SETTLEMENT OF A DISPUTE WITH THE PARTICIPATION OF A JUDGE

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Abstract: This research is devoted to the "settlement of a dispute with the participation of a judge" institute, which at the end of 2017 was introduced into the administrative, economic and civil processes of Ukraine. During the preparatory proceedings the legislator has provided for the plaintiff and the defendant the opportunity to apply the procedure of peaceful settlement of a dispute with a judge. Of course, for the short time of existence, settlement of a dispute with a judge does not have the proper application in judicial practice. This is due to caution of the subjects of its application, and so the uncertainty and sometimes incomprehensibility purpose of this procedure. There are many subjective and objective factors. But the key is the Ukrainian's perception of court, mainly as a punitiver, than a state body that protects human right and inability to conduct constructive negotiations and agreement. Despite these obstacles, it should be done as evidenced although rare positive jurisprudence [1].

The main focus of the research of the institute of dispute settlement involving judges should be the unification of the provisions relating to procedures foundations (principles, the beginning and the end, the order and timing of, etc.). Thanks to the practical application, the order of the procedure will be improved. But there are issues that require theoretical development. Based on the available papers of scientists and practitioners, items in this article will attempt to reveal the concept of settlement of a dispute with a judge: opportunities and risks.

Keywords: settlement of a dispute with the participation of a judge, alternative dispute resolution, mediation, judge.

1. Introduction

The judicial process (order, attributes, form) does not allow effectively and simply to resolve a dispute substantially. Court outside parties themselves will have to focus on the process, competition rather than addressing the merits. Therefore, the international community is actively using alternative methods of dispute resolution that can solve a dispute out of court. Dispute by agreement before the hearing on the merits, with a judge for a long time has a mandatory or voluntary basis in many countries: Australia, Germany, Norway, Finland, Bulgaria, Croatia and others.

In essence to resolve a dispute with a judge reminds of a conciliation procedure. It should be noted, that in Ukraine, the procedure for conciliation in court by reaching parties to a mutually acceptable agreement under the procedural guidance of a judge has always been known. These procedures include: signing by the parties of a settlement agreement, waiver of claim and claimant to submit a dispute to arbitration, in criminal proceedings – approval of the settlement agreement and the recognition of guilt.

However, according to Article 2 of the Commercial Procedural Code of Ukraine, Article 2 of the Code of Administrative Justice of Ukraine, Articles 2, 7 of the Criminal Procedure Code of Ukraine, Article 2 of the Civil Procedural Code of Ukraine, this form of dispute settlement is not the main function or the direct task of judicial activity and is not perceived as it. It is not included in the task of achieving justice and conciliation with the help of settling a dispute with a judge. Therefore, along with the task of justice "consideration and resolution of cases" there must be another, but the primary task – "to facilitate the settlement of a dispute between the parties" [2] – notes S. Koroyed.

The article is to compare the opinions of academics and practitioners on applications procedures for dispute settlement involving judges and risk assessment of its implementation, an attempt of forming definitions of the term "settlement of a dispute with a judge."

2. Materials and Methods

In the process of the research, the following methods of cognition have been applied: dialectical – to determine the content of the settlement of a dispute with the participation of a judge; hermeneutic, which ensured the establishment of the limits of the interpretation of the concept; analysis – allowed to highlight the state of the scientific problem; formal-logical, statistical and documentary analysis – for the analysis of the content of legislative and other normative legal acts.

3. Results

Scientists and practice differently perceived a purpose of dispute settlement involving judges. If the introduction of this institute into the economic and civil process as a whole was perceived positively, then as far as administrative legal proceedings are concerned – opinions are divided. Even before the introduction of this institute into the administrative justice of Ukraine, V. Bevzenko noted that the achievement of reconciliation between the parties in an administrative case would facilitate the concealment of the facts of acceptance (commission) by the subject of authority of decisions, actions or inactions which did not meet the conditions, foreseen by the tasks of administrative legal proceedings of Ukraine, public authorities to avoid liability and any further breach of public authorities in the rights, freedoms and lawful interests of individuals, the rights and legitimate interests of legal persons in public law relations [3].

The head of the Cassation administrative court, M. Smokovich, placed the problem of the lack of the right to reconciliation in the authority on the first line and emphasized that this problem is the main one when introducing the procedure of reconciliation in administrative justice. Also, there is a lack of understanding of the essence of this procedure by judges, who consider that they should not negotiate peace agreements with the subjects of power. In addition, mediation can be involved, such as in electoral affairs [4].

