



## PROSPECTS OF DEVELOPMENT OF THE MEDIATION MODEL IN UKRAINE ON THE EXAMPLE OF SOME POST-SOVIET UNION REPUBLICS (BELARUS, MOLDOVA, GEORGIA)

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**Abstract.** *Alternative dispute resolution (ADR) is a group of processes through which disputes and conflicts are resolved without recourse to the formal judicial system. These include: negotiation, arbitration and mediation. Mediation is an alternative method of resolving disputes with the involvement of a neutral third party - a mediator. Mediation has been used successfully in many European countries and has proven to be an effective method of settling disputes. However, each country has taken its own authentic path to the introduction and promotion of mediation. Despite the fact that mediation has existed in Ukraine for more than twenty years, we remain at the beginning of the path of development and implementation of this alternative method of dispute resolution. Mediation has not yet become a common method of resolving conflicts in our society, moreover, some participants in conflicts are unaware of the existence of such a method or have a misconception about where and when mediation can be used. Like many countries where mediation is already a mandatory pre-trial procedure, Ukraine has faced a number of challenges in implementing this alternative method of conflict resolution. Research on these issues and obstacles to the implementation of mediation in Ukraine will facilitate its rapid implementation. A comprehensive and in-depth study of all the positive and negative factors that have accompanied the introduction of alternative dispute resolution methods in other countries will allow to avoid mistakes, strengthen the positive aspects and influence the negative factors. Therefore, the article will consider models of mediation development in some post-Soviet countries to find the most optimal way of development in this direction for Ukraine.*

**Key words:** *mediation model, mediation process, development of mediation in Ukraine.*

**JEL Classification:** *K10; K30; K40; K41.*

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### Introduction

Mediation... More than a decade before, the notion "mediation" was completely new to most of ordinary citizens and was just known in narrow professional communities, mainly among moderators, judges, lawyers, academicians etc. But in recent years, the application of mediation procedures becomes more and more popular, this notion became known and raises less questions about its essence.

The notion "Mediation" is of English origin and means "intermediary, inbetweening, reconciliation". In other words, this is the process of settlement or resolving of conflict situation between the parties. Mediation is also part of the culture of Alternative Dispute Resolution (ADR). In addition to mediation, dispute resolution procedures are negotiation, arbitration, conciliation, and neutral assessment. [1].

Although, as we have already noted, the notion "mediation" is popularized every year in our society, the process of its application in Ukraine dates back to the early 2000s.

According to the Ministry of Justice of Ukraine, experiments have been actively con-

ducted in courts since 2003 (in particular, in Kyiv, Kharkiv, Ivano-Frankivsk, etc.). There are also a number of Regional Mediation Groups in Ukraine, which have merged into the Association of Mediation Groups of Ukraine and the Ukrainian Center for Understanding, which is actively involved in the implementation of reconciliation programs for victims and offenders and educational activities in this area [2].

### Literature review

Issues of popularization and legal regulation of mediation are currently of considerable scientific interest. Thus, various issues concerning the genesis and development of mediation in Ukraine, the implementation of norms regarding the legal regulation of aspects of mediation in domestic legislation, raised in the scientific researches of Podkovenko T., Karmaza O., Mazaraki N., Gavryliuk R., Fursa S., Yasynovskyi V., Shynkar T. and others. Particular attention is paid to the efforts of scientists and practitioners to study the experience and path of the former Post-Soviet republics, and now new independent countries in the development and implementation of this phenomenon in public life.

Thus, some issues of comparing mediation



in commercial disputes in Ukraine and Georgia are covered in the papers of Frantsuz A. and Polishchuk V. [3]; the experience of the CIS countries in the issues of legal regulation of mediation in commercial disputes was studied by Polishchuk V. [4]; aspects of the mediation development in the countries of the Customs Union were raised in the work of Krasylowska Z. [5, pp.191-192] The dissertation research of Shynkar T. is aimed to improve the application of mediation in the administrative proceedings of Ukraine [6, pp.3-5].

