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ABOUT SPECIAL ISSUE

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TABLE OF CONTENTS

ABOUT SPECIAL ISSUE

This AJEE Issue 3 (4) is a special edition, related to the Alternative Dispute Resolution development in Europe. Undoubtedly, that out-of-court peaceful settlement is more attractive and efficient than long-term and exhausting court buttle between parties and their representatives. The current trend of peaceful agreement settlement agreed by both sides of the conflict is much closer to Eastern Europe – there are initiatives of some types of ombudsmen and negotiations introducing. Despite this, not always these ideas are realized in practice due to certain specific features of East-European traditions and non-ended reforms of the judiciary. Find more information about financial ombudsman implementation in Ukraine in the essay written by ***Roksolana Khanyk-Popsolitak***.

Nevertheless, this Issue starts with a brilliant essay of ***Elisabetta Silvestri*** about international mediation and the main consequences of the new Singapore Convention on Mediated Settlement Agreements.

The next article of ***Dmitry Abushenko*** is related to an extremely curious topic, which helps us to answer the question, what if the settlement agreement is signed by parties but not approved by court? The procedural and substantive consequences of the above mentioned were investigated and final conclusions were reached as a result.

One more article in the current issue is written by ***Victor Terekhov*** and related to the innovative approaches and their results within mediation implementation. Various on-distance communications overcrowded our world and we should use them with the aim of simplifying ADR schemes and making them faster and cheaper than regular. Would it be successful or there is much ado about nothing, you will find in Victor essay.

On behalf of the Editorial and Advisory Boards of the Journal, I would like to thank our authors for their contributions and our editors and reviewers for their help within the publication process.

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THE SINGAPORE CONVENTION ON MEDIATED SETTLEMENT AGREEMENTS: A NEW STRING TO THE BOW OF INTERNATIONAL MEDIATION?

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Summary: 1. Introduction. – 2. Features of Settlement Agreements. – 3. Enforcement of a Mediated Settlement Agreement and Its Refusal. – 4. Final Provisions of the Singapore Convention. – 5. Conclusions.

On 7 August 2019 the Singapore Convention on recognition and enforcement of international mediated settlement agreements (hereinafter, the Singapore Convention)[1] became open for signature. This multilateral treaty was drafted by UNCITRAL after a labourious discussion that spanned several years and was adopted by the United Nations General Assembly on 20 December 2018. In order to mirror the provisions of the Singapore Convention, the UNCITRAL Model Law on International Commercial Conciliation of 2002 was amended and renamed as UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation.[2] The purpose of this essay is to present an overview of the major contents of the Singapore Convention, a treaty aimed at providing uniform enforcement mechanisms for the mediated settlement agreements by which international commercial disputes are resolved. The hope is that the Convention will promote a wider use of cross-border mediation. Just as the New York Convention of 1958[3] has been a successful instrument of international arbitration, the Singapore Convention is expected to make mediation more appealing thanks to specific and harmonized rules that are intended to make enforcement of settlement agreements easier and quicker to obtain.

1 United States Convention on International Settlement Agreements Resulting from Mediation <https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf> accessed 20 August 2019. The name 'Singapore Convention' is connected to the fact that Singapore offered to be the location where the States will convene for the signing ceremony of the treaty.

2 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002) <https://www.uncitral.org/pdf/english/commissionsessions/51st-session/Annex_II.pdf> accessed 20 |August 2019.

3 Convention on the Recognition and Enforcement of Foreign Arbitral Awards<https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf> accessed 20 August 2019.

Keywords: Singapore Convention, international mediated settlement agreements, settlement agreements, enforcement of a mediated settlement agreement

1. INTRODUCTION

The Singapore Convention will enter into force 'six months after deposit of the third instrument of ratification, acceptance, approval or accession' (Article 14), meaning that, in principle, for the entry into force of the treaty it is sufficient that at least three States ratify the Convention. There was much speculation as to the States that would be the first ones to sign the treaty,[4] in light of the fact that the drafting of the Convention progressed, at least in its initial stages, along a bumpy road and had to face (and eventually overcome) the strenuous opposition of the European Union's representatives.[5] In any event, thanks to the Convention, the party willing to enforce an international settlement agreement resulting from mediation in a State that is a party to the Convention itself will be able to turn to the courts (or any other 'competent authority') of that State and request relief. If the requirements of the agreement laid down by the Convention are met, the court must 'act expeditiously' (Article, 4, sec. 5), since it is devoid of any powers to impose further formalities concerning either the form or the content of the agreement. Enforcement can be denied by the court only insofar as it finds one of the grounds for refusal listed in Article 5.

Further on in this essay, the main features of the enforcement mechanisms provided for by the Singapore Convention will be outlined. For now, it seems critical to emphasize that the Convention 'accords new status to mediated settlements in their own right. It converts what would otherwise be seen as purely a private contractual act into an instrument that can circulate under a legally binding international framework'.[6] And this 'new status' granted to international settlement agreements is likely to boost mediation as a method of resolving cross-border commercial disputes, overcoming the concern – widespread in the business community – that if a party to a successful mediation procedure later has a change of heart, the company interested in compliance with the terms of the agreement will be forced to start over, commencing either litigation or arbitration.

2. FEATURES OF SETTLEMENT AGREEMENTS

For the applicability of the Singapore Convention, a settlement agreement must comply with a number of requirements: it must be mediated, international and commercial. Furthermore, it must not fall within the scope of the exclusions listed in Article 1, sections 2 and 3.

As far as the first requirement is concerned, it is self-explanatory that the agreement must be the outcome of a successful mediation procedure. The Singapore Convention, at Article 2, section 3 offers a definition of mediation that echoes the definitions one may find in other international legal instruments, such as the UNCITRAL Model Law

4 See Eunice Chua, 'The Singapore Convention on Mediation – A Brighter Future for Asian Dispute Resolution' (2019) 9 Asian JIL 195.

5 See Bruno Zeller, Leon Trakman, 'Mediation and arbitration: the process of enforcement' (2019) Uniform LR <https://doi.org/10.1093/ulr/unz020> ACCESSED 20 August 2019.

6 Timothy Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements' (2019) 19 Pepp. Disp. Resol. LJ 1–60, 11.

on international commercial mediation,[7] or the EU Directive 2008/52/EC on a certain aspect of mediation in civil and commercial matters,[8] just to mention two texts that almost inevitably come into play in any discourse regarding mediation. A common element is the insignificance of the name by which the procedure followed by the parties to reach an agreement representing an 'amicable settlement'[9] of their dispute is referred to. This feature appears to make it clear that what counts is the presence of a third disinterested person, whose assistance is supposed to bring the parties closer so as to come to a peaceful resolution of their controversy. While the EU Directive defines mediation as 'a structured process',[10] the procedure by which the agreement is reached does not seem to have any bearing on the applicability of the Convention. By the same token, it can be noticed that no reference to the impartiality of the mediator appears in Article 2, section 3 that defines mediation and its essence.[11] In spite of that, among the grounds to refuse enforcement of the settlement agreement at least two relate to possible flaws in the mediation proceeding and its development, as well as in the mediator's behavior, a point that will be clarified later on in this essay.

It is important to underline that the Singapore Convention does not take any stand on the source of mediation. In other words, the parties may have decided voluntarily to resort to mediation instead of commencing litigation, or an attempt at mediation may have been mandatory because it was ordered either by a legal rule or by a court or an arbitral tribunal. This issue, which is debated in the European Union, where some Member States believe that the only way to persuade individuals to resort to mediation is to make it mandatory,[12] does not surface in the Convention. However, on a different issue the text of the Convention is adamant: it provides that the 'third person' assisting the party qualifies as mediator insofar as he is devoid of any authority 'to impose a solution upon the parties to the dispute'.[13] In the context of the Convention, the emphasis is on the lack of adjudicative powers in the hands of the mediator, while the question whether he is allowed to propose to the parties a solution to their dispute stays in the background and it is not specifically addressed.

In order to fall within the scope of the Singapore Convention, the settlement agreement must be international, too. This requirement is essentially connected with the parties' places of business, which must be located in different States. This is listed as the main criterion to take into account to evaluate whether the settlement agreement is international, but Article 1 provides for other, supplemental criteria, replicating almost verbatim the relevant part of the definition of international commercial mediation laid down by the Model Law, at Article 2(2).

It has been emphasized that the notion of the 'state of origin' of the settlement agreement is alien to the Singapore Convention, which in principle makes the settlement agreement a 'stateless instrument'.[14] That said, though, since the

7 See UNCITRAL Model Law (n 2) *supra* note 2.

8 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L 136/3.

9 See Article 2, s. 3 of the Singapore Convention (n 1) and Article 1, s 3 of the Model Law (n 2), as well as Article 3(a) of the EU Directive (n 8).

10 Article 3(a) of the EU Directive (n 8).

11 For a completely different approach, see Article 3(b) of the EU Directive (n 8).

12 Italy, for one, is a Member State that relies heavily on the debatable virtues of mandatory mediation: see Elisabetta Silvestri, 'Too Much of a Good Thing: Alternative Dispute Resolution in Italy' (2017) 21 Netherlands-Vlaams Tijschrift voor Mediation en Conflictmanagement 29.

13 See Article 2, s3 of the Singapore Convention (n 1) and, along the same lines, Article 1, s 3 of the Model Law (n 2).

14 Schnabel (n 5), *supra* note 6, at 22.

enforcement is supposed to follow the rules of procedure of the State where relief is sought (according to Article 3, sec. 1), domestic law may interfere with the procedure by which enforcement is granted or refused.

Last, but not least, the Singapore Convention applies to international settlement agreements that have resolved commercial disputes. Like the Model Law, the Singapore Convention does not offer any definitions of commercial disputes; but some guidance as to which types of settlement agreements, even though mediated and international, cannot be enforced under the Convention is given by the numerous exclusions listed in Article 1, sections 2 and 3. In this regard, what is relevant is the subject matter of the dispute: therefore, consumer disputes, as well as disputes arising out of family law, inheritance law or labour law are excluded from the application of the Convention. Other exclusions concern settlement agreements that are enforceable as judgments or as arbitral awards, as well as settlement agreements approved by a court or reached in the course of a judicial proceeding.

To be enforceable under the Singapore Convention, a settlement agreement must comply with the requirements listed in Article 4. Differently from the requirements analyzed above, these requirements have to do with formal features of the agreement. First of all, the agreement has to be 'in writing', but the requirement of a written form is satisfied if the content of the agreement 'is recorded in any form', including modern IT devices, provided that 'the information contained therein is accessible' so that it can be used later on.[15]

The signatures both of the parties and the mediator are required. If the settlement agreement is recorded in an electronic document, special rules are laid down in order to guarantee that the electronic communication was reliable and appropriate, taking into account the circumstances of the case.[16]

An important requirement that the party willing to rely on the settlement agreement is expected to satisfy is the offer of evidence demonstrating that the settlement agreement resulted from mediation. To this end, the mediator's signature will suffice or, as possible alternatives, evidence can be given by submitting either a document in which the mediator asserts that a mediation took place between the parties or a statement released by the institution that administered the mediation. If none of these options are available, the party can rely on 'any other evidence acceptable to the competent authority'.[17] It is quite puzzling to note that the party is expected to give evidence as to the mediated nature of the settlement agreement, while no proof is necessary to demonstrate that the agreement is commercial and, most of all, international: commentators on the Singapore Convention themselves find this odd, in light of the fact that disputes over the source of the agreement are not likely to occur frequently.[18]

The authority petitioned for the enforcement of the settlement agreement may require its translation or the production of the documents that appear to be necessary to confirm that the requirements of the Singapore Convention have been met. However, reliance on these provisions should not be used as an *escamotage* to impose further formalities with a view to slowing down the procedure for the recognition and enforcement of settlement agreements: this would run contrary to the very purpose of the Convention and its aim to provide a unified and straightforward enforcement mechanism for mediated agreements.

15 See Singapore Convention (n 1) Article 2, s 2.

16 See Singapore Convention (n 1) Article 4, ss 1(a) and (b)(i), as well as s 2(b)(i).

17 See the Singapore Convention (n 1) Article 4, s (b)(iv).

18 See, for instance, Schnabel (n 5) *supra* note 6, at 30.

3. ENFORCEMENT OF A MEDIATED SETTLEMENT AGREEMENT AND ITS REFUSAL

The party that relies on a mediated settlement agreement which has resolved an international commercial dispute and is willing to have it enforced in a State that is signatory to the Singapore Convention can turn to a court or any other 'competent authority' based on the law in force in that State. According to Article 3, section 1, each Party to the Convention will provide enforcement 'in accordance with its rules of procedure and under the conditions laid down in [*the*] Convention'. The court (or the 'competent authority') is under the obligation to recognize and enforce the settlement agreement (and must do so 'expeditiously') unless the party against whom enforcement is sought is able to prove that one or more grounds for refusal exist. Some say that the Singapore Convention makes it possible to use the settlement agreement both as a 'sword' and as a 'shield':[19] the 'sword' effect is the mere fact that the party interested in the enforcement of the agreement can obtain it without the necessity of overcoming specific hurdles; the 'shield' effect is the fact that this very party is allowed to invoke the settlement agreement as a defense in order to demonstrate that the dispute has been resolved, should the other party try to litigate anew the same matter.[20]

With regard to the grounds that, if proved by the party trying to avoid compliance with the settlement agreement, can persuade the court to refuse enforcement, their list, laid down by Article 5, is permissive, on the one hand, and exhaustive, on the other: permissive, since States that are signatories to the Singapore Convention, when they transpose it into their domestic law, are free to reduce the number of the grounds for refusal; exhaustive, in light of the fact that enforcement cannot be denied for grounds that are additional to those listed in Article 5.[21]

The 'grounds for refusing to grant relief' can be grouped in different categories.[22] The incapacity of a party, as well as the invalidity of the settlement agreement, can be defined as 'substantive grounds'. The second group of grounds has to do with the content of the settlement agreement. Therefore, enforcement can be denied when the settlement agreement is not binding, or it is not final; when its terms have been modified after the settlement was reached; when the obligations arising out of the agreement have already been complied with, or are unclear; and when granting relief would be at odds with the terms of the settlement agreement.

Interestingly, the last two grounds listed in Article 5, section 1 under sub-sections (e) and (f) are different from the grounds mentioned above, since they do not directly concern the settlement agreement, but the mediator and his behavior. In fact, enforcement can be denied if the party opposing relief is able to prove that the mediator was responsible for 'serious breach … of standards applicable to the mediator or the mediation', insofar as the same party can show that such a breach was the main reason prompting him to settle the dispute. The first example of a 'serious breach' that comes to mind occurs

19 See Lucy Reed, 'Ultima Thule: Prospects for International Commercial Mediation' (NUS Centre for International Law Working Paper 19/03 – January 2019) 13 <http://cil.nus.edu.sg/library/> accessed 20 August 2019.

20 According to Article 3, s 2, 'If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.'

21 See Schnabel (n 5) *supra* note 6, at 42.

22 The classification offered in the text is suggested by Edna Sussman, 'The Singapore Convention. Promoting the Enforcement and Recognition of International Settlement Agreements' (2018/3) ICC Dispute Resolution Bulletin 42, 52.

when the mediator violates his duties of impartiality and independence; but both duties come into play in the description of the other ground for refusal dealing with the mediator's conduct. Failure to disclose circumstances that could cast a shadow over the mediator's impartiality and independence can cause the denial of enforcement if the missing disclosure had 'a material impact or undue influence on a party', so that that party accepted a settlement agreement which otherwise it would have refused. It is hard to figure out the difference between the two grounds just described. Even commentators seem to find it difficult to offer examples of the mediator's misconduct that would allow drawing a clear line of distinction between the hypotheses contemplated by sub-sections (e) and (f) of section 1 of Article 5. The emphasis is placed on the cause-and-effect relationship that must exist between the mediator's misconduct and the party's decision to settle the dispute, as well as on the difficulty to offer positive and convincing evidence of the mediator's misbehavior.[23]

Two additional grounds for refusing relief are listed in Article 5, section 2: unlike the ones mentioned above, these grounds can be raised by the court (or by the 'competent authority') on its own motion. Therefore, enforcement can be denied when:

(a) granting relief would be contrary to the public policy of that Party; or

(b) the subject matter of the dispute is not capable of settlement by mediation under the law of that Party.

It is clear that these grounds echo the corresponding grounds that can prevent the recognition and enforcement of arbitral awards under Article 5, section 2 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. As for mediated settlement agreements, it is difficult to imagine that in practice the public policy ground will be resorted to in order to refuse enforcement, while refusal due to domestic rules forbidding the mediation of disputes concerning specific matters seems to describe a more realistic occurrence, at least in certain jurisdictions.

Legal scholars have mixed feelings with regard to the list of the grounds for refusing enforcement of mediated settlement agreements. On the one hand, there are those who emphasize that the effort to contain as much as possible the risk of granting enforcement to unlawful settlement agreements is laudable; on the other hand, there are those who maintain that a few grounds, in order to be established, force the court petitioned for relief both to investigate thoroughly the facts of the dispute and to look into the mediation procedure and the settlement agreement, which could work against the purpose of the Singapore Convention that aims at making the enforcement of mediated settlement agreements simpler and more expedited.[24]

4. FINAL PROVISIONS OF THE SINGAPORE CONVENTION

Among the remaining provisions of the Singapore Convention, a few appear to be quite significant and deserve a brief account.

Article 6 grants the discretion to the court or the other 'competent authority' of the signatory State where enforcement is sought to adjourn the proceeding and order security when the judgment of another court or an arbitral award may affect its decision to grant or deny relief.

23 See Schnabel (n 5) *supra* note 6, at 49–54.

24 For these remarks, see Miglė Žukauskaitė, 'Enforcement of Mediated Settlement Agreements' (2019) Teisé 111, 2019 205, 213 <http://www.journals.vu.lt/teise/article/download/12826/11628/> accessed 20 August 2019.

Under the heading 'Reservations', Article 8 deals with two complex and controversial issues, namely the applicability of the Convention to public entities and the choice between 'opt-out' or 'opt-in' as the basis for determining whether or not the Convention will apply to mediated settlement agreements as default law. As to the first issue, each signatory State can announce that the Convention will not apply to settlement agreements to which the State itself, any government or governmental agency (as well as any person acting on their behalf) is a party. With reference to the second issue, each Party to the Convention can state that the Convention will apply only insofar as the parties to the settlement agreement have opted-in, that is to say, that the parties must have affirmatively chosen to avail themselves of the Convention.

Two more provisions are worth mentioning. Article 12 allows regional economic integration organizations to sign the Singapore Convention, assuming the rights and undertaking the obligations of a Party to the Convention, to the extent that the organization has competence over matters governed by the Convention. Finally, Article 13 addresses the problem of non-unified legal systems, namely signatory States incorporating a number of territorial units subject to different systems of law: these States will be able to declare that the Singapore Convention will apply to all its territorial units, or only to one or more units.

5. CONCLUSIONS

According to an empirical survey conducted by the School of International Arbitration at Queen Mary University of London in partnership with White & Case LLP,[25] for 97 percent of respondents arbitration is still the preferred method for the resolution of international commercial disputes, essentially because of the ease of enforcing arbitration awards almost worldwide thanks to the New York Convention, which is one of the most successful international treaties. But the high costs of international arbitration are still a drawback that seems difficult to overcome, and so is the fact that an arbitral proceeding, just like adjudication, is bound to produce a win-lose outcome that is not likely to persuade the parties to work towards a restoration of their commercial dealings. In contrast, mediation, according to the Preamble of the Singapore Convention, brings about 'significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States'. The Singapore Convention is expected to make enforcement of mediated settlement agreements simpler at the international level thanks to a relatively effortless and uniform procedure. Should this goal be reached, international mediation will undoubtedly become a fierce competitor of arbitration.

25 See 2018 International Arbitration Survey: The Evolution of International Arbitration <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf> accessed 20 August 2019.

THE PROCEDURAL AND LEGAL CONSEQUENCES OF AN UNAPPROVED SETTLEMENT AGREEMENT IN THE LAWSUIT

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Summary: 1. Introduction. – 2. Settlement Agreements Signed by the Parties, in Respect of Which a Judicial Decision has not yet been made to Approve or to Refuse Approval. – 3. Settlement Agreements Signed by the Parties, the Approval of Which Was Denied by the Court. – 4. Conclusions.

This article considers the issues of procedural legal consequences of settlement agreements that were not approved by the court. It researches the fundamentally different models of legislative regulation that could be applied to settlement agreements signed but not approved by the court. An attempt is made to identify certain features of the legal force of a judicial decision on the refusal to approve a settlement agreement. Special approaches are justified to resolve some specific issues arising in the distribution of court costs.

Keywords: settlement agreement, court`s refusal to approve a settlement agreement, legal consequences of a court ruling, prejudice, res judicata, exclusivity as a property of legal force of a court ruling, court costs, reimbursement of legal expenses to a third party, optional substantive dispute.

