APPLICATION OF MEDIATION FOR SETTLEMENT OF ADMINISTRATIVE DISPUTES IN UKRAINE

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Abstract. The need to introduce the institution of mediation in the domestic legal system is based on the positive results of the practical application of the institution of reconciliation in many countries around the world, which indicates its effectiveness. The use of an alternative, non-judicial way of resolving disputes, particularly, mediation, will provide an opportunity to solve the problem of court congestion.

The article is devoted to the research of the introduction of the practice of settling administrative disputes through the mediation procedure in Ukraine.

The problematic issues that need to be regulated in the legislation have been identified, that are principles and procedure for conducting mediation: from its initiation to the moment of termination; the legal status of the mediator, particularly, the conditions for acquiring the status of a mediator, the content of his rights and obligations, liability for violation of the law on mediation, as well as the categories of disputes in which it can be used.

The feature of administrative proceedings is that one of the parties in the dispute is the subject of power. Thus, the feature of alternative dispute resolution, in particular mediation, in administrative proceedings is the peaceful settlement of relations between a state agency, on the one hand, and with a natural or legal person, on the other. There are several possibilities for legalization of the status of a mediator: the first is the implementation of mediation by professional independent mediators (for example, members of a professional association of mediators); the second is judicial mediation: or the settlement of a dispute with the participation of a judge. The issues of determining the categories of cases in which mediation can be used, in particular administrative disputes, remain unresolved. Resolving these issues will help expand the practice of mediation in the settlement of administrative disputes.

Keywords: mediation, administrative dispute, administrative court, conciliation, mediation agreement.

INTRODUCTION

Unlike many foreign countries, where the practice of mediation is more than a decade old and has been regulated, in Ukraine there is no special legal act that would define the concepts, principles, procedure for mediation, from its initiation to termination, legal status of a mediator (conditions for acquiring such a status, rights and responsibilities, liability for violation of the law on mediation), as well as the categories of disputes in which it can be used.

In today's world, mediation is used mainly in resolving civil law and commercial law disputes.

After all, such disputes usually arise between equal subjects, who can choose different options for resolving the conflict. The questions of the possibility and expediency of introducing mediation in resolving administrative disputes are more debatable. This is due to the fact that one of the parties to the dispute is a public authority endowed with power, which should act only within the limits clearly defined by law. Therefore, finding a compromise between the conflicting parties is more difficult than in civil or commercial disputes. It should be noted that there is no consensus on the possibility of using mediation to resolve administrative disputes, neither among practitioners nor among scholars. At the same time, determining the possibility of using mediation in the administrative process is important not only theoretically but also practically, which determines the relevance of the search. The use of an alternative, non-judicial method of resolving disputes, including mediation, will provide an opportunity to solve the problem of court congestion.

MATERIALS AND METHODS

Some aspects of the disclosure of the essence and benefits of mediation were covered in the works of: Bogutskiy P.P. (Bogutskiy, 2015), Belinska O.V. (Belinska, 2011), Bondarenko-Zelinska N.L. (Bondarenko-Zelinska, 2012), Kanarik U.S. and Kostyuchenko A.M. (Kanarik and Kostyuchenko, 2017), Mazaraki N. (Mazaraki, 2017), Podkovenko T. (Podkovenko, 2017).

Problematic issues of introduction of mediation in resolving administrative disputes were investigated in the works: Sereda O.G. (Sereda, 2017), Panura U.V. and Yaroshuk Y.V. (Panura and Yaroshuk, 2018), Rostovskaya K.V. and Grishina N.V. (Rostovskaya and Grishina, 2020), Shinkar T.I. (Shinkar, 2018).

The purpose of the article is to summarize the scientific provisions and theoretical review of the legal regulation of the institution of mediation in the judiciary of Ukraine, particularly, the possibility of its application in resolving administrative disputes.

