

Vytautas Nekrošius
Vilnius University
vytautas.nekrosius@tf.vu.lt

Arbitration vs. Mediation – The Lithuanian Situation

Abstract: The article discusses the development, features and perspectives of arbitration and mediation. The author carries out a detailed historical analysis of those dispute resolution mechanisms. Both arbitration and mediation are relatively new institutions in Lithuanian law and their emergence and development may be associated exclusively with the country's restored independence. Recently the Supreme Court of Lithuania, has encouraged their adoption and moved Lithuania towards the apparent pro-arbitration group of States.

The article analyzes the common features and differences between arbitration and mediation, and suggests which form should be attractive to the business community. The article reviews proposals to improve the mediation process (proposals to establish mandatory mediation for certain categories of cases, introduce some qualification requirements for mediators, etc.).

The article concludes that currently arbitration is more widely used than mediation in Lithuania as well as the existing case law.

Keywords: arbitration, mediation, Lithuania

Introduction

The methods of alternative resolution of civil and commercial disputes, and development of the mediation process in particular, have recently been extensively brought up-to-date. Undeniably, an important role in the development of mediation has been played by Directive 2008/52/EC of the European Parliament and of the Council of 12 May 2008 on certain aspects of mediation in civil and commercial matters as well as the obligation imposed on Member States to comply with it.

Even though the subject of the article may appear slightly flamboyant or even illogical (why should arbitration and mediation be contrasted?), it has been consciously selected because it provides a way to best present the respective advantages and disadvantages of the two institutes. On the other hand, it is apparent that the “competition” contained in the title is slightly artificial because mediation in Europe, at least

today, can by no means compete with arbitration, which is deeply rooted in history. Nevertheless, in Lithuania, this competition seems to be quite natural because both institutes are relatively “young” introductions to our legal system.

During the interwar period, in most parts of Lithuania, the Act on Civil Proceedings of the Russian Empire of 1864 as well as the Act on the Judicial System were binding¹. Neither of these Acts regulated issues connected with the operation of the arbitration court. During the Soviet occupation, Annex No. 1 to the Code of Civil Procedure of 1964² specified the principles of arbitration, but generally it mentioned arbitration only in the *ad hoc* sense. Furthermore, the impact of state courts on the proceedings was quite considerable. For these reasons, we can talk about the development of the institute of arbitration in Lithuania only after independence was reinstated, or to be more precise, since 6 April 1996 when the Parliament adopted the Act of the Republic of Lithuania on Commercial Arbitration³. The amended Act was approved by the Parliament on 21 June 2012 and has been in force ever since⁴ (this Act was drafted based on the model UNCITRAL Law). Another undeniable stimulus for arbitration’s development in Lithuania was the ratification of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards⁵ by the Lithuanian Parliament on 17 January 1995. This Act for the first time clearly separated state courts and arbitration court competence and created favorable conditions for the development of arbitration.

The beginning of mediation in Lithuania dates to 15 July 2008, when the Parliament adopted the Act on Mediation in Civil Disputes to implement Directive 2008/52/EC.⁶ Thus, arbitration and mediation got their starts in Lithuania only a decade apart. Historically, the beginning of the development of both institutes is separated by only a decade, therefore the comparison of the intensity of their progress is not so illogical as it may seem at first glance.

1. Features common to arbitration and mediation

1.1. The voluntary title of procedure

The parties must mutually agree to arbitrate or mediate a dispute. In fact, as far as mediation is concerned, the legislator may determine specific categories of disputes where the parties would be obliged to take advantage of the mediation process before

1 Č. Butkys (ed.), *Civilinės teisenos įstatymas*, Kaunas 1938.

2 LTSR civilinio proceso kodekso komentaras 1980, Vilnius.

3 Lietuvos Respublikos komercinio arbitražo įstatymas No. I-1274, www.e-tar.lt (31.01.2017).

4 Lietuvos Respublikos komercinio arbitražo įstatymo nauja redakcija No. XI-2089, www.e-tar.lt (31.01.2017).

5 *Valstybės žinios* (Journal of Laws) 1995 No. 10-208.

