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The extrajudicial methods of disputes settlement in entrepreneurial activity

The scientific article is devoted to consideration of extrajudicial methods of permission of enterprise disputes. As separate ways negotiations, mediation (mediation), reconciliation, minitrial and arbitration are analyzed. In comparative aspect advantages of each of the specified extrajudicial methods of permission of enterprise disputes are considered. In article the author pays attention to conditions of their application. Width of application of separate alternative ways of permission of enterprise disputes in foreign countries and extent of development and their use in Kazakhstan is investigated.

Key words: the dispute, arbitration, mediation, negotiation, dispute resolution.

Alternative ways of settlement of dispute is a set of means and the methods applied by the parties to achievement of the agreement, if necessary with involvement of the third, independent person which final judgment on the substance of dispute is recommendatory, and in certain cases obligatory.

Alternative ways of permission of enterprise disputes can be defined as an extrajudicial form of protection of the right. At different emergence of disputes it is unreasonable to restore at once against itself the opponent, it is recommended to make a complaint and prove the requirements taking into account that the parties in forces to resolve dispute without an appeal to the court of the general jurisdiction.

The analysis of legal literature gives the grounds for allocation of the following main types of alternative ways of settlement of disputes:

1) negotiations (negotiation);
2) mediation;
3) reconciliation;
4) «minitrial»;
5) Arbitration [1].

As we see, as criteria for such division participation in settlement of disagreements of the third representative by the parties of the person serves. Elements of these types can be combined in diverse options.

Negotiations. By means of negotiations the bulk of civil disputes, including enterprise is allowed. It should be noted, as the Kazakhstan businessmen even more often seek to use conciliatory procedures. So, for our contracts the reservation that in case of disagreements of the party will try to settle them by negotiations became usual. However, most often this reservation has formal character. Really neither participants of dispute, nor their representatives — lawyers aren't ready to the qualified negotiating. By tradition at dispute emergence they address for protection to justice which is much more expensive, meaning time, money, an emotional pressure.

In world practice the importance of negotiations on settlement of disputes is defined by existence of the whole theory which is constantly developed and investigated by lawyers. It is represented that this experience can be useful to development of conciliatory procedures and in the Kazakhstan legal system, especially at the settlement of disputes, concerning foreign economic activity.

In scientific literature the negotiations aiming settlement of dispute, received the name legal, first, owing to the legal nature of the conflicts subject to settlement and, secondly, that they are conducted, as a rule,

on behalf of the parties by lawyers. Legal negotiations on settlement of commercial disputes can be distinguished from negotiations on the conclusion of transactions. Though in a basis and that and others the general theory lies, legal negotiations are connected more with negative feelings and emotions as the parties are in a condition of the conflict. It causes need of the special approach, special knowledge and a certain experience. Much attention to such negotiations is paid by legal conflictology [2; 16].

In the western concept of alternative settlement of disputes negotiations are investigated in two aspects: as independent means of settlement of disputes and as integral element of any alternative non-judicial procedure (for example, arbitration, mediation, minitrial, etc.). The main difference is that in the first case negotiations are carried on directly by the parties (or their representatives), in the second — it is obligatory with participation of the third, independent, the person called by the arbitrator, the intermediary or the chairman [2]. On the one hand, such differentiation has the important practical value as allows to define correctly a role of participants in negotiating, with another — the theory of direct negotiations has fundamental value. It is universal and can be applied in any other procedure on settlement of disagreements. For this reason bigger interest is represented by negotiations as a separate alternative form.

Mediation. Radical difference of mediation from other alternative ways of permission of vapors consists that this format leans not on definition of the right and guilty parties (at which interests of one of the parties are inevitably restrained), and on search and finding of mutually advantageous approaches. Certainly, absolutely mutually advantageous decisions in a conflict situation won't manage to be reached never, but search of such platform leads to identification of the various compromises which to some extent were more acceptable for participants of dispute, than open opposition.

And if such approach is rather minor for usual production, for the enterprise right connected with economic activity, it is most optimum, at least for the reason that, arising between business partners, means preservation of partnership and after trial that in the conditions of the small capacity of the domestic market it is represented very important.

According to M.K.Suleymenov it is possible to allocate, at least, four types of mediation:

1) mediation in criminal trial;
2) mediation in civil process;
3) the mediation which is carried out by the arbitration courts;
4) extrajudicial, independent mediation [2].