RESULTS AND DISCUSSION

In world practice, mediation is one of the most popular forms of alternative ways of reconciling conflicting parties. Unlike litigation, mediation is not limited to the subject matter of the dispute, but takes into account the underlying causes of the conflict. Mediation is

a type of alternative dispute resolution, a method of resolving disputes involving a mediator, who helps the parties to the conflict to establish a communication process and analyze the conflict situation so that they can choose the solution that would meet the interests and needs of all parties. It makes it possible to avoid wasting time in court proceedings and additional and unforeseen material costs.

At present, Ukraine is only at the stage of forming a model of mediation, but the need to introduce the institution of reconciliation (mediation) is supported by a wide range of specialists. Such support is based, first of all, on the positive results of the practice of applying the institution of reconciliation in many countries of the world, which testify to its effectiveness. In addition, it corresponds to the general position of Ukraine on the harmonization of national legislation with the legislation of the European Union. Thus, the use of mediation in administrative relations is expressed in Recommendation Rec (2001) 9 of the Committee of Ministers of the Council of Europe to member states on alternatives to litigation between administrative authorities and private parties.

On August 7, 2019, the Minister of Justice of Ukraine signed on behalf of Ukraine the United Nations Convention on International Agreements on the Settlement of Disputes on Mediation (Singapore Mediation Convention). In order to ratify and implement this Convention, Ukraine needs to adopt a special law that will define the main provisions, particularly, on the scope of mediation, the procedure for its conduct and the status of mediators.

Despite the fact that Ukraine has not yet adopted a separate law regulating legal relations in the sphere of mediation, the current legislation already has a basis for its introduction, particularly, it is the institution of conciliation in procedural law and dispute resolution with the participation of a judge – Art. Art. 201 – 208 of the Civil Procedure Code, Art. Art. 186 – 193 of the Commercial Procedure Code, Art. Art. 184 – 190 of the Code of Administrative Procedure of Ukraine. In addition, Art. Art. 45, 46 and 66 of the Criminal Code of Ukraine determine the grounds for release from criminal liability in connection with effective repentance and reconciliation of the perpetrator with the victim, as well as mitigation of punishment. St. Art. 468 – 476 of the Criminal Procedure Code of Ukraine provide for the implementation of criminal proceedings on the basis of agreements.

In addition, the Strategy for Reform of the Judiciary, Judiciary and Related Legal Institutions for 2015-2020, which was approved by the Decree of the President of Ukraine of May 20, 2015 № 276/2015, among the measures to increase the efficiency of the judiciary, proposes to introduce: “expanding ways alternative (out-of-court) settlement of disputes, in particular, through the practical introduction of the institution of mediation and mediation, expanding the list of categories of cases that can be decided by arbitrators or considered by courts in summary proceedings; introduction of effective procedural mechanisms to prevent the consideration of cases in the absence of a dispute between the parties; study of the expediency of the introduction of justices of the peace”.

Given the importance and practical necessity of the institute of mediation in Ukraine on February 15, 2020 in the first reading was adopted as a basis the bill „On Mediation” from 19.05.2020 № 3504. The draft provides the following definition of „mediation” – a voluntary, extrajudicial, confidential, structured procedure, during which the parties with the help of a mediator (mediators) try to resolve the conflict (dispute) through negotiations.

The bill proposes to determine the legal framework and procedure for mediation in Ukraine. Thus, the mediation procedure will be used in any conflicts (disputes) that arise, in particular, from civil, family, labor, economic, administrative relations, as well as in criminal proceedings when concluding reconciliation agreements between the victim and the suspect, accused and in other areas public relations.

It is envisaged that any natural and legal person will be able to apply to a mediator for mediation, both in court, arbitration, international commercial arbitration, and in court, arbitration or arbitration proceedings or in the execution of a court decision, arbitration court or international commercial arbitration.

But it is necessary to clearly define which administrative disputes can be resolved through mediation. Article 19 of the Code of Administrative Procedure of Ukraine defines cases in public law disputes covered by the jurisdiction of administrative courts.

