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*Institute of specialized ombudsman vs dispute resolution with participation of a  
judge: current situation and development prospect*

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# Secção I

## Investigação Científica\*

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\* Os artigos presentes nesta secção foram sujeitos a processo de revisão segundo o método *blind peer review*.

## Institute of specialized ombudsman vs dispute resolution with participation of a judge: current situation and development prospect

### Instituto do provedor de justiça especializado vs resolução de disputas com a participação de um juiz: situação actual e perspectiva de desenvolvimento

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**ABSTRACT:** Ukrainian institutions that would facilitate alternative dispute resolution have been in the process of establishment since Ukraine's independence in 1991. At present, only the activity of arbitration courts is regulated in Ukraine by law as an alternative way of resolving disputes. Since 2010, there have been repeated attempts to create financial ombudsman institute. The first ideas of creating business ombudsman institute date back to 2013. This type of ombudsman has been in operation since 2014 and can be considered the most successful and effective both now and in the near future. Currently in Ukraine, there are also the following types of specialized ombudsmen: insurance, energy, language and education ones. Dispute settlement with the participation of a judge was introduced in civil litigation as an alternative method of dispute resolution in 2017. This institution provides the parties of the conflict with additional opportunities for faster and more effective settlement of the dispute. At present, this institution is not very widely used in practice, but in the coming years it will become more popular. The example of the activities of specialized ombudsman institutions and dispute resolution with the participation of a judge shows that Ukraine is adopting the world's best dispute resolution practices that will contribute to a faster, more effective resolution of the conflict without trial.

**KEYWORDS:** Alternative Dispute Resolution (ADR); Specialized Ombudsman; Business Ombudsman; Financial Ombudsman; Settlement of a dispute with the participation of a judge.

**RESUMO:** As instituições ucranianas que facilitariam a resolução alternativa de litígios estão em processo de estabelecimento desde a independência da Ucrânia, em 1991. Atualmente, apenas a atividade dos tribunais arbitrais é regulada por lei na Ucrânia como uma forma alternativa de resolução de litígios. Desde 2010, tem havido repetidas tentativas de criar um instituto de mediação financeira. As primeiras ideias de criar um instituto de provedoria de justiça empresarial datam de 2013. Este tipo de provedor está em funcionamento desde 2014 e pode ser considerado o mais bem-sucedido e eficaz, tanto agora como no futuro próximo. Atualmente na Ucrânia, existem também os seguintes tipos de provedores de justiça especializados: seguros, energia, línguas e educação. A resolução de litígios com a participação de um juiz foi introduzida no litígio civil como método alternativo de resolução de litígios em 2017. Esta instituição proporciona às partes do conflito oportunidades adicionais para uma resolução mais rápida e eficaz do litígio. Atualmente, esta instituição não é muito utilizada na prática, mas nos próximos anos tornar-se-á mais popular. O exemplo das atividades das instituições especializadas de mediação e resolução de litígios com a participação de

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um juiz mostra que a Ucrânia está a adotar as melhores práticas mundiais de resolução de litígios que irão contribuir para uma resolução mais rápida e eficaz do conflito sem julgamento.

**PALAVRAS-CHAVE:** Resolução alternativa de disputa (RAD); Ombudsman especializado; Ombudsman de negócios; Ombudsman financeiro; Resolução de um litígio com a participação de um juiz.

## Introduction

Since gaining independence in 1991, Ukraine has been in the process of finding an effective judicial system, including the introduction of out-of-court (alternative) dispute resolution mechanisms.

In 2016, amendments were made to Art. 124 of the Constitution of Ukraine<sup>3</sup>, and now it provides for the possibility of establishing a mandatory pre-trial procedure for resolving disputes. However, pre-trial dispute resolution and alternative dispute resolution, which are widely used in world practice, are not identical concepts. In addition, the amended Civil Procedure Code of Ukraine, in the wording of 2017<sup>4 5</sup>, introduced a special dispute resolution procedure with the participation of a judge, which also became an important element of the new system of civil proceedings in Ukraine.

Currently, the Ukrainian leaders declare the need to take measures to attract foreign investment. At the same time, they reiterate that one of the important aspects is the need for judicial reform. An element of judicial reform, of course, is the introduction and further development of special mechanisms within the courts themselves and an out-of-court dispute resolution system that would help reduce the workload of the courts and reconcile the parties of the conflict.

In this context, the institution of a specialized ombudsman (other than the Commissioner for Human Rights) and the settlement of a dispute involving a judge deserve attention. These institutions are not as promoted and popularized as mediation or arbitration; however, they are noteworthy mechanisms for reconciling the parties to the conflict.

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<sup>3</sup> Constitution of Ukraine, <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>

<sup>4</sup> Civil Procedural Code, <https://zakon.rada.gov.ua/laws/show/1618-15#Text>

<sup>5</sup> A similar institute is enshrined in the Commercial Procedural Code of Ukraine in the 2017 edition.