Mediation as the method, possesses a number of additional benefits:

– its use conducts to the general decrease in a conflictness and intensity of disputes, transferring them from the sphere of a personal antagonism to the sphere of the interested discussion;
– broad application of mediation has a consequence a humanization of legal process, focusing it not on search and punishment guilty, and on search of the general common ground;
– introduction of this method in daily practice influences development of legal culture as a whole as demands knowledge and skills of application of standards of the current legislation in an everyday life from all participants of business activity;
– practical use of mediation allows to reveal existing legal collisions between various norms, and to propose to the legislator their optimum solution;
– mediation зримо reduces a field for corruption offenses as not one party, and both becomes beneficiaries that removes need of «breakdown» of the necessary decision. It is impossible to bribe a mediator: not the mediator makes a final decision, and the opposing party. If your opponent doesn't agree — he simply doesn't make the decision unprofitable to it. At mediation it is simpler to bribe the opponent that will be considered and as version of the compromise solution.

The last feature results from the content of the process of mediation: mediation is based on a mutual consent and good will confidential negotiation process during which the arguing parties, by means of the neutral person (mediator) try to develop the acceptable decision on settlement of this dispute.

Thus, a mediator (or the group of mediators) doesn't pass the decision, and only offers the parties various options and combinations of actions on conflict overcoming.

– at last, mediation promotes gradual replacement from practice of unlawful ways of the solution of the conflicts, to kriminogennost reduction in the sphere of economic and civil disputes.

Participation of the arguing parties in direct negotiations is allowed on a closing stage, or even the correspondence registration of a consent to accepted option in the order established by the law is accepted.

Thus arguing party can refuse at any time negotiations and to leave the agreement that deprives of possibility of application of coercive measures and does senseless attempts of finding of unilateral benefit (that underlies all corruption offenses).

Besides development of various versions of the decision, a problem of mediators include:

– initiation of negotiations on the beginning of procedure of mediation and definition of mediators;
– organization of optimum conditions and negotiating format;
– creation of the atmosphere of trust, mutual respect and equal opportunities;
– maintenance of constructive dialogue between the parties (or their representatives), cooperation in search of the decision;
– creative legal thinking, use and continuous expansion of lawful opportunities for formation of various options and combinations;
– prevention and removal of periodically arising emotional splashes and manifestations of personal hostility;
– correctness, flexibility, openness to non-standard approaches, the passionless and distantsiirovanny relation to a subject and the dispute parties.

Despite the obvious voluntary beginnings of mediation, this activity throughout a long time needed legal support and standard regulation. In this connection, on January 28, 2011 in Kazakhstan the law «About Mediation», which was adopted:

– legislatively I fixed mediation, as institute legitimate and having legal grounds; and also I defined a place granted institute in the general system of the right;
– I defined the status of the institutes (bodies) having the right to performance of mediatorial functions with participation of physical and legal entities;
– I defined extent of ensuring procedures of mediation and security of the reached agreements

In the USA, Great Britain, Australia mediation is legislatively fixed and successfully more than half a century functions. A bit later it gained distribution in Germany, France, Belgium and other countries. In Germany mediation is built harmoniously in justice system. For example, intermediaries work directly at vessels, considerably reducing quantity of potential lawsuits. In the majority of the German schools of the right the constant course of mediation [3] is entered.

Legislations of all these states stimulate mediation, and in a number of the countries mediation is compulsory pre-judicial procedure.

In the European Union the European Parliament Directive of May 21, 2008 concerning mediation in civil and commercial cases works. The commission of the UN on international trade adopted special laws on mediation development.

Reconciliation. For many lawyers «mediation» and «reconciliation» are concepts synonyms. Really, reconciliation is very similar to mediation, but has one difference: the conciliator defines those conditions of the forthcoming settlement of dispute which are the most favorable to both parties — so-called «fair settlement of dispute» [4]. The decision of the conciliator will be submitted to the parties as the recommendation which can be accepted by them or can form a basis for the subsequent negotiations between them. The recommendation isn't obligatory for the parties. Thus, if the intermediary is obliged to carry on negotiations with the parties, to participate in negotiations of the parties among themselves, choosing options of settlement of dispute and tracing their discussion by the parties, the conciliator has to develop only the accurate position in dispute and offer the parties the vision concerning settlement of dispute as the recommendation.

