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STUDY OF PRIVATE AND PUBLIC INTERESTS WHEN IMPLEMENTING MEDIATION IN CRIMINAL LAW: NATIONAL AND FOREIGN PRACTICE

ДОСЛІДЖЕННЯ ПРИВАТНИХ ТА ПУБЛІЧНИХ ІНТЕРЕСІВ ПРИ ВПРОВАДЖЕННІ МЕДІАЦІЇ У КРИМІНАЛЬНЕ ПРАВО: НАЦІОНАЛЬНА ТА ЗАРУБІЖНА ПРАКТИКА

The study of positive foreign experience in the use of conciliation procedures in the settlement of commercial and civil disputes is relevant and necessary for the consistent reception of foreign ideas and the most effective models. Mediation is an effective method of resolving conflicts that arise between two parties, while a third party who has no interest in this conflict helps in resolving the conflict. Mediation has been around since ancient times and has been developed in many countries, but this process develops differently in each country. This topic is very relevant today, as it arouses considerable interest in the scientific community and the public. The author comes to the conclusion that mediation in the concept of restorative justice is an indicator of a high level of development of consciousness and legal culture of society, which cares not only for the interests of the victim, but tries to help the offender to realize the negativity of criminal behavior and reintegrate him into society with the least losses.

The role of the court, when approving conciliation agreements between the victim and the suspect or the accused, is analyzed as a guarantor of compliance of the approved agreement with the norms of the law, which excludes the possibility of abuse of this right by the parties. Peculiarities of the balance of private and public interests during the introduction of mediation into criminal law, which is beginning to play an important role, have been studied in the resolution of which criminal legal conflicts mediation can be used. Therefore, the effectiveness of mediation depends not only on a successful combination of the key characteristics of this procedure, but also on the correct definition of the type of conflicts to which it should be applied. The author argues for the need to introduce mediation into the criminal law of Ukraine not only to solve existing problems in the criminal law field, but also as a natural demand of society, formed as a result of the development of legal consciousness and social responsibility of citizens, due to the influence of more developed countries that have a corresponding positive the practice of such application.

Key words: *private interests, public interests, mediation, reception, foreign experience.*

Вивчення позитивного іноземного досвіду використання процедур примирення при врегулюванні комерційних та цивільних суперечок актуально та необхідно для послідовної рецепції зарубіжних ідей та найрезультативніших моделей. Медіація – це ефективний метод вирішення конфліктів, що виникають між двома сторонами, при цьому в вирішенні конфлікту допомагає третя сторона, яка ніяк не зацікавлена у цьому конфлікті. Медіація з'явилася ще давніх часів і отримала свій розвиток у багатьох країнах, однак у кожній країні цей процес розвивається по-різному. Ця тема є дуже актуальною на сьогодні, оскільки вона викликає значний інтерес у наукової спільноти та громадськості. Автор приходить до висновку, що медіація у концепції відновного правосуддя – є показником високого рівня розвитку свідомості і правової культури суспільства, яка дбає не лише про інтереси потерпілого, а намагається допомогти правопорушнику усвідомити негативність злочинної поведінки і реінтегрувати його у суспільство з найменшими втратами.

Проаналізовано роль суду, при затверджені угод про примирення між потерпілим та підозрюваним чи обвинуваченим, як гаранта відповідності затвердженої угоди нормам закону, що виключає можливість зловживання сторонами цим правом. Досліджено особливості балансу приватних і публічних інтересів при впровадженні медіації у кримінальне право, яке починає грати важливу роль, при вирішуванні до яких кримінально-правових конфліктів можна застосовувати медіацію. Тому ефективність медіації обумовлена не тільки вдалим поєднанням ключових характеристик цієї процедури, а і правильним визначенням виду конфліктів, до яких її слід застосовувати. Автор аргументує необхідність впровадження медіації у кримінальне право України не тільки для вирішення існуючих у кримінально-правовій сфері права проблем, а також, природньою вимогою суспільства, сформованою у результаті розвитку правової свідомості та суспільної відповідальності громадян, через вплив більш розвинених країн, які мають відповідну позитивну практику такого застосування.

Ключові слова: *приватні інтереси, публічні інтереси, медіація, рецепція, зарубіжний досвід.*

The purpose of the article is to study foreign experience regarding the application of the mediation procedure and the possibility of its reception in Ukrainian legislation.

