

Моделі вирішення господарських спорів у Країнах Східної Європи

Досліджено зміст категорії «моделі вирішення господарських спорів». Проаналізовано історію формування судових систем східноєвропейських країн. Запропоновано класифікацію моделей вирішення господарських спорів у країнах Східної Європи з метою визначення оптимальної моделі для України.

Ключові слова: господарський спір, господарський суд, судова система, арбітраж.

Models of economic disputes resolution in Eastern Europe Countries

The content of the category “models of economic disputes resolving” is investigated. The history of the formation of the judicial system in Eastern Europe countries is analyzed. The classification of models of economic disputes resolution in Eastern Europe countries is proposed in order to determine the optimal model for Ukraine.

Key words: economic dispute, the Commercial Court, the judiciary, arbitration.

Economic disputes as an essential element of economic life arise in each country. The procedure for resolving of such disputes is caused by many factors, including: membership in a particular legal family, historical traditions, economic conditions, administrative and territorial structure of the country and so on. A. Saidov divides Europe into two groups: the law in the first group of countries – Hungary, Poland, Czechoslovakia, Croatia, Slovenia – has been developing almost the same as in Germany, Austria and France; in these countries there was much rooted legal tradition (law considered as one of the fundamental principles of society); in the second group of countries – Albania, Bulgaria, Romania and Serbia – the law historically developed differently; as well as Russia, these countries for a long time have been feeling the influence of Byzantium, not Western Europe¹.

¹ Саидов А.Х. Сравнительное правоведение (основные правовые системы современности): Учебник / Под ред. В.А. Туманова. – М.: Юрист, 2004. – р. 225-226.

Mechanism for resolving commercial disputes should be called models (legal structure), which determine the main features of the system and procedure of such resolving. “Models of commercial dispute resolution” is a very broad concept, which includes not only the mechanism for resolving commercial disputes, but also the content of the judicial system of a country. Speaking about judicial system, M. Yarova notices that it is the system of courts and quasi-judicial bodies in the state, it is essentially nothing more than a hierarchically organized set of state institutions designed to deal with the administration of justice, their common, consistent and based on a special, procedural law activity².

The building of model for commercial dispute resolution has practical importance because it allows you to see the features of this solution in different countries, to identify dependencies and patterns that will adopt the useful experience of other countries for Ukraine. The model must be simple and clear, have a holistic nature and consistent with other models. The model indicates what elements consist of an object, as a result facilitates the understanding of the phenomenon. In turn, the typology of models for solving commercial disputes facilitates the identification of optimal forms to resolve such disputes.

I. Nazarov rightly emphasizes that historical analysis of the formation of the judicial systems of European countries indicates the absence of any single model of the judicial system for all states. Attempts to introduce such a model have been always. For a sample was taken the judiciary of state, which had overwhelming military political and economic situation in the region³. This thesis applies fully and models to solve commercial disputes. For countries that weren't the part of the Soviet Union (Bulgaria, Poland, Romania and Slovakia), the existence of separate courts to resolve commercial disputes is not typical. It is seen from the fact that state arbitration (prototype of commercial courts) was formed in these countries in the late 40's – early 50's under the pressure of the Soviet Union, and after the weakening of position of the last state arbitrations began to be eliminated. R. David and K. Joffre-Spinozi indicate that the example of the Soviet Union and other socialist countries have created special authority for dealing with disputes in the socialized sector which is not associated with the general judicial system, such as State arbitration, the title of which varies in different countries. Also there are some differences from the Soviet system. Evolution of the State Arbitration Institute took place in Yugoslavia, Albania and Hungary. In these countries, respectively, in 1955, 1969 and 1972 State arbitration was eliminated⁴.

In Yugoslavia instead of State arbitration were established commercial courts which were considered to be specialized. The competence of commercial courts in this country was quite

² Яровая М. В. Судебные системы современных европейских государств: сравнительно-правовой анализ [Текст] : дис. ... канд. юрид. наук : 12.00.01 – М., 2006. – р. 31.

³ Назаров І. В. Судові системи європейських країн: історичні аспекти формування // Держава і право : Збірник наукових праць. – № 47. – р. 559.

⁴ Давид Р., Жоффре-Спинози К. Основные правовые системы современности: Пер. с фр. В.А. Туманова. – М.: Междунар. Отношения, 1997. – р. 186.

broad. In particular, in addition to the traditional for commercial courts considering of economic disputes, these courts in Yugoslavia prescribed penalties and other sanctions for perpetrators of economic crimes. Higher economic courts of the republics as the first instance court decided the administrative and financial disputes. In this case, the status of judges of commercial courts was the same with the status of general courts⁵.

It should be noticed that the judicial system in Eastern Europe in the period of socialism contained specialized courts. For example, in Bulgaria till 1960 there was a transport court that decided the cases on actions that violate the proper functioning and safety of different modes of transport. In the Hungarian People's Republic also there were transport courts which dealt with cases of crimes against the normal operation of all transport modes. In the Poland also there were specialized courts – courts of Social Insurance, which decided complaints against decisions of department pensions and social deductions.

