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Mediation as a way to resolve corporate disputes

Mediação como forma de resolver disputas societárias

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ABSTRACT: The actuality of the scientific research is determined by the need of finding the most effective way of resolving corporate disputes, which are caused by the creation of new social relations in the sphere of management in a post-soviet environment. The research aims to analyze mediation procedures as a way of resolving corporate disputes with the account of Kazakhstan Republic's national legislation peculiarities. Amongst used approaches, the dogmatic method, synthesis method, juristic hermeneutics method, logical analysis method, theoretical approach, induction method, and others were used in the research. Comparative-juristic analysis was conducted

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in the research, which allowed us to investigate the modern state of corporate dispute prevention and resolution mechanisms in the context of juristic practices of European Union countries and Kazakhstan. Analysis of this segment has shown that the current mediation practice of resolving corporate disputes has several drawbacks and problems, which causes a need of implementing international practice into the law enforcement practice of Kazakhstan while addressing all the peculiarities of current national legislation. An analysis of the corporate dispute resolution mechanism was conducted, which allowed highlighting key characteristics, attributes, and functioning principles of the segment. During the current national basis analysis, the adoption of the Law "On mediation" caused several amendments in the legislative acts. Even though, norm regulation still has problematic aspects. The practicality of acquired results is in the ways of fixing issues with corporate dispute resolution via mediation mechanism functioning.

Keywords: alternative means of dispute resolution, reconcilement procedures, corporate management, court proceeding, international practice.

Introduction

The current civil law of the Kazakhstan Republic in the modern environment has substantially changed. Corporate law, related civil relationship, and corporations serve as a factor for the creation of new institution, which was not present before and did not exist in a post-soviet environment. Due to the transition of Kazakhstan's economy to a market economy, related corporate relationships began to appear. As A.A. Seydimbek [1] notes, the lack of proper corporate

relationship legal regulations has logically caused several issues and problematic aspects in resolving corporate disputes. As a result, special attention should be brought to the legal issue of this relationship category, the notion and object of the corporation, its legal subject status, and its place in the domestic legislation system. The actuality of the research is determined by the role of effective corporate dispute resolution mechanisms and respective corporate legislation in ensuring the economic system stability of Kazakhstan. According to B. Sreya [2], as of today, many types of disputes are counted as corporate conflicts. For example, disputes, caused between a stock company and its managers or between insiders and outsiders or various outsider groups, between business or corporation owners and executive authorities,. These disputes are usually based on natural conflicts between the interest of small and large shareholders, shareholders, and managers as well as investor conflicts regarding control of stock company manufacture and financial processes realization. Corporate disputes cause practical significant losses and damages to dispute parties and society in general.

Moreover, as J.J. Coe et al. [3] notes, questions, related to alternative corporate dispute resolution, remain mostly unregulated. This harms the protection of minority shareholder rights, and activity of stock companies and creates conditions for hostile acquisitions. There are several possible ways to resolve a possible corporate dispute, such as court proceedings, arbitration, mediation, and negotiations. I. Batiashvili [4], in his research, notes, that, in modern conditions, conciliation methods through e-mailing, online videoconferencing, internet-chatting, or via mobile phones are employed most often due to the need of resolving disputes with minimal financial losses. While analyzing European countries'

practices, it is worth noting, that corporate disputes are not a serious issue in the context of law resolution as they are on a sufficiently high level. Only the cases of corporate law abuse are being heard in a court of law [5].

The modern economy state of Kazakhstan Republic is characterized by quite complicated matters, which are caused by the risk of liquidity realization in the banking sector, financial crisis, and the influence of the global pandemic on the development of economic potential realization, which, in turn, causes significant attention being paid to the issue of business management implementation. Currently, corporate issues are the lack of equal representation of corporate goal contractors, non-transparency of company management aspects, low level of risk management system improvement, etc. As such, many international-level standards, particularly in the corporate management segment, cannot be fully and properly implemented in the law enforcement practice of Kazakhstan. In many cases, they are formal and only appear present, which causes their practicability of legal employment to be low. Overall, currently, Kazakhstan is characterized by most corporate disputes not reaching the court proceedings, which is caused by insufficient legal issue knowledge in the sphere and, as a result, many conflicts are solved in latent form.

