EUROPEAN STANDARDS OF MEDIATION IN CIVIL DISPUTES AND THEIR IMPLEMENTATION IN UKRAINE: THEORY AND PRACTICE

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Abstract: The purpose of the article is to determine the state and prospects for the introduction of mediation as an alternative way of resolving legal disputes in the judicial procedure in Ukraine. The European Court of Human Rights in its decisions has repeatedly pointed out the imperfection of judicial protection in Ukraine, especially paying attention to such problems of the Ukrainian judicial system as insufficient legal certainty, failure to comply with reasonable time limits for considering cases, limitation of the right to access to court, insufficient observance of the principles of independence and impartiality of court. Therefore, the introduction of new alternative methods of resolving legal disputes in Ukraine, one of which is mediation, should become an integral part of the national mechanism for protecting the rights and freedoms of the individual.

Keywords: European standards, Labor disputes, Legal disputes, Mediation, Protection of rights and freedoms.

1 Introduction

The European judicial system remains for Ukraine a “beacon” of reforming justice in order to improve its quality and accessibility. However, this year the countries of the European Union were obliged to reduce the role of courts in resolving disputes. Until May 21, 2011, all EU member states were forced to implement regulations to fulfill the provisions of the European Parliament Directive “On Certain Aspects of Mediation in Civil and Commercial Disputes” dated May 21, 2008. Reconciliation, carried out with the participation of an independent mediator, is seen as a full-fledged alternative to the courts [1].

Domestic and international experience shows that the introduction of alternative methods of dispute settlement along with the justice system is an effective prerequisite for resolving legal disputes. Today, the justice system in Ukraine has some shortcomings: a high workload of courts, the length and complexity of the trial, significant court costs, insufficient development of the mechanisms of adversariality and equality of parties in the process, publicity of the trial, which leads to cases of disclosure of confidential information, etc. Now business representatives and participants in disputes choose not only arbitration as one of the methods of alternative dispute resolution, but also mediation, which implies the involvement of a mediator to resolve the dispute.

In Ukraine, the discussion on the benefits of mediation was updated after the registration of the draft law “On Mediation” (No. 8137) on February 21. Among the main advantages of the methodology, there is the ability to resolve the conflict, taking into account the interests of both parties. Mediation does not make a decision – it is like a civil law agreement between the parties, where each of them gets what it wants. The effectiveness of such a method is always higher than winning in court, because the principle of “win-lose” presupposes that someone puts up with their mistake [4].

It should be noted that even critics consider mediation an important innovation, but they see a lot of shortcomings in the existing project. An example is the conclusions of the Supreme Administrative Court of Ukraine, the Supreme Court of Ukraine and the Main Scientific and Expert Department of the Supreme Council of Ukraine. The following remarks are the most important: there is no prohibition to make decisions regarding third parties; release from the responsibility of criminals bypassing the Criminal Code is possible; the norms of the project can lead to the legalization of violations in the field of land relations.

2 Literature Review

A number of issues related to the mediation procedure in the judicial system of Ukraine have repeatedly been the subject of research by many foreign and domestic scientists. At the same time, the updating of procedural legislation provided for the introduction of new conciliation procedures that are associated with mediation, and, therefore, require additional research.

Mediation, as a pre-trial dispute resolution process, has many advantages for parties as opposed to litigation. First, the participants control the negotiation process [9]. Mediation can be carried out in the manner and under the conditions determined by the parties in agreement with the mediator. In particular, the parties have the right to make proposals on the procedure for conducting mediation, provide the necessary information, declare the need to participate in mediation of third parties, initiate an individual conversation with the mediator, participate in the discussion of the proposals put forward, form a range of issues requiring discussion, express their opinion and position on the disputable situation.

Secondly, confidentiality is an advantage. All information regarding the mediation process is confidential and cannot be disclosed without the consent of the party that provided it. The parties and the mediator are not entitled to refer to such information during the court session, as well as to disclose it in any other way [3].

Third, it saves time and money for the business. [29] The parties to the mediation do not need to spend money on legal costs (which can be significant amounts), the involvement of specialists (for carrying out expert examinations, the cost of which in some cases may be more than the amount of the claim), payment for the services of lawyers [2, 6-8]. The expenses of the parties to the mediation are limited to the payment of the mediator's remuneration, the amount of which is determined by agreement between the parties and the mediator and is fixed in the agreement on the use of mediation.

