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GENESIS OF PRE-TRIAL SETTLEMENT OF COMMERCIAL DISPUTES

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SUMMARY

In the article, the author established the legal framework and mechanism for the implementation of pre-trial settlement of commercial disputes in the context of recent legislative changes.

The problems of functioning of separate norms of the Commercial and Procedural Code of Ukraine with regard to the Institute of the pre-trial settlement of disputes are investigated.

Key words: claim, pre-trial settlement, economic disputes.

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АННОТАЦИЯ

В статье автор установил правовые рамки и механизм для осуществления досудебного разрешения хозяйственных споров в контексте последних законодательных изменений.

Исследуются проблемы функционирования отдельных норм Хозяйственного процессуального кодекса Украины в отношении института досудебного разрешения споров.

Ключевые слова: иск, досудебное регулирование, экономические споры.

REZUMAT

În articol, autorul a stabilit un cadru juridic și un mecanism pentru soluționarea litigiilor economice în contextul ultimelor modificări legislative.

Se explorează problemele de funcționare a anumitor norme ale Codului de Procedură Economică din Ucraina în ceea ce privește instituirea soluționării litigiilor înainte de judecată.

Cuvinte cheie: proces, regulament preliminar, litigii economice.

Introduction. Pre-trial settlement of commercial disputes is important for economic entities, as well as for the judicial system as a whole. This legal remedy is used by the parties independently and at their own discretion with the aim of immediate and rapid resolution of a commercial dispute, however, it helps to "unload" the courts from a large number of claims. However, in the current legislation, countries still have certain disadvantages and contradictions that require some changes [1, c. 123].

The importance of legal regulation of pre-trial procedures for the resolution of commercial disputes is regulated by the Commercial Procedural Code of Ukraine.

The pre-trial settlement of commercial disputes is governed by Section I of the Commercial and Procedural Code of Ukraine, the Civil Code of Ukraine and others legal acts, in particular:

1) The Merchant Shipping Code of Ukraine;

2) The Air Code of Ukraine;

3) The charter of the railways of Ukraine.

The state of the recent researches. It should be noted that the issue of pre-trial settlement of disputes is the subject of interesting research by such scientists as I.A. Baliak, V.D. Chernadchuk, Y.V. Volokhai, T.S. Dunailo.

Unfortunately, most scientists have focused their attention on the scientific and theoretical aspects of the pre-trial settlement of commercial disputes [2]. I.A. Balyuk drew attention to the existence of the problem of legal regulation of the pre-trial procedure for the resolution of commercial disputes and, as a conclusion, noted that the legal norms regulating the relations of pre-trial settlement of disputes should not be contained in the Civil Code of Ukraine, and for the legal consolidation of such norms it is expedient to apply by-laws [3].

Statement of the main material. It should be noted that in the old version of the Commercial and Procedural Code of Ukraine in accordance with Art. 6 pretentious settlement of disputes is carried out by applying with a written claim, which is sent by a recommended or valuable letter or is handed over to the receipt. Part 2 of this article establishes the provision that enterprises and organizations whose rights and legitimate interests are violated in order to directly resolve the dispute with the infringer of these rights and interests, apply to him with a written claim, but all the above is simplified in the new the Commercial and Procedural Code of Ukraine (No. 6232 from 23.03.2017). In our opinion, a claim should be understood as a legal remedy for the parties to protect their rights and interests.

Thus, in particular, the claim as a material requirement of one of the participants in the controversial legal relationship with another is a means of resolving the conflict by the parties themselves. Pre-trial settlement of commercial disputes means that the parties independently apply measures aimed at resolving an existing dispute between them until the moment of entering the legal relationship with the court, by filing a claim against the counterparty who breached the terms of the contract [4, c. 234].

A. M. Dolgopolov emphasizes that the main aim of claiming is to prevent the negative influence on the enterprise from the contractors by legal rules implementing. By proceeding the claims one enterprise points to another one to the wrong actions or omissions that have violated the interests of the claimant and demands correction of the inaccuracies or ambiguities voluntarily appealing to the normative acts or facts of the case. This is the principle of every claim. In case of the positive settlement, the parties do not apply to the court [14, p. 54].

Though there is no clear definition of the claim in the Commercial and Procedure Code of Ukraine from 06.11.1991 or in the new of Commercial and Procedure Code.

Claiming as dispute resolution is one of the additional means of protecting the rights and the legal interests of the parties. By proceeding the claims one party points to another party to the wrong actions or omissions that have violated the interests of the claimant and demands correction of the inaccuracies or ambiguities voluntarily appealing to the normative acts or facts of the case.

