



Nesterova Iryna Anatoliyvna,
*PhD in Law, Associate Professor of the
Criminal Law and Process Department,
Uzhhorod National University,
Ukraine, Uzhhorod
e-mail: nesterovaira903@gmail.com
ORCID 0000-0003-0481-2965*



Shelever Natalya Vasylivna,
*PhD in Law, Associate Professor of the
Department of Administrative,
Financial and Information Law Department
Uzhhorod National University,
Ukraine, Uzhhorod
e-mail: nataliashelever@gmail.com
ORCID 0000-0003-3641-4910*

doi: 10.21564/2414–990x.145.162219
UDC 343.1:364–782

MEDIATION AS AN ALTERNATIVE METHOD OF PUBLIC LEGAL DISPUTES SOLVING

The article deals with the problems of mediation in administrative legal proceedings. It is alleged that it is an effective alternative way of disputes settling. The authors pay attention on the problems that arise in mediation applying. The authors analyze the positive foreign experience on this issue. Proposals for improving domestic legislation are provided there.

Keywords: mediation; mediator; judge; public legal disputes; court proceedings.

Нестерова І. А., кандидат юридичних наук, доцент кафедри кримінального права та процесу, Ужгородський національний університет, Україна, м. Ужгород.
e-mail : nesterovaira903@gmail.com ; ORCID 0000-0003-0481-2965

Шелевер Н. В., кандидат юридичних наук, доцент кафедри адміністративного, фінансового та інформаційного права, Ужгородський національний університет, Україна, м. Ужгород.
e-mail : nataliashelever@gmail.com ; ORCID 0000-0003-3641-4910

Медіація як альтернативний спосіб вирішення публічно-правових спорів

Стаття присвячена дослідженню інституту медіації в адміністративному судочинстві. У зв'язку з внесенням змін до процесуальних кодексів аналіз новел, які є у Кодексі адміністративного судочинства України, на даний час є актуальним завданням. Однією із таких новел є інститут медіації, який викликає зацікавленість як серед теоретиків, так і практиків.

Медіація – це альтернативний спосіб вирішення справ, який широко використовується в провідних країнах-членах Європейського Союзу.

У зв'язку з прагненням України стати повноправним членом Європейського Союзу вивчення позитивного досвіду провідних європейських держав є доцільним. Виникає необхідність приведення чинного законодавства до стандартів провідних європейських держав. Такі зміни необхідні і у сфері судочинства, зокрема адміністративного. Першочерговим завданням для демократичної країни є забезпечення справедливого правосуддя. Один зі способів врегулювання спорів – судова медіація, яка забезпечує швидке вирішення спору без судового розгляду.

Варто зазначити, що судова медіація є досить дієвим альтернативним способом вирішення спорів. Автори зосередили свою увагу на дослідженні механізму впровадження медіації в адміністративне судочинство, вивченні позитивного європейського досвіду з даного питання з метою усунення прогалин у вітчизняному законодавстві.

У статті констатовано, що медіація була відома ще римському та грецькому праву. Першою країною на європейському континенті, яка почала використовувати медіацію, стала Велика Британія. Автори роблять пропозицію щодо створення Національного інституту вирішення спорів.

Значення медіації полягає у тому, що, з одного боку, вона розвантажить адміністративні суди, з іншого – даний інститут надасть змогу швидко вирішити справу без участі суду і тим самим зекономити час та кошти. Медіатор шукає компромісне взаємовигідне рішення між сторонами та вживає всі заходи щодо запобігання виникнення конфлікту в майбутньому. Переможця не існує, оскільки рішення у справі має задовольнити обидві сторони.

Процесуальне законодавство, а саме глава 4 Кодексу адміністративного судочинства, визначає порядок врегулювання спору за участі судді. Якщо спір не вдалося врегулювати, то повторна медіація не допускається.

Автори спростовують думку про те, що часто публічно-правові спори вважають немедіабельними і обґрунтовують свою позицію.

