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APPLICATION OF MEDIATION FOR THE SETTLEMENT OF AN ECONOMIC DISPUTE

Abstract. Purpose. The article is devoted to the study of issues related to economic litigation, the use of alternative protection, mediation, analysis of the effectiveness of the protection of the rights of economic entities, etc. **Research methods.** To achieve the goal, the following research methods were used: hermeneutic semantic, system-structural, comparative legal, and others. The hermeneutic semantic method was used to study the content of the "mediation" concept in Ukrainian law. The system-structural method was employed to determine areas for improving the Law of Ukraine "On mediation". The comparative legal method was used to present a proposal to introduce of mediator's civil liability insurance, to submit a proposal to amend the Law of Ukraine "On mediation" following the experience of the Law of Ukraine "On notary". **Results.** The scientific novelty consists in the study of relations regarding the legal regulation of mediation relations in Ukraine, as well as in the determination of ways to improve the Law of Ukraine "On Mediation" and the development of provisions for such improvement. Proposals for the Law of Ukraine "On Mediation" have been proposed. **Conclusions.** It was established that with the appearance of a new form of out-of-court dispute resolution in the legal field of Ukraine, additional issues of a law enforcement nature arose, which are related to certain defects of the new legal act. They can take place in case of violation of the mediation agreement concluded by the parties, application of responsibility to the mediator, determined by the status of individuals of the mediation procedure, etc. The uncertainty of the outlined issues can have a number of negative consequences for the parties to the mediation procedure. Based on the research results, it is proposed to make changes to the Law of Ukraine "On Mediation"; and when applying for the mediation procedure, business entities should take into account the existing imperfection of the relevant legislation and analyze additional means of protecting their own rights and interests.

Key words: economic litigation, alternative protection, mediation, protection of the rights of business entities, justice.

1. Introduction

The activity of business entities involves constant connections between themselves and with other participants in relations in the sphere of business. These connections are not always conflict-free due to various circumstances. Among such circumstances, it is possible to single out the bad faith of counterparties, the action of force majeure, the activities of state authorities, etc. Such circumstances, in turn, cause delivery of low-quality goods, works, services, delay in their delivery, untimely payment, improper use of property objects, including intellectual property, etc. In order to resolve such conflicts, the current legislation provides for several ways, the main of which is the protection of the rights of business entities in court. However, this type of protection is not always

acceptable to the parties due to certain factors. Among the alternative types of protection is a pre-trial settlement between the parties. The development of alternative types of protection of the rights of business entities is taking place thanks to the recently adopted Law of Ukraine "On Mediation". Despite the fact that the law has just appeared in the legal field of our country, the request for extrajudicial protection procedures has always existed. This is confirmed by the norms regarding pretentious settlement of disputes in the Economic Code of Ukraine and the Economic Procedural Code of Ukraine.

Literature review. There is also a great scientific and practical interest in alternative ways of resolving disputes between business entities. We can name some authors who studied these issues: B. Derevyanko (2022), L. Nikolenko

(2022), I. Kovalenko (2021), M. Nikolaishyn (2023), S. Gud (2021), V. Kovalenko (2022), R. Antoniv (2022), V. Sytyuk (2020) etc. However, constant changes in theory, practice, and legislation require new research, including in terms of studying and considering the positive aspects in the legislation of EU countries.

Taking into account the study of individual issues of alternative dispute resolution, the effectiveness of each type of out-of-court dispute resolution should be clarified, the existing problems in the mediation procedure proposed by the new legislation; imperfection of the legislation that existed before the adoption of the specified act in terms of ensuring dispute settlement, etc. Separately, there are issues that arise when the parties violate the mediation agreement concluded, the responsibility of the mediator, the status of individuals in the mediation procedure, etc. The uncertainty of the outlined issues can have a number of negative consequences for the parties participating in the mediation procedure, and this confirms the relevance of the study.

Research methods. To achieve the goal, the following research methods were used: hermeneutic semantic, system-structural, comparative legal, and others. The hermeneutic semantic method was used to study the content of the "mediation" concept in Ukrainian law. The system-structural method was employed to determine areas for improving the Law of Ukraine "On mediation". The comparative legal method was used to present a proposal to introduce of mediator's civil liability insurance, to submit a proposal to amend the Law of Ukraine "On mediation" following the experience of the Law of Ukraine "On notary".

