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## **MEDIATION IN UKRAINE: PROBLEMS OF THEORY AND PRACTICE**

*Were analyzed the directions of legal regulation of mediation procedure as a modern method to settle legal disputes given the positive international experience, international obligations of Ukraine and the need to improve the national system of legal disputes resolution. Were defined the ways of improving the legal regulation of mediation procedure in our country.*

*Keywords:* legal conflict, legal dispute, mediation, mediation procedure, mediator.

***Мазараки Н. Медиация в Украине: проблемы теории и практики.** Проанализированы направления правового регулирования процедуры медиации в качестве современного метода разрешения юридических споров, учитывая положительный зарубежный опыт, международные обязательства Украины и необходимость улучшения отечественной системы разрешения юридических споров. Определены пути совершенствования правового регулирования процедуры медиации в нашей стране.*

*Ключевые слова:* правовой конфликт, юридический спор, медиация, процедура медиации, медиатор.

**Formulation of the problem.** Legal disputes and conflicts are an inherent part of the society. And the task of the state is to create conditions for the settlement of disputes and the protection of legally protected rights and interests of citizens. Domestic and international experience shows that the introduction of alternative methods of dispute settlement along with the justice system is the most effective prerequisite for resolving legal conflicts and disputes. Moreover, these days the system of justice in Ukraine has a number of significant drawbacks: huge workload of courts, length and complexity of litigation, significant legal costs, lack of a developed mechanism of competition and equality of parties in the process, the publicity of the trial leading to disclosure of confidential information, the lack of generally accepted criteria of justice. In view of this, court decisions generate negative reaction of the parties, as a consequence, the dispute is stopped by force or otherwise, but is not solved.

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According to sociological surveys\* judicial system is not trusted by 80% of citizens, the same percentage of citizens believe in corruption of the judiciary system [1].

The above together with the international obligations of Ukraine encourages the introduction of new methods of dispute resolution.

**Analysis of recent research and publications.** Currently among researchers and lawyers increased interest to the questions of legal regulation of procedures for alternative dispute resolution. It is necessary to distinguish the works of S. F. Demchenko [2], H. I. Kozyryev [3], V. V. Ryznikova [4], A. P. Havrylyshyn [5], E. R. Bersheda [6] where the authors noted positive features of the mediation procedure in comparison with judicial procedures for resolving disputes. However, the analysis of the compliance aspects of Ukrainian legislation on mediation procedure with European experience was not conducted. Besides, there is no comprehensive analysis of mediation procedures as an effective method of dispute resolution.

The **aim** of the article. Determination of the main principles of introducing the mediation procedure in the national legal system, clarification of Ukraine's international obligations in this area, analysis of the principles and benefits of mediation as an alternative commercial dispute resolution methods.

**Materials and methods.** While elaborating the selected topic were used general scientific and special research methods, including: formal-logical – to interpret the content of mediation as one of the types of dispute resolution; comparative – to carry out comparative characteristics of different ways out of difficult situations; sociological – to analyze social conditionality of mediation procedure; instrumental – for distinguishing components of the mediation procedure as instruments of mediator's work; axiological – to determine the rules and objectives of conduct of the conflict parties; cliometric – to review the historical experience of conflict resolution involving an intermediary.

**Research results.** One of the promising directions of developing the system of alternative methods for dispute resolution is mediation – a procedure during which the mediator systematically promotes communication

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\* The survey was conducted by the Razumkov Centre from 6 to 12 March 2015. Were interviewed 2009 respondents aged above 18 from all regions of Ukraine, except Crimea and the occupied territories of Donetsk and Lugansk regions with a sample which represents the adult population of Ukraine according to the main socio-demographical indicators. The sample of the survey was constructed as a multi-stage, random with quota selection of respondents at the last stage. Theoretical sampling error (excluding design effect) does not exceed 2,3% with a probability of 0,95.

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between parties to the conflict or dispute to reach a mutually acceptable solution to the conflict or dispute. In addition, the mediator operates on the principles of neutrality and confidentiality on the merits.

Unlike the trial, which is strictly regulated, formalized and focused on the merits of the claim, mediation enables flexible approach to dispute resolution, taking into account all aspects of the controversial situation, regardless of their legal value. That is why mediation is referred to alternative dispute resolution methods.

