

Report and conclusion

Provided by Vasyl Kysil, mediator in mediation procedure between Odessa Regional State Administration, LLC “ENERGY PRODUCT LTD” and LLC “ALLSEEDS BLACK SEA”

Period of mediation procedure: April 08, 2016 – June 22, 2016.

Key documents for Mediator: EU Directive of the European Parliament and of the Council dd May 21 2008 "On certain aspects of mediation in civil and commercial matters" (directive 2008-52); European Code (European Code of Conduct of Mediators) dd June 02, 2004; Code of mediator's Ethics proposed by Ukrainian Mediation Center.

The Parties were represented:

Odessa Regional State Administration: by Luba Shypovych (council of Odessa Regional State Administration) - permanently;
by Dmitry Terletsky (lawyer of Odessa Regional State Administration) and Solomiya Bobrovski (deputy chairman of Odessa Regional State Administration) - periodically submitted information.

LLC “ENERGY PRODUCT LTD”: by Eugene Garden (by proxy from the owner of the company) - permanently;
by Igor Petrashko – participating in meeting to clarify positions).

LLC “ALLSEEDS BLACK SEA”: by Viacheslav Petryshche (CEO of Allseeds) - permanently;
by Vasyl Fastovets (Head of Legal Department) - permanently;
by Alex Feliv (Managing Partner of ILF INTEGRITES LLC) - periodically;
by Ivan Ogilchyn (volunteer of Odessa Regional State Administration, an independent consultant) - until June 06, 2016.

On March 21, 2016 Ms. Luba Shypovych and Mr. Ivan Ogilchyn applied to me with proposition to arrange an appointment and negotiate situation arose between Odessa Regional State Administration, LLC “ENERGY PRODUCT LTD” and LLC “ALLSEEDS BLACK SEA” in connection with a dispute concerning allocation of a land plot within Adzhalytsky firth for construction of berths, and proposal to involve me as mediator in the settlement of the dispute.

Being assured there is no conflict of interests I agreed to be a mediator.

On March 29, 2016 Odessa Regional State Administration submitted LLC “ENERGY PRODUCT LTD” and LLC “ALLSEEDS BLACK SEA” with letters to involve me as a mediator in the dispute concerning allocation of a land plot. According to the representative of Odessa Regional State Administration, LLC “ENERGY PRODUCT LTD” and LLC “ALLSEEDS BLACK SEA” agreed and accepted proposition to involve me as a mediator in the dispute settlement procedure.

On April 08, 2016 I, as a mediator, invited the Parties for the joint meeting, explained the nature and rules of mediation, got assured in agreement of all the Parties to proceed mediation procedure with me as a mediator, and also got the Parties acquainted with the Code of mediator's Ethics and

EU Directive (explained the lack of legislation regulation of mediation procedure in Ukraine; also stated on the draft of the Law of Ukraine “On mediation”, which was submitted to Verkhovna Rada, but no actions were performed, so I, being a mediator, will act on the basis of the Code of mediator’s Ethics and EU Directive).

Then, from April 13, 2016 till April 25, 2016 I held meetings with the Parties and the latter provided me with their positions regarding the dispute.

After analysis of the information the following was clarified: land plot was allocated to LLC “ENERGY PRODUCT LTD” on the basis of the order of Odessa Regional State Administration № 773/A-2015 dd November 13, 2015 and Order № 21/A-2016 dd January 16, 2016. LLC “ALLSEEDS BLACK SEA” assumes that Odessa Regional State Administration unlawfully and unfairly deprived LLC “ALLSEEDS BLACK SEA” from the allocation of the land plot, despite the fact the latter was the first to submit the claim for the allocation a month and a half earlier than LLC “ENERGY PRODUCT LTD”. Odessa Regional State Administration stated its interest in extrajudicial settlement of the above mentioned dispute in order to satisfy interests of LLC “ALLSEEDS BLACK SEA” and LLC “ENERGY PRODUCT LTD” and not to change previous decisions.