The **purpose** of the present article is to study the issues related to the use of mediation to settle a business dispute and to analyze the effectiveness of protecting the rights of business entities using this procedure.

2. Determining the notion of mediation in Ukraine

Analyzing the regulatory legal framework that ensures the settlement of the issue concerned, one should determine the main legislative act in this area – the Law of Ukraine "On Mediation" (On Mediation, 2021).

According to Art. 3 of the specified Law, its effect extends to a fairly wide range of social relations, including civil, family, labor, economic, administrative cases, as well as cases of administrative offenses and criminal proceedings with the aim of reconciling the victim with the suspect (accused) (On Mediation, 2021).

If you refer to part 1 of Art. 18 of the Law of Ukraine "On the Judiciary and the Status of Judges", courts specialize in consideration

of civil, criminal, economic, administrative cases, as well as cases of administrative offenses, which fully corresponds to the circle of social relations defined above (On the Judiciary and the Status of Judges, 2016).

In turn, the Economic Procedural Code of Ukraine, namely, Clause 2 Part 2 of Art. 182 stipulates that in the preparatory session the court finds out whether the parties wish to conclude a settlement agreement, conduct an out-of-court settlement of the dispute through mediation, refer the case to an arbitration court, international commercial arbitration or apply to the court for settlement of the dispute with the participation of a judge (Economic Procedural Code of Ukraine, 1991).

From the analysis of the specified norm, it can be concluded that the economic procedural legislation currently defines five alternative options for dispute resolution for participants in commercial disputes. Turning to the norms of substantive law, namely, Art. 222 of the Economic Code of Ukraine, one more pre-trial dispute settlement procedure is considered – the pre-litigation procedure (Economic Code of Ukraine, 2003).

It follows from a comprehensive analysis of the specified norms of economic procedural and material law that the application of the first five options requires the will of two parties, and the application of the sixth requires the will of one of the parties.

3. Peculiarities of the legal regulation of relations during mediation

The effectiveness of each of the types of dispute resolution, their positive and negative aspects have repeatedly become the subject of scientific and practical interest. In the context of this study, we are interested in the effectiveness of the mediation procedure. Thus, researchers determine that among the main positive aspects of mediation are the saving of time, money, and effort, settlement of the dispute without conflicts and the opportunity to maintain good relations and confidentiality, relief of the domestic judicial system, confidentiality and preservation of business reputation I. Kovalenko (2021), V. Kovalenko (2022), R. Antoniv (2022).

At the same time, we can agree with R. Antoniv, who points out that mediation should not be perceived as an alternative to litigation, since it by definition does not involve state coercion, and therefore is useless in the absence of the will of both parties to resolve the conflict through negotiations, and in its essence, mediation is similar to the dispute settlement procedure with the participation of a judge, which did not have a significant impact on the effectiveness of dispute resolution

R. Antoniv (2022). Therefore, when talking about the possibility of using mediation by business entities to resolve the dispute, one should take into account the totality of circumstances, including the quality of the new legislative act regulating the specified procedure.

Analyzing some of the provisions of the Law of Ukraine "On Mediation", certain questions arise regarding the legal constructions applied in them. According to Art. 9 of the Law, a natural person can be a mediator who has undergone basic mediator training in Ukraine or abroad. In turn, in Art. 10 of the Law stipulates that the basic training of mediators is carried out according to a program with a volume (duration) of at least 90 hours of training, including at least 45 hours of practical training. The training of mediators is carried out by subjects of educational activity ("On Mediation", 2021).

According to Art. 1 of the Law of Ukraine "On Education", the subject of educational activity is a physical or legal entity (educational institution, enterprise, institution, organization, public association) that conducts educational activity, and Art. 74 of the same Law stipulates that the register of subjects of educational activity is a component of the single state electronic database on education issues (On Education, 2017).

Consequently, the question arises – how a mediator who has undergone basic mediator training abroad will meet the requirements of the specified articles of the relevant Law and legislation in the field of education. Therefore, the legislation in this part needs some adjustment, namely, harmonization of the provisions of the specified legislative acts.

The following contradictory provisions of the Law of Ukraine "On Mediation" are the provisions of Part 3-4 of Art. 9 of the Law, according to which mediation parties, state authorities and local self-governments, enterprises, institutions, organizations regardless of the forms of ownership and subordination, public associations may set additional requirements for the mediators they engage or whose services they use, in particular regarding availability of special training, age, education, practical experience, etc. Associations of mediators and entities providing mediation may set additional requirements for mediators they include in their registers, in particular regarding the presence of special training, age, education, practical experience, etc. (On mediation, 2021).

