Attractive Alternative

Litigation is both an expensive and time-consuming undertaking. Ukrainian legislation allows the mechanism of alternative dispute settlement, which certainly has its predicted benefits. However, it is not a widespread tradition as in the Western world. **Oleg Malinevskiy**, partner of **EQUITY Law Firm**, explained that the instruments of alternative dispute resolution have wider potential and should definitely be reinstated for both parties and their legal representatives.

UJBL How do you currently assess ADR (Alternative Dispute Resolution)?

Oleg Malinevskiy: Unfortunately, the given way of settlement of disputes, which is an alternative of public courts, is not effective enough, failing to make use of the existing potential. To my mind, the share of disputes which can be settled alternatively is potentially larger. Therefore, in my opinion, the government and professional community must take measures for this share to catch up with its natural capacity, which has already been proved by practices in the leading western countries.

UJBL Why ADR is not popular enough in Ukraine?

O. M.: Several aspects need to be accentuated in this respect. First and foremost, why disputes arise and, accordingly, in what way they can be settled. Currently, there are many factors, in particular crisis manifestations, when each hryvna is fought for. These are conditions under which the regime of reciprocal concessions is not attractive for all parties. In other words, each party tries to take certain measures to deprive its opponent of everything, being confident that the existing mechanisms allow it to do so. Such a situation is sometimes predetermined by attorneys who, accounting for tough competition in the legal market, do not explain to their clients in detail all legal prospects of a specific case.

The second important aspect lies in the fact that at least for some categories of disputes the first phase must necessarily be pre-trial or out-of-court settlement. This phase has to be directly specified in the law as the stage that, if avoided, presupposes a legal action. Though such an option has been directly spelled out in the Constitution of Ukraine since 2016, it is not going to work unless there is a specialized law.

The third aspect has to do with additional preferences of the parties which help to settle a dispute out of the courtroom i.e. the "carrot" which along with the stick of mandatory procedures urges the parties to agree on amicable settlement. These can be benefits, for example, tax benefits, reduction of court fees for the parties, keeping a register of trial stories (analogous to the register of debtors), which would indicate extent to which this or that person is inclined to get involved in legal conflicts.

A legal action must become an unreasonable luxury to which participants of economic relations resort while being in dead ends, when facing the need to protect their rights. Considering the aforementioned, the increased court expenditures will make out-of-court settlement more attractive. One may talk in this respect not only about payment of a legal fee, but also about advancing court charges (expenditures for legal assistance).

UJBL What role is assigned to ADR amid the reforming of the justice system? What is the essence of the reform and how, in your opinion, is it conducted?

O. M.: Today, unfortunately, attention to ADR is paid rather rhetorically and via slogans. ADR is a kind of cake icing that nobody fundamentally dealt with. Of course, we may reform the very procedure of alternative dispute settlement, but nothing is going to change until we make it attractive and, in some cases, mandatory for the parties. If the current processes were to be characterized, they would seem to be held without a clearly outlined goal, principles and understanding of what we want finally to build. As of today, there are draft laws on mediation, but they, however, insufficiently specify goals in the context of the existing problems or attractiveness of this way of dispute resolution. The point is that mediation in Ukraine is not prohibited. Moreover, it is specified at the level of the institute of dispute settlement, involving a judge or amicable agreement in procedure codes, and can be settled by the same defense lawyers and other professionals. However, it is not going to work in full without stimulating parties to the dispute to settle it out of the courtroom.

Another important aspect lies in inconsistence. For example, two years ago, at the beginning of a new wave of the judicial reform, which was connected with the change of political authorities in Ukraine, the newly-appointed Minister of Justice, Denys Maliuska, said that a new court would be established to resolve investment claims of foreigners. Later on, after he changed his mind, it was decided to create a new arbitration institution. Then that idea transformed into the concept of a branch office of an already existing reputable arbitration. Today, the situation has raged itself out. That is why such signals in the sphere of ADR on the side of the authorities will result in nothing positive. To sum it up, the objectives and principles of reforming the field need to be clear and consistent, and also aimed at introducing incentives to expand the number of cases when alternative ways of dispute settlement are used.

KEY FACTS

EQUITY

Year of establishment: 2002

Location: Kyiv, Ukraine

Number of partners: 8

CORE PRACTICE AREAS

Banking and Finance
Bankruptcy and Insolvency
Corporate/M&A
Criminal Law/White Collar Crime
Litigation/Arbitration
Real Estate
Tax

The objectives and principles of reforming this field need to be clear and consistent, and also aimed at introducing incentives to expand the number of cases when alternative ways of dispute settlement are used up

Cautious optimism is invoked by the Strategy of Development of the Judicial System and Constitutional Judiciary for 2021-2023, which was put into effect by the Decree of the President of Ukraine No 231/2021. The given document not only refers to the problem of missing effective mechanisms of alternative (out-of-court) and pre-trial settlement of disputes, but also proposes a number of measure to resolve it.

