Law Review ● vol. VIII, issue 2, July-December 2018, pp. 113-121

ALTERNATIVE DISPUTE RESOLUTIONS WITHIN ADMINISTRATIVE CONTRACTS: ATTRIBUTES AND ENFORCEMENTS

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Abstract

This study provides an overview of the attributes of the alternative dispute resolutions (ADRs), and attempts to address the missing information about the use of these methods in Romania. Particular attention is given to the arguments that take a dispute out of the court. ADR schemes are known as out-of court mechanisms, which have been developed across Europe to reach a peaceful agreement. ADR schemes usually use a third party such as an arbitrator, mediator or conciliator, negotiator to help the parties to reach an amicable settlement. The advantages of ADR schemes are that they offer more flexibility; they are cheaper, quicker and more informal than the court. Within the world based on the country development, legal culture and traditions, business environment, and other factors ADR techniques have evolved differently in each one of them, even in the countries which are member of the same legal family. This article defines the basic ADR traits and reviews the theory, history, controversies, and future of alternative dispute resolution processes in administrative contracts.

Keywords: quality of ADRs, construction contracts, peaceful settlement of dispute.
JEL Classification: J52, K23.

Introduction

One of the greatest paradigms of our legal system, strongly influenced by the French political and legal culture, is this division between public and private law. Regardless of the forms in which the administration's reform policies affect this binomial, most of the time, a cleavage between the two sections of our legal system is invoked. Alternative dispute resolution is caught between them, and the use of it is seen most of the time as an escape of the lengthy public court system, especially in the public procurement contracts. The Romanian new regulations established based on the European Directives for public procurements have established in Law

no. 101/2016[1] the possibility to appeal to ADR, namely to arbitration[2]. More recently, in Government Decision no. 1/2018[3] recognises direct negotiation, mediation and arbitration as mandatory dispute resolutions processes [1].

The new legislative solutions seems to give an answer to the requests of the construction industry for a faster, friendly and inexpensive procedure. But, in the Romanian doctrine the administrative contract, in principle, is subject to a regime governed by public law and, where appropriate, and if it is compatible, rules of private law will apply. Each type of administrative contract will also comply with the provisions of the applicable special laws, and here is the situation of the construction contracts stated in GD no. 1/2018. The dispute public – private law is not under review in our research, but because of the new regulations we are keen to find out which were the guiding ideas that supported the implementation of arbitration and other ADR methods in the Romanian legal system for administrative contracts. The research is based on the literature review and public documents which demonstrates why arbitration, and other ADR are preferred instead of court. Beside the mimetic phenomenon of taking other institutions specific to different law system, we will try to demonstrate the utility of ADR in the Romanian legal system which is in a full process of adaptation to the new market requirements.

Many private legal system increasingly use different solution to resolve disputes during the course of contractual relationship, and do not take into account contract withdraw as a solution. ADR includes the basic processes of negotiation, mediation and arbitration, and a variety of *hybrid processes* such as med-arb, minitrials, summary jury, or judge trials and early neutral evaluation, which vary in providing opportunities for settlement of cases, advisory opinions, or decisions. [2] These solutions are developed outside of the court system when the parties consider that the judicial system no longer serve their interests. Furthermore, in practice [3] the alternative solutions are seen more and more as the appropriate solutions to overcome the dissent. Appropriateness depends of different factors – the urgency of the problem, costs, type of dispute, legal regime of the contract, circumstances, registered delay and many others.

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[1] Law no. 101/2016 on legal means and remedies regarding the award of public procurement contracts, sector-specific contracts and works and services concession contracts, as well as the organization and functioning of the National Council for the Solving of Complaints published in the Official Journal of Romania no. 393, May 23, 2016.

[2] Article 57 states: "*The parties can make arrangements so that disputes concerning the interpretation, conclusion, enforcement, modification and termination of contracts shall be settled by arbitration*".

[3] Government Decision no. 1 on the approval of general and specific conditions for certain procurement contracts related to investment objectives financed by public funds published in the Official Journal of Romania no. 26, January 11, 2018

In and Out of the Court

The construction contract partners should look for other ways, than the judicial one, to solve their disputes, because by using the legal route could harm the spirit of the alliance and increase the gap between their specific interests.

Alternative dispute resolution can aid the participants in finding solutions for their disputes while conserving their relationship. This process will help them to protect the outcome of the contract. Going to court over a dispute will harm the relationship of the parties, their status quo is changed, and they become the accused and the complainant. Besides that, the use of ADR is not as expensive as the court, it can prevent the parties from falling into disagreement with each other, and decrease the hostility. Many contractors found that there is no winner when a claim is field and goes to arbitration or litigation [4]. The construction industry has gone over the paradigm of winning with any price, the constructors do well when the projects do well. Romanian construction industry needs an incentive to go further the paradigm, and for this reason we consider the ADR a good provisory solution for our legal system.