The research aims to analyze mediation procedures as a way of resolving corporate disputes with the account of Kazakhstan Republic's national legislation peculiarities.

Materials and Methods

A conducted scientific research study in the field of mediation as a way to resolve corporate disputes was done with methodic approaches, that evaluated the theoretical

and practical aspects of the research sphere. By utilizing a theoretical approach, a notion of the mediation procedure, which is an alternative way of resolving disputes was evaluated, and its characterizing peculiarities were highlighted, especially those, which regulate corporate dispute resolution. The dogmatic approach, in its turn, allowed for investigation of corporate disputes and possibilities of mediation procedure employment during the resolution of disputes of this category. The juristic hermeneutic method enabled us to evaluate the current Kazakhstan national legislation basis. During the method employment, several amendments to various legislative acts were made by the adoption of the Law of the Republic of Kazakhstan No. 401-IV "On Mediation" [6]. Problematic aspects, related to the norm reglamentation, are still present.

The formal-juristic method allowed us to analyze corporate dispute resolution through the mediation procedure employment segment functioning concerning national peculiarities of Kazakhstan. Several problems at the current stage of formation were highlighted, which decrease the effectiveness of the alternative dispute resolution method. Comparative-juristic method analysis allowed us to investigate the modern state of corporate dispute prevention and resolution mechanisms in the context of juristic practices of European Union countries and Kazakhstan. Analysis of this segment has shown that the current mediation practice of resolving corporate disputes has several drawbacks and problems, which causes a need of implementing international practice into the law enforcement practice of Kazakhstan while addressing all the peculiarities of current national legislation. The deduction method allowed us to characterize the mediation mechanism as a corporate dispute resolution method under the highlighted inherent peculiarities and real-

ization principles of this segment. The induction method, in its turn, allowed us to characterize the mediation process as an alternative way of corporate dispute resolution under the highlighted notions. With the use of the synthesis method, acquired theoretical and practical research results were combined, which allows deducting ways of fixing the mediation process employment in corporate dispute resolution issues and to increase the effectiveness of the research object.

As such, this research was conducted in several stages. The first stage of the research is dedicated to the theoretical aspect of research. The term "mediation" was analyzed and notions with realization principles, present on the alternative way of resolving disputes, were highlighted. Corporate dispute resolution peculiarities were also analyzed under the national legislation. The second stage of the article consists of comparative-juristic analysis, which enabled us to investigate the modern state of corporate dispute resolution mechanism functioning in the context of mediation procedure law enforcement practice in the European Union countries and Kazakhstan. The third stage allowed us to highlight possible ways and methods of fixing problematic aspects in mediation as a corporate dispute resolution mechanism functioning in Kazakhstan and to improve the effectiveness of this segment.

Results

Corporate dispute as a legal phenomenon is caused by the illegitimate and legitimate actions of any parties of the legal corporate relationship of the third party. It should be viewed as a legal objection, which harms the interests and rights of the corporate party, hinders its realization, and creates further problems. A similar approach defines the notion of "corporate dispute" as a certain state of a corpo-

rate relationship, influenced by an event or action, which creates legal protective relations [5]. A corporate dispute can be resolved through the employment of mechanisms, which are regulated by the current national legislation or stated in the agreement between shareholders. In general, the corporate dispute should be regarded as a dispute or disagreement, caused between stockholders, shareholders, managers, investors, and the company, which may result in negative effects, usually violating the norms of current legislation, founder rights co-founders, codex or other inner documents of a stock company, can be a reason for a lawsuit against the company, its regulatory body, may be ground for a substantial change of the shareholder collective, premature termination of operating agencies powers and authorities, etc. [7].

