Vitaly Makhinchuk

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DEVELOPMENT OF ALTERNATIVE WAYS OF ENTREPRENEURIAL DISPUTE RESOLUTION IN UKRAINE

Vitaly Makhinchuk

ABSTRACT

The article under consideration examines the legal settlement of disputes, including commercial disputes, through mediation in the context of the legislative work regarding mediation in Ukraine. The author concludes on the need of consolidation of provisions in legislation on mediation, taking into account the experience of other states, as well as amending relevant current legislation of Ukraine.

KEY WORDS

entrepreneurial dispute, legal proceedings, mediation, mediative agreement

INTRODUCTION

Ukraine, along with other post-Soviet states, recently became the path of development of the market economy. And although today the image of an existing public economic relations is still far from liberal foundations of private Western European economy, the legal system of Ukraine are implemented in twenty years a significant amount of institutions typical of a market economy. However , business development , increase in the number of businesses, the complexity of business relations inevitably entail an increase in the amount of business disputes, with which traditional state judicial system to cope become more difficult with each passing year.

ANALYSIS POSLEDNYH RESEARCH

In countries where there are well-established tradition of the commercial relationship has long been developed and successfully used alternative dispute business disputes. Among them, occupies an important place as a voluntary mediation negotiations of the parties with the assistance of one or more intermediaries , the parties elected on the basis of mutual agreement , the purpose of which (negotiation) is to achieve a mutually beneficial settlement business conflict. Mediation in varying degrees, harmoniously integrated into national legislation, which is also due Harmonization efforts of various international organizations and inter-governmental associations, which are expressed in the basic principles of mediation, including commercial .

Moreover , some states - participants of the CIS have adopted national laws on mediation and made appropriate changes. This, above all , the Russian Federation and the Republic of Belarus and the Republic of Kazakhstan. In Ukraine is still not only a law on mediation , but also all relevant bills withdrawn subject to legislative initiative or were not adopted by the Supreme Council of Ukraine.

THE PURPOSE OF THE ARTICLE

The purpose of this paper is to develop alternative ways settling disputes in Ukraine entrepreneurial.

PRESENTATION OF BASIC MATERIAL

It should be noted that in practice the whole mediation can be provided by means of existing private law. In fact , based on the method of special

prohibition, nothing forbids entrepreneurs to enter into negotiations , refer to the help of intermediaries, and to bring the agreements reached contractual form. Government can only facilitate the development of mediation, taking into account the interests of potential "consumers" of the services of a mediator, as well as the risks that hinder entrepreneurs in accessing alternative methods of solving commercial disputes.

Among the key factors that adversely affect the popularity of mediation as a form of settlement business disputes , occupy a prominent place the confidentiality of information that is disclosed by the parties during the procedure. Because the information can be crucial in potentially possible judicial review of the dispute, in the case of unsuccessful mediation , but in general further commercial activities of the parties as competitors. And if the ban on the use of information about the other side received during mediation , commercial purposes or dissemination , can be mounted in a civil agreement , then its use in judicial proceedings can not affect the parties . It is therefore necessary legislative strengthening guarantees of non relevant information in court, primarily through changes in the relevant procedural codes .

So, in the Draft Law of Ukraine "On Mediation » № 7481 one of the principles of mediation called privacy. This principle was formulated as follows: individuals who participate in mediation , undertake not to distribute or use without the mutual consent of the information that they have become aware during the mediation. It also supposed to limit the right of a mediator to inform the public about the scope of its activities privacy information made known to him as a result of mediation. Also imposes a duty on the mediator unresponsive judiciary, while maintaining confidentiality of information obtained in the course of mediation, unless otherwise provided by law. Obviously, such a clause can hardly convince the entrepreneur should be granted opponent really important information. Note that in the Russian Federation Law "On Mediation" no separate list , which were fixed to the rights and obligations of the mediator , so it is suitable restrictions on disclosure of information to the court mediator enshrined in Art. 5, which sets out the basic conditions of confidentiality . Its content is largely corresponds to Art. 22 Draft Law of Ukraine № 7481 . Both articles contain almost identical lists of data that the parties can not be invoked before the courts (Federal Law), or which are required to maintain the confidentiality of mediation participants (Draft Law of Ukraine № 7481) . In this project list is as follows:

1) offers one of the parties on the use of mediation , as well as the willingness of the parties to participate in mediation;

2) Views expressed or suggestions made by a party with respect to the possibility of settlement of the dispute;

3) recognition of certain facts , committed one of the parties during the mediation;

4) the willingness of the parties to accept the proposal of the mediator or the second side of the dispute , other information, as well as fixing the mediation procedure .

As already noted, in itself a list of such information nor warrant its proper protection from disclosure in court. There needed special procedural rules . In Art. 22 Draft Law of Ukraine № 7481 specifically provides that the court has no right to demand such information, except as required by law. Again, we see the reservation , which casts doubt on the ability to provide confidentiality of mediation in the event of litigation in this or any other dispute. However, making changes to the procedural codes authors of the bill number 7481 is not provided , although in the same article . 22 provided the norm , according to which in a mediation agreement, the parties indicate information that you consider it acceptable to use as evidence for review or possible court proceedings . In general, such a rule looks declarative and no immunity from disclosure in court does not grant the parties . After all, it only provides that the parties shall indicate the information in a mediation agreement. What is important is for the proceedings, it is not clear even in conjunction with Part 2 of Art . 22 of the bill , which states that the court proceedings without the mutual consent of the

parties can not be used as evidence information obtained during the mediation , except for the information specified in a mediation agreement and the decision on the conclusion of the mediation procedure. So mediativnoe agreement under the definition proposed by the authors of the bill , this paper on the results of the agreements reached in the dispute after the use of mediation , which is enforceable by the parties. In this case, it appears advisable to permit the court to refer to the content of a mediation agreement as the basis of its decision only when the party asked the court to compel the defendant to the execution of a mediation agreement. This would limit the possibility of a mediation agreement the parties to use it as a tool for effective solution of another dispute between the same entities that , in turn, could significantly reduce traders cautious attitude to mediation. If mediativnoe agreement executed, and the subject of the suit should not be, and its provisions can be protected norms of confidentiality, as well as the provisions of any other business transaction.