Alternative dispute resolution is at the interests' conjuncture of three actors – citizens/business people, state, European Union, each one of them found the escape from the "heavy" court system into it. Alternative dispute resolution registers a growing interest from all European Union countries, and even from the European Union. The main reasons which support the interest are:

- an increasing awareness of ADR as means of improving general access to justice in everyday life;
- a close attention from the Member States, many of which have passed legislation encouraging it, even for the public contracts;
- the European Union's opinion on these alternative techniques, set as political priority, that can ensure an environment propitious to future development of the information society, and because it can guarantee quality.[4]

In some countries, such as Romania, ADR is preferred because offers a solution to the problem of access to justice faced by citizens/business people due to three factors:

- the increased volume of disputes brought before courts;
- the lengthiness and the costs of the proceedings;
- the quantity, complexity and technical obscurity of the legislation.

Cross-border dissent are even more difficult than the domestic ones, and often raise complex issues which involve conflicts of laws and jurisdiction and practical difficulties of finance and language. Moreover, in an era of cross-border e-commerce where *lex digitalis,* with an autonomous private regime, amplifies the

[4] Green paper on alternative dispute resolution in civil and commercial law, COM/2002/0196 final.

necessity for better, faster and more specialised solutions, ADR is perceived as the sunshine in disputes.

Alternative dispute resolution governed by the private law can take different forms, based on specific legal provisions. One of the distinction made is between ADRs conducted or entrusted by the court to a third party (see the Mediation Directive), and ADRs used by the parties in an out-of-court procedure (conventional ADRs: mediation, negotiation, transaction, conciliation).

In Romania besides ADR procedures, such as mediation and arbitration, which provide alternatives to the access to justice, for the administrative contracts we can also use the administrative, non-judicial bodies, such as the National Council for the Solving of Complaints in the pre-contracting stage. All of them may advance access to justice by providing quicker ways of obtaining remedies or by allowing collective redress. However, they must not override individual's right to access the formal system – the court, and should generally be subject to judicial supervision.

All the alternatives to solve disputes are preferred based on the optional nature of proceedings and, in some cases, the lack of involvement of state authorities. European Union encourages the use of ADR with legislation[5], and by creating a variety of methods for consumer protection[6].

The cases and administrative and legislative actions set forth many of the key developments in alternative dispute resolution in the last period of time [5]. The world movement is either to compel or to avoid solution like arbitration.

Menkel-Meadow [6] stressed that the "quality" of justice should remain the paramount goal and ADR only in some situations produce a just result. Even so, none of the ADR precursors could not capture the degree of ADR development in the detriment of the court, the competition between traditional litigation and various modes of ADR [7]. As courts and theoreticians recommend major shifts from the traditional of adjudication, questions on jurisprudential impact arise. That is why the attributes of ADR should be seen comparatively with the ones of the traditional litigation.

Alternative Dispute Resolutions' Attributes

ADRs aimed to improve access to justice, but in effect they complement judicial procedures, and help the parties to enter into dialogue where this was not

[5] Directive 2008/52/EC of the European Parliament and of the Council, of 21 May 2008, on certain aspects of mediation in civil and commercial matters, Official Journal of the European Union, L136/3 on May 24th, 2008.

[6] For detailed methods in specific areas consult the in-depth analysis of Jana Valant, Consumer Protection in the EU – Policy Overview, European Parliamentary Research Service, retrieved at http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA(2015)565904_EN.pdf, on 3rd of December, 2018.

possible before, and to come to their own assessment of the value of going to court. Dispute resolution has attracted the interest of many researchers and practitioners. Most of them determined the appropriate method which could be used for a peaceful settlement, but only few of them get beyond and managed to determine the attributes of ADRs.

Table 1. Attributes of Alternative Dispute Resolutions

Attributes	Brunet (1987) [7]	David (1988) [9]	Goldberg et al. (1992) [10]	York (1996) [11]	Brown and Marriott (1999) [12]	Cheung (1999) [13]	Hibberd and Newman (1999) [14]
1. Cost	∨	∨		∨	∨	∨	∨
2. Confidentiality		∨		∨	∨	∨	∨
3. Consensus		∨			∨		
4. Control by parties		∨		∨	∨	∨	∨
5. Creative agreement	∨			∨		∨	∨
6. Enforceability		∨	∨		∨	∨	
7. Fairness					∨	∨	∨
8. Flexibility	∨			∨	∨	∨	∨
9. Formality			∨		∨		
10. Knowledge in construction							∨
11. Liabilities to opponent's cost				∨			
12. Neutrality	∨		∨	∨	∨		
13. Power to compel consolidation	∨				∨		
14. Preservation of relationship		∨		∨	∨	∨	∨
15. Privacy	∨		∨		∨	∨	∨
16. Speed	∨	∨		∨	∨	∨	∨
17. Range of issue				∨	∨		
18. Width of remedy		∨		∨	∨	∨	∨
19. Willingness	∨		∨		∨		

Source: Completed and adapted after Cheung et al. [8]

Cheung et al. [8] used a panel of experts to identify the attributes of ADR, and to this panel we add one more author, Brunet [7]. Based on it and in comparison with the rules of the GD no. 1/2018 we will try to determine the attributes of the ADRs stated as mandatory in the construction contract. The attributes identified as

critical include: first - cost and speed, second - confidentiality, control by parties, flexibility, preservation of relationship, privacy, and width of remedy. Even in practice neutrality is considered as very important in ADR, based on the panel is recognised as tertiary, along with enforceability and creative agreement. All the others even are mentioned by some authors are not considered as critical for the existence of a simple and effective ADR process.