«Mini-trial». It found broad application at permission of commercial disputes. The name received mini-trial from external similarity to legal proceedings and represents settlement of dispute with participation of heads of corporations, lawyers and the third independent party heading hearing of business [4]. Representatives of the parties who state the point of view on the main point to the jury consisting usually of the senior performer from each party participate in this process, having power to oblige the party which it represents, to conclude the settlement agreement, and sometimes the neutral chairman. The statement of the main point is carried out during strictly limited period of time. The purpose of this procedure is not only the short review of that both parties consider them as the most important part put, but also that the party considers as weak point in a position of their opponents. (Weakness of the point of view on the main point of this or that party can be hidden previously from the senior performers by the employees, wishing to protect the positions, or it can be hidden by their subordinates). Thereof the senior performers will be able to create the points of view

on the substance of dispute, to separate them from emotions while participate in settlement of dispute, and also to continue negotiations on world settlement of dispute on their basis.

Arbitration (arbitration court). Point 1 of Art. 9 of RK Group defines the list of bodies, competent to carry out protection of the rights of citizens and legal entities, it: court, arbitration court and the arbitration court, that is both at legal, and individuals have a possibility of a choice of body in which it is possible to address for protection of the rights. Thus, any private (civil) dispute can be resolved both state, and the arbitration court, and solutions of these vessels have identical, equal validity and are subject to obligatory execution.

The arbitration court is the generic term covering, arbitration courts, the international and foreign commercial arbitration [5; 13]. Unlike the state court the arbitration court is the court elected by the parties for permission of receivership and other proceeding. The arbitration court is constantly operating arbitration court or the arbitration court formed by the parties for the solution of concrete dispute (ad hoc).

The majority of the states of the world promote development of system of the arbitration courts in the territory, in every possible way create conditions for their work. Today practically there is no more or less developed state which would have no legislation on the arbitration courts, and the major norms making a basis of such legislation, articles defining an order of compulsory execution of decisions of the arbitration courts are. So, in 2002 laws on the arbitration court for permission of internal disputes (disputes between residents) were adopted by Russia and Kyrgyzstan. And the Law «About the International Commercial Arbitration» regulating questions of settlement of disputes in cases when as one of the parties the foreign person acts, works in the Russian Federation since 1993.

In the Republic of Kazakhstan till December, 2004 there was no special law on the arbitration courts, in GPK RK there was no norm about compulsory execution of decisions of the intra Kazakhstan arbitration courts. Today the status of the arbitration courts is defined by state laws — «About the arbitration courts» and «About the international commercial arbitration».

In article 1 of the Law RK «About the Arbitration Courts» the sphere of its action is defined. The law is applied concerning the disputes which have arisen from civil contracts, concluded by physical and legal entities if other isn't established by acts of the Republic of Kazakhstan. This norm is concretized by GPK RK Art. 25: receivership proceeding subordinated to court can be by agreement of the parties submitted the arbitration court when it isn't forbidden by acts.

The law establishes the right of the parties under the mutual agreement to transfer dispute to permission of the arbitration court though this dispute is subordinated to the state court. Realization of this right in practice is carried out on the basis of standards of several articles GPK RK. So, if one of the parties after conclusion of agreement about transfer of dispute to the arbitration court addressed in the state court, the last is obliged to refuse adoption of the statement of claim as it isn't subject to consideration as civil legal proceedings (subitem 1 of item 1 of Art. 153 of GPK). In the course of preparation of business for judicial proceedings the court also explains to the parties their right to ask dispute in the arbitration court (subparagraph 4 of article 170 GPK). The similar explanation is made to the parties when opening a court session (article 185 GPK). The court reminds again of the right of the parties to submit the case on consideration of the arbitration court and before consideration of the case on a being (article 192 GPK). At last, the court leaves the statement of claim without consideration if establishes that between the parties according to the law the contract on transfer of this dispute for permission of the arbitration court (subparagraph 5) of Art. 249 of GPK) is signed.

The law «About the Arbitration Courts» extends on the disputes which participants are residents of the Republic of Kazakhstan.

Legal status of the international arbitration (arbitration) courts is established by point 4 of article 6 of the Law RK «About the International Commercial Arbitration». This norm provides that arbitration the disputes following from civil contracts, between individuals, commercial and other organizations if at least one of the parties is the nonresident of the Republic of Kazakhstan by agreement of the parties can be referred. Competence differentiation between the arbitration courts and the international arbitration courts makes the law on subject structure of participants of dispute. If at least one party in dispute is the nonresident, dispute is considered not «internal», but international, and at its permission the law «About the International Commercial Arbitration» has to be applied. Thus, the main criterion, allowing to qualify arbitration trial as international, the concept «nonresident» is.