The main position of the Parties:

Representative of the LLC “ENERGY PRODUCT LTD” declared readiness to settle the dispute but without concession of long term lease (49 years) right, obtained according to the Order of Odessa Regional State Administration. Within the mediation procedure the mediator received the following declaration: *“We’ve stressed from the very beginning of the procedure that we are not a party of the dispute between Allseeds and Odessa Regional State Administration; taking part in negotiation is our goodwill. We also accented that reversal of the Orders of Odessa Regional State Administration in part of allocation of our land plots and/or deprivation of land lease in full or partly shall not be a subject of the dispute”*. Being a mediator, I took into consideration such position of LLC “ENERGY PRODUCT LTD”. Representative of the LLC “ALLSEEDS BLACK SEA” insisted on the position that it’s essential to construct own berth and to operate it without interference of third parties. Odessa Regional State Administration declared its readiness to provide any decisions agreed by the parties of the dispute in order to show favorable investment situation in the region.

Taking into account positions of the Parties and their intent to settle the dispute I, being a mediator, understand that parties have to reach compromise saving their business interests (otherwise mediation is pointless). Therefore ***I proposed the following***. LLC “ENERGY PRODUCT LTD” remains long term lessee of the land plot obtained under the Order of Odessa Regional State Administration, but the part of the land plot shall be subleased to LLC “ALLSEEDS BLACK SEA” for the construction of 1 of 3 berths. Thus, rights of the LLC “ENERGY PRODUCT LTD will not be violated, and the interests of the LLC “ALLSEEDS BLACK SEA” will be satisfied. Representatives of Odessa Regional State Administration accepted such option, representatives of LLC “ENERGY PRODUCT LTD” and LLC “ALLSEEDS BLACK SEA” decided to analyze the option and provide decisions afterwards.

On the next meeting the Parties came with their updated positions and readiness of LLC “ALLSEEDS BLACK SEA” to accept the above mentioned option was confirmed but also negative position of LLC “ENERGY PRODUCT LTD” to accept the option. LLC “ENERGY PRODUCT LTD” stated that *“sublease is deliberately not acceptable for us. There will not be a settlement on such basis”*. Nevertheless, representative of LLC “ENERGY PRODUCT LTD” noted readiness to conclude in the future corresponding transshipment agreement and to provide LLC “ALLSEEDS BLACK SEA” privilege conditions for the transshipment through berths, which shall be constructed by LLC “ENERGY PRODUCT LTD”. LLC “ALLSEEDS BLACK SEA” declined such proposition and motivated it having previous experience of conclusion of such agreements with other companies on the not acceptable conditions, which cannot be suitable. LLC “ALLSEEDS

BLACK SEA” provided statistics on the transshipment rates of the Black Sea basin berths and the ones LLC “ALLSEEDS BLACK SEA” has to pay for the transshipment because of not having its own berths. Difference is striking, not in favor of LLC “ALLSEEDS BLACK SEA”.

Odessa Regional State Administration accepted my option in whole.

Taking into account position of the Parties I proposed the latter to provide additional argumentation of their positions.

LLC “ENERGY PRODUCT LTD” informed about its right for allocation of the land plots according to the Order of Odessa Regional State Administration, and that there are no additional grounds for land sublease, transshipment agreement conclusion only.

LLC “ALLSEEDS BLACK SEA” provided its detailed reasons in writing, the main idea is following.

“On the January 28, 2014 the Head of the State Enterprise “Administration of Sea Ports of Ukraine” (SE “ASPU”) adopted Plan of development of sea port “Yuzhnyy” for the short- (till 2018), mid- (till 2023) and longterm (till 2038) perspective, which prescribes construction of berths № 10, 11, 12 and 12a.

On the November 03, 2014 based on the request of LLC “ALLSEEDS BLACK SEA” amendments to the Plan of development of sea port “Yuzhnyy” for the short- (till 2018), mid- (till 2023) and longterm (till 2038) perspective were made: the Head of the State Enterprise “Administration of Sea Ports of Ukraine” (SE “ASPU”) adopted new Plan of development of sea port “Yuzhnyy” for the short- (till 2018), mid- (till 2023) and longterm (till 2038) perspective, which contains clause about construction of berths № 10, 11, 12 and 12a, and indicates that investor is ASPU/investor.

The claimant for construction of berths № 11, 12 and 12a was LLC “ALLSEEDS BLACK SEA”.