Позитивним наслідком медіації є і те, що рішення, яке прийняте за її наслідками, має бути виконане у найкоротші строки, бо воно є компромісним. На практиці рішення суду виконуються тривалий час або взагалі не виконуються, тому перевагою медіації є те, що рішення, прийняті за її наслідками виконуються стовідсотково.

Незважаючи на позитивні моменти запровадження даного інституту в Україні, автори вказують і на проблемні питання, які виникають при застосуванні медіації.

У статті проаналізовано позитивний іноземний досвід з даного питання. Надаються відповідні пропозиції щодо удосконалення вітчизняного законодавства.

Медіація є прогресом в українському правосудді. Її метою є забезпечення доступу громадян до правосуддя, покращення якості судових рішень, розвантаження судів.

Ключові слова: медіація; медіатор; суддя; правосуддя; публічно-правовий спір; судочинство.

“Avoid suing.
Make your opponent come to a compromise.
Pay attention to the fact that the nominal
victory in court is often a real defeat
in the time and money costing”.
A. Lincoln

Problem statement. In connection with the desire of Ukraine to become a full-fledged member of the European Union, there is a need to bring existing legislation to the standards of the leading European states. Such changes are also needed in the sphere of legal proceedings, in particular administrative ones. The priority task for a democratic country is to ensure fair justice. One of the ways of resolving disputes is the judicial mediation that provides the quick dispute resolving without trial.

Taking into account that today the trust of Ukrainians in the judicial system is rather low, as well as in connection with the international obligations of our state to study and implement new methods of disputes resolving is the topical issue of nowadays.

World practice shows that today mediation is one of the most popular forms of conflict resolution, since practically 90 % of all mediation procedures are successfully completed for conflicting parties [1].

Recent research and publications analysis. The procedure of mediation is of great interest to domestic and foreign scholars such as S. Zagainov, G. Goncharov, V. Komarov, Yu. Prytyka, V. Reznikov, S. Fursa, T. Podkovenko and others.

In connection with the adoption by the Verkhovna Rada of Ukraine of the new Code of Administrative Proceedings, the institution of mediation became a novelty. An important issue of the present is the mechanism of the implementation of this alternative-native method of resolving disputes in administrative justice researching, the study of a positive European experience on this issue in order to fill gaps in national legislation.

The purpose of the article is to study the institute of mediation in administrative proceedings, to analyze the current legislation on resolving public disputes through mediation, to investigate problems that arise in practice, European experience and provide relevant proposals.

Presentation of the main material. The use of mediators to resolve disputes has been recorded since ancient times; the historians pay attention to similar cases in the trade relations of the Phoenicians and in Babylon. In Ancient Greece there was a practice of the use of mediators (proxenetes). Roman law, starting with the Code of Justinian (530-533 AD), recognized the mediation. The Romans used different terms to refer to the “mediator” such as: internuncius, medium, intercessor, philanthropus, interpolator, conciliator, interlocutor interpres, and finally mediator. In some traditional cultures, the figure of a mediator was treated with special respect and revered on a par with priests or tribal leaders. Mediation in its modern sense began to evolve in the second half of the XXth century, first of all, in the countries of Anglo-Saxon law, such as the USA, Australia, Great Britain, and then began to

spread in Europe. As a rule, the first attempts to use mediation were concerned the resolution of disputes in the field of family relations. Subsequently, mediation was recognized in resolving a wide range of conflicts and disputes, beginning from conflicts in local communities and ending with complex multilateral conflicts in the commercial and public spheres [2].

So, as we see, the mediation was known also to the Roman and Greek law. It should be noted that mediation on the European continent was the first to be used by Great Britain. Unfortunately, this procedure has been introduced in Ukraine recently.

The Council of Europe Committee of Ministers in its Recommendations No. R (86) 12 of September, 16, 1986 "On Measures to Prevent and Reduce Excess Workloads of Judges" paid the attention of states to the contribution of national courts to the reconciliation of the parties both outside the judicial system and to (or) in the trial process.

In this regard, it was proposed to place on the judges, as one of the main tasks, the responsibility for achieving reconciliation of the parties and the conclusion of a settlement agreement on all relevant issues, both before and at any stage of the trial process. In connection with this the change of procedural legislation, including the administrative proceeding is due to a number of novels that characterize the modern direction of legal proceedings development.

