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Arbitration vs. litigation:a look from within

Sorainen Law Offices is preparing a novel seminar on litigation and arbitration for Baltic lawyers and businessmen. The seminar, which will take place May 19 in Vilnius, will illustrate the differences between the two forms of settlement and explain why more Baltic businessmen are choosing arbitration as a vehicle for resolving disputes. Guest speakers will include lawyers from several firms working in various European markets. For a preview of the seminar, The Baltic Times recently sat down with two Sorainen lawyers in Riga to discuss litigation and arbitration.

For the sake of the legally challenged, could you explain the basic difference between litigation and arbitration?

Renata Berzanskiene: It's in the main principles of the method of dispute solution. Arbitration is mostly geared toward commercial disputes, because then you can choose the expert arbitrators from a particular field. For instance, in construction you can have expert engineers arbitrate, because arbitrators do not need to be lawyers. There are flexible procedures in arbitration. It is not as strict as in court.

You also have confidentiality [in arbitration]. If a dispute goes to court it is public information. Arbitrators are obliged to keep confidentiality.

In addition, there is the time aspect. For example, in normal practice in Lithuania and Estonia arbitration disputes are solved within six months, which is a more expedient procedure than courts.

We also have only one level in arbitration. That means the arbitral award is final. In the court system you have three levels [of appeal].

You can't enter arbitration without a prior agreement between the parties. Because arbitration is such a specific issue that it needs consent of both parties. Without it, you go to court.

In my opinion, all commercial disputes should be solved in arbitration. Of course, there are some cases you can't solve in arbitration. For instance, in Lithuania, trademark, bankruptcy cases.

You've said that arbitration has received little attention in the Baltics. Why is that? One would think that, after 13 years of capitalism, more disputes would go toward arbitration.

Berzanskiene: For long time arbitration court was poorly developed. For instance, in Lithuania, only 120 disputes have been solved in arbitration court since introducing the institute of arbitration in 1998, which is a very low number. Each year in Lithuania approximately 15 disputes are solved, in Estonia 30 and in Latvia, the number of cases is approximately 7,000, So in all three countries the courts are overloaded with litigation cases. Businessmen are not thinking about other alternatives.

In Lithuania we have two permanent arbitration institutions, one in Estonia, but in Latvia there are 127 arbitration institutions, some 30 of which are active. All associations, banks, societies have their own arbitration institution, and this has led to a high number of cases. There is a different arbitration culture is Latvia.

Agris Repss: Arbitration has also caused problems in Latvia. There are so many arbitration institutions out there that it has damaged the reputation of

arbitration as such. These days there is a certain mistrust of arbitration among Latvian businessmen. Until recently it was fairly easy to set up an arbitration institution – you just had to notify the Ministry of Justice. Now you have register the institutional arbitration with the Commercial Registrar.

You mention that now that the Baltic states are part of the EU, businessmen will have legal recourse to litigate with the state. In other words, governments are more liable. Are there any precedents for this?

Repss: When a state enters into a contractual relationship, a commercial transaction, it waives its immunity and thus it becomes liable. And one of the mechanisms holding the state liable is international investment treaties, whereby two countries have made an agreement they will protect each other's investment in the countries. And here Latvia has been held liable. One of the most famous examples in recent history is the Swedish ship case.

The other new set of rules affecting state liability is implementation of European Union law. And if the state fails to do so, there is a possibility for private parties to claim damages under EU law. There haven't been any cases yet given that Latvia just joined the European Union, but we are quite sure there will be.

This is an absolutely new thing for all three Baltic countries and one of the topics that we intend to cover at the seminar.

But you mention litigating with the state, or threatening to litigate, as a means of disciplining the state so that it follows the same rules it makes for everyone else. How do you discipline an enormous bureaucracy?

Repss: It takes time. At various administrative level [the state] is probably becoming more aware of this threat to be sued and to be liable. I think the process has already yielded some results. For example, the Ministry of Justice and other ministries that are responsible for certain sections of law when concluding major investment contracts are hiring professional law firms that have expertise and knowledge to represent its interests in these transactions. Not too long ago the state relied on its own resources, and for this and many other reasons the state was weaker than the private party.

Which method is more expensive – arbitration or litigation?

Berzanskiene: Generally, arbitration is more expensive than the courts. But in Lithuania we are now seeing that the courts are more expensive because arbitration institutes are trying to attract more cases by offering lower fees and there is no appeal process.

In what sector are the most disputes taking place?

Berzanskiene: In Lithuania the biggest umber of disputes are from trade contracts, in construction. Then there are big cases involving states, but they are not solved in Stockholm, London and Washington Arbitration institutions. There are also a lot of infrastructure-related cases as well.

What are the most typical disputes that arise among shareholders of a single company?

Berzanskiene: The biggest amount of disputes involves the violation of rights of smaller shareholders. For example, the majority shareholder does not inform smaller shareholders properly of a capital increase, real estate transactions sometimes are concluded violating the laws. Number of disputes arises in relation with the price of shares, as well as from shareholder agreements. The biggest problem is when you have 50–50 percent ownership. Then you can't do much – you can't increase capital, you can't reorganize the company etc. without the consent of other shareholder. Normally when our clients have a 50-50 percent arrangement we show them some examples and advice to have 51 or 67 percent.

What qualities must a good arbitration lawyer possess as opposed to a court lawyer?

Berzanskiene: In court a lawyer must be prepared for anything, you have to know all the documents backward and forward. In arbitration, things are more flexible: In court there is more emphasis on writing – so a court lawyer must be a good writer! Nowadays our process in litigation in oriented on written document.

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