These provisions are in direct contradiction with the provisions of Part 1 of Art. 2-1 of the Code of Labor Laws, according to which any discrimination in the field of labor is prohibited, in particular, violation of the principle of equality of rights and opportunities, direct or indirect limitation of the rights of employees depending on age. At the same time, actions

established by this Code and other laws, as well as restrictions on the rights of employees that depend on the requirements inherent in a certain type of work (regarding age, education, state of health, gender) or due to the need for strengthened social and legal protection of certain categories of persons.

So, if the mediator has passed the basic training, he has the appropriate certificate confirming the completion of this training, that is, he meets the requirements of Art. 10 of the Law of Ukraine "On Mediation", there is no reason to put forward additional requirements in the form of special training, age, education, practical experience, firstly, due to the requirements of other legislative acts, and secondly, that such criteria for special training, age, education, practical experience should be specified directly in the Law, and not be left to the discretion of state authorities, local self-governments, enterprises, institutions and organizations, because this is a wide field for abuse.

As for the above-mentioned associations of mediators and entities that provide mediation, certain questions also arise regarding their status defined by the Law. Having analyzed the definitions given in Art. 1 of the Law, it can be concluded that the first and second have similar functions – they provide mediation services. Similar functions are assigned to them and part 1 of article 14 of the Law of Ukraine "On Mediation" – the association of mediators and entities that provide mediation maintain registers of mediators in compliance with the requirements of the law regarding the collection, storage, use and distribution of confidential information about a person (On Mediation, 2021).

Further, in Chapter III of the Law "Conducting Mediation" in Part 1 of Art. 16 states that a mediator or an entity providing mediation carries out preparatory measures with the parties to an existing or possible conflict (dispute), together or separately, to clarify the possibility of conducting mediation in order to prevent the occurrence or settlement of a conflict (dispute), in particular, meetings, collection and exchange of information, documents necessary for the parties to the conflict (dispute) to make a decision and the mediator's decision to participate in mediation, as well as other measures agreed between the parties to the conflict (dispute) and the mediator or the entity providing mediation. That is, the mediator and the entity providing the mediation are equal in carrying out preparatory measures for the mediation. Along with the fact that it follows from Art. 17 of the Law of Ukraine "On Mediation" the mediation procedure itself is conducted by the mediator(s) (On Mediation, 2021).

Therefore, the question arises about the status of the entity that ensures mediation – on

the one hand, the functions assigned to it are duplicated with the same functions of the association of mediators, on the other – with the functions of the mediator. The legislator determined that the entity that provides mediation is a legal entity of any organizational and legal form that provides mediation services and maintains a register of mediators, but in our opinion, this definition and its status require more detailed specification in the Law. Since ambiguous interpretations in normative legal acts create chaos in law enforcement and judicial practice, they do not contribute to the proper regulation of social relations in this area.

Another challenging issue is the question of applying responsibility to the mediator. Part 3 of Art. 6 of the Law stipulates that the disclosure of confidential information is subject to liability provided for by law. Part 4 of Article 13 determines that the procedure for holding a mediator who is a member of such an association to account for non-compliance with the norms of professional ethics is determined in the statute or regulation of the association of mediators. Art. 15 stipulates that in case of breach of obligations under the mediation agreement, the mediator bears civil liability in accordance with the law. In cases provided by law, the mediator bears administrative or criminal responsibility. In case of non-compliance with the norms of professional ethics, the mediator bears the responsibility defined by the charter or regulations of the association of mediators, of which he is a member (On Mediation, 2021).

In this regard, the following should be noted. In the course of his work, the mediator gets access to confidential information, and therefore there is a need for its reliable preservation from disclosure. In addition, in the case of poorly performed work of the mediator, the parties lose time and money to resolve the existing dispute and subsequently turn to other methods of dispute resolution. Of course, the mediator cannot guarantee any result, but in such a case (low-quality service provision), one can talk about applying a certain responsibility to him. All the above-mentioned provisions of the Law do not provide working mechanisms for applying such responsibility to violators. Speaking about the mediator's liability, it is advisable to turn to experience in other areas and introduce mediator's liability insurance. For example, Art. 28 of the Law of Ukraine "On Notaries" stipulates that in order to ensure compensation for damage caused as a result of a notarial act and/or other act entrusted to a notary in accordance with the law, a private notary is obliged to conclude a civil law insurance contract before starting private notarial activity responsibility. The minimum insurance amount is one thousand minimum wages (On Notary, 1993).