In order to imply above mentioned plan, basing on the applications of the claimants Kominternivska district state administration of Odesa region developed detailed plan of the territory, which stipulates construction of two berths on the land plots, allocations of ones were made by Odessa Regional State Administration and Vyzyrsk village council of Kominternivsk district Odesa region in favor of LLC “ENERGY PRODUCT LTD” and ones subject of the dispute.

Detailed plan of the territory was adopted under Order № 370/A-2015 of Kominternivsk district state administration of Odesa region dd July 27, 2015.

Based on the developed town planning documentation, which provides and allows construction of berths №№ 11, 12 and 12a on land plots, allocation of which is subject of appeal by LLC “ALLSEEDS BLACK SEA”, the latter appealed on July 27, 2015 to Odessa Regional State Administration with application No. 06/469 dd July 20, 2015 on the authorization of LLC “ALLSEEDS BLACK SEA” on the drafting of land management project of land plot for allotment of land in long lease for 49 years from the lands of water fund, change of purpose of land from water resources fund to transport land.

According to p. 3. of art. 123 of Land Code of Ukraine corresponding executive authority or local authority within their powers within a month shall consider the request and authorize the drafting of land management project for allotment of land or provide a reasonable refusal. The grounds for refusal to provide such permission may only be discrepancy of the allocation of land to requirements of laws adopted in accordance with the normative legal acts, as well as master plans and other town planning documentation, land management schemes, feasibility studies for land use

and protection of administrative territorial units, land management projects to streamline the territories of settlements adopted in accordance with the law.

However, as of today LLC “ALLSEEDS BLACK SEA” did not receive any official letter from Odessa Regional State Administration regarding request ref. № 06/469 July 20, 2015.

Thus, LLC “ALLSEEDS BLACK SEA” supposes that Odessa Regional State Administration violated requirements of the current legislation of Ukraine in force and deprived LLC “ALLSEEDS BLACK SEA” the right to allocate/obtain land plot for construction of the above mentioned berths.

Furthermore, on September 14, 2015 (a month and a half later after submit by the LLC “ALLSEEDS BLACK SEA” of its request ref. № 06/469 July 20, 2015) LLC “ENERGY PRODUCT LTD” submitted to Odessa Regional State Administration request ref. № 11/09 September 11, 2015 on the authorization on the drafting of land management project for allotment of the same land plot LLC “ALLSEEDS BLACK SEA” submitted earlier.

On the basis of the order of Odessa Regional State Administration № 773/A-2015 dd November 13, 2015 LLC “ENERGY PRODUCT LTD” obtained the authorization on the drafting of land management project for allotment of the land plot.

Based on the order 818/A-2015 of Odessa Regional State Administration dd December 01, 2015, Odessa Regional State Administration amended order of Odessa Regional State Administration № 773/A-2015 dd November 13, 2015, and stipulated new usage purpose of the land plot which does not correspond to the Classification of the purpose of land, adopted by the State Committee for Land Resources of Ukraine of 23.07.2010 p. №548.

During beginning of December 2015 LLC “ALLSEEDS BLACK SEA” became informed about intentions of Odessa Regional State Administration to allocate the land plot subject to the request of LLC “ALLSEEDS BLACK SEA” in favor of LLC “ENERGY PRODUCT LTD”. LLC “ALLSEEDS BLACK SEA” applied with request ref. № TPO-486 dd December 02, 2015 to Odessa Regional State Administration to consider previous request ref. № 06/469 dd July 20, 2015 on the authorization on the drafting of land management project for allotment of land plot for longterm lease. Official response for the above mentioned request was received only on April 25, 2016.

However, Odessa Regional State Administration adopted order № 21/A-2016 of Odessa Regional State Administration dd January 16, 2016 drafting of land plot for allotment to the LLC “ENERGY PRODUCT LTD” and provided the latter with the land plot (5122755400:01:002:0129) for longterm (49 years) lease.

On February 17, 2016 Odessa Regional State Administration and LLC “ENERGY PRODUCT LTD” concluded corresponding lease agreement.