1. INTRODUCTION

A fairly large amount of scientific research in the Russian legal doctrine is dedicated to the institution of settlement agreements. It is surprising that at the moment there are practically no studies that would substantively research the phenomenon of an unapproved settlement agreement, even despite the fact that the question of the consequences of not approving a settlement agreement is raised quite often. The authors who address this issue usually confine themselves to the prevailing approach, according to which a settlement agreement not approved by the court does not entail any legal consequences at all, and is, in fact, an unconcluded

agreement.[1] It is indicative that this approach is directly declared in such an important document as the Concept of the Unified Civil Procedural Code of the Russian Federation of 14 November 2002 N 138-FL (hereinafter – the CPC RF) .[2] And although at the moment in the procedural and civil legislation of the Russian Federation there is no norm that would directly determine the consequences of a non-approval of a settlement agreement for lawsuit cases, by and large, law enforcement practice is based on this basic message.[3]

However, in some works other judgments are still possible to find. Thus, for instance, V.V. Yarkov believes that in the event of a non-approval of a settlement agreement, one should speak of a 'completed actual composition' that performs 'right-preventing functions'.[4] S.V. Moiseev, with some reservations, proposes to qualify an unapproved settlement agreement as a 'substantive contract'.[5] A.G. Karapetov, reflecting on the legal nature of the signed, but not yet approved agreement, makes an assumption, which, in essence, makes it possible to qualify such an agreement as a 'special organizational deed'.[6]

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1 For example, L A Gros, reflecting on the significance of a settlement agreement at the stage of execution of a judicial act, emphasizes that 'only if approved by the court does it become a legal fact in civil law (entails termination of an obligation that has become indisputable based on a court decision) and in arbitration procedural law (entails termination of civil legal relations between the bailiff - the executor, on the one hand, and the recoverer and the debtor, on the other hand)' (L Gros, 'Settlement agreement in the enforcement proceedings: disputed situation' (2002)5 Russian justice (LCS 'Consultant Plus').
D L Davydenko, exploring the institute of the settlement agreement in comparative legal terms, expresses the following thought: 'So, since under the law of the Russian Federation the settlement agreement enters into force only after its approval by the court, until the court approves the settlement agreement by its definition, it is considered unconcluded...' (D L Davydenko, 'The settlement agreement as a means of extrajudicial settlement of private law disputes (on the basis of the law of Russia and some foreign countries' (Candidate of Legal Sciences Dissertation, Moscow 2004).
M A Rozhkova categorically asserts that 'in the absence of a settlement agreement approved by the court, the latter does not meet the requirements for its form, and cannot be considered an accomplished legal fact. In other words, in accordance with Art. 432, 434 of the CPC RF, a settlement agreement not submitted to the court for approval or submitted with the court having refused to approve it, will be an unconcluded agreement' (M A Rozhkova, N G Eliseev, O Y Skvortsov, *Contractual Law: agreements on jurisdiction, international jurisdiction, conciliation procedure, arbitration (tribunal) and settlement agreement* (M A Rozhkova ed, Statute 2008).

2 'It is also necessary to determine that the settlement agreement not approved by the court does not give rise to legal consequences' (clause 15.3.8).

3 'The novation agreement between the recoverer and the debtor, made at the stage of enforcement proceedings, but not approved by the court as a settlement agreement, is not concluded' (paragraph 7 of the information letter of the Presidium of the Supreme Court of Arbitration of the Russian Federation of 21 December 2005 N 103 Article 414 of the CPC RF).
'The conclusions of the courts in the present case that the named unapproved settlement agreements do not entail legal consequences for its participants and in this regard, they cannot be subject to independent challenge, should be considered true' (definition of the SAC RF of 2 September 2013 N 11076/13 in case N A64-2504 / 2012).
'The settlement agreement of the parties, not approved by the arbitration court in accordance with Part 4 of Art. 139 and Part 2 of Art. 141 of the Arbitration Procedural Code of the Russian Federation of 24 July 2002 N 95-FL (hereinafter – the APC RF), expresses only the parties' intention to conclude it, which is not implemented in accordance with the procedure established by Chapter 15 of the Code, and therefore does not entail the legal consequences of a settlement agreement (Art. 9 of Memo on the conclusion and approval of settlement agreements, posted on the official website of the Arbitration Court of the Sverdlovsk region <http://www.ekaterinburg.arbitr.ru/sites/ekaterinburg.arbitr.ru/files/pdf/ZP14042014_5.pdf> accessed 7 September 2019).

4 V V Yarkov, 'Legal facts in the mechanism of implementation of civil procedural law' (Doctor of Legal Sciences Dissertation, Ekaterinburg 1992).

5 S V Moiseev, 'The principle of dispositive arbitration process' (Candidate of Legal Sciences Dissertation, Moscow 2001).

6 'If we assume that the settlement agreement signed by the parties to the litigation does not enter into full force before the court approves it, and does not give rise to appropriate civil law and procedural legal consequences, it nevertheless binds the parties in such a way that none of them may prevent the court from approving such an agreement (or at least the parties impose obligations on themselves not

For the purposes of this research, we propose to title it as 'unapproved settlement agreements' as a term and divide into two relative groups:

(a) those that are signed by the parties, but for which *a judicial decision has not yet been made* to approve or to refuse approval (see please part 2 of the article);[7]

(b) those that are signed by the parties, but which *were denied by the court* (see please part 3 of the article).

The need for such a division is explained by the fact that the moment of judicial verification of a settlement agreement is extremely important from the point of view of possible legal consequences. This is a kind of dividing line, which translates the legal situation into a state of complete certainty about the disputed substantive legal relationship, the dividing line, after which specific legal consequences must occur (or not). In addition, the grounds for issuing a judicial decision of rejecting also, apparently, may have some influence on the composition of possible consequences for a signed but unapproved settlement agreement.

2. SETTLEMENT AGREEMENTS SIGNED BY THE PARTIES, IN RESPECT OF WHICH A JUDICIAL DECISION HAS NOT YET BEEN MADE TO APPROVE OR TO REFUSE APPROVAL

Several questions arise concerning the first group of unapproved settlement agreements. Should the signing of a settlement agreement have legal procedural consequences? Is it possible to approve a settlement agreement in a situation where one of the parties does not make a corresponding petition or even directly speak out against its approval? Is it possible to assert that the signing of a settlement agreement is only one of the elements in a complex factual composition, which, besides the signing itself, also implies the independent will of each of the parties in the framework of the judicial procedure?

These questions are, by and large, interrelated. To find the answer to them, let us begin with the fact that, in our opinion, two fundamentally different models that determine the legal significance of agreements (and, in particular, settlement agreements) that are signed by the parties after the initiation of the judicial procedure are hypothetically possible.

The *first model* is based on the fact that the party that signed the document has already expressed its will to commit a certain procedural motion (for convenience of further exposition, this model will be referred to as **binding**). The court cannot learn about the signed document and make the appropriate judicial act,[8] but if the agreement itself is submitted to the case by an interested person, then this alone is sufficient. For example, if there is a petition from the defendant to discontinue the proceedings to which the settlement agreement signed by both parties is attached, the court is obliged to consider it. Indeed, in the given situation the claimant has already expressed the will to commit

to do this), we see a preliminary legal binding effect of the agreement not yet approved by the court. In this case, there is room for the recognition of an unapproved settlement agreement as a special organizational agreement, which is converted into a full settlement agreement with the entire bouquet of legal consequences specific to it after approval by the court' (V V Baybak, R S Bevzenko, S L Budylin et al, *Deeds, representation, limitation of actions: article-by-article commentary on articles 153 – 208 of the CPC RF* (M-Logos 2018).

7 Further in the text also - the refusal definition.

8 'Thus, ... both parties can sign an agreement or declare in front of witnesses that they are finishing the case via settlement ... but if this has not been brought to the notice of the court yet, the proceedings will continue' (E V Vaskovsky, *The course of the civil process* (Bashmakov Bros Publishing House 1913).

a procedural act, as they signed not an agreement on novation, not any other civil law document, but a settlement agreement. Both from the essence of this legal institution, and from the content of the document itself, it is obvious that the settlement of the conflict covers not only the sphere of private law, but also implies the completion of the already initiated judicial procedure.[9]

The second model is based on a different foundation: the signing of the agreement itself is considered here only as a kind of formal prerequisite for the implementation of the procedural motion, the addressee of which is the court (this model can be called the model of ***necessary co-directed expressions of will***). And this motion (since the subject matter is an agreement) can find its manifestation exclusively in the expression of the co-directed wills of both subjects. Accordingly, if at least one of the subjects who participated in the signing of the settlement agreement did not notify the court about its approval (or directly objected to it), then there are no grounds for considering this procedural issue.

Thus, for the first (binding) model, the essential feature is that the right has already been exercised, and if there is an appeal from at least one interested person, the court is obliged to respond in a certain procedure to such an assertion (petition); as for the second model (the model of the necessary co-directed expressions of will), we can only speak about a certain accumulation of elements, but not about a specific legal consequence in the form of the court's duty: such a duty arises only when all interested parties appeal.

What are the advantages and disadvantages of each model?

The first one is more flexible because it does not require duplication of the already expressed will. Such flexibility, perhaps, is not such an obvious advantage for the most frequent dispute with one plaintiff and one defendant, but if we imagine a dispute in which there is a sufficiently large number of subjects on the active or passive side, then apparently the need for the model in question will become more obvious. The advantages of the first model include the greater stability and predictability of opponent's behavior - having signed the document, both parties already know that the next 'procedural step' will entail judicial verification of the settlement agreement, that the procedural opponent will not 'change his/her mind' and will not start negotiating more favorable terms, will not return the procedural situation to the position preceding the conclusion of the settlement agreement. This, of course, in a certain way disciplines the subjects. In addition, the parties, starting from an already concluded settlement

9 We emphasize that the analysis of the binding model offered below is limited solely to the procedural law area. Meanwhile, by adopting a binding model as a starting point for thinking about possible legal consequences, if one of the parties avoids going to court to approve a settlement agreement, it is also possible to raise questions on the material and legal level (for example, on the admissibility of a penalty from the evading party for legal losses or on the construction of conditional settlement agreements, providing negative property consequences for the party evading the court to approve the settlement agreement). It is clear that the discussion of such issues goes beyond only the procedural legal consequences.
However, for those interested in this field of research, we draw attention to the fact that in some countries the conclusion of a settlement agreement under a suspensive condition is expressly prohibited (see, for example, part 3 of article 176 of the CPC of the Republic of Kazakhstan of 31 October 2015 No. 377 -V 3RK; hereinafter - CPC RK). For some of our considerations specifically on the substantive consequences of an unapproved amicable settlement, see: D B Abushenko, 'Civil law consequences of an unapproved settlement agreement: statement of the problem / Conciliation procedures in the civil law and legal proceedings' in V P Ocheredko, A N Kuzbagarova, S Y Katukova (eds), *Proceedings of the International Scientific and Practical Conference* (April 26 - 27, 2019, St. Petersburg, Part 2, North-West branch of the Federal State Budgetary Educational Institution of Higher Education 'Russian State University of Justice', Asterion 2019).

agreement, can build legal constructions that are based on the future implementation of such a settlement agreement among themselves or with the participation of other subjects. For example, a conscientious participant in turnover who is in dire need of money, to whom an individually-determined object must be transferred by a settlement agreement, can immediately conclude an agreement with the prospective purchaser of this object; in the end, both the buyer and the seller will have the confidence that the object will not remain in the procedural opponent's possession, if he suddenly 'changes his mind', but will be transferred under the terms of the settlement agreement, and in the future the obligation from the purchase and sale agreement will be properly executed. Or, the parties themselves, on the basis of the compromise reached in the court case, can simulate the overall economic effect and conclude a settlement agreement in another case that is being considered with their participation, here the obligation of the already signed settlement agreement will also have some stabilizing effect, to serve as the basis for bargaining position.

But the binding model has certain drawbacks. Firstly, it becomes permissible that the court is presented with a document from one of the opposing sides - this, of course, may give rise to distrust of both its content and the reality of the will of the party that is absent at the court hearing.[10] Secondly, in the case when both disputing parties are present at the court hearing, a rather conflict situation arises, in which the will expressed initially by the party (which is fixed in the settlement agreement) conflicts with the actual expression of will (which the court directly observes in court hearing). Thirdly, for judicial procedures that do not require professional judicial representation, an important aspect is that of explaining the consequences of approving a settlement agreement and termination of proceedings. Assuming that the settlement agreement can be approved only on the basis of the petition of one of the disputants of the parties, there will inevitably be cases when the decision of the approval of the settlement agreement will be appealed for the reason that the party believed in the possibility of bringing a new identical claim or returning to the consideration of the case instituted by the original lawsuit in case of non-performance of the terms of the agreement.[11]

Accordingly, the drawbacks and advantages of the necessary co-directed expression of will model are mirrored: less flexibility and, in fact, the absence of some stability, the unpredictable nature of the procedural opponent's behavior, the difficulty or impossibility of using a number of legal structures based on the intended execution of the settlement agreement, but coupled with guarantees that the actual will of all parties was established in the judicial procedure, and the consequences of approving the settlement agreement and termination of proceedings of the case are clear to all signatories.

The comparison of the proposed models involves a discussion of another purely theoretical issue, which is associated with the sign of the ability of cancellation of procedural actions identified in the procedural doctrine. If (as indicated above for the

10 S V Moiseev quite reasonably admits blunt falsifications of the document in such cases (S V Moiseev (n 5) 125, 126).

11 According to the current Russian procedural legislation, the definition by which the settlement agreement was approved entails termination of the proceedings (part 2 of article 150 of the APC RF, paragraph 5 of article 220 of the CPC RF), which excludes a second appeal with an identical claim (paragraph 2 of 1 article 127.1 of the APC RF, paragraph 2, part 1 article 134 of the CPC RF). At the same time, the refusal of a party (debtor) to voluntarily execute such a definition allows the lender to apply to the procedures of compulsory execution (part 2 of article 142 of the APC RF, part 2 of article 153.5 of the CPC RF). In comparative legal terms, we note that similar norms exist in the legislation of a number of other countries: for example, similar provisions are established in the legislation of Kazakhstan by paragraphs 2, part 1, art. 151, part 2, article 178, p. 5, art. 277 of the CPC of the Republic of Kazakhstan.

binding model) we are to assume that the party that signed the document has already expressed its will to commit a certain procedural action, then can it be restricted in principle in the right to withdraw such a will? One of the most authoritative experts in the field of civil process prof. E.V. Vaskovsky pointed out that 'the parties have the right to withdraw their claims, testimonies and approvals. This contains a characteristic feature of procedural actions as unilateral acts which is their cancellation. However, such a cancellation should have certain limits, since otherwise the normal course of the process would be impossible and violations of the rights of the opposing party could occur... Since any procedural action is directed towards achieving a certain goal, therefore, the general limit of cancellation should be the achievement of the goal for which the action was undertaken'.[12] At the same time, the specified author has at least one reservation, which makes it possible to state that the procedural treaties were appointed in a certain special (from the point of view of analysis of the annulment feature) group: thus, E.V. Vaskovsky believed that if 'the litigant has tied himself with an agreement with a counterpart then he is obliged to abide by it and is responsible for non-fulfillment or violation, whereas in unilateral actions he is free and can cancel them at his discretion but within the general limits of their cancellation'.[13] However, the views of one specialist, even one of the most authoritative in the field of civil procedure, can hardly be a serious argument; a more detailed analysis of the features of cancellation of procedural actions and agreements is clearly needed here.

To begin with, it is really difficult to find any serious counter arguments against the general idea that a unilateral expression of will, which has not yet entailed the adoption of the relevant judicial act, can be withdrawn. For example, if a party has filed a motion for an examination, but for some reason has changed its mind before it was resolved by the court, should this party be deprived of the right to disavow this petition? The answer is obviously negative: what is the point of considering a petition, the motive for which has already been lost? Dispositive beginning, coupled with the principle of a procedural economy push for a negative answer. Equally, this approach should apply to more important regulatory actions. For example, if the claimant stated that he had rejected the claim, but before making a court decision on the termination of the proceedings, he nevertheless decided that it was in his interest to consider the dispute on the merits, it would be extremely unfair to deprive him of such an opportunity. However, should the ability to cancel procedural actions, including procedural agreements, be extended? Some modern Russian researchers give an affirmative answer to this question.[14] Such an approach seems absolutely wrong to us.

If the procedural agreement is concluded before the initiation of the judicial procedure, the possibility of unilateral refusal seems completely unwise, since the procedural agreement itself is one of the conditions of a civil contract or other agreement. The fact is that all the conditions that the parties considered necessary to include in the agreement are based on a certain balance of interests, and procedural agreements are

12 E V Vaskovsky, 'Recognition of the parties in civil proceedings' in *Selected works of the Polish period* (Reprinted version of the 1913 year`s book, Statute 2016).

13 Vaskovsky (n 8) 661.

14 For example, D L Davydenko, reflecting on the signed, but not yet approved settlement agreement, directly indicates that 'because according to the law of the Russian Federation, a settlement agreement enters into force only after it is approved by the court ... each party can refuse it even despite its signature in the text...' (Davydenko (n 1)).
A similar judgment is expressed by O N Shemeneva, arguing that 'either of the parties ... has the right to "change its mind" and not appeal to the court claiming to apply the consequences of the agreements reached, or express its will to reject these agreements or indicate that it has no intention to demand that their consequences be applied in another form" (O N Shemeneva, *The role of the parties' agreements in civil proceedings* (Infotropik Media, 2017).

no exception. For example, at the negotiation stage the seller reduced the price of the object to be sold and, in return, set the condition of a geographically convenient court in the event of a dispute. It is clear that a unilateral refusal of the condition of contractual jurisdiction distorts the general agreement reached by the parties, and allows one of them to play a kind of double game when a certain advantageous contractual condition is negotiated first, and then whatever caused the compromise is removed from the content of the relationship.

But here you can reasonably argue that the settlement agreement is concluded after a dispute arose, so maybe the extension of the rule of cancellation of procedural actions for such an agreement would still be entirely appropriate? And indeed, a settlement agreement is a completely autonomous, independent agreement, which, although it has a connection with a disputed legal relationship, is not incorporated into it as a kind of special condition. Most often, the settlement agreement in general 'dissects' the substantive legal relationship that has already arisen between the parties, in essence, acting as a new civil law agreement. Consequently, a refusal of a signed but unapproved settlement agreement in itself does not affect a general agreement, does not introduce a certain disproportion in the balance of rights and obligations (as was the case with the unilateral refusal of the condition on contractual jurisdiction described above). And yet we believe that a simple, linear solution, consisting in the admissibility of an unmotivated refusal from the settlement agreement signed by the party, would be wrong, and there are several reasons for this.

Firstly, the signing of a settlement agreement not only represents a possible compromise between the disputing parties, but also reveals, in fact, the concessions that each of them is ready to make. Spreading a feature of cancellation of procedural actions to settlement agreements, the legislator would encourage the dishonest party to enter into the negotiation procedure in order to 'test' the weak points, and then, after receiving the relevant information and even possibly fixing it in a settlement agreement, refuse its approval, and demand consideration of the dispute on merits.[15]

Secondly, the feature of revocability of procedural actions when it comes to a procedural agreement completely ignores the interest of the procedural opponent in obtaining the legal result that the parties pursued when signing such an agreement. Why does the interest of one side to unmotivated disavowal of legal consequences prevail over the interest of the other side to achieve them? Of how much value is the right, in essence, to ignore the agreement reached with the opponent? In our opinion, there are no reasonable grounds for resolving the dilemma in favor of the side behaving inconsistently.

Thirdly, it is possible to look at the settlement agreement from the point of view of a civil law agreement (namely, it is such from the content side with the rare exceptions, when the compromise is, for example, in mutual refusal of the initial claim and counterclaims). If this is an agreement, then it is possible to draw an analogy with cases when the legislator establishes requirements for state registration to achieve the desired legal effect. The approval of the settlement agreement is, of course, not identical to the state registration, as making judicial decision does not entail mandatory effect of publicity in the sense that it occurs when making an entry in the public register (moreover, judicial acts in a number of categories of court cases are not subject to

15 Note: the thesis that the non-motivated cancellation of legal proceedings, including those associated with the institute of the settlement agreement, creates a ground for abuse, has already been expressed by some researchers (see, for example, A V Yudin , 'Abuse of procedural rights in civil proceedings' (Doctor of Law Dissertation, St. Petersburg 2009).

publication or the information contained in them shall be impersonal).[16] But there is something in common between the state registration of an agreement and the approval of a settlement agreement, which still merits a comparison: in both cases, the competent state authorities (the registrar in the first case and the court in the second) in some way 'dissect' the agreement, conducting a kind of test for the absence of defects in content and expression of will, suppressing possible violations of the rights of persons who are not parties to the agreement, and so on. And since this goal is by and large the same, the logic of defense mechanisms in the event when one party evades this 'test' should be at least similar. The Russian civil law is based on the idea that, in cases of evasion from the state registration of an agreement, it is admissible to file a special claim, the satisfaction of which entails a court decision on the registration of the agreement.[17] At the same time, the law not only does not allow any unmotivated refusal of an already signed agreement, but more than that: it imposes on the party unreasonably evading state registration of the agreement the obligation to compensate the other party for losses caused by the delay in registration of the agreement.[18] Why, then, for a generally similar procedure of approving an arrangement that is within the settlement agreement, should we deviate from these general approaches and allow the rule of annulment of procedural actions to be disseminated? We emphasize that, of course, we are well aware of the significant difference that exists in the activities of an 'ordinary' state body, such as the registrar, and the court itself as the body administering justice. But it is precisely for this case that it is not the presence (or absence) of the procedural form that matters, but the general logic of 'legitimizing' a certain substantive relationship: in both cases the parties bind themselves to an obligation, and then in a public procedure they appeal to the state body, which ultimately entails the latter to resolve the issue of such a 'legitimization'.

So, in our opinion, there are serious reasons for recognizing the legal effect of a signed, but still unapproved settlement agreement, postulating the bind of the parties by the will expressed in such a settlement agreement and the impossibility of a unilateral unmotivated refusal.

