UDC: 351
DOI: https://doi.org/10.32689/2617-2224-2019-5(20)-85-96

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IMPLEMENTATION OF MEDIATION IN THE STATE GOVERNMENT INDUSTRY IN UKRAINE

Abstract. The article is devoted to consideration of the basics of state-legal regulation of mediation. The purpose of the article is to review and streamline the established criteria in the doctrine of the civil law directions and approaches to defining the concept of protection of the civil rights and interests protected by law, highlighting their heterogeneous and common nature to develop a holistic view of how to understand the classification of the concept, and a vision of an optimal methodological framework for defining the concept of protection of the civil rights and interests protected by law.

The legal model of mediation, as well as approaches to the construction of the structure of mediation and mediation processes are considered. Methodological principles of regulation of mediation and their implementation in the present day are analyzed. Areas of application of mediation have been identified. The mediation model is modeled. It is established that in the modern period the provisions are widely recognized and it is proved that mediation is a process of joint settlement and resolution of conflicts. Its main components are certain tendencies of introduction of mediation in the world, corresponding to them regularities and the principles connected with them. Implementation of mediation in accordance with the requirements of the developed laws and principles depends entirely on

the conflicting parties. It is substantiated that the tendencies of the development of mediation agreement are determined by the development and functioning of the state regulation and social processes in the society. But the main factor influencing the introduction of mediation is the state-legal system that reflects all the phenomena occurring in the country and beyond.

Mediation has been found to be the driving force behind dispute resolution. The optimal methodological basis for defining the concept of protection of the civil rights and legitimate interests will be its integrative legal model that will be based on the protection of the civil rights and protected by law as a state-law institute, which should exist on the border of procedural law, contain rules of private and public law accordingly, to consider the substantive and procedural aspects of the protection of the civil rights and the interests protected by law, and to cover the substantive, procedural elements thereof, and combine static and dynamic state of protection.

Therefore, the state-legal system needs to be developed and successfully applied to achieve a peaceful settlement of disputes.

Keywords: mediation, negotiations, method, extrajudicial method, mediation procedure, court decision, dispute resolution, legality, law.

ВПРОВАДЖЕНЯ МЕДІАЦІЇ В ГАЛУЗІ ДЕРЖАВНОГО УПРАВЛІННЯ В УКРАЇНІ

Анотація. Стаття присвячена розгляду основам державно-правового регулювання медіації. Мета статті є огляд та упорядкування сформованих завизначеними критеріями у доктрині цивільного права напрямів та підходів до означення поняття захисту цивільних прав і охоронюваних законом інтересів, висвітлення їх різнорідного та спільного характеру для вироблення цілісного уявлення про способи розуміння зазначеного поняття та їх класифікацію, а також викладення власного бачення щодо оптимальної методологічної основи для визначення поняття захисту цивільних прав та охоронюваних законом інтересів.

Розглянута правова модель медіації, а також підходи до побудови структури медіації та медіаційних процесів. Проаналізовано методологічні засади регулювання медіації та їх реалізацію у сьогоденні. Визначено сфери застосування медіації. Змодельована модель медіації. Встановлено, що у сучасний період широко визнаним є положення та доведено, що медіація це процесс спільного врегулювання та вирішення конфліктів. Головними складовими її є певні тенденції запровадження медіації в світі, відповідні їм закономірності й, пов'язані з ними, принципи. Запровадження медіації відповідно до вимог, що випливають із розроблених закономірностей і принципів, цілком залежить від конфліктуючих сторін. Обґрунтовано, що тенденції розвитку медіаційної угоди визначаються розвитком і функціонуванням державного регулюваннята соціальними процесами в суспільстві. Але головним фактором, що впливає на запровадження медіації, є державно-правова система, яка віддзеркалює всі явища, що відбуваються у державі та за її межами.