6 Lietuvos Respublikos civilinių ginčų taikinamojo tarpininkavimo įstatymas No. X-1702, www.e-tar.lt (31.01.2017).

going to court. In Lithuania, a possibility of introducing obligatory mediation in family matters⁷ is now considered with particular vigour. Such settlements are reached voluntarily by the parties and the State does not participate in this process at all. If such settlements have been reached, courts are not entitled to resolve the dispute. The Lithuanian Supreme Court repeatedly has ruled that “arbitration is a commonly recognized alternative method of dispute resolution equivalent to litigation. This alternative jurisdiction is based on the arbitration clause made voluntarily by the parties whereby they submit specific disputes to be heard by the arbitration court. The parties not only authorize arbitrators to deal with their dispute, decide about possible subjects of the dispute and principles applicable to the settlement, but also waiver the right to apply to a court in any country to deal with the disputes listed in the abovementioned arbitration clause. Hence arbitration jurisdiction is based on the principles of the parties’ availability and binding nature of agreements...”⁸ Regarding the moment of reaching a settlement, mediation processes are even in a more favorable situation than consideration of a dispute before an arbitration court because pursuant to Article 3, paragraph 3 of the Act on Mediation, the court hearing the case may propose the parties to make an attempt at solving the dispute through mediation.

1.2. Disputes subject to arbitration court and admissibility of mediation

As far as the admissibility of arbitration and mediation is concerned, the same rule is generally in force thereto, according to which these methods of civil and commercial disputes resolution are admitted in all cases except statutorily imposed restrictions. Article 12, paragraph 2 of the Act on Arbitration, envisages that the arbitration court cannot accept disputes that are not civil/commercially orientated as well as disputes resulting from family law relations or disputes concerning the registration of patents, trademarks and patterns. Similarly, the arbitration court cannot be submitted disputes resulting from employment agreements and consumer agreements except cases where the arbitration clause was made after the occurrence of the dispute. The third paragraph of the same Article envisages that the arbitration court cannot be submitted disputes if one of the parties is a State Treasury company or self-government company, or state or self-government office or organization except the Bank of Lithuania if a prior consent of the founder of the company, office or organization was not obtained with regard to the arbitration clause. Moreover, we should pay attention to the fact that in the amended Act the initiation of insolvency proceedings against one of the parties is not an obstacle to considering the dispute through arbitration. Comparing relevant Articles of the Acts before and after the amendment, we may draw the unambiguous conclusion that in Lithuania arbitration is more and

7 Lietuvos Respublikos civilinių ginčų taikinamojo tarpininkavimo įstatymo projektas, www.e-tar.lt (31.01.2017).

8 Civilinė byla No. 3K-3-320-611/2015.

more trusted because the catalogue of disputes subject to arbitrations is consistently extended.

Article 1, paragraph 2 of the Act on Mediation envisages that all disputes may be subject to mediation except those whereby reaching a settlement agreement is banned. Therefore, comparing the possibilities of resolving disputes through arbitration and mediation, it is apparent that the legislator admits a wider application of mediation.

1.3. Confidentiality

Both arbitration and mediation proceedings are bound by the principle of confidentiality, which is one of their most important advantages with regard to justice administered by the State. Entrepreneurs are assured an opportunity of a discreet resolution of the dispute. Furthermore, stability and security of business relations are guaranteed, which is indeed of great value. The confidentiality guarantee often is one of the most important reasons for business entities to choose alternative methods of dispute resolution.

Confidentiality boundaries are broader in mediation than arbitration. Article 7 of the Act on Mediation envisages that information about mediations and data obtained therein shall not be submitted, not only outside but to the court of arbitration or court as well (if the mediation has failed to bring a settlement) except cases when both parties do not object to this, or if failure to provide information would be contrary to public interest (e.g. if the interests of the child require disclosure of the information).