It is easy to see that the reasons that exclude the admissibility of an unmotivated refusal from the settlement agreement signed by the party, lead us to the answer to the question which of the two models described above should be preferred. By and large, for the stability of the turnover, for the parties to be able to use flexible legal tools, to develop a respectful attitude towards the agreements reached, of course, it is more important that the binding effect arose at the time of the signing of the settlement agreement and so that no party could 'withdraw' from the obligation, which the court must further approve as a condition for the termination of a judicial dispute.

But the priority of the binding model gives rise to three blocks of related questions.

1) How to eliminate or minimize previously identified negative aspects inherent in this particular model?

16 See Art. 15 of the Federal Law of 22 December 2008 N 262-FL 'On ensuring access to information on the activities of the courts in the Russian Federation', sec. 2, 3 of the ruling of the Presidium of the Armed Forces of the Russian Federation of 27 September 2017 'On approval of the Regulations on the procedure for placing texts of judicial acts on the official websites of the Supreme Court of the Russian Federation, courts of general jurisdiction and arbitration courts in the Internet information and telecommunications network.'

17 In accordance with paragraph 2 of Art. 165 of the CPC RF 'if the agreement requiring state registration is made in the proper form, but one of the parties evades its registration, the court, at the request of the other party, has the right to decide on the registration of the agreement. In this case, the agreement is registered in accordance with the decision of the court.'

18 See paragraph 3 of Art. 165 of the CPC.

2) Should there be any peculiarities in the procedural mechanism for exercising the right of a person who insists on the approval of a settlement agreement?

3) Can certain special grounds be identified, in the presence of which the party could still disavow its will expressed in the settlement agreement before the question of its approval is resolved?

We have pointed out some of the drawbacks that may appear in the implementation of the binding model above. One of the drawbacks is related to the possible distrust on the part of the court to the content of the settlement agreement, as well as to the validity of the will of that party, which is absent in the court hearing. When all interested subjects appear in court, the court can always hear objections and, if necessary, undertake the necessary verifications (for example, assign handwriting expertise), but what should be done if the party is absent?

The simplest approach, which is to prohibit approval of a settlement agreement if one of the parties fails to appear, of course, would essentially discredit the model itself and a rather strange situation would occur when a party cannot withdraw its will, but its failure to appear will de facto lead to the same legal effect.[19] Consequently, the general idea requires that the question of approving a settlement agreement to be considered regardless of the appearance of the procedural opponent. Should we then use some kind of legal mechanisms that would protect against possible abuses?

Of course, the notarization of the settlement agreement or the notarization of the signature would significantly simplify the situation. However, it is completely unnecessary to introduce such certification (notarization) into the law as mandatory. And the justification for this, in our opinion, is obvious. First, such an appeal to a notarial procedure would entail additional financial and time costs for numerous subjects, who most often agree on some banal monetary refunds and have no goal to mislead the court regarding the will of the procedural opponent. Secondly, it can be assumed that possible cases of abuse as such will not be quite frequent, given that the opposing party in the judicial procedure may subsequently raise the question of cancelation of the judicial act approving the settlement agreement. Thirdly, the 'ordinary' falsification of a document may lead to comparable or even more substantial property losses, however, for this reason, the legislator does not establish a rule on mandatory notarization of documents submitted to the court.

Apparently, the simplest insurance mechanism would be a one-time postponement of the trial with a separate court ruling, in which the court would offer the absent party to present their opinion on the approval of the settlement agreement. If the duly notified person who received a copy of such a definition does not exercise such a right, the court could proceed from the uncontested presumption of validity of the will and consider the approval of the settlement agreement in the next court hearing.[20]

In addition, for cases when the decision to approve a settlement agreement, entered into legal force or subject to immediate enforcement, is appealed in the court of

19 The court cannot oblige the party to appear in session on the basis of general rule in the Russian civil process.

20 In comparative legal terms, we draw attention to a rather simple mechanism that is implemented in the Republic of Kazakhstan: the consideration of a petition for approval of a settlement agreement is allowed if the parties fail to appear, but if there is an application to consider the petition without their participation (part 1 of article 177 of the CPC of the Republic of Kazakhstan). It is clear that such a mechanism cannot be applied when the party 'changed its mind' and decided against turning to the court for approval of a settlement agreement. However, for most cases of absenteeism, apparently, it will solve the problem of possible distrust on the part of the court in the content of the settlement agreement and in the validity of the will of the party that is absent in the hearing.

corresponding instance, a rule could be established on the mandatory suspension of its execution (if a corresponding petition of the party is submitted), provided that the grounds for the cancellation of the judicial act referred to by the complainant is connected with the evils of will (distortion of the actual content of the agreement reached in the settlement agreement).

As a drawback we also indicated a conflict situation in which the party present in the case categorically insists on the inadmissibility of resolving the issue of approval, referring to the fact that the initial will expressed by it (stated in the settlement agreement) was withdrawn, that they 'changed their mind' etc. We believe that for these situations a special rule in procedural legislation is needed, which would clearly and unequivocally establish that signing a settlement agreement does not imply revoking the will, that the question of the approval by the court is considered if at least one of the interested parties has a motion. The existence of such rules in civil law[21] in itself removes the question: the parties clearly see the consequences of signing an agreement requiring state registration from the content of the law.

The most significant drawback of the binding model, in our opinion, is that for judicial procedures that do not contain requirements for professional judicial representation, situations will arise where one of the parties does not really understand the consequences of approving the settlement agreement. It is clear that the standard clarification of procedural rights and obligations that the court does at the preparatory stage and at the beginning of the court hearing when considering the case on its merits,[22] does not have much effect here: the parties formally announce the right to enter into a settlement agreement, but it's important that such clarification would focus on the consequences of the approval of the settlement agreement and that it should be done in a situation that objectively precedes the approval. As mentioned above, the mechanism providing for the approval of a settlement agreement only with the attendance of all interested parties is fundamentally unacceptable, since it, in fact, allows the unscrupulous subject with his passive behavior to prevent consideration of the issue of approval. Consequently, the only possible way to clarify the consequences of the approval of a settlement agreement is to send the relevant court ruling to the absent party.

Thus, if the party that signed the settlement agreement fails to appear at the court session, and in the absence of its written application for approval, the court is obliged to postpone the trial and make a court ruling, which (besides offering to present its opinion on the approval of the settlement agreement) has to clarify the consequences of approving the settlement agreement. Accordingly, in the next court session, the court should consider the question of approval, regardless of whether or not the party that had not appeared in the previous court session appeared in the process.[23]

21 This refers to paragraph 2 of Art. 165 of the CPC RF.

22 See item 1part 1 art. 135, item 5 part 2 art. 153 APC RF, item 1part 1 art. 150, art. 165 CPC RF.

23 Let us note that, commenting on the norms of the CPC of the Republic of Kazakhstan allowing the approval of a settlement agreement in the absence of parties (but if there is a statement to consider the issue without their participation), the retired judge of the city of Bremen G. Schnitger believes that it is quite enough if the indication of clarification of the legal consequences arising from the terms of the settlement agreement will be contained either in the application for approval of the settlement agreement, or in the settlement agreement itself (G Schnitger in *Commentary on the CPC of the Republic of Kazakhstan*, (Astana 2016) <https://online.zakon.kz/Document/?doc_id=32469410#pos=5865;-36&sdoc_params=text%3D%25D0%25BC%25D0%25B8%25D1%2580%25D0%25BE%25D0%25B2%25D0%25BE%25D0%25B5%2520%25D1%2581%25D0%25BE%25D0%25B3%25D0%25BB%25D0%25B0%25D1%2588%25D0%25B5%25D0%25BD%25D0%25B8%25D0%25B5%26mode%3Dindoc%26topic_id%3D32469410%26spos%3D1%26tSynonym%3D1%26tShort%3D1%26tSuffix%3D1&sdoc_pos=0)> accessed 7 August 2019.

Another issue that requires resolution in the implementation of a binding model is the need to single out the specifics of the exercise of the right of a person who (in the absence of a procedural opponent) insists on approving a settlement agreement. We believe that at least one such feature needs to be discussed.

The fact is that if a procedural opponent (if he had not previously filed a petition for approval of a settlement agreement) fails to appear at the court session, the party present at the court session will have an opportunity for some procedural 'game': having a signed settlement agreement, this party can either make a request for approval, or keep silent about the fact of signing. In the latter case, the court will continue to review the case in a general manner, and the final judicial act is likely to have little in common with the agreement reached by the parties. It is clear that, by virtue of the principle of dispositiveness, it is impossible to oblige the side that appeared at the court session to file a petition for approval. But the situation when in the absence of an opponent (perhaps, hoping that the settlement will be approved regardless of his absence) the party gets the opportunity to vary the procedural behavior, actually 'holding' the settlement agreement as a backup option, does not seem to be completely correct either. For example, let's take a rather simple case: the parties signed a settlement agreement, one of them did not appear at the court session, and at this court session the court announced the results of the forensic examination previously appointed by it. If such a study is crucial for resolving a substantive dispute, then the party may, depending on its outcome, either file a petition for approval of a settlement agreement (if the result of the expert study is not in its favor) or not declare it (if, based on the result of the examination, substantive dispute is in its interests). In our opinion, in order to exclude such situations, it would be reasonable for the case when only one of the parties is present at the trial, to provide a rule according to which the right to petition for approval of a settlement agreement can be exercised only at the very beginning, at the moment when the court finds out whether there are any petitions that impede the consideration of the case. And if the party has not exercised this right, then the court can turn to the question of approving a settlement agreement only if the corresponding expression of will is expressed at the court hearing and by the second party.

Finally, it is necessary to discuss the issue of the admissibility of the allocation of specific grounds, in the presence of which the party could disavow its expression of will, expressed in the settlement agreement, before the question of its approval is resolved.[24] It is clear that such grounds should not coincide with those that will serve as a reason for refusing judicial approval of the settlement agreement. In other words, it is necessary to separate two completely different situations:

- the first: the settlement agreement was signed, but, in the opinion of the party, there is a defect, as a result of which it appeals to the court with a petition to refuse to approve it;

- the second: the settlement agreement is signed, the will itself is not questioned, but before considering the approval of one of the parties in an extrajudicial procedure, the party announced the refusal from the previously expressed will, resulting in no longer being in a state of bind.

24 In order to eliminate the possible confusion of legal institutions, we note the important difference between the mechanism that allows the party to disavow its expression of will, expressed in the settlement agreement, from the previously considered institution of cancellation of procedural actions. In our opinion, the first legal phenomenon has a private law nature, while the second, on the contrary, is of a public law nature. And that is why, in disavowing its will, the party in the extrajudicial procedure appeals to the counterparty of the agreement constituting the content of the settlement agreement, while cancelling the procedural act that was performed, the person appeals neither to the procedural opponent, nor to other persons involved in the case, but exclusively to the court.

In the first situation described, there is no specificity, the court is charged to assess the relevant arguments of the party and (depending on whether such a defect exists or not) to approve the settlement agreement or deny its approval. The second situation looks fundamentally different, since here, when a petition for approval is received from one of the parties, the second objects to such an allegation, insisting that the legal effect of the concluded agreement is disavowed by the unilateral refusal it had previously declared. As a result, the court cannot immediately proceed to a substantive assessment of a settlement agreement; it needs to first find out whether there were real grounds for a unilateral refusal, and whether this secondary right was properly implemented by the party. Accordingly, if the court comes to the conclusion that the will of one of the parties is de jure disavowed, then the very question of approving a settlement agreement is not considered.

So, should certain grounds be singled out, which, in divergence from a general rule, will allow a party to withdraw from a signed settlement agreement? In answer to this question, one should consider firstly the flexibility and breadth of legal instruments that parties can use to conclude a settlement agreement, and secondly, the provided in the civil law grounds for unilateral termination of an agreement (withdrawal from an agreement).

The purpose of this study does not include a description of all admissible private-law tools that could be used in connection with a settlement agreement. Nevertheless, the most obvious example here is the usual contractual condition that gives one or both parties the opportunity to unilaterally withdraw from a settlement agreement not yet approved by the court if by a certain point concrete circumstances had occurred (or had not). For example, such a circumstance can be a deviation from a claim, declared by one of the parties in another case (this is a situation where there are several legal disputes between the parties, as a result of which disputing parties would like to settle them in a package). Accordingly, if such a refusal does not follow, the adversary gets the opportunity to disavow his/her will. Another example where it would be reasonable to allow the approval of the right to unilateral refusal may be the situation of the debtor's alleged use of borrowed funds, for example, from a credit institution (the defendant accepts the obligation to make certain payments under an approved settlement agreement only if a loan agreement will be concluded by a certain date prior to the approval of the settlement agreement). Then the negative decision of the bank on the provision of appropriate financing may just act as a circumstance that gives the defendant the right to withdraw from the previously expressed will.[25]

The contractual nature of the settlement agreement leads to the conclusion that the grounds for unilateral termination of the contract (withdrawal from the contract) established by civil law, in general, should also enable the interested party to 'withdraw' from the state of bind. For example, if in the period between the signing of a settlement agreement and the consideration of its approval, one of the parties was withdrawn the license to operate (which ultimately leads to the impossibility of fulfilling the obligation

25 The last example, at first glance, may seem far-fetched: why do you need such a complication if the defendant can conclude a loan agreement before the conclusion of a settlement agreement? However, we believe that the bank is not always ready to provide a targeted loan for financing the contract, which has a very vague prospect of conclusion (and that is the unsigned settlement agreement). On the contrary, after the disputing parties entered into a settlement agreement within the framework of the above-proposed binding model (by virtue of which both the claimant and the defendant became bound by expressions of will), the bank has a more realistic opportunity to assess the risks of lending. In short, for turnover (and bank lending in particular) in the event of a legal dispute, it is more preferable to have a clear legal perspective of a disputed relationship, rather than when participants are ignorant, relying solely on a good will of the procedural opponent.

constituting the content of the settlement agreement), then the other party, of course, should be able to refuse a signed settlement agreement.[26]

At the same time, the use of separate civil structures, which are quite appropriate for private relations, cannot be considered admissible for the settlement agreement. In particular, the current Russian civil law allows parties of multilateral treaties to include as a condition the right to non-arbitrarily terminate such treaties by agreement not of all, but of the majority of persons participating in the said agreement.[27] In our opinion, a similar condition placed inside a settlement agreement should be considered null and void. The explanation here is related to the binding nature of the binding model identified above: if, as a general rule, one of the parties cannot withdraw its will, then it would be extremely illogical to give such a right, for example, to two defendants for the case when three subjects participate in the settlement agreement: specified co-defendants and a claimant.

3. SETTLEMENT AGREEMENTS SIGNED BY THE PARTIES, THE APPROVAL OF WHICH WAS DENIED BY THE COURT

We now turn to the problems of procedural and legal consequences in relation to the second of the groups we have previously identified.

The first set of questions that needs to be considered is related to the properties of the legal force of a judicial definition. So, does the definition, with which the court refused to approve of the settlement agreement, have the *prejudicial* property? This intermediate definition may contain judgments about certain facts established by the court, which relate to both the disputed substantive relationship and other legal relations.

In our opinion, on the issue of the content of the disputed (binding the plaintiff and the defendant) substantive legal relations, one should proceed from the basic premise, which is that the final conclusions can be made only in a judicial decision. It is this final judicial act that, in a certain sense, 'draws the line', since only at the time of its adoption in the court case should all the evidence be concentrated, and the court, examining it and evaluating it in aggregate, can make a reasonable judgment about the content of mutual rights and obligations of disputing parties. And therefore the circumstances established in the court decision, even if they contradict what was previously established in the interim definitions, should act as an irrefutable basis for future court cases that may arise between the same persons involved in the case.

However, this raises one not so simple question: what if, after the court refused to approve the settlement agreement, a final judicial act was issued that did not resolve the dispute on the merits? For example, if the court left the claim without consideration due to the non-appearance of the claimant at the court hearing,[28] then the court not

26 Russian legislation directly provides for the possibility of such a refusal for 'ordinary' civil law contracts, establishing that 'if one of the parties to the contract does not have a license to carry out activities or membership in a self-regulating organization necessary to fulfill the obligation under the contract, the other party has the right to refuse the contract (fulfillment of the contract) and claim damages' (item 3 of article 450.1 of the CPC RF).

27 Paragraph 2, item 1 of Art. 450 of the CPC RF stipulates that 'a multilateral agreement, the execution of which is connected with the business activities of all its parties, may provide for the possibility of modifying or terminating such an agreement by consensus of all or most of the persons participating in the said agreement, unless otherwise provided by law. The contract specified in this paragraph may provide for a procedure for determining such a majority.'

28 This basis is provided for by the legislation of the Russian Federation for both arbitration and civil proceedings (see item 9 part 1 article 148 of the APC RF, para. 8 article 222 of the CPC RF).

only failed to make 'final' judgments about the disputed substantive legal relationship, but could not make them in principle. At the same time, the judicial definition could contain conclusions of a substantive nature related to the qualification of the disputed legal relationship or the content of the rights and obligations that arose, which, in fact, served as the basis for refusing to approve the settlement agreement. Is it possible to allow such a 'legal metamorphosis' when the occurrence of prejudicial determination would be made dependent on the final judicial act:

- if a court decision is made, the determination to refuse the approval of the settlement agreement has no prejudicial force;

- if the proceedings in the case are completed on grounds not related to the settlement of the dispute on the merits, then does the definition of refusal to approve the settlement agreement have such force?

The opinion has been expressed that by itself the prejudiciality of judicial definitions should be based on the absence of certain negative criteria and the presence of specific positive criteria (features).[29] Perhaps such an approach really should be a starting point for thinking about prejudice, but with regard to the issue under consideration, we believe that, despite the absence of negative and positive features, the final conclusion should be negative. Here we would point out two reasons.

The first is that the parties, having signed the settlement agreement, did not intend to continue the legal dispute and therefore, most likely, did not care about sufficiently filling the court case with the necessary evidence. It is logical to assume that in some cases the parties even deliberately kept silent about certain circumstances, not wanting them to be reflected in the court decision and become known to any other persons.

The second argument is more logical and implies a comparison of the consequences depending on different procedural scenarios. So, if the court refused to approve the settlement agreement, then later, as mentioned above, it is not bound by its own judgments about the disputed substantive relationship, since the judicial procedure provided for by the Russian procedural legislation allows the court to present new evidence, admit facts by the party, the conclusion of agreements on the actual circumstances and the commission of other actions that may lead the court to radically different conclusions about the facts. But we will look at the same situation in a somewhat modified scenario: the court also refused to approve the settlement agreement, but then left the claim without consideration due to the plaintiff's secondary failure to appear in court, and after that the plaintiff filed a new identical lawsuit. If in this situation a prejudice is allowed, then when considering a newly instituted court case, the court will be obliged to proceed from the facts established in the previously issued refusal definition. But this is completely devoid of any logic. The situation arises when if the substantive dispute is dealt with in the same court case, then there is no prejudice, and if the same dispute 'survived reincarnation' through the initiation of a new court case, then the prejudice miraculously arises.

Apparently, not too often, however, the definition, with which the court refused to approve of the settlement agreement, may contain conclusions about other (besides

29 In particular, A M Bezrukov in one of his early works (A M Bezrukov, *Prejudicial connection of judicial acts* (Volters Kluver 2007) considered the adoption of the definition in the protocol form to be among the negative signs, and court hearing with the obligatory summoning of persons participating in the case and the ability to determine to act as an independent object of appeal – among the positive signs. Separately, we note that at the time of writing this study, A M Bezrukov has corrected his position, indicating to the author in the electronic correspondence the following:
'A prejudicialness

disputed) substantive legal relations. We are talking about cases when the very reason for refusal is related to the fact that the agreement that constitutes the content of the settlement agreement enters into some kind of contradiction with another legal relationship, and such a contradiction is so essential that it excludes 'judicial legitimacy'.

It is clear that if the subject of another substantive legal relationship does not have the status of a person participating in the case, then the prejudice is excluded. But what about the reverse situation? Take, for example, the following case. The plaintiff (prior to the initiation of court proceedings) on the basis of the contract of assignment has acquired the right to claim the defendant. In the case on the side of the claimant, the original creditor with the status of a third party, who has no independent claims regarding the subject of the dispute, was involved. The claimant and the defendant apply to the court for approval of the settlement agreement, which implies, for example, a change in the timing of the performance of the principal obligation. In this case, the court qualifies the contract of assignment in the substantives of the court case as void. Should a settlement agreement be approved? It is absolutely clear to the court that the claimant did not become a creditor in the main obligation. Is it possible to ignore this circumstance? It is doubtful. In our opinion, the court should issue a definition of rejection, which should explicitly state that the approval of such a settlement agreement would violate the rights of the original creditor (the third party on the claimant's side), who due to the insignificance of the assignment did not drop out of the main obligation and the right (as agreed with the defendant) to 'dissect' the main obligation. So, suppose that the court finally issued such a definition of rejection, and then ended the case, leaving the claim without consideration. Will the definition of a refusal to approve a settlement agreement have the property of prejudiciality? For example, when presenting a new claim by the original creditor, do you need to establish the invalidity of the assignment according to the general rules of evidence, or considering that the original creditor had the status of a third party in the first court case, and the defendant remained the same, proceed from a predetermined fact?

The argument put forward earlier that the parties, having signed the settlement agreement, did not intend to continue the court dispute and therefore were not interested in presenting all the available evidence, obviously does not work here: both the plaintiff and the defendant wish to discontinue the proceedings, and therefore most likely, they will make the necessary efforts to refute the judgment of the possible insignificance of the assignment. In addition, the original creditor participates in the case, who is a party to the contract of assignment, and therefore has the most immediate interest, as a result of which, the available evidence will be presented with a high degree of probability to them at the time of resolving the issue of approving a settlement agreement.

