Judgment mediation: essence and types

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Summary

In the article the author explored the legal nature, essence and features of adjudication mediation as an alternative form of dispute resolution, as well as described its varieties. Describing the features of adjudication mediation, the author emphasizes that it: is proposed by the judge to the parties after they go to court, but before the start of the trial on the merits; it is recommended to the parties by the judge after the opening of proceedings in the case; the parties themselves come to the conclusion that the mediation procedure has already been used during the court proceedings; the precondition for its appointment is a procedural document in the form of a relevant court decision. It is established that adjudication mediation can exist in two models in the context of structuring in the content of the classical trial: integrated adjudication mediation (German model) and non-integrated adjudication mediation (Dutch model. The first model is to some extent directly reflected in the procedural legislation of Ukraine. rules of application of each of the given types of adjudication.

These considerations made it possible to formulate proposals for current legislation and the draft Law on Mediation, the implementation of which will clear the legal framework for the existence of this legal institution and ensure the existence of a more effective mechanism for protecting human rights and freedoms.

Key words: mediation, adjudication mediation, alternative form of dispute resolution, court proceedings, court decision.

Among the scientists who to some extent studied the nature of mediation should be noted such as: P. Bartusyak, L. Burova, L. Galupova, G. Goncharova, N. Mazaraki, A. Novosad, G. Ogrenchuk, O. Senyk, O. Spector, T. Shinkar, T. Tsuvina, V. Yakovlev, I. Yasinovsky and others. However, these studies considered the place of mediation among other alternative forms of dispute resolution or were devoted to its use in conflict resolution in the field of relevant public or private relations, such as administrative law, criminal law or intellectual property, housing relations, labor disputes. etc. In connection with the inclusion in the procedural legislation of the normative basis for the existence of so-called adjudication mediation, as well as the formation of the basic principles of mediation as an alternative form of

dispute resolution in the next draft Law on Mediation of 19.05.2020 № 3504[100], Today there is a need to study the features of this type of mediation, taking into account the models already developed by the world community and the available research of this phenomenon in terms of its differentiation,

In this regard, the purpose of this article is to determine the legal nature and essence of the so-called adjudication mediation, as a consequence, outlining its features in comparison with classical mediation and other forms of alternative dispute resolution, citing its varieties given the world experience and prospects domestic social and legal reality.

The general humanization of all spheres of public life is manifested in the corresponding transformations of socio-economic and legal institutions. The issue of resolving conflict situations in social life has been, is and will be relevant in the human community, which is related to the nature of the individual. In addition, the degree of involvement in the resolution of conflicts directly in society through the mechanisms of legislative, executive or judicial power during the existence of mankind has changed. Given the determination of man with his rights and freedoms in international and national law today, the direct participation of the state in any of these forms is increasingly meaningless, in the first place is the model of self-sufficient society, which seeks to create conditions for human dignity. which person. Following the reasoning of the famous philosopher Emmanuel Kant in a self-sufficient society, its members themselves determine the limits of their behavior and seek to understand the problems and preconditions for conflict situations, as a consequence to come to a compromise solution.

All the above was a prerequisite for reforming the procedures for dispute resolution in a particular area of public relations with the participation of public authorities and individuals. For Ukraine, the classic dispute resolution procedure is litigation or litigation, depending on the jurisdiction of such cases. In order to solve a number of organizational, economic, legal, humanitarian problems for our country is characterized by the formation of certain alternatives to the judicial form of dispute resolution, including: negotiations, arbitration, arbitration. This fully echoes the declared progress of our country in implementing the Action Plan for Ukraine of the Council of Europe for 2018-2021, approved by the Committee of Ministers of the Council of Europe on February 21, 2018, where promoting alternative dispute resolution is one of the priorities in ensuring justice. The latest achievement in this area is the attempt to standardize the mediation procedure as a self-sufficient structure for resolving a dispute without the participation of third parties. And, although some will object in the context of the above understanding

[100] Draft Law on Mediation: dated 19.05.2020 № 3504. URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=68877 (access date: 17.05.2021).

of mediation as a way of alternative dispute resolution, yet the nature of this phenomenon lies precisely in the passive role of the mediator.

Mediation by its nature has a number of features that distinguish it from the above phenomena, such as: along with the mediator, the parties to the procedure are equal in the range of variations of possible behavior, they have a dispositive model of behavior without any defects in the will, each of participants in the mediation procedure, including the mediator, are distinguished by their property independence. Comparison of this with the provisions of Art. 1 of the Civil Code of Ukraine (hereinafter - the Central Committee of Ukraine) indicates nothing more than the civil nature of such relations. Moreover, it is generally accepted that the basic principles of the mediation procedure include: voluntariness, confidentiality, equality of all subjects, neutrality, independence, good faith, cooperation of the parties. The above is fully reproduced in Art. 3 of the Civil Code of Ukraine on the principles on which the construction of civil law is based, which reinforces the above reasoning, and has a response in scientific developments[101].