Fourth, non-standard and flexible solutions [5]. The parties to the mediation are not limited either by the subject of the dispute or by the stated requirements at the beginning of the mediation. The only limitation in mediation is the desire and willingness of the parties to discuss certain aspects of the conflict. In mediation, there is no need to try to “fit” the options for resolving the conflict within the original requirements [13, 23-26]. Thanks to this, it is possible to achieve non-standard solutions, depending on the specific case. The parties can discuss options for getting out of the conflict until they find a way that best suits their interests. This option, if the parties agree, forms the basis of the mediation agreement [41].

It should be noted that mediation is traditionally defined as a negotiation process in which the parties involve a third party or persons in order to provide them with assistance in the amicable settlement of disputes arising from or related to contractual or other legal relations [32-35]. Over the past decades, mediation has become widely used by most countries in the world. It is considered as the most progressive form of informal settlement of individual legal disputes. At the same time, world practice considers mediation not only as a definite alternative to resolving legal conflicts and disputes, but also as a part of the judicial system as a whole [41].

Unlike litigation, which is clearly regulated and formalized, mediation provides an opportunity for a flexible approach to resolving the conflict, taking into account all aspects of the disputed situation [21]. Mediation is guided by the principles of absolute voluntariness, and the parties to mediation independently determine the procedure for carrying out this procedure. A number of norms of international law indicate the advisability of introducing the mediation procedure into civil proceedings in Ukraine: recommendations of the Council of Europe "On Mediation in Civil Cases", "On Family Mediation", "Green Book" on alternative settlement of disputes in civil and commercial law of the Commission of the European Commonwealth, Model UNISRAL Law on International Commercial Conciliation Procedure with guidelines for its implementation and application, etc. At the same time, in Ukraine, the mediation procedure is still not regulated at the legislative level, which significantly complicates its use in practice.

3 Materials and Methods

The concepts of introducing mediation into the national defense system envisage several approaches. Thus, according to the program of the European Union and the Council of Europe "Transparency and efficiency of the judicial system of Ukraine", mediation should become an integral part of the judicial procedure. For this purpose, as an experiment in individual courts of Ukraine, for several years, mediation has been used in the consideration of administrative, economic, and civil cases [28]. Representatives of another concept consider mediation as an independent way of resolving legal conflicts, which exists autonomously and functions in parallel with the judicial process. There is an opinion that mediation in no case can be an element of the national civil process, if only because the principles of its organization and conduct do not correspond to the principles of civil procedural law [37]. Thus, civil proceedings are subject to the requirements of the procedural form, which is characterized by imperativeness, clear definition of the content and sequence of procedural actions that are performed by the participants in the process, documenting almost every procedural action, etc. [5].

Mediation is carried out on the basis of absolute voluntariness. The parties to the mediation independently determine the procedure for carrying out this procedure; the mediator can only establish the mediation procedure when there is no agreement between the parties to the dispute on this matter. From the point of view of the science of civil procedural law, namely judicial mediation raises a number of legal issues that require additional settlement [19].

4 Results

Recent changes in civil procedural legislation (new version of the Civil Procedure Code of Ukraine dated 03.10.2017), aimed at increasing the efficiency of civil proceedings and bringing it in line with international norms and standards, provide for a number of novelties, including the possibility of settling a civil dispute with the help of a judge [5, 10]. However, the question of the correlation between the dispute settlement procedure with the participation of a judge and mediation arises. According to the norms of civil procedural legislation (Article 201 of the Civil Procedure Code of Ukraine), the procedure for resolving a dispute with the participation of a judge is carried out by agreement of the parties by the beginning of the proceedings on the merits. The court issues a resolution on such actions, which at the same time suspends the proceedings [3].

The settlement of the dispute with the participation of a judge is carried out in the form of general closed meetings or separately with each participant. The parties also receive the right to participate in such meetings via videoconference. Such actions must be carried out within a reasonable time, but not more than thirty days from the date of issuance of the relevant resolution [31]. The possibility of repeated carrying out of the mentioned procedure is also excluded.

