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MEDIATS Mediation: Training and Society Transformation

WHY BUSINESSES IN COUNTRIES OF EASTERN PARTNERSHIP NEED MEDIATION (BRIEF THEORETICAL DISCUSSION)

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Abstract. *Businesses are eager to use the dispute resolution mechanisms which are fast and require less costs. At the same time, these mechanisms should be neutral, free from corruption and must not have negative influence on business processes. Mediation is considered as one of the popular methods for solving the conflicts in business sphere. It is distinguished not only from courts but also from other methods of alternative dispute resolution. Gradually, mediation becomes popular in Eastern Europe and in post-socialist world as well. The court systems which are overwhelmed by disputes can benefit from mediators who can relieve the judges from the immense number of cases. Moreover, popularizing the mediation can be profitable for businesses too. Article gives the basic analysis of positive aspects of mediation and underlines its superiority in comparison to traditional courts and other methods of alternative dispute resolution.*

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Introduction

Mediation is considered as efficient alternative dispute resolution (ADR) mechanism which has potential to solve the conflict among parties with using less time, money and other resources than traditional methods of case solution. The efficiency of the ADRs is especially vivid in commercial cases when the parties want to solve the dispute as soon as possible because the conflict adversely affects the development of business, reduces the potential gains, increases the expenses and negatively influences the business processes.

Unfortunately, in the Eastern Europe, in the former member countries of Soviet Union, mediation is not well-developed institute and the businesses do not have the opportunity to fully use the potential of mediation as a tool for alternative dispute resolution.

In the developed countries, the mediation has long standing tradition as the efficient mechanism capable for dealing the interests of the parties and presenting them the best solutions. Almost in all countries, courts, as government bodies, lack flexibility regarding costs and length of procedures. Therefore, governments and civil society organizations advocate for using the measures for alternative dispute resolution, including mediation. Despite the challenges, mediation is widely considered as one of the best methods for managing the disputes among parties.

The situation is different in the Eastern Europe, especially in the countries which were previously members of the Soviet Union. Soviet totalitarian regime, closed and corrupt governance didn't give much options for free and apolitical dispute resolution process. Therefore, the court system was lacking trust and integrity. The situation regarding the courts is remaining largely unchanged. Though there are reforms implemented in the court system, it still has problems in integrity, qualification, and trust. The court procedures are scattered in time, and disorganized. This has also negative effects on the economic development. Therefore, there is a necessity for developing the effective alternative dispute resolution tool.

The article aims to give the readers the brief analysis of the positive aspects of mediation, and formulate the theoretical ground justifying its usage.

Literature Review

According to E. Sussman (2009) Mediation is a process in which the Mediator tries to bring parties together with using different methods [1, p. 56]. The methods of solving disputes among parties is associated with costs. The administrative procedures envisaged in the courts proceedings generally require more expenses than during the mediation.

Though it has been mentioned above that the mediation is relatively less developed in Eastern Europe, there are studies which demonstrate that evolution of Mediation is generally weak process in throughout the world too. In Policy Research S. Pouget (2013) has mentioned that more than half

of the countries surveyed out of 100 didn't have a consolidated law composing of all aspects of commercial mediation but at the same time, 64% of surveyed economies had laws that provide for court referral of cases to mediation [2, p. 9].

At the same time, costs and procedures of mediation is different not only from court proceedings but also from other alternative dispute resolution mechanisms as well, such as arbitration. Studies claim superiority of commercial mediation to commercial arbitration in terms of costs and procedures. S.I. Strong (2016) highlights that commercial arbitration is going through existential challenges, such as – cost of the arbitration which can be really huge, and the time for completing the procedures which, especially cross border disputes, require one to two years [3, p. 6]. There are also doubts about efficacy of the arbitration process [P. Lucarelli (2012), 4, p. 2]. With this, the costs and procedures of the courts is more similar to those of arbitration, therefore, mediation is different both from the courts and from the arbitration as well. E. Sussman (2009) states that "the opportunities and advantages afforded to the parties in a mediation have been proven time and again in the resolution of commercial private disputes" [1, p. 56].

Moreover, unlike courts, ADRs can offer "win-win" solutions where the parties can preserve their relationship [C. A. Carr and M. R. Jencks (1999-2000), 5, p. 209].

Most importantly the papers indicate that:

(a) With using mediation parties can get speedier resolution with reduced cost (E. Sussman (2009), 1);

(b) Mediation enables the business parties to preserve the steady relationship (C. A. Carr and M. R. Jencks (1999-2000), 5);

(c) Parties keep confidential information, and remain creative throughout the process [T. Stipanowich (2004), 6, p. 10];

(d) Commercial mediation is a dynamic, structured and interactive process where the neutral party is using negotiating techniques to resolve the problems, with this significantly reducing the burden on courts [EBRD, 7];

(e) Almost all economies, most importantly the developing countries, recognize voluntary mediation as a valid method of resolving the contractual disputes [World Bank, 8].

Despite the fact that there are number of articles and researches in this sphere, more should be done to precisely analyze the reasons of the problems of commercial mediation in EaP countries, particularly, why the mediation is not yet formed as the alternative to traditional dispute resolution, and whether the mediation is considered as sufficient legal mechanism for the businesses to apply to it when the disputes occur.