One of such novels is the dispute settlement with the participation of a judge. A characteristic feature of such a novel is the implementation of judicial mediation in the administrative process, which is a part of the preparatory process. The nature of such a settlement is that the reconciliation initiative, or the settlement of an administrative legal dispute with the participation of a judge, belongs to the parties to the dispute, and not to the judge.

The judge by his own will or his right cannot initiate or independently implement the dispute settlement process, since such a procedure has its own specific, non-procedural form that cannot take place without the consent of the parties. Such agreement (petition) of the parties must have the written form. At this stage, it is difficult to identify the parties as the sides of legal proceedings; they are rather parties of negotiations.

Negotiations are usually not mandatory in legal sequence, as is the case in classical justice. This is a more democratic procedure in which you can express your attitude to the dispute, suggest your way out of the situation, ask the other party to go to a meeting on a matter with an equivalent on this substitute, etc. At the same time, the judge acquires essentially the status of a state mediator, on which, according to his status, all organizational issues lie, as well as the management of the negotiation process, the choice of the form of negotiations, etc. In spite of the democratic nature of this process, negotiations in its entirety are of a procedural nature, since its form is regulated by procedural rules of law. Such a conglomerate has its own procedural principles, which affects both the confidence of the parties in such procedures and the expectations regarding the speed of dispute resolving in

essence without a “deployed litigation”. One of these principles is the principle of confidentiality.

All procedural actions of dispute resolving with the participation of a judge are of confidential character. Confidentiality, in its general sense, is a mandatory rule according to which all information that has received during the judicial and mediation procedures is not subject to disclosure, whether orally and in writing, unless otherwise it is not stipulated by the parties’ agreement. Thus, such information becomes essentially information only for use in the internal judicial-media space. This rule applies not only to parties, their representatives, but also judges, since such a rule is their professional duty [10, p. 249–250].

Unlike the trial, which is strictly regulated, formalized and focused on the essence of the claim, mediation provides a flexible approach to the dispute resolving, taking into account all aspects of the controversy, regardless of its legal significance. That is why mediation refers to alternative methods of disputes resolving [3, p. 94].

But there are essential features when it is possible to distinguish mediation from other methods of disputes resolving (arbitration judge /court, reconciliation, negotiations) that is: the voluntary using of this procedure; flexible nature of the procedure; the desire of the parties to agree and resolve the dispute; lack of mediator judicial powers. For example, an arbitrator judge is obliged to take a decision, the procedure of an executive document issuing is foreseen, and the mediator does not have such rights, but only contributes to the fact that the parties themselves determine the procedure for dispute resolving [3, p. 94].

Mediation refers to so-called alternative dispute resolution methods; the ADR (Alternative Dispute Resolution). The concept of ADR was introduced in practice in the 70’s of the twentieth century in the United States of America and in ten years has become widely used. There is no one serious negotiation process without mediators in the field of economy, politics, and business in this state. The National Institute for Dispute Resolution, which deals with the development of mediation new methods, the private and public services of mediation operate there. The American Arbitration Association has approved its Rules of arbitration and mediation, that are used, including, when considering internal disputes, is very influential [4, p. 18].

When analyzing the American experience in mediation, we come to the conclusion that in Ukraine it would be worthwhile to create the National Institute for Dispute Resolution.

Mediation in administrative proceedings was implemented on December 15, 2017. Public legal disputes, that is, the disputes of individuals and legal entities with the subject of authority are considered in the administrative court proceedings. The introduction of mediation is a positive step forward, since it will unload, first of all, administrative courts. In addition, Ukrainian officials will not mind such a way of disputes resolving, because mediation allows a quick resolution of the dispute without the participation of the court. Such a trial will ensure the procedural economy of time, money. The procedure will be confidential. All efforts of the parties

are aimed at an alternative dispute resolution, as well as all measures to prevent a conflict in the future are taken. The mediation decision is always winning, because there is no winner. The decision is formed in the way to satisfy both sides.