Instead of State arbitration, understanding the need in special order for resolving commercial disputes, in Eastern Europe countries was introduced a special procedure for settling commercial disputes in courts. But such special orders also were eventually canceled (except Bulgaria).

Thus, in Bulgaria, Poland, Romania and Slovakia, there is a tendency to unify procedural principles for resolution of all disputes, regardless of specialization.

Jurisdiction of commercial dispute resolution is inextricably linked with the judicial system, court system and litigation. These institutions determine the procedure for settling commercial disputes and determine its characteristics.

First of all, a model of resolving commercial disputes is affected by the availability of a specialized court to resolve such disputes.

Settlement of commercial disputes in Europe takes place in quite different ways, ranging from the existence of commercial courts that specialize in resolving commercial disputes (France, Belgium), and ending with the general procedure to resolve such disputes without regard to any characteristics (Slovakia).

A special place among the European countries occupied by the former Soviet Union (Ukraine, Russia, Belarus), where the resolution of these disputes is carried out by special courts (commercial or arbitration) which fully included in the judicial systems of their countries. It should be noted that the RF and RB system of economic (arbitration) courts exist in parallel with the general court system, and besides the said courts decide administrative cases, replacing the same administrative court.

The variety of models for solving commercial disputes necessitates their classification to determine the optimal model for Ukraine. There is no single classification of models for solving commercial disputes in Eastern Europe. Speaking about models for solving commercial

⁵ Судебные системы социалистических стран. Под ред. И.С. Власова. – М.: ВНИИ советского права, 1973. – р. 40.

disputes, A. Osetyn'skiy proposed the classification of models for resolving commercial disputes. However, this author proposed a classification of the above models in national legal systems of European countries in general, namely: according to historical tradition and modern economic and legal environment it is proposed to apply three basic models of mechanisms for resolving trade (commercial) disputes: the functioning of specialized bodies, the activity of specialized departments in appropriate territorial level general courts and mixed model where, for some categories or based on a territorial basis, disputes relating to commerce, shall be settled either in special departments of general courts, or in a separate specialized body⁶.

Given that in Eastern Europe there are a variety of models for resolving commercial disputes, classification of them should be done according to various criteria. Making the classification of models for solving commercial disputes we have to consider many factors, including: the composition of the judiciary, the existence of a codified act regulating commercial dispute resolution, the possibility to use simplified procedures for resolving commercial disputes, the existence of the arbitration court (arbitration) and nonjurisdictional bodies to resolve commercial disputes.

For example, in Ukraine the system of courts of general jurisdiction includes: local courts; courts of appeal; high specialized courts; The Supreme Court of Ukraine. Courts of general jurisdiction specialize in civil, criminal, commercial, administrative matters and cases in administrative offenses (ch. 1, Art. 18 of the Law of Ukraine "On the Judicial System and Status of Judges"). Commercial courts are specialized courts. The local commercial courts are commercial courts of the Autonomous Republic of Crimea, regions, cities Kyiv and Sevastopol. The system of courts of general jurisdiction form three separate subsystems of specialized courts, and the highest judicial body is the Supreme Court of Ukraine. Economic disputes in the courts are decided in accordance with the provisions of the Commercial Code of Ukraine.

Also commercial disputes in Ukraine may be resolved by agreement of the parties by the arbitration.

Arbitration courts in Russia are the part of the judiciary with special status. Arbitration courts in Russia are four-instance system (Supreme Court of Russia, Federal arbitration courts of districts, arbitration courts of appeal, arbitration courts of the republics, territories, regions, federal cities, autonomous regions and autonomous districts). Economic disputes are resolved on the basis of the Arbitration Procedure Code of Russia, and for certain categories of cases a simplified procedure is used.

By the agreement of the parties the economic disputes can be resolved by arbitration courts, or in the process of mediation.

The judicial system of Belarus includes:

⁶ Осетинский А. И. Перспективы запровадження комерційних судів в аспекті судового реформування в Україні // Вісник господарського судочинства. – 2006. – № 6. – р. 168.

- The Constitutional Court of Belarus – a body of judicial control over the constitutionality of legal acts in the country, which implements the judiciary through constitutional justice;
- General courts which administers justice in the form of civil, criminal and administrative proceedings;
- Commercial courts which administer justice in the form of economic and administrative proceedings.

Commercial disputes are resolved in accordance with the rules of the Commercial Procedure Code of Belarus, including: using the imperative institute proceedings.

Justice in Moldova is carried out by the Supreme Judicial Chamber, the Appeal Chambers and courts, and for certain categories of cases there are specialized courts, including the District Commercial Court. The order of dispute resolution by District Commercial Court is regulated by commercial Civil Procedure Code of Moldova, according to which such disputes are considered in a general way, without any features. The above code provides the clerks (simplified) proceedings.

Commercial disputes can be resolved in Moldova by means of mediation and resolved by arbitration.

In Bulgaria there are courts of general and administrative jurisdiction. In Bulgaria the jurisdiction system is organized under three-phase plan: the first instance – a district court, the appeal instance – the district court, courts of cassation – Supreme Court of Cassation. If the case in the first instance is considered by the district court, the appeal instance is the Court of Appeal and cassation instance is The Supreme Court of Cassation.

