism for foreign investors in almost all of the international contracts. Also, consumers and internal investors are increasingly using the ADR mechanism to resolve their disputes. Therefore, ADR is an important mechanism towards the resolution of consumer and investors disputes. But still Albanian courts have to control on the end the ADR judgments trying to guarantee the public policy in the country. Therefore, the focus of this article will be to examine how the implementation of ADR in Albania and the continuing judicial reform, affect the ability of consumers and investors to resolve their disputes in an effective and speedy manner.

Key words: *civil justice, court, disputes, privatization, alternative dispute resolution (ADR), ECHR, EU Regulation, consumer, investor, annulment, non-recognition, public order*

The state as guarantor of the fair trial in the dispute resolution

Civil justice and state courts as a public good

The state provides certain goods whose value depends upon their public provision, such as defence, security, education and health. But some of these goods can also be provided or produced by private individuals. An attempt to privatize *'intrinsically*

public goods' is considered from some authors self-defeating, as the value of the goods is conditioned upon the identity of the agent producing it.[2] Nowadays discussion is in the terms of discussing the terms of the two forms fulfilling the functions or services such as public bureaucracy and private entrepreneurship. Through the privatization could be realized the objectives of the government in a proper way, but some authors considers the privatization a liability of the government, rather an asset, due to the loose fidelity on the part of private entities to the promotion of the public good. In this framework, some authors based on the concept of '*inherently governmental functions*' consider that some state functions are well executed and provided from the public agents rather than the private agents. In their broad discussion, they had concluded that some decisions must be made and some actions must be executed by public officials and ought not to be privatized.[3] Adopting laws is the job of the public entities and on the other hand, the execution of a criminal decision is still the job of another public entity. It is true that the private agents in providing certain goods are more capable than the public agents and as consequence more capable in executing the function of the state. Nowadays, is a clever solution that certain goods and services been provided from the private bodies, as long as it helps in the fulfilling of the government's objectives and in the quality of the services to the citizens, but on the other hand some goods must be provided only from the public entities.

The judiciary has to be understood as an essential element of a democratic political order.[4] Owen Fiss has argued that judges has the capacity to make a special contribution to the social life, which derives not from their personal traits or knowledge, but from the definition of the office in which they find themselves and through which they exercise power.[5] It is very important how the judges do justice. Civil justice has a social and economic significance, but the adjudication is a very important process. Judges are considered fundamentally political creatures and democratically accountable. The defence of human rights and the rule of law is a legitimate task for a judge.[6] Courts have the power to make binding decisions relied on the Constitution and law, which are binding for everybody, including all the other branches of government.[7]

The definition of Civil Justice does not include only the substantive law affecting civil rights and duties but the machinery provided by the state and the judiciary for the resolution of civil justice disputes and grievances. The administration of civil justice includes the institutional architecture, the procedures and apparatus for

[2] See, Harel. A, Why Law Matters, 2014, Oxford legal philosophy, p. 65

[3] Ibid, 66

[4] Gearey. A, Morrison. W and Jago. R, 'The politics of the common law- Perspectives, rights, processes, institutions', 2013, Routledge, second edition, p. 208

[5] Fiss (1979):13).

[6] Gearey. A, … , p.218

[7] See, Harel. A,… p.194

processing and adjudicating civil claims and disputes.[8] Civil justice serves a private function, in providing peaceful, authoritative and coercive termination of disputes between citizens, companies and public bodies.[9] The role of the government is to serve the free market economy and it does this by providing personal security, and providing a legal system for the protection of rights, most especially property rights for the enforcement of the contracts, and for the resolution of contractual disputes.[10] Law is a public good and everyone enjoys its fruits merely by living in a society and that an unlimited number of people can benefit from the legal principles at no additional costs.[11] There is a political will of the State to provide the civil remedies that the citizens realize their civil rights and claims when their private rights are infringed. Without an effective civil justice system, substantive civil laws are no more than words and that the rule of law becomes an aspiration rather than a reality.[12]

Einstein has stated that '*Imagination is more important than knowledge. For while knowledge defines all currently know and understand, imagination points to all we might yet consider*'. Images of justice help determine the acceptability and success of the process associated with those images.[13] The judge should be independent, impartial and neutral. But is it possible that the State provide to the citizens an effective judiciary? Is the judiciary a monopoly of the State? According to the doctrine and to the practice, the State has been not always effective in providing the civil justice to the citizens. The reforms in providing the judiciary, appointment of judges should be driven by a notion of 'democratic accountability' that sought to achieve a balance between the need to secure the transparency of the appointments procedure, and the requirement of judicial independence. [14] European Court of Human Rights has found in a lot of cases a breach of article 6/1 of the Convention because of the length of proceedings, missing of the access to the Court and on the end breach of a fair trial. The right to a hearing, access to the court are crucial principles of the civil justice. Courts are designed to investigate individual grievances, and that such an investigation is crucial for protecting the right to a hearing.[15] To provide a fair trial or due process relied on the main principle of the access to the court and right to be heard the domestic rules of the civil procedure should be developed and reflect the standard of the ECHR and of the ECtHR. Procedural law has been considered as an essential feature of the politics of democracy and as consequence object of radically and frequently reforms.[16]

[8] Genn. H, Judging Civil Procedure, Cambridge University Press, 2010, p. 10
[9] Ibid, p.16
[10] Capaldi. N, The ethical foundations of Free Market Societies, 20 J. Private Enterprise 30, 37(2004)
[11] Caplan. B &Stringham. E, Privatising the adjudication disputes, p.11
[12] Genn.H…, p.18
[13] Gearey.A, ...p.275
[14] Ibid, see, …, p. 212
[15] Harel.A,… p.214
[16] Gearey.A. p. 222

Some authors have considered that adjudication is a public good and something more than a public service but the civil system remains a private and a public good as long as the public is able to access the machinery for enforcing their rights and that the procedures for enforcement are fair.[17] The civil courts and judiciary may not be a public service like health or transport systems, but through the performance of this critical, social and economic function, the judicial system services the public in a way that transcends private interests.[18] In a society the citizens benefits from the interpretation of the law by the judges and of the resolutions of the disputes in both cases when the parties in dispute is the State and individuals or both individuals. Professor Dame Hazel Genn has considered that the machinery of civil justice sustains social stability and economic growth by providing public processes for resolving civil disputes, for enforcing legal rights and for protecting private and personal rights and to a certain extent people takes that for granting. But on the other hand he has argued that exist a degradation of the courts, which he has found related to different factors starting from the lack of the financing from the government till the development of the new profession of mediator competing the legal profession.[19]

Over years, the judicial system is considered slow, costly and complicated. The State not all the time is doing the best on the financing and effectiveness of the judiciary. Historically the civil courts were financed jointly by the taxpayer who paid for judges and court buildings, while the rest of the cost of civil justice was met out of court fees. In this way the costs are covered between the taxpayer and the litigants.[20] Nowadays, some of the states have difficult to quantify the costs for the civil justice, as long as the judiciary has been seen as one natural areas of the government activity. In some other jurisdictions has been accepted that judicial system should be provided by the government, as long as it is not possible to exclude the individuals from access to justice and these goods tend not to be produced in private markets because people can consume the good without paying for them.[21] Nowadays, court users are expecting that the fees income be used to improve the civil court service than to be used for the legal aid.[22]

States are less interested to invest in their civil justice system, meanwhile the reforms has an invoice for the budget and not always successful in simplifying the judicial system and speed up the process. On the other hand the private market of the legal professional is offering alternative dispute resolution concurring the state courts which help to resolve in a due time and with professionalism the disputes of the consumers, commercials, and investors. This is called privatization of the civil

[17] Genn.H…, pp 23, 24
[18] Ibid, p.26
[19] Ibid, See pp. 181, 182
[20] Genn. H, … p.45
[21] Ibid, p.47
[22] Ibid.p.50

justice. From dispute resolutions benefits the parties in the dispute and society and this is the reason why is considered as a public good. Nowadays this public good is provided from the court and from the capable private sector. When we speak for privatization we have in mind the privatization of the state enterprises. In economic terms, privatisation is much more than the simple transfer of ownership, the alteration of the rules of the qualifications and modern technology and in reality its implementation revealed on the political situations, changes and continuity in the modes of governing. On the other hand, withdrawal by the state is neither homogenous nor total. The state is disengaged from the direct management, but it is engaged in the management of the social realm, in modernization policies, or in the management of external economic relations.[23] As such, the state is the main actor in supervising and guaranteeing the standard of civil justice provided from the private professionals.

