

CD corporate disputes



OCT-DEC 2012

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Production: Mark Truman

Corporate Disputes
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MEDIATION IN UKRAINE: REGULATORY FRAMEWORK AND DEVELOPMENT TRENDS

BY **SVITLANA KHEDA**
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Mediation was introduced to Ukraine at the end of the last century by the IFC and some other international development institutions. Before that, the word 'mediation' did not exist in the Ukrainian language and Ukrainian law did not recognise any alternative dispute settlement but arbitration. For the past three to four years the awareness of the legal community, government officials and other stakeholders about mediation as an effective tool for settling disputes has been

significantly increased. However, many potential consumers of mediation services still think that mediation is just some form of 'meditation' and are sceptical when told about mediation and the benefits it may offer.

The slow pace of mediation in Ukraine can be partially explained by the predominantly hostile attitude towards this process held by the vast majority of lawyers – a phenomenon common for all jurisdictions in the early phase of mediation

development. In addition, some experts think the major obstacle for the spread of mediation is that this type of dispute settlement has not been yet formally introduced into the Ukrainian legal system by either passing a special law on mediation (the 'Law on Mediation') or amending existing legislation.

The issue of whether a Law on Mediation is required to push mediation development in Ukraine is controversial and widely debated, as many mediators and other experts think the country should follow the

path of those jurisdictions with no official regulation of mediation. Even though there are pros and cons of both positions, it seems a Law on Mediation could indeed trigger mediation development in Ukraine.

The main argument supporting this statement is that Ukraine belongs to the continental legal system, the members of which, unlike those of the Anglo-Saxon legal system, are known for placing any legislative act at the top of the hierarchy of legal sources and giving a subordinate role (or no role at



all) to court precedents. Thus, people trust only those institutes that are prescribed by law and are hesitant to choose something that exists only in the writings and speeches of experts. Notwithstanding experts' tireless assurances to the public that mediation does work and will make life easier by saving money, time and relationships, it is well known that to believe in mediation one has to experience it personally.

Therefore, the absence of a Law on Mediation sends the wrong message to the potential consumers of mediation services – namely that the state does not treat it seriously. This results in a low demand for the service which, consequently, does not generate supply and feeds a negative attitude benefiting the opponents of mediation.

On the other hand, those who support enacting a Law on Mediation often misinterpret the nature of this act. They do not distinguish between litigation and mediation as a form of amicable dispute settlement where flexibility and voluntary performance of the reached agreement are at the core. Therefore, a Law on Mediation should be adopted as a framework act, the primary purpose of which is to encourage the spread of mediation in Ukraine by declaring it as part of state policy. The details should be left for the mediation centres to

be reflected in their rules and for the parties to the dispute.

Recently, two alternative drafts of a Law on Mediation were submitted to the parliament. The first draft dated 5 April 2012 (the 'First Draft') is the improved version of the draft Law on Mediation dated 21 February 2011, rejected by the parliament back in 2011. The First Draft was developed as a framework law by the leading Ukrainian practicing

"A Law on Mediation should be adopted as a framework act, the primary purpose of which is to encourage the spread of mediation in Ukraine by declaring it as part of state policy."

mediators and has been well received by local and foreign experts. This document emphasises the leading role of mediation centres in developing the mediation rules and organising the training and certification of mediators, leaving only the key issues to state regulation.

The second draft Law on Mediation of 19 April 2012 (the 'Second Draft') is authored by the main opponent of the First Draft, Mr Kivalov. It contains a number

of controversial provisions and, in general, does not fully meet international standards. For instance, the Second Draft distinguishes between 'mediators' and 'authorised mediators'. The difference between them is that only authorised mediators can sit in mediations ordered by court. Mediators shall acquire the status of authorised mediator only after they register with a national register of authorised mediators, to be administered by the special mediation body at state level. This could result in excessive regulation of mediators' activities and corruption.

Both the First and the Second Drafts require improvement, but, even if adopted in their existing form, they will still push mediation development forward. However, the mediation community will be more welcoming of a law based on the First Draft.

Currently, in Ukraine a number of reputable mediation centres (Ukrainian Mediation Centre, Ukrainian Centre for Common Ground, etc.) provide mediation services on a regular basis. The most demanded types of mediation offered by the centres are family, labour and commercial mediation. Mediation centres also offer training courses to potential mediators and organise various events for practicing mediators to improve their skills. In

addition, mediation centres are the main mediation promoters and it is largely due to their efforts that the public awareness of mediation and the number of consumers of mediation services have been gradually increasing.

Notwithstanding the abovementioned obstacles, there is a positive outlook for mediation development in Ukraine. It is likely that a Law on Mediation will be adopted in the near future and the educational mission of the mediation centres, as well as the promotional activity of their mediation programs' graduates should make mediation a popular method for settling disputes in Ukraine. Continuous cooperation with international mediation institutions, as well as the training of Ukrainian mediators by leading foreign mediators is needed for mediation to go forward. On the other hand, the public also has to be educated on this new dispute settlement mechanism to raise demand for mediation services.



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