The subjective side of corporate disputes is the specific sequence of actions, the intention of which is to protect the rights of the subject. The objective side of corporate disputes is the coordinated activity, aimed to resolve the dispute to all intents. During the development of this type of dispute, it is possible to highlight the initial violation of a company, determine specific action or event, when a dispute in a company is born, creation of respective resistance to the specific situation with the mandatory creation of opposition, advert conflict with a constructive and destructive manner of actions as well as a corporate dispute, which foresees a court proceeding. Potential parties of the corporate dispute are usually a limited group of bodies. They can be company co-owners and owners, major shareholders, which do not possess the majority stake, directors, top managers, external parties, and organizations, which have some complaints about the specific corporation [8]. Equal distribution of roles may still result in a conflict despite juristic equality of owners. The

initial sign of a problem can be a termination of a negotiation process between partners. This is related to the inability to accept one or another proposal of a company due to the own vision of the problem, which results in a corporate dispute, possible financial losses, or even bankruptcy.

An important aspect of quality corporate relation implementation is the proper preparation of constitutional documents and agreements between key roles, such as CEO (chief executive officer), CFO, (chief financial officer) and CVO (chief visionary officer). Special attention should be paid to such procedures, as calling the shareholders together, order of voting for, nomination, demotion, and appointment termination of a director. In this case, minimal requirements should be noted, which position candidate should meet, a minimal list of employers, which cannot hold director position, should be compiled, a procedure of partner removal from the structure should be created, and conditions and requirements during stake selling should be formed, and leadership position powers should be limited. As a result of this preventive procedure and work, a special agreement should be compiled, which will enforce every other main agreement and aspects, which were reached before and during the partnership [9]. It is also important to note, that description of an approach to the definition of the stake value, evaluation formula, methods, etc. are important aspects. As such, a corporate agreement may have the positions, which allow for regulation of a series of potential conflicts and disputes, caused between company sides.

While analyzing European Union countries' practice in the sphere of corporate dispute resolution, it is sufficient to note, that formation of this occurrence control system is one of the most efficient mechanisms. This system includes diagnostic means, simulation, implementation, and evalu-

ation of the most effective means and methods of dispute control. While focusing on the initial stages of the conflict this system allows evading court proceedings on the corporate dispute. While analyzing mediation as a strategy of dispute resolution, it is worth noting, that this negation process is based on interests, backed by the conflict party position. As a result, an agreement is signed between conflict parties. In modern conditions, many European companies prefer alternative means of dispute resolution, which allow evading court proceedings. Other benefits of alternative dispute resolution means are the length of the procedure, its simplicity, and low financial impact. Data confidentiality is also an important benefit of corporate dispute resolution via mediation [10].

One widely used means of pre-trial investigation on an alternative method of dispute resolution is third-party expert enlistment, whose function is to present an expert resolution to the case of his client. The level of trust of the picked expert is determined by his experience in the sphere, record of work, and respective reputation. It is sufficient to note that non-compulsory arbitration is a corporate dispute resolution process. It is of more formality and includes more mandatory procedures, and its main difference from traditional arbitration is the fact, that it is not mandatory [11]. Another widely used method is a conciliation procedure, which is characterized by its voluntary nature, and it is performed if a mediator is involved, both sides are to take part in it [12]. During the performance of this procedure, a mediator does several steps to achieve agreement between parties to avoid court proceedings and presents specific offers, regarding the process of the dispute resolution to all parties. Mediation procedure became possible after the adoption of the European Union Directive in 2008, and in

2017, a Resolution implementing Directive 2008/52/E was adopted by the European Parliament with intention of further review and change [13]. United Nations Convention on International Settlement Agreements, signed as a result of a mediation, has substantially influenced the mediation laws in many countries, which shows, that this is an internationally accepted standard in the sphere [14].