Problem with the state courts

An old German saying goes: *"Before courts and on the high seas we are in the God's hands"*. Civil justice system has the social purpose to provide a modern and efficient system that delivers justice and enjoys public confidence. Judges has the direct responsibility for the decisions on direct impact in the life of the parties in dispute and further citizens.

The Government has the obligation to provide the judiciary system and to guarantee the fair trial, the impartiality, neutrality and the independence of the judiciary. But, the reality is different from what the government proclaimed on the judicial system. In a lot of cases, the courts failed to provide the fair trial, and in some others provide injustice to the citizens. Usually, the public courts are supported by taxes, the court services are under-priced and the courts have little incentive to serve customers or control costs.[24]The trials take too long and there are not so many efforts of the courts to reduce the long process and lead the parties settling the disputes before reaching trial. The trial except being too long, is very expensive taking in consideration not only the fees of the parties' lawyers but also other expenditures that are covered from the taxpayers in the well-functioning of the justice. The problem with the civil process has to be cost, complexity and delay and the blame is laid to the layers than to the parties and to the court. Professor Dame Hazel Genn relied in his research didn't found positive the portrayal of the civil justice system. Nowadays, people like to have more access to justice and less access to the court.[25]

[23] Hibou.B, Privatising the state, 2004, Columbia University Press, p.47.
[24] See, Caplan.B &Stringham.E,… p.7
[25] See, Genn.H, Paths to Justice, Oxford: Hart, 1999, p.1

Governments try to undertake and implement reforms to solve the problems of the judiciary, but not always they realize to be successful. The reforms consists on the legal framework related to the civil process and length of the proceedings, training of the judiciary, increasing the court financing from the state, encouraging alternative dispute resolution. The states are trying to limit appeals in particular cases as much as possible and mostly lead the parties to settle the small claims and particular cases regulated by law. Also, there are some efforts to rule the disciplinary of the lawyers in civil procedures, when they contribute in the length of the proceeding. Mostly in all the countries, there is identified the need for modernization, simplification and harmonization of the legislation on civil procedure, the reduction in the costs of the litigation, promotion of the principle of the fairness, timeliness, proportionality, transparency, efficiency and the accountability in the civil justice system including the responsibility of the parties and lawyers to comply with the ethical obligations relating to truth telling, honesty and efficiency. But, usually it is common that the reforms and the policy are made in dark, as they are concluded in the absence of a quantitative or qualitative research on the functioning of the civil justice.[26] In some countries are spend a lot of money for the assessment of the civil justice, but that assessment has been not based on the true database and evidences and as consequence the reform has been not effective and meet the objectives. The reform to be effective should be relied not on the perception of the citizens and politics but on the caseload of the court and a professional analysis of the civil court decisions in a long period of time faced to the standard provided from the international mechanism such as the ECHR and the jurisprudence of the ECtHR.

Professor Dame Hazel Genn stated that '*In a profession where appointment effectively means appointment for life, are we clear enough about who the supreme exponents of professional judging are? Would we be able to describe in detail, to analyse those characteristic and thus refine our selection process?*'[27] It is true that Professor Genn is speaking for the judges in the common law system, but the problem with the judiciary and the situation of the civil justice seems to be the same in all countries around the world. Maybe, because the states failed to realize deep analyses and to limit costs in this direction, the solution has been to alternative dispute resolution.

The access to the civil courts is restricted by some factors: (i) Parties in the dispute mostly has to hire an advocate; Claimant has to pay the fees and taxes in the court; Parties in the dispute has to spent time and money before the trial and during the proceedings till the final judgment; sometimes people feel wee and find very stressful the proceedings in the court.

[26] See, Genn.H, … pg.63
[27] Ibid, p. 180

Nowadays, there is a clear message that litigation and adjudication are bad and disagreeable, while settlement and, in particular ADR are attractive and in everyone's interest. Some authors has considered that as a decline in trials and degradation of the public court, but some others has considered as sign of a healthier society that resolves its conflicts without the intervention of the judiciary and without judicial determination.[28]

Alternative dispute resolution is partly a creature of the state, under the impulse of the private actors, consumers, traders, investors. Some authors states that if state don't manage the court system, they have to forget about it and provide some other ADR instead.[29] But, regardless of the problems of the judiciary and the international tendency towards ADR, I agree with Professor Genn that we need to re-establish civil justice as a public good, recognizing that it has a significant social purpose which is important to the health of the society.[30]

Privatising Dispute Resolution – Arbitration alternative to state justice

Efficiency of arbitration over State Courts

Courts have a strong contribution to the social and economic well-being and people can take such a public good for granted. In the frame of 40 years it is evident the growth of the alternative methods for dispute resolution, creating the flexibility to the people to resolve their disputes out of the courts and mostly to withdraw the appeal of the final judgment, with the purpose to realize *de facto* their individual rights. On a daily basis and even for mundane purchases people often waive an important right: the right to go to the court.[31] Mostly, the alternative method of dispute resolution tends to be used in commercial cases, insurance cases, family cases, labor cases etc. *'Alternative'* feature of the ADR poses a threat to the monopoly of the justice distribution of modern states. Via the liberal and rational-based theories, ADR has an element of resistance that incentivizes the disputants to continue utilizing it. Parties are free to opt for ADR and choose it because they feel they can 'participate' in the process of shaping justice.[32]

Under a Eurobarometer survey done in 2010 ('Consumer Empowerment'), almost 50% of the all consumers throughout Europe would not go to court for a

[28] Ibid, pg.51

[29] Sturner.M, 'ADR and adjudication by state courts: competitors or complements 'in 'The role of consumer in ADR in the administration of justice", SELP, 2014, p.29.

[30] See, Genn.H…, p. 183

[31] Ghodoosi.F, International dispute resolution and the public policy exception, Routledge, 2017, p.49

[32] Ibid, pp. 52, 59

sum at stake up to 500 Euro.[33] People find a speed, non-costly and efficient solution for their dispute. ADR is a solution found by the governments, seeking to improve the range of options available for dispute resolutions, providing cost control, stripping down of procedure and active case management.[34] Some authors has considered that people has more access to justice, but less justice.[35] Also, Professor Genn is thinking the same, and is concerned with ADR and its main product mediation, stating that: 'The outcome of mediation is not about *just* settlement, it is just *about* settlement'[36] He raises concern about the access to justice for individuals and about the form of the civil justice that the citizens need, which should not measured simply in term of speed and cheapness.[37] Harel concludes that public institutions are more accountable to the public interest than private individuals and, consequently is wrong on instrumental grounds. He found the state courts more protective of democracy or freedom than private adjudication justifying with the judicial review.[38]

Some other authors argument that superiority of ADR over the civil courts, it is because public bodies has not incentive to be efficient, and private entities do; and public bodies usually don't know what is efficient, meanwhile the private bodies know better. This happens because private adjudication in contrast to the public courts would be free and try to experiment all the time what the client thinks and like. As consequence they conclude that the government should respect the will of the parties for a final and binding arbitration.[39]

Public trial has some advantages: (i) on the end there is a binding decision, which sometimes becomes a binding precedent; (ii) the trial provides procedural safeguards designed to ensure a due process;(iii) judges are trained and professional; (iv) the judges are obliged to respect the legal framework and protect people's individual rights. But also has disadvantages: (i) judicial process is costly; (ii) delay till the final judgment; (iii) potential to destroy the relationship between the parties; (iv) parties have no control over the process and the outcome; (v) parties has not the possibility to choose the judge; (vi) rigidity of the process and uncertainty of the outcome.[40]

Many reforms on civil justice in the entire world have been implemented with the purpose to divert the legal disputes away from the courts into mediation,

[33] Eurobarometer No.342, 2010, p.217
[34] See, Genn.H, … pp 68, 103
[35] See, C.M.Hanycz, 'More access to less justice: efficiency, proportionality and costs in Canadian civil justice reform'' Civil Justice Quarterly, 27:1 (2008); H.Genn, … p. 71.
[36] Genn.H, … p.4
[37] Ibid, .p.77
[38] Harel.A, ….p. 227
[39] Caplan.B & Stringham.E, .. pp 15-16
[40] See, Fiadjoe.A, Alternative dispute resolution: A developing world perspective, Routledge, 2004, p.31, 32.

which has been considered as a strategy that will increase the access to justice. The interest in ADR jurisdiction is group up in parallel with the failure of the courts to provide to the citizens fair trial according to the due standard. This is a possibility for the states to reduce the costs and clear the caseload of the court. Except the legal framework, in this process, the court is involved directly inviting the parties to settle the case through negotiation or mediation.

