

Creating an appropriate model of Court-connected mediation for Uzbekistan

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a. Background of Mediation Procedure in Uzbekistan.

The mediation procedure is not officially used as a dispute resolution procedure in the judicial system of Uzbekistan. Currently, there is no legal basis for this ADR institution in the state. However, traditionally in Uzbek society mediation has been used for a long time. Usually, people settled small family and neighborhood disputes via so-called “mediation” procedure. As a mediator disputants chose older and honorable person who had rich life experience. This procedure is different from court-connected mediation in the legal sense, but the main idea of two procedures is similar. The major aim of both procedures is to assist disputants to reach an agreement.²⁾

Presently, the neighborhood communities or so-called “mahalla” are using the procedure similar to mediation. Every neighborhood community has its own reconciliation committee, which consists of a chairman and several citizens. The chairman is a person elected by the inhabitants of the community as a leader of the “mahalla”. Other members of the reconciliation committee are respected people of the community. Usually, minor family or neighborhood disputes go through this committee. During the settlement, the reconciliation committee members act like mediators by recommending different solutions. However, currently in Uzbekistan there is neither law nor legal rules for this reconciliation procedure. Thus, the committee creates own regulations and acts

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2) Масадиков; Masadikov, “Сущность медиации и проблемы ее правового регулирования в Республике Узбекистан; The essence of mediation and issues of legal regulation in the Republic of Uzbekistan,” 2008.

based on them.³⁾

In general, the reconciliation committees are doing a useful job in the neighborhood communities. Nevertheless, their reconciliation measures are unpopular and ineffective in the society. In most cases the committee members cannot act professionally, since they do not have any training courses. Furthermore, the members of that community do not have any specific skills to assist the disputants to negotiate. As a result, the disputants consider this reconciliation method as a barrier, which makes the dispute resolution process more difficult.

Officially the reconciliation procedure in “mahalla” is voluntary for all conflicts. However, for divorce cases this procedure is mandatory in spite of the fact that legally it is not mentioned anywhere. For instance, if a couple wants to divorce they have to go through this procedure before applying to the court or ZAGS (registration body) for legal separation. These two organs only begin the divorce proceeding when the disputants show the document from reconciliation committee about the ineffectiveness of the reconciliation procedure. Otherwise, they do not even accept the claim for divorce. In general, one can make a conclusion from ‘Mahalla’ reconciliation committee’s activity that out of court mediation⁴⁾ procedure is not working efficiently in Uzbekistan.⁵⁾

b. Necessity of the court-connected mediation procedure.

Recently the number of lawsuits in the civil courts of Uzbekistan is increasing rapidly. The civil courts are work loaded with the cases and the judges are not able to handle this high number of cases. Presently there are 63 civil courts with 263 judges in Uzbekistan. Because of the exceeding number of civil cases the courts are facing difficulties. For instance, according to 2012

3) Maksud Karaketov, “Court-Connected Mediation in Uzbekistan and Japan: A Comparative Analysis;” (Nagoya University, LLM Dissertation, 2011).

4) Out of court mediation in this paper means private mediation. Private mediation is a procedure provided by the mediation centers. It does not include a mediation procedure carried in administrative section or a bar-association.

5) Amirova Narghiza, *Mediation in Family Dispute Resolution : Opportunities for Transforming Divorce Procedure in Uzbekistan* (Nagoya University, LLD Dissertation, 2011).

year's statistics, the total number of the civil cases was 599.522. Consequently, one judge handled around 8-10 cases per day. From this statistic, it is clear that even physically it is hard for the judges to review this number of cases.

Another factor is the time limitation for the judicial proceeding. In Uzbekistan there is strict time limitation for the court proceedings. For example, according to the Art. 131 of Civil Procedure Code of Uzbekistan 'the procedural term for judicial proceeding is one month. Except, alimony, health injury and labor cases. For these kind of cases procedural term is 10 days, if the disputants are located in the same district or region, otherwise 20 days'.⁶⁾ One month procedural term is came from the old Civil Procedural Code of 1963. This Code stated that one-month term is enough to settle civil case objectively. As a result, because of the high number of the cases and time limitation for judicial proceedings the quality of the judgments is getting worse.

Therefore in order to solve above-mentioned problems and improve the quality of the judgment, the new ADR procedure namely court-connected mediation should be implemented into the judicial system of the state. For the reason that other ADR procedures like arbitration and so-called 'out of court mediation' are not working so effectively.