On April 25, 2016 LLC “ALLSEEDS BLACK SEA” received a response for request ref. № TPO-486 dd December 02, 2015 from Department of Infrastructure and Housing of Odessa Regional State Administration (ref. № 275-06/2213-I dd February 11, 2016). Declining request of LLC “ALLSEEDS BLACK SEA” Odessa Regional State Administration motivated such decision because of absence of access to the neighbor landplot subject of request of LLC “ALLSEEDS BLACK SEA” i.e. absence of servitude agreement with owner of neighbor landplot.

Despite the fact that such motive is legally inconsistent, representatives of Odessa Regional State Administration constantly used such motive in the internet – Facebook official page and web site of Odessa Regional State Administration.

However, according to ch. 2 of art. 123 of the Land Code of Ukraine person interested in obtaining in the use of land plots from state or municipal property for the land management project for its allocation, shall request for permission for its development to the relevant executive authority or local authority which, under powers prescribed by Article 122 of the Code, transfer the ownership or use of such land. The request shall indicate the approximate size of the land and its purpose. A request should contain graphics, which indicates the desired location and size of land, the land user written consent notarized (in case of withdrawal of land). Verkhovna Rada of the Autonomous Republic of Crimea, the Council of Ministers of the Autonomous Republic of Crimea, executive agencies or local governments, which transfer lands of state or municipal property for use in accordance with the powers defined in Article 122 of the Code, it is prohibited to request additional materials and documents provided in this Article.

Thus, references of Odessa Regional State Administration to absence of servitude agreement shall be considered as breach of the current legislation of Ukraine in force as well as the idea of conclusion of servitude agreement: to obtain servitude right for the land plot the legal grounds of ownership or usage of the landplot shall be previously obtained.

By the way, right to establish land servitude with the purpose to obtain access to the landplot and construct communication ways prescribed by the art. 401-406 of the Civil Code of Ukraine, and art. 98-102 of the Land Code of Ukraine.

References of Odessa Regional State Administration to absence of servitude agreement to the desired landplot of LLC "ALLSEEDS BLACK SEA" are completely groundless.

Allocation / grant of the land plot for lease by Odessa Regional State Administration to LLC "ENERGY PRODUCT LTD" instead of LLC "ALLSEEDS BLACK SEA" (taking into account earlier request submit of the latter) also indicates on anticompetitive actions of Odessa Regional State Administration: the latter provided LLC "ENERGY PRODUCT LTD" with anticompetitive advantage, breached legislation on protection of economic competition, i.e. art. 1, ch. 2 of art. 4 of ch 1, 2 of art. 15 and provisions of clause 6 of ch. 1 of art. 5 of Land Code of Ukraine and art. 4 of the Law of Ukraine "On sea ports of Ukraine."

In addition, land allocation to LLC "ENERGY PRODUCT LTD" according to LLC "ALLSEEDS BLACK SEA" was performed with violations of the Land Code of Ukraine and the Law of Ukraine "On Land Management", in particular: the change of category of land is not allowed, determined type of purpose of landplot does not meet requirements of current legislation of Ukraine, neighboring land owners did not determined properly, graphics do not correspond to the actual data, there is no approval of the land project by all state authorities, remarks to the land project provided by the state examination does not take into account".

Being familiarized with argumentations of LLC "ALLSEEDS BLACK SEA" and position of LLC "ENERGY PRODUCT LTD" and Odessa Regional State Administration I, being a mediator, came to decision that main grounds of Odessa Regional State Administration on refusal in allocation of land plot to LLC "ALLSEEDS BLACK SEA" is because neighbor land plot is owned by the third party, and because of absence servitude agreement with owner of neighbor landplot. My opinion, as independent mediator: such position is very controversial and I completely agree with decisions of legal firm "Saenko Kharenko" and Institute of State and Law of V.M. Koretsky of NAS of Ukraine, which state that the servitude agreement concludes with neighbor landplot owners with their consent; in case if neighbor landplot owners decline to conclude such servitude agreement the latter may be established under court decision (see. Conclusion of Scientific-legal expertise of the Institute of state and law of NAS of Ukraine On the possibility and procedure of establishment of servitude dd March 9, 2016 № 126/22 and Conclusion of the legal firm "Sayenko Kharenko" dd March 4, 2016, both attached).

