MEDIATION AS AN ALTERNATIVE PROCEDURE FOR RESOLVING COMMERCIAL DISPUTES IN THE COUNTRIES OF THE MODERN WORLD

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ABSTRACT

The article examines the issue of international experience in the use of mediation as an alternative procedure for resolving commercial disputes in the countries of the modern world. Existing models of legal regulation of the mediation procedure for the legislation of foreign countries were considered. Characteristic features of mediation as an alternative to the resolution of commercial disputes were identified. The advantages and disadvantages of mediation, which hinder the process of introducing alternative ways of resolving disputes in the commercial sphere into practical activities in many countries, were revealed. The necessity of providing professional training of mediators, as well as the active participation of judges in the implementation of the mediation procedure to resolve commercial disputes has been proved.

Keywords: Commercial Problems, Alternative Dispute Resolution Procedures, Mediation, Commercial Disputes, Mediators.

INTRODUCTION

In many countries of the modern world, alternative ways of solving disputes are recognized by law. The use of such methods and the results achieved are recognized as legal procedures and protected by measures of state coercion legal dispute resolution.

In the United States, civil society institutions have initiated the need to form a mediation system and intermediary services as an alternative to a complex, expensive and time-consuming judicial resolution of disputes. In this connection, the Joint Commission on Alternative Dispute Resolution was established in 1970 to research and implement alternative dispute resolution methods in the framework of judicial resolution of disputes, in 1972-the "*Society of professional mediators in the field of dispute resolution*" was created, and in 2001, a federal law regulating alternative dispute resolution was adopted, in which mediation was defined as a process where a mediator facilitates communication between the parties in order to help resolve a dispute on the basis of a voluntary agreement.

In the EU, the first alternative dispute resolution laws were passed in the 1990s. At the same time, the Model Law of the United Nations Commission on International Commercial Mediation 2002 is decisive. Nevertheless, acts passed at the EU level also regulate alternative dispute resolution. First of all, it is about the Directive 2008/52/EC *"On some aspects of mediation in civil and commercial matters*", which became the basis for the formation of

national laws on dispute resolution through mediation. However, in a number of countries the use of alternative procedures is still not common. For example, in Belarus, a law on alternative dispute resolution has been adopted, but there is only a judicial procedure for the use of mediation, a similar situation also exists in Germany.

Today, the resolution of disputes by alternative means in most countries of the world exists formally and in fact limits the rights of commercial entities to protect their interests in the event of a conflict. In this connection, it is advisable to disclose the specifics of such methods of resolving commercial disputes, paying particular attention to their advantages and disadvantages in order to formulate recommendations towards the widespread use of mediation in all countries of the world without exception.

LITERATURE REVIEW

Surma notes that mediation is an extrajudicial method for resolving a dispute that has arisen between the parties, with the participation of a neutral and impartial party-a mediator-who coordinates the mediation process and encourages the parties to take the most advantageous decision on the dispute. Mediation, as an alternative method of resolving disputes, has long established itself, and it becomes a very important instrument for resolving disputes between entrepreneurs and commercialmen (Surma, 2017; Makedon et al., 2019). Dragos Marian Radulescu notes that mediation in disputes is a complex process that includes such elements as: intermediary agreement; actual mediation; implementation of the decision taken during mediation (Dragos, 2012). Predonu Ionică to commercial disputes that may be considered in mediation refers disputes: regarding a specific way to fulfill obligations under the contract; regarding the timing of payment of commercial debts; regarding the termination of a commercial contract; regarding the fulfillment of certain obligations under the contract; e-commerce disputes (Predonu, 2012). Lavi Dafna in connection with the popularization of mediation in his study considers online mediation to resolve consumer Internet disputes (Lavi, 2016).

At the same time, not all representatives of the scientific community support the need to introduce mediation as an alternative way to resolve disputes between entrepreneurs. In particular, their views can be combined into one group. Goldberg et al. (2010) highlight the lack of proper control over the quality of services provided by mediators, and Wall, Chan-Serafin & Dunne various techniques and methods of applying pressure on the parties to the dispute (Wall et al., 2012).

METHODOLOGY

The analysis of theoretical and practical problems of the existence of alternative dispute resolution procedures has led to the use of a number of general scientific and special legal methods for considering this issue and formulating proposals regarding the prospects for the institute of alternative commercial dispute resolution procedures. The dialectical method made it possible to consider the historical aspects of the formation of alternative dispute resolution procedures and their fixation in the legislation of different countries. Using the logical and semantic method, the essence of alternative dispute resolution procedures and the method of rational criticism was revealed-the advantages and disadvantages of mediation, which restrain the development of this institution in individual countries. The comparative method became the

basis for the consideration of doctrinal provisions, the legislation of foreign countries in comparison.

FINDINGS AND DISCUSSIONS

It should be noted that the emergence of mediation as an alternative method to resolve disputes in different countries has a different prerequisite for its legislative consolidation. The Model Law of the United Nations Commission on International Commercial Mediation 2002 establishes a similar definition that mediation is a process by which parties involve a third party or persons to provide assistance in the peaceful settlement of disputes under a contract or other legal relationships. At the same time, the conciliator has no right to impose a method of resolving the dispute (Melin, 2016).

In general, in the EU countries, there are several approaches to the legal regulation of alternative dispute resolution methods. In particular, there are countries where the regulation of alternative dispute resolution procedures and related issues are regulated at a significant level. An example of such a country is Austria, where the law defined the detailed rules for registering legal intermediaries, including organizations of intermediaries, their rights and obligations, requirements for the training of mediators, and so on.