In the science of civil procedural law, there is an opinion that the settlement of a dispute with the participation of a judge should be considered as an independent model of mediation, the so-called "judicial mediation", integrated into the judicial system of Ukraine [11]. Moreover, supporters of this idea demonstrate several approaches to understanding this type of mediation. According to the first approach, the judge must directly carry out the mediation procedure under the conditions provided for by the national procedural legislation [44-48]. Another approach to judicial mediation refers to the procedures that are carried out in accordance with the recommendations or decisions of the judge after the acceptance of the relevant case, as well as mandatory pre-trial procedure by virtue of the requirements of the law. It should also be noted that the program document "Integration of mediation into the judicial system of Ukraine" identifies the following types of judicial mediation: voluntary mediation with the participation of a mediator judge and a dispute settlement procedure with the participation of a judge.

The first type of mediation assumes that judges undergo training in facilitation mediation, which allows them to act as mediators, separating the functions of a judge and a mediator. In this case, the case must be transferred from one judge to another, who acts as a mediator and conducts the mediation procedure in a special mediation room.

The second type of conciliation procedures is mediation with the participation of a judge in whose proceedings the case is. Such a procedure was launched within the framework of the Ukrainian-Canadian project to reform the judicial system of Ukraine and was called "negotiating the pre-trial settlement of a dispute with the help of a judge." In the original version, the model allowed the judge, who was involved in the settlement of the dispute, to make a decision on the case. There is also an opinion, which is fully supported by the author, that the settlement of a dispute with the participation of a judge is not mediation at all, but is a separate procedure that differs significantly from the classical model of mediation [30].

5 Discussion

Among the characteristic features that distinguish the procedure for settling a dispute with the participation of a judge, experts single out the following: implementation by the judge in whose proceedings the case is; the possibility of settling the dispute before starting the decision on the merits; implementation of the settlement process within a reasonable time, but not more than thirty days from the date of the decision to conduct it [27]. The difference between the settlement of a dispute with the participation of a judge from mediation is also indicated by the fact that the powers of a judge include the opportunity to offer the parties a way of peaceful settlement of the dispute (part 4 of article 203 of the Code of Civil Procedure of Ukraine); in closed meetings, the judge has the right to draw the attention of the parties to judicial practice in similar disputes, to propose to the party and/or appropriate representative possible ways of peaceful settlement of the dispute (part 5 of article 203 of the Code of Civil Procedure of Ukraine); if the parties conclude an amicable agreement - to accept it (clause 4 of part 1 of article 204 of the Code of Civil Procedure of Ukraine); in case of failure to reach agreement by the parties, the case is transferred to another judge (part 4 of article 204 of the Code of Civil Procedure of Ukraine).

Also, the draft Law of Ukraine "On Mediation" dated December 17, 2015, contains a number of fundamental provisions indicating a clear difference between the concepts under study. In particular, a mediator can be a specially trained mediator who assists the parties to the conflict (dispute) in its settlement through a structured negotiation process. At the same time, the procedure for resolving a dispute with the participation of a judge, prescribed by the Code of Civil Procedure, does not provide for the involvement of a trained (certified) mediator judge.

The norms of the project correspond to the order accepted all over the world: the dispute is referred to mediation after the conclusion of the mediation agreement by the parties or by the

court before the decision is made [12]. A mediator can be an individual who, at the time of the conclusion of the mediation agreement, turned 21 years old, has undergone special training in the relevant areas in Ukraine or abroad and has received a certificate or other document confirming the completion of such training (at least 40 hours). Let us note that Article 12 requires certification of a mediator by special non-governmental organizations operating in Ukraine, but there are no provisions on the need, and all the more so the procedure for certification of these organizations. This approach is consistent with foreign experience [36].

Excessive regulation will lead to the fact that the Cabinet of Ministers of Ukraine will approve the training program, draw up a list of organizations, and then license them [42]. This does not guarantee quality. In civilized countries, the market itself selects the best.