Private adjudication has a lot of benefits to the peoples because they can decide to the rules of the proceedings, have flexibility, pay less money for the adjudication. A modern and efficient civil justice system means a system that delivers justice and enjoys public confidence. ADR allows the parties to choose to settle their dispute, save costs and time, selecting the procedural rules that they consider as the most convenient, and are more amicable than the trial process. But exist also doubts in relation to 'privatization' of the adjudication. ADR are essentially private, differently from the court where it is a public hearing. Privacy is good but the justice is done in open courts. On the other hand privacy of ADR may hamper the justice and the fair trial, which used to be provided in open courts. The proceedings may turn costly, when the dispute is taken to the court *de novo*. Not all the private adjudication held to one standard, differently from the standard requested from the state court, precluding the creation of the precedent.

Apart the challenges of the ADR, nowadays people choose to file there their cases on small claims because they don't want to litigate or have not the proper budget to realize that. Traders and investors seem to feel good with the privacy and the speediness of the ADR. Also, the states are more comfortable to realize their objective on civil justice through ADR and encourage people and the courts to use such alternative forms for the resolutions of the disputes.

Due process in the arbitration under the ECtHR case-law

People have the right to go to the court, but ate the same time they have the right to waive from the right to go to the court. People want to have access to justice, but not access to the court. They express the will to find alternative forms for the dispute resolution. People want to have access to justice, without going to the court, but they pretend to have a due process relied on the main principle of the civil proceedings which are in conformity with the legal order in state in which the decision is going to be enforced. Article 6(1) of the ECHR is apparently applicable to the courts, which are established by law, also is applicable to the international arbitration. There is a relation between the human rights and the international arbitration. The ECtHR has found that article 6/1 is applicable in the international arbitration. In the case of Strain Greek Refineries and Stratis Andreadis v. Greece[41]

[41] Case Stran Greek Refineries and Stratis Andreadis v. Greece, no. 22/1993/417/496, dated 9 December 1994.

the Court has found that '*… Article 6-1 applies irrespective of the status of the parties, of the nature of the legislation which governs the manner in which the dispute is to be determined and of the character of the authority which has jurisdiction in the matter; it is enough that the outcome of the proceedings should be decisive for private rights and obligations…*'[42] and in following concluded that *'..The arbitration court allowed the applicant's claims in part by a decision which was final, irrevocable and enforceable both under the terms of the contract itself and the terms of the Greek law… The applicant's right under the arbitration award was' pecuniary' in nature, as had been their claim for damages allowed by the arbitration court. Their right to recover the sums awarded by the arbitration court was therefore a ' civil right' within the meaning of article 6/1'*[43] In this judgment, the ECtHR established a minimum procedural guarantees to develop the content of article 6/1 of the ECHR in the international arbitration.

The Court in its jurisprudence has accepted that the right to a fair trial referring to the access to justice, reasonable time, independence and impartiality of the tribunal, equality of arms is applicable also to non-judicial procedures. In the case Lithgou and others v. United Kingdom, the Court has concluded that with tribunal it is not to understand the court of classic kind, but also it may comprise a body set up to determine a limited number of specific issues.[44] Arbitration is a creature of the state delegation and is established and organized by law. Arbitrators substitute the judges, and they are obliged to provide the same standard of the access to justice as the courts do. ECtHR has made the difference between forced arbitration, imposed by law and voluntary arbitration under the agreement of the parties. In case that international arbitration is imposed by law then the parties has not the possibility to waive from the international arbitration justifying with the access to the justice. This has been concluded from the Court in the case Bramelid and Malmstrom v. Sweden.[45] In forced arbitration the Court came on the conclusion that under the Convention, '*the State has to provide a judicial mechanism to control and guarantee the fairness and correctness of the arbitration proceedings which they considered to have been carried out in conformity with the fundamental rights*'.[46]

In the cases when there is an agreement between the parties, the parties can't waive from the international arbitration and raise a dispute on the denial of the access to justice under article 6/1 of the ECHR. The Court has accepted the voluntary agreement for arbitration if not concluded under pressure and constraint. However access to court is not absolute. In several cases the Court has found the right of

[42] Ibid, § 40
[43] Ibid
[44] See, Lithgow and others v. United Kingdom, (no. 9006/80; 9262/81, 9262/81, 9265/81, 9266/81, 9313/81, 9405/81), dated 24.06.1986.
[45] See, case Bramelid and Malmstrom v. Sweeden, no.8588/79 and 8589/79.
[46] See, case Jacob Boss Söhne KG v Germany, (no. 18479/91), dated 2.12.1991.

access to court may be subject to legitimate restriction, where the individual's access is limited either by operation of law or in fact, whether it pursued a legitimate aim and whether was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[47] In the case Deweer v. Belgium, the Court concluded that it is possible to waive the right to hear the case before a court in civil cases.[48]

In the case Suda v. Czeck Republic, the Court found applicable article 6/1 concerning the access to justice not only in voluntary or forced arbitration but also of the third parties agreement to arbitrate, concluding that '*.. the applicant could not be required to institute arbitration proceedings to which he had never consented and risk that the arbitration tribunal would rule on the merits of his case*'.[49] In this case the Court came to the conclusion that '*no problem arise in the field of article 6 when it comes to voluntary arbitration freely consented…, meanwhile when it is forced the proceedings must offer the guarantees provided by article 6/1 of the Convention*'.[50] The Court concluded that waive by will from access to the court is accompanied by waive of right to a public hearing. The Court has found that the public hearing is not absolute and in special circumstances is allowed.[51] The Court has concluded that if there is a will of the parties, the privacy of the process is accepted and there is not a breach of the article 6/1 of ECHR.[52] In this framework, waive of a public hearing in international arbitration has been regarded as effective for Convention purpose.

Independence and impartiality are two other essential guarantees under article 6 of the ECtHR. Such guarantees have been considered very strong safeguards under the Convention. In the case Fragner v. Austria, the Court concluded that '*Independence is related to the manner of appointment of the member's court and their term of office, the existence of safeguards against outside pressures and whether the tribunal presents an appearance of independence found that there are two requirement to be met regarding impartiality*'.[53] Meanwhile, according to impartiality the Court has concluded that a subjective and objective requirement are to be met, meaning that the tribunal must be free of personal prejudice or bias and that the

[47] See, case Axelsson and others v. Sweden (no. 11960/86), dated 13.07.1990; Momcilovic v. Croatia (no. 11239/11), dated 26.05.2015

[48] See, case Deweer v. Belgium, no.6903/75, dated 27.02.1980.

[49] See, Suda v. Czech Republic, (no.1643/06), dated 28.10.2010, §46; Day S.R.O and other v. Czech Republic (no. 48203/09), dated 16.02.2012, § 33.

[50] Ibid

[51] See, case Hakansson and Sturesson v. Sweden, no.11855/85, dated 21.02.1990; Nordstrom-Lehtinen v. The Netherlands, (no. 28101/95), dated 27.11.1996; Kolgu v. Turkey (no.2935/07), dated 27.08.2013; Day S.R.O and other v. Czech Republic (no. 48203/09), dated 16.02.2012

[52] See, case Alexon & Others v. Sweeden, (no.11960/86), dated 13.07.1990; Day S.R.O and other v. Czech Republic (no. 48203/09), dated 16.02.2012

[53] Fragner v. Austria, (no.18283/06), dated 23.09.2010.

tribunal must offer sufficient guarantees to exclude any legitimate doubt.[54] In this sense, such guarantee seems to be un-waivable, but in the case Suovaniemi and other v. Finland, the Court concluded that *'the applicant's waiver of their right to an impartial judge should be regarded as effective for Convention purposes'* [55]In the arbitration, the parties are aware of the characteristics of the arbitrator and by free will they waive from access to court and choose access to arbitration.