But there are essential features with the help of which mediation may be distinguished from other methods of dispute resolution (arbitration judge / court, conciliation, negotiation): voluntary use of this procedure; flexible nature of the procedure; the desire of the parties to reach an agreement and resolve the dispute; lack of mediator's judicial power. For example, the arbitrator is entitled to make binding decisions, is suggested the procedure for issuing an enforcement document, the mediator does not have such rights, but only helps to ensure that the parties themselves have defined procedure for resolving the dispute.

Use of mediators to resolve disputes has been recorded since ancient times. Historians note such cases in merchant relations of Phoenicians and in Babylon. In ancient Greece there was a practice of using intermediaries (*proxenetas*). Roman law, starting with the Code of Justinian (530–533 B.C.) recognized mediation. The Romans used different terms to refer to the concept of «intermediary»: *internunciarius*, *medium*, *intercessor*, *philantropus*, *interpolator*, *conciliator*, *interlocutor*, *interpres*, and finally, *mediator* [7, p. 163]. In some traditional cultures the figure of mediator was treated with great respect and honor along with tribal leaders or priests.

Mediation in its modern sense began to develop in the second half of the XX century, primarily in common law countries – the USA, Australia, Great Britain, and then began to spread in Europe. The first attempts of applying mediation are usually related to dispute resolution in family relationships. Later mediation was recognized in solving a wide range of conflicts and disputes, beginning with conflicts in local communities to complex multilateral conflicts in commercial and public sphere [7, p. 170].

The term «mediation» derives from the Latin *mediatio* – intermediation; the similar meaning have words *mediation* (Eng.), *médiation* (Fr.). Everyone within his own understanding can give a definition to this concept. In social psychology researchers consider mediation to be a specific form of disputes, conflicts regulation and reconciliation of interests. The scientist H. Besemer defined mediation as the technology of conflict resolution involving a neutral third party [8, p. 12].

The formal definition of mediation (or settlement) is provided in Article 1 of the Model Law of the United Nations Commission on International Trade Law (*hereinafter* – UNCITRAL) of 2002 on international commercial arbitration procedures, under which mediation is «... a process ... when the parties engage a third person or persons ... in order to provide

assistance in the peaceful resolution of disputes concerning contractual or other legal relations, or related. The conciliator has no right to impose on the parties ways to resolve the dispute» [9].

In more practical terms, mediation is a reconciliation and finding a constructive approach to the settlement of the dispute, which allows you to identify important issues for both parties; considers the subject of the dispute from different angles; allows to use the conflict as «a learning tool» and a basis for improving relations between the parties. Mediation offers the parties an opportunity to resume or sometimes start negotiations.

Centre for Effective Dispute Resolution (*hereinafter* – CEDR) defines mediation as «... a flexible confidential process during which neutral party actively helps interested parties to reach an agreement in resolving the conflict or dispute, but the last word in the decision making or the terms of the agreement to resolve the dispute rests with the interested parties».

According to S. F. Demchenko, the main differences between traditional litigation and mediation lie in the fact that the judge listens to the parties and basing on the relevant articles of the law makes a judgment. While the mediator’s task is far more difficult: he should help the conflicting parties to find a solution for the dispute. So mediator should also have other specific knowledge. To know how to organize the process of conflict resolution so that its sides would be involved in the process absolutely voluntarily, creative search of the solution for the dispute, which would satisfy both sides and open new possibilities for their further interaction [10, p. 48].

According to some scholars, among all the alternative methods of dispute resolution mediation has several advantages. In the process of mediation the parties have more active influence on resolving the conflict. The confidentiality of the process is also obvious, which is crucial. Although, some companies identify applying to the state judiciary bodies as reputation loss. And with the help of mediation they establish immunity on disclosure. Also, the benefits of mediation include flexibility and non-formalized procedure.

The mediator aims to achieve a clear agreement between the parties to the dispute, including how the parties will resolve specific issues. He disregards detection of any feelings during the mediation procedure. The mediator focuses on the future prospectives of relations between the parties to the dispute, not the analysis of parties’ past relationships. He monitors the process and does not affect the participants of the mediation process or the result, while carrying out the procedure. The mediator helps identify the real interests of the parties to the conflict, the scope of legal disputes and helps the parties work out their own agreement on the dispute, besides the parties to the conflict fully control the decision-making process of dispute settlement and conditions of solving disputable situation. The mediator facilitates communication between the parties, understanding the positions and interests of each, focusing the parties on their interests and assists in finding productive solution, enabling them to develop their own agreement [11].