Due to the heavy load of the administrative courts in Ukraine, the need for mediation implementation has come to an end. And the mediation itself will provide a quick dispute resolution without a court. Mediation is a kind of intermediary in a dispute in which the parties resolve the dispute on their own, looking for a mutually beneficial solution.

Chapter 4 of CAP (Code of Administrative Proceedings) determines the procedure for settling the dispute with the judge participation. The consent of the parties is required. Suspension of proceedings is foreseen. An interesting point is that if the parties have not reach a compromise, re-mediation is not allowed.

Mediation is conducted in the form of joint and/or closed meetings. During the settlement of a dispute, the judge carries out actions aimed at the dispute peaceful settlement by the parties. However, the judge can himself offer the parties their own way of resolving the conflict. All information is confidential. The term of mediation is no more than 30 days from the date of the decision to hold a dispute settlement with the participation of a judge.

Settlement of a dispute with the judge participation may take place only “behind a closed door”, which excludes publicity. Despite the closed character of the negotiations’ procedural form, the privacy is not an obstacle to the efficiency of such actions. On the contrary, the simplicity of the negotiations is connected with a scrupulous, but quick analysis of the dispute subject, discussion of each party arguments as to its rightness in the dispute, with the correctness of such evidence confirming, and in this context the judge or the parties themselves offer certain compromises and proposals for the peaceful settlement of the dispute as on joint and individual (closed) meetings. Such an approach is logical, since in such cases, after hearing the arguments of the parties, each of them independently calculates the real possibilities for a particular legal result that is based on one or another judicial practice, pronounced by a judge or representatives of the party.

Certainly, the actions of the parties to meet each other are not limitless, but the possibility of a fair compromise has always been there. Another thing is that the parties either do not try to find such a compromise and, on the basis of it, formulate their capabilities or deliberately not agree on a certain compromise, since it does not give them those or other perspectives on which they hoped. At the same time, all these points are confidential so that any party of the administrative legal dispute has not suffered both material and moral damage. Under the agreement of the parties, such negotiations are followed by their representatives, who can recommend judges a certain form of negotiations with the acceptance of participation in the discussion and possible compromises. The generally recognized fact is that the position of the representatives always has an impact on their trustees. Therefore, the judge must give all possible opportunities to such representatives for their close cooperation in such negotiations [10, p. 250–251].

On a confidentiality basis the parties work out and the terms of various in their content peace agreements concluding. At the same time, the information provided by each of the parties in the closed meetings is included under the confidentiality regime, since such information is often one of the conclusions of a settlement agreement' conditions. Consequently, each party, in closed meetings, gives the judge's consent to a message to the other party of his proposals or certain information. Thus, all the negotiators are related to the principle of confidentiality at all stages of the dispute settlement with the judge participation, since confidentiality is a form of closed information keeping. At the same time, the law should provide the administrative and even criminal liability of the parties, their representatives and interpreters who, if necessary, can take part in the negotiations o with the participation of a judge, since none of them has the right to use this confidential information in their interests or interests of other persons before the end of the trial on the merits. Certainly, oral information that took place during a dispute with the participation of a judge should not be recognized as evidence in a civil case, otherwise it will be impossible to achieve honesty in the positions of the parties [10, p. 251].

Article 188 of the CAP determines the grounds for terminating the settlement of a dispute with the judge participation:

- 1) In the case of submission by the party of an application for the termination of the dispute settlement with the participation of a judge;
- 2) In the case of the dispute settlement term expiration with the participation of a judge;
- 3) On the initiative of a judge in case of the dispute settlement procedure delaying by any of the parties;
- 4) if the parties reach reconciliation and appeal to the court with a statement on reconciliation or petition of the plaintiff in court with a statement on leaving the claim without consideration or in the event of the applicant's refusal from the claim or recognition of the claim by the defendant [5].

Often it's said that the mediation is impossible in public law disputes, since one of the dispute parties is the subject of power necessarily. We do not agree with this position, because we believe that, on the contrary, public legal disputes are subject of mediation. Even the subject of the authorities itself is interested in dispute resolving as soon as possible, reaching an appropriate compromise and not getting involved in legal proceedings, not paying court fees, bearing the burden of proof according to the Code of Administrative Proceedings.

