THE ROLE OF AN ATTORNEY-AT-LAW IN OUT-OF-COURT DISPUTE RESOLUTION: MEDIATION AS AN ALTERNATIVE TOOL FOR PROTECTING INTERESTS

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Summary

The article is devoted to the analysis of mediation as a modern out-of-court, effective tool for dispute resolution and improvement of relations between parties to legal relations and the role of an attorney-at-law in the application of such a tool. Today, in the context of a full-scale war and russia's armed aggression against Ukraine, which has put the Ukrainian statehood, including the judicial system, in a difficult position, the issue of mediation is more relevant than ever, since this out-of-court procedure allows resolving conflict situations between parties to legal relations with minimal involvement of the judiciary.

Mediation as an alternative dispute resolution procedure has become widespread in many countries around the world, including the United States and developed countries of the European Union.

The author relates the beginning of the development of the mediation procedure in Ukraine to the adoption of the Law of Ukraine 'On Mediation' No. 1875-IX dated 16 November 2021 (hereinafter – the Law on Mediation), which entered into force on 15 December 2021. In the author's opinion, it was from that moment on that the attorney-at-law, as a person engaged in professional representation of interests, had another obligation – to critically examine the prospects for protecting the client's interests both in court and out of court (alternative) procedures.

The results of the study confirm the importance and effectiveness of mediation as an out-of-court tool in the hands of a lawyer in conflict resolution.

Key words: agreement, conflict resolution, mediability of a dispute, mediator, out-of-court procedure, professional representation.

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1. Introduction

Mediation, as a process of amicable dispute resolution with the help of a neutral third party, has ancient roots and is an important part of the legal systems of many countries. The term 'mediation' itself comes from the Greek medos ('neutral', 'independent of a party') and mediare ('to mediate a dispute') *(Kirdan, O., 2019, 15).*

When researching the origins of the mediation institution, scholars find proto-images of mediation in ancient civilisations such as Ancient Egypt, Mesopotamia, Greece and Ancient Rome. For example, in Ancient Egypt, people in conflict often turned to elders and priests to resolve disputes based on moral and religious norms. In Mesopotamia, along with the application of the Laws of Hammurabi, there was a practice of 'fixing' disputes through reasonable agreements, where claims could be settled through discussion and the use of testimony from

third parties who were not directly involved in the conflict but had knowledge of laws and social norms. Thus, although Mesopotamian laws were harsh, many disputes were resolved through negotiations and peace agreements.

In ancient Rome, mediation was further developed due to the high level of organisation of the legal system. The Romans created special institutions that included procedures for the peaceful resolution of disputes through mediators who acted as 'arbitrators', helping to resolve issues that arose between citizens and ensuring fairness and balance. Roman jurists such as Gaius, Papinian and Ulpian described processes that could be interpreted as mediation, where parties used the help of impartial individuals to reach a compromise without the need to go to court. The Romans used different terms to describe the concept of a mediator – intenuncius, medium, intercessor, philantropus, interplator, conciliator, interlocutor, interpres, and finally mediator *(Besehmer, K., 2004, 176).*

We believe that mediation as a form of dispute resolution emerged much earlier than the formalised judicial system, as its roots go back to ancient times when communities and tribes used informal ways to resolve conflicts to maintain social harmony. However, in our opinion, given the development of law and the trend towards formalisation of procedures, the judicial procedure for dispute resolution has become more widespread in the future.

The modern approach is to understand mediation as an alternative tool for resolving a legal dispute through voluntary communication between the conflicting parties with the participation of a mediator.

We partially agree with the approach of the scholar Slyva L.V. to defining the features of the out-of-court conflict resolution procedure (voluntariness, participation of an independent mediator, confidentiality, flexibility), which is based on the legislatively enshrined definition of mediation, we argue that at the current stage of development of mediation processes in Ukraine, this procedure is not sufficiently structured *(Slyva, L. V., 2018, 123).* Currently, the procedure depends on the methods and tools used by a particular mediator.

2. The role of a barrister in mediation

Based on the legal definition of mediation (Article 1(4) of the Law of Ukraine 'On Mediation'), the mediator's task is to prevent or resolve a conflict (dispute) through negotiations. In other words, the mediator's intentions are not to satisfy the interests of any of the parties, but to resolve the conflict.

Given the basic principles of mediation, a mediator is neutral and independent of any of the parties to the dispute, and therefore cannot a priori protect the individual interests of the parties. The mediator's task is to ensure conditions for effective communication between the parties to the dispute, in which the parties can hear each other, trust each other and rationally seek common solutions to the existing conflict. Investigating the interests of each party to the conflict is a crucial stage of mediation, which allows the parties not only to expand the field of possible agreements, but also to better understand the motives of the other party and to understand the reasons for its behaviour.

In such realities, the role of an advocate as a person who should be guided only by the interests of his or her client is of particular importance. Traditionally, advocates, when defending the interests of one of the parties to a conflict, find themselves in a situation in which each party does its best to prove that its position is the only true, correct and possible one. This is due to the opposition of the parties' positions, which may indeed be contradictory and mutually exclusive at first glance, which usually leads to an escalation of the conflict. The introduction of an

out-of-court dispute resolution method, on the one hand, provides an additional tool for satisfying the client's interests, and on the other hand, should lead to a rejection of the categorical approach inherent in the 'classical' algorithm of a lawyer's work with a conflict *(Haro, H., 2020, 40)*.

