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Why Arbitration?

The large number of various disputes between natural and legal persons is common for all modern societies. This is true both nationally and internationally. And no society which does not take account of this fact and seek to provide machinery for the peaceful, speedy, economical and just resolution of these disputes can claim to be civilized.

The State traditionally offers a court system for the resolution of various disputes. However, the resolution of the private disputes today is no longer the exclusive jurisdiction of State courts. More and more disputes are solved outside the State court's system by the means of the so called alternative dispute resolution. The arbitration, as private procedure for the resolution of a disputes by the private persons, is one of an alternatives to the court proceedings. By concluding an agreement to arbitrate, parties express their preference to submit their dispute to private persons – arbitrators, instead of State courts. On which considerations, if any, is this choice based, particularly, in Lithuania?

The arguments for and against arbitration are well known in many countries and in international perspective. However, the Lithuanian phenomena is the fact, that arbitration is unpopular, despite the fact, that the largest part of society distrust the State courts. The results of the research of public opinion shows that only 15-20 percents of populations trust State courts in Lithuania. Despite this fact a large amount of civil cases are filed each year in the courts of general jurisdiction. For example, during 2003 124 155 civil cases were filed; during 2004 – 152 132; during 2005 – 148 750, and during 2006 – 145 705. Respectively, during 2003 only 5 cases were filed to Vilnius Court of Commercial Arbitration, during 2004 – 14; during 2005 – 23, and during 2006 – 20 cases. In comparison, ICC International Court of Arbitration has received 521 new cases in 2005, and Arbitration Institute of the Stockholm Chamber of Commerce has received 100 cases.

On another hand, an arbitration is very popular in many Western European countries. For example, some sources indicate that in the Netherlands about 80 percent of all commercial disputes are solved by an arbitration. This could be explained by the fact of deeply rooted traditions of arbitration in many Western European countries. For example, according to Marc Blessing, well known Swiss arbitrator, international arbitration in Switzerland in commercial issues, in disputes between corporations and also in relation to the status of citizens can be traced right back to the

Middle Ages. The well known institutional arbitrations of the world has their roots in XIX century. For example, one of the most famous institutional arbitrations – London Court of International Arbitration was founded in 1892, the ICC International Court of Arbitration – in 1919. However, there are no such old traditions in Lithuania. The beginning of arbitration is dated in 1996, than Law on Commercial Arbitration was adopted. Because of this reason, the experience of foreign countries, specially of Switzerland, are of great importance for the promotion of arbitration in Lithuania.

The growth of the popularity of arbitration, as alternative to litigation, reflects its ability to escape from the limitations and disadvantages of the court proceedings. On the other hand the increasing use of arbitration in many countries reflects corresponding recognition of the quality of the arbitration.

Arbitration offers advantages that litigation, from its nature, can never provide. These advantages vary from case to case. However, there are the commonly recognized advantages of arbitration.

I. Advantages

1. The first advantage in resorting to arbitration in lieu on going to State court lies in the appointment of arbitrators who are experts on the subject-matter of the dispute. In many areas of industry as arbitrators are appointed persons who have experience in the relevant branch of industry, for example, in construction, trade of nuts and other goods, maritime transport, etc. The expertise of the potential arbitrator is a dominant factor in the constitution of the arbitral tribunal. In court proceedings, expert opinions may fill this gap in the knowledge of the judges, but most often the court will appoint an independent expert. In arbitration this can usually be avoided as arbitrators have enough experience of their own.
2. The second advantage of arbitration is that the parties can choose the arbitrators. If they cannot agree upon a particular person or persons, they can almost invariably agree upon some institution to make the appointment. And thereby agree upon the qualifications of the person or persons to be appointed. For example, the Chairman of Vilnius Court of Commercial arbitration is likely to appoint someone known to the experienced as an arbitrator, because so requires the prestige of the institutional arbitration. On another hand, the possibility for both parties to choose arbitrators is of particular importance where the

parties to a contract are from different countries or cultures. Each party can be sure that the arbitral tribunal will include at least one member familiar with his country or culture.

3. Another factor in favour of arbitration is the more informal atmosphere in which arbitration procedures take place. In arbitration the atmosphere is more relaxed than in court proceedings. At least this should be the case, but it depends to a large extent on the way the chairman conducts the hearings. As a rule, the parties wish to maintain friendly relations even during arbitration proceedings as they are expected to continue doing business with each other. For example, it is a common practice to make a coffee and tea breaks during the arbitration hearing during which the arbitrators, parties and their representatives have a friendly discussion.
4. In the event of arbitration the parties are free to decide in respect of the mode of proceedings. The principle of party autonomy allows the parties to agree upon written procedure, upon the periods of time, content of an award and upon many other questions of arbitration procedure. So the parties are real “owners” of arbitration proceedings and theoretically may create own “Code of arbitration proceedings”. In contrast, court proceedings are formalized by the rules of the Code of Civil Procedure, and the parties have no possibility to create own way of proceedings.
5. Confidentiality of arbitration may be regarded as another advantage. The conflict between the parties is not revealed to the outside world. Publication of the award may therefore, as a rule, only take place with the consent of the parties or without mentioning their names and without any other indication which might reveal their identity.
6. Costs are usually mentioned as an advantage of arbitration compared with court proceedings. However, contrary to judges, arbitrators have to be paid which may increase the costs of arbitration in particular in case of a tribunal of three arbitrators. Also, in institutional arbitration the administration costs of the Institution have to be paid.
7. Arbitrators, as a rule decide in one instance, whilst in judicial proceedings, except in cases of minor importance, a second instance, which may be followed by a third instance, may be needed to arrive at a final decision. In particular this aspect may justify to qualify arbitration as less costly. For this reason the risk of delays is also minimal.