Recently, another guarantee under the article 6/1 '*the right to appeal*' has been judged from the ECtHR. The waiver of a right to appeal against arbitration award is found inadmissible from the Court in the case Tabanne v. Switzerland.[56] In that case the Court found that '*The applicant had, without constraint, expressly and freely waived the possibility of submitting potential disputes to the ordinary courts, which would provide him with all the guarantees of Article 6.*' The Court found the waiver of the wright to challenge an international arbitral award by the free will of the parties in the agreement. The Court has concluded that some restriction by law on the right to challenge the arbitral award did not appear disproportionate to the aim pursued, to provide flexible and rapid procedures, while respecting the applicant's contractual freedom.[57]

The Court considered the non-enforcement of a final arbitral judgment as a breach of the due process, meanwhile the parties agreed to waive from the access to court and the same principle it will be applied as in the case of the final court judgment.[58]

For the moment ECtHR has not referred to other guarantees of Article 6(1) of the ECHR, but they could be treated in the same way as the other rights in the meaning that they can't be waived in advance, although case by case the exception could be made.[59]

Nowadays, high cost of the arbitration and the impossibility to claim, some authors referring to the standard of the ECHR, and the case Banifatemi, Dutco has considered as denial of the access to justice.[60] There is a direct responsibility of the state to guarantee the standard of the ECHR in the national level. It is true that the State has not a direct responsibility for the arbitrator's decisions, but the State has an indirect responsibility for the violation of the rights under Article 6(1) of ECHR and should put the restriction through law using other mechanisms to control the

[54] Ibid

[55] See, Suoavaniemi and other v. Finland, (no. 31737/96), dated 23.02.1999.

[56] See, Tabane v. Switzerland, (no. 41069/12), dated 1.03.2016

[57] Ibid, §§24,25

[58] See, case Regent Company v. Ukraine, (no.773/03), dated 29.09.2008; Kin-Stib and Majkic v. Serbia (no.12312/05), dated 20.04.2010.

[59] See, Ringquist, Do procedural human rights requirements apply to arbitration-a study of Article6(1) of the ECHR and its bearing upon arbitration, 2006, www.lunduniversity.lu.se, p.39.

[60] See, Decision of the French Court of Cassation in the case of Yas Banifatemi, dated 6.11.1998, 20.2.2001; in the case Dutco, dated 7.01.1992.

private adjudication and protect the public order, including the access to justice which prevail over the party autonomy.

Arbitrations as a mechanism of dispute resolution in today's reality

The international and European standard of ADR

ADR is found as a solution to have a speed and non-costly adjudication. The types of ADR are different, starting from negotiations, mediation, hybrid forms and finally arbitration. In the negotiation process parties are going to settle the case without the need of a third person and without spending money. Apart, in the mediation it is a third party who is requested from the both parties by will to give a solution. Arbitration is a process in which a neutral third party or a panel of neutral parties renders a decision based on the merits of the case. The parties in arbitration are able to agree on the arbitrators, procedural rules which could be more convenient for them. The arbitration is much more amiable than the trial process. The arbitrator's award could be final and binding or advisory if the parties agree in that way.[61]

Also, there are some combined processes called *'hybrid process'*, which is nothing more than a combination between the mediation and arbitration. Usually, not all the mediation results in a final resolution. In med/arb the neutral third party starts as a mediator and if no conclusion is reached then he ceases the mediation and becomes an arbitrator who then renders a final and binding decision for the parties. The other hybrid form is arb/med, where the neutral third party under the request of the parties starts the process as an arbitrator and delivers a decision which is not shared with the parties immediately and then becomes a mediator and attempts to facilitate a resolution between the disputants. If the parties reach a solution in the mediation then the arbitral award will be destroyed and if they are not able to reach a solution during the mediation then the decision of the neutral third party will be released to the disputants and that is binding for them.[62]

The parties have agreed by will to include an arbitration clause in their contract as an alternative to court to resolve their disputes. The parties to arbitration can maintain some control over the design of the arbitration process. The rules of arbitration process in some situations are set out by statute or by contract and in other circumstances the parties work together to design an arbitration process, which appropriate to their dispute.[63] The decision of an arbitrator usually is final and binding, but may be advisory when the parties agreed that the arbitral award

[61] See, Fiadjoe.A,…, p. 27
[62] Ibid
[63] Ibid, pp 30, 31

been non-binding and the dispute been court-ordered. In the case that the parties agreed to resolve by arbitration, the award is binding, even the parties change mind and are not happy with the final award. Arbitration clauses are separable from the main contract and the issues of the competence have been resolved in the arbitrator's favour.[64]

International arbitration nowadays is found as the most popular and common mechanism to adjudicate the dispute out of the court. Urged on by powerful private actors, the major trading states ratified the 1958 New York Convention. The extraordinary development of the New York Convention regime has been driven by competition among these same states for arbitral business.[65] The New York Convention during years has served as an international tool in providing the legislative standard for the recognition of the arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards. Under the NY Convention, the central obligation imposed upon States Parties is to recognize all arbitral awards within the scheme as binding and enforce them, if requested to do so, under the *lex fori*.[66] In this frame work, during the Conference on International Commercial Arbitration 20 May-10 June 1958 the state parties has been encouraged to uniform the national law on arbitration which would contribute to the effectiveness of the arbitration in the settlement of the dispute.[67] NY Convention has served as a tool for the harmonization of the legislation on arbitration around of the world and in following the various organizations drafted the Model of UNCITRAL to uniform the rules of the arbitration in commercial disputes for all the states contractor parties in the Convention. Under the Article 2 of the NY Convention, contracting states are obliged to recognize the agreements in writing under which the parties undertake to submit to arbitration the disputes. *'Agreement in righting'* includes an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. The arbitration tribunal[68] has the competence to resolve the dispute, unless it finds that the agreement to arbitrate is null and void, inoperative or incapable of being performed.

Following New York Convention of 1958, in Geneva on 1961 was signed the European Convention on International Commercial Arbitration with the purpose to remove certain difficulties that may impede the organization and operation

[64] See, Sweet.Stone.A & Grisel.F, "The evolution of international arbitration" (Judicialization, Governanace, Legitimacy), Oxford University Press, 2017..p.26

[65] Stone Sweet.A…, p. 233

[66] New York Convention, 1958, " On the Recognition and Enforcement of Foreign Arbitral Awards"

[67] See, Final Act of the United Nation Conference on International Commercial Arbitration (E/Conf.26/8Rev.1) available at www.uncitral.org

[68] The New York Convention is applicable not only on the arbitral award rendered by the appointed arbitrators for each case, but also those made by permanent arbitral bodies to which the parties have submitted. (Article 1)

of international commercial arbitration in disputes related to physical or legal persons of different European countries. This Convention was another tool which served that many states in Europe elaborates their internal legislation embracing arbitration for the resolution of the cross-border commercial disputes.[69]

The effectiveness of the arbitration depended upon its judicialisation, although the theory of judicialisation was not developed with international arbitration in mind.[70] In the judicial model, which depends upon the construction of hierarchical authority, arbitrators render justice, at a minimum, by ensuring due process and maximizing legal certainty for present and future users of the system.[71] Convention for Settlement of Investment Disputes (ICSID)[72] is a model of the effectiveness of the mandatory procedural rules in the investment arbitration, which provides facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States. Under the Article 25 of the ICSID Convention, the Centre has jurisdiction on the conciliation and arbitration of the any legal dispute arising directly out of an investment between a State and a national of another State, which the parties to the dispute consent in writing to submit to the Centre. The jurisdiction of the Centre covers an unknown number of foreign investments disputes referring to the bilateral treaties between the states, rather than being conferred in a case- by- case basis. This model of investment arbitration is found effective because of the judicialisation, the principles and rules applied from tribunal, more or less as the courts do, when they resolve the contractual disputes and when determine liability for compensation under investment treaties. Nowadays more competences are delegated to the investments arbitrators, who have the authority to apply the mandatory law and the arbitral case law on investments referring to the ICSID and bilateral treaties between states. There is an obligation of the states to review and renegotiate the treaties under the consolidated case law of the Centre.

Under the 1958 NY Convention, an ICC[73] initiative, pro-arbitration states in the major trading zones have explicitly recognized the autonomy of the arbitral order as a legal system.[74] The ICC Rules of 1998 and 2012 are considered as mandatory procedures, centralizing the functioning of the international arbitration increasing the administrative control on the final award of the arbitrators. The recent legal framework of the ICC is competitive to that of ICSID. The intensification of party conflict has pressured dispute resolvers to construct procedures that are

[69] See, Article 1,2 of the Geneva Convention, 1961

[70] See, Stone Sweet. A,… p.21

[71] Ibid, …. p.33

[72] ICSID Convention, dated 18 March 1965, entered into force on October 14, 1966. The provisions of the ICSID Convention are complemented by Regulations and Rules adopted by the Administrative Council of the Center, pursuant to Article 6(1)(a)-(c) of the Convention.

