МЕНЕДЖМЕНТ

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EFFECTIVE SYSTEM OF COMMERCIAL DISPUTES RESOLUTION AS A PREREQUISITE OF ECONOMIC PROGRESS

Urgency of the research. *The current state of the justice system in Ukraine does not provide a quick and justified resolution of disputes that is particularly acute for business circles. Given the lack of qualitative changes in the area of justice in the course of ongoing reform of the judiciary and procedural legislation, the preservation of a critically low level of trust in the judiciary, the state should offer the sociery a new social contract on the procedure for resolving legal disputes in the state, which must necessarily include the institutionalization of alternative methods of resolution disputes, first of all, mediation.*

Target setting. *The introduction of alternative methods of dispute resolution should be based on an argumentated conceptual model that will ensure an effective and fair solution to legal disputes.*

Actual scientific researches and issues analysis*. The scientific works of leading foreign and domestic researchers Yu. Prytyka, V. Reznikovf, Y. Demchenko, G. Braun, A. Marriot, R. Reuben are devoted to separate aspects of the settlement of commercial disputes and the formation of a system of alternative dispute resolution.*

Uninvestigated parts of general matters defining. *At present, there is no national concept for resolving commercial disputes, the place of alternative dispute resolution, in particular mediation, in the legal system of Ukraine has not been formulated.*

The research objective. *There is a need to formulate a new concept of a dispute resolution system that would ensure that citizens and legal entities have a real choice of an effective and fair dispute resolution procedure.*

The statement of basic materials. *The formation of the Ukrainian concept of the dispute settlement system must necessarily take into account the national socio-cultural and legal features. The necessity of institutionalization of mediation is proved by the adoption of the relevant law and the use of mediation procedures by public authorities in state-investor disputes and disputes with business entities.*

Conclusions. *The introduction of alternative methods of resolving disputes in the legal system of Ukraine should ensure an effective and justified settlement of disputes and, as a consequence, create the preconditions for economic growth.*

Keywords: *alternative dispute resolution, mediation; out-of-court dispute resolution; enforcement of contracts; justice, commercial dispute; justified dispute resolution.*

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ЕФЕКТИВНА СИСТЕМА ВИРІШЕННЯ ГОСПОДАРСЬКИХ СПОРІВ ЯК ЗАПОРУКА ЕКОНОМІЧНОГО ПРОГРЕСУ

Актуальність теми дослідження. *Поточний стан системи правосуддя в Україні не забезпечує швидкого та справедливого вирішення спорів, що набуває особливої гостроти для підприємницьких кіл. З огляду на відсутність якісних змін у сфері правосуддя в ході триваючої реформи системи судоустрою та процесуального законодавства, збереження критично низького рівня довіри до судової влади держава має запропонувати суспільству новий суспільний договір щодо порядку вирішення правових спорів в державі, який неодмінно має включати інституалізацію альтернативних методів вирішення спорів, насамперед, медіації.*

Постановка проблеми. *Запровадження альтернативних методів вирішення спорів має бути засновано на аргументованій концептуальній моделі, яка забезпечить ефективне та справедливе вирішення правових спорів.*

Аналіз останніх досліджень та публікацій*. Наукові праці провідних зарубіжних та вітчизняних дослідників Ю. Притики, В. Рєзнікової, Ю. Демченка, Г. Брауна, А. Мерріота, Р. Ройбена присвячені окремим аспектам вирішення господарських спорів та формування системи альтернативного вирішення спорів.*

Виділення недосліджених частин загальної проблеми*. На даний час відсутня національна концепція вирішення комерційних спорів, не сформульовано місце альтернативних методів вирішення спорів, зокрема, медіації, у правовій системі України.*

Постановка завдання. *Постає необхідність формулювання нової концепції системи вирішення спорів, яка б гарантувала наявність для громадян та юридичних осіб реального вибору ефективної та справедливої процедури вирішення спору.*

Викладення основного матеріалу*. Формування української концепції системи вирішення спорів неодмінно має враховувати національні соціокультурні та правові особливості. Доведена необхідність інституалізації медіації шляхом прийняття відповідного закону та використання органами державної влади процедури медіації у державно-інвесторських спорах та спорах з суб'єктами господарювання.*