Claiming in the dispute resolution scheme is targeted towards consideration of unreasonable demands and indisputable complaints by the court. The positive side of claim in the dispute resolution is the avoiding of the court applying that is connected with the financial expenses such as charges levying, commission, document preparation, travel expenses, etc.

The tasks of the law department of the enterprise in claim settlement procedures are: to provide the observance of the treaty obligations in all spheres; to guarantee rational usage of the physical, labour, financial resources, gas and energy, raw materials and other resources; to reduce and to eliminate of the inefficient expenses; to protect and to rehabilitate of the property rights and the interests of the enterprise; to ensure the liability for rights violations; to improve the economic indices and to prevent their violations [15].

Claims settlement procedures are mostly conducted by the law department of the enterprise. The author speaks about the decentralized case conduct when the claims procedures are conducted by the employees of the functional departments or the experts of the claiming departments and the advantage of such claiming framework is that the executive knows the essence of the dispute and the contractors he/she works with. Compromises can be reached in order to settle the dispute.

According to A. M. Dolgopolov, the practice of the law departments defines the general methods of the claims settlement procedures and its organizational forms. There should be the decree or instructions on the claims settlement procedures with the specification of the department or the person in charge responsible for the claim procedures in case of the breach of a contract at every enterprise. This department or the executive has the right to demand documents and materials from other departments necessary for the dispute resolution or responses to the claims [14, p. 55].

The control for the registering the claim and the responses to the complaints; summing up the results of the claims procedures; preparation the propositions in elimination the drawbacks in the claims procedures are viewed as the functions of the law department of the enterprise.

The claim settlement procedures are done according to the recommendations of the Ministry of Justice of Ukraine "In the enterprise, agency or organization" [16] and the appropriate bylaws, instructions drafted by legal bodies. Though these recommendations do not meet the present realities and there is a need for new by law on complaint and claim procedures by the legal entities regardless of the property form.

If the claim is sued by the executives some duties are be done by the law departments: to control claim settlement procedures, to prepare the documents, to manage and control claim procedures, to do briefings, to calculate analyses and teach claim settlement procedures. Claim responses prepared by other departments and the rejected claims are authenticated under the seal of law departments.

We agree that relegation of cases to other legal departments is justified by law departments workload and their obligations to pay attention to other legal issues. The control of the law departments workload should be done not by the cases amount relegation but by the increase of the law department staff. A big amount of income and outcome claims affirms the problems both inside the enterprise and from the side of the counterparty.

It should be noted that before 2002, pre-trial settlement of commercial disputes was a mandatory stage of the commercial process. In Art. 63 of The Civil Procedural Code of Ukraine stated that in case of failure to submit evidence about taking measures of the pre-trial settlement of a dispute, the claim is returned. This provision was applied by the Supreme Economic Court of Ukraine for a long time. In this regard, the question is next is this a violation of the existence of a mandatory pre-trial settlement of disputes on the right of a person to judicial protection?

Consider the historical development of pre-trial settlement of disputes in the context of the Independent State. From the contents of Part 2 of Art. 124 of the Constitution of Ukraine, regarding the extension of the jurisdiction of courts to all legal relations arising in the State, it follows that each of the subjects of legal relations in the event of a dispute may appeal to the court on his decision [5].

The first step towards solving this problem was the resolution of the Plenary Session of the Supreme Economic Court of Ukraine "On the Application of the Constitution of Ukraine in the Administration of Justice" of 1.11.1996 No 9, in paragraph 8 of which, with reference to Art. 124 of the Constitution of Ukraine states: "The court is not entitled to deny a person the acceptance of a statement of claim or a complaint only on the grounds that its claims may be considered in accordance with the pre-trial procedure prescribed by law".

Subsequently, in a decision of the Constitutional Court of Ukraine in a case under constitutional appeal of the Limited Liability Company "Trade House" Campus Cotton Club "regarding the official interpretation of the provision of Part 2 of Art. 124 of the Constitution of Ukraine (case on pre-trial settlement of disputes) "of 09.07.2002, No. 15-rp / 2002, it was determined that the establishment of a law or a contract of pre-trial settlement of a dispute by the will of the subjects of legal relationships is not a restriction of the jurisdiction of courts and the right to judicial protection.

Thus, the Constitutional Court of Ukraine has established that the existence of contractual rules of the pre-trial settlement of disputes is not an obstacle to an appeal to a court of law [6, c. 200]. The next step in solving this problem was the adoption of the Law of Ukraine on June 23, 2005, No 2705-IV "On Amending Certain Legislative Acts of Ukraine Regarding Relative Prejudicial Settlement of Disputes", which excluded the provisions of paragraph 7 of Part 1 of Art. 63 of the The Civil Procedural Code of Ukraine: "in cases of non-submission of evidence of the application of measures for pre-trial settlement of a dispute, the claim is returned", the fact that the pre-trial procedure for settling economic disputes is not a mandatory condition (stage) for further consideration of the case by the commercial court.