Nevertheless, we believe that in the case when the court refused to approve the settlement agreement, referring to a different (other than binding the plaintiff and the defendant) substantive relationship, we should also proceed from the inadmissibility of prejudice. The explanation here is by and large based on the above logical reasoning: if the refusal definition does not bind the court with its judgment about the invalidity of

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, as an institution that limits the parties and the court in the possibilities of re-examining the circumstances and presenting evidence, can be applied with absolute precision to decisions and appeals decisions (in the terminology of the CPC RF). With regard to the definitions made in the course of the consideration of cases, here the prejudice should either be completely eliminated or left for exceptional cases, but at the same time fix some very strict criteria allowing it to be applied.

When solving any procedural issue, none should force the parties to commensurate each step with possible far-reaching substantive consequences (in particular, this applies to the non-professional process in the courts of general jurisdiction, where citizens may simply not be aware of the potential consequences of some or other unimportant procedural actions)'.

the assignment and subsequently (for example, when presenting additional evidence), it can come to the opposite conclusion in a court decision, then there are no reasonable arguments to restrict a court in the authority in a general manner to establish the validity or invalidity of a cession when considering a claim filed by the original creditor.

In addition to the property of prejudiciality, the judicial definition may also have a different property — exclusivity, which implies the impossibility of re-applying an identical petition (in this case, an appeal containing a request to approve a settlement agreement on the same conditions, about which the court has previously unequivocally expressed, refusing in approval).

From the point of view of procedural economy, of course, such repeated appeals should not be considered. And, it should be mentioned, the approach according to which the refusal definition has the property of exclusivity is supported by some authors.30 We believe that a purely formal refusal to consider the issue of approving a settlement agreement only because of the fact that a similar issue has already been considered before should be questioned. There are several arguments here.

Firstly, for the proceedings in the court of first instance, the law does not prevent the parties of the case from submitting new evidence, such as those, which may lead to conclusions that are contrary to what the court had previously indicated in the refusal definition. In addition, a situation is quite permissible when new evidence will in general entail the establishment of other facts, and this in some cases may radically affect the conclusion on the approval of the settlement agreement.

Secondly, the circumstances themselves, which prevented the approval of the settlement agreement, may disappear (for example, if the court initially refused to approve the settlement agreement on a dispute about an individually-specific thing, referring to the fact that one of the owners of the thing does not participate in the settlement agreement, then after some time, the common share ownership may cease, and then such an agreement will no longer violate the rights of other persons).

Thirdly, it is impossible to exclude a change or cancellation of the law, which initially served as the basis for making a refusal definition, or the adoption of a new law, for example, legalizing an agreement constituting the content of the settlement agreement.

The second set of issues that should be considered is related to the institution of court costs.[31] Let us ask a general question: is there any specificity with regard to the distribution of such expenses in the event of a non-approval of the settlement agreement?

The current Russian procedural legislation connects the resolution of the issue of distribution of court costs with the final judicial act,[32] while giving the court discretionary

30 So, for example, V V Yarkov, analysing the provisions of the CPC RSFSR, stated the following: 'According to part five of Art. 165 of the CPC, in case of the court's failure to reject the claim, the defendant's recognition of the claim or the court's non-approval of the settlement agreement of the parties, the court makes a reasoned decision. Therefore, in such cases one should also speak about the completed actual composition, but it does not give rise to those legal consequences that the person concerned or both parties were counting on. Such an actual composition performs law-preventing functions in the sense that it is impossible, for example, to again suggest that the court approve the settlement agreement on the same conditions that were not previously accepted by the court' (V V Yarkov, 'Legal facts in the mechanism for implementing civil procedural law' (Doctor of Legal Sciences Dissertation, Ekaterinburg, 1992).

31 According to the Russian procedural legislation, they include a state duty and costs associated with the consideration of the case (Article 101 of the APC RF, Part 1 Article 88 of the CPC RF).

32 The essence of the idea is very simple: court costs are borne by the person who lost the dispute (see Article 110 of the APC RF, Article 98 of the CPC RF); hereinafter the general rule.

power to assign all court expenses, regardless of the final judicial act, to a person abusing their procedural rights or not performing their procedural duties.[33] We also note that recently the approach of the Russian legislator and court practice to the possibility of reimbursement of court costs to a third party who does not declare independent claims has changed: if earlier for a third party such right was not recognized in principle, now it is acceptable if the following circumstances are present:

a) such third party participated on the side in whose favor the final judicial act in the case was adopted;

b) the actual procedural behavior of the third party contributed to the adoption of this judicial act.[34]

So, let us model the following situation: after the initiation of a lawsuit, the defendant proposes to innovate the obligation on favorable terms for the plaintiff; the parties eventually sign a settlement agreement, however, the court, having established a possible violation of the rights of another person, attracts him to participate in the case as a third party, who does not declare independent claims. Then, in a new court hearing, the third party presents evidence that the innovation really violates his subjective right, and the court ultimately refuses to approve the settlement agreement. At the same time, the further consideration of the dispute on the merits ends with the issuance of a court decision refusing to satisfy the claims.

Thus, both parties, as well as the third person, incurred the costs of participation in court sessions, in which the court considered the issues of bringing a third person to participate in the case and approving the settlement agreement (for simplicity, suppose that the court did not resolve any other procedural issues). Based on the general rule, since the consideration of the case was completed in favour of the defendant, the claimant will have to reimburse him including the costs incurred in connection with participation in such meetings. Is it possible to qualify the behavior of the defendant as abuse of procedural rights? We believe not: initially the goal with which he entered into the negotiation procedure, and then petitioned the court for approval of the settlement agreement, was not unsuitable as the defendant really wanted to settle the dispute. But the court issued the refusal decision precisely because the innovation proposed by the defendant was flawed. Does the claimant, who lost the substantive dispute, have to reimburse the legal costs of the defendant in respect of the two court hearings? How should be dealt with the costs incurred by a third party? Is it fair that their compensation in this situation is subject to the condition of the final resolution of the dispute between the plaintiff and the defendant? Is it paramount that a third party necessarily actively contributed to winning of one on whose side he is, if the third party itself pursued a

33 In accordance with Part 2 of Art. 111 of the APC RF, the arbitration court has the right to charge all court costs in a case to a person abusing his procedural rights or not performing his procedural duties if this led to the disruption of the court session, delaying the trial, obstructing the consideration of the case and adopting a lawful and reasonable judicial act.

34 See part 5.1 of Art. 110 APC RF, part. 4 of Art. 98 of the CPC RF (as amended by the Federal Law of 28 November 2018 N 451-FL 'On Amendments to Certain Legislative Acts of the Russian Federation'), as well as item 6 of the Resolution of the Plenum of the RF Armed Forces of 21 January 2016 N 1 'On some issues of application of the law on reimbursement of costs associated with the consideration of the case.' For administrative proceedings, the Constitutional Court of the Russian Federation, in addition to these circumstances, also highlights the need (forced need) of court costs, the reasonableness of their limits and some other criteria, the presence of which allows the interested person to demand reimbursement of costs (see Decree of the Constitutional Court of the Russian Federation of 21 January 2019 N 6 P 'In the case of the verification of the constitutionality of Article 112 of the Code of Administrative Procedure of the Russian Federation in connection with the complaint of citizens N.A. Balanyuk, N.V. Lavrentieva, I.V. Popova and V.A. Chernyshev').

different goal which is to prevent his property from becoming subject to court-approved novation?

In our opinion, in such a situation it is necessary to proceed from the following. Yes, the conclusion of civil contracts violating the rights of other persons should not be rewarded. And if such a deal was challenged in a separate court case, then the defendant as the losing party would also be charged with property compensation related to judicial protection. However, in our example, the novation verification did not take place in another court case - the court conducted it as part of the procedure for approving a settlement agreement. Here we can conditionally talk about a certain *optional* substantive dispute,[35] the consideration of which ended with a refusal to approve the settlement agreement. But who is considered to be the winning party in this case? It is clear that this is not the defendant (it was he who proposed the innovation that did not stand the test of 'judicial legitimation'). Perhaps, it is necessary to identify the procedural victory of the plaintiff? And there are very serious doubts as the claimant, too, wanted the approval of the settlement agreement. Yes, in the beginning the initiative to innovate a disputed obligation came from the defendant, and yet the claimant's will was in line with the will of the procedural opponent, because they both expressed a desire to end the dispute on agreed terms. Logically, we come to the conclusion that the only entity that has benefited from the non-approval of the settlement agreement is a third party. Indeed, although it did not have the status of a disputant, it was its subjective right that the court defended by accepting the refusal definition. Moreover, an important point is that for this case it doesn't matter at all on which side a third person was involved in the case (this is explained by the fact that in optional substantive disputes a third person may well have an independent interest against the plaintiff and the defendant).

Such a (perhaps rather artificial) separation of the dispute concerning judicial review of the agreement, which constitutes the content of the settlement agreement, opens the way to a different, more fair approach to resolving the issue of court costs. This approach, we believe, should be as follows:

- firstly, the general rule on the distribution of court costs should be extended only to those expenses that individuals incurred in connection with the resolution of the 'main' dispute (meaning the substantive dispute between the plaintiff and the defendant, about which the case was initiated);

- secondly, there should be exceptions from this rule that would take into account the nature of the procedural behavior of the disputants (for example, the presence of procedural abuse in their actions);

- thirdly, court costs incurred by persons involved in the case, in connection with the consideration of individual issues that essentially relate to optional substantive and legal disputes, should be distributed depending on the actual interest of each person in

35 The term 'optional substantive dispute' proposed by us implies a completely independent (different from the 'main') substantive dispute, which is being considered in the framework of an already initiated lawsuit. It is important that the consideration of such a dispute does not imply a change in the procedural and legal status of the persons involved in the case, and the actual subjects who have mutually exclusive substantive interests may not coincide with the disputing parties.
Separately, we note that it is necessary to distinguish the proposed design of an optional substantive dispute from the concept of a 'separate dispute' in Russian legal doctrine for insolvency (bankruptcy) cases. The latter is characterized by the initiation of independent judicial proceedings, a special subject composition and some other signs that are not inherent in the optional dispute (for more on the signs of a separate dispute, see. Y D Podolsky, 'Separate insolvency (bankruptcy) disputes' (Candidate of Legal Sciences Dissertation, Ekaterinburg 2018).

resolving the optional dispute, persons to participate in the case and the results of the resolution of such disputes in interim judicial acts adopted on the 'main' dispute.

Returning to the content proposed above, we will make brief conclusions. The costs of the plaintiff and the defendant to participate in the court session, in which the court considered the issue of bringing a third party to the case, each party must bear independently (this court session is in no way connected with the final resolution of the dispute, it only preceded the resolution of the agreements). Similarly, each of the parties must assume the expenses that it incurred in the next court session (when the refusal was issued). And finally, the expenses of the third party, which it incurred to protect its subjective right, are subject to reimbursement by the claimant and the defendant, since it was they who opposed the third party, insisting on the approval of the settlement agreement.

The general logic of the distribution of court costs for optional substantive disputes should also apply to those costs that the persons involved in the case will incur in the courts of the verification instances. In other words, if, for example, when the claimant and (or) the defendant makes complaints about the refusal definition, their satisfaction will be denied, then no property compensation on the basis of participation in the trial court between the parties (claimant and defendant) should not be made, however third party legal fees are refundable. However, some nuances should apparently be associated with the definition of the obligated subject. If both parties filed complaints, then the claimant as well as the defendants would have to reimburse the court expenses to a third party. If the complaint is filed only by one party, then the second party must reimburse court costs only if it has supported the arguments related to the grounds for annulment in the court of the verification instance.

The situation with the non-approval of the settlement agreement may be even simpler: the court is empowered to refuse to 'legitimize' the agreement reached by the claimant and the defendant in case a violation of the law is established [36]. Here, as we see, there is no subject (a third person) opposing the parties, but does this mean that only a general rule is enough to distribute court costs?

We believe that (as in the case with a third person described above) it makes sense to separately single out that part of court costs that relates exclusively to the court session in which the court considered the question of approving the settlement agreement. Why should the distribution of these costs follow a general rule? The very purpose of holding such a meeting is in no way connected with the resolution of the dispute on the merits. The parties try to complete the judicial procedure, and then, if the court does not approve the settlement agreement because of a conflict with the law, one of them gets the right to demand reimbursement of court costs from another. What is the logic behind this? In our opinion, a reasonable approach requires the opposite: so that such expenses as a whole will be removed from the operation of the general rule. And if we agree with this thesis, then the following question logically arises: what should be the mechanism for the equitable distribution of such expenses?

We believe that the basic approach to the allocation of expenses incurred by the parties in connection with the court hearing, which considered the approval of the settlement agreement, should be that each party must accept such expenses at its own expense (regardless of the outcome of the dispute settlement on the merits). However, there are cases when a non-approval of a settlement agreement is connected exclusively with the actions (inaction) of only one of the parties. We are talking here not about any abuses, but about flaws, shortcomings, which such a party incurred when concluding a settlement

36 See part 5 art. 49 APC RF, part 2 art. 39 CPC RF.

agreement, which ultimately led to the renunciation of the definition. For example, a party to make an agreement constituting the content of a settlement agreement should have received corporate approval, but in fact the parties signed a settlement agreement in its absence. The court, having established this circumstance, refused to approve the settlement agreement. Accordingly, even if the subsequent dispute is considered on the merits and the court decision is made in favor of the party that did not receive corporate approval, court costs in the part relating to the court session, at which the approval was resolved, should be assigned to that side.

4. CONCLUSION

Summarizing the abovementioned, we shall formulate brief conclusions on the problems that arise when analyzing the institution of unapproved settlement agreements.

So, in our opinion, the issue of the obligation for the disputing parties (the plaintiff and the defendant) of the agreements signed after the initiation of judicial proceedings can be resolved on the basis of two fundamentally different models:

1) the binding model, which assumes that the party to the document has already expressed its will to commit a specific procedural action. Therefore, if the agreement itself is submitted to the court case by only one of the parties, the court should consider the legal consequences of such an agreement, proceeding from the fact that the will of both parties has already been expressed earlier;

2) the model of the necessary co-directed will, which is based on the fact that the signing of the agreement is considered only as a kind of formal prerequisite for the implementation of the procedural action, the addressee of which is the court. And this action (as far as an agreement is concerned) can find its manifestation exclusively in the expression of the co-directed will of both subjects. Accordingly, if at least one of the entities that participated in the signing of the agreement did not submit a petition to the court to consider it, then the court has no reason to consider this procedural issue.

When comparing these models, it is concluded that it is necessary to give priority to the binding model. The pro arguments come down to maintaining the stability of the turnover, providing the parties with the opportunity to use flexible legal instruments, as well as developing respect for the reached agreements.

On the issue of the prejudice of the determination by which the court refused to approve the settlement agreement, it is proposed to depart from the general rule on the mandatory nature of a judicial act that has entered into legal force. This is explained by the fact that the final conclusions on questions of fact can only be made in a court decision (because only by the time of its adoption in a court case all evidence should be concentrated, and the court, having examined them and evaluated in aggregate, can make a reasonable judgment about the content of the mutual rights and obligations of the disputing parties). Accordingly, the interim findings of a substantive nature that the court makes in the rulings should not be linked either by the court that is considering the case, or by any other court when considering another dispute with the same persons.

The term 'optional substantive legal dispute' is introduced into scientific circulation, which should be understood as a completely independent (different from the 'general between plaintiff and defendant) substantive legal dispute, which is being considered in the framework of an already initiated legal case. A distinctive feature of the optional substantive legal dispute is that, firstly, its consideration does not imply a change in the procedural legal status of the persons participating in the case, and secondly, actual entities having mutually exclusive substantive interests may not coincide with

disputing parties (the plaintiff and the defendant). At the same time, the suggested design of the optional substantive dispute is proposed to be distinguished from the concept of separate dispute' highlighted in the Russian legal doctrine for insolvency (bankruptcy) cases.

Based on the distinction between the concepts of the general and optional substantive legal dispute, a fundamentally different approach to resolving the issue of court costs of a third party that does not state independent claims regarding the subject of the dispute is substantiated. In particular, it is proposed to extend the effect of the general rule on the distribution of court costs only to those expenses that the persons incurred in connection with the resolution of the main dispute (the dispute between the plaintiff and the defendant). As for the legal costs incurred by the persons participating in the case in connection with the consideration of certain issues that relate to optional substantive legal disputes, they should be allocated depending on the actual interest of each person in resolving exactly the optional dispute. In this case, it is also necessary to take into account, on whose initiative the person was involved in the case and the actual results of the resolution of the optional substantive legal dispute in an interim judicial act.

ONLINE MEDIATION: A GAME CHANGER OR MUCH ADO ABOUT NOTHING?

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Summary: 1. Introduction – 2. Defining Online Mediation. – 3. Technologies Used in Online Mediation. – 4. Areas of Application. – 5. Known Benefits. – 6. (Un)obvious Drawbacks. – 7. Solutions and Potential for Improvement. – 8. Concluding Remarks.

This paper focuses on the phenomenon of Online Mediation, which is gaining in popularity in recent years. Being part of the Online Dispute Resolution family, this particular method is the one applied most often. The very idea of disputes being heard and resolved in the global network seems exciting and quite appealing to some, while for others it presents a source of major concern. New technologies influence the ways parties and the neutral interact, share ideas and reach a settlement. Moreover, they have a clear impact on how people evaluate the other party, their mediator and the whole procedure they are involved into. This makes trust a significant issue for online mediation, one that is not so easy to establish while relying on the old techniques. Another important thing is the absence of positive regulation for the sector. In spite of recent instruments adopted by the EU, online mediation is still a field largely unknown to lawyers, consumers, business players and national regulators.

The present article aims at clarifying the notion of 'online mediation' (which, surprisingly, has not been properly done yet), showing some of the most obvious benefits and drawbacks of this dispute resolution method (a deeper, more profound look on them will only be possible over time, when online mediation proves itself in practice and more statistical data are available) and providing valuable remarks on the solutions for the problems determined.

Key words: Online Dispute Resolution, Online Mediation, IT platforms, fourth party, consumer disputes, eCommerce, caucusing, settlement of disputes

1. INTRODUCTION

In the past decade we have witnessed a rapid entry of technologies into our lives. Businesses, consumers and governments start to perform their usual tasks with the help of computers, and many new previously unknown fields of human interaction come to

life. Being formerly an object of interest exclusively to software engineers and a small IT community, now the technology is a powerful tool changing the world on a daily basis.[1] More and more people choose a career in the IT sector, while those, whose work never involved any interaction with computers, are now intensively trying to catch up with the modern technological trends.

It is hard to imagine an area that has not recently moved online: one can name banking, insurance, consulting, education, commerce, consumer shopping, entertainment and even certain public services provided by governments and municipalities.[2] At the same time, many new sectors and industries are emerging, such as trading in domain names, web hosting, online gaming, cloud storage of data,[3] blockchain and cryptocurrencies, smart contracts[4] with more to come in the foreseeable future.

While appreciating this remarkable progress, we must not forget about the problems that go in hand with it. People still face difficulties entering into relations with each other: numerous disputes arise and put obstacles on further development and bring too much of a fuss to all involved. Luckily, humanity has already developed civilized ways of dispute resolution helping overcome disagreements and restore peace and harmony. These may be adjudicatory or non-adjudicatory, binding or non-binding, mandatory or voluntary, facilitative or evaluative, involving a third neutral party or just the two disputants. All of them nowadays follow the general trend and also relocate to the web. There are several reasons for this: convenience for internet-people,[5] lower costs, simplicity and speed of procedures, and, last but not least, the opportunity for providers of related services to compete for yet another important market (that of internet dispute resolution).[6]

This article focuses on one particular method of dispute resolution, namely, online mediation, as it seems to be one of the easiest to be deployed online (unlike, e.g. online arbitration facing difficulties with recognition, establishing a proper form for agreement and the award and some other). Mediation is also among the most popular ways of dispute resolution in real ('offline') life,[7] thus there is no reason things should dramatically change when relocating online.[8]

Part II of this article elaborates on the definition of Online Mediation, describing it as an Online Dispute Resolution (ODR) technique, and sheds some light on the history of the matter. Part III presents an overview of the technology used to conduct mediation sessions and to help parties and their mediator reach a peaceful settlement of the dispute. In Part IV an incomplete list of areas where Online Mediation is already widespread, or may become popular in the future, is provided. Parts V and VI describe known

1 P Astromskis, 'Ateities teisės tyrimų modelis' (2018) 1(17) Teisės apžvalga 74.

2 O Turel, Y Yuan, J Rose, 'Antecedents of Attitude towards Online Mediation' (2007) 16(6) Group Decision & Negotiation 539.

3 M Corrales, M Fenwick, N Forgó, Disruptive Technologies Shaping the Law of the Future in: *New Technology, Big Data and the Law* (Springer 2017) 2.

4 R O'Shields, 'Smart Contracts: Legal Agreements for the Blockchain' (2017) 21 North Carolina Banking Institute 179.

5 'Internet people' (an 'internet person' for a particular representative) – people who live on the Internet, follow all of its trends and feel more comfortable in the online environment than they do in real life. See the definition in Urban Dictionary <https://www.urbandictionary.com>.

6 J Hörnle, *Cross-border Internet Dispute Resolution* (Cambridge University Press 2009) 87.

7 P Cortés, 'Can I Afford Not To Mediate? Mandatory Online Mediation for European Consumers: Legal Constraints and Policy Issues' (2008) 35 Rutgers Computer and Technology Law Journal 1.