Thus, mediation may not be used in disputes concerning legal relations related to the electoral process or the referendum process, as well as in disputes between subjects of power over the exercise of their competence in the sphere of governance, including delegated powers. In turn, the mediatable can include: disputes over the admission of citizens to public service, its passage, dismissal from public service; disputes of individuals or legal entities with the subject of authority to appeal its decisions (regulations or individual acts), actions or omissions, except when the law establishes a different procedure for consideration of such disputes.

The 3d Article of the bill stipulates that mediation will be conducted by mutual consent of the parties to the mediation, taking into account the principles of voluntariness, confidentiality, independence and neutrality of the mediator, impartiality of the mediator, self-determination and equality of rights of the parties.

The principle of voluntariness means that participation in mediation is a voluntary expression of the will of the parties to mediation.

The principle of confidentiality. Confidential is all information related to mediation, in particular about the proposal and readiness of the parties to the conflict (dispute) to participate in mediation, facts and circumstances that became known during mediation, judgments and proposals of the parties to mediation to resolve the conflict (dispute), the content of the agreement according to the results of mediation. None of the parties to mediation, the mediator, other participants in mediation, as well as the organization providing mediation, have the right to disclose information concerning mediation without the written consent of the parties to mediation. If the mediator has received information concerning mediation from one of the parties, he may disclose such information to the other party only with the consent of the party that provided such information. The parties to the mediation, the mediator, and other participants in the mediation shall be liable under the law or the mediation agreement for the disclosure of information concerning the mediation without the written consent of the parties to the mediation.

The principle of independence and neutrality. During mediation, the mediator as a neutral third party must be independent of the parties to the mediation, public authorities, local governments, their officials and officials, and other individuals and legal entities.

The principle of impartiality of the mediator. The mediator must be an impartial person who helps the parties to the conflict (dispute) to communicate, reach an understanding and negotiate. The mediator has no right to resolve the conflict (dispute) between the parties to the mediation or to encourage the parties to make a specific decision on the merits of the conflict (dispute).

The principle of self-determination and equality of rights of the parties to mediation. The parties to mediation independently choose a mediator (mediators) or an organization that provides mediation.

The parties to the mediation independently determine the list of issues under discussion, options for resolving the conflict (dispute), the content of the agreement based on the results of mediation, terms and methods of its implementation, other issues related to the conflict (dispute) and mediation. Other participants in mediation may provide advice and recommendations to the parties to the mediation, but the decision is made exclusively by the parties to the mediation. Mediation is carried out on the basis of equality of the parties. The parties to mediation should be treated equally, and each should be given equal opportunities to express their position. The mediator's obligations must be the same for all parties to the mediation.

The bill defines certain requirements for a person who has expressed a desire to be a mediator. Thus, a mediator can be an individual who has a higher education and has undergone basic training in the field of mediation in Ukraine or abroad.

Therefore, it should be a person who has a higher education, but does not specify the field of education (psychology, law, etc.) and the level of education (junior bachelor, bachelor, master). It is separately determined that a mediator cannot be a person who has an outstanding or outstanding criminal record, recognized by a court as having limited legal capacity or incapable. The parties to mediation, state bodies and local self-government bodies may set additional requirements for the mediators they involve or use, including their age, education and work experience. Associations of mediators and organizations that provide mediation may set additional requirements for mediators, which they include in their registers.

As rightly noted by Bogutskiy P.P., mediation is designed to promote justice and for this purpose contains all the possibilities of procedural and procedural nature. However, currently mediation contains many risks, among which corruption risks are almost the first. The successful solution of the issue of mediation in Ukraine should be facilitated by the figure of a mediator, which needs special attention, because the future of this legal institution in our society will depend on the training and selection of mediators (Bogutskiy, 2015).