Aims

The purpose of this paper is to analyze the features of mediation for countries of EaP. It is impossible to discuss all issues in this paper, and article doesn't aim to give the detailed analysis of the challenges of mediation in the countries of EaP but this article will support the enhancement of the theoretical ground for further researches that should answer the questions about problems on commercial mediation and the execution of the measures for their solution.

Methods

To study the aspects of commercial mediation and support its promotion in EaP, we used various methods. First of all, the article is actively using the historical research method and compares the perspectives of different countries and viewpoints.

Furthermore, the paper uses doctrinal research with analyzing legal concepts, and principles.

At the same time, we used the method of policy analysis with analyzing the documents of international organizations and policy briefs.

Results and Discussion

As it was mentioned above, socialist regimes affected the development and freedom of courts. This resulted in creation of the quasi-judicial institutes which needed reforms to improve their functioning.

What were the main problems in judicial system after the collapse of the Socialist Bloc:

- Lack of neutrality: in Soviet Union, and in socialist countries of the Eastern Europe, the judicial system was politicized, therefore, it was under heavy influence of central government. This absence of impartially remains till nowadays and affects the development of the court system. It is widely assumed that the court systems in EaP are comprised of members of specific, and closely connected, groups of individuals, which control the judicial system and are dealing with the government.

- Corruption: judicial systems in Post-Soviet world are one of the most corrupt institutions. Though number of reforms were held in countries of EaP aiming to reduce the area for corruption, the effects of these reforms are weak.

- Lack of professionalism: this particular problem is still considered as one of the core problems despite the huge efforts both from the side of the state and from civil organizations to bolster the competence among representatives of the court sphere.

These problems cause the following material adverse effects:

- Lack of trust: from the purposes of our paper we can say that the trust from the investors side is important because it enhances the economic development of the country, and attracts further investments. Parties know that if they can trust the impartiality and neutrality of the court system, it will positively affect their will to invest money.

- Violation of administrative procedures which are envisaged to deal with the court cases. Judges are violating the reasonable time-schedule given for discussing of the certain cases, and are discussing them with violation of the established procedures;

- Absurd amount of resources allocated for hearing. These resources include time till the final decision will be announced, finances spend for the preparation of the case and payment of the court fees.

Going to the court is becoming not a business wise choice.

Therefore, using of the alternative dispute resolution mechanisms is strongly recommended. From the discussion above, the mediation should consider the following challenges:

- Allocation of resources – the time and money spend on the mediation should be less compared to the resources we are using during the court hearings.

- Impartiality – the mediators should be neutral and trustworthy individuals who can deal with both parties, and neither of the parties should have the feeling that they are cheated or misled.

- Professionalism – there is no obligation for the mediators to be representatives of the legal sphere. But as they are representatives of the private sphere, their low competence would be more vivid, and the attitude from the parties towards the mediation will be lowered.

Is the mediation the institute which can overcome the challenges of the court system, and present itself as the prominent alternative dispute resolution body?

Positive aspects of mediation:

Mediation can become the important tool for solving the disputes. There are several positive aspects of mediation which can be helpful for conflicting parties, such as:

- Parties can control the outcome of mediation with the help of neutral mediator [J. Kerwin (2020), 9];

- After spending several hours in the process of Mediation, Mediators can help parties to discover their weak and strong points or understand the situation from the point of view of other party;

- Direct communication with the parties is conducted on neutral ground;

- Ways of reimbursement are much broader than in court systems;

- Privacy of the proceedings in ensured;

- Mediation has the possibility to save time and money [J.R. Allison (1990),10];

- The chances for negotiations, and resulting in mutually beneficial agreement are higher than in courts.

How the mediation should position itself in post-socialist world:

- Parties are in charge of the case, they are the ones to make the decision, and not the judges;

- Court system is more competitive and increases chances of corruption;

- Privacy is ensured which is the rare thing in Post-soviet world;

- Having the chances in negotiations is important because it enables the parties to have the relationship in the future as well;

- Mediation reduces the costs and speeds up the process.

Conclusion

Based on the discussion and results of the article, it can be concluded that having only single solution mechanism represented by courts is a bearer of significant risks which can have negative outcomes for the parties as they will be obliged to provide more resources in terms of court and lawyers' fees and wait for several years till the final decision while awaiting for the unfavorable decision. The mediation, on the contrary, gives speedy alter-

native to the parties, and they can allocate affordable resources to the proceedings. At the same time, the results of the mediation can be profitable for all of the disputing parties. Mediation needs promotion in countries of EaP. Businesses can make the profitable use of the alternative dispute resolution mechanism. The article aims to underline the importance of mediations and its positive characters. Studies and papers should popularize the positive aspects of mediation, analyze its challenges and suggest its application to practical problems which are so frequent among businesses in the countries of EaP.

Acknowledgements.

These studies will be relevant for businesses, professionals, students and society at large. The article aims to popularize mediation and present it as alternative and effective dispute resolution method. Implementation of mediation will have long-term positive perspectives on commercial entities.

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