The mediation process consists of stages, each of which has its purpose and content. Successful mediation requires transition to the next stage after reaching all the goals at the previous one. There are the following stages of mediation implementation: mediation training; joining the mediation procedure; discussion of the problem, search and development of solutions to the dispute; dispute resolution, settling an agreement and summarizing.

It should also be noted that today, despite the lack of specific legislation, Ukraine can boast its own experience of the mediation procedure, which confirms high efficiency of this institution in solving conflicts. Since 2003 were actively conducted experiments in courts. Also in Ukraine operate a number of Regional mediation groups, which united in the Association of mediation groups in Ukraine and Ukrainian Centre of understanding and reconciliation.

In Ukraine operates Ukrainian Mediation Center (*hereinafter* – UMC) created at Kyiv Mohyla Business School. UMC intends to act in two directions: training of mediators (education sector) and services of independent mediators. Today the main task of the Centre is to bring about mediation as an effective tool in conflict resolution and to demonstrate successful experience of its application.

Within the joint program of the European Union (the EU) and the Council of Europe «Transparency and efficiency of the judicial system in Ukraine» in April 2009 was signed an agreement on cooperation between Vinnytsia District Administrative Court (*hereinafter* – VDAC) and Council of Europe experts to implement a pilot project on mediation in solving administrative disputes in court. Since then in VDAC actively began the process of implementing mediation hearing of administrative affairs and promotion of this process in society [12].

The need for the introduction of mediation institute in the domestic legal system is based on the positive results of the practice of reconciliation institute in many countries, which indicates its effectiveness. In addition, it meets the general position of Ukraine concerning the harmonization of national legislation with the EU legislation, since to the question of conciliation procedures is dedicated a set of recommendations and decisions of the Council of Europe.

Among them are worth mentioning: Recommendation № R (98) 1 of the Committee of the Ministers of European Council on mediation in family cases of 21.01.1998; Recommendation Rec № (2002) 10 of the Committee of the Ministers of European Council on mediation in civil cases of 18.09.2002; Directive of the European Parliament and the Council № 2008/52 EU on certain aspects of intermediation (mediation) in civil and commercial matters of 21.05.2008, etc. [13].

In addition, the entry into force of the Association Agreement between the EU and Ukraine (*hereinafter* – the Agreement) has become a factor in the overall improvement of legal regulation of alternative methods for dispute resolution, approximation of Ukrainian legislation to the EU standards.

The agreement contains the Provisions on the mechanism of mediation (mediation term in the English version of the Agreement was translated into Ukrainian as «intermediation») as a means of settling disputes, however national legislation is still at the stage of bills.

It is believed that the Law of Ukraine «On mediation» which would effectively regulate the mediation procedure, the legal status of mediators, provision of mediation quality, performance of mediation agreements, provision of mediation procedures confidentiality, etc., will contribute to reforming the judicial system, improvement of the investment attractiveness of Ukraine.

The study of the European experience of resolving disputes using alternative methods, the analysis of the implementation of the mediation procedure in the national law of the Member States enables to single out some of the main approaches to the regulation of the mediation procedure:

- significant level of regulatedness of mediation procedure. For instance, in Austria in order to promote mediation procedure by the state, to ensure legal certainty, the need for distinguishing mediation from professional legal services, consumer protection, legislation contains detailed rules on the register of legal mediators, self-governing organization of mediators, rights and obligations of registered mediators, suspension of the limitation period, professional training of mediators;
- low regulatedness of the mediation procedure. In the United Kingdom and the Netherlands, in particular, to encourage creativity and flexibility, development of the mediation process, civil laws regulate only the payment for the services of a mediator. And the very process of mediation, training of mediators is carried out by self-regulatory organizations of mediators;
- moderate regulatedness of the mediation procedure (Germany).

A very detailed approach to regulating mediation procedure was used by the authors of the Law of Ukraine «On mediation» of 17.12.2015 № 3665 and of 29.12.2015 № 3665-1 [14]. In particular, the bills propose to regulate the legal principles and performance of the mediation procedure, the principles and procedures of mediation, the mediator's status, rights and obligations of mediation parties.

**Conclusions.** Mediation is a new promising way of resolving disputes in both public and private law area. In Ukraine, at the level of legislative initiatives was formed the foundation for mediation and mediation procedures, but these bills require the formation of a clear theoretical framework to:

- interpretation of terms (mediation, mediator, etc., mediation agreement);
- ascertaining the nature and limits of the concept of legal disputes which can be resolved through mediation procedure, for example, the inclusion to this category of criminal proceedings and cases on administrative offenses requires amendments to the current legislation of Ukraine;

- liability of the members of the mediation procedure for violation of privacy.