Висновки*. Запровадження альтернативних методів вирішення спорів в правову систему України має забезпечити ефективне та справедливе вирішення спорів та, як наслідок, створити передумови до економічного зростання.*

Ключові слова: *альтернативні методи вирішення спорів; медіація; позасудове вирішення спорів; виконання договорів, справедливість; комерційний спір; справедливе вирішення спору.*

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Urgency of the research. Diligent enforcement of contracts and fast dispute resolution, respect for rule of law play vital role for efficient economic processes. Nevertheless commercial disputes are inevitable in the course of business relations and they range from small claims to investor – state disputes. So the aim of the state is to provide access to justice, a well-functioning court system and legal framework for alternative dispute resolution methods and to create a favourable business climate, provide incentives for foreign investment and economic growth as well. Mediation and other alternative methods of dispute resolution are new for Ukraine, though foreign experience influences internal reforms it cannot be used in "copy and paste" mode. So here in Ukraine we should assess the on-going situation, values of the society and than implement reforms.

The World Bank in its annual "Doing business" reports includes the indicator "Enforcing contracts" measuring time and cost to resolve a commercial dispute and the quality of judicial processes. Alternative dispute resolution availability is also taken for measurements.

This paper will be focused on analysis of commercial disputes as a part of business activities, assessment of Ukraine judiciary and perspectives of implementation of alternative dispute resolution into legal and judiciary system.

Target setting. The well-known assessment and studies (Investment Climate Assessments, Doing Business etc.) show that efficient access to justice is the key for a healthy economic climate. The disputes including commercial ones can be resolved in number of ways, and the judiciary is not the only option. The trend for alternative dispute resolution (ADR) is on the rise throughout the world with the states and big companies implementing ADR methods, creating and promoting new ones (e.g. online dispute resolution) and, in such a way, bringing consent-based dispute resolution to businesses and consumers.

In some idealistic vision the key objective is that commercial and civil disputes should be resolved in a way to correspond the needs of the parties and conform to fundamental principles of justice.

The legal framework of any state should provide the choice for parties involved in commercial disputes to decide, whether their dispute can be resolved by agreement (directly or with the help of a third party) or by judicial proceedings.

There's a great demand in Ukraine for efficient, accessible, transparent and modern justice, and the judiciary reforms are underway not showing positive results. i.e. that judges are gaining independence and impartiality and trust.

Actual scientific researches and issues analysis. The study conducted by the Sociological Service of the Razumkov Centre in 2015 showed that 45.4% of respondents fully distrusted and 36% rather distrusted the courts with only 1.1% of people who trusted the courts.[1]

Besides such attitude of citizens towards the judiciary, the work of economic courts is also unsatisfactory in terms of speed and effiency. According to official statistics in the first half of 2017 local commercial courts of Ukraine were dealing with 131.4 thousand of claims and actions, among them 89.3 thousand of claims and actions were brought within that period. By the end of the first half of 2017 40.8 thousand of claims and actions (31.1%) remained unresolved[2]. Moreover in general every Ukrainian judge of an economic court had to deal with 154 cases during that period.

Such situation persuades the search for alternatives in dispute resolution. Among known ADR methods the main attention is paid to mediation in Ukraine nowadays, the ways to integrate it into judicial system or to create framework for extra-judicial mediation are sought.

Since early 1990s US Federal Mediation and Conciliation Service, US non-governmental organisation "Search for common ground", USAID and other donors have been promoting mediation in Ukraine, setting up mediation centres and organising seminars and other events to promote mediation.

[1] Sociological poll "How much do you trust the following social institutes?" conducted by the Sociological Service of the Razumkov Centre from 6 to 12 March 2015. http://old.razumkov.org.ua/eng/poll.php?poll_id=1030.

[2] Statistical information on the execution of legal proceedings by economic courts of Ukraine in the first half of 2017 http://vgsu.arbitr.gov.ua/files/pages/05.pdf

The International Finance Corporation, World Bank group (IFC) financed the creation of Ukrainian Mediation Centre in Kyiv. A dozen of regional mediation organisations have been also registered and concentrated in promoting this ADR method and providing mediation trainings. The National Association of Mediators of Ukraine was established in 2014.

With the financial and organisational help of US, EU and European donors mediation projects have been piloted in Ukrainian courts in order to popularize mediation and to find the most appropriate mediation model for Ukraine.