Визначено, що медіація є тією рушійною силою, яка націлена на вирішення спорів. Оптимальною методологічною основою для визначення поняття захисту цивільних прав та законних інтересів буде така її інтегративна правова модель, що ґрунтуватиметься на захисті цивільних прав і охоронюваних законом інтересів як державно-правовому інституті, який має існувати на межі процесуального права, містити норми приватного і публічного права, а відповідно, враховувати матеріальні й процесуальні аспекти захисту цивільних прав та охоронюваних законом інтересів і охоплювати матеріальні, процедурні й процесуальні його елементи, а також поєднувати статичний і динамічний стани захисту.

Тому в державно-правовій системі потрібно розвивати й успішно застосовувати для досягнення мирного регулювання спорів.

Ключові слова: медіація, переговори, метод, позасудовий спосіб, процедура медіації, рішення суду, вирішення спорів, законність, закон.

ВНЕДРЕННЫЕ МЕДИАЦИИ В ОБЛАСТИ ГОСУДАРСТВЕННОГО УПРАВЛЕНИЯ В УКРАИНЕ

Аннотация. Статья посвящена рассмотрению основам государственно-правового регулирования медиации. Цель статьи является обзор и упорядочение сложившихся по определенному критериями в доктрине гражданского права направлений и подходов к определению понятия защиты гражданских прав и охраняемых законом интересов, освещение их разнородного и общего характера для выработки целостного представления о способах понимания этого понятия и их классификацию, а также изложения собственного видение оптимальной методологической основы для определения понятия защиты гражданских прав и охраняемых законом интересов.

Рассмотрена правовая модель медиации, а также подходы к построению структуры медиации и медиационных процессов. Проанализированы методологические основы регулирования медиации и их реализацию в настоящем. Определены сферы применения медиации. Смоделирована модель медиации. Установлено, что в современный период широко признанным является положение и доказано, что медиация это процесс совместного урегулирования и разрешения конфликтов. Главными составляющими ее есть определенные тенденции внедрения медиации в мире, соответствующие им закономерности и, связанные с ними, принципы. Введение медиации в соответствии с требованиями, вытекающими из разработанных закономерностей и принципов, полностью зависит от конфликтующих сторон. Обосновано, что тенденции развития медиационной соглашения определяются развитием и функционированием государственного регулюваннята социальными процессами в обществе. Но главным фактором, влияющим на внедрение медиации, является государственно-правовая система, которая отражает все явления, происходящие в государстве и за ее пределами.

Определено, что медиация является той движущей силой, которая нацелена на решение споров. Оптимальной методологической основой для оп-

ределения понятия защиты гражданских прав и законных интересов будет такая ее интегративная правовая модель, основываться на защите гражданских прав и охраняемых законом интересов как государственно-правовом институте, который должен существовать на грани процессуального права, содержать нормы частного и публичного права, а соответственно, учитывать материальные и процессуальные аспекты защиты гражданских прав и охраняемых законом интересов и охватывать материальные, процедурные и процессуальные его элементы, также сочетать статический и динамический состояния защиты.

Поэтому в государственно-правовой системе нужно развивать и успешно применять для достижения мирного регулирования споров.

Ключевые слова: медиация, переговоры, метод, внесудебный способ, процедура медиации, решение суда, решения споров, законность, закон.

Formulation of the problem. The relevance of the topic is due to the need for further development of mediation in the society in the context of the tasks that are put forward in the system of state-legal regulation. Pursuant to Article 124 of the Constitution, it is stated that the law may stipulate a mandatory pre-trial procedure for resolving a dispute. At the same time, the mediation procedure remains unresolved in the Ukrainian legislation, but the practice of mediation through disputes is gradually being extended to a voluntary basis.

At the present stage of the development of the state-legal system in Ukraine the problem of introducing mediation in Ukraine is of particular importance.

An important manifestation of the responsibility of the modern state is compliance with guarantees and fulfillment of the social obligations towards the citizens. Ensuring that the principles of mutual understanding and voluntariness are fulfilled, such assistance means providing equitable decisions and identifying needs in the interests of the legitimate interests of any person or representation.