Also, the Law made some changes to Part 1 of Art. 5, which established that the parties apply measures of the pre-trial settlement of a commercial dispute by agreement between themselves, which finally determined the pre-trial procedure for resolving disputes as an alternative. But it should be emphasized that this legal remedy is not mandatory [7, c. 76].

Consequently, after introducing extreme amendments to the Code of Civil Procedure of Ukraine, the pre-trial procedure for resolving a dispute is the right of economic entities, and not a duty, unless otherwise provided by law.

It should be noted that the binding nature of its application can be reduced only to the will of the participants, which they can, if desired, secure in the contract in the form of a reservation that the disputes between them, which are related to the conclusion, termination, execution of this contract, can be transferred to the decision of an economic court only if the order of pre-trial settlement, which is enshrined in section I of the Civil Code of Ukraine [8, c. 24], is observed.

Some scientists, such as I.A. Balyuk and Y. V. Volokhay have an interesting idea that the procedure for pre-trial settlement of commercial disputes is not needed at all because it effectively only acted due to the peculiarities of the Soviet economic system, and the conditions of the guilt cannot be effectively applied and lost popularity among economic entities.

In our opinion, the advantages of the pretentious order are more obvious. As a rule, if the Commercial Court will adjudicate your case, consider and resolve it not less than in 2-3 months (maybe more), then the satisfaction of the claim will take about from one to two months depending on the complexity of verifying the validity of your claims.

Another advantage of the pre-trial settlement of a commercial dispute can be considered that the application of the parties to the claim order allows them to save on court fees, which at the moment is very relevant. If the application to the Commercial Court for a claim of a proprietary nature takes 2% of the price of the claim and at least 1.5 times the minimum wage, see The Law on court fees for today, as well as the payment of the cost of your representative, then the claim only requires the cost of sending her counterpart (offender) [9].

In this regard, in our opinion, the existence of the institution of the pre-trial settlement of commercial disputes is necessary, but it is undoubtedly important because it ensures the realization of the interests of legal entities who wish to accelerate the settlement of a dispute between the counterparty and ensure the preservation of own funds.

But it will be more correctly if the procedure for pre-trial settlement of commercial disputes is carried out only by the Commercial Code of Ukraine, but it should not be limited to only Article 222, but it should be determined by a separate section of the Civil Code of Ukraine in order to clearly establish the procedure for the implementation of economic and legal responsibility [10, p. 23].

As for the Commercial and Procedural Code of Ukraine, its norms should be directed to the procedural procedure (the procedure and terms for the presentation and consideration of the claim, the notification of the applicant on the results of the consideration of the claim, the write-off of funds in an unconditional manner by the institutions of the bank, the amount of the claim, etc.)

In connection with this, the Commercial and Procedural Code of Ukraine should make changes, namely: to add in Section I "GENERAL PROVISIONS" and to indicate the possibility of resolving the dispute by agreement of the parties in the pre-trial procedure, and to more clearly formulate requirements for the content, form of claim processing [11, p.100].

As noted above, until recently, pre-trial settlement of commercial disputes was considered one of the mandatory stages of the economic process. In order for the Commercial Court to adjudicate the case, legal entities needed, above all, to take measures for the pre-trial settlement of disputes. But the decision of the Constitutional Court of Ukraine on July 9, 2002, No. 15-rp / 2002 established that the right of a person to apply to a court cannot be restricted by law or other normative-legal acts.

After bringing the provisions of the Commercial and Procedural Code of Ukraine to the requirements of Art. 124 of the Constitution of Ukraine, namely the exception clause 7, part 1 of Art. 63 GPC ("In cases of non-submission of evidence of taking measures of the pre-trial settlement of a dispute, the claim is returned").

The Law of Ukraine of 23 June 2005 No 2705-IV stipulates that the pre-trial procedure for the settlement of commercial disputes is not a prerequisite and a stage of the economic process for further consideration of the case by the Commercial Court.

Conclusions. The possibility of judicial protection can not be imposed by law depending on the use by the legal entities of the pre-trial settlement of the dispute. The application of the claim order, to date, is the right of the parties and is carried out exclusively by agreement between them, on their own. And also the refusal of legal entities in its application does not exclude the possibility of a person to use its constitutional right to judicial protection. Thus, the new Commercial and Procedural Code of Ukraine defines the fundamental principles for resolving pre-trial dispute according to the present realities [13].

We believe that this pre-trial settlement institution should exist as a regulator of business relations between the counterparties and enhance their business reputation.

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