While analyzing Italy's practice, in the year 2019, more than 100000 commercial and civilian mediation processes have been concluded with an average result of 50% positive resolution of a dispute, when parties accepted the mediation procedure offered in the first round of negotiation [15]. Italian Law "On Mediation" regulates, that parties always can resort to a mediation process in any dispute of legal nature under the norms, regulated by the current legislation. Affiant has a right to utilize his rights for tax advantages and remission to cover the mediation procedure expenses. In cases, when a commercial contract includes a statement of mediation, parties should try to involve a mediator between going to the arbitration process or court proceeding. If a mediation attempt was not made by the parties, a moderator or judge has the right to file a pleading or by his initiative to give 15 days for sides to file for a mediation procedure [16]. This procedure should be regarded as a voluntary mediation, which is regulated by the law and accredited mediators.

Point 1 of Article 1 of the Law of Germany "On the support of mediation and other procedures for out-of-court settlement of conflicts" [17] defines this procedure as a confidential and structured process, in which sides, with the help of mediators and voluntarily and under their responsibility, aim to resolve the dispute in a civilized manner. In the law enforcement practice of Germany, the model of mediation through a combination of stimulative and evaluative coop-

eration is actively used, especially in commercial mediation procedures. Mediators in Germany prefer cooperative sitting, which is dedicated to the interests and needs of both sides, even though private sittings are possible in law enforcement practice. The mediator takes responsibility for a procedure and structure of a mediation process, as well as cooperates with dispute parties on 3 levels: process, facts, and relations. In the sphere of commercial dispute resolution in Germany, the main peculiarities are that the mediators offer consultations for both parties, evaluate possible risks and analyze the best outcome of the dispute resolution. Worth noting, that judicial instances in Germany, as well as other official installations, cannot order mediation before or during the court proceeding as they only have the power to file a recommendation for a mediation procedure and, if parties accept the offering during the court proceeding, it should be paused for the time of mediation process.

Corporate disputes are also common in practice of Kazakhstan. To prevent them, a company should develop its legal documentation with the co-founders during the creation of an organization. Law of the Republic of Kazakhstan No. 415-II "On Joint Stock Companies" [18] consolidates a provision, under which a requirement to adopt corporate management codex is explained by the peculiarities of a corporate memorandum, which foresees several points, aimed to resolve these disputes in a constructive context. In general, all cases of economic disputes proceed in the Special interdistrict economic court of Kazakhstan, which allows focusing gained practice experience regarding this category of dispute resolution, to interchange this experience, to utilize the same approach in resolving disputes, including corporate disputes. This allows to form practical experience and avoid mistakes during fair resolution of corporate dis-

putes. Article 17 of the Civil Procedure Code of the Republic of Kazakhstan [19] regulates norms on resolving corporate disputes by utilizing the process of mediation at a stage, when unresolved corporate conflict has led to the corporate dispute, which may be solved through the employment of a conciliation agreement, resolution agreement under the participative procedure or through the mediation procedure.

The most perspective and effective way of resolving corporate disputes in Kazakhstan is the utilization of mediation procedures. This procedure is used in cases when parties cannot resolve a conflict by themselves and need an assistance of a mediator for a mediation process initialization. Under Article 20 of the Law of the Republic of Kazakhstan No. 401-IV "On Mediation" [6], mediation procedure may be used before addressing the judicial instance and after the proceeding has been initiated. Its legal intention is to resolve corporate disputes and create a mediation agreement, which is a part of a civil agreement. As such, it is possible, to sum up, that corporate dispute may lead to substantial damage to an organization and society in general. Amongst the analyzed practice of European Union countries, implementation, and employment of new means of corporate management are required, many of which are unique and thoroughly developed under international legal initiatives. The most effective way of preventing and resolving corporate disputes is to commence negotiations in a form of mediation, while the desire of both sides to come to peace and find an appropriate decision is needed. It is also worth mentioning, that transition of organizations in Kazakhstan to civilized corporate management is a guarantee of success on an international level and is an objective tendency, which reflects the solidarity of interests of all organization members.