Analysis of the recent research and publications. Various aspects of government, legal and social analysis in their works covered the domestic and foreign scholars and practices: O. Horetsky, T. Volina, R. Fisher, V. Yuri, A. Zalar, E. Romanenko, I. Zhukova, V. Butenko, B. Marsh, O. Khmaruk.

Highlighting previously unresolved parts of the common problem. Despite the considerable interest in the development of mediation in the field of mediation, the role and place of these services in the government guarantees and obligations remains insufficient.

Formulation of the objectives (goal) of the article. The goal of the article is to determine the role and place of mediation in the government guarantees and obligations to the citizens.

Presentation of the main material. In the Ukrainian legal system the non-judicial, as well as the pre-trial means of dispute settlement are mostly formal. At the same time, the traditional incli-

nation of Ukrainians to settle disputes in the courts leads to the fact that many such disputes that could be resolved in the pre-trial or extrajudicial manner are considered in the courts. In turn, this overloads the judicial system, leads to huge budget expenditures on its maintenance, delaying the hearing of cases. Pursuant to Article 124 of the Constitution it is stated that the law may stipulate a mandatory pre-trial procedure for resolving a dispute.

At the same time, the mediation procedure remains unresolved in the Ukrainian legislation, but the practice of disputes through mediation is gradually being extended to a voluntary basis.

Thus, there is a public demand for the adoption of the relevant law on mediation, whereby the Constitution of Ukraine allows to establish a mandatory pre-trial procedure for the settlement of a dispute through mediation.

For Ukraine this method is new and not widespread in comparison with other countries. And although the mediators in Ukraine are already in operation, there is no law governing this activity.

In Ukraine the courts make judgments based on the principle of legality, while at the same time, the principle of fairness is secondary to them. That is why in practice the decision of the Ukrainian court is widespread — legal but not fair. The European Court of Human Rights (ECHR) has repeatedly stressed in its application against Ukraine that the court's decision must be not only legal but also fair. And this decision is clearly visible in all the decisions. In particular, this is more clearly seen in Ukraine. Recently, they have become more active in applying the case law of the European Court of Justice, because 3–4 years ago, when judges heard that a lawyer was referring to the ECHR case, it was unclear to them. No "Why" was reported.

Especially if the lawyers referred to the decision of the European Court of Justice not of Ukraine, but of another country while applying the English language rulings.

Mediation works less with law — it is the sphere of responsibility of the lawyers, and more — with justice: whether this or that decision is in the interests of the persons, whether such persons will be satisfied with the result obtained, and, importantly, whether the parties' decision can be really fulfilled. If the judiciary were to move in this direction, it would substantially increase the efficiency of the judiciary and bring it closer to day-to-day justice.

Mediation is a mediation process that helps the conflicting parties reach a consensus — finding a mutually beneficial solution for the both sides. An independent agent who helps to find such a solution is a mediator. And mediation itself is based on three principles: voluntariness, confidentiality, independence and neutrality of the mediator.

Thus, there is a public demand for the adoption of the relevant law on mediation, whereby the Constitution of Ukraine allows to establish a mandatory pre-trial procedure for the settlement of a dispute through mediation. For example, the global experience of such leading countries as Germany, the United Kingdom, the United States and most European countries has repeatedly confirmed that the demand for this alternative method of dispute resolution is widespread in practice.

There are several advantages to mediation. As Oleh Horetsky notes, such popularity of mediation is caused by a number of reasons: "Firstly, the speed and timeliness of the resolution of disputes is high, because, because of the overloaded judicial system, some cases sometimes have to wait for more than one year and the resolution of the dispute loses its relevance. Secondly, mediation allows the parties to resolve the conflict by reducing litigation costs. Another advantage is that the parties to the conflict have the opportunity to focus on the main aspects of the resolving issues. The experience of the European countries shows that mediation can be used not only to resolve a dispute that has already been referred to a competent court, but is also useful in order to maintain normal relations in the future" [1].

The application of mediation can be found in the administrative proceedings. It will save time and budget allocated to the litigation support, as well as increase its efficiency and effectiveness.