### **Aims**

As can be seen from the above, mediation issues have been and will be of increased scientific and practical interest. The primary source of this interest lies in the opportunities that mediation and other alternative means of resolving conflicts open up to unburden of the national judicial system. At the same time, as for the beginning of 2021, even the relevant law that would regulate the provision of mediation services in the legal field has not yet been adopted in Ukraine. While in our closest neighbors - the former Soviet republics, in particular, Moldova, Belarus, Georgia, mediation is developing in the most active way. This process in these countries is accompanied not only by the adoption of special legislation, but also by number of sub-laws and executive regulations designed to further regulate special issues arising in connection with the provision of mediation services, maintaining a register of mediators, mediation training, etc. (particularly in Belarus).

Meanwhile, the above-mentioned countries not only have a common historical background with Ukraine (as they were formerly part of one big country), but also went through a similar path with us to gaining independence and fighting for a European future. This means not only peoples' revolutions and mass manifestations of distrust to the country's authorities (Georgia, Belarus), but also encroachments on the territorial integrity and existence of the occupied territories (Moldova, Georgia).

The purpose of this study is the authors' attempt to investigate the current situation with the development of the legal framework for the regulation of mediation in the abovementioned countries and the available opportunities to learn international experience in the legal recognition of mediation for Ukraine.

### **Methods**

The methods of this research include the following: the method of analysis was used in the study of the essence of the concept of "mediation" and the nature of this phenomenon; the modeling method was used during the study of models of mediation development in such countries as Belarus, Georgia and Moldova and the possibility of applying a certain model of development of this phenomenon for Ukraine. A review of legislation and scientific literature allowed the authors to clarify the features of the legal framework of mediation in the abovementioned countries, the opinions of researchers on the peculiarities of the mediation development in Ukraine.

### **Results**

Mediation is a new culture of dialogue that needs to be developed not only in business and in our lives, but also to be adopted at the legislative level. T. Sydorshyna "Mediation - a new feature of communication" [2].

This is what the researchers say about mediation. However, as I.H. Yasynovskiy aptly notes in this regard, "... mediation has not yet become widespread in our society as a new legal institution unusual to Ukraine" [7, pp.261-262.].

Speaking about the development of a culture of alternative disputes resolution (mediation) in the abovementioned countries (Belarus, Georgia, Moldova), it would be logical to start with Belarus. Compared to Georgia and Moldova, this country boasts the fastest implementation of mediation practices in society and legislation.

In general, in Belarus, mediation has been mentioned as a way to resolve conflicts since 2010, when pilot projects were implemented in the commercial litigation system (commercial courts of Minsk and Minsk, Gomel, Brest, Grodno and Mogilev regions) to promote mediation as an effective way to resolve economic and other legal conflicts (CIS). However, as the first stage in the application of alternative means of conciliation the adoption of a new version of the Commercial Procedure Code of the Republic of Belarus in 2004 can be considered. In particular, Chapter 17 "Settlement of disputes through mediation" appeared in the Code, thanks to which the resolution of commercial disputes outside the court session became possible through a neutral mediator (official) of the commercial court. Researchers emphasize that



until 2011 there was no notion of "judicial conciliation" in the legislation of Belarus, but after the amendments to the Commercial Procedure Code of the Republic of Belarus, there was not only the mentioned notion of it, but also a number of new requirements for the conciliation procedure of economic entities: conducting the procedure in accordance with the court decision; court control over this procedure; appointment of a specific judicial "conciliator"; the possibility of involving out-of-court mediators in the conciliation procedure on a contractual basis; preferences for the parties of the conflict which have applied for this procedure in the form of a significant reduction of court fees (mediation in CIS countries). [8]

In 2014, the Law on Mediation came into force in Belarus. Procedural codes are used to supplement this law during court mediations. In addition, there are "Rules for mediation" approved by the Government and a number of acts of the Ministry of Justice, which is the regulatory body of the mediation institute. These are, in particular, the Instruction on the procedure for maintaining the register of mediators and the register of organizations that provide mediation, the Resolution on the establishment of forms of documents in the field of mediation and the Code of Ethics of Mediators [9,10].

The peculiarity of "Belarusian" mediation is the development of facilitative mediation at the legislative level. Accordingly, mediation can be used both out of court and in trial cases.

Mediation in Belarus is not mandatory, unless there is a provision in the agreement between the two parties to settle the dispute through mediation. In addition, the court must notify the parties of the dispute of their right to use mediation. However, there is also a possibility of enforcement of mediation agreements in commercial disputes. In addition, there are benefits of 25% to 50% refund of state duty in case of litigation through mediation.