In particular, it proposes to establish a mandatory pre-trial procedure to settle disputes through mediation and other practices for separate law-specified categories of cases; introduce pre-trial procedures of administrative appeals in administrative cases, with possibilities of using pre-trial and out-of-court procedures of dispute settlement expanded; downsize court fees and procedures of their administration with the view to encouraging out-of-court ways of dispute settlement; improve the procedure under which tertiary courts are established and operate, in particular in regard to new requirements to founders of arbitration courts, reinforcing institutional capabilities of arbitration self-governance, expanding jurisdiction of arbitration courts, extending guarantees of confidentiality to arbitrators; launch and develop the institute of mediation; improve the procedure of dispute settlement with participation of the judge.

UJBL How do you assess the current legislation?

O. M.: On the one hand, the legislation allows to resolve disputes alternatively. However, unfortunately, we don't have incentives or guarantees for parties which are potentially ready to choose the given type of settlement of disputes.

Besides, one should not forget about international agreements obligations under which Ukraine has undertaken. Thus, the Covenant on the Recognition and Enforcement of Foreign Arbitral Awards and the European Convention on Foreign Trade Arbitration are mandatory for us. Generally, there is sufficient legislative environment which regulates different issues of arbitration, all our procedure codes specify the institute of amicable settlement, and, since not so long time ago, institute of dispute settlement with participation of the judge.

The legislation, of course, still needs to be worked on in order to get a) incentives, b) obligations of parties to settle; c) guarantees for parties willing to settle in such a way; d) a determined proper moderator or, in some cases, initiator, of the process of mediation (a peace justice, independent mediator, etc.).

UJBL In 2020, the Verkhovna Rada of Ukraine adopted the Draft Law on Mediation in the first reading. What are prospects and advantages of the Law on Mediation for business and the judicial system overall?

O. M.: As far as prospects of the draft law are concerned, accounting for the information campaign which is underway, nature of its discussion at the level of the specialized committee and the way of voting in the parliament, one may assume that it will be adopted. Thus, the industry will get a specialized document on the given issue very soon, which, actually, is an advantage. It has already drawn attention of the public to possibilities of the institute of mediation, formation of the profession of the mediator, and, consequently, has created preconditions for further development of legislation in the given field.

UJBL What amendments are appropriate/are expected in the second reading?

O. M.: Despite the positive effect for the field in general, the existing draft law cannot be deemed perfect. On the one hand, there is a need for the mentioned above guarantees for parties entering mediation in the aspect of confidentiality as well as prohibition of certain activities by the other party. Personally, I see the problem in the absence of adequate guarantees to protect the party in mediation from unfair actions of the opposing party. For example, there is a high risk of dishonest party using confidential information obtained in the process of negotiations, carrying out real or preparatory actions against the opponent while he is not acting in mediation, etc. Such risks discourage or render mediation ineffective. I am sure there should be clearer, formalized norms on guarantees and possible responsibility of the other party that expressed its willingness to join the mediation process. For example, recog-

nition as null and void of actions that could have been performed during the period when the party was formally in the mediation process. It is also important to establish compensatory mechanisms to hold the party that violated the relevant requirements of the confidentiality law liable for damages. This could also be a formal prohibition to use documents and information produced or received from the other party in the process of mediation for further hostile actions in case the mediation did not end successfully. Unfortunately, the submitted Draft Law does not contain relevant protective mechanisms.

On the other hand, it is necessary to create legislative (tax and other) incentives and guarantees for parties to conclude an amicable agreement, to settle out of the courtroom. Thus, unfortunately, is insufficiently specified in the draft law. And, of course, it is important to review spheres in which mediation could be applied by, likely, having got rid of insufficiently substantiated observations and limitations, and, on the other hand, having outlines spheres in which mediation is mandatory.

Another important aspect that has been overlooked by the legislator is mediation in the public sector. In order to shift the situation from the zero point it is necessary to expand and legislate the discretion of subjects to resolve disputes on the basis of mutual concessions, however, in the interests of the relevant state subject. Until now any "discount" is perceived by law enforcement agencies as a detriment to the state, although according to business logic such an operation is more attractive for state interests.

UJBL What are advantages of arbitration in comparison with hearings in public courts. In what cases would you recommend arbitration?

O. M.: According to Ukrainian business tradition, arbitration is often used to avoid negative stereotypes of the domestic judicial system, and in some cases, it is even a tribute to fashion. It does not always take into account the objective things related to the advantages of arbitration, which are confirmed by the world experience.