Of course, the question may arise: what is the point of introducing a dispute settlement with the participation of a judge in administrative proceedings without giving appropriate authority to the subjects of authority? But before answering it, it is necessary to analyze whether such powers in the subjects of power are absent. For example, with the Model Regulations of the Court staff [5] it follows that any limitation of authority to resolve a dispute with a judge or conducting a mediation procedure is given to the court staff. Another thing is that the relevant Law on Mediation in Ukraine is not adopted, that is, at the legislative level, the possibility of conducting this procedure is not regulated, and the subject of power authorities has the right to act only on the basis and within the powers, provided by law.

If it is clear with the procedure of mediation, a categorically refusal to settle a dispute with the participation of a judge should not be. In the Administrative Court of Ukraine, there are categories of cases in which this institution should be applied. First and foremost, these are cases involving individual administrative acts, that is, those that apply to a particular person or a certain circle of persons. In our opinion, the settlement of a dispute with the participation of a judge should necessarily apply in disputes of individuals or legal entities with a manager of public

information regarding the appeal of his/her decisions, actions or inactivity in terms of access to public information; disputes concerning the seizure or compulsory alienation of property for public needs or the motives of social necessity, as well as in some disputes over the decision of citizens to public service, its passage, release of the public service. For example, the subject of authority did not provide access to public information – information on the amount of bonus, received by a civil servant B. in the year. In the course of a joint meeting, a judge may draw the attention of the parties of a dispute to the decision of the Constitutional Court of Ukraine [6]. Obviously, this information will be a signal for an authority to review its position and grant the complainant requested public information. Accordingly, the administrative dispute will be settled.

Also, there is the lack of a dispute settlement institution with the participation of a judge. A judge, involved in the settlement of a dispute, has no right to consider the case as a judge in the future: redistribution will be carried out, and the parties [4] and a judge [7] may specifically abuse this norm, – the representatives of the judiciary noted. The initiation of the settlement procedure may be a "quasi-withdrawal from the trial" [8] and an ordinary attempt to replace a judge in the absence of grounds for his/her disengagement [9], lawyers say. Consequently, a party is aware of the procedural subtleties that a party can fall into the hook of abuse of procedural rights of both an opponent and an unfair judge.

The Code of Administrative Justice of Ukraine defines disputes in which the settlement with the participation of a judge is not allowed (appeals of normative legal acts, cases, related to the election process, etc.).In other disputes, this mechanism can be used, for example, on appealing of tax communication decisions. But a positive court practice in disputes of this category does not and will not exist. The reason is that the Tax Code of Ukraine is not included in the relevant regulations that tax notice, decision or tax claim may be withdrawn and that the tax authority may reduce the amount of additional assessed taxpayer's money obligations as an outcome of a dispute settlement procedure with a judge. Consequently, the discretionary powers of the tax authority need to be expanded. And this is only possible at the legislative level. It is unlikely, that such legislative initiatives will come from the fiscal authority, since for their employees any step towards reconciliation or settlement of a dispute has always been considered a corrupt act.

Space hazards, associated with dispute settlement procedures involving judges, are called by Berezhnaya T. and B. Grabowski a possibility of abuse by the opponent [9]. The tax authority may initiate a "sham" dispute settlement in order to buy time for a conviction, which came into force in criminal proceedings against the applicant's contractor.

L. Yuhtenko convinced that "less than one per cent of administrative cases can be completed as reconciliation of the parties by signing the settlement agreement"! Government entities do not want to go some concessions and find compromises on certain controversial issues of entities and / or citizens, arguing that either they are not authorized to do it or it is not required by the law of Ukraine [10].

The success of a dispute settlement procedure with a judge mainly depends on the human factor, namely the understanding of a judge and representatives of the parties need such a procedure, their conscientious attitude to professional duties, attempts to achieve a balance between private and public interests. But in administrative proceedings a success of this procedure directly depends on the legal regulation of law by a subject of authority to resolve a dispute with a judge and establish a clear list of categories of cases in which it is possible to do it.

4. Discussion

Scientists are divided in their views regarding the relationship between mediation and dispute settlement institution for judges. Most scientists have thought that the settlement of a dispute with a judge is not mediation, although they have similar features. So, S. Kivalov notes: "The settlement of a dispute with a judge has a lot in common with mediation, however, the institution can't accept mediation in the classic sense due to the fact that, firstly, a mediator is an independent person, secondly, mediation is an extremely flexible and confidential procedure, thirdly, mediation is separate from the legal proceedings and is an alternative to it" [11].