8 As shown in the research of Schultz, Kaufmann-Kohler et al, Online Mediation is indeed the most common form of ODR with over 50 institutions providing it. See T Schultz, G Kaufmann-Kohler et al, *Online Dispute Resolution: The State of the Art and the Issues* (University of Geneva 2001) 24.

advantages and drawbacks of using this method, while Part VII shows particular ways of overcoming major hurdles. Part VIII concludes and presents some food and thought.

2. DEFINING ONLINE MEDIATION

Before trying to evaluate the phenomenon of Online Mediation it makes sense to find a proper definition for it. The concept itself is not new, appearing towards the end of the 1990s with the expansion of the Internet for commercial use.[9]

The most common definition of *mediation* as such is a method of ADR where an impartial person (mediator) assists parties in reaching an independent solution of their dispute. In the European Union mediation (at least for cross-border instances) is defined as a 'structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator'.10 National member states have their own regulations on mediation11 and even special names for it and those practicing in this area.[12]

Mediation is commonly based upon the following rules and principles:

(1) It involves three parties – two disputants and a neutral intermediate offering his assistance. Although in principle there may be more conflicting subjects, in practice we normally have just two of them with the most opposite views on certain essential questions. The presence of the neutral is what distinguishes the process from negotiation where the parties communicate directly. Mediation is 'assisted negotiation' which is launched where the latter process fails.[13] All mutual relations between the two parties and parties with their mediator are normally referred to as the 'mediation triangle'.

(2) Non-adjudicatory role of the mediator. The third neutral party has no adjudicatory powers. His role is to facilitate the conversation between the main parties by providing them with advice, opinions, suggestions, directions and information. In some variations of the procedure he may even present a draft settlement, but to sign it and impose its contents upon the parties is definitely beyond his authority. Such a prerogative is reserved for the disputants. In most situations the goal of the mediator is to create a settlement-friendly atmosphere, whatever that can mean in a particular case. It must be noted that the third party must be independent from the disputing parties and impartial in his views and appreciation of the dispute.

(3) Flexible and informal nature of the procedure. Mediation is only regulated by the law in most abstract terms. The fundamental parts of the procedure are decided by the three parties or are laid down in terms and conditions of the mediator. Flexibility means fewer

9 Previously, in the early 1990s the Internet was mainly used by scholars, educational and military institutions, while the conflicts within it were quite rare and, in any case, preference was given to judicial ways of dispute resolution.

10 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (EU Mediation Directive), OJ L 136, 24.05.2008, 3-8.

11 *E.g.* In the Republic of Lithuania, mediation is understood as 'a dispute resolution procedure in which one or more mediators help the parties to the dispute to resolve the dispute amicably'. In most cases it is seen as a professional activity (Law on Mediation, 15.07.2008, Nr. X-1702, Art. 2).

12 Thus, in Estonia the law distinguishes between 'mediation' and 'conciliation', in Greece besides ordinary mediation there are similar processes (with a different status) for employment and consumer cases, etc. See: Mediation in EU Member States information page – <https://e-justice.europa.eu/content_mediation_in_member_states-64-be-en.do?member=1> accessed 15 August 2019.

13 E M Lombardi, 'Is Online Mediation the Way to Fit the Forum to the Fuss?' (2012) 19(4) Maastricht Journal of European and Comparative Law 526.

bureaucratic formalities and obligatory steps to be satisfied in order for the process to gain recognition. It also means that parties are in the control of the procedure and can construct it in accordance with their wishes. When we talk about an informal style of mediation we mean that it is an 'interest based procedure' in contrast with litigation or arbitration ('right-based procedures').14 The aim here is to determine what the parties can do for each other rather than to establish who is right and wrong.

(4) Private origins. On the one hand, mediation is mainly used to deal with disputes of private (i.e. 'non-public' nature), those that parties are allowed to dispose of themselves, without governmental intervention. This feature is slowly becoming obsolete, since we find a growing number of mediation examples in criminal, administrative, constitutional and even international law. On the other hand, the most important thing is that mediation is being offered by professionals who are not part of the judiciary or other governmental authority. In majority of cases these persons only receive certificates or training from a public authority, being virtually independent and not subject to any review on matters of law. In some states mediators are a self-regulated profession while in a small number of them it is not regulated at all.

(5) Voluntary participation. Parties may not be forced to mediate as any resort to this procedure is a matter of mutual and independent agreement. However, in modern doctrine of civil procedure it is believed that settlements are generally preferable to 'hard' solutions, thus some national legislators design a system of mandatory, or court imposed mediation.15 At the same time, even such procedures do not fully block subsequent access to judicial procedures (otherwise would be a violation of the ECHR Art. 6 on fair trial or the national provisions with a similar effect). Voluntary nature means autonomy for the parties to participate and/or leave the process at any time desired. They will not be punished for their lack of cooperation or inability to arrange a settlement. The content of the final document (mediation agreement) is also up to the parties, although the mediator may propose some template to follow.

(6) Mostly face-to-face interaction. Although not included in the notion of mediation (supposedly on purpose), mediation is normally a face-to-face process, such where the parties see each other (being virtually present together in mediator's cabinet) and may engage in oral discussions. This is regarded as essential, since otherwise it is extremely hard to build up a settlement-friendly atmosphere.

In the end, mediation presents an effective way of dispute resolution, since it helps operatively solve the problems and alleviate the pressure on courts.[16] What about online mediation then? How is it related to classic mediation and what is so special about it? First of all, it is usually seen as an integral part of Online Dispute Resolution (ODR) movement, which to most speakers presents the use of technology to assist parties with the resolution of a dispute outside the courtroom.[17] The exact meaning and contents of the term ODR is, however, subject to controversy. Most scholars relate ODR with ADR, which makes sense as the most common forms of the former (apart from mediation) are negotiation and arbitration – which are also the most well-known types of ADR.[18] In this way, online dispute resolution stands

14 Cortés (n 7) 1.

15 See N Kaminskienė, 'Privaloma mediacija: galimybės ir iššūkiai' (2013) 20(2) Jurisprudencija 687-8.

16 A V Feoktistov, 'Mediation as a Means of Conflict Regulation' ("Mediatsiia kak sposob uregulirovaniia konfliktov') (2014) 27 Concept 1.

17 J C Betancourt, E Zlatanska, 'Online Dispute Resolution (ODR): What Is It, and Is It the Way Forward?' (2013) 79 Arbitration 256.

18 K Mania, 'Online Dispute Resolution: The Future of Justice' (2015) 1 International Comparative Jurisprudence 78.

for nothing else than traditional ADR supplemented and facilitated by some modern information and communication tools (ICT), such as email, VoIP, smart-messengers, videoconferencing and so on.

At the same time, many scholars tend to give ODR a more independent status.[19] According to Hörnle, ODR is not just a transplant of ADR into the online environment, as we need never underestimate the transformative power of the technology.[20] In online forms of dispute resolution the latter is not only used as communication medium, but takes the active role, assisting the third party in resolving the dispute and on rare occasions even taking its role.[21] The pioneers of the ODR movement, E. Katsh and J. Rifkin even coined the term of 'fourth party' to describe a special status of the technology.[22] Computer tools help organize sessions, collect and sort data, present relevant materials to the parties at a convenient time, remind of the sessions and deadlines to submit documents, analyze previous practice and on that basis propose solutions for the case at hand. In other words, programs can do much more than a human individual, consequently they are not *being used*, but *are* rather *functioning* on their own, performing their separate and unique tasks. Another view insists on drawing a line between popular technologies (such as email or Skype) created and used for different tasks and sectoral technologies, which are more sophisticated and normally designed precisely for dispute resolution purposes. Only applying the latter ones we deal with ODR, while the use of traditional web instruments does not create any added value, and consequently does not need additional attention and research (it is not ODR in its pure form, but rather technically-facilitated dispute resolution).

Applying everything mentioned to online mediation, we can note that in many aspects it mirrors its traditional offline counterpart.[23] It also takes place between two parties and an intermediary, the latter not having right to impose a decision, and it also concentrates on interests instead of rights. The difference lies in the active use of information and communication technology (ICT). Consequently, for many of us online mediation is just the same process empowered and supported by modern technology.[24] The only difference seemingly lies in the device used to connect the participants.

As was just shown, this is quite a simplistic idea of what the whole process is. Technologically advanced mediation is not the same thing as online mediation. Despite being quite close to each other, they have sufficient differences, which may become evident through an example. Imagine a mediator knowing his client to be away from his normal business premises, decides to organize a videoconference between the parties or to keep in touch through email. This does not necessarily turn the whole process into an 'online' one.[25] As was said, computer technologies are so much a part of our daily lives that their use for both personal and professional issues does not present further

19 L Zissis, 'Disputes in the Digital Era: The Evolution of Dispute Resolution and the Model ODR System. (Université de Toulouse 2015) 153.

20 J Hörnle (n 6) 86.

21 G Ross, 'ODR's Role in In-Person Mediation and Other 'Must Know' Takeaways About ODR' <https://www.mediate.com/articles/RossG2.cfm> accessed 10 August 2019.

22 E Katsh, J Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Jossey-Bass, 2001) 9.

23 A M Braeutigam, 'Fusses that Fit Online: Online Mediation in Non-Commercial Contexts' (2006) 5(2) Appalachian Journal of Law 285.

24 A Ramasastry, 'Government-to-Citizen Online Dispute Resolution: A Preliminary Inquiry' (2004) 79 Washington Law Review 160.

25 Such a situation though is described as 'hybrid mediation' when the mediator can choose which solutions to rely upon. See Rogers, 365.

questions, nor rise any specific problems to be solved.[26] Moreover, we clearly see that in the situation given the use of distant communication means was only one of the available options. A mediator could alternatively postpone the session to a later date and prepare for a normal oral hearing. This shows that the use of technology in this and similar situations is only ancillary, there is no strict dependence on it and it is easily interchangeable.[27]

Quite the opposite will be the situation where the mediation takes place entirely online. On that occasion the participants use only one means of communication, do not get together physically and only interact online. The role of the mediator remains the same then, but the selection of techniques will sufficiently differ.[28] No longer will it be possible to rely on facial expressions, gestures and body language of the clients. The atmosphere of interaction, its pace, emotions of the participants, worries and fears they encounter – everything will be slightly different. At the same time, technology will also permit some types of relations impossible in real life (e.g. immediate web sessions in chat rooms between each of the parties and mediator – previously he had to conduct private caucuses[29] at a different time).

In extreme situations we may even replace a human-mediator with pre-programmed algorithms that respond to parties' behavior and actions and help them draft a solution. The necessary technologies are already here, and the reasons for their inactivity are rather legal and bureaucratic than technological. The programs will need some time, though, to take into account all peculiarities of human behavior and the spectrum of reactions to the same impulses. Moreover, people feel more comfortable working with other people, albeit indirectly, rather than depersonalized machines.

To sum up, we need to distinguish situations where classic procedures have embraced certain modern technologies from those where the IT tools present the driving force of the whole process and cannot be dispensed with. Only the latter ones will be further discussed here as 'online mediation', while for the former the term 'traditional mediation' will be used.

Online mediation started to be offered in the late 1990s and presented a purely university project then. Quite soon most projects evolved into commercial ventures and started to order professional internet services.[30] However, most of them went bankrupt with the new millennium. The same was also true for academic research: while we find a vast amount of publications on the topic at the beginning of the 2000s, quite soon it ceased to be interesting and was largely abandoned. In recent years, however, we see a revival of interest for it. We can identify three reasons to this: (1) emergence of improved web technologies permitting to easily build up complex internet services for various use;[31] (2) extreme workload of

26 H Pakaslanti, 'The Costs of Resolving Conflicts Online' (2017) < https://helda.helsinki.fi/bitstream/handle/10138/191368/the%20Costs%20of%20Resolving%20Conflicts%20Online.pdf?sequence=2&isAllowed=y> accessed 29 July 2019.

27 G Kaufmann-Kohler, 'Online Dispute Resolution and Its Significance for International Commercial Arbitration' (2005) Commerce and Dispute Resolution 454.

28 P Cortés (n 7) 3-4.

29 Private, or separate caucus – 'a confidential mediation session that a mediator holds with an individual party to elicit settlement offers and demands'. See *Black's Law Dictionary* (9th edition), ed. B A Garner (West 2009) 248.

30 J Hörnle (n 6) 75.

31 There is a concept of 'software as a service' (SaaS), where a program designed by software engineers is deployed on a website and does not require installation and support on user's machine. On the other hand, it normally requires advance payments before an access to it can be obtained. Thus, it presents a perfect business model and one does only need to find a suitable niche to operate in. Dispute resolution virtually presents one of such 'prospective fields'.

the courts, such that the government itself starts to look at ADR (and, now also ODR) as a saving grace; (3) relocation of most businesses and consumers to the web, where it is now comfortable and common to make transactions. As a consequence we see a unity of opinion concerning the necessity and importance of ODR.

Online mediation is still the most popular type of ODR and is being offered by a number of institutions (BBBOnline, Camera Arbitrale di Milano, Modria (Tyler), SmartSettle, SquareTrade, Web Trader, WebAssured, WebMediate and Internet Neutral). Despite that, this dispute resolution method, in the words of Cortés, is still in its infancy.[32] Many issues surrounding it are problematic, the scholar and practicing community are not united in terms, no solid regulatory framework is provided from the public side and, finally, some potential users may be distracted from it due to trust-related problems.

3. TECHNOLOGIES USED IN ONLINE MEDIATION

Practice shows that Online Mediation is capable of using all range of available web-based technologies: from simple email communication and messengers to videoconferencing and procedures involving advanced algorithms.[33] Despite the great diversity of solutions available on the market, they all may be divided into textual and dynamic (audio, video), and also immediate (synchronous) and asynchronous.

Textual, as the word suggests, rely on written statements submitted by the parties. Computers, tablets and mobile phones give the opportunity to exchange postings in various ways: SMS, instant messengers (IMs), web chats, forums (bulletin boards), social media sites, emails and others. Some of them may even be synchronous, e.g. permitting a person to see what the other one is typing, but in most cases it is only possible to reply after he/she has finished the message and sends it to you.

Dynamic tools include audio (phone calls, VoIP) and video (skype or another similar program) interactions. In most cases we are talking about their combination – audiovisual mediation.[34] Here parties can see each other and exchange their comments directly. Although in practice there is an example where a party 'films' a video, sends it to another party and then waits for a similar reply,[35] there is more sense in a process where people are capable of seeing each other directly and engage in conversation in real time.

It must also be added that audiovisual mediation is an attempt to copy and even replicate the classic procedure of face-to-face communication: it is believed that such way of interaction gives a richer perspective on the case and permits the parties to be more open towards their companions and the intermediary.[36] Since video-communication is, in principle, supported by any modern laptop or telephone, the proponents of online mediation normally speak out in favour of this type of procedure.

32 P. Cortés (n 7) 2.

33 E M Lombardi (n 13) 533-7.

34 F S Rossi, A Holtzworth-Munroe, 'Shuttle and Online Mediation: A Review of Available Research and Implications for Separating Couples Reporting Intimate Partner Violence or Abuse' (2017) 55(3) Family Court Review 395.

35 See the example of Crowdsourced ODR: J van der Henrik, D Dimov, 'Towards Crowdsourced Online Dispute Resolution' (2011) Law Across Nations: Governance, Policy & Statutes 244-257.

36 D Lavi, 'Till Death Do Us Part?!: Online Mediation as an Answer to Divorce Cases Involving Violence' (2015) 16(2) North Carolina Journal of Law and Technology 300.

In spite of such ideas, online mediation is currently proposed principally in a written form.[37] The reason is that broadband internet access is not evenly accessible throughout the world, making interactions between the parties from distant geographic regions via this method unavailable or significantly impeded. It may also create an unnecessary advantage for one of the parties, possessing better technical capabilities (normally big corporations vs. small and medium sized companies and consumers), while text-based instruments are widely distributed and universally available.

Among text-based solutions, email is the simplest way to conduct sessions between the disputants and the mediator.[38] It is preinstalled in every computer, available as a web-service and requires no additional licenses or periodic payments. It is also rather fast and easy to use. Although popular in practice and heavily relied on, it is not among the best things the Internet can offer for disputing parties. This type of communication is not encrypted and thus prone to hacker attacks and the leakage of data. Moreover, its use does not give a mediator much power over the process. He is effectively prevented from using restrictive tactics and cannot basically influence the flow of postings between the parties. It is believed he might spend more time ensuring his authority than diving into the complex relations between the parties and the obstacles to their reconciliation.[39]

Much more effective are full-fledged online platforms specifically designed for dispute resolution purposes. Among their indisputable advantages one may name process-guided interfaces, smart reminders, virtual chat rooms, calendars, notes, drafts and much more. From among those, virtual meeting rooms present a particular interest and a decent alternative to email. These present a special interactive web-site hosted by the mediator (or, otherwise under his exclusive control) where parties may exchange notes and messages, and ultimately resolve their disagreements. They look like modern messengers enabling communicating subjects to see all the history of their correspondence. Virtual rooms may be general (open to all three participants) and private (only one of the parties and the mediator have access there). Such design enables the mediator to chat with both parties in separate browser windows and none of the parties is capable of seeing what is being typed to its counterpart. This seems impossible in real life, where the mediator has to conduct separate caucusing with both parties consequentially, which certainly increases the degree of tension (with each of the parties presuming something unfair happening behind the closed doors).[40]

Another solution worth mentioning is the dynamic filling forms.[41] This is not artificial intelligence (AI) as such – we rather speak about pre-programmed web pages with data that appear in a particular order depending on which answers the party has chosen during previous steps. The forms change depending on the information entered. This solution, however, has its drawback: it does not allow much creativity, thus, instead of fully expressing herself (which is essential in a process like mediation) a party has to rely on answers and wording provided by the program. It must also be mentioned that computer algorithms are not yet ready to replace a human mediator, who is still a key player in the whole process. His ability to react quickly, change the tone and pace of

37 J Melamed, 'Mediating on the Internet: Today and Tomorrow' <https://www.mediate.com/articles/Melamed5.cfm> accessed 20 July 2019.

38 F S Rossi, A Holtzworth-Munroe (n 34) 439.

39 R Regazzoni, 'RisolviOnline: Online Mediation from a Very Practical Point of View' <http://ceur-ws.org/Vol-430/Paper5.pdf> accessed 10 July 2019.

40 J Hörnle (n 6) 79.

41 Id 80.

mediation, ask the correct questions and make reasonable comments is invaluable, and is not something a machine is likely to reproduce quite soon.[42]

Putting it together, technology in online mediation should provide for effective communication between the mediator and parties, establish a settlement-friendly atmosphere and present information and support required by the participants.

4. AREAS OF APPLICATION

The first type of disputes suitable and even preferable for online mediation that comes to our mind, is, probably, conflicts in eCommerce. The latter word comprises different forms of commercial activity in the Internet, including sales and purchases, provision of services and some other things.[43] It may include both B2B and B2C transactions.[44]

ODR is a logical solution here, since such relations are born and develop within the network, so it makes sense to handle the related disputes internally, without transferring them to the real world.[45] As the business community already prefers ADR to litigation, there is no wonder they would consider resorting to some cyber alternatives of the same methods (and if none is available – invest in developing them from scratch). That is exactly what happened to eBay and TaoBao trade platforms, which were in desperate need of dispute resolution tools for their buyers and sellers. Eventually they came up with totally authentic solutions that are now cited as the most successful ODR examples.[46]

Online mechanisms of dispute resolution are especially welcome where the physical distance is the main obstacle for a proper hearing. In eCommerce it is highly likely that parties are not present within one jurisdiction,[47] consequently it is easier to interact through an unbiased and neutral platform, such as the Internet.[48] There is no need to travel anywhere, to look for a proper court or arbitrator to handle the case: the ODR provides an approachable solution for all. The other two things the business people may value are savings in money and time. We believe, it is obvious that online procedures take less time and do not require that much investment (including such obsolete things as travel expenses and costs for printing out the documents). Some expert estimations promise up to 30% savings in time and money when dealing with online mediation.[49]

All the things mentioned are especially inviting for the consumers (who, since recently, are also active online-buyers). Sometimes ODR may even be the only chance for them to get any relief. In eCommerce situations the other (business) party may be miles away, protected by foreign and unknown legislation, sometimes not even

42 P Noriega, C López, 'Towards a Platform for Online Mediation' (2009) CEUR Workshop Proceedings 482.

43 A S Shetty, R R Pathrabe et al, Legal Issues in eCommerce < https://www.academia.edu/8148042/Legal_Issues_in_E-Commerce> accessed 12 August 2019.

44 B de Vries, 'Book Review: Online Dispute Resolution: Challenges for Contemporary Justice' (2006) 15 Information & Communication Technology Law 121.

45 D Sauliūnas, 'Alternatyvūs ginčų sprendimo būdai internetu (online ADR)' (2003) 41(33) Jurisprudencija 40.

46 Y Zhao, 'Rethinking the Limitations of Online Mediation' (2018) 11 American Journal of Mediation 164.

47 B L Beal, 'Online Mediation: Has Its Time Come?'(2000) 15(3) Ohio State Journal on Dispute Resolution 735.

48 E Katsh, C Rule, 'What We Know and Need to Know About Online Dispute Resolution' < https://www.americanbar.org/content/dam/aba/images/office_president/katsh_rule_whitepaper.pdf> accessed 3 July 2019.