[73] International Chamber of Commerce Paris, (ICC), Institutional Arbitration.

[74] Stone.A..., p.79

harmonized with the principal and rules of the trial and able to maintain the legal system effectiveness.[75]

Also, the European Community has stressed the importance of developing an area of freedom, security and justice, in which the free movement of persons is ensured. In this framework, the Community has adopted measures in the field of judicial cooperation in civil matters for the proper functioning of the internal market where the principle of access to justice is fundamental. The European Council in the Tampere meeting in 1999 called for alternative, extra-judicial procedures to be created by the Member States.[76]In this regard, in April 2002 the Commission presented the Green Paper on alternative dispute resolution in civil and commercial matters referring to the situation in European Union. As consequence, in 2008 has been adopted the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 *"On certain aspects of mediation in civil and commercial matters"*, which is applicable only to mediation in cross-border disputes, without preventing the Member States from applying such provisions also to internal mediation process. The Directive is applicable to cases where parties agreed to use mediation, mediation is ordered by a court, or in which national law prescribes mediation.[77] Mostly, mediation according to that directive has been used in commercial and consumers disputes.

Consumer ADR has existed in parts of Europe for some decades, but only this decade became important at the level of European policy on dispute resolution and the Mediation Directive has served as a tool to resolve the cross-border consumer disputes, transforming the regulatory system and form an effective European approach.[78] In addition to the Mediation Directive, a series of regulatory measures have included references to Consumer Dispute Resolution based on the Article 114 of TFEU, which stressed the need for a high level of protection for consumers Directive 2013/11/EU (On Consumer ADR)[79], followed by the Regulation No.524/2013 (ODR).[80] Under this Directive CDR, by 2015 all the EU member states have full coverage of CDR, building upon that an ODR platform, providing the consumers access to high quality, transparent, effective and fair out-of-court redress mechanism, without preventing the parties from their right for access

[75] Ibid.., p.115

[76] See, Tampere summit of the European Council, 15-16 October 1999

[77] See, Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008, 'On certain aspects of mediation in civil and commercial matters', Art. 1(2), 2.

[78] See, Creutzfeldt.N, 'Alternative Dispute Resolution for Consumers' in 'The role of consumer ADR in the administration of justice', Sturner. M, Inchausti. F, Caponi.R, SELP, 2015, p. 3.

[79] Directive 2013/11/EU of the European Parliament and of the Council "On alternative dispute resolution for consumer disputes and amending Regulation (EC) No.2006/2004 and Directive 2009/22/EC, starting implemented by July 2015.

[80] Regulation (EU) No. 524/2013 of the European Parliament and of the Council of 21 May 2013 "On online dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), starting implemented by January 2016.

to court.[81] According to the Article 2 of the CADR, the Directive is applicable to procedures for the out-of-court resolution of domestic and cross border disputes concerning contractual obligations stemming from sales contracts or service contracts between a trader established in the Union and a consumer resident in the EU through the intervention of an ADR entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution.[82]

Internet has created the world online trade and e-commerce, faced with the difficulties for the consumers. Consumer protection has been one of the key issues addressed in the Digital Agenda for Europe, launched by the European Commission in 2010 (COM (2010) 245), where one objective has been the improvement of ADR systems for e-commerce and improvement of access to justice on line.[83] According to this new EU legal system, CADR systems have huge potential to deliver not only effective, but also cheap and quick solution to the disputes between consumers and traders arising from the sale of goods and services. States are responsible for the quality of CADR system, although not requested that been organized and financed from the state authorities, but monitors the functioning of the CADR system and certificates the ADR entities. The Directive ensured that the ADR procedure is free of charge for consumers or available at a nominal fee under the control of the state and the consumers have not the obligation to be represented by a lawyer. [84] Some solutions are on the speed of the process, which is provided to be realized in 90 days from the date on which the ADR entity has received the complete complaint file.[85] In this regard, a better functioning of domestic ADR and cooperation between ADR entities, contribute, step by step, to a better performance of the redress mechanisms of consumer's rights in cross-border situations.[86]

The requested standard of the ADR in the European level has no difference with that in the international level such as: independence & impartiality, transparency of the proceedings, effectiveness, legality and fairness. The minimum standard in EU concerning the Consumer ADR level following the Resolution of the European Parliament on 14 November 1996, has been provided through two recommendations, the 98/257/EC[87] and the 2001/310/ EC[88], filling the gap left from

[81] CDR Directive, Art.1

[82] Ibid, Art.2

[83] COM (2010) 245, A digital agenda for Europe

[84] CDR, Art. 8(c), (b)

[85] CDR, Art 8 (e)

[86] See, Inchausti.F, 'Specific problems of cross-border consumer ADR: What solutions?' in 'The role of consumer ADR in the administration of justice', Sturner. M, Inchausti. F, Caponi.R, SELP, 2015, p.57.

[87] Rec 98/257/EC 'On the principles applicable to the bodies responsible for out of court settlement of consumer disputes', dated 17 April 1998.

[88] Rec 2001/310/EC " On the principles applicable to the bodies responsible for out of court settlement of consumer disputes", dated 19 April 2001.

the Recommendation of 1998. The Directive 2013/11 EC sets out four minimum standards to be complied with any case if they want to operate properly in a Member State not limited to the independence and integrity, transparency, accessibility and special protection of personal data. They are not limited because there are further safeguards regarding the rights of consumers, traders and third parties entrusted with ADR to guarantee the procedures of arbitration, which I have elaborated for the safeguards of arbitration in general and are applicable to the consumer arbitration.[89] As consequence, the safeguards provided through the European legal system in Consumer ADR have proved a great success as an alternative to court proceedings, bringing the parties closer to find an agreement trying to reach an win-win solution what is important in the field of consumers and traders, as long their relationship can often survive beyond the conflict. This is a good example for all kind of arbitration and proves the success of the judicialisation of arbitration competing the access to court, that the parties are no more interest in.

The consolidation of minimum standard regarding ADR in Albania

Albanian Constitution provides that '*the law constitutes the basis and the boundaries of the activity of the state*'[90] and *'the Republic of Albania applies international law that is binding upon it*'[91]. Meanwhile, Article 41(2) provides that '*Everyone, for the protection of his constitutional and legal rights, freedoms, and interests, or in the case of an accusation raised against him, has the right to a fair and public trial, within a reasonable time, by an independent and impartial court specified by law*'.

It is clear that the legal system in Albania provides that people have the right of the access to the court to realize the execution of his individual rights, but the parties are free by will to choose other mechanism to resolve their dispute. There is not the place to mention the history of negotiation, mediation or arbitration in Albania. Also, there is no need to repeat what is presented in the previous heads. But the domestic law since 1992, when signed the ICSID Convention and Albania was open to the free market, the resolution of the disputes through international arbitration made progress. Also, negotiation, conciliation has been one of the safeguards of the trial in civil proceedings, which guarantee the will of parties to resolve their dispute in their own and to realize an output of win-win for both of them.[92]

The recent Civil Procedure Code in force in Albania provides that *'The judge should make every effort to settle the dispute amicably during the preparatory stage,*

[89] See, Lopez. M, "On minimum standards in consumer ADR", in " The role of consumer ADR in the administration of justice", Sturner.M, Inchaysti.F, Caponi.R, SELP, 2015, pp 138-141.