We suggest that the following functions of an attorney-at-law in mediation should be distinguished:

– consultative, which consists of: informing the client about the mediation process, its advantages and limitations, which allows the client to make an informed choice about participation in mediation, explaining the client's legal position and prospects for consideration of his/her case in court, taking into account the current case law, determining the interests (needs) behind the positions stated by the client;

– negotiation, which consists in: facilitating the achievement of an agreement without emotional conflicts and without violation of ethical standards, protecting the client's interests not only before the other party, but also before the mediator;

– psychological support, which consists in reducing emotional stress and focusing on constructive conflict resolution;

– legal assistance, which consists of legal support at the stage of agreement, which means both legal formalisation of the mediation agreement and further enforcement.

3. The place of mediation in the defence strategy

In view of the amount of atypical work that an attorney-at-law has to do in the course of preparing and conducting mediation, it is advisable to determine the grounds for using mediation in defending the client's interests.

In our opinion, the following are sufficient grounds for using mediation as an alternative to litigation:

– cost reduction. Mediation avoids lengthy and expensive court costs (especially in property disputes), reduces the cost of attorneys' fees and other legal services (forensic examinations, participation of interpreters, valuation procedures), which reduces the financial burden on the client;

– prevention of escalation of the conflict between the parties and the possibility of maintaining long-term relationships. Often, the existence of a legal dispute between the parties (for example, in commercial or family disputes) does not lead to the termination of legal relations between them, and therefore reducing tension and maintaining positive relations in resolving the dispute between the parties may be the main task.

– confidentiality. The use of mediation means that any circumstances of the dispute, details of the conflict, will not be reflected in the court decision and will not be disclosed, which may be important for the business reputation of the parties. The mediator, other participants in the mediation, and the entity providing the mediation may not disclose confidential information unless otherwise provided by law or unless all parties to the mediation agree otherwise in writing. Moreover, a mediator may not be questioned as a witness in a case regarding information that became known to him or her during the preparation for and conduct of mediation (Article 6 of the Mediation Law);

– Flexibility and adaptability. Mediation allows the approach to be tailored to the specific circumstances of the case, making the dispute resolution process more flexible and suitable for complex situations where standard judicial methods may be less effective.

– Legal relations between the parties are characterised by the presence of a foreign element. Participants in private law relations with a foreign element choose mediation as a tool

that allows them to simplify the process of resolving a dispute between persons from different countries. In this case, mediators must take into account the cultural and business characteristics of the parties to reach a consensus.

At the same time, we agree with the galaxy of scholars who divide disputes depending on their mediaability. Referring to the definition proposed by A. Bitsai, we understand mediability as the property of a legal conflict that allows it to be settled directly by the parties to the conflict during the mediation procedure *(Bitsai, A. V., 2016, 82).*

For example, not all administrative disputes, contrary to the provisions of Article 47(5) of the Code of Administrative Procedure of Ukraine, can be settled through mediation. For example, disputes between individuals or legal entities and a public authority regarding appeals against decisions, actions or inaction of such a body do not currently appear to be mediable, which should be taken into account by an attorney-at-law when developing a strategy for protecting interests.

4. Conclusions

Thus, we argue that mediation as a method of dispute resolution predates the judicial system and all known ancient civilisations mention the use of mediation to resolve conflicts. In modern conditions, the Ukrainian legislator's attention to this procedure is driven by globalisation processes that facilitate Ukraine's integration into the international community and require the introduction of modern approaches to dispute resolution.

Mediation, as one of the most effective alternatives to court proceedings, is in line with global trends and contributes to the adaptation of national legislation to European standards. Governmental and non-governmental international organisations, including the United Nations, actively promote mediation. For example, the UN Convention on International Settlements Concluded by Mediation (Singapore Mediation Convention 2018), developed by UNCITRAL, is an important tool for promoting the recognition and enforcement of mediation agreements between parties from different countries.

In our opinion, in connection with the adoption of the Law of Ukraine ‘On Mediation’ No. 1875-IX, the lawyer has an obligation to critically assess the prospects for protecting the client's interests in court and in an out-of-court (alternative) procedure. When preparing a legal position, an attorney-at-law is obliged to analyse a number of circumstances, such as the subject matter of the dispute between the parties to the conflict, their goals (desired outcome), the presence or absence of a need to maintain long-term relations, the cost of the court procedure in the event of a potential court dispute (the amount of court fees and other court costs) and, depending on the information received, offer the client the best way to resolve the dispute. Thus, the introduction of mediation has enabled lawyers not only to resolve conflicts, but also to reduce the escalation of disputes, facilitate consensus and maintain long-term relationships between the parties. In the author's opinion, mediation procedures in disputes with public authorities should be subject to a separate study and legislative regulation, since currently, it is impossible to resolve disputes with these entities through mediation.

In general, we consider the introduction of mediation as an additional dispute resolution tool at the legislative level to be a positive trend. This not only facilitates Ukraine's integration into the European legal space, but also ensures the efficiency, cost-effectiveness and adaptability of dispute resolution mechanisms, especially in the context of the growing complexity of modern legal relations.

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