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SOME ASPECTS OF MEDIATION AS AN ALTERNATIVE WAY TO RESOLVE CIVIL LAW DISPUTES DURING MARTIAL LAW IN UKRAINE

Abstract. Purpose. The purpose of the article is to study some aspects of mediation as an alternative way to resolve civil law disputes during martial law in Ukraine. **Results.** The article studies some aspects of using mediation as an alternative way to resolve civil law disputes during martial law in Ukraine. Mediation should be considered as the promptest, easiest way to resolve civil law disputes in order to protect violated, unrecognised or disputed rights, freedoms or interests of individuals, rights and interests of legal entities, in particular during the period of martial law in Ukraine. Mediation may be conducted both before going to court and during court proceedings or enforcement of a judgment. The author emphasises that if a party or a third party declaring independent claims regarding the subject matter of the dispute is a member of the Armed Forces of Ukraine or other military formations established in accordance with the law, which are transferred to martial law or involved in the anti-terrorist operation before the expiration of the term of such serving, according to the Civil Procedure Code of Ukraine, the court shall suspend the proceedings, and therefore the parties to such a civil dispute have the right to resolve it through mediation. It is proposed to unify the concepts of "mediation agreement" and "agreement on mediation" in the Law of Ukraine "On Mediation". It is noted that the legislation does not impose any restrictions on the conclusion of the above agreements (contracts) during martial law in the state. In this regard, the parties to a civil dispute (conflict) have the right to apply to a mediator and conclude the above agreements (contracts). **Conclusions.** Due to the introduction of martial law in Ukraine, some rights of citizens are legally restricted, in particular, in terms of protection of violated, unrecognised or disputed rights, freedoms or interests of individuals, rights and interests of legal entities. In this regard, mediation is one of the promptest and easiest ways to alternatively resolve a civil dispute (conflict), and the Laws of Ukraine "On the Legal Regime of Martial Law" and "On Mediation" do not provide for any restrictions on its use in civil disputes (conflicts).

Key words: mediation, concept of mediation, mediator, alternative dispute resolution, civil law dispute, mediation during martial law.

1. Introduction

With the adoption of the Law of Ukraine "On Mediation" (hereinafter referred to as the Law) on November 16, 2021 and its entry into force on December 15, 2021, Ukrainian citizens can use a relatively new method of alternative dispute resolution – mediation – in accordance with international standards and trends. Pursuant to Article 3 of the Law, mediation applies to social relations related to mediation in order to prevent future conflicts (disputes) or resolve any conflicts (disputes), including civil, family, labour, commercial, administrative, as well as in cases of administrative offenses and in criminal proceedings with the aim of reconciling the victim with the suspect (accused). We

consider civil law relations to be the largest group of relations that can be resolved through mediation. However, today the exercise of this right has specificities due to the introduction of martial law in Ukraine.

Thus, we believe that the use of mediation in civil law disputes during martial law is a relevant issue.

The purpose of the article is to study some aspects of mediation as an alternative way to resolve civil law disputes during martial law in Ukraine.

In Ukraine, mediation in civil law disputes during martial law has not been studied sufficiently. However, a number of studies are somehow related to the use of alternative dis-

pute resolution methods, in particular, the following scientific works should be mentioned: A. Antsupov, N. Atamanchuk, S. Bychkova, N. Bondarenko-Zelinska, O. Bryzhynskyi, D. Davydenko, B. Kyrdan, O. Kostiuhenko, S. Kivalov, K. Kovach, D. Kravtsov, N. Mazaraki, A. Monaienko, Y. Prytyka, V. Prushchak, S. Reznichenko, T. Shamlikashvili, A. Shypylov, and others. Therefore, we propose to analyse the specificities of mediation in resolving civil law disputes during martial law in Ukraine in more detail.

2. Formation and development of mediation

According to part 5 of Article 55 of the Constitution of Ukraine, everyone has the right to protect their rights and freedoms from violations and unlawful encroachments by any means not prohibited by law. Applying the classical approach by going to court to protect one's violated, unrecognised or disputed rights, freedoms or legitimate interests is a long process. That is why the use of alternative methods of resolving civil disputes (conflicts) is a positive step in a legal society.

The specificity of alternative dispute resolution is the use of this method of protecting rights outside of court procedures. There are a number of alternative dispute resolution methods: evaluation, negotiation, conciliation, mediation and arbitration. However, the most common is mediation, since it is during the mediation procedure that the parties independently control the process and resolve the dispute (conflict).

In Ukraine, the concept of mediation was enshrined in the legal framework only at the end of 2021, and public mentality is not yet fully aware of its scope (Kyrdan, Shyrokovska, 2022, p. 90).