[90] Article 4 Albanian Constitution

[91] Article 5 Albanian Constitution

[92] Civil Procedural Code of Albania, originating law no.8116, dated 29.03.1996 and amended recently through law 38/2017, dated 30,03.2017.

when the nature of the case allow that.' Mediation was regulated through the law no.9090, dated 26 June 2003 "On Mediation in dispute resolution". Today that law is abrogated, and replaced by Law no.10385, dated 24.02.2011, approximated with the Directive 2008/52/EC "On certain aspects of mediation in civil and commercial matters", recently amended through the Law no.26/2018, dated 17.05.2018.[93] Also, the recent amendments of the Albanian Civil Procedure Code provides that '*At each stage of the trial, the court shall inform the parties about the possibility of settlement of the dispute through mediation and if they give their consent, it* transfers the case to mediation'[94] According to the today in force Law "On mediation in dispute resolution", the mediation applies for the resolution of all the disputes in the civil, commercial, labour and family law, intellectual property, consumer's rights and the disputes between the public administration organs and private subjects.[95] The court approves the reached reconciliation through mediation, only in case that it is not inconsistent with the law. Under the Mediation Law, mediation is based on the principle of equality of parties, confidentiality of information and respect for flexibility and transparency of the procedures and will of the parties in the process.[96] Also, under the civil procedure provisions, the parties have the right to appeal the decision of the mediator, giving to the court the authority to control the legal solution in the mediation process, if one of the parties do not agree and challenges the decision.[97]

Also the rules on the internal arbitration and international arbitration have been provided through the Civil Procedural Code of 1996. After Albania ratified Geneva Convention[98] and New York Convention[99] by the years 2000, the provisions on the international arbitration in the Code of Civil Procedure has been abrogated, because the international agreement under Article 122 of the Constitution are directly applicable. As consequence the international standard provided from the Conventions and the relevant jurisprudence is directly applicable in Republic

[93] Republic of Albania has the obligation of the approximation of the internal legislation with the *aquis* in the EU.

[94] Article 158/ç (2) (3) of the Albanian Civil Procedural Code, amended by Law 38/2017, article 44.

[95] Article 158/ç (1), Albanian Civil Procedural Code, amended by Law 38/2017, article 44. The Law 10 385 "On mediation in dispute resolution", amended through the Law 26/2018, in Article 2 (4) provides the cases, but not limiting to, when the Court, or the respective state body could transfer the case to the Mediation authority: a*) civil and family cases, which involve the interest of minors; b) conciliation cases in case of dissolution of marriage foreseen in article 134 of FC; c) property-related disputes or co-ownership, dividing of the properties, restitution lawsuit, negation lawsuit and lawsuits for cessation of the adverse effect on possession, disputes on the non-execution of the contractual obligations, and those on non-contractual damages.*

[96] Article 3(1), Law 'On mediation of dispute resolution'.

[97] Article 158/ç (6) Albanian Civil Procedural Code, amended by Law 38/2017, article 44.

[98] Law no. 8687, dated 9.11.2000 "On the Accession of Republic of Albania in the European Convention of Arbitration"

[99] Law no. 8688, dated 9.11.2000, "On the Accession of Republic of Albania in the Convention 'On Recognition and Enforcement of the foreign judgments of International Arbitration' "

of Albania. Usually such Conventions have been referred on the commercial international arbitration matters according to the contracts or law. Also, ICSID Convention and its jurisprudence, is directly applicable on investment arbitrations referring the bilateral treaties between the state parties in the Convention. In Albania, referring to the international and European requirements, there is a policy of conciliation, mediation and arbitration, meanwhile the court is not found effective in the resolution of internal or cross-border disputes in commercial or investment matters.

According to the progress report of 2016, *'The judicial system remains seriously affected by politicization, corruption and week inter-institutional cooperation*'.[100] In this framework the justice reform aimed to increase the independence, impartiality and transparency of the country's judicial bodies, including Constitutional Court, Supreme Court, governing bodies of the judiciary and the General Prosecutor's office.[101] The progress reports stated that *'The budget planning capacity needs to be improved and adequate budgetary resources for the justice system ensured, in particular for the implementation of the reform*'.[102] In such conditions, when there is a problem with the court system, the attention of the state has to be paid to the ADR. According to the Cross-cutting strategy of the justice adopted through the DCM no.773, dated 2.11.2016[103], the government is engaged in a radical judicial reform, where one of the main objectives is the consolidation of the independence and efficiency of the judiciary, but not the first but the last another objective is set up of a legal framework for the arbitration which will realized through the strengthening of the role of the mediator according to the law in force.

The government, to reach the objectives as stated in the cross-cutting strategy, is engaged to budget till the year 2020 a total amount of 98,385,653.00 Euro, meanwhile for the alternative dispute resolution only 9000 Euro in the whole period. Speaking on the lack of the judiciary efficiency, there is no descriptions of the measure to be undertaken for the strengthening of the mediation, meanwhile there is nothing stating about the arbitration and international arbitration. Still today, there is not a law on internal arbitration and international arbitration, meanwhile the provision of the Civil Procedural Law remained revealed since September 2013. Referring to the progress report of 2016, there are 467 mediators in Albania against 367 in 2015, and only 63 mediators are working actively on cases and the mediation provided remains very limited, even though it increased from the previous year.[104] The progress report of 2018, speaking on the progress in

[100] Progress Report 2016, dated 9.11.2016, SWD(2016)364 final, p.58.

[101] See, Ibid.

[102] See, Ibid, p. 59

[103] Cross-cutting strategy 2017-2020. The first cross-cutting judicial strategy has been was adopted in 2011 for a period of two years (2011-2013). For three years there was not provided from the government a political document on the judicial reform.

[104] See Progress Report 2016, p. 59

the judicial reform and the budget spent during 2017 for the justice referring to the estimated budget and the government reports, doesn't make an assessment about the progress of ADR in Albania and the further requirements for the future.[105] Under the cross-cutting strategy of justice, there are not provided measures to ameliorate and to encourage as an alternative form for the dispute of resolutions. Meanwhile, in Europe is developed Consumer ADR and On line dispute resolution and found effective, under the Albania political document there is not a vision of government to introduce and develop an authority involved in the arbitration of the consumer disputes in accordance with the Directive 2013/11/EU CADR and Regulation 524/2013 ODR.

There is no clear the policy on the alternative dispute resolution in Albania, meanwhile government speaks only of a law on international arbitration and amelioration of the mediation in civil, commercial, family and labor disputes, without telling how that can be realized. Recently, through the law 26/2016 amending the Law 'On Mediation', has been included some other area of mediation such as intellectual property, consumer's rights and the disputes between the public administration organs and private subjects. Also, some further rules has been provided through the recent amendments on the law "On Mediation", relating to the organization of the National Chamber of Mediators, initial and continuous training of the mediators, organization and functioning of the General Meeting of the Mediators etc. Apart the recent amendments of the law, there is a lack of a clear policy on alternative dispute resolution, because of the lack of a research on the organization, functioning and efficiency of mediation and arbitration in Republic of Albania and at the same time because the government motive to promote the ADR has been only to save money and not of the merits and success of this mechanism.

The limits of the privatizing Dispute Resolution

The international and European standard in the control from the state courts of the ADR

Nowadays, as mentioned previously the success of private dispute resolution depends on the bilateral agreement of the parties, or both parties participate in the same association accepting the private adjudication and finally enforcing the final decision.[106] State is engaged to promote the ADR, because failed to provide an effective judiciary, to fulfil the expectation of the public on the court justice and

[105] See Progress Report 2018, p.19-21
[106] See Caplan.B &Stringham.E, … p.16

finally to save money. As a consequence, the state has another obligation to respect and enforce the final judgment resolved by ADR as provided by law. That depends on the flexibility of the internal legislation and interpretation of the international agreement ratified by the state related to the state control over the ADR mechanism exercised mostly through the courts.

The Conventions in force that are applicable to the member state parties from years has served as procedural safeguards in ADR proceedings. Nowadays all kinds of the ADR have an international role, as long the online dispute resolution has been promoted, although the arbitration seems to be mostly used in the past for cross-border conflicts between parties. Apart the fact, that all the kinds of ADR are promoted around the world, the international law has provided a mechanism through which the private adjudication could be controlled from the internal courts. It is good, if the government respects the will of the parties in executing the contracts and the final ADR judgments, but the states have the obligation to guarantee the standard of the proceedings related to the access to justice. The famous New York Convention considers the arbitral judgments binding and there is an obligation of the state to enforce them. But on the other hand, provides to the parties the possibility of the refusal of the recognition and enforcement. In this framework, states have to apply directly the Convention or provide internal rules on the recognition and enforcement of the final foreign arbitral awards transposing the NY Convention. Article 5 of the NY Conventions provides the grounds for the refusal of the recognition and enforcement of the international arbitral awards relating mainly to the breach of the principles of a fair trial and public order.

