CONCILIATION AS A MEANS OF ADR VS ARBITRATION AND MEDIATION

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Abstract: *Currently, alternative methods of dispute resolution are increasingly being developed, their specific forms of conflict resolution of different tones and hybrid forms of resolution of several different issues are also emerging. This article examines scientific-theoretical approaches as well as international and foreign legislation practices to reveal the importance and special features of such settlement as arbitration and mediation as one of the alternative forms of dispute resolution. In particular, the process of carrying out the conciliation process of such countries as China, Korea and India from Asian countries, the Russian Federation from the CIS countries, Germany, Hungary and Ireland from the European Union as well as Australia and Brazil will be analyzed comparatively by studying their similarities and different aspects,*

Key words: *Alternative methods of dispute resolution (ADR), Arbitration, Mediation, Conciliation, Conciliation agreement, Conciliator, Judicial conciliator, Judicial mediator, Conciliation center*

Introduction

Today, the importance of alternative dispute resolution tools is growing. There are several reasons for this tendency. The first is to ensure that disputes are resolved quickly and efficiently, while the other is to reduce the workload of state courts, which is the traditional way of resolving such cases. This trend is developing not only at the international level, but also in the territory of a particular country, including Uzbekistan.

At this point, we need to focus on what is meant by alternative dispute resolution.

Alternative Dispute Resolution (“ADR”) refers to any method of resolving disputes out of court. The ADR combines all the processes and methods of conflict resolution that arise outside any public authority. The most popular ADR methods are mediation, arbitration, conciliation, negotiation and settlement [i].

All ADR methods have common features, i.e. they allow the parties to find solutions to their disputes outside of traditional litigation, but are governed by different rules. For example, unlike mediation and conciliation, there is no third party involved in the negotiations to assist the parties in reaching an agreement, where the purpose of the third party is to facilitate the conclusion of a settlement agreement between the parties. In arbitration, a third party (arbitrator or several arbitrators) plays an important role due to the fact that an arbitration award is subsequently binding on the parties. By comparison, in conciliation and mediation, a third party cannot influence a binding decision for the parties.

Although ADR methods have different characteristics, they all have the character of complementary means and differ from each other in their application in practice and legal mechanisms. The main advantages of ADR are speed, privacy and flexibility.

Methodology

The research methodology is based both on the general scientific methodology of cognition of reality and private-scientific methods: historical, system-structural analysis, comparative legal analysis, analysis of judicial practice data. The study of procedural legislation, mediation, and legal consultation, as well as several national sources and other regulatory acts was carried out using the methods of specific research, logical and statistical analysis. In work, the author relied on the results of research by Europian, Russian and American legal theorists in the considered and related fields of knowledge, and international frameworks as well as the foreign legislations and practices of certain countries like Germany, Ireland, Hungary, Brazil, Russia, China, India, Australia and South Korea.

Results

At present, Uzbekistan has adopted special laws regulating ADR methods such as arbitration and mediation. In particular, the Law of the Republic of Uzbekistan on Mediation of July 3, 2018 LRU-482 “On Mediation” and the Law of the Republic of Uzbekistan on Arbitration of February 16, 2021 LRU-674 “On International Commercial Arbitration” can be quoted as an example.

But there is no special law on conciliation. In other words, this mechanism exists in the form of scattered norms as alternatives to existing national legislation, which also regulate only a certain stage of conciliation. In particular, in national legislation, the ADR in the form of conciliation exists in the form of “settlement agreement” and “conciliation”, but there are no norms that disclose its content and regulate its implementation with the participation of a third party.

In particular, in the case of crimes under Article 66^1 of the Criminal Code of the Republic of Uzbekistan [ii] according to Chapter 62 of the Criminal Procedure Code of

the Republic of Uzbekistan [iii], on cases on administrative offenses specified in Article 21^2 of the Code of Administrative Liability of the Republic of Uzbekistan in accordance with Chapter $XXIII^1$ of this Code [iv] and at all stages of civil proceedings in accordance with Chapter 17 of the Code of Civil Procedure of the Republic of Uzbekistan [v] and at all stages of economic proceedings in accordance with Chapter 16 of the Code of Economic Procedure of the Republic of Uzbekistan [vi] the settlement agreement is allowed. The specific features of concluding a conciliation agreement in national legislation are:

- the agreement is made only through the court;
- the proceedings are terminated when the settlement agreement is concluded;
- the settlement agreement is approved by the court and is not reapplied to the court on the executed case.

In this regard, the institute of conciliation in national legislation differs somewhat from the views of scholars on the scientific and theoretical content of conciliation and the basics of international and foreign law.

According to Olive du Preez, conciliation is an easy way to resolve conflicts where positive relationships are established. In doing so, the conciliator seeks to establish a positive and conciliatory relationship between the parties. The goal is to correct the relationship, reduce fear, and improve communication to guide the parties to negotiate and compromise without conflict. He also explained that conciliation is a psychological component of the mediation process and that the parties have the opportunity to determine their final outcome. A similar idea was quoted by Pretorius. He stressed that conciliation is an organized negotiation process, which is the first stage in bringing the parties into the mediation process [vii].