Discussion

While analyzing widely used forms of conflicts between founders, M.I. Dyachuk [20] notes, that they are usually abused by a minority, suppressing the majority, and creating conflict situations between organization co-founders. Contractors, in the international practice of corporate law, usually use various agreement-based guarantees, which expedite the effective prevention of disputes to resolve corporate conflicts. According to B.M. Barry [21], lawyers simulate standardized conditions of corporate codex instead of creating optimal agreements of individual direction for organizations. Early intervention into corporate disputes and their strategic resolution expedites the decrease of common direct and indirect reasons, why conflicts arise. It also benefits with minimal costs, which is caused by de-escalating and preventing disputes. The issue of resolving corporate disputes with alternative methods is more actual now due to the realization of court proceeding impracticality cost- and timewise. For example, according to the statistical data of the British organization, which specializes in mediation procedure initiation to resolve commercial disputes, English companies lose more than 33 billion pound sterling each year to resolve these disputes. Important to note, that nearly 80% of these conflicts substantially influence the functioning and effectiveness of business, the resolution process of which require more than 1 million pound sterling and more than 3 years of managers' work time [22].

Article 23 of the Civil Procedure Code of the Republic of Kazakhstan [19] contains a regulation, which regulates a right to defend one's violated rights in a court of law or other stated procedures. It is also regulated in the norm, that judicial instances can accept cases of violated rights in

the judicial civilian procedure only if the defense of violated rights is not possible in any other way under the current legislation. Under the norm, regulated by Article 24 of the Civil Procedure Code of the Republic of Kazakhstan [19], disputes, subject to the court jurisdiction, caused during civil-law relations, may be forwarded to arbitration if both sides present a written agreement to do so. There is no direct prohibition for arbitration to regulate corporate disputes in the Civil Procedure Code of the Republic of Kazakhstan [19]. Because of this, a list of disputes, regulated by Article 27 of the Civil Procedure Code of the Republic of Kazakhstan [19], may be presented not only in the Specialized Interdistrict Economic Court but also resolved through an alternative method.

A special role in the system of pre-trial resolution of corporate disputes is dedicated to mediation. As G.N. Tsheko et al. [23] have stated, this procedure can be used during the resolution of a corporate dispute between the majority and minority stakeholders, where a stake percentage of the holder, during the process of corporate conflict resolution, has become unclear due to the additional emission and other factors. It is worth noting, that the mediation procedure is also employed not only in the pre-trial stage but also during the court proceeding. This alternative method of corporate dispute resolution has quite a large number of benefits, as it offers a sufficiently high probability of a positive outcome for both parties as a result of the dispute resolution process. According to the I.M.W.C. Satriana and N.M.L. Dewi [24], it is caused by both sides taking active participation in achieving mediation agreement during mediation procedure realization. Moreover, corporate dispute mediation procedure participants can successfully cooperate further in the future, as in the case of traditional method dispute resolution of this category in court, a relationship often becomes destroyed.

For the mediation procedure of corporate dispute resolution to be more successful and effective, a list of cases, allowed to be reviewed by this mechanism, should be adopted at the legislative level. Such cases are disputes between directors and stockholders and auditor due to refusal to authorize auditor report by the stakeholders; between a board of directors and stakeholders due to the failure to provide information or providing false information; disputes of agreements, which hold subjective interest; disputes regarding the nomination of presented candidates and their criteria; acquisition condition disputes; disputes regarding payment and reward system; disputes regarding violations or employee mistakes; disputes due to the failure to fulfill requirements, set by inner documentation or current legislation; disputes regarding share method evaluation. This will enable concretization further of the disputed object and develop an effective initiation algorithm of mediation employment.