Thus, mediation is a promising area for the development of Ukrainian administrative justice.

Advantages of mediation for the state:

- unloading of the judicial system;
- unloading of the enforcement service of the court decisions;
- reducing the level of corruption.

Advantages of mediation for the ordinary Ukrainians:

- economic interest;
- process control;
- a jointly developed solution that satisfies the parties.

The classics of negotiations Roger Fisher and William Yuri suggest that the idea is that when you get to a dead end, "you should go out to the balcony" to put yourself in the place of another, but there is one more element. From your "imaginary balcony" you should look down at the both sides of the negotiation, instead of looking across the table at another parliamentarian who is on the same level.

The mental "exit to the balcony" can reduce the level of emotional involvement enough to look at what exactly impedes the progress of the negotiations both on your part and on the opposite [2].

Mediation can be seen in a broader sense than the pre-trial stage or product marketed. This is an opportunity to look at things through the eyes of the observer from the "imaginary balcony", which will help competently and civilly solve almost any family, work or social problem. An opportunity to build relationships, save money and improve the emotional climate in the organizations. It is a competence that, unlike the legal component of the rights and responsibilities, in its informal form, can always and everywhere bring benefit and quality.

The main principles of mediation:

- willingness of all the parties to participate in the process and the opportunity to leave it at any time;
- equality of the parties;
- neutrality of the mediator;
- confidentiality of the process.

These principles and their proper understanding by the mediator and the participants in the process contribute to the effective use of mediation in many areas of life and business.

The mental "exit to the balcony" can reduce your emotional involvement

enough to look at what is hindering the progress of the negotiations, both on your part and the other way around.

Mediation is one of the alternative ways of resolving disputes the effectiveness of which is extremely high in all the countries where this institution is established.

We will not talk about the procedure, stages of implementation, order, principles of mediation. To "not drag it out", let us just say — we need mediation. Moreover, the prerequisites for its existence in Ukraine are provided by the institutions of the amicable settlement and out-of-court settlement of disputes of the Civil Procedure Code, the Commercial Procedural Code, separate provisions of the Laws "On International Commercial Arbitration", "On Arbitration Courts" and "On the Procedure for the Settlement of Labour and Collective Disputes", as well as the Criminal and Criminal Procedure Code, which provides for reconciliation of the victim and the offender in certain categories of cases.

Mediation in Ukraine: what are the benefits?

Among the main benefits of mediation are:

• Efficiency;

• Confidentiality of the parties in resolving the conflict situation;

• Saving the time, effort and money to settle a dispute through litigation;

• Psychological factors (removal of the emotional tension and possibility of further cooperation);

• The analysis of the experience of other countries is also overwhelmingly positive.

Therefore, the question that arises is: what problems may arise when implementing mediation in the legal system of Ukraine?

Problems of implementation of mediation:

1) Who will be the mediator?

This problem has two aspects.

FIRSTLY, the requirements for the applicants — the presence of higher education, age, experience, special education.

SECONDLY, the presence of legal knowledge.

Some scholars believe that legal education is not necessary for a mediator. However, the conflict is considered to be settled only after the mediation agreement has been concluded. Only a lawyer will be able to explain to the parties the requirements of the current legislation, as well as the possible consequences of the mediation procedure (terms of court proceedings, possibility of appeal and cassation appeal, problems of execution of the court decision) and the expediency of its conduct.

2) Cases in which mediation is possible. Mediation is used in civil, commercial, labour, family disputes. Discussion is the issue of administrative cases (since the party is always a public administration body that is not inherently dispositive in legal relations) and criminal. In them mediation cannot be part of a lawsuit.

3) Payment, responsibility, independence. The issues of remuneration of the mediator (who and where to pay depends on the "state/non-state" status of the mediator), his responsibility, independence and impartiality, etc., also remained unresolved.