Presently there are more than 150 arbitration courts in Uzbekistan. These courts handle disputes arising from civil and commercial law including commercial disputes between business entities. However, arbitration procedure is still considered as a new ADR procedure in Uzbekistan. Most of the people do not have sufficient information regarding this procedure. Moreover, since this procedure's fee is considered more expensive than litigation parties prefer to solve the dispute at the court.⁷⁾

Out of court mediation in Uzbekistan may work after some years when people⁸⁾ would be familiar with this procedure but not now.⁸⁾ The main difference

6) *Гражданский Процессуальный Кодекс Республики Узбекистан; Civil Procedure Code of the Republic of Uzbekistan*, 1998, http://www.lex.uz/pages/GetAct.aspx?lact_id=186098.

7) Масадиков; Masadikov, "Сущность медиации и проблемы ее правового регулирования в Республике Узбекистан; The essence of mediation and issues of legal regulation in the Republic of Uzbekistan."

8) Example of ineffectiveness of out of court mediation procedure in family cases is

of private mediation from the court-connected mediation is the authority, which controls the procedure. In the private mediation the mediation centers control the procedure and the quality of the proceeding. On the other hand, the court-connected mediation is under the jurisdiction of the courts. The court is responsible for the quality of the procedure and legitimacy of the outcome. Usually, the mediation at courts is cheaper and quicker than private mediation. In most states the courts have strict time limitation for the mediation procedure. Consequently, if the parties would not be able to reach an agreement in the court-connected mediation, the case directly goes to the litigation. This is another advantage of the mediation under the court. However, despite the abovementioned merits of the court-connected mediation, it would not be so effective without the assistance of the court.

It means that without promotion and support from the side of the state this procedure may have the same situation with arbitration in Uzbekistan. It would be another ADR procedure that would be considered as inefficient procedure among the people.⁹⁾ For this reason Uzbekistan should first implement mediation under the court and later after the promotion of this procedure the out of court mediation. At the initial stage the court-connected mediation should be mandatory and the state should provide some financial privileges for the parties who settle the dispute in this procedure.

If the state supports and promotes this procedure, there is high possibility that some percent of the civil cases would be referred to the mediation from the litigation. Since the court-connected mediation procedure is considered faster and less expensive than legal proceedings. Furthermore, the judges may refer some complicated cases to the mediation for narrowing the disputable issues. In fact even if the parties were not able to reach a mediation agreement, they could at least simplify the conflict matters.

'mahalla' reconciliation committee.

9) For instance, in Kazakhstan and Russia private mediation is not so popular among the people. Most of them even do not know about this procedure at all. Therefore, currently these states intend to create court-connected mediation under the authority of courts.

c. Possible ways of implementation of court- connected mediation into the judicial system of Uzbekistan.

In order to create an effective dispute resolution procedure, there should be a legal basis for it. Usually, there two main ways of implementation of court-connected mediation into the judicial system. First one is making amendments to the Civil Procedure Code and including provisions regarding the mediation procedure. Second way is adopting a law on mediation. In general these ways are almost similar. Moreover, some jurisdictions have both provisions in the Code and the law.¹⁰⁾ However, the most suitable way for Uzbek government is creating a law about the mediation. The adoption of this law would create the appropriate mechanisms based on which mediators could operate the procedure.

The creation of a law draft requires careful consideration of several complicated issues. First, there should be clear information about the category of the cases, which could be settled in the court-connected mediation. In other word the 'mediability' of the case. Second, the law should clarify about the voluntary or mandatory character of the mediation procedure. Should the parties participate in the mediation voluntarily at any stage of the litigation or the court should order mediation procedure despite the consent of the parties.¹¹⁾

In case the state chose the course from mandatory court-connected mediation to voluntary out of court mediation procedure, it may become an efficient dispute resolution procedure among the parties. By making the mediation procedure mandatory at the initial step of the development, the courts have a chance to promote this procedure among the parties. The promotion of the mediation by the state or the courts is crucial at that step.

The state should provide some privileges for the parties who settle the dispute in the court-connected mediation procedure. For instance, the Republic of Belarus in order to promote the mediation procedure amended the law "On State Duty" in 2008. The amendment allowed the parties to get back 50 percent of the state fee, which they paid at the beginning of the lawsuit, if they try a

10) E.g Republic of Belarus

11) Karaketov, "Court-Connected Mediation in Uzbekistan and Japan: A Comparative Analysis;,"

mediation procedure and conclude a mediation agreement.¹²⁾ This provision was a great financial privilege and impulse for the parties to use the mediation procedure. For the reason that even if they conclude an amicable agreement during the litigation they can return only 25 percent of state fee. As a result the court connected mediation procedure became the cheapest dispute resolution procedure in the judicial system of the Republic of Belarus.¹³⁾ Furthermore, the courts should also actively participate in promotion of the procedure.¹⁴⁾ For instance, judges while meeting with parties could inform about the merits of the mediation procedure and recommend it to the parties.