As it concerns the GD no. 1/2018 rules and the state of facts for construction contracts we can determine as important attribute of ADR: cost, flexibility, neutrality, preservation of relationship, privacy and speed. Cost and time are two interrelated attributes; as soon as a resolution is achieved, the overall cost are reduced. It is difficult to calculate how long a dispute will take as each is unique. The duration of an ADR process can be measured in days or weeks, rather than months or years, as it is the case with litigation or arbitration. Because of the time stress to solve a claim within the contract some unnecessary procedures should be avoided, but for this the parties should have an objective evaluation of their interests, and of the outcome they want to obtain. ADR processes are usually more flexible than the court process. Most of the ADRs will usually bring both parties together for a face-to-face discussion. Neutrality and fairness depend on the competence, training, and integrity of the neutral third parties, and it is a barometer of impartiality of the solutions. The maintenance of the contractual relationship is one of the key elements of any organisation, either public or private, and is closely related with the reasonability of the claims. The success of such a process depends very much on the attitude of the disputants and the interest to find an amicable solution.

As soon as disputes arise, the parties should not wait until they turn into a full-sized problem. The parties should seek assistance when they find that it is not possible to resolve the dispute between them. Most of the ADRs maintain privacy of the parties, leaving to them the decision to make the solution public or not.

Formality and enforceability are the two attributes more specific to arbitration, and less to mediation and direct negotiation. Even so, in the last period of time we could remark a European movement to the formalisation of mediation. In this sense the Council of Europe established through the European Commission for the Efficiency of Justice (CEPEJ) standard mediation forms and the European code of conduct for mediators.

At European Union level mediation is promoted as an extrajudicial and autonomous ADR. According to the Mediation Directive (Directive 2008/52/EC) the courts suggest mediation to parties in civil and commercial cross-border disputes. Even e-commerce and construction contracts have a high degree of cross border, if they are concluded with a public authority they are not under the rules of the Mediation Directive due to the legal administrative regime. But, the

Mediation Directive emphasis few gaps in the regulatory system to which any state/public authority should pay attention, among them we can mention: the lack of transparency regarding to the rules applicable to mediation, the lack of awareness on the benefits of accessing mediation, the existence of factors which influence the confidentiality of mediation, the costs and quality.

All the attributes of ADRs were determined based on the theoretical framework developed in other legal systems, and not by taking into account the quantitative data. One of the criticism of the ADR methods is the lack of quantitative data, and the fact that pragmatic evaluation cannot be done. Furthermore, there are no data on the decrease of the lawsuits or on how much was spent for a dispute to never make it to court [14].

Although ADR has been considered, principally an Anglo-Saxon legal method substitute to courts, the use of ADR is spreading around the world, being used to relieve court congestion, provide expertise in various subject matter disputes (e.g., construction, e-commerce, labour matters, family law), and offers alternative justice systems where there is distrust of existing judicial institutions. [15]

As it concerns the administrative contracts and the use of ADRs, the Romanian doctrine is quite poor in studies, and most of them resumed to the analysis of the legal provisions and less on the effect in practice. Even more, because the regulations (Law 101/2016 and GD 1/2018) are new, there are no data available for a better evaluation of their efficiency in our legal system.

Conclusion

Increasingly, many national legal systems ruled and accepted the ADRs in their legal civil system, but now we are witnessing the mimetic phenomenon in the public law, in the administrative contract provisions. The analysis of diverse aspects of the ADRs and the lack of data on the use of them have revealed us that countries, which are in the process of modernisation, such as Romania, have tendency to adopt other country's ADR experiences and develop similar working mechanism even they are specific to a different legal culture. We should take a closer look to the use of ADRs in countries that are in the same Romano-Germanic law system, and which consider that the administrative contracts have a different legal regime than the commercial or civil one. The research have revealed that there are six attributes of ADRs that we can determine in the Romanian regulation, to which we have to give a proper attention in a future research. It can be concluded that even at the European level (Council of Europe and European Union) rules concerning the ADRs were concluded none of them are recommended for the administrative contracts. Overall the ADR system has to take into account the legal similarities and the sectorial competences. We do not consider that we should reject the use of them, but the simple inclusion in few legal

provisions could harm more the disputes, if their enforcement is not properly prepared. Above all, ADRs methods will be widely accepted if they meet the interests of users.

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