1.4. A possibility of selecting the course and place of dispute resolution

Although both permanent arbitration institutes and mediation service providers always follow their own approved rules of conduct, the parties have discretion to decide freely about the course under which the dispute will be resolved. Under such an agreement, a party may waive the application of institutional principles of dispute examination in whole or in part. Moreover, the parties to the dispute are free to decide about the place where their dispute will be resolved. Such possibilities of the parties to determine the course and place of the dispute resolution confirm that the methods are “friendly” to the parties and emphasize the equality of the parties, the arbitrators or mediators.

1.5. Limited possibilities of the State’s interference with dispute resolution in arbitration or mediation

Both arbitration and mediation are protected (even with regard to court mediations) against the State’s interference with these proceedings. Neither courts nor other state bodies are entitled to interfere in dispute resolution. In arbitration a court may acquire specific rights exclusively upon the parties’ or arbitrators’ request (e.g., if there is a need for support to carry out investigation, or the application of interim

measure is requested), or in case of the examination of the appeal against an arbitration decision (here we should notice that hearing a complaint, a court does not examine a dispute as to its essence but only verifies if the arbitration decision cannot be reversed due to the statutory grounds transferred from the New York Convention). With mediation, the situation is even simpler because the only competence of the court is a possibility to refuse the approval of a settlement reached in mediation if it contradicts imperative legal norms or public interest.

It appears that both methods share many common features; yet there are differences between them which should be briefly discussed.

2. Differences between mediation and arbitration proceedings in Lithuania

2.1. A different degree of advancement of dispute resolution

Arbitration is a final method of defending the appealed substantive subjective rights or interests protected by the law. Article 41 of the Act on Commercial Arbitration clearly indicates that a decision issued in the case is valid from the moment of its issue and should be enforced. If the parties do not enforce the decision issued by the arbitration court, the enforcement body is entitled to apply to a court enforcement officer for coercive enforcement. An arbitration decision may be appealed solely in cases specified by the law, as beforementioned. Therefore, taking advantage of arbitration, the party loses every possibility of reapplication to a state court for the resolution of dispute between the same parties on the same subject and on the same grounds. With mediation, the situation is clearly different and for several reasons. Firstly, mediation is chosen as a certain pre-trial or pre-arbitration possibility of dispute resolution. That is why in case of failure the claimant will apply to the court or court of arbitration for examination of the same dispute. Secondly, opposite to litigation or arbitration, the party may withdraw from mediation at any time. This difference may be assessed as both an advantage and disadvantage of mediation. The advantage is the fact that the party may treat an additional possibility of amicable resolution of the dispute quite positively knowing that mediation does not prevent further examination of the case. On the other hand, additional costs and longer proceedings will result if a settlement is not reached.

2.2. Different purposes of proceedings

With regard to arbitration as civil proceedings, even if arbitrators fail to make the parties conclude a settlement agreement, the dispute is resolved anyway as to its essence on issue of a decision by the arbitrator(s). On the other hand, Article 2 of the Act on Mediation defines mediation as a procedure resolving civil disputes under which one or more mediators assist the parties to a civil dispute to reach an amicable agreement. Hence the only possible positive ending of mediation is the conclusion of

a settlement agreement by the parties to the dispute. Otherwise mediation is found unsuccessful. In fact, a mediator is an intermediary between the two parties to the dispute helping them find an amicable settlement. That is why mediation's main purpose is not examining the facts of the case but rather finding common ground upon which the parties are agreed.