L. Romanadze also explains that the settlement of a dispute with the participation of a judge is an independent hybrid reconciliation procedure, which has nothing to do with the classic facilitation model of mediation [12].

Denying the opportunity to consider the institution of dispute settlement with the participation of a judge as a model of mediation, N. Petrenko gives the following arguments: firstly, decisions of mediation's procedure must be taken by the parties, and the leading role of the court in the passing process and one of the court decision is fixed in national legislation. Secondly, a mediator has no right to give advice or to suggest ways to resolve a dispute, and the powers of a judge in the procedure for resolving a case involving a judge are completely opposite. For these reasons, the scientist believes that the settlement of a dispute involving a judge is an independent institute of Commercial procedural law [13].

The settlement of a dispute with the participation of a judge I. Butyrskaya also considers an independent form of conciliation procedures for the reasons: Firstly, in the Commercial procedural code of Ukraine the status of persons, providing mediation services (mediation) and those, who settle a dispute are delimited; secondly, unlike mediation, during the settlement of a dispute involving a judge the parties are deprived of the right to choose a mediator, as a judge which helps to settle their dispute is determined by the automated system of document circulation of the court; thirdly, the settlement of a dispute with the participation of a judge is possible only prior to the commencement of consideration of the case on the merits and only once [14]. In addition to these differences between mediation and settlement of a dispute with a judge O. Karmaza added: the lack of flexibility trial principle, and in mediation - principles of competition and a reasonable time; the presence of the rules of jurisdiction of a dispute in court and the lack thereof in mediation [15].

Exploring mediation in civil jurisdiction, S. Kalashnikova calls "settlement of a dispute with a judge" "integration of mediation's technology into the trial". In most European countries, scientist remarks, judicial mediation is in the interest of the judicial system (and not in the interests of parties of a dispute), and is aimed at the following objectives: reducing the number of cases, considered on the merits, in the courts; settlement of disputes at earlier stages of the process; increasing the efficiency of the courts; shortening the timing of the case; increase enforcement opportunities of judgments; reduce the cost of a judges and the administration, etc. Only a few countries, such as Finland and the Netherlands, declared the autonomy of legal disputes as the task of judicial mediation participants, which ultimately helps create a dispute settlement mechanism in the interests of parties of a dispute, not the judiciary [16].

However, A. Mozhaykina considers settlement of a dispute with a judge a type of mediation and identifies the following key criteria for its position: firstly, a judge acts as a neutral side that helps the parties to reach agreement and such a function of a judge can't be regarded as an activity of justice; secondly, the key principles are: voluntary and confidential; thirdly, a dispute is decided not only on legal opinions and within the subject of the claim but also with the interests of the parties; fourthly, a judge who conducts a dispute settlement procedure like the mediator has no right to provide legal advice and recommendations to the parties and to evaluate the evidence in the case; Fifthly, responsibility for the decision lays on the parties of a dispute that mutually admit the decision [17].

Since mediation in Ukraine develops exclusively on a voluntary basis, and in judicial practice only the declarative obligation of a judge prevails over explanation to the parties of the possibility of applying a dispute and solution procedure with the participation of a judge instead of inducing the parties to conciliation, – further research and comparison of regulation and practical application of the procedures in foreign countries is promising.

Among the researchers there is divided an opinion on the processuality institute of dispute settlement involving judges and its place in the proceedings. Some scientists consider it a procedure within the framework of a trial [18]; other scholars in general deny its procedurality [19]. The most successful position seems to us to classify this institution to optional phase (part) of the preparatory stage of the proceedings [11, 20].

"Communication sides with a judge for clarification and additional information to assess the prospects of litigation parties of a dispute", as Shelekhova A. and A. Rubanenko consider settling a dispute with a judge [21]. Considering that the settlement of a dispute with a judge is in the form of open and closed meetings – apparently, this procedure can be considered a joint communication to discuss important issues, as the ability to jointly analyze important issues, express their opinions and suggestions, take coordinated decisions.

Thus, the settlement of a dispute with a judge – it ordered the optional stage (part) of the preparatory stage of the proceedings, conducted with the consent of the plaintiff and defendant under procedural guidance of judges in order to achieve reconciliation by the parties of a dispute.