However, the problem is that not all disputes that are subject to administrative legal proceedings are media-related. So, mediation is not allowed in cases, defined by Chapter 11, Section 2, of the CAP, that is, there is a special proceeding of administrative cases separate categories. Exceptions are typical cases and administrative proceedings on claims for expropriation of land, other objects of real estate, which are located on it, for reasons of social necessity.

The German mediation experts identify the following administrative disputes with the characteristics for which mediation is appropriate:

- a) if the relationship between the parties is possible; for example, between the owners of neighboring land;
- b) the presence of communication problems of the conflict parties;
- (c) if the administrative authority has the right to choose alternatives of sanctions;
- d) if the circumstances of the conflict are not the subject to disclosure.

However, there are conflicts that have the relevant characteristics and cannot be resolved with mediation, that is:

- a) the offense may lead to criminal punishment;
- b) the purpose of the trial is directed solely at the resolution of any legal problem;
- c) the conflict can be solved only through the proof procedure [6].

There is often discussion about the subject matter of the dispute parties, as there is procedural inequality of the parties. The question the burden of proof imposing on the subject of power in mediation is not regulated. We believe that the decision taken as a result of mediation will be faster, because both parties have made a voluntary joint decision and they will implement it. The court decision is not always performed voluntarily by the parties and very often remains unenforced or executed in practice. Then, in general, the sense of justice is lost.

Therefore, it is the mediation that will ensure 100 % implementation of the decisions. It should be noted that the mediation can be applied to any category of cases. Nevertheless, the mutual desire of the parties is necessary.

As Hamburg Administrative Court Presiding Judge, the mediator Friedrich-Joachim Memel points out, that mediation proceeding, especially in complex proceedings, is appropriate, first of all, in cases where the parties are actually in a dispute over a solution (often prolonged-time, emotional-personal) conflicts, which, in fact, stand in the legal dispute, when the direct cause of the conflict is not the subject of the dispute itself, or if the court decision gave the participants “not bread, but stones», or parties will still have to “live with each other”, or if communication violations were still hampered by conflict resolution. As already mentioned above, mediation is not limited by the previous subject of the dispute. In this case; it must take into account the hidden conflict, which, after all, are not related to the right of the parties’ aspirations (for example, the desire to obtain apologies or recognition). In addition, third parties who have not yet taken part in the proceedings may also be involved in the mediation procedure. Therefore, mediation can be almost applied in every law sphere, but often, as practice shows, in so-called “triangle constellations” (neighboring law (for example, in the case when issued construction permit affect the rights of third parties), competition cases (for example, state subsidies / grants providing), large industrial and construction projects, etc.). It is precisely the lack of mediation procedure restriction provide the parties more possibilities for mutually beneficial dispute resolving, that would prevent the conflict situations emergence, and, consequently, new lawsuits in the future [7].

A. Kalish and A. Zinkevich distinguish the following main mediation objectives:

- to promote mutual understanding that takes into account the interests of both parties (problem-solving/interest-based paradigm of mediation);
- to formate the positive relationships and the basis of cooperation between the dispute parties, as well as in self-knowledge, self-improvement and the so-called inner moral growth assistance (transformative paradigm of mediation) [8].

Conclusions and suggestions. We believe that mediation in administrative proceedings is a positive step forward, as it will provide access to justice, helps to improve the quality of court decisions and unload the courts. However, practice of its application will show if the mediation'll bring positive results.

It is also important to pay attention to the court decisions' enforcement, because the sense of justice is lost at all without it.

We fully agree with O. Pasenyuk that there is an acute problem with enforcement of court decisions in Ukraine. The introduction of a mediation procedure will reduce the flow of appeals to the European Court of Human Rights of court decisions' non-enforcement, which, in turn, will reduce the penalties that are heavy burden of the country's budget. In addition, an open dialogue, and a positive communication conflict solution between the state government and the public will contribute to increase their legal awareness and legal culture [9].