In our opinion, it would be appropriate to add part 1 of Art. 15 of the Law of Ukraine "On Mediation" as follows: "In order to ensure compensation for damage caused as a result of the act committed by the mediator in accordance with the law, the mediator is obliged to conclude a civil liability insurance contract before starting mediation. The minimum insurance amount is one thousand minimum wages."

Therefore, when building their own defense strategy, business entities should take into account the possible legal consequences when choosing such a strategy, because they will have their own set of pros and cons when applying to court, and their own when using alternative means. Business entities, when applying for the mediation procedure, should take into account the existing imperfection of the legislation that regulates it and analyze additional means of protecting their own rights and interests.

4. Conclusions

Current legislation establishes certain rules for resolving disputes between business entities. They can be judicial and extrajudicial in nature. At the same time, when resolving disputes, business entities should take into account certain features of each of the dispute resolution methods provided for by current legislation. Each of them has its positive and negative points. Taking into account the obtained research results, the following conclusions can be drawn.

First, the current legislation provides for several ways to resolve economic conflicts, the main of which is the protection of the rights of business entities in court. However, this type of protection is not always acceptable to the parties due to certain factors. Among the alternative types of protection is a pre-trial settlement between the parties. The development of alternative types of protection of the rights of business entities takes place thanks to the Law of Ukraine "On Mediation". Secondly, the specified legal act has certain shortcomings. These shortcomings may manifest themselves in case of violation by the parties of the concluded mediation agreement, application of responsibility to the mediator, determined by the status of individuals of the mediation procedure, etc. The uncertainty of the outlined issues can have a number of negative consequences for the parties participating in the mediation procedure. In this regard, there is a need to adjust the legislation regulating the mediation procedure. Thirdly, business entities, when applying for the mediation procedure, should take into account the existing imperfection of the legislation that regulates it and analyze additional means of protecting their own rights and interests, which, in turn, determines the conduct of further scientific developments in this direction.

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ЗАСТОСУВАННЯ МЕДІАЦІЇ ДЛЯ ВРЕГУЛЮВАННЯ ГОСПОДАРСЬКОГО СПОРУ

Анотація. Мета. Статтю присвячено дослідженню питань, пов'язаних із господарським судочинством, застосуванням альтернативного захисту, медіацією, аналізом ефективності захисту прав суб'єктів господарювання тощо. **Методи дослідження.** Для досягнення мети використано такі методи дослідження, як герменевтично-семантичний, системно-структурний, порівняльно-правовий та інші. Завдяки герменевтично-семантичному методу досліджено зміст поняття «медіація» в українському праві. Системно-структурний метод використано для визначення напрямів удосконалення Закону України «Про медіацію». За допомогою порівняльно-правового методу подано пропозиції щодо запровадження страхування цивільно-правової відповідальності медіатора, внесення змін до Закону України «Про медіацію» на основі досвіду Закону України «Про нотаріат». **Результати.** Наукова новизна дослідження полягає в аналізі відносин щодо правового регулювання медіації в Україні, а також у визначенні шляхів удосконалення Закону України «Про медіацію» та розробленні положень стосовно цього вдосконалення. Запропоновано внести зміни до Закону України «Про медіацію». **Висновки.** Встановлено, що з появою в правовому полі України нової форми позасудового вирішення спорів виникли додаткові питання правозастосовного характеру, які пов'язані з певними вадами нового нормативно-правового акта. Вони можуть мати місце в разі порушення сторонами медіаційної угоди, застосування до медіатора відповідальності, визначення статусу окремих осіб процедури медіації тощо. Невизначеність окреслених питань може мати низку негативних наслідків для сторін, які беруть участь у процедурі медіації. За результатами дослідження пропонується внести зміни до Закону України «Про медіацію», а в разі звернення до процедури медіації суб'єктам господарювання необхідно врахувати наявну недосконалість законодавства, що її регулює, та проаналізувати додаткові засоби захисту власних прав та інтересів.

Ключові слова: господарське судочинство, альтернативний захист, медіація, захист прав суб'єктів господарювання, правосуддя.

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