According to Article 19 of the draft law, the mediator is not only prohibited from imposing a decision on the settlement of the conflict on the parties to mediation, but it is even prohibited to provide legal advice, expert opinions, or other advice on the subject of the conflict or the possible results of its resolution. Lawyers see this as a limitation of the mediator's rights to resolve the conflict. However, the authors of the bill, introducing such a prohibition, aimed to eliminate the subjective factor from the reconciliation procedure [38]. Although the mediator may offer the parties to suspend the mediation in order to carry out additional preparatory actions or to attract the necessary specialists, in addition, the mediator has the right to help the parties to the mediation formulate the content of the agreement on the results of the mediation in accordance with the decisions made by the parties. The role of the mediator is minimal. He only helps the parties in the dialogue process to prioritize interests and to formulate “on paper” the thoughts expressed by the parties themselves [14, 15, 17].

A positive effect is expected primarily in relation to the unloading of ships. True, at the same time, the bill presupposes new grounds for legal claims: due to the mediator's provision of poor-quality services (Article 13) and failure to comply with the agreement on the results of mediation within the allotted time (Article 24). However, the experience of mediation in the UK shows that the parties rarely go to court on these grounds. After all, if citizens have reasons to doubt the success of mediation, then they, as a rule, terminate the procedure before the conclusion of an agreement. The advantages of mediation include the fact that the parties do not need to spend money on the services of lawyers for the preparation of claims and on representing the interests of the parties in court [16].

A positive effect from mediation will be obtained if these services are provided at the proper level. Who will monitor the quality – parties, mediator associations, or the state? The project leaves the issue of quality to the discretion of the parties: they can go to court if they are dissatisfied with the services [49-51]. Since reconciliation is a public function, control by the state is mandatory. It would be logical to delegate these powers to the Ministry of Justice as the central body responsible for legal policy [43]. The Ministry of Justice must approve the standards and rules for the professional activity of mediators, developed by the organizations of mediators. In the current version of the project, the developers themselves have the right to approve these documents. According to the authors of the project, even the issue of payment for mediation should be regulated by the market.

The bill on mediation claims to be an alternative to processes arising from civil, economic, family, labor, criminal and administrative disputes. There are no contradictions here. As for mediation in the criminal sphere, its application should be limited to certain categories of cases – crimes of minor severity or with the participation of minors. However, this is not spelled out in the project itself [19].

The fact that the mediation procedure is applicable for resolving administrative disputes is evidenced by the accumulated experience, including domestic experience. Vinnytsia District Administrative Court and Donetsk Administrative Court of Appeal since 2009 have been participating in the Council of Europe project on the introduction of alternative methods of dispute resolution. According to experts, disputes regarding the dismissal of civil servants, as well as in the case of complaints from citizens when receiving information from state bodies, are successfully resolved. In the Netherlands, mediation is widely used to resolve tax disputes. In Germany, mediators helped to resolve large-scale conflicts when territorial communities opposed construction projects that pose a threat to the environment.

As an example of the positive development of mediation, we can cite several countries in which mediation is used by business representatives to resolve disputes at the level of litigation and is enshrined in specific regulatory legal acts. Speaking of the statutory regulation of mediation, for example, in the United States of America, as early as 1981, California became the first state in which mediation was proposed to resolve disputes related to child custody [27]. Non-disclosure of confidential information is very important for Americans. In the United States, more than 250 statewide privacy and privilege rules govern the question of what information can be disclosed in the mediation process without fear of further dissemination. For this purpose, the Uniform Mediation Act was developed. With regard to the European practice of introducing mediation, Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, approved in 2008, provides for the implementation of the norms in the legislation of the member states. This directive establishes the basic principles for the conduct and implementation of the mediation procedure in the national legislation of the EU member states. However, successful foreign experience undoubtedly needs to be adapted taking into account domestic legal traditions.

With the adoption by the Verkhovna Rada of Bill No. 3665 as a basis, discussions continue whether the institution of mediation will be able to find its place in the legal plane of Ukrainian national legislation. Back in 2013, the Verkhovna Rada registered bill No. 2425-1 “On Mediation”, but in 2014 the bill was withdrawn. In 2014, Ukraine signed an Association Agreement with the European Union. According to Article 1 of the Agreement, Ukraine and the EU should strengthen cooperation in the field of justice, freedom and security in order to ensure the rule of law and respect for human rights and fundamental freedoms. The countries of the European Union agreed that ensuring the rule of law and better access to justice should include access to both judicial and non-judicial methods of dispute resolution [5].

