http://www.cisarbitration.com/2016/01/26/new-adr-regulations-enacted-in-kazakhstan/
Advandazy, 26 January, 2016
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New ADR regulations enacted in Kazakhstan

Kazakhstan intends to reduce the caseload of the judicial system by expanding alternative dispute resolution procedures.

On 1 January 2016 the new Civil Procedure Code, Entrepreneurial Code and an accompanying on amending the current legislation came into force. The laws actively promote alternative dispute resolution procedures (ADR).

Alternative Dispute Resolution: New Approach

For many years the legislation of the Republic of Kazakhstan (RK) provided various types of ADR, such as negotiation, mediation, domestic and international arbitration and pre-action protocols. From January 2016, this list also includes notarial endorsement, participatory procedure and court-endorsed mediation.

Notarial endorsement as ADR

Notarial endorsement constitutes a new (but, in fact, old and well-forgotten) notarial instrument designed to conduct reconciliation procedures. Initially, the Law on Notary of 1997 listed a notarial endorsement among the notarial acts, but the legislator eliminated it in 2000. Apparently, at that time notarial endorsement did not find sufficient recognition by the legislator.

Starting in 2016, the instrument of notarial endorsement will return to the list of notarial acts. Consequently, notaries will have the authority to carry out notarial endorsement where: i) documents confirm an indisputable debt or other liability of the debtor to the claimant and ii) the term of the statute of limitations has not elapsed by more than three years.

Within three years after a notary executes the endorsement, either party has a right to enforce it. The debtor however is entitled to protest to the notary within 10 business days from the date of receiving the notarial endorsement. In case of receipt of a protest, the notary shall review the protest and rule either to cancel or to uphold the endorsement.

Participatory Procedure as ADR

Unlike in the notarial endorsement, in a participatory procedure, the parties negotiate with active involvement of their lawyers, without any supervision by a judge or other neutral third party. In this procedure, the lawyers facilitate the possibility of reaching a mutually acceptable resolution in the dispute. Ultimately, lawyers play an important role in the participatory procedure, and the outcome, to a great extent, depends on them.

Stages of a Participatory Procedure and why it is different

A participatory procedure normally consists of three stages:

1) advancement of dispute resolution proposals by the parties or their lawyers;

2) consideration of the proposals by the parties; and

3) selection of a mutually appropriate proposal by the parties.

This procedure assumingly has a positive outcome when the parties conclude a written agreement with assistance of their lawyers. In cases where the parties agree, the court will issue an order to formally approve the written agreement.

Although the participatory procedure resembles mediation in its negotiation nature, the procedures differ materially in their objectives. Pursuant to the RK Mediation Law, the mediation aims to:

1) achieve a resolution of the dispute (conflict) mutually acceptable to both parties; and

2) reduce the tension between the parties.

In other words, the parties in mediation attempt not only to settle their dispute by negotiation, but also to retain their amicable relationship after the procedure ends. Therefore, unlike the participatory procedure, in mediation the parties do not try to validate their claim and objections, but instead try to achieve a resolution to the conflict acceptable to both disputants (ie a win-win solution).

Court-connected mediation as ADR

Although the doctrine of mediation has existed in Kazakhstan since 2011 and the Government gives every possible support to this type of ADR, it still remains less-utilised in Kazakh society. To expand the scope of mediation and reduce the caseload of the judges, the judiciary is widely introducing this procedure to the parties. The active promotion started in 2014 when the Supreme Court of Kazakhstan conducted a pilot project to implement court-connected mediation in civil proceedings at 59 courts specialising in civil cases, courts of general jurisdiction, as well as civil and administrative appeal panels at regional courts.

As a result, from May to December 2014, these courts conducted 3,939 court-connected mediation cases (3,816 cases at the district courts and 123 cases at the appeal benches of the regional courts). In fact, that pilot project increased by three times the total number of private and court-connected mediation cases in 2014.

Essentially, court-connected mediation constitutes a reconciliation procedure between the parties with the assistance of a judge. The parties can apply for this procedure at the court of first and appeal instances.

Upon the request of the parties the judge in charge of the case or a different judge (if the parties choose one) may mediate the dispute when the case is still pending in the first instances; however, in the appellate instances only a judge from the collegial panel may mediate.

Court-connected mediation successfully ends when the parties conclude a mutually acceptable dispute resolution agreement, otherwise known as a mediation agreement. The judge in charge of the case shall review the agreement, render an order to approve it, and terminate the proceeding. If either party fails to resolve their dispute in the court-connected mediation or the court refuses to approve the agreement, the case will resume, and go to trial.

Court-approved agreements resulting from court-connected mediation or private (out of court) mediation, as well as agreements from a participatory procedure, are enforceable in the same way as an amicable agreement: the court issues a writ of execution based on the provisions of the agreement and the party may apply to the court bailiff service if the other party fails to fulfil such agreement.

For further information, see this comparative table.

Conclusion

Will the above-mentioned ADR procedures become effective in practice and reduce the caseload of the judicial system? The answer is more likely to be yes than no, but only so long as they receive consistent support from the State and the judiciary. To successfully implement these procedures, the courts should actively introduce them to disputants and the State should keep the stamp duty of these procedures as low as possible.