Among them we should mention the deep specialization and professionalism of arbitrators, the possibility of their choice, including without reference to the residency of one of the parties, the relatively fast speed of the process and predictability of costs, finality of the dispute resolution and other fine things.

It is necessary to create legislative incentives and guarantees for parties to conclude an amicable agreement, to settle beyond the confines of the courtroom

But arbitration has one important feature, which is often ignored by Ukrainian business. You should think about going to arbitration even before the dispute and even before entering into a relationship with a counterparty, who in case of his bad faith behavior is unlikely to agree to sign any agreements with you. That's why, by recommending arbitration as a dispute resolution, I mean a different approach to doing business — a more balanced and predictable, with the involvement of lawyers at the very beginning of legal relations.

UJBL What peculiarities arise at different stages of enforcing arbitral awards in Ukraine?

O. M.: The reform held in 2017 raised arbitrability of the Ukrainian legislation in regard to arbitral awards. In other words, almost all our doubts are interpreted in favor of enforcing arbitral awards, the possibility of obtaining interim measures in support of arbitration processes has appeared. This is a great gain that the state has returned to this category of disputes on the side of the authorized person.

Also, we have a unified court that decides on recognition and enforcement of arbitral awards. This is the Kyiv Court of Appeals, which functions as a court of the first instance, and Supreme Court, which is factually the final appeal court. This has double positive effect as, on the one hand, it helps to shape the unified law-applying practice and, on the other hand, is a guarantee of a period to consider a case and save procedural expenditures of the parties.

As far as enforcement is concerned, it is worth mentioning that upon recognition of an arbitral award or, in other words, its introduction into the legal system of Ukraine, it is equaled to the judgement of the Ukrainian court. Thus, it is subject to general peculiarities and problems which are pertaining to enforcement of court decisions in Ukraine.

UJBL How effective are ADR instruments for businesses both nationally, and internationally?

O. M.: If we compare the effectiveness of the use of instruments of alternative dis-

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pute resolution at different levels — national or international, it is largely determined by the subject composition of the dispute and the forms of its alternative solution.

For example, arbitration review as an alternative to a court is more typical for disputes with an international element. In some cases, this is almost the only opportunity to protect the property rights of a subject of private law in relations with a foreign country.

Business mediation, on the other hand, is more relevant to the national level. After all, as our experience in successful mediation shows, the key factor here is the reputation of the mediator and the trust of all parties to the dispute. It neutralizes the risks of breach of confidentiality and possible abuse, as well as serves as an additional guarantee of its success.

Notably, the popularity of using ADR instruments in our legal market is expected to be on the rise in the nearest future. To EQUITY, which cultivates superlitigation (assistance for client in all legal aspects of dispute - litigation, criminal defence, bankruptcy proceedings etc), it is very important to use all possible tools to protect the interests of our clients. And as our experience shows, ADR can be especially efficient in large cases in the field of NPL.

UJBL What is the standpoint of the Constitutional Court in regard to mandatory pre-trial dispute settlement? Is it likely to change in the near future in connection with the judicial reform?

O. M.: In fact, the Constitutional Court of Ukraine enunciated its stance on the given issue by specifying in its decision in case №1-2/2002 dated July 9, 2002 (case about pre-trial settlement of disputes), that under Part 2 of Article 124 of the Constitution of Ukraine on extension of jurisdiction of courts to all legal relations which arise in the state, the right of an individual to take a legal action to have a dispute resolved may not be limited by the law or other normative acts. The law or agreement establishing pre-trial settlement of a dispute upon volition of persons-at-law is not limitation of jurisdiction of courts and right to judicial protection.

However, Law No 1401-VIII dated June 2, 2016, altered Article 124 of the Constitution by adding a new provision under which the law may prescribe mandatory pre-trial procedure of dispute settlement. Thus, the foundation for mandatory out-of-court (pre-trial) dispute settlement has been laid at the highest constitutional level, with the previous position of the Constitutional Court of Ukraine, which was worded according to another version of the norm of Article 124 of the Constitution of Ukraine, impeding development of alternative methods, virtually annihilated.

According to the logic of the new approach to understanding the right to judicial protection, the above mentioned Strategy of the Judicial System and Constitutional Judiciary for 2021-2023 proposes specially aimed pro-ADR measures, in particular: establishing a mandatory pre-trial settlement of law-specified categories of cases, launching the institute of the peace justice; introducing the pre-trial procedures of administrative appeals into cases of administrative judiciary, with possibilities of pre-trial and out-of-court settlement of disputes being expanded; and take other measure. Although, I'm quite optimistic about the future of ADR in Ukraine, the eventual level of its attractiveness depends on the further joint efforts of all legal society.

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