The doctrine of the public order in arbitration grants discretion to the courts to set aside private legal arrangements, including arbitral awards, which harm the public and endanger legal order and society.[107] Courts around the world had reacted differently to the principle of the public policy referring to the Article 5/2(b) of New York Convention.[108] Such principle has been used from different courts to limit the recognition of the final awards of the private adjudication. There is a lack of a definition for the domestic and international public policy. Ghodosi cited Lalive, *'the concept of public policy in international private law differs from municipal public policy because of necessity and the different purposes of each legal order'.*[109] In his opinion, international public policy of states should not apply to the cases involving international matters.[110] The grounds on limitation of the private adjudication can't be exaggerated from the domestic courts referring to the principle of the public policy. The system of the privatization of the justice promoted and developed nowadays around world is to allow people to execute

[107] Ghodoosi.F, 'International dispute resolution and the public policy exception', Routledge, 2017, p.62
[108] See, Ibid, p.63
[109] Ibid, p.71
[110] Ibid, pp.72, 97

their agreement to opt the courts if they desire and as consequence the public courts need to step back and simply allow the market to function.[111]

The courts can't surpass the will of the parties, if they agree that the final judgment be binding. Although, the public courts have the authority to decide on the recognition of a final international award concerning the grounds for refusal, but not to review that decision related to the merits. Also, the Geneva Convention provides rules on the setting aside of the final arbitral award from the domestic courts, which constitute a ground for the refusal of recognition or enforcement of that award in another state.[112] On the matters of the investment arbitration, ICSID Convention provides that the final award is binding, is not subject of any appeal and states are obliged to enforce it, considering the arbitrator the judge of its own competence.[113] But on the other hand exists the administrative hierarchy of the Centre, where the review or annulment could be decided from a Committee of arbitrators appointed from the Chairman.[114] International investment arbitration is a public procedure and the governing law, unlike almost all commercial arbitration cases, is international law and usually people are more comfortable with that, because they can apply the international public policy.[115] According to the European standard, in the matters of the consumers ADR, the Directive 2013/11/EU provides that the decisions of the CADR entities are binding if the parties have been informed previously of its nature in advance and specifically accepted this.[116] Consumers are not prevented from judicial proceedings if they didn't agree previously on the binding nature of the final arbitral award.[117]

It is true that governments interfere with all the means despite the will of the parties, which destroy the free market of the private adjudication. Governments try to justify such kind of intervention with the access to justice and the protection of poor people. Indeed, referring to the European policy related to the Customer ADR and international policy of the established institutions dealing with international commercial arbitration, it is clear that the adopted legislation and rules is according to the principle of a fair trial, providing procedural safeguards to guarantee a speed, costless arbitration and mainly respecting the access to justice.

The limits of the privatizing dispute resolution under the Albanian law

ADR has developed in Albania recently, but still there is not a state policy in the promotion of the private adjudication. The Albanian legal framework on ADR is

[111] See Caplan.B &Stringham.E, … p.18
[112] See, Article IX of the Geneva Convention
[113] See, Article 41, 53 of ICSID Convention
[114] See, Article 51, 52 of the ICSID Convention
[115] Ghodoosi.F, .. p.103
[116] Directive 2013/11/EU, article 9/3; 10/2
[117] Ibid, article 12/1

compound of international agreements, which have been ratified from Albania and are directly applicable. The progress report of 2016, speaking for a number of 63 mediators working in practice, found that *'the mediation provided remains very limited, even though it increased from the previous year'*. The progress report of 2018 states nothing about ADR. There is no data about the domestic arbitration or international arbitration. There is no data on the recognition and enforcement of the international arbitration awards.

Also, the government in its Cross-cutting Strategy of Justice 2017-2021, is saying nothing on the domestic arbitration and international arbitration, about the role of the government on the recognition of the international arbitration award and enforcement; is saying nothing about the quality of mediators and arbitrators in Republic of Albania; is saying nothing about any reform on the customer arbitration in domestic or cross-border disputes; is saying nothing about the building of the capacities in ADR and about the reduction of the ADR costs. The government in its ross-cutting strategy has only one objective: Set up the legal framework on arbitration, which started some years ago and was planned to be adopted and approved in the Parliament by September 2013 together with the amendments of the Civil Procedure Code. It is hard to make an assessment of the limits of the ADR in Albania, because there is no official database on the domestic disputes solved through mediation and arbitration; there is no database on the international arbitration commercial or investment. We heard on TV on the international arbitration awards delivered from the tribunal, in which cases state is a party, but we don't know about the disputes between private parties. We have the possibility to find some court decision of the Appeal Court on the recognition of the awards, but there is not enough to understand and make the assessment of the limits in the ADR. The state institutions are not collaborative in giving information, or better saying refuse to spread such kind of information. The fact, that there is nothing in the progress report about the recognition and enforcement of international arbitration award, meanwhile that is an obligation under the international agreements makes evident that there is not transparency from the government and at the same time there is not an assessment from the government in the moment they adopted the cross-cutting strategy of justice, what proves finally the missing of a vision.

Apart from the above, under the Albanian legislation in force on the matters of arbitration there are limits to ADR generally and to international arbitration especially.

Regarding the Law 'On mediation', it provides that '*Where the case is referred for mediation by the court or the prosecutor office, the mediator, by the end of the mediation procedure, or within time limit specified by them, shall notify them of the resolution or non-resolution of the dispute, through the submission of the respective*

acts."[118] According to Article 158/ç (5) of Civil Procedure Code the court shall give its approval decision, but in any case it should be no against the law. The act agreement through mediation is final and binding as the arbitration decisions and constitutes an executive title and the bailiffs are responsible for the enforcement. It is clear that the court has a control on the decision of the mediator on the dispute according to the will of the parties.

In the arbitration procedures, nowadays the provisions on domestic arbitration are abrogated and still today there is not a law on the domestic arbitration. Regarding the international arbitration, under the Civil Procedural Code of 1996, amended by law 38/2017, the rules on the recognition of the foreign court decision are applicable in international arbitration, even since the year 2000 Albania has ratified the New York Convention. [119]According to the article 394 of the Civil Procedure Code there are provided some legal obstacles for the execution of decisions issued by foreign courts, which doesn't seem to be harmonized with the NY Convention or other international and European legislation on the recognition of foreign decision. The amended Civil Procedural Code doesn't provide some rules on the recognition and enforcement of the final awards of the international arbitration neither has transposed the provisions of the NY Convention. Taking in consideration that according to the Article 122 of the Constitution and Article 393/2 of the CPC the international agreements prevails over the CPC, then NY Convention and Geneva Convention are directly applicable. As mentioned in the previous head, the court under the NY Convention has the possibility to non-recognize or decide on the annulment of the final award of the international arbitration. According to the Article 395 of CPC, the competent court to decide on the recognition is the court of Appeal. In Albania, nowadays there is not provided by law the annulment of a final award of an international arbitration, but the draft-law preview the right of appeal against an international arbitration award. [120]

It is clear that the legal framework in Albania on international arbitration has provided the limitation of the privatization of the civil justice, meaning that exist a mechanism to control the decisions issued from the arbitrator that are not judges. This is good, to guarantee people on the access to justice and prevent any possible abuse from the arbitrators. But on the other hand, state has to not allow the court's abuse in the process of recognition of the international arbitration awards referring to the interpretation of the nature of recognition or annulment, and to the interpretation of the public policy under the NY Convention and Geneva Convention. There are a lot of cases, where the Tirana Appeal Court has done its own interpretation on the public policy not relied on the jurisprudence of NY Convention, or has prolong the procedures of the recognition of the final award,

[118] Law no.10385, dated 24.02.2011 "On mediation in dispute resolution", amended, article 23
[119] Article 399 Civil Procedural Code
[120] Draft-Law "On International Arbitration in the Republic of Albania", Art.45

telling that has the competence to control the international arbitration decision and put limits to the privatization of the adjudication.[121] Albanian legislation has no definition of the domestic and international public policy. Also, there is not a developed jurisprudence from the Supreme Court or Constitutional Court that made such kind interpretation and definition referring to several kind of arbitration, such as investment, commercial or consumer arbitration. Judges are lazy to read and find jurisprudence of the NY Convention. Sometimes they have not the will to do it. It is an task for the lawyers to refer to the court the jurisprudence of NY Convention, ICSID and ECJ, which will help to fill the gap in the understanding of the international and European law. Also, it is a task for the state to organize research on international arbitration, and draft the strategies only relying on the database and reflect the true problems, which need the right solution.

