# New Prospects For Alternative Dispute Resolution In Ukraine

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In the realities of our time, the judicial branch performs one of the most crucial parts in the functioning of any state. Civil and commercial courts are the main elements in this system, because they consider cases concerning a vast range of important issues for the national economy and involving both local and foreign businesses.

Ukraine is no exception to this rule. However, for numerous reasons, Ukrainian state civil and commercial courts ("state courts") are far from ideal. State courts are infamous for their red tape, unpredictability, misinterpretation of legislation and procedural violations, and are often also prone to outside influence.

These and other reasons often prompt parties involved in commercial disputes to seek alternative methods of dispute resolution (ADR) - for example, international commercial arbitration, which has been available in Ukraine for a long time. However, in this article we wish to examine certain novel, or modified, methods that are now becoming available, such as domestic courts of arbitration and commercial mediation.

**I. New *Courts of Arbitration Act***

One of the most widespread means of ADR in many countries worldwide is the use of domestic courts of arbitration. Such courts were long in coming to Ukraine, arriving only with the passage of the *Courts of Arbitration Ad of Ukraine No. !701-IV(Pro treteyski sudy)*, which came into effect on 16.lune 2004 (the "Act").

In general, the Act is quite modern, and its importance to Ukraine's legal system cannot be overestimated. The Act substantially strengthens the ability of Ukrainian companies and individuals ("parties") to protect their rights and interests. According to Articles I and 5 of the Act, parties can now refer most of their commercial or civil-law disputes (with some exceptions) to courts of arbitration, which are
non-state bodies. Article 51 stipulates that awards of the said courts of arbitration are final, and Article 57

stipulates that they can be subject to mandatory enforcement via a competent state court.

The Act provides for both *ad hoc* courts of arbitration and permanent courts of arbitration. *Ad hoc* courts of arbitration can be set up only temporarily for the settlement of a specific dispute between parties. More interesting are permanent courts of arbitration, which can serve as useful, effective and independent tool for settling civil law and commercial disputes.

In fact, permanent courts of arbitration constitute a real alternative to state courts and would eliminate many of the problems that come with the state court system.

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According to Article 7 of the Act, courts of arbitration are not legal entities, and Article 8 stipulates that permanent courts of arbitration can be set up only as parts of civic organizations, organizations of employers, stock and commodity exchanges, self-regulating organizations of equity market participants, chambers of commerce and industry, associations of credit unions and associations of companies, including banks.

***Benefits of the Act***

Courts of arbitration have a number of important advantages over state courts. These advantages include:

*Freedom of choice:* In contrast to state courts, where rules of procedure generally determine where a claim must be filed and decided, generally parties can choose any available court of arbitration to hear their dispute.

*Broad availability:* In contrast to international commercial arbitration, Ukrainian courts of arbitration have jurisdiction over domestic Ukrainian disputes that lack an international element.

*Fair trial*: The vested interests of the civic organizations that set up permanent courts of arbitration help to ensure that parties, whose disputes are heard in such a forum, receive a fair hearing by unbiased arbitrators, correctly applying legislation.

*Prompt trial*: In contrast to the state courts, where waiting time before a dispute is heard can be lengthy, parties can choose any available court of arbitration to hear their case, considerably shortening the waiting period for resolving their dispute. Moreover, because a court of arbitration's decision is final and, in general, appeals cannot be made, parties need not endure multiple appeals before reaching a final resolution, as is common in state courts.

*Relatively cheap trial:* Again, because the decision of a court of arbitration is final, parties avoid incurring additional costs (state duties, court fees, travel costs, legal fees, etc.) relating to multiple appeals. Moreover, courts of arbitration can examine disputes via written submission when the physical presence of the parties is not required.
*Simple trial procedure*: Courts of arbitration often operate pursuant to streamlined trial procedures that are considerably simpler than those prevailing at state courts.
*More control by the parties*: The regulations of a court of arbitration generally permit parties to choose the number of arbitrators hearing the dispute and to nominate their desired arbitrators. Therefore, parties can to a large extent control the costs and determine mutually acceptable arbitrators to hear their disputes.
*Competent and complete consideration*: Because they can nominate their desired arbitrators, parties have the ability to ensure that the arbitrators hearing their dispute possess expertise in the subject areas relevant to the dispute. This is not always the case in state courts.

***Disadvantages of the Act***
However, it should be noted that the system of courts of arbitration, stipulated by the Act, also contains some ambiguous or negative aspects. For example:
• The mechanism for securing a claim (ordering interim measures) within an arbitration proceeding is not stipulated in the Act.
• Courts of arbitration cannot consider disputes between businesses and stale agencies, or disputes arising from commercial contracts concerning state interests. Given the high level of involvement of the Ukrainian State in private business, this can pose a serious obstacle in many cases.
• The Act contains certain latent dangers for parties: for example, Article 17 of the Act stipulates that if a party fails to appoint arbitrators or if the appointed arbitrators fail themselves to appoint a necessary additional arbitrator within the required (and very short) term, the dispute must be transferred to state courts unless the relevant arbitration clause provides otherwise. This disadvantage, however, can be mitigated if parties ensure that their contracts contain well-drafted arbitration clauses.

***The Act's Potential***
Overall, the Act has great potential. Conceivably, it permits the creation of an all-sufficient, effective and independent judicial system, which can become a serious alternative to the somewhat flawed state courts. Ukrainian companies and their associations have already realized this fact, and as a result, many business associations are already considering setting up their own permanent courts of arbitration to take advantage of the opportunity afforded by the Act. It is also worth pointing out that, because setting up courts of arbitration promotes the role of business associations and elevates both their status and relevance, associations have considerable motivation themselves to make use of this opportunity.

## IT. *Commercial* Mediation

Another rapidly developing ADR method is commercial mediation. The reasons for the increasing popularity of this method are the high and often prohibitive costs of litigation and arbitration, their long, cumbersome and unpredictable proceedings and, most importantly; the serious practical difficulties with enforcing their decisions. Commercial mediation, a natural alternative to litigation and arbitration that is actively and successfully used around the world, is finally being introduced in Ukraine as well and is now gaining increasing exposure among Ukraine's legal and business community.
This is a process driven by the business community, which is coming to realize that commercial mediation is actually the most effective, the least costly, and the quickest way to achieve a solution that is acceptable to all parties. Consequently, it is easy to implement, being to some extent "self-enforcing. Thus, as a method of ADR, it is superior even to courts of arbitration. Furthermore, commercial mediation offers a means of preserving reputations and "lace" among all parties to a dispute, and leaves the door open to restoring business relations between the parties after a dispute has been resolved.


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