## **1. Historical retrospective of the development of the institutions of the specialized ombudsman and settlement of the dispute with the participation of a judge in Ukraine**

The relevance of establishing a specialized ombudsman and resolving disputes with the participation of a judge has been repeatedly mentioned in various policy documents related to judicial reform or the development of the relevant sector in Ukraine. And these mechanisms are fully in line with the Strategy for the Reform of the court authority, Judiciary and Related Legal Institutions for 2015-2020, approved by a presidential decree on May 20, 2015.<sup>6/7</sup>

### **1.1. What are the prerequisites for the introduction of the institution of dispute resolution with the participation of a judge in the legislation of Ukraine?**

If we analyze the Draft Law on Amendments to the Procedural Codes and the Explanatory Note to this draft<sup>8</sup>, it can be argued that there are both negative and positive preconditions for the introduction of the Institute for dispute resolution with the participation of a judge.

The negative preconditions include: reduction of the workload of courts by the number of cases in the proceedings on the number of population and the size of the court staff; overcoming non-compliance with procedural deadlines by courts; criticism by foreign institutions of the inability of the judiciary to resolve cases within a reasonable time.

The positive prerequisites are: implementation of international experience and the desire to meet international standards; search for an effective simplified procedure to save time and resources of all involved in litigation and increase the efficiency of dispute resolution; active use by the parties of mediation and other ADRs in the context of globalization, which encourages the legislator to support such an initiative and create additional mechanisms.

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<sup>6</sup> The Strategy for reforming the judiciary, the proceedings and related legal institutions for 2015-2020, <https://zakon.rada.gov.ua/laws/show/276/2015#Text>

<sup>7</sup> It should be noted that the draft law 3711, which was initiated by the current President of Ukraine, does not address the issues considered in this article and concerns an insignificant component of the judicial system of Ukraine. [https://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=69228](https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=69228); No other strategic documents on judicial reform have been developed in Ukraine to date.

<sup>8</sup> Draft Law on Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Administrative Procedural Code of Ukraine and other legislative acts // 2147-VIII from 03.10.2017. Link: [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_2?pf3516=6232&skl=9](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=6232&skl=9)

## 1.2. Development of specialized types of ombudsman in Ukraine

The first ombudsman for historical retrospect in Ukraine in 1997 was the Commissioner for Human Rights of the Verkhovna Rada of Ukraine, which is a traditional institution for most countries. However, the study of world experience helped to initiate the creation of other specialized types of ombudsmen in Ukraine, which would help resolve conflicts in various spheres of society, both public and private. In this regard, one can agree that the simple (procedurally) and accessible to all citizens (free of charge assistance) institution of ombudsman in many democracies and some post-authoritarian countries has become an integral part of the legal system<sup>9</sup>.

Such attempts to create the first types of specialized ombudsmen date back to 2008. It was then that a UN-funded international aid project proposed the creation of a financial ombudsman. Despite the fact that more than 12 years have passed, the institution of financial ombudsman has not been established, although the expediency of this type of ombudsman was mentioned in a number of policy documents related to the development of the financial market<sup>10</sup>. The last attempt was in 2018, when the bill on the establishment of the institution of financial ombudsman was registered in the Parliament of Ukraine. This attempt was close to success; however, she did not receive the necessary support in parliament. In this context, it should also be noted that the approach to the legal model of the financial ombudsman has also changed historically. It was based on either the German or the British model<sup>11</sup>.

The first ideas for creating another specialized type of ombudsman, namely the business ombudsman, date back to 2013. This type of ombudsman has been

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<sup>9</sup> Kosinov S.A. The ombudsman as an institution of control over authority. / Theory and practice of jurisprudence. – Entry 1 (7) / 2015// file:///C:/Users/User/Downloads/ombudsmen-kak-institut-kontrolya-za-vlastyu.pdf

<sup>10</sup> The establishment of a Financial Ombudsman was provided for in a number of acts, in particular: Strategy for reforming the system of consumer protection in the financial services markets for 2012-2017, approved by the Cabinet of Ministers №867-r of 31.10.2012, Comprehensive program for the development of the financial sector of Ukraine until 2020, approved by the NBU Board № 391 of 18 June 2015.

<sup>11</sup> The draft Law on the Institution of the Financial Ombudsman is based on the British model The history of development and the problem of creating a financial ombudsman are described in detail in the article 'Financial Ombudsman: Towards an Effective Customers Rights` Protection in Ukraine', R.Khanyk-Pospolitak, /Access to Justice in Eastern Europe – Issue 3, 2019 – p. 51-63 [doi.org/10.33327/AJEE-18-2.4-a000019](https://doi.org/10.33327/AJEE-18-2.4-a000019)

in operation since 2014 and can be considered the most successful and effective in Ukraine both now and in the near future. Moreover, the draft law that should regulate the activities of the business ombudsman is being considered by the Verkhovna Rada of Ukraine.