4) Mediation in Ukraine: the absence of law. Most of these problems

would be addressed by the draft law, but the law itself is the biggest problem. There are currently several alternative bills "On Mediation" in Ukraine that address these issues to some extent. In particular, bills define the concept of mediation differently. The requirements for obtaining the status of a mediator in the draft laws differ. As for the scope of mediation in Ukraine, the both documents refer to civil, economic, administrative, labour and family disputes. Criminal cases in situations stipulated by the current legislation. The draft laws contain the provision that the conclusion by the parties of the conflict (litigation) of the agreement on mediation is a ground for stopping the proceedings at the time of mediation in accordance with the procedure established by the law. On the one hand, adopting the law "On Mediation" would be a clear advantage. This would increase confidence in the mediation process and establish common vectors for its development.

In the report of an international mediator, Governmental Advisor Bill Marsh, prepared with the support of the Ukrainian international partners and the National Association of Mediators of Ukraine, B. Marsh believes that the obligation of mediation as such is not possible. At the same time, at the law level, it would be nice to:

• empower the courts to propose or invite the parties to use mediation;

• ensure that judges are properly trained in mediation;

• oblige the courts to place mediation information on premises and the court staff to know where to find a mediator (for example, from a list of accredited service providers).

Another international expert — the former Slovenian Minister of Justice, Judge Ales Zalar — proposes to introduce funding for the judicial mediation schemes, to give courts the power to develop and implement mediation programs, to provide for automatic referral of the parties to certain categories of cases.

In the report he stressed the impossibility of completely forced mediation due to low efficiency, over-regulation and high cost.

Also, A. Zalar proposes to expand the range of options for electing a mediator to include in the list of the parties' choice of a dispute, the election and appointment of a mediation provider, a court appointment. And if you already attach mediation to court, the foreigner insists on the need to regulate the ratio of mediation and the limitation period [3].

Vadym Butenko, Deputy Chairman of the Council of Judges of Ukraine, commented on the need to pay attention talking about the introduction of the mediation institute "First of all, it should be a regulatory act that will determine the requirements for the mediation procedure and the mediator himself. ...In spite of the peculiarity of the mediation procedure, in which the parties independently reach the necessary decision, the role of the leader of this process is crucial" [3]. On July 27, 2019, the President of Ukraine Volodymyr Zelensky authorized the Justice Minister Pavel Petrenko to sign the UN Convention on International Agreements on mediation disputes settlement. The corresponding decree № 239/2019-рп is published on the website of the Head of the State.

"To authorize the Minister of Justice of Ukraine Petrenko Pavel Dmytrovych to sign on behalf of Ukraine the United Nations Convention on International Agreements on the Settlement of Disputes by Mediation" [4]. On August 7, 2019, the United Nations Convention on International Agreements on the Results of Mediation, the Singapore Convention, was signed in Singapore. The Ministry of Justice of Ukraine, with the participation of the National Association of Mediators of Ukraine, has done a great job in preparing this Convention for signature by Ukraine.

As is known, the legal force of a mediation agreement is one of the determining factors in deciding the parties to a dispute to seek mediation or litigation.

An agreement on the results of mediation may remain unfulfilled due to objective (significant changes in the financial position, other economic factors, changes in legislation, changes in management or owners of a legal entity, poor definition of the terms and procedure of fulfillment of obligations in the agreement concluded by the results of mediation, etc.) and subjective factors (change by the party of its position on the resolution of the dispute). The implementation of mediation agreements with the international element is complicated by the presence of the parties and/or the subject of the dispute in various jurisdictions.

Therefore, the Convention provides for the obligation of the states-parties to the Convention to enforce international mediation agreements in accordance with the national procedural law and in accordance with the conditions laid down in the Convention.

The following aspects are mentioned separately:

1. The Convention refers to agreements that result from mediation and are concluded in writing by the parties to resolve a commercial dispute that is international at the time of its conclusion (the Convention defines the term "international").

2. The Convention shall not apply to mediation agreements concluded in disputes relating to private, family and domestic relations, or in disputes in matters of family, hereditary and employment law.