3. General background of both proceedings

Even though both proceedings in Lithuania emerged almost concurrently, arbitration's decade longer history has generated positive effects visible at several levels. Most of all, after the first ten years of arbitration's functioning in case law, this method has been recognized as an equal alternative to litigation in a national court. In effect, the Lithuanian case law has recently become very arbitration oriented. Concerning binding arbitration clauses, the Lithuanian Supreme Court has repeatedly stated that "in case of doubts as to the existence or effectiveness of the arbitration clause, doubts are dispelled in favor of the arbitration clause, i.e. the favor contractus principle applies. If the parties expressed their intent to resolve disputes before arbitration court, the court should fulfill the parties' will in this respect even if some aspects of the arbitration clause are inaccurate or imprecise. The parties' will should be fulfilled if the arbitration clause may be enforced without favoring the rights of any party thereto. Hence first of all, courts should interpret the arbitration clause applying the favor contractus principle. Secondly, interpreting the arbitration clause, such interpretation should prevail which would allow to maintain the effectiveness of the arbitration clause (the principle of effective interpretation)."⁹ Considering the principle of court priority to hear a dispute, according to which if several individuals initiate a few claims where examination of at least one is subject to court jurisdiction, all of them are heard before the court. The Lithuanian Supreme Court clearly and explicitly explained that due to the existence of the arbitration clause this principle does not apply. The Lithuanian Supreme Court emphasized that "Provisions of Article 24 of the Code of Civil Procedure are not intended to regulate relations between the court and arbitration. The purpose of the above mentioned Article regulating priority of submitting a case to a court is the intention to provide the parties with the right to court defense, and it should be applied when some claims are subject to the court jurisdiction and the other – to different bodies. It should be stated that when the arbitration clause applies to some claims brought in the case and there is no such a clause with regard to others, these claims may be separated factually and legally (they result from different transactions between different people, etc.), and they should be heard

9 Decision of the Judicial Council of Civil Cases Department of the Lithuanian Supreme Court issued on 2 October 2013 in the civil case UAB AK "Aviabaltika" v. Flight Test Aerospace INC, case No. 3K-3-431/2013.

separately.”¹⁰ Finally, the most recent case law of the Lithuanian Supreme Court has recognized and allowed to enforce the decision of the arbitration court in Stockholm against the Republic of Lithuania, where an anti-suit injunction was applied against Lithuania (Lithuania was obliged to discontinue the initiated proceedings) even though the Lithuanian Supreme Court stated in the issued decision that “there is no anti-suit injunction in the verdict of a foreign arbitration court which applies to the recognition of and permission to perform specified obligations”¹¹.

The previous examples confirm that during its twenty-year history, arbitration has achieved a strong position in being seen equal to justice administered by state courts. Significantly enough, due to their diligent and consistent work, permanent arbitration institutes operating in Lithuania have won courts’ trust, without which such case law might not have developed at all.

Nevertheless, it should be acknowledged that arbitration as a method of dispute resolution is not yet as popular among entrepreneurs in Lithuania as in other countries of well-established arbitration tradition such as Holland and Switzerland. That may be explained though by habits taking a while to change. After analyzing statistics published by the Vilnius Court of Commercial Arbitration (hereinafter VCCA), the arbitration institute which is the largest, oldest and appointed by all major business associations, it is apparent that arbitration is already well-established and year-on-year enjoys an even stronger position in the business world. This is further confirmed by the fact that recently the volume of claims processed has been increasing not in percentage terms but in number¹².

Mediation in Lithuania looks slightly different in this respect. Because this institute is quite young in the Lithuania’s legal system, it may be claimed that entrepreneurs and attorneys have now gradually started to understand it as a method of dispute resolution. The Act envisages two possible types of mediation – court and out-of-court. The Court Mediation Procedure Rules¹³ approved by the Judicial Council under the decision of 26 September 2014, determine that it is a procedure of resolving civil disputes whereby one or several court mediators (persons who were granted the status of court mediators under the decision of a committee appointed by the Judicial Council under the specified course) help the parties to the civil proceedings to settle the conflict amicably. Therefore, court mediation is always carried out on the basis of a court civil dispute and solely by court mediators. Respectively, out-of-court mediation ensues mediation in resolving any civil dispute whereby a mediator appointed by the parties is an intermediary. It should be noticed that an

10 Decision of the Judicial Council of Civil Cases Department of the Lithuanian Supreme Court issued on 2 April 2014 in the civil case J. N. v. N. N., UAB VP GRUPĖ, case No. 3K-3-171/2014.