The steps of introduction of mediation technologies are clearly traced in the French Civil Procedure Code, the German Law "On Support to Mediation and Other Forms of Out-of-Court Conflict Resolution", the Romanian Law "On Mediation in Civil Disputes", the Laws on Mediation in Belarus, Bulgaria and Kazakhstan. Directive 2008/52 / EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, UNCITRAL Model Law on International Commercial Conciliation (2002), Recommendations of the Committee of Ministers of the Council of Europe on Family Mediation (1998) are unified international regulations aimed at regulating mediation procedures, which are implemented, including in the legislation of Ukraine. In particular, among the first steps in this area is the adoption of the order of the Ministry of Social Policy of Ukraine from 17.08.2016 № 892 "On approval of the State standard of social mediation service", the joint order of the Ministry of Justice of Ukraine and the Prosecutor General's Office from 21.01.2019 № 172/5 / 10 "On the implementation of the pilot project" Recovery Program for juveniles suspected of committing a crime "", as well as a set of procedural legislation that introduces elements of active (adjudicative) mediation in the domestic legal field with the participation of a judge, such as the head 4 of Section III of the Civil Procedure Code of Ukraine (hereinafter - the CPC of Ukraine).

Since mediation is a construction of mediation, it is related to such phenomena as moderation, negotiation, representation. Its purpose is to settle the dispute on a parity basis, ie to invent such a minimum common multiple for the common interests of the parties, which would remove a significant part of the root cause of the conflict. The allocation of so-called active or adjudication mediation is a need

[101] Novosad A., Soyka Y., Semenkova N. Problems of mediation as an alternative form of dispute resolution with the participation of a judge or lawyer. 2019. Volume 30 (69). № 2. pp. 56-60.

of the time, which is justified by the possibility of sometimes imperative-dispositive way to offer the parties to the dispute to resolve the conflict in a simplified form. This construction is fully consistent with the mentality and legal culture of Ukrainian society, which is still on the way to developing self-sufficient levers to resolve certain problems, conflicts, conflicts without the participation of state institutions.

Of course, the very name of this type of mediation procedure contradicts its essence, as the perception of mediation as an alternative form of dispute resolution creates the preconditions for distinguishing the classical court process from other forms of dispute resolution. Accordingly, the formulation in the literature of mediation as a procedure for resolving a conflict with the mediator's participation does not correspond to the nature of adjudication mediation, which is sometimes called active mediation, as opposed to classical passive mediation in terms of mediator's participation.[102]

The above division of the mediation procedure is proposed to be carried out on the basis of its integration into the structure of the classical court process, which provides for the settlement of disputes.[103] Obviously, it is more appropriate to formulate such a criterion as the inclusion in the structure of the classical process of the stage of adjudication. At the same time, a more appropriate criterion for dividing the mediation procedure in such circumstances could be the special legal status of a mediator, which in adjudication mediation under Ukrainian procedural law is a judge who differs slightly from the classic mediator, as well as the limits and content of such person's behavior. directly through mediation.

When characterizing adjudication mediation, it is necessary to indicate the following characteristics. It is not an alternative to the judicial form of resolving the dispute on the merits, as it is considered as a component of the procedural form of consideration of the case in court. The judge assumes the authority of a mediator, which does not ensure the implementation of the principle of dispositive mediation procedure when choosing a mediator, although there are opinions in the literature on the possibility of involving a third person instead of a judge, which contradicts the CPC of Ukraine. to argue with the procedural form is useless.

According to the Code of Civil Procedure of Ukraine, within this type of mediation, the following properties of this form of dispute resolution are manifested: 2) meetings are held both jointly with the parties to the process and separately in separate (closed) forms; 3) the judge offers options for resolving the dispute on the example of judicial practice in similar disputes, as well as other possible ways of peaceful settlement of the dispute, so such mediation has signs of

[102] Mazaraki N. Mediation in Ukraine: problems of theory and practice. Foreign trade: economics, finance, law. 2016. № 1. p. 93–94.

[103] Yakovlev VV Judicial and extrajudicial mediation: main features. Collection of scientific works of Kharkiv National Pedagogical University named after GS Skovoroda "LAW". 2017. Issue 26. p.143–144

active; 4) the judge, however, does not assess the evidence, and also has no right to provide legal advice and recommendations to the parties; 5) there is no traditional for the procedural form technical support of meetings in the framework of mediation and no protocol of procedural action is kept; 6) the terms of mediation within the CPC of Ukraine are limited to thirty days and cannot be extended; 7) only the plaintiff and the defendant in the relevant civil case may be parties to mediation; 8) the resolving mediation agreement for this type of mediation is embodied in the settlement agreement as a procedural document.