Conclusions and Implications

Civil justice has been considered as one of the goods that can be provided not only from the state entities. The most important task of the state adjudication system is the enforcement of individual rights speedily and efficiently, giving to the parties what is due to them under the substantive law. On the other hand, a second goal it is the development of law and legal certainty of the citizens. There are different theories about the failure of the state in providing this public good. The reality of nowadays is that states failed to provide budget for the court and to perform long terms reforms, which guarantee an effective judiciary. People need flexibility, speed and costless process, and for sure the guarantee of a fair trial. They are more interested in access to justice than access to court. States have accepted that, because of the fatigue with reforms and huge invoices for judiciary alternative mechanisms must be developed. Therefore, states have been supportive of ADR mechanisms, which are partly a creature of the state urged from the citizens trying to find a speedy solution with reduced costs for the dispute of subjects.

However, cheaper and faster is not necessarily better and there are many challenges with ADR regarding the safeguards of the system of justice. ECtHR has accepted that the fair trial principle under Article 6/1 of the ECHR is directly applicable to private adjudication, but on the other hand it is the state that has to guarantee the due process provided from the private entities. International and European policy nowadays is towards promotion of the ADR in civil and commercial dispute, and forget about litigation. As a consequence, states are requested to promote the mechanism of ADR on commercial, investment and consumer arbitration. Recently, we are witnessing the spread of ADR for online commercial disputes also.

[121] See , Iliria vs Republic of Albania, Pranvera shpk vs Republic of Albania

Overall, states should stop the old policy of the strong control to the private adjudication, but also should have a real vision on the organisation and functioning of the ADR to guarantee the safeguards of private adjudication as a public service, based on a real assessment of the ADR system. Although, in parallel states have to make efforts to re-establish the civil justice as a public good, that the civil courts not been in the future out of the business in fulfilling their significant social purpose on the execution of the individual rights effectively, that is as important to the health of the society.

Regarding this article's specific case study, the Albanian government's stated policy is to strengthen the judiciary through the deep reform it undertook recently. Mediation as a mechanism of dispute resolution remains very limited, and we lack data to make an informed judgement about it. There is a strategy that has as an only objective the promotion of the mediation and adoption of the new legal framework on arbitration. That strategy seems to be drafted in dark and with a lack of the vision, as far as there is no database and research on ADR in Albania followed by a professional assessment. Now is the time for the state to think seriously on alternative dispute resolution and access to justice, meanwhile Europe and the entire world is finding the mechanism to fully ameliorate and create a high standard of providing justice to citizens.

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Bibliography

Harel.A, Why Law Matters, 2014, Oxford legal philosophy

Gearey.A, Morrison.W and Jago. R, 'The politics of the common law- Perspectives, rights, processes, institutions', 2013, Routledge, second edition,

Genn.H, Judging Civil Procedure, Cambridge University Press, 2010

Capaldi.N, The ethical foundations of Free Market Societies, 20 J. Private Enterprise 30, 37(2004)

Caplan.B &Stringham.E, Privatising the adjudication disputes

Hibou.B, Privatising the state, 2004, Columbia University Press

Genn.H, Paths to Justice, Oxford: Hart, 1999

Sturner.M, 'ADR and adjudication by state courts: competitors or complements 'in 'The role of

consumer in ADR in the administration of justice", SELP, 2014
Ghodoosi.F, International dispute resolution and the public policy exception, Routledge, 2017
C.M.Hanycz, 'More access to less justice: efficiency, proportionality and costs in Canadian civil justice reform`' Civil Justice Quarterly, 27:1 (2008); H.Genn
Fiadjoe.A, Alternative dispute resolution: A developing world perspective, Routledge, 2004
Ringquist, Do procedural human rights requirements apply to arbitration-a study of Article6(1) of the ECHR and its bearing upon arbitration, 2006, www.lunduniversity.lu.se
Sweet.Stone.A & Grisel.F, "The evolution of international arbitration"(Judicialization, Governanace, Legitimacy), Oxford University Press, 2017
Inchausti.F, 'Specific problems of cross-border consumer ADR: What solutions?' in 'The role of consumer ADR in the administration of justice', Sturner. M, Inchausti. F, Caponi.R, SELP, 2015
Lopez. M, "On minimum standards in consumer ADR", in "The role of consumer ADR in the administration of justice", Sturner.M, Inchaysti.F, Caponi.R, SELP, 2015
Creutzfeldt.N, 'Alternative Dispute Resolution for Consumers' in 'The role of consumer ADR in the administration of justice', Sturner. M, Inchausti. F, Caponi.R, SELP

ECtHR Case Law

Case Stran Greek Refineries and Stratis Andreadis v. Greece, no. 22/1993/417/496, dated 9 December 1994.
Case Lithgow and others v. United Kingdom, (no. 9006/80; 9262/81, 9262/81, 9265/81, 9266/81, 9313/81, 9405/81), dated 24.06.1986.
Case Bramelid and Malmstrom v. Sweeden, no.8588/79 and 8589/79.
Case Jacob Boss Söhne KG v Germany, (no. 18479/91), dated 2.12.1991.
Case Axelsson and others v. Sweden (no. 11960/86), dated 13.07.1990; Momcilovic v. Croatia (no. 11239/11), dated 26.05.2015
Case Deweer v. Belgium, no.6903/75, dated 27.02.1980.
Case Suda v. Czech Republic, (no.1643/06), dated 28.10.2010
Case Day S.R.O and other v. Czech Republic (no. 48203/09), dated 16.02.2012
Case Hakansson and Sturesson v. Sweden, no.11855/85, dated 21.02.1990
Case Nordstrom-Lehtinen v. The Netherlands, (no. 28101/95), dated 27.11.1996
Case Kolgu v. Turkey (no.2935/07), dated 27.08.2013
Case Alexon & Others v. Sweeden, (no.11960/86), dated 13.07.1990
Case Fragner v. Austria, (no.18283/06), dated 23.09.2010.
Case Suoavaniemi and other v. Finland, (no. 31737/96), dated 23.02.1999.
Case Tabane v. Switzerland, (no. 41069/12), dated 1.03.2016
Case Regent Company v. Ukraine, (no.773/03), dated 29.09.2008
Case Kin-Stib and Majkic v. Serbia (no.12312/05), dated 20.04.2010

European Legislation and International Agreements

Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008, 'On certain aspects of mediation in civil and commercial matters'
Directive 2013/11/EU of the European Parliament and of the Council "On alternative dispute resolution for consumer disputes and amending Regulation (EC) No.2006/2004 and Directive 2009/22/EC, starting implemented by July 2015.
Regulation (EU) No. 524/2013 of the European Parliament and of the Council of 21 May 2013 "On online dispute resolution for consumer disputes and amending Regulation

(EC) No. 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), starting implemented by January 2016.
Rec 98/257/EC 'On the principles applicable to the bodies responsible for out of court settlement of consumer disputes', dated 17 April 1998.
Rec 2001/310/EC "On the principles applicable to the bodies responsible for out of court settlement of consumer disputes", dated 19 April 2001.
New York Convention, 1958, " On the Recognition and Enforcement of Foreign Arbitral Awards"
ICSID Convention, dated 18 March 1965, entered into force on October 14, 1966.
International Chamber of Commerce Paris, (ICC Rules)

Albanian Legislation
Albanian Constitution
Civil Procedural Code of Albania, originating law no.8116, dated 29.03.1996 and amended recently through law 38/2017, dated 30, 03. 2017.
Law no. 10 385 'On mediation of dispute resolution' amended recently through law 26/2018, dated 17.05.2018.
Law no. 8687, dated 9.11.2000 "On the Accession of Republic of Albania in the European Convention of Arbitration"
Law no. 8688, dated 9.11.2000, "On the Accession of Republic of Albania in the Convention 'On Recognition and Enforcement of the foreign judgments of International Arbitration' "
Draft-Law "On International Arbitration in the Republic of Albania"
International Arbitration Cases
Case Iliria vs Republic of Albania, International Arbitration under ICC Rules,
Case Pranvera shpk vs Republic of Albania, International Arbitration under the ICC Rules
Other materials:
Albania Progress Report 2016, dated 9.11.2016, SWD(2016) 364 final
Albania Progress Report 2018, dated 17.04.2018, SWD (2018) final
Tampere summit of the European Council, 15-16 October 1999
COM (2010) 245, A digital agenda for Europe
Eurobarometer No.342, 2010
Final Act of the United Nation Conference on International Commercial Arbitration (E/Conf.26/8Rev.1) available at www.uncitral.org
Cross-cutting strategy of Justice, 2017-2020 adopted through the DCM no.773, dated 2.11.2016.