Legislation does not foresee mediation in conflicts where one of the parties is a state body or an official of a state body, while in general the range of disputes where it can be applied is quite wide: family, labor, civil and economic relations. The impossibility of a mediation agreement in administrative disputes, in our opinion, quite eloquently testifies about the assertive authority of the

status of Belarus public authorities in contradiction to «green light» for mediation provided by the mentioned authorities... In general, this example reflects the style of public governing in the country, but this research is not about that...

A person with higher education who has completed training courses for mediators or has experience in judicial conciliation, and obtained a Certificate of Mediator can be the Mediator. All mediators should be listed in the Register of Mediators. Thus, for the beginning of 2020, more than 860 people received a certificate and have the right to conduct the mediation activities. In total, more than 900 mediations were conducted in Belarus in 2019, 650 of which resulted in the conclusion of mediation agreements [11].

At the end of the review on the development of mediation procedures in Belarus, it should be added that the country has systematized and state-supported measures to promote alternative dispute resolution. Judicial system actively explains the peculiarities of the mediation procedures application, advertising of mediation is carried out by the Ministry of Justice and in the mass media [12]. Thus, the opportunities for potential users at least to learn about this procedure and its features increase continuously. That is why it seems logical that Belarus was one of the first former Soviet countries, which ratified in 2020 United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation).

Moldova has chosen a slightly different path of implementing alternative means of conflicts resolution in its legal and social space. Thus, the first Law on Mediation was adopted in 2007, but it has not been properly implemented. Therefore, a new legislative act was adopted in 2015. A professional environment of mediators has been formed in Moldova and mediation practice is continuously developing. In general, mediation activities in Moldova have many common features with Belarus: the presence of additional regulations of the Ministry of Justice; benefits in the payment of state duties in case of an attempt to resolve the dispute through mediation; state support for the implementation of the mediation agreement. Distinctive features of mediation in Moldova are the following: the main and generally accepted model of mediation in the country is facilitative mediation; in addition to



family, civil and labor disputes, and in some cases in criminal and administrative cases, mediation is also used in disputes concerning consumer rights protection; both a Moldovan citizen and a foreigner can be a mediator; the condition for acquiring the status of a mediator is the completion of special courses and passing the attestation examination at the Ministry of Justice [8].

At the same time, experts say that conciliation procedures, which are confidential and relatively inexpensive compared to court costs, are not expected to gain the real mass demand in Moldova in the nearest time. Thus, according to a survey of 65 companies that work in the sale of goods and services, agriculture and manufacturing, conducted in 2019, it was found out that only 6% of Moldovan entrepreneurs turn to mediation to resolve their conflict situations, while 72% respondents only showed interest in such services [13]. Among the factors contributing to the lack of popularity of mediation are distrust to such a procedure, fears of difficulties in implementing the mediation agreement and lack of basic knowledge about mediation.

However, in our opinion, the Government of Moldova has taken the necessary steps to provide legal background to alternative disputes resolution, and the issue of promoting these tools will be positively resolved over time.

Let us move on to the formation and development of alternative dispute resolution in Georgia. According to researchers [8], this phenomenon has deep historical roots: conciliation procedures for resolving conflicts within the community with the involvement of its authoritative members are still actively used in the highlands of Svaneti, Abkhazia, Adjara, Khevsuretia. This is despite the fact that mediation as a legal institution was not represented in the country's legal system until 2010. In general, the notion "mediation" first appeared in the Criminal Procedure Code of Georgia after amendments made to it in July 2010. In particular, these changes made it possible to develop alternative measures of prosecution in the form of a program, which was later called the "Program of Mediation and Generation (or Advancement) of Minors". The purpose of this program was to develop measures to release juveniles from criminal prosecution without probation and criminal record.

For now Georgia has the Law on Mediation, which was adopted on September 18, 2019

and came into force on January 1, 2020. Mediation in Georgia, as well as in Belarus and Moldova, has many common features, so we consider it is necessary to put an emphasis only to aspects that differ [14].