In addition, there are other advantages of mediation, for example, N. Mazaraki notes that the advantages of mediation include universality, confidentiality, relative cheapness, speed of dispute resolution, high probability of reaching a mutually beneficial solution and maintaining friendly relations between the parties to the dispute, etc. (Mazaraki, p. 82).

Honcharova emphasises the advantage of mediation over court proceedings. In her opinion, first, it ensures promptness; secondly, the absence of clear procedural frameworks contributes to a free atmosphere and willingness of the parties to the conflict to cooperate; third, the decision reached by consensus is usually implemented in the future, and finally, mediation promotes communication between the parties, namely, cohesion in society in general (Honcharova, 2013, p. 133).

Moreover, some scholars believe that the development and effective implementa-

tion of mediation in Ukraine, in particular for the protection of civil rights, require focus on the procedural aspects of mediation in reconciliation of the parties to a dispute (conflict) and monitoring of the parties' implementation of the mediation agreement. It will take time to identify shortcomings and gaps in the legal regulatory mechanism for mediation in order to achieve the ultimate goal. The global experience of democratic countries is aimed at finding ways to resolve disputes. In this regard, the movement to introduce mediation has gained great support in Europe, as evidenced by a significant number of international instruments of the European Community and the Council of Europe (Kostiuchenko, Monaienko, Atamanchuk, 2022, p. 51)

According to S.S. Bychkova, the diversification of judicial and out-of-court conciliation procedures expands the possibilities of the parties to private law disputes and finds the most acceptable and optimal mechanisms, ways and means of their resolution (Bychkova, 2022, p. 270).

Under Article 1, part 1, clause 4 of the Law, mediation is an out-of-court voluntary, confidential, structured procedure during which the parties, with the help of a mediator (mediators), try to prevent or resolve a conflict (dispute) through negotiations.

In order to protect their civil rights, freedoms or legitimate interests, the legislator provides for mediation before applying to a court, arbitration court, international commercial arbitration or during pre-trial investigation, court, arbitration proceedings, or during the implementation of a court decision, arbitration court or international commercial arbitration (part 2 of Article 3 of the Law).

3. Legal and regulatory mechanism for civil law disputes

In other words, property and non-property rights that arise for legal entities and individuals as participants in civil relations are exercised by them as legally equal participants and are based on free will and property independence. This indicates the need to consolidate at the legislative level the basic legal conditions for conducting mediation procedures that do not restrict the freedom of will of the parties to the dispute, and do not violate human rights and fundamental freedoms in the process of developing and adopting a compromise decision in the case (Kostiuchenko, Monaienko, Atamanchuk, 2022, p. 51-52).

The principles of mediation not only reflect its objective properties, but also embody the subjective and objective perception of mediation by society, consider the experience of mediation in different countries, the mentality of the popula-

tion and the legal traditions of a particular state (Mazaraki, 2019, p. 247).

However, in accordance with Article 1 of the Law of Ukraine "On the Legal Regime of Martial Law", the exercise of the above rights by citizens may be restricted for a certain period. Since February 24, 2022, martial law has been introduced on the territory of Ukraine and is still in effect (Decree of the President of Ukraine No. 64/2022 "On the Introduction of Martial Law in Ukraine" of February 24, 2022 for 30 days, approved by the Law of Ukraine "On Approval of the Decree of the President of Ukraine No. 2102-IX "On the Introduction of Martial Law in Ukraine" of February 24, 2022; Decree of the President of Ukraine No. 133/2022 of March 14, 2022 "On Extension of the Martial Law in Ukraine" from March 26, 2022 for 30 days, approved by Law of Ukraine No. 2119-IX "On Approval of the Decree of the President of Ukraine "On Extension of the Martial Law in Ukraine" of March 15, 2022; Decree of the President of Ukraine No. 259/2022 of April 18, 2022 "On Extension of the Martial Law in Ukraine" from April 25, 2022 for 30 days, approved by Law of Ukraine No. 2212-IX "On Approval of the Decree of the President of Ukraine "On Extension of the Martial Law in Ukraine" of April 21, 2022; Decree of the President of Ukraine No. 341/2022 of May 17, 2022 "On Extension of the Martial Law in Ukraine" of May 25, 2022 for 90 days, approved by Law of Ukraine No. 2263-IX "On Approval of the Decree of the President of Ukraine "On Extension of the Martial Law in Ukraine" of 22.05.2022).

Under the legal regime of martial law, courts, bodies and institutions of the justice system act exclusively on the basis, within the limits of their powers and in the manner prescribed by the Constitution of Ukraine and the laws of Ukraine (Article 12-2 of the Law of Ukraine "On the Legal Regime of Martial Law"). In other words, civil proceedings are continued for the period of martial law, but according to Article 251, part 1, clause 2, of the Civil Procedure Code of Ukraine (hereinafter – the Civil Procedure Code), the court shall suspend the proceedings if a party or a third party making independent claims regarding the subject matter of the dispute is a member of the Armed Forces of Ukraine or other military formations established in accordance with the law, which are transferred to martial law or involved in the anti-terrorist operation before the expiration of the term of such serving (Article 253, part 1, clause 2, of the Civil Procedure Code of Ukraine).