Furthermore, representative of LLC "ENERGY PRODUCT LTD" confirmed that *"there is no doubt Allseeds have the right to obtain servitude under court decision or thorough the agreement to pass our land, and I do not consider servitude as a reason to start construction of transport galleries or oil pipeline...That requires superficies or lease agreement"*.

On my request regarding abovementioned position LLC "ALLSEEDS BLACK SEA" replied the following. First, LLC "ALLSEEDS BLACK SEA" referred to Art. 404 of the Civil Code of Ukraine, the first paragraph of which states *"right to use someone's land or other real estate is the possibility of passage, passage through a foreign land, laying and operation of power lines, communications, pipelines, ensuring water supply, irrigation, etc."*. This is also confirmed by the conclusions provided by legal firm "Sayenko Kharenko" and the Institute of State and Law of V.M. Koretsky of NAS of Ukraine.

Second, if the LLC "ALLSEEDS BLACK SEA" has a lease or sublease agreement on land for the construction of berth, the question of access to such land plot would be settled within the next stage with all parties with interest.

Third, LLC "ALLSEEDS BLACK SEA" does not exclude that transshipment through this berth may be performed otherwise than laying oil pipeline.

Being convinced that LLC "ENERGY PRODUCT LTD" does not accept my offer of a long-term sublease, I asked the Parties to provide other compromise solutions to the dispute. The representative of LLC "ENERGY PRODUCT LTD" reported that their position is *"still the same"*. LLC "ALLSEEDS BLACK SEA" offered to return to the project of berths configuration, which was developed by SE "CHORNOMORNIIPROEKT" on the order of LLC "ENERGY PRODUCT LTD".

After being informed about the proposition of LLC "ALLSEEDS BLACK SEA" I came to the conclusion that it can really satisfy the interests of all three Parties.

First, such option was proposed by the LLC "ENERGY PRODUCT LTD" once. The representative of LLC "ENERGY PRODUCT LTD" confirmed it in writing: *"Moreover, this option was proposed by me and was developed by CHORNOMORNIIPROEKT, then presented to the board of port Yuzhny"*.

Second, the number of berths increasing from three to seven.

Third, LLC "ENERGY PRODUCT LTD" shall obtain more berths than they wanted and received in accordance with the order of Odessa Regional State Administration, and LLC "ALLSEEDS BLACK SEA" shall obtain two - three berths.

Fourth, this option is more attractive for investments Odessa Regional State Administration.

Taking all abovementioned into account, I initiated an arrangement with the representative of LLC "ENERGY PRODUCT LTD" - Igor Petrashko (who also stated that represents the interests of owners), held on June 1, 2016, where we discussed this new proposal of LLC "ALLSEEDS BLACK SEA". He said that such project actually took place with the initiative of LLC "ENERGY PRODUCT LTD", but it was not implemented because the project was not approved by the Council of port Yuzhny and because of the fact that *"not all parties fulfilled their obligations"*. However, he did not deny the opportunity to return to this project; also he told that *"that is utopia"*.

Then, on June 02, 2016 at the next meeting of the mediation procedure representative of LLC "ENERGY PRODUCT LTD" - Yevgeny Sadovy said that the company LLC "ENERGY PRODUCT LTD" does not intend to return to this proposal, because they have allotted land plots as they planned.

So there is a situation when mediation is impossible because of no will to achieve the desired compromise.

Odessa Regional State Administration, through its representative Lyuba Shypovych also reported that according to the Department of Infrastructure and Housing Odessa Regional State Administration, realization of this project can be difficult because of the interests of third parties, but she did not deny the possibility of its implementation subject to checking other specifications and additional approvals.

During the mediation procedure suggestion on possible corruption component in the allocation of land have arisen couple of times.

Being a mediator, I explained the Parties that it is not the subject of the dispute and mediation, and the Parties may submit a claim to law enforcement authorities. LLC "ALLSEEDS BLACK SEA" provided a copy of the Kominterniv district state administration of Odesa region deputy's inquiry to the National Anticorruption bureau of Ukraine. I took it into account and explained the Parties one more time that I am not authorized to analyze that deputy's inquiry.