Thus, the effect of the abovementioned Law (Article 1) expands to: mediation, which is carried out by concluding a mediation agreement; judicial mediation. Moreover, mediation agreements can be concluded even in the field of medical mediation. It is noteworthy that an informal institution the Medical Mediation Service, supported by the Ministry of Health, was established in 2006 to resolve conflicts between the patient/legal representative and the medical institution (and/or insurance company). The aim of this structure is to assist the parties in conflict resolution.

However, the abovementioned Law in Georgia does not cover the notarial mediation. Thus, conflicts in family inheritance, neighborhood and other cases, which are not covered by the Law "On Mediation", are subject to resolution by a notary. This is what Article 38-1 of the Law of Georgia "On Notaries" proclaims. We believe that the existence of this norm in Georgian law is actually very successful: after all, the parties in such conflicts really communicate primarily with the notary and it would be logical to offer to find a way to reconciliation during the notarial acts [16].

The similar situation is also with conflicts in the labor field and in relation to juvenile justice. That is, the Labor Code of Georgia and the Code of Juvenile Justice, respectively provide the resolution of such conflicts. In addition, the Law of Georgia «On Mediation» regulates the mediation procedure itself and its other rules.

Finally, we would like to emphasize on another positive point provided by this Law, namely: the establishment of the Association of Mediators of Georgia on the basis of the Law and granting the right to maintain the Unified Register of Mediators to this Association. This shows a considerable state support for mediation, which contributes to the promotion of this institution. The Association was created with the support of the Ministry of Justice of Georgia and on the website of this Ministry anyone can find the information about the mediator in which they are interested. And since it comes from the state, although the various organizations that provide mediation services and maintain appropri-



ate registers in the country are enough, the trust in the mediator recommended by the state body will be higher.

### Discussion

Thus, we have studied the experience of development of mediation as an alternative tool of conflicts resolution in three countries: Belarus, Moldova and Georgia. What and who prevents Ukraine from choosing any model of dissemination and popularization of mediation and implementing it? In the scientific literature, opinions on this subject differ and relate to the development of mediation in two directions: as a legal and as a social phenomenon.

Thus, the authors O. Karmaz, T. Podkovenko, T. Shynkar, A. Frantsuz, V. Polishchuk are convinced on the direction of legal development of the mediation model: it is necessary to adopt the relevant Law of Ukraine "On Mediation". V. Polishchuk clarifies that at the same time it is necessary to adopt a number of accompanying bylaws regarding the maintenance of the register of mediators, mediation procedures, requirements for the profession of mediator, etc. We have already mentioned such a positive experience during the review of the Belarusian model of mediation development. In general, these authors are convinced that mediation will relieve the judiciary system and increase public confidence to the courts, will facilitate the rapid resolution of conflicts in any category of cases [3, 4, 6, 16, 17].

Regarding the directions of development of mediation as a social phenomenon I.H. Yasynovskiy, for example, believes that mediation in Ukraine has faced a number of moral, ethical and psychological problems, to overcome which it is necessary to increase the legal culture of the population and the level of trust in this service, overcome the information barrier to knowledge of the phenomenon and to draw the attention of the state

to provide support for mediation development [7, p.262]. O. Karmaza states that the clear legal position of the state regarding the support of mediation can be perceived by society as a "medicine" that will promote its "recovery" from diseases related to corruption, "telephone law", family quarrels and conflicts between neighbors, relatives, etc [16, pp.25].

### Conclusions

In our personal opinion, the successful development of mediation is a balanced combination of social and legal directions of its development. For now, 13 draft laws on mediation are registered in the Parliament of Ukraine, none of which has been adopted as a law. On the other hand, we have a relatively small number of citizens who, thanks to the efforts of public organizations and some educational institutions, have begun to learn about mediation as a phenomenon, a service, an additional competence. But, obviously, it is not enough. A unified coordinated state policy, even political will, is needed to support and develop this institution in Ukraine. Let us agree with I.H. Yasynovskiy that the practical implementation of mediation in Ukraine in comparison with the former Soviet republics, in particular Belarus and Georgia, is carried out at a very slow pace [18, pp.2-3]. But, as our research on mediation models in these countries has shown that it all depends on balanced, effective and joint support from both the legislative and the executive branches. Belarus is a good example of this, but the development of mediation in Georgia and Moldova, although it has certain peculiarities of development, still shows the proper political will of the authorities of these countries.

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