As a way of resolving conflicts, mediation began to be very actively used in many countries, the period of origin of this procedure is the 20th – 21st centuries. Mediation developed very quickly, primarily in the countries of the European Union.

The study of positive foreign experience in the use of conciliation procedures in the settlement of commercial and civil disputes is relevant and necessary for the consistent reception of foreign ideas and the most effective models.

The need to study the foreign experience of using mediation is due to a number of features of this procedure:

1. Universality of the procedure. Acquaintance with foreign practice makes it possible to make sure that mediation in its modern form is a universal procedure. The commonality and universality of this professional language of the procedure, which is used in various cultural conditions and on different continents, allows for a free exchange of experience. Mediators today have their own lingua franca, which needs to be preserved and developed by increasing the intensity of international contacts.

2. Universality of the mediation development process. As noted by the majority of domestic researchers dealing with mediation issues, the universal mediation procedure was developed in the USA, and later it became widespread throughout the world. Each country in Europe has its own "acquaintance" with mediation and its own way of development and implementation of this procedure within society, judicial and legal systems [5, p. thirteen]. Ukrainian legislators will be able to avoid mistakes by studying the positive and negative experiences of other countries.

Analysis of recent research and publications. This study is based on the analysis of doctrinal sources of such scientists as V. Zemlyanska, N.V. Nestor, Yu. Mykytin, O. Semchyshyn, M. Yakovenko, Z. Symonenko, O. Galagan, M. Sirotkina, O. Ishchenko, I. Gochachko, O. Belinska, M. Karpenko, A. Tumayants, N. Turman, O. Mykolenko, I. Basista, R. Arakelyan, N. Mazaraki, T. Kiselyova, A. Ogrenchuk, T. Podkovenko, M. Umbreit, M. Libman, H. Zer, V. Ness and other scientists.

Presenting main material. It should be noted that many experts believe that mediation arose only in the 20th century. It was first substantiated in America, and then in European countries [1, p. 85]. But some facts indicate that this concept appeared much earlier, only under a different name and in a different form.

The first stage of the emergence of mediation is primarily related to the need to resolve conflicts between cities and states. This stage is a kind of prehistory of mediation, as it is more characteristic of prehistoric society. Aksakals, leaders, priests, etc. acted as mediators in that period. [2, p. 68]. And at that time, the word mediation was used, not mediation.

Such countries as: Japan, China, Greece and others used a similar method of conflict resolution. In Russia, a similar method of conflict resolution began to be used from the 6th century AD [1, p. 86].

The basis for the formation of the institution of mediation was the adoption of the "Mediation Act", which was adopted in 1803. This act ensured the independence of Switzerland. In the second half of the 20th century the active development of mediation began in such countries as Australia, Great Britain, and the United States. Later, the development of mediation began in continental Europe, and it began to be used in the current sense. Consider how the mediation procedure was used in Germany, France, the USA and Great Britain.

Other states are considering the possibility of adopting a Uniform Act, and to date, the rules governing privacy in mediation vary from state to state. Although it should be noted, California has one of the highest privacy guarantees in the US.

In addition, the Federal Alternative Dispute Resolution Act of 1998, known as The Federal Alternative Dispute Resolution Act, may also be cited, under which federal district courts are ordered to adopt local rules defining the possibility of alternative dispute resolution (ADR), and it also states that the courts must promote and encourage the use of ABC in each district. These ABC rules are adopted in every county in the United States.

Only in the mid-90s. in our country, mediation agreements appeared as an advanced trend. Yes, today there is an opportunity to conclude a political, socio-legal, social, labor and economic agreement.

The Law of Ukraine dated July 16, 2021 No. 1875-IX "On Mediation" clearly regulates the mediation procedure and accompanying issues in our country.

However, despite all this, the scope of mediation is still very limited [4, p. 110].

United Kingdom. In this state, there is no single legislative act that would regulate the use of mediation. It so happened that mediation in the United Kingdom experienced and continues to develop largely due to private initiatives, while undergoing changes under the active influence of the judicial community, which, together with state initiatives, also aims to promote mediation. And the institution of mediation itself is regulated by separate parts of the legislation, and its formation takes place in the form of court practice.

However, many experts believe that many cases are incompletely submitted to the court system. In this regard, the Ministry of Justice considers it necessary to develop such a mechanism for consideration in court only of those cases for which a judicial review is absolutely necessary.