49 Online Mediation – MediasiMediasi <https://mediasi.nl/en/mediation/online-mediation> accessed 12 July 2019.

possessing a physical address or due incorporation to be sued in a court of law.[50] Moreover, a great number of consumer cases concern relatively small matters ($5 – $100 in average). While being sensitive to consumers, these disputes are, beyond all doubt, unprepared to offline consideration, as the sole preliminary steps to be taken would consume much of the potential award.[51] At the same time ODR helps cut down on travel expenses, production of documents, hiring representatives and so on. Online environment also smooths the inequalities between the business and the consumer in their negotiating power, especially in asynchronous communication. There is no more a situation where a company's representative comes with piles of documents and a well-prepared speech while the consumer is feeling lost and outnumbered. On the contrary, both parties exchange textual notes and have enough time to plan out their strategy. The reasons mentioned here have already been embraced by the European Union, which primarily targets consumer disputes in its recent ADR/ODR instruments.[52]

Thus, parties involved in commercial activities are the primary beneficiaries of online mediation services, while time and money are the two things driving the parties to online mediation providers. However, these are not the only (and in many cases – the primary) reasons to move things online. One may think of other situations, in which a virtual mediator would better suit a person's needs than his offline colleague. Here, we may name situations where it is physically difficult for a party to attend live sessions (due to illness or permanent disability).[53] Internet connections, on the other hand, are more approachable and really capable to evade most of the difficulties.

In yet other situations a physical meeting might be possible though highly undesirable as is the case with various kinds of matrimonial and family disputes, especially those involving interpersonal violence or abuse.[54] Here joint mediation is not the wisest solution due to concerns of fear and intimidation a party may have, as well as a coercive pattern of control that may exist in a mediation setting. For such reasons it was generally supposed that cases like these are not suitable for mediation at all.[55] However, the chance of the parties to work out the dispute themselves and to find a peaceful solution should not be neglected, especially when the fate of common children or the well-being of a victimized party are among the subject matters.[56] For them, online mediation gives a chance to participate in a dispute resolution procedure without fear of meeting the other party. They may do it from a comfortable place with their friends being near. Whereas it is true that negative emotions come from direct face-to-face contact, maybe this is exactly what should be evaded (and not mediation as such). As was said, online mediation gives a possibility to interact in textual form, thus it is definitely a promising solution for former spouses. It must be added that family mediation is extremely helpful

50 N Ebner, 'E-Mediation' in M S Abdel Wahab, E Katsh & D Rainey (eds) *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing 2012) 362.

51 C Rule, 'Designing a Global Online Dispute Resolution System: Lessons Learnt from eBay' (2017) 13 University of St. Thomas Law Journal 356.

52 See Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), OJ L 165, 18.06.2013; Regulation (EU) 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), OJ L 165/1, 18.06.2013.

53 E M Lombardi (n 13) 541.

54 F S Rossi, A Holtzworth-Munroe (n 34) 399-400.

55 F Rossi, A Holtzworth-Munroe (n 34) 391.

56 A Kuhl, 'Family Law Online: The Impact of the Internet' (2008) 21(1) Journal of the American Academy of Matrimonial Lawyers 239-42.

in countries with a mobile population. After a breakup, the spouses may settle in a new location and for that reason it is not their reluctance to meet face-to-face, but rather the impossibility of this due to new work and social commitments that presents a problem. They may, however, easily find some free time to conduct online meetings, or just to exchange messages in an asynchronous procedure.

With many other cases (employment, intellectual property, corporate and partnership, etc.) it becomes a general truth that the parties are annoyed or unwilling to see each other in person, while still opting for an amicable solution of their dispute. In that way, relations between former employer and employee may be strained, they may no longer be present in the same area, so online mediation gives them a proper place to voice their views and settle disagreements.

Online mediation has some perspectives in educational (both school and college) environments, conflicts between public authorities and citizens/businesses (e.g. parking, granting licenses, land rental, payment of taxes and much more).[57] Potentially, this form of dispute resolution may embrace all areas of human activity that are not exclusively resolved for the courts (constitutional, administrative, most criminal cases).[58] At the same time, even in public conflicts mediation may appear as a supporting tool, and thus its online form is also quite welcome.

5. POSITIVE FEATURES

Classic advantages of mediation are well-known and have been repeated many times.[59] These are: confidentiality of the procedure, time and cost savings, control of the parties over the process, flexibility and predictability and some others.[60] Many of them have already been discussed in this paper. What is important about mediation is its flexible nature, permitting those participating to feel more comfortable and cooperative. A great deal depends on the mediator, who is a necessary figure in the process: we presume that where parties resort to mediation, their previous efforts to reach peaceful solutions through bilateral negotiations have failed, thus a third neutral person is needed to maintain a balance and give each party a chance to express herself.[61]

It was mentioned that online mediation is cheaper for the parties, but it also provides for some savings to the neutral intermediary. The latter does not have to rent an office and bear associated costs,[62] however, in some cases his expenses for professional software licenses, data protection and cloud storage may even exceed those of offline mediators. Nevertheless, what is definitely expanding is the possibility of a mediator to practice around the globe. With a laptop as his main tool there are no geographic limits to offer the corresponding services.[63] The market is quite competitive, yet a solid professional will always be able to find his niche. From the participant's perspective such situation is

57 F Petrauskas, E Kybartienė, 'Online Dispute Resolution in Consumer Disputes' (2011) 18(3) Jurisprudence 924.

58 S S Raines, 'Can Online Mediation Be Transformative? Tales from the Front' (2005) 22(4) Conflict Resolution Quarterly 449.

59 S N Exon, 'The Next Generation of Online Dispute Resolution: the Significance of Holography to Enhance and Transform Dispute Resolution' (2010) 12 Cardozo Journal of Conflict Resolution 24-6.

60 K Taylor, *Technological Advancements Help Resolve Disputes* <https://www.mediate.com/articles/TaylorKbl20151218.cfm> accessed 5 August 2019.

61 S N Exon (n 59) 24.

62 D Lavi (n 36) 289.

63 G Ross, *ODR's Role in In-Person Mediation and Other 'Must Know' Takeaways About ODR* <https://www.mediate.com/articles/RossG2.cfm> accessed 2 July 2019.

also quite favorable, as his home region may offer services of poor quality or none at all. The Internet, however, permits to find a specialist on the other side of the world, and the only big obstacle is, seemingly, the language barrier.

Many inherent advantages are attributed to textual communication (the main medium of online mediation). This way, the parties have more time to think about their answers instead of hurrying up and saying aloud many undesired things. Their messages are more likely to be a thorough and logical proposal than the one coming from a face-to-face hearing limited in time.

To some, the significant benefit of text-based mediation is a possibility to eliminate bias based on race, age, gender or disability.[64] Neither the mediator, nor the parties normally know, who is behind the screen, thus they may focus on essential points of the dispute rather than a specific characteristic of another participant triggering some form of prejudice in their mind. Since there are no 'faces', but just 'accounts' or 'user profiles', all the subjects in the process may genuinely feel themselves equal.

Last but not least, online mediation may be essential in cases where everything else fails. Some of the relations existing on the net are not properly regulated by the law with none efficient remedies offered in case of violation or abuse. To this category we may include disputes between online gamers over some in-game artifacts, not being considered as 'real property' in classic terms, yet quite valuable and important for the relevant community; and also inter-personal conflicts in social media, which can only be comprehended by someone, who is also a part of the same community and knows its hierarchy of values and codes of conduct. As is clearly seen, online arbitration and negotiation are quite likely to fail in both mentioned cases, thus a procedure involving a charismatic and persuasive intermediary needs to be put in place.

5. (UN)OBVIOUS DRAWBACKS

In traditional mediation the key issue is that of trust. This broad term embraces trust between the participants, trust of each party to the mediator and, finally, confidence in the procedure itself. With online mediation we can safely add trust to technology behind the process to the list. Without proper trust established the parties will not be willing to act in a co-operative manner, share their thoughts and feelings, to exchange sensitive data and so on. Ultimately, they may even opt out of the procedure, preferring to bring their dispute further to court, the powers of which are undoubted.

Unfortunately, the Internet, in general, has developed into an environment fraught with distrust.[65] Reasons for that are different: the big number of frauds, impossibility to get enough information about another party, let alone a general fear of the unknown. In fact, we have to build up this trust from scratch when moving online.

Despite some examples of effective synchronous text-based communications (such as chats or web-messengers), offered by some major ODR platforms (such as ODRWorld or RisolviOnline), the standard in the industry is still asynchronous communication.[66] This comes at odds with the very idea of traditional mediation, i.e. that it has to be

64 P Young, *Online Mediation: Its Uses And Limitations* <https://www.mediate.com/articles/young4.cfm> accessed 22 July 2019.

65 N Ebner (n 50) 369.

66 Id 370.

face-to-face, not screen-to-screen.[67] For some professionals, the concept of indirect mediation presents a complete nonsense.[68]

These negative concerns have their grounds: indeed, such process as mediation requires a deep personal connection. With text-based communication you never know who is behind the screen and what are their true intentions. If you are unfamiliar with another side, it is extremely difficult to 'humanize' it, that is, to start thinking of that other party as the same human being with all the usual feelings and propensity to errors. Text typed online and delivered by the machine cannot help to catch person's emotions, feelings and desires. What one can see is just a bit of words written by 'someone'. Such form of communication is much more stale, emotionless and straight. Where interaction is implemented by means of email or messenger notes, another important feature comes out. People normally try to sound more professional, solid and reliable while composing their letters. When the use of email is at stake people normally resort to standard templates and set phrases, which include formal words and expressions devoid of any practical meaning and thus useless for the other party and mediator to identify their true intentions.

It is also quite easy to understand the promise of a letter in a wrong way. A joke included by the party to defuse the situation may be considered to be a mockery, and a reasonable proposal – as a gimmick. It must be observed that this argument does not work in case of family or matrimonial mediation where the parties are already familiar with each other and are less likely to misinterpret words and intentions of another participant. Some also argue that in eCommerce disputes the textual nature of mediation does not pose serious problems, as they are often non-personal (but rather, monetary). Consequently, there is no need for the parties to go deep into building up a picture of each other's character. Their initial decision to resort to online mediation shows their intention to negotiate and to peacefully settle the problem, going on with their business. Although somewhat reasonable, this argument misses a mediator's role in the procedure. He is also quite limited by the chosen medium and may have a hard time getting information about the parties.[69]

An interesting observation also showed a stronger prevalence of aggressiveness in online communication. People online are more likely to insult and offend each other, as well as to say words that would never sound in face-to-face communication.[70] Such inflammatory comments and *ad hominem* attacks are quite unusual for traditional mediation where the parties all appear in the same room.[71] Decency, tact, education, in the end, fear of rebuff all act as psychological barriers to aggressive attacks. With distant contacts, however, parties start feeling that they can get away with anything, as they can always quit the discussion and, at the worst, turn off the computer. Although in online mediation parties are aware their partner is a real person, their online habits of treating others may still come out.[72]

Textual communication also shows its drawbacks when speaking about the ability to logically and clearly present one's thoughts and some literacy. As mentioned previously, web-based media make communication less biased, as we do not see who the parties are in reality. Thus, their rhetoric skills and ability to win the crowd do not bring any

67 M Albornoz, N González, 'Feasibility Analysis of Online Dispute Resolution in developing Countries' (2012) 44 University of Miami Inter-American Law Review 39.

68 A M Braeutigam (n 23) 276.

69 A Schmitz, 'There's An "App" for That: Developing Online Dispute Resolution to Empower Economic Development' (2018) 32 Notre Dame Journal of Law Ethics & Public Policy 2.

70 N Kravec, 'Dogmas of Online Dispute Resolution' (2006) 38 University of Toledo Law Research 130.

71 P Young (n 64).

72 D Lavi (n 36) 297.

additional points. However, in online mediation people do not become fully equal, as there is still a divide based on their literacy. A mediator might feel more respect towards a person with solid writing skills rather than the one making constant mistakes and being unable to convey his idea.[73]

Another thing that calls for rethinking is the idea of faster procedures in online surroundings. It was said that since parties do not need to travel anywhere, the mediation procedure will require less time. At the same time, since in most cases we talk about the textual medium, things may be quite the opposite.[74] It takes time for parties to read a message and craft their reply. Sometimes, we may face delays just because of the inability of the participant to keep with the pace of the procedure. The main reason is the lack of temporal discipline that in normal mediation is remedied by the mediator and the general atmosphere in his room. In fact, a professional offline mediator may be able to resolve the dispute in one day. His online colleague might want to beat that record, yet some aspects of the process (such, as the time it takes for a party to reply) go beyond his control.

This lack of effective control is another weakness of online mediation. It is not possible to use uninterrupted mediation, as well as to impose a 'cooling off' period on the parties (especially where the communication takes place via email or another medium beyond mediator's control. In such situation a good mediator knows in advance that it is better to stop and let the parties some time to calm down. During this period they do not meet in person before the mediator and normally do not talk to each other in any other way. As mentioned by Raines, she was unable to impose a cooling off period on the parties in an online mediation setting where email was the main means of communication.[75] Since the means of communication was outside of her control, there was nothing she could do to ensure compliance. Eventually, the parties continued exchanging offensive letters insulting each other and escalating the conflict, without mediator even knowing of what is going on.

A situation where the mediator does not see messages prior to them being sent (or, in the worst case, not seeing them at all) makes him totally blind and unable to track the progress in the dispute. In fact, at some stage he may be totally and implicitly removed by the parties from the loop essentially turning the whole process into another form of dispute resolution – negotiation. The only thing that can motivate parties to return to mediation is their advance payment for the whole procedure.

Quite tense is also the situation with private data of the participants and confidentiality of the whole procedure. As known, traditional mediation is a highly confidential procedure with all information revealed during the sessions kept in secret by the parties and mediator. The latter, moreover, is placed under an obligation to keep everything in secret, and many national laws even presume that they cannot be compelled to give evidence regarding information arising out of or in connection with a mediation process.[76] Information is only shared in oral form, and never leaves the mediation room. With online mediation the things are, however, becoming more complicated. Since we talk about online platforms and special applications, we presume that textual data shared by the parties are stored somewhere on the web server. In other words, there is a digital trail left after each session.

73 B L Mann, 'Smoothing Some Wrinkles in Online Dispute Resolution' (2009) 17 International Journal of Law and Information Technology 110.

74 *See* J C Betancourt, E Zlatanska (n 17) 258.

75 S S Raines (n 58) 448-9.

76 EU Mediation Directive (n 10), Art. 7; Lietuvos Respublikos mediacijos įstatymas, Valstybės žinios, 2008-07-31, Nr. 87-3462, Art. 17.

This brings us once again to the question of trust – what is the chance that the sensitive information kept on the server would not be transmitted, leaked or otherwise made available to the third party? One may think of deliberate hacker attacks or simple provider's negligence in keeping the data well-protected. Surely, most ODR services provide in their terms and conditions that the confidentiality of information is guaranteed and all the materials are duly encrypted,[77] however, these are only standard promises and their sincerity is in question. In fact, most commercial organizations cannot guarantee a decent level of privacy and data protection. Even such powerful corporations as Facebook or Microsoft get hacked or leak private information of their users, what to say of small private ODR providers with limited cyber-security budgets?

The problem is not only in third parties' unauthorized access to the data, but also in the potentially unfair conduct of the other party to the dispute. Technology permits recording. Even when the mediator ensures that the system makes no record of the communications, it is still possible that one of the parties uses a third-party application to take screenshots or record audio- and video conversations. The information retrieved might be later used to blackmail the opponent or to cause damage to his reputation by publicly distributing it, while it is almost impossible to somehow prevent such illegal behavior. In the end, this may lead to two possible situations: parties will either fear to disclose sensitive information, which will in turn harm building trustful relations between them, or they will totally ignore OM for the fears named above, instead opting for traditional mediation or other dispute resolution techniques.

For all forms of ODR the technological gap has always been considered a significant issue. In order to participate in online mediation you have to be familiar with modern technology. Consequently, a new form of social inequality comes to the stage: that of computer literacy. Advanced users get priority, while ordinary citizens (especially those living in rural areas) lag behind without any fault on their side. This problem of the digital divide might seem to be far-fetched and no longer valid in the year 2019.[78] Firstly, the main target audience for online mediation becomes the younger generation, which actively uses ICT for both private and professional needs and finds no difficulties in getting familiar with some new application. Secondly, it is incorrect to presume that access to the internet is limited. In fact, one does not need a laptop to connect to the network, as modern tablets, smartphones, e-readers provide for that. In any case, online mediation websites can be accessed through public places (libraries, schools, universities and the like). Thirdly, it must not be forgotten that mediation is a voluntary process, thus a party feeling uncomfortable in the online environment in any case can refuse to participate from the start.

In their turn, proponents of the digital divide problem insist on drawing the line between simple web-browsing (which is, indeed, open to any modern person) and using the Internet for professional (job- or business-related purposes). Only the latter form presupposes the knowledge of specific means of online dispute resolution and frequent resort to them in practice. However, an ordinary consumer may know even less about online mediation than he does of its offline counterpart.

7. SOLUTIONS AND POTENTIAL FOR IMPROVEMENT

In this section, we will try to see how different problems named above may be solved. For many scholars the most significant drawback of online mediation is its text-based nature, thus it may be overcome as technology advances and high-speed Internet connections

77 D Lavi (n 36) 296.

78 P Cortés, *Online Dispute Resolution for Consumers in the European Union* (Routledge 2010) 58.

will allow for videoconferencing. As suggested by Beal[79] and Goodman,[80] only with the dissemination and promotion of videoconferencing will we be able to witness the true success of online mediation? In their view, the current trends of primarily text-based procedure present a temporary juncture that is likely to change with the evolution of technology and it's becoming more available to wider audiences.

However, we find it difficult to agree with the authors. Videoconferencing (as it is available nowadays) is not nearly as efficient as oral communication (which it is called upon to replace): in most situations it is only possible to see a person's head on the screen, thus leaving participants without other important cues (gestures, poses, handshaking, etc.). Audiovisual channels used for transmission are also far from perfect. They are susceptible to disruption and deterioration; a connection may be lost or its quality may be far from perfect. Moreover, it shall not be forgotten that some people opt for online means of resolution precisely for a chance to stay 'anonymous',[81] if only that means a chance to withdraw from showing one's real face. For a younger generation text-based communication largely presents the 'new normal' as much of their interaction with friends, family and colleagues takes place via messengers.[82]

To conclude here, text-based procedures are not just interim measures designed for a transitional period (until videoconferencing becomes widespread). Instead, they are rather here once and for all and we have to embrace their principal role in internet dispute resolution.

It does not mean we are turning a blind eye to the problems of textual communication. Instead, we propose to solve them through changing the role and some functions of the mediator in such proceedings. After all, it is his proficiency and determination that drive the whole process. First of all, this person will need to dig deeper into the texts they are working with, learn to read between the lines. It may happen that quite often the mediator will have to ask leading questions ('did you mean X by saying Y?', 'did I get it correctly that you find Z's proposal unacceptable?') or suggest reformulating some of the ambiguous sentences. Some neutrals get permission at the outset of the mediation to filter certain types of comments by returning them to the sender for redrafting. Only afterwards they are delivered to another side of the dispute. Such a practice seems essential in overcoming misunderstanding.

As for the poor means of expression available in textual mediation, one needs to remember the following. The whole procedure bears a remarkably non-formal nature. In online interaction it is obvious more than ever. The target audience for online mediation is internet people, already bearing this kind of informal culture. They bring it together with them to their disputes, turning it into a universal standard. It may well happen that the use of emoticons, capital letters (the online equivalent of shouting) and specific slang may become widespread in online communication and even be partially adopted by the mediators. All these techniques will definitely help compensate for the lack of cues available during direct meetings. In fact, although yet to be proven by research, the modern generation may feel more comfortable with available textual means than

79 B L Beal (n 47) 735.

80 J F Goodman, *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites* < https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1073&context=dltr> accessed 2 July 2019.

81 'Anonymous' - a name of decentralized international hacktivist group as well as web-movement, the central idea of which is a human right to full anonymity for internet users in all forms of their interactions.

82 A Kuhl, 'Family Law Online: The Impact of the Internet' (2008) 21(1) Journal of the American Academy of Matrimonial Lawyers 226.

with oral communication with an unknown person in unfamiliar surroundings (like mediator's cabinet).[83] In this way, text-based communication is not inferior to face-to-face meetings, but rather presents a different mechanism of doing the same thing – negotiating over a dispute with an intention to reach a peaceful settlement.

In order to deal with aggressive speech, mediators may resort to an already mentioned tactics of pre-moderation of the messages that parties intend to deliver each other. Modern software may also do quite a lot to paraphrase sentences and delete offensive words. However, in order to ensure better effect, it makes sense that a human mediator as a third neutral party reads through the lines and shows parties which parts of their postings may sound odd or lead to unwanted results.

A mediator may also reframe certain words or sentences in order for them to sound more natural, clear and close to what the party had in mind. There is, however, another problem: people may oppose such censorship, which does not have direct equivalents in traditional mediation. Where in normal mediation you can freely express your thoughts, here you have to deal with a neutral, who comments on your phrases and may misinterpret them much like the other party. No definite solution to this concern may be presented now. It seems that much depends on the mediator's ability to win the party's trust and show he is there to help, which in turn presupposes his need to intervene within an inter-party communication to break the tension and ensure the cooperative atmosphere. It is also important to recommend rather than command. A kind note on the incompatibility of the wording shall always be preferred to strict rejection of party's text. Instead of criticizing a party for choosing wrong words and tone, it is always better to point out which additional things could be mentioned and what kind of style would look more attractive.

Returning to the problem of the digital divide, it must be observed that it shall now fall within the official duties of modern mediators to clarify and make obvious for the parties what is going to happen on the whole course of online mediation process. At the same time mediator needs not to be regarded as an IT consultant, thus questions on how to send messages, upload/download files, join and leave virtual meeting rooms must be addressed to specialized technical staff. For practicing online mediation it requires hiring some support specialists trained in those questions and paying them on a regular basis.