Later, by the Decree of the President of Ukraine No. 276/2015 of 20.05.2015, the Strategy for reforming the judiciary, legal proceedings and related legal institutions for 2015-2020 was approved. In accordance with clause 5.4 of the values of the Strategy, it is envisaged to expand the methods of alternative (out-of-court) settlement of disputes (including through the practical implementation of the institution of mediation and mediation). As of today, the Verkhovna Rada of Ukraine has registered several drafts of the Law “On Mediation”, but the adoption of the law continues [18].

Now in the Verkhovna Rada two bills are presented - No. 3665 and No. 3665-1. Both have a number of shortcomings, but Bill No. 3665 has already been adopted in the first reading. It should be noted that the draft law No. 3665 does not clearly regulate the issues of organizing the professional activity of mediators and their professional training. In particular, the conclusion of the Main Expert Directorate states that it is necessary to prohibit the participation in mediation of employees of local government bodies, judges and other employees of the judicial authorities, officials of the prosecutor's office, notaries, etc.

In draft No. 3665, it would be advisable to more clearly define the issues of the legal status of mediators and the legal grounds for their activities (in particular, whether they are subjects of

entrepreneurial activity, etc.). For example, in Article 8 of the draft law, it would be necessary to describe in more detail the list of circumstances that make it impossible for the neutrality of the mediator, and the consequences of the mediator's failure to comply with the prohibition on participation in mediation of disputes in which he has a personal interest [20]. Although the draft law contains provisions on the neutrality of the mediator, based on their content, they are only formal in nature. It is not clear how such neutrality can be checked, and also how, in case of revealing the facts of abuse of neutrality by the mediator, to withdraw his mediation [39].

According to the draft, mediation can be used in any disputes, including civil, family, labor, economic, administrative, as well as in criminal proceedings and cases of administrative offenses. An important aspect of the bill is that its provisions provide for the responsibility of the mediator [21]. The mediator is responsible for violation of the requirements of the law on mediation, the rules of ethics of mediators, any contractual obligations regarding the parties to mediation.

A party to mediation who believes that material or moral damage has been caused by illegal actions or inaction of the mediator may file a complaint with the organization that provides mediation, the association of mediators, as well as with the court for the protection of their legal rights and interests. On the one hand, this is a positive moment, because such provisions make it clear who is responsible for violation of the mediation procedure. However, the bill for some reason provides for the responsibility of only the mediator, but not the parties to the dispute [22]. On the other hand, such provisions may lead to overregulation of the institution of mediation. At the same time, the responsibility of the parties is not established, for example, in the case of disclosure of confidential information [40]. Also, after the adoption of the draft law in Ukraine, it is planned to create a register of mediators. The register will include information about the mediator (education, information on the preparation of a person as a mediator, information about the organization that carried out the training, the number of hours of preparation, as well as other information that will help the parties choose a mediator for a particular case). In accordance with the provisions of the law, the parties to the dispute will be able to independently choose a mediator. This procedure is somewhat similar to the procedure for choosing an arbitrator in the dispute settlement process by arbitration.

6 Conclusion

Mediation should become an integral part of the judicial procedure in Ukraine. However, it is more appropriate to see it as a separate alternative procedure for resolving legal conflicts, which can be used in preparing a case for trial, as well as at other stages of the civil process. Now the draft law No. 3665 is being finalized for the second reading, but the proposed provisions for the future law will already be able to ensure the effective and high-quality development of mediation in Ukraine. However, it should not be forgotten that today (without a valid law) mediation in Ukraine is often used as a way to reconcile the victim and the offender, to protect consumer rights, to resolve labor and family disputes [5].

An indicator of the effectiveness of mediation in Ukraine is the very implementation of the agreements reached during mediation by the parties. According to statistics, only about 20% of decisions reached as a result of mediation are not implemented. Mediation is voluntary.

If the parties agree to settle the dispute through mediation, this means that they are ready to fulfill the agreements reached by them [28]. After the adoption of the law, the only obstacle to the rapid development of mediation in Ukraine may be a low level of knowledge about mediation among ordinary citizens and in the business environment, which may give rise to distrust of such a procedure. Mediation in Ukraine is not as unrealistic as it might seem, but it is necessary to go the way of defining this procedure at the legislative level.

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