Appeal of arbitration legal proceedings is defined by such factors, as:

– independence and impartiality of the arbitration judge. Arbitration judges are that at execution of the duties and though their candidates are defined by the parties, judges aren't their representatives as there can't be the judge a person directly or indirectly interested in outcome of the case;
– equal rights of the parties. Settlement of dispute in the arbitration court is carried out on the basis of equal rights and opportunities of the parties for a statement of the point of view. Each party is obliged to prove those circumstances to which it refers in justification of the requirements or objections;
– freedom of application of a procedural and substantive law. The parties to or in the course of arbitration trial are free in a choice of norms of a substantive law on which dispute, in definition of a procedural order of a court session and on hand by the substantive and procedural laws (refusal of the claim, claim recognition, the settlement agreement, change of the basis or a claim subject) will be considered;
– qualification of consideration of dispute. The parties appoint judges of those persons, in knowledge and which qualification on the questions concerning dispute, they are sure;
– providing atmosphere of cooperation. The arbitration court promotes achievement by the parties of the mutually acceptable agreement, that is the conclusion between them the settlement agreement and to preservation as a result of this spirit of trust and cooperation on the future;
– obligation of the decision of the arbitration court. This decision is obligatory from the date of its removal for all parties of process;
– voluntariness of execution of the decision of the arbitration court. Both parties execute this decision on a voluntary basis;
– efficiency of arbitration legal proceedings. As it consists of one cycle, the decision is final and doesn't provide appellate procedures (the cassation, the appeal);
– profitability of arbitration legal proceedings. Besides owing to lack of multistaging of procedures of consideration of dispute, and also inversely proportional dependence of a legal cost on the claim sum legal proceedings don't provide too big expenses. Besides, are provided both a delay, and payment payment by installments, and also confirmation of validity of the agreement of the parties on distribution of court costs in other, arranging them, proportionality (except the international arbitration);
– security of execution of the decision of the arbitration court. In case of decision non-execution voluntary, it is executed through the state system of compulsory execution (except the international arbitration).

The legal nature of arbitration and its place in system of permission of the legal conflicts in many respects are defined by that, activity of the arbitration court and persons participating in business on consideration of civil dispute is how internally organized and ordered.

Arbitration process as a version of law-enforcement activity also breaks up to stages of initiation of activity (production), preparation and adoption of the law-enforcement act (pronouncement of the arbitral award) which in the set form law-enforcement cycles.

At a stage of excitement of proceeding the arbitration court resolves an issue of adoption of the statement of claim, checks existence of the arbitration agreement, observance by the claimant of an order of the address to the arbitration court, payment of arbitration collecting. It should be noted especially that after initiation of proceedings in constantly operating arbitration court procedural activity is generated only after formation of structure which will consider case on dispute of the parties. Chronologically activities for election (appointment) of arbitrators follow initiation of proceedings and precede a preparation stage, however aren't a stage of arbitration process. Feature of development of arbitration process consists in this gap.

The created structure of the arbitration court carries out actions on preparation of business for trial. Problems of a stage of preparation of business to consideration in the arbitration court essentially don't differ from the state legal proceedings. Determination of nature of the disputable legal relationship which is subject to application of the legislation, the circumstances important for the correct consideration of the case, reconciliation of the parties concerns to them.

At a stage of preparation of business by the respondent the response on the statement of claim or objections for the claim (to item 4 of Art. 22 of the Law on the arbitration courts is represented; item 4 of Art. 18 of the Law on the international commercial arbitration) or objections in the claim. Requirements to their contents, and also an order of their representation are most often regulated by local regulations of constantly operating arbitration courts. Some of them contain the norms allocating the arbitration court with the right of

establishment of a deadline of representation of a written response and documents, proving objections after which they aren't accepted and aren't considered. At this stage the issue of adoption of the counterclaim can be resolved provided that it can be considered by the arbitration court according to conditions of the arbitration agreement. Also by preparation of business for consideration the arbitration court can dispose at the request of any party about acceptance of interim measures concerning a dispute subject, demand to present appropriate providing in connection with such measures. In the course of preparation of business for trial the arbitration court can face need to resolve an issue of the competence of the relation of dispute of the parties.