Technology plays a great role in online mediation as well. It can allow for direct talks between a mediator and each of the parties, remind of important deadlines, propose words and phrases to be included in response to the other party and ultimately – even draft a preliminary settlement agreement. The software tools need neither be demonized nor worshipped. They simply fulfil their tasks and may improve with time (in case enough feedback is received from previous participants).

8. CONCLUDING REMARKS

It is obvious that modern society lives on the Internet. According to some statistical data, time spent online 'equates to more than 100 days […] every year for every Internet user'.[84] Dispute resolution techniques are a necessary component of this web-based community, and these have to be fast, easy, costless, effective and efficient.[85] Mediation

83 E M Lombardi (n 13) 541-2.

84 M Hughes, Study Shows We're Spending an Insane Amount of Time Online < https://thenextweb.com/tech/2019/01/31/study-shows-were-spending-an-insane-amount-of-time-online> accessed 2 July 2019.

85 A Kuhl (n 82) 236.

was not designed for the Internet when it originally appeared, yet it fits perfectly within this environment. It is flexible and informal, much like other things in the World Wide Web. It does not present a binding form of dispute resolution, but that is precisely what allows it to survive jurisdictional and political pressure. In other words, we are sure that online mediation will survive as such, however, its exact perspectives are far from clear.

The most important concern is the ability of mediators to rearrange their tactics and learn new tricks ensuring the quality and success of the procedure. For those who believe online mediation to be just involvement of several ICT tools there may be a problem to adapt to new realities. On the other hand, those ready to evolve, learn and sometimes test new techniques, will be able to benefit from getting a share of the new, huge and innovative market.

Online mediation is still a developing area, without firm rules and boundaries. Only time will tell whether it turns into a trustworthy and authoritative form of dispute resolution, or occupies a marginal place among other ODR methods.

FINANCIAL OMBUDSMAN: TOWARDS AN EFFECTIVE CUSTOMERS RIGHTS` PROTECTION IN UKRAINE

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Summary: 1. Introduction. – 2. Existing Extrajudicial Mechanisms for Rights Protection of Financial Services Consumers in Ukraine. – 3. World Models of the Financial Ombudsman as the Basis for the Financial Ombudsman Institute in Ukraine. – 4. The Genesis of the Concept of a Financial Ombudsman in Ukraine. – 5. Current Legal, Institutional and Theoretical Prerequisites for Establishing an Institute of Financial Ombudsman in Ukraine. – 6. Preparation of the Draft Law of Ukraine 'On the Institute of a Financial Ombudsman'. – 7. Compliance of the Draft Law of Ukraine 'On the Institute of a Financial Ombudsman' with the Principles of the Directive on Consumer ADR. – 8. Conclusions.

This article explores the prerequisites and prospects for introducing the Financial Ombudsman Office in Ukraine as an institute for alternative (extrajudicial) resolution of disputes between consumers and financial service providers. Particular attention is paid to the analysis of the draft law on the establishment of the Financial Ombudsman in Ukraine. Considering the existing mechanisms of alternative dispute resolution in Ukraine and the possibility of their application to the issues of financial services consumers' rights protection, the historical retrospective of the establishment of the Financial Ombudsman institute in Ukraine is considered. The author analyses the legal, institutional and theoretical prerequisites for the implementation of one of the Financial Ombudsman models operating in other countries. The focus is on the analysis of the compliance of the draft law on the establishment and operation of the institute with the principles set out in Directive 2013/11 on consumer ADR. At the same time, it is stated why one or another structure of the legal regulation of the establishment and activity of the Financial Ombudsman Office in Ukraine was chosen. The author, as one of the experts involved in the drafting of the law, concludes that, despite the compliance of the draft law with the European principles of

1 Note. The author of this article was an expert during investigation and preparation of the draft law 'On the Financial Ombudsman Office' of the USAID project 'Transformation of Financial Sector' <https://www.facebook.com/FSTProject/ > accessed 2 September 2019.

the ABC, there is, unfortunately, no prospect of its adoption as a legal basis for setting up a Financial Ombudsman Office in Ukraine at the moment and in the coming year, and analyses the causes.

Keywords: ADR, extrajudicial dispute resolution, Financial Ombudsman, consumer protection.

1. INTRODUCTION

According to court statistics of Ukraine, 3.8 million cases and materials were submitted to local and appellate courts in 2018, including nearly 40,000 cases, which were not reviewed by liquidated courts, and were submitted to new appellate courts.[2] Although the level of trust in the courts in Ukraine has increased in recent years, it remains low.[3] This state of affairs is not beneficial for the speedy and effective resolution of disputes, and therefore to the realization of the principle of accessibility of justice. World experience has long demonstrated that in such cases it is necessary to introduce effective mechanisms for alternative (extrajudicial) dispute resolution.

Article 124 of the Constitution of Ukraine[4] provides for the possibility of securing a mandatory pre-trial settlement of the dispute at the level of law. However, pre-trial dispute settlement and alternative (extrajudicial) means of dispute resolution are not identical concepts.[5]

A number of international and national acts emphasize the need to create a consumer protection system. In particular, in the Action Plan for 2015-2017 of the Council of Europe in the aspect of Effective Functioning and Organization of the Judicial System, the priority is to create a system of alternative dispute resolution.[6] Similar priorities and expectations are set by the Council of Europe Action Plan for Ukraine for 2018-2021.[7] The Strategy for Reformation of the Judiciary, Justice and Related Legal Institutions for 2015-2020, approved by the Decree of the President of Ukraine on 20 May 20 2015, indicates the imperfection of procedural instruments for the protection of the rights and interests of persons, including an underdeveloped system of alternative dispute resolution methods (paragraph 3). Therefore there is a need to expand ways of alternative (extrajudicial) dispute settlement (paragraph 5.4).[8]

2 The Judiciary of Ukraine. Data Review on the Administration of Justice in 2018, p. 2 <https://court.gov.ua/inshe/sudova_statystyka/analit_rewiew_18> accessed 10 June 2019.

3 According t o the results of the second n ationwide survey of th e population of Ukraine on trust in the judiciary, judicial reform and attitude to corruption, conducted in October 2018 by USAID 'New Justice' Program, the level of trust increased from 5% in 2015 to 16% in 2018 </C:/Users/User/Downloads/1_NJ_October_2018_SurveyPublic_Result_UKR.pdf> accessed 10 June 2019.

4 The Constitution of Ukraine <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80> accessed 10 June 2019.

5 R Khanyk-Pospolitak, '"Prejudicial", "Alternative", "Extrajudicial" Regulation/Ajudication of Private Law Disputes: Correlation of the Notions' ('"Dosudove", "alternatyvne", "pozasudove" vrehuliuvannia/vyrishennia pryvatnopravnyh sporiv; spivvidnishennia poniat'") (2019) 1 Enterpreneurship, Economy and Law 38.

6 Government portal. Cooperation with the Council of Europe. <https://www.kmu.gov.ua/ua/diyalnist/yevropejska.../spivrobitnictvo-z-radoyu-yevropi> accessed 10 June 2019.

7 Ehe Council of Europe. Action Plan for Ukraine for 2018-2021 *<rm.coe.int/coe-action-plan-for-ukraine-2018-2021-ukr/1680925bec>* accessed 10 June 2019

8 The strategy for the Reform of the Judiciary, Judicial Procedure and Related Legal Institutions for 2015-2020. The legislation of Ukraine. Official site of the Verkhovna Rada of Ukraine <https://zakon.rada.gov.ua/laws/show/276/2015> accessed 10 June 2019.

2. EXISTING EXTRAJUDICIAL MECHANISMS FOR RIGHTS PROTECTION OF FINANCIAL SERVICES CONSUMERS IN UKRAINE

The financial market plays an important role in the development of any state. The expansion of financial services to consumers is also increasing day by day. That is why there is an increase in the number of consumer appeals to the court or the state regulator, which is currently the National Commission for the State Regulation of Financial Services Markets. This commission provides state regulation in the sphere of financial services markets in case of failure to provide or improper provision of financial services and create conditions for efficient and transparent functioning of non-banking financial services markets.

However, according to the USAID 'Financial Sector Transformation Survey', almost half of Ukrainians, namely 45%, do not know where to go in order to resolve disputes that arise with financial institutions, and another 78% of Ukrainians do not want to go anywhere at all in case of disputes with financial institutions.[9]

This state of affairs is caused by the actual absence of mechanisms for alternative (extrajudicial) dispute resolution in this area. Moreover, the mechanisms that do exist are not widely used.

In particular, at present, there are only two existing methods of ADR in the field of protection of the rights of financial services consumers - the Ukrainian Insurance Ombudsman[10] and the Appeal Commission of the Ukrainian Federation of Insurance[11] (UFI). In both cases, the underwriter who considers his/her rights and interests violated may contact the Ukrainian Insurance Ombudsman or the UFI Directorate free of charge in the prescribed form with a complaint against the company. However, the number of persons who can use ADR data is limited, as the Ukrainian Insurance Ombudsman or the Appeals Commission only deals with complaints about members of this system. And thus, little is known about ADR data in the financial market.

Common practices in the world of ADR are mediation and arbitration. However, in Ukraine it is not possible to apply them to protect the rights of consumers of financial services. The reasons for this are:

1) The lack of legal regulation of this institute hinders the spread of mediation. Despite numerous attempts, none of the draft laws (the latest of which was No. 3665 of 17 December 2015[12]) was adopted by the Verkhovna Rada of Ukraine.

2) Unlike mediation, arbitration in Ukraine is settled. This is the only way of ADR in Ukraine, which is currently legislated in the special Law of Ukraine 'On Arbitration Courts' of 2004. However, the jurisdiction of arbitration tribunals does not extend to consumer protection cases under Section 14, Art. 6 of this Law.[13] It should be noted, though, that at the time of adoption of this Law, the jurisdiction of arbitration tribunals did extend to protect the consumers' rights, including the rights of financial services consumers. However, due to the failure of particular arbitration courts to respect the

9 Who is a Financial Ombudsmen and What Does He Do? <http://suddya.com.ua/news/zvernit-uvagu/hto-takii-finansovii-ombudsmen-i-cim-vin-zaimatimetsa> accessed 3 September 2019.

10 The Ukrainian Insurance Ombudsman. Official Site < http://ombudsman.ua/> accessed 10 June 2019.

11 For Consumers of Insurance Services. Official Site of the Ukrainian Federation of Insurance < http://www.ufu.org.ua/ua > accessed 10 June 2019.

12 This draft law had the greatest chance of parliamentary approval. However, in February 2019, this draft law failed to get the required number of votes for final adoption.

13 The Law of Ukraine 'On Arbitration Tribunals' < https://zakon.rada.gov.ua/laws/show/1701-15> accessed 10 June 2019

principle of impartiality (in practice they were also called 'pocket courts' because they solved cases solely for the benefit of one party which was not the consumer), this category of cases was removed from the jurisdiction of these courts in 2011.[14]

3. WORLD MODELS OF THE FINANCIAL OMBUDSMAN AS THE BASIS FOR THE FINANCIAL OMBUDSMAN INSTITUTE IN UKRAINE

The Financial Ombudsman Institute has already been successfully established in more than 40 countries: Armenia, Australia, the United Kingdom, Poland, the Netherlands, Italy, Canada, Belgium, Switzerland, Sweden, Denmark, France, Spain, Latvia, Lithuania, etc.[15] The institute has different names in different states,[16] but the essence and the purpose of such an institution are solely to resolve the dispute between consumers and financial service providers to improve the quality of consumer confidence in the financial services market.

Currently, there are two models of the Financial Ombudsman Institute in the world: the German one and the British.

The main features of the German system are the following: the institute operates in the banking or other (e.g. insurance ombudsman[17]) sector; the ombudsman is one; funded by the banks or another association at which it is established; the ombudsman is appointed by the Board of the German Banks Union; the ombudsman only deals with consumer complaints; the ombudsman's decision is binding to the parties of the dispute if the amount of the dispute is under EUR 10,000.[18]

The UK Financial Ombudsman Institute, known as the British Model, is funded mainly by the state and partly by financial institutions, unlike in the German system. The legal status of the ombudsman is enshrined in a special 'Financial Services and Markets Act',[19] that extends to the entire financial services market. The Office of the British Ombudsman is one, but several ombudsmen usually specialize in particular areas of the industry, such as insurance, investment, banking, financial companies,

14 The explanatory note to the draft law, which amended the Law of Ukraine 'On Arbitration Courts' in 2011, states that 'recently business entities, especially in the field of banking and insurance services, when concluding contractual relations with consumers have been actively practicing a kind of "imposition" of an agreement clause about consideration of the case in arbitration courts (the so-called arbitration clause or arbitration agreement)' < *w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=38239&pf35401.* > accessed 10 June 2019

15 O Zaitseva, 'Ombudsman in Financial Sphere: Will he be Able to Protect the Rights of Ukrainians? <https://gurt.org.ua/articles/19820/?order=comments> accessed 3 September 2019; 'Who is a Financial Ombudsmen and What Does He Do?' <http://suddya.com.ua/news/zvernit-uvagu/hto-takii-finansovii-ombudsmen-i-cim-vin-zaimatimetsa> accessed 3 September 2019.

16 For example, in Italy the services of an ombudsman are used to resolve disputes in the banking sector, in Germany there is an insurance ombudsman, in France - the Ombudsman of the Financial Markets Agency. In some countries, such mediation mechanisms apply to the entire financial sector: the UK Financial Sector Ombudsman, the Danish Financial Complaints Institute. Another option is setting up a dedicated body to handle all consumer complaints, related not only to the financial sector, for example, the Swedish National Consumer Complaints Council, the Lithuanian State Consumer Protection Agency, Czech Financial Arbitrator in the Czech Republic, Financial System Mediator in Armenia, Financial Arbitration Board in Hungary.

17 The Insurance Ombudsman Association <https://www.versicherungsombudsmann.de/welcome/> accessed 10 June 2019.

18 The ombudsman scheme of the German private commercial banks <https://bankenverband.de/media/publikationen/Verfahrensordnung_Ombudsmann_June2015_2c_engl.pdf.> accessed 10 June 2019.

19 Financial Services and Markets Act 2000 <https://www.legislation.gov.uk/ukpga/2000/8/contents> accessed 10 June 2019

non-governmental pension insurance.[20] Complaints about the actions or omissions of financial institutions are resolved first by reconciling the parties.[21]

4. THE GENESIS OF THE CONCEPT OF A FINANCIAL OMBUDSMAN IN UKRAINE

The process of establishing the Financial Ombudsman Institute in Ukraine has a long history. The legal basis for its foundation, activity and search for a legal model has been underway since 2008. The draft law on the implementation of the Financial Ombudsman Service in Ukraine, which was developed by the Blue Ribbon Centre with the support of the United Nations and the EU, was based on the British model, as stated by the developers themselves. [22] However, this draft law was never registered with the Verkhovna Rada of Ukraine.

The draft law 'On Amendments to Some Legislative Acts of Ukraine Regarding the Establishment of a System for Financial Services Consumers Protection in the Financial Markets of Ukraine', proposed by the Deputy Yu. Polunieiev in 2011, did not clearly determine which legal model was proposed for the institute,[23] since it only outlined the creation of the institute, without specifying such important details as the requirements for the candidate of a financial ombudsman, the procedure of creation and his competence.

Further, the attempt to introduce the Financial Ombudsman Institute was made in the banking system. In particular, the Independent Banking Association of Ukraine (IBAU) in 2013 proposed a German model for reference.24 This model, as noted above, is characterized by the fact that it is limited to only one sector which is the banking sector, that is, it was created under IBAU and had to be financed by the contributions of members of the association. However, this attempt was unsuccessful, and the Institute of Financial Ombudsman in the banking sector did not start working in Ukraine.

Currently, the draft law 'On the Institute of the Financial Ombudsman'[25] has been registered in the Verkhovna Rada of Ukraine (registration number 8055 of 22 February 2018). It is based on the British model, since the order of its creation and activity is planned to be regulated at the level of the Law. This institute is universal for the whole financial services market and its financing will be provided at the expense of market participants.

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20 Official site. Financial Ombudsmen Service < https://www.financial-ombudsman.org.uk/about/index.html; > accessed 10 June 2019.

21 R Khanyk-Pospolitak, 'Financial Ombudsman: Perspectives of Implementation in Ukraine' in OS Zakharova, IO Izarova (eds), *The European Standards of Rights Protection in Civil Law: Test of Time* (materials of international scientific and practical conference, Kyiv, Dakor 2014).

22 International Analysts: Ukrainian Consumers will Be Assisted by Financial Ombudsman <http://zhvaniya.com/ua/print_art/14668/> accessed 3 September 2019.

23 Draft Law 'On Amendments to Some Legislative Acts of Ukraine Regarding the Establishment of a System for Financial Services Consumers Protection in the Financial Markets of Ukraine' <http://search.ligazakon.ua/l_doc2.nsf/link1/JF7EI00I.html> accessed 10 June 2019.

24 Bankers propose to set up an institution of financial ombudsman independent from the authorities in Ukraine <https://tyzhden.ua/News/90790> accessed 3 September 2019; NABU Statute <http://www.nabu.com.ua/ukr/about/statute/> accessed 10 June 2019.

25 Draft Law 'On the Institute of the Financial Ombudsman'. Official Site of the Verkhovna Rada of Ukraine <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=8055&skl=9> accessed 10 June 2019.

5. CURRENT LEGAL, INSTITUTIONAL AND THEORETICAL PREREQUISITES FOR ESTABLISHING AN INSTITUTE OF A FINANCIAL OMBUDSMAN IN UKRAINE

As noted above, for the first time an attempt has been made to develop an effective system for protecting the rights of financial services consumers in Ukraine. In order to improve the protection of the rights of financial services consumers in Ukraine, a number of legal acts were adopted, in particular: The Concept of the State Policy in the Field of Consumer Rights Protection for the Period up to 2020 [26], approved by the Decree No. 217 of the Cabinet of Ministers of Ukraine (hereinafter – the CMU) on 29 March 2017; the Strategy for Reforming the System of Consumer Rights Protection in the Markets of Financial Services for 2012-2017, approved by the CMU Decree No. 867-p of 31 October 2012, [27] Comprehensive Program for the Development of the Financial Sector of Ukraine for up to 2020, approved by the Resolution No. 391 of the National Bank of Ukraine Board of 18 June 2015,[28] the draft law 'On Amendments to Certain Legislative Acts of Ukraine on Improving the Protection of Financial Services Consumer Rights' (registration number 2456-д of 29 December 2015).[29]

All these documents state that one of the main tasks is to create the conditions for an effective alternative for the regulation of consumer disputes, in particular, by setting up a financial ombudsman institution for the extrajudicial settlement of disputes between the financial sector participants and consumers of financial services in Ukraine.

Among the international documents and studies of international organizations that have become the basis for the development of national legislation in individual countries where such an institute already exists, and which were also taken into account by Ukraine in drafting law 8055, there are: Good Practices for Financial Consumer Protection, 2017 Edition',[30] 'Resolving Disputes between Consumers and Financial Business: Fundamentals for a Financial Ombudsman. A Practical Guide Based on Experience in Western Europe'[31], 'Consumer Protection and Financial Literacy Lessons from Nine Country Studies',[32] etc.), 'G20 High-Level Principles On Financial Consumer Protection' (2011),[33] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR.

The existing institutional infrastructure in the system of protection of the rights of financial services consumers is also a prerequisite for the establishment of such an

26 The Concept of the State Policy in the Field of Consumer Rights Protection for the Period up to 2020 <https://zakon.rada.gov.ua/laws/show/983-2017-%D1%80> accessed 10 June 2019.

27 The Strategy for Reforming the System of Consumer Rights Protection in the Markets of Financial Services for 2012-2017< https://zakon.rada.gov.ua/laws/show/867-2012-%D1%80> accessed 10 June 2019.

28 Comprehensive Program for the Development of the Financial Sector of Ukraine for up to 2020 <https://zakon.rada.gov.ua/laws/show/v0391500-15> accessed 10 June 2019.

29 Draft Law 2456-д <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=57617> accessed 10 June 2019.

30 Official site of the World Bank <https://www.worldbank.org/en/topic/financialinclusion/brief/2017-good-practices-for-financial-consumer-protection> accessed 10 June 2019.

31 Official site of the World Bank <http://documents.worldbank.org/curated/en/169791468233091885/a-practical-guide-based-on-experience-in-western-Europe> accessed 10 June 2019.

32 Official site of the World Bank <http://www.worldbank.org/en/topic/financialinclusion/publication/consumer-protection-and-financial-literacy-lessons-from-nine-country-studies> accessed 10 June 2019.

33 G20-OECD Task Force on Financial Consumer Protection <http://www.oecd.org/finance/financial-education/g20-oecd-task-force-financial-consumer-protection.htm> accessed 10 June 2019.

institution as a financial ombudsman. Currently, the special Central Executive Body which implements the state policy in the sphere of state control over the observance of the legislation on consumer protection in Ukraine is the State Service for Food Safety and Consumer Protection. It is worth noting right away that the powers of this body, in accordance with Art. 27 of the Law of Ukraine 'On Consumer Protection'[34] do not cover the protection of the financial services consumers' rights.

At the same time, the current regulations do not contain a clearly defined list or system of state bodies in the sphere of protection of the financial services consumers' rights. Their scope can be determined from the legislation that provides for the authorities that regulate the financial services markets.[35] In particular, it is the National Bank of Ukraine, the National Securities and Stock Market Commission and the National Commission for the State Regulation of Financial Services Markets.

Such a 'Trojan' system of state bodies does not allow consumers to identify which of these bodies to complain about the protection of their violated rights.