The above construction of out-of-court mediation in the literature is still characterized as integrated, inheriting the German model[104]. It is fair to say that, in addition to the above, the legislation of some countries offers another type of adjudication mediation, which arises and is offered to the parties to the dispute after the opening of proceedings in a classic trial. An example of such mediation is mediation, which is reflected in the legislation of the Netherlands. Such a mediation procedure is not integrated, as it is not considered at the appropriate stage of the classical process, but is proposed for consideration by the parties as an alternative to judicial protection. After this mediation, a mediation agreement is concluded, and the proceedings in the case are closed without the adoption of a separate amicable agreement, as would have happened in the previous version of the court mediation. In fact, this mediation procedure is fully identified with the classic passive mediation, except that it: 1) is offered by the judge to the parties after they go to court, but before the trial; 2) it is recommended to the parties by the judge after the opening of proceedings in the case within the process; 3) the parties themselves come to the conclusion about the action of the mediation procedure already during the court proceedings[105].

Of course, these types of adjudication should be reflected in a universal legal act designed to regulate mediation as a kind of alternative form of dispute resolution. Thus, in the draft Law "On Mediation" dated 19.05.2020 № 3504 it would be appropriate to make such editorial changes.

First, paragraph 4) of Part 1 of Article 1 shall be submitted as follows: 4) mediation - a voluntary, extrajudicial or adjudication, confidential, structured procedure, during which the parties with the help of a mediator (mediators) or a judge (in adjudication mediation) try to resolve the conflict (dispute) through negotiations.

Judicial mediation is a type of mediation, which is determined by a court decision in the relevant proceedings after the opening of the proceedings and can

[104] Tsuvina T. Introduction of the institute of adjudication mediation as a perspective direction of reforming the civil procedural legislation of Ukraine. Kyiv, 2017. p. 196–197.

[105] Bartusyak P. Judicial mediation: the experience of the Netherlands. Chernivtsi Law School: website. URL: http://surl.li/wdrz (access date: 17.05.2021).

take place both directly with the participation of a judge in the court (integrated) and outside the court (non-integrated).

Secondly, paragraph 7) of Part 1 of Article 1 shall be supplemented with the following paragraph:

“The rules for conducting integrated court mediation are determined by administrative, civil and commercial procedural legislation, depending on the subject matter of the dispute. The rules for conducting non-integrated adjudication mediation meet the requirements of this Law. "

Accordingly, the provisions on adjudication mediation should be transformed into procedural legislation, in particular on the example of the CPC. This can be demonstrated by making the following changes to Section III "Claims".

First, the following changes need to be made in Chapter 3 "Preparatory Proceedings". Item 2 of part 2 of Art. 197 GIC to submit in edition:

"2) finds out whether the parties wish to conclude an amicable agreement, refer the case to an arbitration court, apply to a mediator for mediation (adjudication not integrated mediation) or apply to a court for settlement of a dispute with a judge (adjunctive integrated mediation)".

Secondly, the title of Chapter 4 should be submitted in the form: "Settlement of a dispute with the participation of a judge (integrated court mediation)".

Thus, adjudication mediation has the right to exist in its diversity, where the main connection is with the already initiated trial, and an important distinguishing feature - ensuring the main purpose of this procedure - to create conditions for dispute resolution as an alternative to classical proceedings, regardless of actions of the court aimed at resolving the case on the merits.

Judicial mediation by its nature has certain characteristics, namely: 1) it is offered by the judge to the parties after their appeal to the court, but before the beginning of the court proceedings on the merits; 2) it is recommended to the parties by the judge after the opening of proceedings in the case within the process; 3) the parties themselves come to the conclusion about the use of mediation procedure already during the court proceedings; 4) a precondition for its appointment is a procedural document in the form of a relevant court decision. There are two types of adjudication mediation: integrated directly into the relevant trial or not integrated.

Integrated adjudication mediates meet the following criteria: 1) it is appointed and terminated according to the procedural document of the court - by a decision; 2) meetings are held both jointly with the parties to the process and separately in separate (closed) forms; 3) the judge offers options for resolving the dispute on the example of judicial practice in similar disputes, as well as other possible ways of peaceful settlement of the dispute, so such mediation has signs of active; 4) the judge, however, does not assess the evidence, and also has no right to provide legal advice and recommendations to the parties; 5) there is no traditional for the

procedural form technical support of meetings in the framework of mediation and no protocol of procedural action is kept; 6) the terms of mediation within the CPC of Ukraine are limited to thirty days and cannot be extended; 7) only the plaintiff and the defendant in the relevant civil case may be parties to mediation; 8) the resolving mediation agreement for this type of mediation is embodied in the settlement agreement as a procedural document. Signs of non-integrated adjudication mediation are more in line with the classical mediation procedure.

The rules for the application of integrated adjudication mediation are provided by the relevant sectoral procedural legislation, and not integrated mediation - defined in accordance with the general rules of classical mediation. These considerations are reflected in the content of the proposed proposals to the current procedural legislation and the draft Law "On Mediation".

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