On June 6, 2016 according to the representative of Odessa Regional State Administration it became known that Odessa administrative court of appeal with decision of June 1, 2016 (full text made June 3, 2016) satisfied appeal of SE "ASPU", represented by Yuzhny branch of SE "ASPU", which canceled decision of Odesa district administrative court on April 07, 2016, and the new resolution of the Odessa administrative court of appeal cancelled the Order of the Odessa Regional State Administration dd November 13, 2015 number 773 / A-2015 and the Order of the Odessa Regional state administration dd 16 January 2016 number 21 / A-2016.

Thus, new circumstances gave grounds for Odessa Regional State Administration to declare the impossibility of further participation in mediation procedure and that Odessa Regional State Administration decides for the possibility or impossibility to appeal decision of Odessa administrative court of appeal on June 1, 2016 (full text made June 3, 2016) in cassation. Two days later I asked about intent of Odessa Regional State Administration to appeal, and the response was negative, but later, on June 14, 2016, representative of Odessa Regional State Administration stated that their legal department came to the decision on conclusion a cassation claim in order to "settle with SE "ASPU", and also informed about negotiations to settle.

On June 22, 2016 at the regular meeting of the mediation procedure the representative of the Odessa Regional State Administration informed the Parties about suing of cassation claim and proposed to wait until the end of negotiation between Odessa Regional State Administration and SE "ASPU" subject to "allocation of land within water area of Adzhalytsky firth for administration of SE "ASPU", and, however, to left allocation of land to LLC "ENERGY PRODUCT LTD" without changes". Reaction of LLC "ALLSEEDS BLACK SEA" was as follows:

first, from the beginning of the mediation procedure of LLC "ALLSEEDS BLACK SEA" proposed to attract SE "ASPU" to participate in mediation (however the other Parties of the mediation did not accept it);

second, taking into account that LLC "ENERGY PRODUCT LTD" is not ready settle, Odessa Regional State Administration is negotiating with the SE "AMPU" AND NOT informing LLC "ALLSEEDS BLACK SEA" on that matter; that lawful interests of LLC "ALLSEEDS BLACK SEA" on the subject of the dispute cannot be considered (moreover, LLC "ALLSEEDS BLACK SEA" is a third party to a lawsuit as well as LLC "ENERGY PRODUCT LTD", thus settlement is not possible) - LLC "ALLSEEDS BLACK SEA" being a party of mediation procedure suggested to terminate mediation procedure.

Being a mediator, I conclude the following:

1. There was a real possibility to settle. However, LLC "ENERGY PRODUCT LTD" took uncompromising position and insisted on conclusion in the future transshipment agreement with

LLC "ALLSEEDS BLACK SEA", and has not any intent to even sublease a landplot to LLC "ALLSEEDS BLACK SEA" for construction of 1/3 berths.

2. LLC "ALLSEEDS BLACK SEA" agreed upon mediator's proposal on long term sublease of the part of land plot and on the change of berths configuration according to the project developed by the SE "CHORNOMORNIIPROEKT" on the order of LLC "ENERGY PRODUCT LTD" which allowed to increase the number of berths from 3 to 7, but the other party declined this proposal.

3. In my opinion, proposition to increase number of berths from 3 to 7, what gives LLC "ENERGY PRODUCT LTD" a possibility to obtain 4 berths instead of 3, and LLC "ALLSEEDS BLACK SEA" – 2 or 3 berths, is acceptable and beneficial for all parties, and also considers interests of SE "ASPU". In my opinion, this option is the most attractive for investments Odessa Regional State Administration.

4. Reaching compromise is possible, but Odessa Regional State Administration should become a party to settle the dispute legally, fair, impartially, in a competitive way, operating state interests and local investment interests, and not be an observer. In my opinion, it would help to improve investment climate in the region, and would be an example of extrajudicial settlement of certain disputes, and also would attract additional investments to the region, assist growth of competition in the region.

5. During mediation procedure suggestion on possible corruption component in the allocation of land arose. However, that was not the subject of the dispute, even though a party of the mediation claimed upon certain suspicious of the presence of corruption component. Investigation of such matter cannot be a subject of the mediation, rather – other authorized bodies.

6. Thus, the Parties did not reach an agreement to satisfy all the Parties.

June 06, 2016

Kyiv

Vasyl Kysil
Mediator.