Additionally, the role of the judge in determining the appropriateness of the case for the mediation is important. In the preparatory meeting, judge should take an active position in promotion of the mediation procedure for the parties. Since this promotion may be used as basis for the parties, who were not familiar with the mediation procedure, to file a petition for conducting a mediation procedure. On the other hand, if the case is mediable but the parties hesitates to try it, the judge should order a mediation procedure by himself.

However, the state should be very accurate while making a mediation procedure mandatory. Otherwise, the mandatory provision of the mediation procedure may violate the disputants' right of access to the justice. The mediation procedure should not become a barrier before the litigation.

Another important factor that should be defined by the law is the role of the mediator. Should the mediator have facilitative or evaluative role in the mediation procedure? In the facilitative mediation disputing parties try to negotiate with the help of third party (mediator) in order to reach an agreed resolution of their dispute. In this proceeding, the mediator uses his/her

12) *Закон Республики Беларусь "О Государственной Пошлине"; Law of the Republic of Belarus "On State Duty"*, Art.12 1992, <http://pravo.levonevsky.org/bazaby/zaknb/zakb1409.htm>.

13) Миселюк; Miselyuk, "Опыт Хозяйственных Судов По Применению Медиации; Experience of Economic Courts on the Application of Mediation," n.d., <http://www.court.by/online-help/mediation/publications/e5052f0a096d4615.html>.

14) Масадиков; Masadikov, "Сущность медиации и проблемы ее правового регулирования в Республике Узбекистан; The essence of mediation and issues of legal regulation in the Republic of Uzbekistan."

professional skills and techniques to assist disputants. The primary aim of the mediator is not to negotiate with disputants but to help disputants to negotiate with each other. In this sense, the mediator plays a facilitative role in the procedure by using communication, negotiation and explanation skills.¹⁵⁾ On the other hand, in the evaluative mediation model mediator evaluates the case based upon his/her experience and offers recommendations on how the case should be resolved. In this model, the mediator has an active role. The parties can ask the mediator about the appropriate ways of settlement of the procedure.¹⁶⁾

Again in order to promote and make mediation procedure more beneficial for the parties, the research recommends at the beginning stage of the implementation to provide an evaluative role for the mediators. The parties should feel free to communicate with the mediator and ask some recommendations from him/her.

Finally, the law should create a provision concerning the enforcement of the mediation agreement. In general, there should not be any problem with realizing the terms of the agreement, because the parties reached an agreement by themselves and they are the authors of the agreement. However, there should be clear information regarding the ways of enforcement of the mediation agreement. For instance, the legislator of the Republic of Belarus equated a mediation agreement with an amicable agreement. Therefore, the approval and enforcement procedure of the mediation agreement is the same with the amicable agreement's one. Consequently, according to the Art.124 of the Commercial Procedure Code, the parties should enforce their responsibilities arising from the amicable agreement voluntarily. In case the provisions of the amicable agreement were not performed in the manner and time specified in it, the commercial court on the application of an interested party gives the executive document. Commercial Court reviews the issue of providing the enforcement document without summoning the parties.¹⁷⁾

15) Henry J Brown and Arthur L Marriott, *ADR Principles and Practice* (London: Sweet & Maxwell, 1999), p 127-128

16) Nadja Marie Alexander, *Global Trends in Mediation* (Kluwer Law International, 2006), p 50-55

17) Кулак; Kulak, "Процедура Посредничества Как Форма Альтернативной

Conclusion

The adoption of a law concerning the court-connected mediation with the above mentioned provisions would create the necessary legal basis for the legal regulation of the mediation procedure in the Republic of Uzbekistan. In addition, the introduction of this institution into the legal system of the state allows disputants to resolve their dispute simply by themselves by reducing the caseload of the courts.

Furthermore, having explored mediation as a viable tool of dispute resolution, the author came to the conclusion that the resolution of some civil and commercial disputes (including international conflicts) in Uzbekistan via this institution would be much more advantageous and effective. In this regard, the legislator should reform the judicial system of Uzbekistan by implementing a court-connected mediation procedure.

Uzbek model of mediation should be based on the legal culture of the state. After the implementation the state should promote this procedure among the legal councils and disputants. Moreover, in order to make a mediation procedure a popular dispute resolution procedure the state should provide some privileges for the parties. In fact, at the initial stage of the practice of the court-connected mediation procedure, the courts would be under the huge pressure. They have to promote and provide qualitative court-connected mediation procedure. Otherwise, this procedure would become another ineffective and unpopular alternative dispute resolution procedure.

Юрисдикции; Mediation Procedure as an Alternative Form of Jurisdiction,” *Вестник Высшего Хозяйственного Суда Республики Беларусь*; N5 (2009).