All these activities have led to the need of enacting legislation for mediation services. Several drafts of Law of Ukraine "On mediation" have been registered at the Verkhovna Rada of Ukraine and the only one eventually was voted in its first reading in 2016. By the end of 2017 the Law "On introducing the amendments to the Code of Commercial Procedure of Ukraine, the Code of Civil Procedure of Ukraine, the Code of Administrative Procedure and other legislative acts" provided possibilities for court-annexed mediation.

Nevertheless the mediation remains unpopular among Ukrainians and there's a long way ahead for mediation development. This process in order to be successful needs diligent deliberation in implementing mediation and other ADR methods into Ukrainian legal system and traditions of the society.

The topic of alternative methods of dispute resolution has been investigated by Ukrainian scholars for nearly a decade, in particular, S. Demchenko in 2010 justified arbitration and mediation as a direction of improvement of the economic process, a dissertation study by O. Spector "Alternative methods of resolving civil legal disputes" in 2012 is considered one of the first set of works in this area, further research focused on individual aspects of out-of-court resolution of various types of disputes or certain models and aspects of mediation (H. Ogrenchuk, T. Shinkar, O. Gren, O. But and others). At the same time, the concept of the place of alternative methods of resolving disputes in the legal system of the state has not yet been found.

Uninvestigated parts of general matters defining. At present, there is no national concept for resolving commercial disputes, the place of alternative dispute resolution, in particular mediation, in the legal system of Ukraine has not been formulated.

The research objective. There is a need to formulate a new concept of a dispute resolution system that would ensure that citizens and legal entities have a real choice of an effective and fair dispute resolution procedure.

The statement of basic materials.

Alternative dispute resolution as a pillar for access to justice in commercial disputes.

ADR is usually defined as methods, procedures, techniques, and processes of resolving disputes without addressing for court decision. The researchers and practitioners always point out the consensual nature as the cornerstone of ADR, equity between the parties, seeking compromise, win-win resolution of a dispute, releasing burden from the court system etc.

Though in order to find interconnections between functioning of ADR in a given country and its economic climate we should assess such characteristics and advantages of ADR as:

1) Receiving redress in a less expensive (though arguable, but it's a common view) and more rapid manner that by a court process;
2) Diminishing the need for enforcement of the decision as in ADR processes it is consensual;
3) Preserving amicable relations between the parties of a disputes as they stay to operate in the same sector of economy;
4) Remaining the reasons, the course and the resolution of dispute confidential.

Nevertheless ADR is not a panacea for private sector (businesses and consumers) or the court system, though both of them benefit from availability of ADR services. That is why there are number of indications when a dispute is suitable for ADR or needs to be resolved by formal litigation.

The parties may opt for ADR when they are willing to do so (some states prescribe compulsory mediation, and the assessments of effectiveness of such approach differ), when parties know that the applicable legislation does not cover arguable relations to the needed extent (in Ukraine, IT disputes are often resolved by negotiations, according to the opinions of a number of practitioners), partnership is needed to be preserved and confidentiality is required.

And there are disputes when the legal status is questioned, when the court ruling is needed, when parties do not trust each other that the dispute resolution will be fulfilled by goodwill.

Though mediation in many states is predominantly used in family; employment, property disputes, medical negligence claims and consumer disputes, commercial mediation is on the rise, in corporate and investor-State disputes.

So one can reach a conclusion that ADR and the judiciary should act in a parallel manner, supplementing each other. And it is the task for a state to find an effective mechanism of their functioning, tailoring for the traditions and needs of the society.

The same opinion was expressed be the European Commision: ADRs are an integral part of the policies aimed at improving access to justice. In effect, they complement judicial procedures, insofar as the methods used in the context of ADRs are often better suited to the nature of the disputes involved. ADR can help the parties to enter into dialogue where this was not possible before, and to come to their own assessment of the value of going to court[3]

The attempts to introduce mediation in Ukraine by non-governmental organizations have been and remain with poor results, resulting in sporadic mediations (though statistics of mediations is rare and non-complete due to the fact of its main feature – confidentiality). And there is a hope that legal framework for mediation would be an incentive.