In our opinion, this popularity of mediation in the commercial sphere is due to several reasons: the development of the economy provokes the emergence of new enterprises; it is commercial activity that is subject to the risks of default, which is the cause of disputes between the parties; the opportunity for the parties to the dispute to save their resources (time, finances), to avoid stress and to maintain commercial relations with a partner and their own reputation. The next is a group of countries where there is a lack of regulation of procedures and issues related to mediation, for example, only payment for mediator services is settled in the Netherlands, besides mediation, mediators are trained by self-regulating organizations of mediators (Spencer & Brogan, 2007). The representative of the latter group is Germany, where legislative regulation of the procedure and other issues of mediation can be assessed as moderate, but nevertheless, priority is always given to traditional judicial forms of dispute resolution (the same is true for other countries of the Romano-Germanic legal family).

However, the popularity of commercial mediation in some countries is more popular than the traditional way of resolving disputes for several reasons: the development of the economy is provoked by the emergence of new enterprises; it is commercial activity that is subject to the risks of default, which is the cause of disputes between the parties; the ability of the parties to the dispute to save resources to avoid stress, to maintain relationships with a partner and own reputation.

Statistics at the European level in commercial matters shows that in Belgium the average length of court proceedings is 505 calendar days and court costs average 16.6% of the amount that is subject to dispute and to collection, while in Italy these figures are equal to an average of 1,210 calendar days and up to 29.9% of the amount to be recovered in court. Using mediation, the party's need an average of 45 days to resolve the dispute in Belgium and 47 days in Italy, and the costs incurred as a result of mediation in these countries are approximately 8.3% of the amount of the dispute in Belgium and 10% in Italy. In addition to the advantages of alternative dispute resolution methods for subjects of commercial relations, society, it is worth emphasizing

the special importance of mediation for the courts since such a procedure can reduce the burden on the courts and is faster and less efficient (Shcherbakova, 2016).

The legislation of foreign countries provides for different possibilities of applying to the services of mediators. Including, by voluntary and mutual initiative of the parties, as well as by the recommendations of the court. An example of the latter model is the legislation of Romania, where the law No. 202/2010 (Law and Regulation, 2010) aims at speeding up court proceedings and provides that in cases where a case can be considered through a mediation procedure, the judge may invite the parties to the dispute to inform about the benefits of using mediation. This position of the legislator of Romania is very rational. In confirmation of this, it is worth paying attention that, according to official data from the United States, judges direct almost half of the cases going to court to resolve disputes through mediation, while 80-90% of them end in reconciliation of the parties. Interesting is also the experience of Finland, where, according to Law No. 663/2005, mediation is a procedure that is voluntary for the parties to the dispute and is managed by a judge to reconcile the parties in situations where it is possible without a trial (Ervasti, 2014).

Despite a number of advantages of alternative procedures for resolving commercial disputes, it is their shortcomings that determine the particular discussion, taking into account their essence, many countries around the world are still skeptical about mediation as an extrajudicial way of resolving conflicts arising in commercial sphere, namely, the problem of the mediator's individual approach to each dispute, proper control over the activities of intermediaries, the use of intermediaries techniques and methods of pressure on the parties to the dispute. At the same time, professional lawyers, attorneys as a rule, take the most active part in the work on alternative dispute resolution; therefore we should not have doubts about their competence. Including, the use of pressure by mediators on the parties to the dispute is associated with the professionalism of intermediaries, and accordingly the quality of the services they provide depends on their training.

Despite the aforementioned shortcomings, it is worth to emphasize once again that the country, which goal is to increase the competitiveness of its enterprises at the international level and create the most favorable conditions for their cooperation with enterprises of foreign countries, should offer to the citizens alternative resolutions to disputes to protect their commercial interests. It is obvious that the parties between which a commercial dispute arose without having the desire to go to court for a number of reasons can always solve it using an alternative procedure - mediation. It should be also noted that today the parties are not willing to take part in the settlement of disputes in court due to distrust of the courts, delaying the trial, and so on. It is necessary to agree that corruption is also affecting the delay in court proceedings. As noted by Kulish et al. corruption violates all the principles of a democratic, legal and social state (Kulish et al., 2018), therefore, it is not worth to expect a fair dispute consideration by a corrupt judicial authority between the parties of a commercial activity.

RECOMMENDATIONS

In any case, the fact remains undeniable that only alternative dispute resolution procedures cannot completely replace the judicial form of conflict resolution. And this means nothing more than the existence of mediation solely as an additional, alternative method of

resolving disputes along with judicial consideration of such a conflict. But an indication of its additional, alternative nature should not affect the legal settlement of such a procedure for resolving commercial disputes within the country. In connection with this, it is recommended first of all to properly resolve the settlement of the conflict between commercial entities through mediation.

CONCLUSIONS

Based on the foregoing, the initiators of the emergence of alternative ways to resolve commercial disputes were themselves parties to such disputes. A number of advantages of alternative dispute resolution methods, one of which is mediation, led to the distribution of this method of reconciliation of parties to a commercial conflict in a number of countries around the world, although in each of them the mediation procedure has its own specifics which is primarily related to the level of legal regulation of its implementation.

However, scientists are still focusing on some of the shortcomings of alternative dispute resolution methods, which justifies delaying the introduction of such practices into the laws of some countries. One of these shortcomings which are considered within this article is the need for proper control over the activities of mediators. At the same time, in order to resolve this issue, we consider it sufficient to ensure proper training of mediators as individuals capable of professionally rendering services of mediators without pressure on the parties to the dispute and in each case resorting to an individual approach. In addition, in countries where mediation is still treated with caution (Russia, Belarus, etc.), we propose to begin to implement mediation in resolving commercial disputes by providing for the duty of a judge (if a dispute can be resolved without a trial) to provide information to the parties to the dispute about the possibility of its resolution through mediation, while informing about the benefits of mediation.

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