References

1. The decision of the district court of Bolgrad of Odessa region (2018). Case No. 497/935/17. 06.04.2018. The only state register of court decisions. Available at: http://www.reyestr.court.gov.ua/Review/73258108
2. Koroied, S. O. (2017). Settlement of the dispute as an independent task of civil proceedings under the draft of new edition of the CPC of Ukraine: the influence of the dispute resolution institution with the participation of the judge on the effectiveness of the civil process. Judicial appeal, 3 (48), 79–88.
3. Bevzenko, V. M. (2009). Reconciliation in administrative justice of Ukraine: the legacy of the civil procedure law if the effective means of resolving public law disputes? Available at: http://www.pravoznavec.com.ua/period/article/3971/ %C1
4. Mediation in adminpraise: Yes or no? (2018). LigaZakon. Available at: https://jurliga.ligazakon.net/news/181295_medatsya-v-admnprotses-tak-chi-n
5. Model Regulations of the Court staff (2019). The decision of the High Council of Justice. No. 140/0/15-19. 17.01.2019. Available at: http://www.vru.gov.ua/act/17091
6. The Decision Of The Constitutional Court Of Ukraine (2012). Case 2-рп/2012. 20.01.2012. Legislation of Ukraine. Available at: https://zakon.rada.gov.ua/laws/show/ru/v002p710-12
7. Boiko, V. B.; Kulish, A. M., Rieznik, O. M. (Eds.) (2018). Settlement of a dispute with the participation of a judge: advantages and disadvantages. The reform of the legal system in the context of European integration processes. Part 1. Sumy: Sumy State University, 272–277.
8. Bobkova, A., Banasko O. (2017). The Novels concerning the Economic Procedural Code of Ukraine. Law of Ukraine, 9, 45–50.
9. Berezhna, T., Hrabovskyi, V. (2018). Settlement of a dispute with the participation of a judge in tax disputes: whether or not? Legal Newspaper, 46. Available at: https://www.lexology.com/library/detail.aspx?g=327c2840-1467-4ed9-8c60-66023a52f67d
10. Yukhtenko, L. (2013). Pre-trial settlement of the dispute through negotiations by a judge in administrative proceedings: the nature and problems of introduction. Legal Bulletin, 3, 106–112.
11. Kivalov, S. V. (2018). The settlement of public-law dispute with participation of the judge: a new form of justice or the manifestation of mediation in court? Laws and Institutions Mechanisms for the Development of Ukraine in the minds of Europe and Integration. Odessa: Vidavnichy dim "Helvetika", 5–8. Available at: http://dspace.onua.edu.ua/handle/11300/10930
12. Romanadze, L. D. Settlement of a dispute with the participation of a judge and other procedural changes: impact on the development of mediation. Available at: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=2ahUKEwjB-7egmYTgAhXEh6YKHTRxBAQQFjABegQIBxAC&url=http %3A %2F %2Fmediation.ua %2Fwp-content %2Fuploads %2F2017 %2F05 %2FStattya-pro-Mediatsiyu-v-proektah-protses-kodeksiv-2.pdf&usg=AOvVaw0XLvph9VYp0JSXZTbTzpK1

13. Petrenko, N. (2018). Settlement of a dispute with the participation of a judge in economic legal proceedings. Commercial law and process, 10, 73–77.

14. Butyrska, I. A. (2017). Settlement of a dispute with the participation of a judge: the prospects for the introduction into the economic process in Ukraine. Commercial law and process, 12, 79–83.

15. Karmaza, O. O. (2018). The institution of dispute settlement with participation of the judge in civil, commercial and administrative proceedings of Ukraine. Scientific Bulletin of Public and Private Law, 1 (3), 37–42.

16. Kalashnykova, S. I. (2010). Mediation in the civil jurisdiction. Yekaterinburg, 26.

17. Mozhaikina, O. (2018). Legal analysis of settlement of a dispute involving a judge. Foreign trade: economy, finances, law, 2, 174–180.

18. Tykhanskyi, O. B.; Shcherbaniuk, O. V., Tsybuliak-Kustevych, A. S. (Eds.) (2018). Settlement of a dispute with the participation of a judge in civil legal proceedings of Ukraine. Current challenges and topical issues of judicial reform in Ukraine. Chernivtsi: Yavorskyi S. N., 176–178.

19. Chabanenko, M. M., Lezhnieva, T. M. (2018). Legal nature of dispute settlement involvinga judge (inthecontext of the civiliste procedure structure). Comparative and analytical right, 2, 135–137.

20. Yasynok, M. M. (Ed.) (2018). Code of Administrative Justice of Ukraine. Kyiv: Alerta, 522.

21. What is the peaceful settlement of disputes in court? (2018). Available at: http://loyer.com.ua/ru/chto-takoe-mirnoe-uregulirovanie-sporov-v-sude/