Adopted in 2008, European Directive No. 2008/52/EC on certain aspects of mediation in civil and com-

mercial disputes has been amended differently in the three UK jurisdictions. For example, two legislative documents were adopted in Wales and England: The CrossBorder Mediation (EU Directive) Regulations and the Civil Procedure (Amendment) Rules of 2011 No. 88 (Civil Procedure (Amendment) Rules). At the same time, the norms of the European directive apply only to civil and commercial cross-border disputes. And in Northern Ireland and Scotland, the norms of the European Directive are extended only to cross-border mediation, and they do not affect the mediation of domestic disputes. In order to transform the EU Directive, the Cross-Border Mediation (Scotland) Regulations of 2011 No. 2011/234 ("The Cross-Border Mediation (Scotland) Regulations") were adopted in Scotland, the rules implementing Article 7 of the EU Directive on the confidentiality of mediation and mediators, as well as norms on the extension of the statute of limitations were introduced into some legislative acts, provided for in Article 8 of the EU Directive. These rules, adopted in Scotland, are otherwise not directly correlated with other norms of the EU Directive. Notably, Scotland does not use English case law on mediation, but applies disclosure rules that differ from English ones; nor do separate English civil procedural rules operate in Scotland. In addition, the Scottish jurisdiction is characterized by procedural features, its own rules for the use of language in court proceedings, etc.

In Northern Ireland, the EU Directive has been transformed by the Cross-Border Mediation (Northern Ireland) Rules 2011 and the Supreme Court Rules 2011 – "The 2011 Rules of the Court of Judicature (Northern Ireland), Amendment", as in Scotland, by introducing the norms of articles 7 and 8 of the EU Directive on confidentiality and limitation periods are in effect (new rules have been introduced regarding the calculation of 9 limitation periods, which are established by various statutes).

In general, the following types of disputes are settled through mediation in the UK: civil, family, commercial (including patent and trade mark disputes), corporate, cross-border disputes, small claims disputes, certain types of public law disputes (which are heard by the courts) and criminal legal disputes involving minors. It is interesting to note that, according to the Ministry of Justice, in the case of settlement of small claims disputes, many mediations are carried out using electronic means (up to 96% using telephone, etc.).

In addition, it is worth noting that in 2011, the Government of England and Wales ordered the state authorities, in the event that they act as parties to the dispute, to more actively use such methods of ABC as mediation [1, p. 86]. Regarding the binding nature of the procedure, Great Britain reached a compromise: if a certain party refuses the mediation procedure proposed by the court, it must bear all court costs, even if the case is won.

If you compare Ukraine and Great Britain, you can see that the potential of mediation is determined by the legal framework. Thus, the legal framework directly ensures the functioning and use of mediation procedures at the time of administration of justice.

As for Germany, disputes are resolved in arbitration courts, in this country there are more than 300 of them. Conciliation councils most often deal with issues of a consumer nature: insurance, labor disputes, medical violations, etc. [3, p. 78]. The main source of legal regulation of mediation in its diversity is the Law on the necessity of using mediation and other extrajudicial methods of conflict resolution dated 07.21. 2012 (hereinafter: Law on Mediation).

European Directive No. 2008/52/EC on certain aspects of mediation in the resolution of civil and commercial disputes directly influenced the adoption of the Law on Mediation, while the legal regulation of mediation is the same for both cross-border and domestic disputes, as it is regulated by one law. Along with special legislation, mediation regulations include the Family Procedure Code, the Civil Code, the Civil Procedure Code, as well as acts of the federal states.

It is noteworthy that even before the adoption of the Law on Mediation, some aspects of ABC were regulated in the Civil Procedure Code [ch. 278 (5)] and the CPC Implementation Act (c. 15), references to mediation were, for example, in section 135 of the Family and Non-Dispute Procedure Code. In addition, in the federal lands, including on the basis of the norms of Sec. 15 of the Law on the Implementation of the Civil Procedure Code, pilot projects on mediation under the supervision of the courts were actively implemented. The specified norm provided for the right of the federal states to introduce mandatory pre-trial procedures with the application of the ABC in relation to specific categories of cases. Section 278(5) of the Code of Civil Procedure provides for the judge's right to offer mediation or ACA to settle the dispute. Later, certain special laws began to reproduce this norm.