The IFC experts say, that some types of ADR processes such as mediation can be (and often are) fully independent of any court system or underlying legislation. Many take place pursuant to contracts between the parties and without reference to or connection with the state court system. In some cases, there may need to be a minimum legal framework governing the process in the country in question (for example to protect the confidentiality of the discussions in mediation). In the case of arbitration, which is a more formal ADR mechanism, a minimum enabling legal framework as well as enforcement mechanisms should be in place. Other than that, there is no underlying obligation to connect such ADR activity to the court system. Indeed, to do so is to limit its application [4].

The “Doing Business 2016” report notes, that 171 countries recognize voluntary mediation or conciliation. To be effective, ADR mechanisms need to be accessible. They also need to be comprehensively regulated, with all substantive and procedural provisions available in a single source, such as a specific statute. The data show that this is more often the case for arbitration: while 179 economies have a dedicated law or chapter on arbitration, only 102 have a similar instrument on voluntary mediation or conciliation[5.]

One may argue that the absence of legal framework for ADR would disrupt parties, especially from those methods when third party is included into process (mediator or conciliator), because besides confidentiality that should be secured by law, there other practical questions of the enforceability of mediated agreement, limitation of actions etc.

The further analysis on the ways of implementing ADR into legal system of Ukraine would be focused on mediation mainly because of certain work that has been done in Ukraine and because of wide use and extent of mediation throughout the world.

Selecting a mediation model for Ukraine

The EU Mediation Directive provides such description of mediation as a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.[6]

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[3] Green Paper on alternative dispute resolution in civil and commercial matters COM/2002/0196 Final. Available at http://eurlex.europa.eu/.

4ALTERNATIVE DISPUTE RESOLUTION GUIDELINES http://siteresources.worldbank.org/INTECA/Resources /15322_ADRG_Web.pdf.

5 World Bank. 2016. Doing Business 2016: Measuring Regulatory Quality and E ciency. Washington, DC: World Bank. DOI: 10.1596/978-1-4648-0667-4.

[6] 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 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008L0052.

The experience of foreign countries provides with a number of models of mediation depending on its liaison with the judicial system: court-annexed mediation, court-referred mediation and mediation in free-standing institutions.

Court-annexed mediation presumes that judges or court officials provide mediation services. Such connection to the judiciary is sometimes believed to add to people's trust and recognition of mediation services and also parties rely that the enforceability of the mediated agreement would be stronger because it would be like a court order. Such model has been provided by newly adopted amendments to the Code of Commercial Procedure of Ukraine. Though practitioners and mediators presume that current judicial system of Ukraine is not ready for court-annexed mediation, judges are overloaded with cases, they have no mediation skills and frankly speaking – no interest in providing mediation.

Court-connected mediation is executed by mediators outside the court system, but cases are directed from courts to a designated mediation centers. Agreements that parties are reaching as the result of court-connected mediation usually are enforced as court orders, though some court procedure is needed to secure the enforceability. Also there's a question of cost of mediation services. In terms of court-annexed mediation it can funded by litigation fees, the services of external mediators should be paid by parties additionally (there is such a widely used incentive for amicable dispute resolution as refund of some part of litigation fees to the claimant when agreement is reached in the dispute). Nevertheless the mediation is not mandatory that would be additional obstacle for promoting mediation.

Private or free-standing mediation is more flexible in terms of procedure, terms, but Ukrainian experience shows a number of obstacles for mediation to gain recognition of the Ukrainian society. The draft Law of Ukraine "On mediation" is presuming voluntary free-standing mediation, and the last amendments to the Commercial Procedural Code of Ukraine - court-annexed mediation. Unfortunately Ukrainian mediation society and judicial system as well are hardly ready for providing mediation services at full range.

And now we should analyze key points of successful implementation of mediation:

1) providing basic legal framework. The crucial point is the enforcement of agreements reached as the result of mediation. When such an agreement has the legal power of a plain civil agreement on mutual rights and obligations the parties of a dispute reasonably doubt the effectiveness of mediation. Time and money would be lost, some important information revealed and when the other party fails to fulfill the agreement the only way would be to file a claim eventually.

The above mentioned EU Mediation Directive prescribes that Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.

Ukrainian draft law "On Mediation" has no clause concerning the enforceability of mediated agreements and many practitioners believe it to be obstacle for mediation development in Ukraine.