So, it is clear from these comments that conciliation is neither a negotiation nor a mediation. On the contrary, conciliation is a separate form of ADR between negotiation and mediation and is a process that takes place through an independent third party, as opposed to the case provided for in the above national legislation.

According to Angelina Isabel Valenzuela Rendón, the conciliation is a process involving the actions of the parties aimed at reaching a settlement agreement through a process conducted by a person or persons (a conciliator or conciliation commission, if there are several conciliators) who does not have the power to make an independent decision on a dispute between the parties, but an independent neutral third party that can give recommendations to the parties to reach a mutually real, real, effective and enforceable agreement.

It should be noted that in this case, too, the principle of impartiality and independence of the conciliator is emphasized. It can be concluded that the conciliator must be an independent person with no connection to the parties and the state. This situation also shows that the conciliation is very different from the form provided in the national legislation.

Also, although Angelina Isabel Valenzuela Rendón emphasizes that albeit mediation and conciliation are automatic compositional methods of dispute resolution, they differ from each other because in the mediation the mediator has no right to make recommendations, and in conciliation he can make recommendations to the conciliating parties and even this is considered correct [viii].

In this case, we can see one of the main features of conciliation that differs from mediation. This is because the national legislation does not give the mediator the right to express his independent opinion on the case as a basis for a settlement agreement.

The result of the conciliation process is a settlement agreement. Of course, a settlement agreement can only be enforced if it does not act in violation of the law and if it complies with all established legal rules. As the requirement of legality is important so that there is no problem in enforcing it. Voluntary enforcement of a settlement agreement is also possible only when permitted by law.

So how similar and different is the execution of a settlement agreement with the execution of other forms of ADR? The answer to this question can be found in international and foreign law.

According to P.T. Esenbekova, in fact, the enforcement of a voluntary settlement agreement is also based on a court decision [ix]. As noted above, national law also stipulates that a settlement agreement must be enforced by a court order approving it.

This means that although the settlement agreement must be enforced, it will depend on the legislation of the particular country. In this case, voluntary execution can be understood as voluntary performance of a contractual obligation or execution of a court document without coercive measures on the terms set out in it.

In particular, the conciliation agreement reached in Colombia is binding in accordance with Act No. 446 of 1998 [x].

The International Conciliation Act is the 2002 UNCITRAL Model Law on International Commercial Reconciliation. For the first time, the document provides a legal definition of conciliation. According to Article 1, paragraph 3 of this document, “conciliation” is a process in the form of the participation of a third party(s) or mediation, conciliation, provided by the parties assisting the parties in resolving disputes arising from contractual and other legal relations. The conciliator has no power to compel the parties to settle the dispute [xi].

Hence, in this norm, it can be seen that conciliation is confused with mediation. This situation changed in 2018, and in order to avoid similar uncertainties, the 2002 UNCITRAL Model Law was amended and renamed in 2018. Thus, the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, consisting of 3 parts, was adopted. The second section of this document is devoted to mediation, and the third section is devoted to conciliation [xii].

According to these international documents, the conciliation process differs from the ADR forms in the form of mediation and arbitration with the following features:

Firstly, a third party can move more freely and present his or her views on the case as an invitation to the parties.

Secondly, it is not necessary to enter into a separate agreement, such as in mediation or arbitration, to initiate the process, but rather one party submits an offer to the other party 30 days before the start of the conciliation process.

Thirdly, the amicable agreement signed at the end of the conciliation is binding on the parties only if they reach the final conclusion that this agreement will resolve the dispute. At the same time, the national legislation of the states has different mechanisms for its implementation. But the main difference is that it is not as binding on the parties as it is in mediation, nor is it as binding on the parties as in arbitration. Because it can be changed or canceled until it has a mandatory play feature. The parties can then apply to other forms of ADR or a state court.

In the national law of some countries, the parties to a dispute through conciliation may appoint an arbitrator to reach an arbitral award based on the conciliation agreement they have entered into, thereby enforcing the enforcement. Such legislation and practice exist in **Hungary** and the **Republic of Korea**.

In **China** and the conciliation process is conducted by the arbitral tribunals, as the law allows them to reach a written conciliation agreement or an arbitral award based on it if the settlement is reached as a result of the conciliation. Interestingly, both documents are genuine and equally valid.

In some jurisdictions, the status of a settlement agreement reached after conciliation depends on whether the settlement occurred in the judicial system and the legal process applied to the dispute. For example, under **Australian** law, agreements reached in conciliation outside the scope of conciliation schemes annexed by the court are not registered by the court and cannot be enforced. On the contrary, the court will issue an enforcement order only if this rule is followed.

In **India** while the settlement agreement signed by the parties, it has the same status and effect as the arbitral award under the Arbitration and Reconciliation Act of

1996. Because the conciliation process is conducted by the arbitral tribunal and ends with the issuance of an arbitral award. According to this Act, conciliation does not apply to criminal cases, illegal transfers and family matters, including divorce [xiii].