In Bulgaria there are no specialized courts to resolve only trade disputes. Such disputes are resolving by district courts under the Code of Civil Procedure of Bulgaria, which contains some provisions to resolve trade disputes.

One of the most common ways to resolve trade disputes out of courts is an arbitration and alternative dispute resolution mechanisms includes mediation procedure.

Romania's judicial system is organized under four-phase plan, which includes: courts, tribunals, courts of appeal, the Supreme Court of Cassation and Justice (in the first instance the case is considered by the courts and tribunals, the appeal instance are tribunals and courts of appeal, the cassation instance is Supreme Court of Cassation and Justice) .

The mediation procedure in Romania is a mandatory prerequisite to submit a claim to the court. Commercial disputes are resolved in Romania also by the arbitration court (arbitration).

The judiciary in Poland consist of three instances of internal (civil and criminal divisions as required and family, juvenile, labor, economic as optional) and external specialization (administrative and military courts). A special place is occupied by the Constitutional Tribunal,

which is not a court in the conventional sense, but refers to the bodies of the judiciary, administering justice.

Commercial disputes in Poland are regulated in the process of mediation and resolved by arbitration courts.

Slovakia has three-instance judiciary (region court, district court, Supreme court), which includes the Specialized criminal court. The judicial system in Slovakia contains elements of both foreign and domestic specialization. All civil cases are resolved by the Civil Procedure Code of the Slovak Republic adopted in 1963, which does not provide special procedure for the consideration of economic disputes.

By agreement of the parties, the dispute in Slovakia may be referred to the Arbitration Court. Also in Slovakia the mediation procedure to resolve commercial disputes is used.

After analyzing the content of the judicial systems in Eastern Europe and procedural law, which regulates the procedure for resolving commercial disputes, we propose the following classification of models of economic disputes resolution.

1. On the basis of the presence of the court, which specializes exclusively in commercial dispute resolution, models are divided into:
 - a) models in which there are economic, arbitration and commercial courts (Ukraine, Russia, Belarus, Moldova);
 - b) models in which there are no special courts to resolve commercial disputes (Bulgaria, Romania, Poland and Slovakia).
2. On the basis of the presence of a special procedure for resolving commercial disputes, models are divided into:
 - a) models in which there are separate codes for commercial dispute resolution (Ukraine, Russia, Belarus);
 - b) models in which there are specific provisions in the Code of Civil Procedure to resolve commercial disputes (Bulgaria);
 - c) models in which there are no specific provisions on commercial dispute resolution (Romania, Poland and Slovakia).
3. On the basis of the presence of vertical special courts to resolve commercial disputes, models are divided into:
 - a) models in which there is complete vertical of courts to resolve commercial disputes (Belarus);
 - b) models in which are is cut vertical of courts to resolve commercial disputes (Ukraine, Moldova and Russia);
 - c) models in which there is no vertical of courts to resolve commercial disputes (Bulgaria, Romania, Poland and Slovakia).
4. On the basis of the availability of mediation, models are divided into:

- a) models which apply voluntary mediation (Russia, Belarus, Moldova, Bulgaria, Poland and Slovakia);
 - b) models in which mediation is a mandatory prerequisite to submit a claim to the Court (Romania);
 - c) models in which there is no procedure for mediation (Ukraine).
5. On the basis of the presence of nonjurisdiction agencies authorized by law to resolve commercial disputes, models are divided into:
- a) models in which there are nonjurisdiction bodies authorized by law to resolve commercial disputes (Belarus);
 - b) models in which there is no nonjurisdiction body authorized by law, resolve commercial disputes (all Eastern European countries except Belarus).

Thus, one of the primary factors determining the formation of commercial dispute resolution system in Eastern Europe and its elements are: belonging to one of Eastern European law families, historical and legal traditions, economic conditions, administrative and territorial division. Features of modern legal regulation procedures for resolving commercial disputes in Eastern Europe due to commonality and differences in typological characteristics of the judicial systems of countries that are considered, in particular, to the unity or plurality of elements of the system, models of administrative justice and control, jurisdictional powers of general and specialized courts.

Analysis of models of economic disputes resolution in Eastern Europe countries showed certain characteristics in dealing with such disputes. A special place among the European countries occupied by the former Soviet Union (Ukraine, Russia, Belarus), where commercial dispute resolution is carried out by special courts (commercial or arbitration) which fully are included to the judicial systems of their countries. It should be noted that in Russia and Belarus the system of economic (arbitration) courts exist in parallel with the general court system, and these courts resolve administrative cases, replacing in this way administrative courts. In Poland, Romania, Slovakia, and to a lesser extent in Bulgaria, there is a tendency to unify procedural principles of resolution of all disputes, regardless of specialization.

Classification of models of economic disputes resolution, in our opinion, should be made by taking into account the structure of the judicial system, the presence or absence of a codified act regulating this sphere of relationships, the using of simplified procedures for dealing with commercial cases, the activity of arbitration courts and international arbitration.