In its Clarifications, the Supreme Court notes that in case of a threat to the life,

health and safety of court visitors, court staff, and judges, decisions shall be made promptly to suspend the proceedings of a particular court. If the court has not ceased to conduct legal proceedings, litigants have the opportunity to apply for a postponement of the consideration of cases in connection with military operations and/or for consideration of cases by video conference using any technical means, including their own (Clarification of the Supreme Court regarding the specificities of the administration of justice in the territory where martial law has been imposed, 2022). Therefore, there are risks of restrictions on access to justice. Settlement of a civil dispute with a mediator in accordance with the Law does not have any restrictions on the exercise of such rights. In addition, the parties may resolve their civil disputes without the territorial jurisdiction requirements of the Civil Procedure Code of Ukraine.

One of the grounds for the legitimacy of confirming an alternative resolution of a civil dispute (conflict) through mediation is the conclusion of an agreement. However, the legislator in Article 1, part 1, clauses 1, 3, of the Law provided for the conclusion of: 1) an agreement on mediation, the subject matter thereof is the provision of mediation services, the parties to which are the parties to the civil dispute (conflict) and the mediator; 2) mediation agreement – a written agreement between the parties to legal relations on the method of settlement of all or certain conflicts (disputes) that have arisen or may arise between them through mediation. The legislator also provides for the possibility of concluding a mediation agreement in the form of a mediation clause in a contract or in the form of a separate agreement. As a general rule, a mediation clause in a contract is drawn up in a separate clause, section or paragraph in the contract concluded by the parties to provide legal certainty regarding the actions of each party in the event of conflicts (disputes) between them regarding the performance of a contractual obligation that is the subject of the contract concluded between them, and a mediation agreement in the form of an independent document that sets forth the parties' agreement to mediate (Kostiuchenko, Monaienko, Atamanchuk, 2022, p. 53).

Analysing the legislative construction of the concept of "mediation agreement", we can advocate scholars who consider it as a type of transaction or civil law contract which may be embodied in: 1) the basis for the emergence, change and termination of social relations; 2) a certain action that has the relevant features; 3) dynamic relations during the existence of contractual relations; 4) a document as a form of manifestation of socially significant behav-

our; 5) a means of realising the legal personality of the participants in the mediation procedure; 6) a way to achieve a legally significant result of this type of alternative form of dispute resolution (Makovii, 2021, p. 102; Kostiuhenko, Monaienko, Atamanchuk, 2022, p. 54).

In addition, we agree with the opinion of scholars who consider it appropriate to unify the terms in the Law. For example, the Law currently divides mediation agreements into two groups of contracts. One group of agreements is aimed at establishing mediation relations and their support at various stages of mediation (agreement between the parties to the dispute on their consent to mediation and agreement on mediation between the parties to the dispute and the mediator). The second group of agreements concluded in connection with the resolution of a civil dispute (conflict) or mediation are mediation agreements (Ohrenchuk, 2016, p. 184). In this regard, we propose to exclude the concept of "agreement" in the text

of the Law and replace it with the concept of "contract".

It should be noted that the analysed legislation does not impose any restrictions on the conclusion of the above agreements (contracts) during martial law in the State. In this regard, the parties to a civil dispute (conflict) have the right to apply to a mediator and conclude the above agreements (contracts).

4. Conclusions

Due to the introduction of martial law on the territory of Ukraine, certain rights of citizens are legally restricted, in particular, in terms of protection of violated, unrecognised or disputed rights, freedoms or interests of individuals, rights and interests of legal entities.

In this regard, mediation is one of the promptest and easiest ways to alternatively resolve a civil dispute (conflict), and the Laws of Ukraine "On the Legal Regime of Martial Law" and "On Mediation" do not provide for any restrictions on its use in civil disputes (conflicts).

References:

- Bychkova, S.S. (2022). Protsesualni formy prymyrennia v Ukraini: praktychni aspekty. Prymyrni protsedury v tsyvilistychnomu protsesi: teoriia i praktyka (notariat, sud, advokatura, vykonavche provadzhennia) [Procedural forms of reconciliation in Ukraine: practical aspects. Conciliation procedures in the civil process: theory and practice (notary, court, advocacy, executive proceedings)]. Kyiv: Alerta (in Ukrainian).
- Honcharova, H.S. (2013). Myrova uhoda ta mediatsiia: zahalni rysy ta vidminnosti mizh nymy [Settlement and mediation: common features and differences between them]. *Pravo ta innovatsii – Law and innovation*, 4, 126–136 (in Ukrainian).
- Kostiuchenko, O.Ie., Monaienko, A.O., Atamanchuk, N.I. (2022). Mediatsiia yak forma zakhystu tsyvilnykh prav [Mediation as a form of protection of civil rights]. *Nove ukrainske pravo – New Ukrainian law*, 1, 49–56 (in Ukrainian).
- Kyrdan, B., Shyrokovska, O. (2022). Zarubizhnyi dosvid pravovoho rehuliuвання mediatsii yak sposobu vrehuliuвання sporiv [Foreign experience of legal regulation of mediation as a method of dispute settlement]. *Yurydychnyi naukovyi elektronnyi zhurnal – Legal scientific electronic journal*, 1, 89–92 (in Ukrainian).
- Makovii, V.P. (2021). Pravova pryroda mediatsiinykh uhod [Legal nature of mediation agreements]. *Pivdenoukrainskyi pravovyi chasopys – South Ukrainian legal*, 1, 99–103 (in Ukrainian).
- Mazaraki, N.A. (2019). Teoretyko-pravovi zasady zaprovadzhennia mediatsii v Ukraini [Theoretical and legal foundations of the introduction of mediation in Ukraine]. *Doctor's thesis*. Kyiv (in Ukrainian).
- Ohrenchuk, H.O. (2016). Pravove rehuliuвання zastosuvannia mediatsii pry vyreshenni tsyvilnopravovykh sporiv [Legal regulation of the use of mediation in resolving civil disputes]. *Candidate's thesis*. Kyiv (in Ukrainian).
- Roziasnennia Verkhovnoho Sudu shchodo osoblyvosti zdiisnennia pravosuddia na terytorii, na yakii vvedeno voiennyi stan: vid 4 berez. 2022 roku [Clarification of the Supreme Court regarding the specificities of the administration of justice in the territory where martial law has been imposed from March 4, 2022]. (2022). *supreme.court.gov.ua*. Retrieved from <https://supreme.court.gov.ua/supreme/pres-centr/news/1261727/> (in Ukrainian).

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ДЕЯКІ АСПЕКТИ ЗАСТОСУВАННЯ МЕДІАЦІЇ ЯК АЛЬТЕРНАТИВНОГО СПОСОБУ ВИРІШЕННЯ ЦИВІЛЬНО-ПРАВОВИХ СПОРІВ ПІД ЧАС ВОЄННОГО СТАНУ В УКРАЇНІ

Анотація. Мета. Метою статті є дослідження деяких аспектів застосування медіації як альтернативного способу вирішення цивільно-правових спорів під час дії воєнного стану в Україні.

Результати. Статтю присвячено дослідженню деяких аспектів застосування медіації як альтернативного способу вирішення цивільно-правових спорів під час воєнного стану в Україні. Медіацію слід розглядати як найшвидший, найпростіший спосіб вирішення цивільно-правових спорів з метою захисту порушених, невизнаних або оспорюваних прав, свобод чи інтересів фізичних осіб, прав та інтересів юридичних осіб, зокрема у період дії воєнного стану в Україні. Проведення медіації може бути здійснено як до звернення до суду, так і під час судового провадження або виконання рішення. Акцентовано увагу, що у зв'язку з перебуванням сторони або третьої особи, яка заявляє самостійні вимоги щодо предмета спору, у складі Збройних сил України або інших утворених відповідно до закону військових формувань, що переведені на воєнний стан або залучені до проведення антитерористичної операції до закінчення строку такого перебування відповідно до ЦПК України, на суд покладено обов'язок зупинити провадження, у зв'язку з чим у сторін такого цивільно-правового спору є право вирішити його за допомогою медіації. Запропоновано уніфікувати поняття в Законі України «Про медіацію» щодо «медіаційної угоди» та «договору про проведення медіації». Зазначено, що законодавством не встановлено під час дії воєнного стану в державі жодних обмежень щодо укладання вище вказаних договорів (угод) не встановлено. У зв'язку з чим сторони цивільно-правового спору (конфлікту) мають право звернутись до медіатора та укласти вказані вище договори (угоди). **Висновки.** У зв'язку із запровадженням на території України воєнного стану деякі права громадян на законних підставах вимушено обмежені, зокрема, у частині захисту порушених, невизнаних або оспорюваних прав, свобод чи інтересів фізичних осіб, прав та інтересів юридичних осіб. У зв'язку з цим одним із найшвидших і найпростіших способів альтернативного вирішення цивільно-правового спору (конфлікту) є медіація, жодних обмежень до застосування якої у цивільно-правових спорах (конфліктах) у законах України «Про правовий режим воєнного стану» та «Про медіацію» не передбачено.

Ключові слова: медіація, інститут медіації, медіатор, альтернативні способи вирішення спорів, цивільно-правовий спір, медіація під час воєнного стану.

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