In **Germany** according to the Code of Civil Procedure (Zivilprozeßordnung), conciliation is carried out in an arbitration proceedings provided by the court and approved by a binding arbitral award.

In addition, in the **Honkong Special Administrative Region** of China the conciliation agreement will be enforced and executed by the Court of First Instance only if the conciliation is conducted in an arbitration process based on an arbitration agreement.

In **Ireland** there is also a special law on conciliation. This is the 2010 National Conciliation Act. A distinctive feature of the Irish Conciliation Institute is the contractual nature of the resulting settlement agreement, which means that its implementation is voluntary, if not, there is liability for non-performance of contractual obligations. In this case, the party will be able to apply to the court under the settlement agreement [xiv].

The procedural rules governing the institution of conciliation emerged in the **Russian Federation** after the 2018 "procedural revolution". In accordance with the Federal Law "On Amendments to Certain Legislative Acts of the Russian Federation" of July 26, 2019, relevant amendments were made to the Code of Civil Procedure, the Code of Arbitration and important provisions of the legislation of the Russian Federation on Notaries. According to him, the conciliation process will be applied not only in the civil process, but also in the administrative process. According to the new amendments, the conciliation process has been defined in court, arbitration and out-of-court forms.

Under the new reforms in the Russian Federation, a judical conciliation has given the judge the right to recommend the conciliation process to the parties before the trial. In arbitration, the parties can take the initiative and move from arbitration to conciliation. A document that is the result of conciliation made in out of court and arbitration is said to be a document that, if it is notarized, can be enforced when it is not voluntarily executed.

According to the conciliation process in the trial, as mentioned above, the court shall adjourn the trial if the parties respond positively to the judge's proposal on the conciliation process on their own initiative. In this case, the trial is suspended until the parties fail to reach an agreement or refuse to continue the conciliation, or until the expiration of the period specified for the conciliation process, after which the trial resumes. As a rule, the reconciliation process lasts 2 months. It is noteworthy in this

case that the period of suspension of the court is not taken into account in the expiration of the period of consideration of the case in court.

The conciliation process in court is regulated by the Rules of Conciliation and procedural legislation approved by the Supreme Court of the Russian Federation. According to him, conciliation in court is carried out by a judical mediator on the basis of the principles of independence, impartiality and integrity. A former retired judge may be a judical mediator at his / her own discretion, and the list of judical mediators shall be approved by the Plenum of the Supreme Court of the Russian Federation, and the parties may choose a conciliator from this list.

In **the Federal Republic of Brazil** the conciliation and mediation process shall be regulated in accordance with the norms set out in Section 5 of the Code of Civil Procedure, which entered into force on 18 March 2016. In Brazil, conciliation centers have been set up in each court, which also provide mediation services. The activities of these centers are regulated by the relevant territorial courts and by the rules of the National Council of Justice. Judical conciliators, mediators, private mediation centers and chambers must be registered in the List of Courts of Appeal or Federal Courts of Appeal and in the National Register, which contains information on the field of activity of specialists in this field. [xv].

An analysis of the implementation of conciliation procedures in Russian and Brazilian civil proceedings allows the identification of standard features and differences.

In Brazil, the legal consolidation of these procedures is more precise, and the procedure is clearly understood: how, where, and by whom. The Brazilian Code of Civil Procedure provides for the establishment of specialized conciliation centers in each court, which significantly increases the attractiveness of these methods. In addition, the requirements for a judical mediator, registration, payment for services, and much more are clearly defined.

In the Code of Civil Procedure of the Russian Federation, in the Code of Arbitration of the Russian Federation, in the Code of Administrative Procedure of the Russian Federation, these procedures appear only as an opportunity to appeal to them in court. Therefore, it creates complications such as the parties having to refer to a lot of documents and prolonging the process.

Conclusion

The above-mentioned analysis of foreign experience and international legal practice shows that the importance of the conciliation process as a form of ADR in further simplifying and improving the quality of the dispute resolution process is manifesting itself globally at the beginning of the XXI century.

In order to reflect the conciliation process in the national legislation in a way that reflects its essence, as well as to bring national legislation in line with international legal framework and practice, a number of legal innovations should be introduced into the national legal system.

In particular, it is necessary to open conciliation and mediation centers under economic and civil courts in Uzbekistan. This can lead to the spread of unpopular mediation among the population, as well as to the promotion and practice of these forms of ADR, such as in Australia, Brazil and the Russian Federation, by offering conciliation and explaining its benefits to the parties and a reduction in the workload of the courts can be achieved.

Arbitration courts, as in Germany, China, India and the Russian Federation, should introduce the practice of conciliation in Uzbekistan, ie establish rules for conciliation in TIAC.

Introduce the practice of notarization, as in the Russian Federation, to ensure the implementation of out-of-court conciliation agreements, to adopt a separate law on conciliation, as in Ireland, or to establish the fundamental basis for this, as in the 2018 UNCITRAL Model Law. It is necessary to include Part 2 of the Law "On Mediation", which contains separate provisions on "Conciliation".

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