References:

1. Adamantys, E. (2011). Medyatsyya v Ukrainy: «za» y «protyv». *Yuryst i Zakon*, 42. URL: http://search.ligazakon.ua/I_doc2.nsf/link1/EA002546.html [in Ukrainian].
2. Kokhan, H. (2014). Chy potribna mediatsiya Ukrayini? URL: <http://yurradnik.com.ua/stati/d1-87-d0-b8-d0-bf-d0-be-d1-82-d1-80-d1-96-d0-b1-d0-bd-d0-b0-d0-bc-d0-b5-d0-b4-d1-96-d0-b0-d1-86-d1-96-d1-8f-d1-83-d0-ba-d1-80-d0-b0-d1-97-d0-bd-d1-96/> [in Ukrainian].
3. Mazaraki, N. (2016). Mediatsiya v Ukrayini: problemy teorii ta praktyky. *Zovnishnya torhiv-lya: ekonomika, finansy, parvo*, 1, 92–100 [in Ukrainian].
4. Podkovenko, T. (2017). Mediatsiya yak sposib alternatyvnoho rozvyazannya konfliktiv: geneza ta instytutsiyni zasady. *Aktualni problemy pravoznavstva*, 1 (9), 17–22 [in Ukrainian].
5. Kodeks administratyvnoho sudochynstva Ukrainy: vid 06.07.2005 r. № 2747-IV. *Legislation of Ukraine: Database/Verkhovna Rada of Ukraine*. URL: <http://zakon0.rada.gov.ua/laws/show/2747-15> [in Ukrainian].
6. Yer'omenko, H., Zayichenko, A. (2014). Podatkova mediatsiya: dosvid i perspektyvy vprovadzhennya. *Yuryst & zakon*, 25 (27.06–03.07) [in Ukrainian].
7. Memel, F.-Y. (2007). Mediatsiya v administratyvnomu sudochynstvi Ukrayiny. URL: http://www.voas.gov.ua/upload/337_mediac2.pdf [in Ukrainian].
8. Kalisz, A., Zienkiewicz, A. (2014). Mediacja sądowa i pozasądowa. Zarys wykładu. Warszawa: Wolters Kluwer Polska [in Polish].
9. Pasenyuk, O. Administratyvnyy sud Ukrayiny (zbirnyk naukovykh prats). URL: <http://www.info-library.com.ua/books-book-183.html> [in Ukrainian].
10. Kodeks administratyvnoho sudochynstva Ukrayiny: Naukovo-praktychnyy komentar (2018). M. M. Yasyenko (Ed.). Kyiv: Alerta [in Ukrainian].

Нестерова И. А., кандидат юридических наук, доцент кафедры уголовного права и процесса, Ужгородский национальный университет, Украина, г. Ужгород.
e-mail : nesterovaira903@gmail.com ; ORCID 0000-0003-0481-2965

Шелевер Н. В., кандидат юридических наук, доцент кафедры административного, финансового и информационного права, Ужгородский национальный университет, Украина, г. Ужгород.
e-mail : nataliashelever@gmail.com ; ORCID 0000-0003-3641-4910

Медиация как альтернативный способ решения публично-правовых споров

Статья посвящена исследованию института медиации в административном судопроизводстве. Это действенный альтернативный способ решения споров. Указано на проблемные вопросы, которые возникают в процессе медиации. Авторами проанализирован положительный зарубежный опыт по данному вопросу. Предоставляются соответствующие предложения по совершенствованию отечественного законодательства.

Ключевые слова: медиация; медиатор; судья; публично-правовой спор; судопроизводство.

Рекомендоване цитування: *Nesterova I. A., Shelever N. V. Mediation as an alternative method of public legal disputes solving. Проблеми законності. 2019. Вип. 145. С. 169–178. doi: <https://doi.org/10.21564/2414-990x.145.162219>.*

Suggested Citation: *Nesterova, I.A., Shelever, N.V. (2019). Mediation as an alternative method of public legal disputes solving. Problemy zakonnosti – Problems of Legality, issue 145, 169–178. doi: <https://doi.org/10.21564/2414-990x.145.162219>.*

Надійшла до редколегії 03.04.2019 р.