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主 論 文 の 要 旨

論文題目

CREATING AN APPROPRIATE MODEL OF
COURT-CONNECTED MEDIATION FOR UZBEK
JUDICIAL SYSTEM

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論 文 内 容 の 要 旨

The dissertation has investigated issues concerning court-connected mediation with a mandatory character. The main goal of the paper has been to create an appropriate model of court-connected mediation for the Uzbek judicial system. In order to do that the paper analyzed three jurisdictions that have established mandatory mediation. As a result of the analysis, the author came to conclusion that the discretionary category of mandatory mediation is the most suitable category for Uzbekistan.

The paper consists of two parts with five chapters. First part gave an overview of the mediation model of three jurisdictions: Italy, Australia and Belarus. The reason for choosing these jurisdictions was the effectiveness and variety of the mediation models that are practiced in these states. The reasons for making mediation mandatory arose from the problems in the judicial system of those states. The judiciaries of those states have had difficulties that the Uzbek judicial system is facing now. The courts were overburdened and this has caused inadequate judgments. Consequently, these states intended to reform their judicial system in order to decrease the number of lawsuits by implementing a mediation model with a mandatory character. In spite of the fact that these three jurisdictions have had

different categories of mandatory mediation and the fact that the level of mandatoriness varies, the mediation is considered mandatory there. As a result, these jurisdictions have been able to realize their goals after the establishment of mandatory mediation.

The second part includes two chapters. This part explains the current situation of ADR in Uzbekistan and the necessity for court-connected mediation in the Uzbek judicial system. Moreover, it provides detailed information regarding the mandatory nature of mediation and recommends possible ways of implementing this procedure into the legal system of Uzbekistan. Next an overview of each chapter will be given below.

Chapter I. Mediation in Italy. Historically, Italy has had many types of ADR procedures, including mediation. However, because of frequent reforms to the legal system regarding ADR procedures, people and legal professionals were not so familiar with these procedures. Consequently, these procedures were not working so well. For this reason, the legislature tried to enact a new law on mediation based on the EU Directive. The main goal while adopting a national statute on mediation was to create an effective ADR procedure, which would help to solve two main problems in the judicial system: the high number of pending cases and the long duration of litigation. As a result, the legislator intended to solve those problems by making mediation mandatory for certain types of disputes. In fact the final aim of making mediation mandatory was to improve access to justice.

Italy has categorical mandatory mediation. This type of mediation requires for certain matters to be referred to mediation automatically. Thus, the state provides a legal basis where a list of cases for which mediation is considered compulsory. This means that if the parties have a dispute mentioned in the list, they will not be able to apply for a lawsuit in the courts. They have to try mediation and then when they cannot settle the dispute apply to the litigation. This type of mediation is considered to be the one with the most obligations

for the disputants. Certain cases are referred to mediation despite the nature and intention of the parties. Therefore, in this type of mediation, the mediability issue of each dispute is not so crucial. The judge or registrar does not check the appropriateness of the dispute for mediation. If the dispute is mentioned in the list of mandatory mediation cases, it directly goes to mediation. Because of this notion, the Italian mediation model came under pressure from scholars, legal professionals, as well as the parties. Legal professionals were not so supportive of the law on mediation, particularly the mandatory provision in it. As a result, the Italian government had to find compromise with the lawyers. Consequently, the legislature had to amend the decree on mediation several times in order to establish an appropriate one.

Chapter II. Mediation in Australia. The Australian model of mandatory mediation includes two types: a discretionary and quasi-compulsory one. The discretionary type provides authority to the court to order mediation with or without the consent of the parties. The judge can refer any case to mediation at any stage of the litigation. Usually before the referral, the judge tries to analyze factors regarding the nature of the dispute, the intentions of the parties, and the efficiency of the process for the case. In general complicated matters are not referred to mediation. The judge's case management power is characterized as defining the mediability issue of the case. However, judges do not intend to order mediation for each dispute. He/she is very careful in assigning mediation in order not to make it an ineffective dispute resolution procedure before litigation so that the parties do not feel the court ordered mediation to be a barrier to pursuing a lawsuit.

On the other hand, the Federal Court and some states are practicing quasi-compulsory mandatory mediation. These courts require the parties to try 'a genuine step' before litigation. The genuine step involves 'steps or requirements that a potential litigant is

required to undertake in an effort to resolve a dispute without recourse to the courts as prerequisite to litigation'. Mediation, negotiation, and exchange of documents may be considered as a genuine step procedure. From these procedures, mediation is considered to be the most effective one. The purpose of this step is to let the parties settle their dispute regarding its circumstances and nature before the litigation. Even if they are not able to settle the conflict, they can at least clarify and narrow the disputable arguments. Consequently, the court proceeding for such a case would be less complex and less costly. The genuine step requirement is partly mandatory; the court merely suggests that the parties take this step. However, there are some financial sanctions for not trying it.