As J. Himmelreich [25] points out, the main difference between judicial proceeding and mediation is in the resolution through the process is achieved by both parties voluntarily and is aimed at keeping the relations between parties, while court proceedings will come to the resolution without any control from both parties. As such, the mediation procedure is a transparent and voluntary pre-trial proceeding, in which all parties can fully control the decision procedure and the conditions of conflict resolution. Mediation, in modern conditions of Kazakhstan, is a means of restorative justice, which has been developing fast across the world for a long period, while the implementation of this institute into a law enforcement practice has expedited the development of the restorative approach in the country and reduced level of judicial disputes. Important conditions for completing the

mediation procedure are the in-person presence of both parties, a qualified mediator, data gathering and presentation in the shortest amount of time, strictly volunteer participation, and the ability of each side to refuse the mediation at any point.

According to B. Aisautov [26], employment of a mediation institution to resolve corporate disputes in Kazakhstan can help save more money from the state budget, which causes a need for pre-trial investigation bodies' statistical accounting regarding several cases, terminated due to the mediation process initiation. Worth noting, that for quality implementation of the mediation procedure, special councils for high governmental institutions mediator attestation, keeping a register of mediators and publishing information regarding it, which will ensure and increase the trust of the population to them. Currently, amongst the main problems of mediation institutions in Kazakhstan, is a lack of professional mediators, their physical distance from first-instance court buildings, and the lack of juristic knowledge in unprofessional mediators, which may cause incorrect or inefficient employment of current legislation during mediation agreement creation, high cost of mediator services as well as low level of mediation institute propaganda in mass media.

As such, during the scientific research, juristic mechanisms were highlighted, which can expedite the development process of corporation management in Kazakhstan and can create more efficient conditions and environment for the prevention and resolution of corporate disputes. Another important factor is the insurance of more clear and concise requirements for founders and strengthening the development of business in the country. Resolution of corporate disputes through the mediation procedures offers active participation in the resolution of the conflict for both sides,

including ensuring the interests as well as coordinating the most suitable outcome of the dispute while keeping good relations. Further research on this topic will be aimed at the investigation of digital methods and means of corporate dispute resolution, their implementation into the mediation process, and a perspective of their usage in the law enforcement practice of Kazakhstan.

Conclusions

The scientific research in the field of corporate dispute resolution through the employment of mediation procedure in Kazakhstan has revealed, that at this stage of development, this procedure is not sufficiently efficient and developed. Due to this, several recommendations on the implementation of certain amendments to the current legislation and employment of European Union countries' practice in the law enforcement of Kazakhstan to improve the quality of corporate dispute resolution. Corporate dispute as a legal phenomenon is caused by the illegitimate and legitimate actions of any parties of the legal corporate relationship of the third party. A corporate dispute can be resolved through the employment of mechanisms, which are regulated by the current national legislation or stated in the agreement between shareholders.

While analyzing European Union countries' practice in the sphere of corporate dispute resolution, it was noted, that formation of this occurrence control system is one of the most efficient mechanisms. This system includes diagnostic means, simulation, implementation, and evaluation of the most effective means and methods of dispute control. While focusing on the initial stages of the conflict this system allows evading court proceedings on the corporate dispute.

While analyzing the mediation as a strategy of dispute resolution, it was noted, that this negation process is based on interests, backed by the conflict party position. As a result, an agreement is signed between conflict parties. In modern conditions, many European companies prefer alternative means of dispute resolution, which allow them to evade court proceedings. Other benefits of alternative dispute resolution means are the length of the procedure, its simplicity, and low financial impact. Data confidentiality is also an important benefit of corporate dispute resolution via mediation. Resolution of corporate disputes through the mediation procedures offers active participation in the resolution of the conflict for both sides, including ensuring the interests as well as coordinating the most suitable outcome of the dispute while keeping good relations. Further research on this topic will be aimed at the investigation of digital methods and means of corporate dispute resolution, their implementation into the mediation process, a perspective of their usage in the law enforcement practice of Kazakhstan.

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