Some procedural guarantees confidentiality of mediation was supposed to fix in the Draft Law of Ukraine "On amendments to some legislative acts regarding the use of mediation » № 10302 , which was filed deputies O. Tishchenko and A. Karmazin simultaneously with the draft Law of Ukraine "On mediation »№ 10301 to bring the legislation in line with the proposed law.

The bill number 10302 proposing to Economic Procedural Code of Ukraine norm which prohibits the mediator to participate as a representative of the parties to the litigation of the same dispute. Other guarantees the confidentiality of information obtained in the course of mediation , from disclosure in economic legal proceedings , was not supposed to . And this is largely due to the fact that the economic process is not provided for the examination of witnesses , but does not consider that confidential information may be secured in the documentary form .

In the Code of Civil Procedure was supposed to make changes, in accordance with which could not be questioned regarding information mediator , which he learned during the mediation , and the circumstances of the progress of mediation , except in cases where the parties do not object to the disclosure of such information .

Another important aspect of mediation requiring legal regulation is the question form of the agreements reached in the course of judicial mediation. After mediativnoe extrajudicial agreement may be involved in the form of an unnamed contract and generate the appropriate legal consequences. However , submitting a dispute to settle it in court , the parties enter into a right relationship in which public law prevails beginning and allowed to do only what is stipulated by the procedural law. That is why the legislator should pay special attention to the legal regulation of mediation in court.

Bill number 10302 and 10301-1 supposed along with the introduction of a mediation settlement agreement the agreement , which is also subject to approval by the court. Court was intended to give the right not to recognize mediativnoe agreement when its provisions are inconsistent with the law or violate the rights, freedoms and interests of other persons . It was pointed out that mediativnoe agreement could only address the rights and obligations of the parties and the subject of the claim . Such an approach , however, does not settle the question of the possibility of a mediation court approval of the agreement, the terms of which are beyond the subject of the claim . But , based on the principle of discretionary judicial proceedings civilistic appears feasible court approval mediative agreements beyond the subject of the claim , but completely settle the dispute .

You should also pay attention to the fact that the provisions proposed by the authors of the bills that relate to a mediation agreement , largely duplicate the relevant provisions of the procedural codes of the settlement agreement . This indicates an optional introduction to the procedural legislation of such terms as mediativnoe agreement . Suffice it to say that the court may approve the agreement reached in the judicial mediation as a global agreement. This is the approach chosen by the Russian legislator . After all, for the court, by and large, it does not matter how exactly by the parties agreed terms of settlement. Court relies only secure

these agreements in a procedural document and provide for appropriate procedural consequences of such an agreement , if such an agreement is not contrary to the law and exhaust differences that have caused such recourse.

However, it should be noted that the Economic Procedural Code of Ukraine contains a provision under which a settlement agreement can only affect the rights and obligations of the parties regarding the subject matter of the claim . In this case , of course , the differentiation of a mediation and international agreements might be advisable . Although more promising see increasing discretionary powers with respect to the parties to the dispute settlement agreement in the economic process .

One of the most important features of a mediation agreement is voluntary . Under the voluntary here are due to voluntariness reaching such an agreement , and voluntary execution. However, not all parties perform their duties conscientiously . So the question remains particularly enforcement mediative agreements approved by the court. After failure of the agreement in some way negates the authority of the judiciary , which , as it were sanctified mediativnoe agreement approved by a court decision .

Our proposed above statement by the court a mediation agreement reached in the course of judicial mediation as a settlement agreement entails the same problems that are inherent in the enforcement of a settlement agreement . Currently Ukrainian legislator removed from the list of executive orders by a court decision approving the settlement agreement , significantly complicating its enforcement . This decision was made , apparently, based on the contractual nature of the settlement agreement , its focus on the voluntary settlement of the dispute . Such a character in an even greater extent inherent mediativnoe agreement. Therefore, it is advisable not to neutralize the voluntary settlement agreement (including the results achieved and judicial mediation) and not to give it character enforceable . At the same time , it should be possible issuance of the writ on the basis of a settlement agreement , if the debtor fails to perform his duties provided for under such agreement.

THE CONCLUSION

Thus, the foregoing gives grounds for concluding that the Ukrainian legislator has yet to define the concept of legal regulation of a mediation settlement of disputes , including commercial . However, he is in an advantageous position when the state on many criteria similar to Ukraine , have already adopted laws on mediation and have experience with them , which will take into account many of the shortcomings , and develop a new optimal approaches to legal regulation of mediation in Ukraine.

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AUTHOR

Vitaly Makhinchuk, PhD, Senior Researcher at the Institute private law business NAPrN Ukraine, doctoral