Chapter III. Mediation in Belarus. The way court-connected mediation in Belarus has developed is interesting to observe. In spite of the fact that the provision regarding mediation processes was included in 2004, it was not practiced for another 4 years. The impulse for the usage of mediation was the rapid growth of commercial lawsuits in 2007-2008. Because of the high number of the cases, judges were overloaded and had to handle more than 100 cases in one month. Consequently, this situation affected the quality of the judgment. Therefore, in order to reduce the number of cases and improve the quality of judgments, the Chairman of the High Economic Court made an order to actively practice court-connected mediation. This order made the economic courts not only use mediation but also promote it.

Accordingly, the courts began to initiate mediation processes with or without the consent of the parties. As a matter of fact, from 2008 to 2010 the courts initiated almost all of the mediation cases. Most of the cases were simple cases without any arguments between the parties regarding the main obligations arising out of the contract. But, after promoting mediation, courts began focusing on the quality and efficiency of the process more. For

instance, courts took into consideration the mediability issue. Currently, courts are now analyzing the appropriateness of a case for mediation prior to initiating it. Moreover, nowadays courts are tending to order mediation for complicated cases. They expect the parties to simplify the disputable issues in the court-connected mediation even if they do not settle the dispute. It seems that the economic courts are following the philosophy "from the simple to the complex". Overall, court-connected mediation is working well and one can consider it to be a fruitful one.

The reason for the effectiveness of mandatory court-connected mediation in Belarus is based on the following factors. First of all, the path for the implementation of the mediation process into the judicial system was precise. The legislator added a new chapter to the Commercial Procedure Code regarding court-connected mediation in 2004. As noted above, it was not practiced for 4 years because there was no need for this procedure at courts. However, when the courts faced difficulties providing quick and approachable access to justice, the Chairman of the High Economic Court ordered this issue be solved with the help of court-connected mediation. This step did solve these problems, but it took some time to establish a workable dispute resolution procedure.

The second factor was the systematical modification of the provisions regarding court-connected mediation. For instance, in 2011 two main amendments were enacted; one regarding the stage of litigation when the mediation procedure could be ordered and on regarding the appointment of people from the outside of court to act as mediators. The ground for these amendments was the high number of mediation cases. Finally, in 2013 the legislator adopted a law 'On mediation' which was the legal basis for out-of-court mediation. If the court-connected mediation is applicable only for commercial disputes, the out-of-court mediation may handle disputes arising from civil, commercial, family and labor law.

Another interesting factor about the development of mediation in Belarus is the supportive behavior by the state. The state, in order to promote this procedure, amended the law ‘On state duty’. Because of that amendment, the parties are able to get back 50 percent of the state fee which they paid at the beginning of the procedure if they try court-connected mediation and settle the dispute. As a result court-connected mediation has become the cheapest form of dispute resolution procedure. The fee for the process is even lower than the settlement agreement’s one. Accordingly, the low-cost of the procedure became another reason for the parties to try mediation.

The Belarusian model of court-connected mediation with a mandatory character may also be referred to as being of a discretionary kind. The court has a right to initiate a mediation process without the consent of the parties. In general, court-connected mediation in Belarus reached its aims in a short period. The number of cases at the economic courts decreased and the quality of judgments improved. However, without the promotion by the court and the support by the state, this procedure would not have been so effective. In fact, court-connected mediation became a ‘locomotive’ for out-of-court mediation. There is hypothesis that without earlier implementation of court-connected mediation, the legislator could face difficulties with the introduction of out-of court mediation into the judicial system.

Chapter IV. Mediation style and Values that underlie the mediation Process in Uzbekistan. This chapter introduced the history and the current situation of ADR procedures, in particular court-connected mediation in Uzbekistan. Historically, the mediation process has been used in Uzbekistan. People with disputes were accustomed to contacting elder, experienced persons (‘aksakals’) for the advice for a settlement. However, currently there is no legal framework for this ADR procedure in the state. Furthermore, there are neither

mediation programs at courts nor panels of approved mediators. Although so called “mediation” is being practiced by ‘mahalla’ reconciliation committees, its broad application in the Uzbek court system is still restricted.

Presently, three ADR procedures have been established in Uzbekistan: arbitration; consulting and mediation, and settlement agreement. From these procedures, consulting and mediation is the least usual procedure, which may draw the reader’s attention. Consulting and media is a company under the Association of Arbitration Courts (‘ACC’). The idea of creating this company under the ACC was to prepare the disputing parties for arbitration. Usually the company organizes explanatory sessions about arbitration. In fact the goals of the company are to provide legal consultation for the parties, checks on the arbitrability of the dispute, and assistance to the parties in reaching an agreement. Overall, the mediation procedure provided by the Mediation and Consulting is recent, thus there are no valid facts to evaluate its effectiveness. On the other hand, court-connected mediation has not been used at courts at all.