In Germany, mediation began to develop significantly due to the activity of the courts, which directly participated not only in the promotion of mediation, but also in the very conduct of mediation procedures. In connection with this, German practice gave rise to terms that defined mediation: "judicial mediation", when mediation is conducted by a judge; "mediation at court", when mediation is conducted by an independent mediator at the suggestion of a judge, "out-of-court mediation", when mediation is conducted by an independent mediator taking into account the contract. In addition, in German practice, the terms "conciliation procedure" and "mediation" are used as synonyms, the exception is the field of consumer dispute settlement: here the activity of special bodies for the settlement of consumer disputes is considered as a conciliation procedure (schlichtung), in the pro-

cess of which a decision is made by a third party, mandatory for execution, for example, by a banking organization, a consumer of services.

In general, mediation, according to the Law on Mediation, is used for the widest possible range of relationships – in any case, regardless of the category of the dispute and the place of residence (location) of the parties to the dispute.

According to paragraph 155a of the German Criminal Code, the judge and the prosecutor at each stage must provide for the possibility of reconciliation between the parties, namely the guilty party and the victim. And if reconciliation is possible, they make every effort in this direction. Paragraph 155b of the German Code of Civil Procedure provides for the procedure for implementing conciliation, so according to this paragraph, the judge and the prosecutor can provide personal data for the reconciliation of the parties at the initiative of one of the parties or at the appropriate request. At the same time, the specified data should be used exclusively for the reconciliation of the parties [3, p. 79].

The legal basis of civil mediation (including commercial and labor relations) is such regulatory acts as: Act No. 95-125 of February 8, 1995, Decree No. 96-652 of July 22, 1996. , Decree No. 2012-66 of January 20, 2012

Resolution No. 2011-1540 of November 16, 2011 and its derivative Decree No. 2012-66 implemented the provisions of European Directive No. 2008/52/EC on certain aspects of mediation in the resolution of civil and commercial disputes. Conducting mediation is also regulated by the norms of the Criminal, Labor, Civil Procedure, Criminal Procedure, Financial and Monetary Codes. Norms on mediation are also found in various departmental and ministerial documents.

In addition, we note that the European directive on mediation has had a significant impact on of rights violated by a criminal offense.

the current legislation of France. For example, the definition of mediation in accordance with the European Directive was used, and the direct effect of the Directive extended to domestic disputes of all kinds, not just to cross-border ones (with the exception of labor disputes and public administrative disputes).

In France, mediation is used in all legal areas, provided that it does not undermine the rules of public order governing financial and social behavior. According to section 1528 of the Civil Code, the parties to the dispute have the right, at their own discretion and in accordance with the rules established by the Code, to try to settle the dispute amicably with the help of a mediator, a court conciliator, or in the process of court proceedings, with the help of a lawyer. Therefore, mediation can be applicable to settle commercial, labor, family, public disputes. The development of mediation is also taking place in the field of criminal law regarding offenses committed by both minors and adults. Mediation has developed in the settlement of disputes of an administrative nature (mediation in the field of settlement of tax disputes, disputes on financial markets). In France, the development of mediation takes place in the following forms: private out-of-court mediation and court-ordered mediation.

So, it can be argued that the institution of mediation has been developing in different countries for a very long time. This made it possible to create the optimal content and form of the mediation procedure. However, not all areas of mediation have received the same impetus: the economic and civil law areas are in a more mature state of mediation than criminal court proceedings. Probably, a similar situation arises from the complexity of criminal-legal legal relations, the subject of which conflict is the restoration

Bibliography:

1. Морозова Є. В., Емтиль Ф. А. Медіація: зарубіжний досвід. *Право та держава: теорія та практика.* 2017. № 6(150). С. 85–89.

2. Нагірна М. С., Герасимова Ю. В. Нормативне регулювання медіації в міжнародному праві і зарубіжна правозастосовна практика. *Вісник Ради молодих вчених та спеціалістів*. 2018. Т. 1. № 1(20). С. 68–71.

3. Рогова М. С. Можливості рецепції зарубіжних практик медіації в законодавство. *Вісник сучасних досліджень*. 2018. № 11.6(26). С. 76–79.

4. Федоренко Н. В., Колесник В. В. Інститут медіації у зарубіжних країнах. *Наука та освіта: господарство та економіка; підприємництво; право та управління*. 2019. № 12(115). С. 109–113.

5. Koch H. Mediation im internationalen Streit. In: Bachmann B. Grenzuberschreitungen. Beitrage zum internationalen Verfahrensrecht und zur Schiedsgerichtsbarkeit. Tubingen, 2005. 399 c.