11 Civil case No. 3K-7-458-701/2015.

12 www.arbitrazas.lt 2017 02 08 (31.01.2017).

13 www.teismai.lt 2017 02 08 (31.01.2017).

out-of-court mediator can be any person appointed by the parties. The Act does not impose any requirements in this respect. Because the State does not practically regulate the activity of private mediators, it is quite complicated to acquire data about it (also due to the principle of confidentiality). On the other hand, given that there are now companies providing mediation services in Lithuania, we may conclude that out-of-court mediation occurs to some degree.

Officially published statistics¹⁴ reveal that 47 persons held the status of court mediator in 2013, whereas at the end of 2014 the number had increased to 109. Out of 66 persons granted the status in 2014, 26 were representatives of the court system whereas the others were attorneys, attorney trainees, lawyers, civil servants, and other. In 2014 court mediation was applied in 53 civil cases and a settlement agreement was concluded in 12 of them. 60 percent of court mediations concerned disputes resulting from family law relations. The year 2014 was important for court mediation because the Judicial Council approved the abovementioned rules and decided to apply mediation in all courts in Lithuania. Despite this, there are no official data for 2016. Yet it is already apparent that the number of mediations is clearly growing. Hence it may be claimed that, in time, court mediation will become a natural and, in many cases, inseparable part of a civil court hearing before a state court (even more due to the drafted amendments to the Acts prepared by the Ministry of Justice whereby it is proposed to introduce court mediation to some cases connected with family law relations). The rules of court mediation envisage that mediation may be applied in a specific case solely upon the agreement or support of the parties to the dispute with the court's proposal. According to the general rule, a mediator is usually not the judge hearing the case, but if she or he undertakes to carry out mediation, when the parties do not reach agreement, the judge is obliged to refrain from further participation in the case. It is apparent that the court hearing the case has quite many arguments during preparations to litigation to encourage the parties to take advantage of court mediation; the parties may be motivated by both the length of a lawsuit and its complex nature, or a possibility of recovering some proceedings costs. Moreover, other arguments may also be presented. If the parties approve of the mediation's proposal, after considering the parties' opinion, the court hearing the case appoints a court mediator (out of those enjoying this status), or carries out mediation itself if it has been appointed a court mediator under a specified course and the parties do not object to this. It is obvious that the court hearing the case should undertake to fulfill such a function only if they see a real possibility of reaching a settlement agreement. Otherwise unsuccessful mediation will considerably prolong the proceedings. If court mediation is successful, the court hearing the case approves of the settlement agreement concluded by the parties and discontinues the case. Otherwise the case is continued to be heard. That is why a significant advantage of court mediation is the fact that it

14 www.nta.lt 2017 02 08 (31.01.2017).

is initiated by the court hearing the case, whose opinion will absolutely be taken into consideration by both the parties to the dispute and their attorneys.

As far as out-of-court mediation is concerned, the situation is generally different. Here nobody from “outside” encourages the parties to take advantage of mediation services. Therefore, their popularity mostly depends on which model of dispute resolution prevails both in the society and the world of business alike. Today it is safe to say that in Lithuania the model of dispute resolution prevails as to its essence. It means that if a dispute between the parties reached such a level that they are not able to solve it themselves, they most frequently choose litigation or arbitration because the case will be resolved under any of the abovementioned procedures as to its essences. We need many years of instruction and education to change this attitude. That is why today it seems that the most prospective model is the one where the parties decide to try to resolve the dispute through mediation before choosing litigation or arbitration. This model is not so popular because the parties often anticipate it is likely to prolong the proceedings.

Summary

Considering the arguments presented above, it can be concluded that arbitration is incomparably more popular than mediation as an alternative method of dispute resolution. The institute of court mediation faces the best possibility of development in the nearest future because the court hearing a concrete case encourages to apply it whereas the parties to the dispute are willing to take it into account appropriately.

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