By the general rule arbitration trial is carried out in meeting with participation of the parties or their representatives (item 2 of Art. 27 of the Law on the arbitration courts; item 2 of Art. 25-1 of the Law on the international commercial arbitration), however in arbitration process a stage of consideration of the case on a being can be not always connected with carrying out oral hearing.

After research of facts of the case at a stage of acceptance by jurisdictional body (arbitration court) of the law-enforcement act the arbitration court by a majority vote the arbitrators entering into its structure, makes the decision which appears in meeting of the arbitration court. The arbitration court has the right to declare only rezolyutivny part of the decision, and the motivated decision in this case goes to the parties in time, not exceeding 30 days from the date of the announcement of rezolyutivny part of the decision (item 1 of Art. 34 of the Law on the arbitration courts).

Production in the arbitration court of the first instance comes to the end with pronouncement of the decision. At the same time arbitration process can include production in the arbitration court of the second instance (a law-enforcement cycle) in cases when it is allowed by the national legislation and is provided by the agreement of the parties or regulations of constantly operating arbitration court.

Production in the arbitration court of the second instance gained distribution in the international commercial arbitration in reply to requirement of the parties to carry out verification of the arbitral award without involvement of the state courts, and in some countries gained distribution even appeal production in the internal arbitration courts [6]. To be fair it should be noted that the legislation of foreign countries also enough seldom contains the norms regulating production in arbitration of the second instance, however there are also exceptions. So, for example, the Act of arbitration of the Netherlands not only allows possibility of verification of the arbitral award in appeal instance of the arbitration court (Art. 1050), but even regulates procedure of appeal revision. The facultative appeal arbitration order of the appeal is provided in Art. 594 (1) GPK of Austria (1983). In a number of the countries of Latin America the legislation contains norms about an admissibility of appeal revision of the arbitral award. So, for example, Art. 263 of GPK of Argentina resolves the full appeal of the arbitral award in the state court or, by agreement of the parties, in the arbitration court of the second instance. The order of consideration of the case in the appeal arbitration court in Art. 62 of the Arbitration law Peru (1992) [6] is even more in details settled.

In the Republic of Kazakhstan, as well as in the Russian Federation, settlement of dispute in the arbitration court happens within production only in one instance.

Thus, stages of arbitration process follow one after another in the logical sequence directed on completion of arbitration trial and pronouncement of the decision on a being of dispute.

Today in Kazakhstan the most known arbitration courts are: The arbitration commission at Chamber of Commerce and Industry of the Republic of Kazakhstan and the Kazakhstan international arbitration. The International arbitration court of the Legal center «IUS» acts as the independent party in Kazakhstan also. This court, since 1993, considered many economic disputes. Including disputes with participation of legal entities of the Russian Federation, Ukraine, Republic of Belarus, the Kyrgyz Republic, the Republic of Uzbekistan, the Republic of Korea, Canada, the United Kingdom of Great Britain and Northern Ireland, the Republic of Panama and other states.

Thus, the circle of ways of alternative permission of civil disputes is rather great, it develops, including all new and new mechanisms in the category of means by means of which it is possible without the appeal to the state justice to resolve any conflict connected with non-performance or unfair implementation of civil obligations in business activity.

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А.С.Қыздарбекова

Кәсіпкерлік қызметтегі дауларды шешудің соттық емес тәсілдері

Мақала соттан тыс тәртіпте кәсіпкерлік дауларды шешу мәселесіне арналған. Жекелеген әдістер ретінде делдалдық (медиация), келіссөз жүргізу, дәнекер, бітім келісімге келу, шағын талдау және арбитраж қолданылады. Салыстырмалы деңгейде соттан тыс кәсіпкерлік дауларды шешудің қайқайсының болмасын артықшылығы ескерілді. Автор оларды қолдануға ерекше назар аударған. Кейбір жекелеген соттан тыс кәсіпкерлік дауларды шешудің шетелдік тәжірибесі зерделеніп, оның Қазақстанда қолданылуы зерттелген.

А.С.Киздарбекова

Несудебные способы разрешения споров в предпринимательской деятельности

Статья посвящена несудебным способам разрешения споров в предпринимательской деятельности. Как отдельные способы проанализированы переговоры, посредничество (медиация), примирение, миниразбирательство и арбитраж. В сравнительном аспекте рассмотрены преимущества каждого из указанных несудебных способов разрешения предпринимательских споров. Автором уделено внимание условиям их применения. Исследованы широта применения отдельных несудебных способов разрешения предпринимательских споров в зарубежных странах и степень развития и использования их в Казахстане.