3. According to Paragraph 1, Article 3 the Convention will not be subject to agreements that:

• have been approved by the court or concluded during the trial; that may be enforced as a judgment in the state where the court is located;

• having the status of arbitration decision;

4. Article 4 of the Convention provides for certain requirements for an agreement on the results of mediation, since in order to enforce the latter the party must bring to court:

• mediation agreement signed by the parties; confirmation that the agreement was concluded as a result of mediation (signature of the mediator on the agreement);

• a document on the fact of mediation, signed by a mediator; a certificate from the institution that administered the mediation process, or other evidence of mediation).

5. It is necessary to distinguish between mediation and settlement agreements.

Given that settlement agreements can be concluded not only in the media-

tion process, but in the process of other peaceful methods of dispute settlement (negotiation, reconciliation), the authors of the text stressed that the Convention will apply only to agreements concluded as a result of mediation.

The certified business-mediator, Partner of DecisionLab, Olha Khmaruk, explained Mind under what conditions you can apply for mediation under the Singapore Convention.

In order to apply for mediation, the disputes and agreements must meet the criteria set out in the Convention, in particular:

• the dispute must be international, that is, at least two parties to the transaction are doing business in different countries, or parties originating in a country other than that in which a substantial part of the obligations or subject matter of the transaction is closely related;

• the dispute should be in the sphere of economic relations, that is, the rules of the Convention do not apply to agreements on the results of consumer mediation, where one of the parties is an individual (consumer), as well as family, hereditary and labour law disputes;

• the agreement on the results of the mediation should be made in writing, that is why electronic communication would also be appropriate to establish the content of the parties' agreements;

• the mediator must confirm the application of the mediation procedure, in particular by signing the agreement, or issue a written confirmation.

According to Integrites lawyer Anastasyia Ilyashenko, the consumers of mediation considered it to be a major drawback of the absence of "coercion", as compared to courts or arbitration.

"There are many benefits to recourse to mediation. But its main drawback compared to courts or arbitrations has always been the lack of "coercion". Of course, the principle of mediation is voluntariness. However, if the other party refuses to comply with the agreement (for objective or subjective reasons) for any reason, it is impossible to recognize the agreement. This stopped many potential participants in mediation. The situation was complicated even when one side was abroad", — the expert said.

According to Ilyashenko, these problems are solved by the Convention. It will provide the participants in the mediation process with a certain guarantee that, if something goes wrong, each party has an additional tool.

"As a result, one of the biggest benefits will be the ability to recognize a mediation agreement in other countries. After all, the Ukrainian parties will now be able to recognize and execute mediation agreements concluded with resident parties in other states-parties to the Convention. This is a significant bonus for the Ukrainian business" [5].

The Convention will also have an impact on changes in the Ukrainian legislation. One of the consequences for the state is the need to adopt domestic legislation that should regulate mediation in the state. Therefore, those states that do not have mediation legislation will have an incentive to develop and implement it if they are interested in resolving international disputes through mediation [6].

Conclusions. When introducing a mediation institute into Ukrainian

law, foreign experience must be considered and taken into account. Because in many countries the regulations governing mediation relations have been implemented for a long time and have gone through a process of implementation through various disputes.

In the stages of realization and implementation by the state of the international state norms of mediation in the legislation of Ukraine it is necessary to use consistent actions aimed at introducing the mediation procedure into the legislation of Ukraine.

The following stages of mediation implementation are highlighted:

• fulfillment of the obligations by the state in the framework of the international agreements;

• development and implementation of the state policy in the field of mediation;

• creation of a regulatory framework by adopting a special Law of Ukraine "On Mediation";

• legalization of the activity;

• "provision of mediation services" and profession "mediator" by amending the relevant legislation;

• introduction of a register of mediators;

• conducting seminars, roundtables, conferences to disseminate information on the mediation process to the legal community and the population as an alternative way of settlement/resolving a conflict/dispute.

In order to ensure the successful development and effective functioning of the mediation institute in Ukraine it is necessary to use a comprehensive approach to build a mediation model and to consolidate the legal status of mediation.

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