In addition, according to the legislation governing the activity of these bodies, their competence does not include the settlement of disputes between consumers and financial services providers. Thus, according to the provisions of the Law of Ukraine 'On Appeals of Citizens',[36] consumers can file complaints to these bodies, but this does not lead to a resolution of the dispute.

Therefore, currently there is only one possible way to resolve the dispute, which is to go to court, which significantly complicates the protection of consumer rights.

The necessity of introducing an alternative (extrajudicial) resolution of disputes in the field of financial services, namely the Institute of Financial Ombudsman, is insisted upon by domestic scientists. At the same time, their views differ. In particular, O. Slobodian points to the need to develop an effective legal model of the Commissioner for the Protection of Financial Services Consumer Rights in view of the existing system of state bodies.[37] I. Bezzub points out the same, stating that the establishment of the institute of a financial ombudsman, who will act as a kind of arbiter between the consumer and the financial institution and assist in the settlement of disputes peacefully, will create an effective alternative to the state-judicial system.[38]

I.G. Britchenko and V.S. Stoyka point out that the creation of financial ombudsman institute will improve the quality of financial market regulation, increase the level of public confidence in financial institutions, strengthen financial discipline, reduce the

34 The Law of Ukraine 'On Consumers' Rights Protection' <https://zakon.rada.gov.ua/laws/show/1023-12#n544> accessed 10 June 2019.

35 The Law of Ukraine 'On the National Bank of Ukraine' <https://zakon.rada.gov.ua/laws/show/679-14> accessed 10 June 2019; The Law of Ukraine 'On Financial Services and State Regulation of Financial Services Markets'. < https://zakon.rada.gov.ua/laws/show/2664-14> accessed 10 June 2019; The Law of Ukraine 'On Securities and Stock Market' < https://zakon.rada.gov.ua/laws/show/3480-15> accessed 10 June 2019.

36 The Law of Ukraine 'On Appeals of Citizens'. Official Site of the Verkhovna Rada of Ukraine < https://zakon.rada.gov.ua/laws/show/393/96-%D0%B2%D1%80> accessed 10 June 2019.

37 O Slobodian, 'Financial Ombudsman: in search of a legal model' ('Finansovyi ombudsmen: v poshukah pravovoi modeli') (2015) 1 Journal of Law < http://periodicals.karazin.ua/jls/article/view/1641> accessed 3 September 2019.

38 *I Bezzub, 'What Kind of a Financial Ombudsman Does Ukraine Need: the European Experience' ('Yakyi finansovyi ombudsmen potriben Ukraini: yevropeiskyi dosvid')* <http://nbuviap.gov.ua/index.php?option=com_content&view=article&id=3630:yakij-finansovij-ombudsmen-potriben-ukrajini-evropejskij-dosvid&catid=8&Itemid=350> accessed 3 September 2019.

burden on the judiciary and increase the transparency and openness of the financial market.[39] According to N.V. Sachasov, the existence of financial ombudsman can have positive effects on the financial security of financial institutions.[40]

Therefore, the vast majority of scholars agree on the need for a financial ombudsman institute and the adoption of a special law. In particular, this act should regulate the legal, financial and organizational principles of the system of settlement of complaints by financial services consumers against financial service providers, the procedure of formation and legal status of the financial ombudsman service.[41]

6. PREPARATION OF THE DRAFT LAW OF UKRAINE 'ON THE INSTITUTE OF A FINANCIAL OMBUDSMAN'

Draft law No. 8055, registered within the Verkhovna Rada of Ukraine, was designed to improve the relationship between financial services consumers and financial service providers in Ukraine, as well as to increase the confidence in the financial services market.

This was preceded by considerable preparatory work and large-scale research carried out within the framework of the Financial Sector Transformation project.

Firstly, the experience has been learned, including the specificities of legislative regulation of the activities of similar institutions in most countries that are a part of The International Network of Financial Services Ombudsman Schemes (INFO Network),[42] including the United Kingdom, Germany, France, Poland, and Armenia. This helped to select the legal model of the financial ombudsman in Ukraine and to take the experience that the state has already received during the period of activity of this institution into account. Among this large number of countries, a great deal of attention was paid to the activities of the Financial Ombudsman in Poland[43] and Armenia for several reasons.

Poland, as one of our neighbours has, in many ways, a similar legal system. At the same time, it is an EU member state. Therefore, it was possible to take their achievements related to the European standards into account.

Armenia is a former member of the Soviet Union. The introduction of the Institute of the Financial Ombudsman was initiated by the Central Bank of the Republic of Armenia. However, their activity extends to the entire financial services market. Important experience to borrow is the issue of financing the

39 I G Brytchenko, VS Stoyka, 'Creation of an Institute of Financial Ombudsman: International Experience and Perspectives for Ukraine' ('Sozdaniie instituta finansovogo ombudsmena: mezhdunarodnyi opyt I perspektivy dlia Ukrainy') (2017) 1 Problems of Economy < https://dspace.uzhnu.edu.ua/jspui/handle/lib/13798> accessed 3 September 2019.

40 NV Zachosov, 'Introduction of a Financial Ombudsman Institute in Ukraine: Possible Implications for the Economic Security of Financial Institutions' ('Zaprovadzhennia instytutu finansovoho ombudsmena v Ukraini: imovorni naslidky dlia economichnoi bezpeky finansovyh ustanov') (2016) 1 (44) Academic Review 80.

41 AI Syrota, 'Financial Ombudsman as an Extra-judicial Dispute Resolution System in the Financial Market of Ukraine' ('Finansovyi ombudsmen yak pozasudova systema vrehuliuvannia sporiv na finansovomu rynku Ukrainy') (2013) 4 (63) Scientific Bulletin of the National University of the SFS of Ukraine (Economics, Law) 67.

42 Official site of The International Network of Financial Services Ombudsman Schemes (INFO Network) <http://www.networkfso.org/about-us.html > accessed 10 June 2019.

43 Official site of the Financial Ombudsman (Rzecznik Finansowy) in Poland <https://rf.gov.pl/english> accessed 3 September 2019.

financial ombudsman in Armenia and also the acceptance of conciliation as the main procedure for resolving the case.[44]

The experience of these two countries was also important in terms of the potential number of employees the office would need in the future, how many applications could be submitted to the financial ombudsman institution and the resources needed to get started.

Secondly, 'The Analysis of the Case Law in Cases Related to the Protection of the Rights of Consumers of Financial Services' (2014)[45] was conducted and revealed the main contradictions, gaps in the domestic legislation, which lead to the need for consumers to appeal to the court for the protection of their rights.

Thirdly, a number of meetings were held with representatives of financial service providers,[46] in particular: the Ukrainian Security Federation, the Independent Association of Banks of Ukraine, the League of Insurance Organizations of Ukraine, the Association of Financial Institutions and others.[47]

Fourthly, a number of measures to discuss the draft law were considered, including the international conference 'Protecting the Rights of Financial Services Consumers 2017: A Way to Build Trust' (12 September 2017),[48] a roundtable 'How to Restore Confidence in the Financial Sector and Protect the Consumer of Financial Services' (16 April 2018),[49] a roundtable 'How Will the Financial Ombudsman Protect the Consumer of Financial Services (Discussion of draft law No. 8055)' (10 April 2018)[50] and others.

Fifthly, the draft Law of Ukraine 'On The Business Ombudsman Institute' (registration number 4591 of 5 May 2016)[51] was taken into consideration as an institution of alternative dispute resolution in the field of public law, which was founded in 2014 and has developed successfully and quickly over the years and has shown effective work and has gained the trust of business entities.

Thus, as noted above, the draft law No. 8055 is based primarily on the British model, since the procedure for its creation and operation is planned to be regulated at the level of the Law, and this institute will be universal for the entire financial services market, the principal form of activity of which should be the application of the conciliation procedure.[52]

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44 Official site of The Office of Financial System Mediator <https://www.fsm.am/en/home/> accessed 3 September 2019.

45 Yu Vitka, V Strahova, R Khanyk-Pospolitak, T Karnauh, 'The Analysis of the Case Law in Cases Related to the Protection of the Rights of Consumers of Financial Services' <http://ekmair.ukma.edu.ua/handle/123456789/11229> accessed 3 September 2019.

46 It should be noted that the representatives of consumer rights protection organizations were not involved in the process of drafting the law No. 8055 due to objective reasons, in particular, due to the fact that in practice there are none of such organizations in Ukraine.

47 With this, financial service providers believe that their interests have not been considered at all. See 'Who is a Financial Ombudsman and What Does He Do?' (n 9).

48 Protecting the Rights of Financial Services Consumers 2017: A Way to Build Trust <https://www.facebook.com/FSTProject/posts/1983554305224173/ > accessed 3 September 2019.

49 UAIB News, 'Ukrainian and foreign experts analyze draft law on establishment of financial ombudsman' <http://www.uaib.com.ua/news/weekly_news/265578.html> accessed 3 September 2019.

50 NABU roundtable 'How Will the Financial Ombudsman Protect the Consumer of Financial Services' <https://nabu.ua/ua/zasidannya-kruglogo-stolu-na-temu.html> accessed 3 September 2019.

51 Draft Law No. 4591. Official site of the Verkhovna Rada of Ukraine <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=58980> accessed 10 June 2019.

52 This is one of the basic principles of activity of the financial ombudsman, which is explicitly stipulated in item 7 of Art. 4 of the draft law No. 8055.

7. COMPLIANCE OF THE DRAFT LAW OF UKRAINE 'ON THE INSTITUTE OF A FINANCIAL OMBUDSMAN' WITH THE PRINCIPLES OF THE DIRECTIVE ON CONSUMER ADR

Based on Ukraine's Euro-integration aspirations, Ukraine's commitments under the Association Agreement[53] regarding the adaptation of national legislation to EU law raise the important question of whether the draft law 8055 meets the principles enshrined in the Directive on Consumer ADR. More specifically, how are the principles of Directive on consumer ADR implemented in the draft law No. 8055?

Regarding the first question, it should be noted that when drafting the law No. 8055, the working group tried to fully comply with the requirements of the Directive on consumer ADR.

However, before analyzing the implementation of the principles of Directive on consumer ADR in draft law No. 8055, it is worth to briefly mention the name of the institute itself. At first, the draft law was called 'On the Financial Ombudsman', but in the course of work it was decided to change its name to 'Financial Ombudsman Institute' because of the following reasons.

Firstly, the financial ombudsman will not act alone, but will be assisted by an entire staff of employees. That is, a financial ombudsman cannot be created as a sole proprietorship or in any other form permitted for the individual in Ukraine, it must be a legal entity.

Secondly, the title of the draft law 'On The Business Ombudsman Institute' was taken into consideration. By parity of reasoning, the name 'The Financial Ombudsman Institute' will be better perceived as something positive.

Returning to the issue of compliance of the draft law 8055 with the Directive on Consumer ADR, we should notice that the Directive on Consumer ADR enshrines 8 universal basic principles of ADR institutions: expertise, independence and impartiality (art. 6), transparency (art. 7), effectiveness (art. 8), fairness (art. 9), liberty (art. 10) and legality (art. 11). Six of these principles, namely legality, independence, transparency, efficiency, impartiality and justice, are explicitly enshrined in Art. 4 of draft law No. 8055 as the basic principles of activity of the Institute of the Financial Ombudsman.

In addition, it should be noted that the principles of independence, impartiality, clarity of scope and powers, accessibility, effectiveness, fairness, transparency and accountability should be basic in the development of the Financial Ombudsman system in accordance with the Guide to setting up a Financial Services Ombudsman Scheme developed by INFO Network's in March 2018.[54]

Article 9 of draft law No. 8055 sets out the basic professional requirements for the financial ombudsman, including higher education in economics, finance or law, impeccable business reputation, professional experience in the field of law or the financial services markets for at least ten years. At the same time, the legislator establishes additional requirements for the person as he/she applies for the position of financial ombudsman, in particular: legal capacity, criminal record, perfect business reputation.

Of course, the last requirement of 'perfect business reputation' is very subjective, but the practice, in particular in the financial sector, has already begun to develop the relevant

53 Association Agreement between Ukraine, on the one part, and the European Union, the European Atomic Energy Community, and their Member States, on the other part <https://zakon.rada.gov.ua/laws/show/984_011> accessed 10 June 2019.

54 This is one of the basic principles of activity of the financial ombudsman, which is explicitly stipulated in item 7 of Art. 4 of the draft law.

criteria. Take, for example, the banking sector, where the Law of Ukraine 'On Banks and Banking Activity' (Article 2), the Resolution of the Board of the National Bank of Ukraine 'On Approval of the Regulation on Licensing of Banks' No. 149 of 22 December 2018 (Chapters 6 and 7 of Section II) indicates the criteria for a good business reputation. Therefore, in our opinion, they can be applied by analogy to the financial ombudsman.

In order to ensure the principles of 'independence' and 'impartiality' in the activities of the Financial Ombudsman, as required by the Directive on Consumer ADR, the draft law No. 8055 provides for a number of provisions, in particular:

1) The term of office of the financial ombudsman (Part 9, Article 9). The directive on consumer ADR specifies that the person who will resolve disputes in the order of ADR should be appointed for a term of not less than three years (clause b, Part 3, Article 6). Draft law No. 8055 stipulates that a financial ombudsman should be elected for a term of four years, with the right to be re-elected for the next term. The number of terms is unlimited.

2) The prohibition for anyone to interfere with the activities of the Financial Ombudsman (Part 3, Article 5).

3) The procedure for electing a person to the position of financial ombudsman (Part 9, Article 9, Articles 6, 7 and 8). Draft law No. 8055 provides for a sufficiently complicated election procedure. In particular, as provided for in the Directive on consumer ADR, it should be carried out by a collegiate body which is the supervisory board. The Supervisory Board of the Financial Ombudsman Institution is composed of representatives from the following public authorities, institutions and organizations (associations): 1) one representative from the bodies regulating the markets for financial services (but not more than three persons); 2) one representative from organizations (associations) representing the interests of financial service providers (but not more than four persons); 3) one representative from the organizations protecting the rights of consumers of financial services (but not more than four persons).

Members of the Supervisory Board also have special requirements. The Supervisory Board is elected by the Nomination Committee, which is formed by the Ministry of Justice of Ukraine.[55] We believe that such an approach to the procedure for setting up a Financial Ombudsman's Office is inappropriate and complicated, which may make it impossible to create it in practice. However, it is this procedure that was prescribed after extensive consultation and agreement with financial service providers.

But there is also another practical problem that may make the establishment of a financial ombudsman impossible. The Supervisory Board should be composed of representatives of organizations representing consumers. According to the research conducted by the USAID Financial Sector Transformation Project,[56] as of August 2018, 26 All-Ukrainian Consumer Protection Organizations were registered in the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Formations, 14 of which listed the protection of the rights of consumers of financial services. However, only 3 were found to be working during the study.

4) The exceptional list of cases of termination of powers of the financial ombudsman (Part 6 of Article 9).

5) The prohibition of combining the position of a financial ombudsman with positions in state or local self-government bodies, political parties, engaging in business activities, having any relation to financial market participants (Article 10).

55 It should be added that at the beginning it was planned to make the procedure for electing the financial ombudsman similar to the election of a business ombudsman, i.e. by the Cabinet of Ministers of Ukraine.

56 This research was done for internal use of the Project and has not been published.

6) Institute of withdrawal (self-withdrawal) of Financial Ombudsman (Article 22).

7) The procedure for financing the activities of the financial ombudsman institution (Article 13). This point is worth particular attention as, as envisaged by the draft law No. 8055, the financing of the activity of the financial ombudsman institute will be made through contributions to the financing of the activities of the financial ombudsman institute (initial and periodic) and fees for the dispute. The very first component of financing at the expense of financial service providers has caused tremendous resistance on their part. They are not comfortable with the situation where they will receive complaints at the expense of the money they contribute to financing the activities of the Financial Ombudsman.[57]

8) The impossibility within one year after the termination of the powers of the financial ombudsman to be an employee of a professional financial market participant (Part 5, Article 10).

The principles of transparency, effectiveness and equity set out in Articles 7, 8 and 9 of the Directive on Consumer ADR are implemented in the draft law 8055 in the following ways:

- Article 12 enshrines the powers of the financial ombudsman. In our opinion, it should be noted that the Financial Ombudsman may consider a dispute that does not exceed one hundred minimum wages on the day of referral to the Financial Ombudsman's Institution (paragraph 2, Part 5, Article 17) (according to the NBU rate this is EUR 14,000 as of June 2019).[58] This amount corresponds to the limits when the court can hear the cases in the simplified procedure, provided for in Art. 274 of the CPC of Ukraine.[59] This restriction is in line with the practice of the European and INFO Network member countries. For example, in the Republic of Armenia, the amount of an appeal to a financial ombudsman may not exceed ten million Armenian drams or its foreign exchange equivalent amount;[60] in Poland it is no higher than 50 000 zł.,[61] in England it is no higher than £350,000.[62]

- Section III sets out in sufficient detail the procedure for handling disputes by the Financial Ombudsman. In this respect, in our opinion, the following should be noted: a) that the consumer has the right to apply for his choice in paper or electronic form; b) a prerequisite to appeal to a financial ombudsman institution is to appeal to a financial institution that has violated the rights of the consumer of financial services; c) the lack of necessity to involve a lawyer, etc. It is these elements in the case and not the procedure that is important in terms of the Directive on consumer ADR;

- Article 15 provides for the publication of the annual financial statements checked by the auditor on the official website in the Internet;

- Article 20 establishes a minimum fee for consumers for litigation using financial ombudsman institute service. It should be noted that initially the right to apply for free

57 Who is a Financial Ombudsman and What Does He Do?' (n 9).

58 The National Bank of Ukraine. Official exchange rate of hryvnia against foreign currencies <https://bank.gov.ua/control/uk/curmetal/detail/currency?period=daily> accessed 3 September 2019.

59 Civil Procedure Code of Ukraine <https://zakon.rada.gov.ua/laws/show/1618-15/stru#Stru> accessed 10 June 2019.

60 Article 3 of The Republic of Armenia Law On Financial System Mediator <https://www.fsm.am/en/about-us/legal-acts/> accessed 10 June 2019.

61 Rejestr podmiotów uprawnionych – Polubowne Rozwiązywanie <polubowne.gov.pl/download/other/.../rejestr_podmiotow.xls> accessed 3 September 2019.

62 Increasing the award limit for the Financial Ombudsman Service <https://www.fca.org.uk/publication/policy/ps19-08.pdf> accessed 3 September 2019.

was provided, however, representatives of financial market providers insisted on such a norm that would reduce the possibility of abuse of service of financial ombudsman institute by 'unscrupulous' consumers of financial services. As is well known, this approach is absolutely in line with the Directive on consumer ADR, since the relevant provisions allow for a symbolic fee for accessing ADR institutions;

- Article 23 sets out the term of the case by a financial ombudsman institution, which, as provided for in the Directive on consumer ADR, may not exceed 90 days.

- Articles 30, 31 and 32 stipulate the bindingness of decisions of the financial ombudsman institute, the possibility of appealing such a decision and the enforcement of the decision in the event of the parties to the dispute refusing to execute it voluntarily. It is because of the provisions of these articles of draft law No. 8055 that the principle of legality is immediately implemented, the criteria of which are laid down in Art. 11 of the Directive on consumer ADR, since the consumer always has the right to go to court. The provisions of the Directive on Consumer ADR give states the power to decide whether decisions by ADR institutions are voluntary or binding. Considering the Ukrainian specificity, it was decided to consolidate the principle of binding decision of the financial ombudsman for financial service providers, as the parties may simply ignore and not implement such decisions. However, the representatives of financial service providers strongly disagree with this rule. In their view, this provision is contradictory, violates the equality of the parties, and restricts their constitutional right to apply to court.[63]

8. CONCLUSIONS

To sum up, it is worth noting that there is virtually no alternative (extrajudicial) resolution of disputes in the area of protection of financial services consumers in Ukraine today. The means available, such as the Insurance Ombudsman or the UFS Appeal Commission, are neither widely used nor effective.

The Institute of the Financial Ombudsman in Ukraine has been supported and has been ongoing for over 10 years, but has not been successful as of yet.

In Ukraine, it is proposed to introduce various elements of the basic models of this institute, in particular, the German and British. Currently, the draft law of Ukraine 'On the Institute of the Financial Ombudsman' submitted to the VRU is based on the British model, taking into account the best practical experience of the activity of the Financial Ombudsman in the Republic of Poland and Armenia.

This draft law is in line with the European principles, including expertise, independence, impartiality, transparency, effectiveness, fairness, liberty and legality as laid down in the Directive on Consumer ADR, thereby approximating national legislation to the EU standards and facilitating the implementation of the 2014 Association Agreement between Ukraine and the European Union.

However, it should be noted that in the coming year or two, the Institute of Financial Ombudsman in Ukraine will not be introduced due to the difficult political situation in the country, as well as the unwillingness of market participants (financial service providers) to compromise when deciding disputes with their consumers.

63 Resolving Disputes With Banks Without Court: Why Do Ukrainians Need the Financial Ombudsman <https://ukr.segodnya.ua/economics/finance/reshenie-sporov-s-bankami-bez-suda-zachem-ukraincam-finansovyy-ombudsmen-1117882.html> accessed 3 September 2019; V Volkovskaya, 'Why Does Ukraine Need the Financial Ombudsman' <https://afi.org.ua/articles/viktoriya-volkovskaya-zachem-ukraine-finansovyy-ombudsmen> accessed 3 September 2019.

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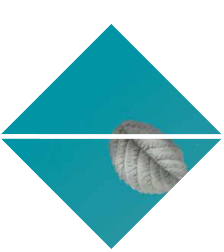

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