It is noted that training in the sphere of mediation will be at least 90 hours of mediator training, including 45 hours of practical training, and will include theoretical knowledge and practical skills on the principles, procedures and methods of mediation, legal regulation of mediation, ethics of mediation, conduct negotiations and settlement of conflicts (disputes). Training in the sphere of mediation will be provided by educational institutions, as well as organizations providing mediation, associations of mediators, business entities of any form of ownership and organizational and legal form, which have the right to provide services in the sphere of mediation or organize their provision accordingly to the legislation.

Registers of mediators will be able to maintain associations of mediators, organizations that provide mediation, as well as public authorities and local governments that involve mediators or whose services they use. Thus, the bill does not provide for a single register of mediators.

The bill also proposes to define the rights and obligations of the mediator and the parties to mediation, the procedure for mediation, as well as the requirements for the mediation agreement and the agreement on the settlement of the conflict (dispute) based on the results of mediation.

Thus, the basic rights of a mediator are defined: 1) to determine the methodology of mediation independently with the requirements of the legislation on mediation, the rules of mediation and ethics of the mediator; 2) receive from the parties to the conflict (dispute) information about such conflict (dispute) to the extent necessary and sufficient for mediation; 3) conduct its activities on a paid or unpaid basis, individually or together with other mediators, form associations of mediators; 4) for reimbursement of expenses incurred for the preparation and conduct of mediation, as well as for remuneration in the amount and form provided for in the mediation agreement and / or the rules of mediation; 5) refuse to conduct mediation for ethical or personal reasons; 6) collect and disseminate depersonalized information on the number, duration and effectiveness of mediations conducted by him; 7) have other rights provided by law, the mediation agreement or the rules of mediation.

The main responsibilities of a mediator include: 1) performing their duties in accordance with the Law, adhering to the principles of mediation, the rules of mediation and the ethics of the mediator; 2) not to disclose information received by him in connection with the mediation; 3) inform the mediation parties before and during the mediation about the circumstances that may raise reasonable doubts about its independence and impartiality, conduct mediation only with the written consent of all parties to the mediation and in accordance with their internal conviction that they adhere to the principles of independence and impartiality; 4) terminate mediation in case of conflict between the personal interests of the mediator and his responsibilities, which may affect his impartiality and neutrality during mediation, as well as in the presence of other circumstances that prevent his participation or require termination of his participation in mediation; 5) inform the parties and other participants in mediation about their rights and responsibilities, principles and rules of mediation, the possibility of obtaining advice from relevant specialists (experts), the consequences of concluding an agreement on mediation and / or agreement on mediation in writing or orally, professional experience and competence of a mediator; 6) manage mediation; 7) constantly improve their professional level; 8) at least once a year on a free basis to provide mediation services, in which one of the parties is a person under the jurisdiction of Ukraine, if his average monthly income does not exceed two subsistence minimum, calculated and approved in accordance with the law for persons, who belong to the main social and demographic groups of the population, or a person with a disability who receives a pension or assistance granted in lieu of a pension, in an amount not exceeding two subsistence minimums for disabled persons, in case such persons apply to a mediator; 9) perform other duties provided by law.

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According to Shinkar T.I. alternative ways of resolving a dispute, in particular in administrative proceedings, may be used in the following order: 1) settlement of a conflict (dispute) without recourse to an administrative court with a claim for resolution of a public law dispute; 2) settlement of the conflict (dispute) using alternative methods, including mandatory pre-trial participation of the parties in dispute settlement procedures; 3) after the beginning of the trial – until the court makes a decision in the case. Instead, if there are relevant provisions in the legislation, alternative procedures may also be used in the process of enforcing a court decision in a dispute. (Shinkar, 2018).

CONCLUSIONS

Thus, the study allows us to draw the following conclusions. The first steps towards the introduction of the practice of resolving administrative disputes through recourse to mediation in Ukraine have been taken. The provisions of the bill of Ukraine „On Mediation” dated 19.05.2020 № 3504 are analyzed confidential information that became known during the mediation. However, the issues of determining the categories of cases in which mediation can be used, in particular administrative disputes, remain unresolved. Resolving these issues will help expand the practice of mediation in the settlement of administrative disputes.

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