Among incentives for implementation of mediation the IFC experts name the following rules:

- order a halt in proceedings for parties to consider ADR;
- order parties to engage in ADR or an ADR information session;
- demand that parties provide reasons to the court why mediation is not appropriate in their case, and even penalize parties for unreasonable refusal
- to engage in settlement and ADR;
- reduce court fees for parties engaged in mediation;

- and amend the disposal targets for judges to give them credit for referring cases to mediation [7]

Some of these rules (for example, return of 50% of litigation fees to a claimant in a case of engaging in mediation, possibility to make pause in proceedings for attempt to mediate the dispute) have been recently included in Ukrainian legislation. Nevertheless they alone cannot change the situation profoundly.

2) creating internal framework for mediation services. The mediation society itself should establish the standards for mediation practices, adopt its own Code of Conduct, maintain the Register of certified mediators i.e. provide the needed quality of mediation services, monitor quality of mediation services.

3) setting out the main principles of mediation. That would help parties to understand the process more correctly and to rely on clear guidelines to follow without harming the inherent flexibility of the process:

Principle of voluntariness, which means it is upon the parties to start mediation and to withdraw from. This principle also determines the role of a mediator, who should play only facilitative role with no evaluative or advisory functions. The parties may or may not consider the recommendations of a mediator. EU Directive on Mediation states that The mediation … should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time.[8]

Principle of confidentiality, which undoubtedly meets the expectations of the parties that have decided to sit at the mediation table. Everything discussed and stated in the course of mediation should remain confidential so the legal framefork, whether statutory or provided by mediators' Codes of Ethics, agreements to mediate, should provide relevant clauses. Confidentiality being the privilege of mediation in comparison with open legal proceedings would drive parties to mediation. From the practical point of view the following matters should remain confidential in the course of mediation: all the documents, statements and settlement proposals, positions of the parties towards such proposals, mediator's proposals and statements, the mediated agreement itself.

The UNICITRAL Model Law on International Conciliation sets out the following forms of communications to remain confidential:

(a) an invitation by a party to engage in conciliation proceedings or the fact that a party was willing to participate in conciliation proceedings;

(b) views expressed or suggestions made by a party in the conciliation in respect of a possible settlement of the dispute;

(c) statements or admissions made by a party in the course of the conciliation proceedings;

(d) proposals made by the conciliator;

(e) the fact that a party had indicated its willingness to accept a proposal for settlement made by the conciliator; and

(f) a document prepared solely for purposes of the conciliation proceedings[9]

Nevertheless confidentiality could not be absolute and the statutory framework should prescribe the circumstances when the confidentiality would be waived or a strict list of exceptions of securing the confidentiality.

Principle of self-determination means that parties of a dispute enjoy all the power over their approach to the process of mediation and its outcome. Mr Nolah-Haley writes that "Self-detemination offers procedural justice protections, providing parties with fairness and dignity.... and parties' percep-

[7] ALTERNATIVE DISPUTE RESOLUTION GUIDELINES http://siteresources.worldbank.org/INTECA/Resources/15322_ADRG_Web.pdf.

[8] 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 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008L0052.

[9] UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002 (United Nations 2002).

tions of procedural justice are enhanced when they actively participate in the process and voluntarily consent to an outcome that is free of any coercive influences»10

This principle also differ ADR from litigation as the parties of a mediated dispute retain full control over the course of resolution. That's why the agreements reached by the mediation are characterised by meeting parties' interest at the highest level and by "win-win" feature.

Conclusions.

In order to successfully and efficiently integrate mediation into the legal system and business practices in Ukraine a lot of consistent steps should be made starting from the current point:

1) the state should complete adopting the legal framework for mediation, at least the first version of the Law "On mediation". We believe that after several years of mediation practices the needed amendments would be formulated whether by judiciary, mediators, researchers etc.

2) mediators community should adopt its own Code of Conduct, training and quality standards for mediators;

3) the state should foster investor-state mediation as the examples of best practices for the society and making the economic climate more favorable for investors;

4) the state should provide a program of information sessions on mediation before court proceedings when there's appropriate infrastructure for mediation

Successful and deliberate execution of above listed steps would certainly gradually make its contribution in changing the economic and investment environment in Ukraine bringing the benefits for public and private sector.

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