8. Speed is also used as a pro-arbitration argument. Thanks to the freedom arbitration laws in general allow the arbitrators in the conduct of an arbitration, they may arrive in a relatively short period at their decision. Since arbitrators decide in one instance, a final decision may indeed be obtained sooner in arbitration. In comparison, the average duration of civil litigation in the courts of first instance in Lithuania is about 7 months. Together with appeal and cassation proceedings the duration of civil litigation could take 2-3 years or even more years. The possibility of the re-opening of the civil case also must be kept in mind. On the contrary, according to the Article 38 (1) of the Arbitration Rules of Vilnius Court of Commercial Arbitration, the Arbitral Award shall be made not later than within a period of 6 months after the file is transmitted to the Arbitral Tribunal.
9. Clear procedure even in the event of international arbitration is another advantage of arbitration. In the event of litigation in foreign courts the procedure normally is unknown. For this reason a foreign party must have a lawyer from the forum State.
10. Possibility of the selection of the place of arbitration and language are usually mentioned as an advantage of arbitration compared with court proceedings. Apart from its great convenience in some cases, it can be in neutral territory rather than on what is perceived to be the home territory of one party.
11. The monopoly of lawyers is established in the court proceedings. So, only a lawyer could be as representative of a party in court proceedings. In the arbitration proceedings there are no such requirements, e.g. in a quality arbitration there is no need of a lawyer at all.
12. The possibility of the parties to choose the mode of arbitration proceedings – written, or oral, or mixed. So the principle of party's autonomy is much wider and greater in arbitration proceedings than in court's proceedings.
13. The question of applicable law – arbitrators are private persons, so the arbitrators are more free to choose the applicable law. The State judge depends from the national rules of conflicts of laws. Arbitrators on the contrary, may rule on the basis of *lex mercatoria*, principles of justice and good faith, etc. For example, there are many arbitral awards in which the UNIDROIT Principles of international commercial contracts were applied.

14. The question of State immunity could be more easy to be solved in the arbitration proceedings – the fact of the signing of arbitration agreement shall mean the refusal of the immunity by the State. So, arbitration is acceptable to many States and State institutions which for reasons of national prestige would be unwilling to submit to the jurisdiction of the courts of the foreign country.

II. Disadvantages

However, sometimes arbitration is not acceptable for certain reasons, which could be qualified as disadvantages of arbitration:

1. The possibility of the attack on the arbitral award seriously diminish the speed approach of the arbitration . The possibility of the State control of the arbitral award and arbitration proceedings may lead to delay in arbitration proceedings. So the enforcement of the arbitral award can be postponed.
2. The arbitrators, as a general rule, have to be paid. Sometimes, keeping in mind the qualification and the professional and social status of the arbitrators, the arbitrators fees are very high. In the case of the arbitral tribunal of 3 arbitrators (in Lithuania about 75 percent arbitration cases are heard by 3 arbitrators) this sum increase in three times. In the event of institutional arbitration the administration cots also have to be paid and this will increase the costs of arbitration in considerable manner. Sometimes, specially in international arbitration, the costs of arbitration in much higher then costs o litigation. The system off legal aid is also unavailable in arbitration. However, the foreign experience shows, that nevertheless, arbitration can be cheaper than litigation, e.g., where the dispute is a technical one and the arbitrator or arbitrators are technically qualified.
3. The arbitrators are private persons empowered by parties. However, the arbitrators has no the same powers as State judges. For example, the arbitrators has no the right in Lithuania to apply provisional measures of protection, also no the right to sanction the parties or witnesses or experts for their misconduct, etc. In the event of necessity for provisional

measures of protection or taking of evidences the arbitral tribunal or parties must apply for judicial assistance into the receptive State court.

4. The lack of appeal instance increase the possibility of mistake regarding law or fact in arbitration proceedings and this is also as one of disadvantages of arbitration.
5. Not all disputes could be solved by the arbitrators. Each State provides the list of disputes which falls under the exclusive jurisdiction of State courts. The list of non-arbitral disputes is provide by the Article 11 of the Law on Commercial Arbitration Lithuania . In comparison with foreign countries this list includes the disputes, which are subject to arbitration in most countries, e.g. consumer disputes. So this list and other legal rules of our Law on Commercial Arbitration needs the revision, which will unable the liberalization of arbitration and promotion of arbitration proceedings in Lithuania.