Moreover, this chapter explains why Uzbekistan needs court-connected mediation and why it should be mandatory. The necessity of court-connected mediation procedure for the judicial system is characterized by the rapid rise of civil and commercial lawsuits. Because of the exceeding number of lawsuits, the courts are not able to provide quick and qualitative access to justice. Another reason is the time limitation for judicial proceedings. The Civil Procedure Code and Commercial Procedure Code of Uzbekistan put one-month procedural term for judicial proceedings. Accordingly, the courts have faced difficulties with a high number of lawsuits and time limitations for court proceedings.

Thus in order to solve the above-mentioned problems and improve the quality of judgments, the paper proposes to implement court-connected mediation into the judicial

system of the state. However, in order to promote this procedure the legislator should make it mandatory and provide some financial privileges for the parties.

Chapter V. Institutional Integration of Mediation in Dispute Resolution Procedures and Substantive Law in Uzbekistan. In this chapter the reason why Uzbekistan needs court-connected mediation with a mandatory character has been explained. The research has tried to create an appropriate model of mandatory mediation for the Uzbek judicial system. Consequently, different models of mandatory mediation have been compared and the advantages and disadvantages of each have been revealed. Overall, this chapter gives detailed information about the mandatory nature of mediation. Next, the main points of this chapter will be listed below.

First of all, mandatory mediation has three categories: categorical, discretionary and quasi-compulsory. For the Uzbek judicial system, the research proposes the second one, in which the court would have the authority to refer any case to mediation with or without the consent of the parties at any stage of litigation. Additionally, the factors based on which the court defines the mediability of a dispute have also been discussed. Consequently, the author considers that the efficiency of mediation depends on the court. The court has an obligation to prepare the parties for the mediation by introducing and explaining the reason why the dispute was referred to this process. Thus, the parties should have sufficient information about the mediation process as well as their rights and responsibilities beforehand.

Second, in spite of the mandatory nature of the procedure, this paper suggests that the parties should have a right to leave the process at any stage when they find that there is no chance of a settlement. However, the cause for these actions should be reasonable. The court should define the reasonability of such decisions. Moreover, the parties' decision also depends on the role and professionalism of the mediator. The mediator is responsible for

organizing circumstances conducive to the parties settling their dispute. However, if he/she finds out that the parties do not intend to settle the dispute, the case should be terminated immediately.

Third, the chapter explains and compares two fundamental acts: the European Mediation Directive and the UNCITRAL Model Law on International Commercial Conciliation, which were successfully implemented into many national laws. The core notions of both and some crucial provisions have been discussed. Accordingly, the paper recommends that the legislative body of Uzbekistan enact a law on court-connected mediation based on these two acts.

Finally, as mentioned in the last section of the chapter, after the adoption of the law two main actions should be taken in order to make court-connected mediation an effective dispute resolution procedure. First, the court and the state should actively promote this procedure among the parties and the legal representatives by organizing seminars on mediation and explanatory meetings with the parties. Moreover, the state should provide financial privileges for parties who try the court-connected mediation and settle their dispute. Second, the courts should provide an effective ADR procedure by setting and controlling the following factors: impartiality of the mediators; mediator's presence and its effectiveness; mediator qualifications; disputants' expectations; and confidentiality of the proceedings.

In conclusion, after researching the above-mentioned jurisdictions, which have had the same legal problems and which were able to solve them with the help of court-connected mediation with a mandatory character, the paper came to the conclusion that the Belarusian model of mandatory mediation is the most appropriate model for Uzbekistan. First of all, Uzbekistan and Belarus are historically close to each other. Both states were members of the

Soviet Union. Consequently, the legal and judicial systems of these two states were established first during that period, and so as a matter of fact these systems are very close to each other. For instance, the Belarusian Code of Commercial Procedure is similarly to the Uzbek one in defining a one-month procedural term for judicial proceedings. Because of these similarities, the problems in the judicial systems are also the same (e.g. the caseload of for the courts and the inadequate quality of judgments). However, presently Uzbekistan is very much behind Belarus in solving these problems. Belarus has been already practicing court-connected mediation for six years, and after systematic reforms, this procedure is working well now. Therefore, Uzbekistan can use the Belarusian model as a sample. Nevertheless, the Uzbek legislator should not simply copy Belarusian model of mandatory mediation and implement it into the legal system. It should establish a new model based on the legal culture of the state that would be appropriate for the parties as well as the courts.

After some years when the people and legal profession get used to and have sufficient information regarding the mediation procedure, the state may establish out-of-court mediation. As a matter of fact, the paper supports the idea that mediation should be voluntary. Nevertheless, at the present stage it is better to choose the path from court-connected mediation with a mandatory character to out-of-court mediation with a voluntary character. In fact, in the future these two types of mediation procedure can exist parallel. As a result, the disputants would have different ways of accessing justice.