That is why these bills have become a subject of public debate involving subjects of external economic activity, which should know and be able to use the services of mediators in resolving disputes that arise in relations with European partners.

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**Мазаракі Н. Медіація в Україні: проблеми теорії та практики**

**Постановка проблеми.** Вітчизняний та міжнародний досвід свідчить, що запровадження альтернативних методів врегулювання спорів поряд із системою правосуддя є найефективнішою передумовою вирішення правових конфліктів та спорів. Більше того, на сьогодні система правосуддя в Україні має низку істотних недоліків: велика завантаженість судів, тривалість і складність судового процесу, значні судові витрати, недостатня розвиненість механізмів змагальності та рівності сторін у процесі, гласність судового розгляду, що призводить до розголошення конфіденційної інформації, брак загальноприйнятних критеріїв справедливості. З огляду на це, рішення суду породжують негативну реакцію у сторін, як наслідок, спір припиняють силовим шляхом або в інший спосіб, але не вирішують. Крім того за результатами соціологічних опитувань судовій системі не довіряють близько 80 % громадян України..

Зазначене разом із міжнародними зобов'язаннями України спонукає до запровадження нових методів вирішення спорів.

**Аналіз останніх досліджень і публікацій.** Наразі серед науковців та юристів-практиків зріс інтерес до питань правового регулювання процедур альтернативних методів вирішення спорів. Слід виокремити роботи С. Ф. Демченка, Г. І. Козирєва, В. В. Рєзнікової, А. П. Гаврилішина, Є. Р. Бершеди, у яких автори зазначали позитивні риси процедури медіації порівняно з судовим порядком вирішення спорів. Водночас аналіз аспектів відповідності українських законопроектів щодо процедури медіації європейському досвіду не проводили. Немає й комплексного аналізу процедури медіації як ефективного методу вирішення спорів.

**Мета.** Визначення головних засад запровадження процедури медіації у вітчизняній правовій системі, з'ясування міжнародних зобов'язань України у цій сфері, аналіз принципів та переваг медіації як альтернативного вирішення господарських спорів.

**Матеріали та методи.** Під час опрацювання окресленої теми використано загальнонаукові та спеціальні методи дослідження, зокрема: формально-логічний – для тлумачення змісту медіації як одного із видів вирішення спорів; компаративістський – для здійснення порівняльної характеристики різних способів виходу із складних ситуацій; соціологічний – для аналізу соціальної зумовленості процедури медіації та інші.

**Результати дослідження.** На відміну від судового розгляду, який є суворо врегульованим, формалізованим та зосередженим на суті позову, медіація дає змогу гнучкого підходу до вирішення спору, урахування всіх аспектів спірної ситуації, незалежно від їх юридичного чи правового значення. Саме тому медіацію відносять до альтернативних методів вирішення спорів.

Автором проаналізовано напрями правового регулювання процедури медіації як сучасного методу вирішення юридичних спорів з огляду на позитивний закордонний досвід, міжнародні зобов'язання України та потребу покращання вітчизняної системи їх вирішення. Визначено шляхи удосконалення правового регулювання процедури медіації у нашій державі.

**Висновки.** Медіація є новим перспективним способом вирішення спорів як у публічно-правовій, так і в приватноправовій сфері. В Україні на рівні законодавчих ініціатив сформовані підвалини для запровадження медіації та медіаційних процедур, проте зазначене потребує формування чіткого теоретичного підґрунтя до: тлумачення термінів (медіація, медіатор, медіативна угода тощо); з'ясування суті та меж поняття юридичних спорів, що можуть бути вирішені за допомогою процедури медіації, адже, наприклад, включення до цієї категорії кримінальних проваджень та справ про адміністративні правопорушення потребує внесення змін до чинного законодавства України; відповідальності учасників процедури медіації за порушення вимог конфіденційності.



*Тому ці законопроекти мають стати предметом громадського обговорення із залученням також суб'єктів зовнішньоекономічної діяльності, які мусять знати та вміти користуватися послугами медіаторів при вирішенні спорів, що виникатимуть у відносинах із європейськими партнерами.*

*Ключові слова:* правовий конфлікт, юридичний спір, медіація, процедура медіації, медіатор.