Since 2016, the idea of creating an energy ombudsman to protect the rights of consumers in the field of housing and communal services has been promoted. In 2017, a relevant draft law was registered in the Verkhovna Rada of Ukraine, which was not adopted. Accordingly, the Energy Ombudsman currently acts as a non-governmental organization. However, it is difficult to assess their activities on the posts in FB.

Currently, there are other types of specialized ombudsmen in Ukraine: educational, language, insurance. In addition, examples of corporate ombudsmen are beginning to emerge<sup>12</sup>. Although the activities of these types of specialized ombudsmen are regulated at the level of laws, in our opinion, this regulation is very insignificant. Because it is not a separate specialized law, which clearly spells out all aspects related to the activities of these ombudsmen, but several provisions within the Law governing special issues. As an example, the Law of Ukraine “On Ensuring the Functioning of the Ukrainian Language as the State Language”<sup>13</sup>, contains relevant provisions on the Commissioner for the Protection of the State Language (language ombudsman).

## **2. The institution of the ombudsman and the settlement with the participation of a judge: is there anything in common?**

The settlement of a dispute with the participation of a judge is subject to certain procedural requirements, which are defined by the procedural codes, where this institution is established, and is carried out by a qualified lawyer, a judge. The judge may suggest to the parties a possible way of amicable settlement of the dispute.

According to V. Prushchak, the settlement of a dispute with the participation of a judge is both an independent alternative way of resolving civil disputes and

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<sup>12</sup> An example of a corporate ombudsman is the student ombudsman (Student Ombudsman), established at Poltava University of Economics and Trade.

<sup>13</sup> <https://zakon.rada.gov.ua/laws/show/2704-19#top>

an institution of civil procedural law.<sup>14</sup> He points to the following external and internal features of this procedure. The external features are: a) the presence of a civil dispute between the parties; b) partial self-regulation of the procedure; c) voluntary nature of the procedure; d) almost unlimited procedural discretion; e) participation of a third independent person as a neutral intermediary; g) the final act of application of the specified method of alternative dispute resolution, which extends its effect only to the parties. The internal features are: a) the presence of a judge in the proceedings of the case, where he is acting as a neutral mediator; b) the possibility of using this method only at the beginning of the consideration of the case on the merits; c) the envisaged right of a judge to offer the parties a peaceful solution to the dispute; d) direct responsibility of the parties for the adopted decision<sup>15</sup>.

A Specialized Ombudsman does not even have to be a lawyer, and appeals are not dealt with as much in the prescribed procedure as in the case of a dispute resolution with a judge.

A Specialized Ombudsman also applies to the ADR as does the institution of dispute settlement with the participation of a judge. Common to these two procedures are:

- a) partial self-regulation of the procedure, which stipulates that in the settlement of a dispute involving a judge or an ombudsman, there are no strict mandatory rules. The judge and the ombudsman must use all possible tools to settle the dispute amicably;
- b) voluntary nature of the procedure. Only with the voluntary consent of the parties to the conflict is it possible to apply the dispute resolution procedure with the participation of a judge and a specialized ombudsman;
- c) participation of a third independent person as a neutral intermediary. The judge and the specialized ombudsman act as a third party who is independent of the parties to the conflict;
- d) the final act of application of the specified method of alternative dispute resolution, which extends its effect only to the parties. The decision of the specialized ombudsman, as well as the court decision based on the results of the

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<sup>14</sup> Prushchak V.E. Settlement of a dispute with the participation of a judge in civil proceedings of Ukraine: dis. cand. / V.E. Pruschak. - Odessa, 2020. - 192 p. - p. 3

<sup>15</sup> The same.



dispute settlement procedure, is not valid for third parties, but only for the parties to the case;

e) application of tools, principles that are characteristic of mediation.

Thus, at first glance, it seems that these two institutions have nothing in common. However, the settlement of a dispute involving a judge and a specialized ombudsman have many common features.

### **3. Settlement of a dispute with the participation of a judge: is such a procedure effective?**

The importance of introducing the institution of dispute resolution with the participation of a judge means that the parties have an alternative in terms of the parties' ability to resolve their conflict at the stage of consideration of the case in court. Because as you know, it is no longer possible to apply any other ADRs at this stage.

Distinctive features of the institution of dispute resolution with the participation of a judge from other ADRs are: time limits; subjects; the judge is not obliged to have special knowledge of the mediator; one-time use of the institute; less focused circle of clarification of issues and interests of the parties by the judge. Common features of this institution with other ADRs include: the presence of two parties to the conflict; the purpose of the mediator; confidentiality throughout the procedure.

According to Art. 201 of the CPC of Ukraine, settlement of the dispute with the participation of a judge is carried out with the consent of the parties before the trial on the merits. Dispute settlement with the participation of a judge is not allowed if a third party has intervened in the case, making independent claims on the subject matter of the dispute.

According to Art. 202 of the CPC of Ukraine, in the procedure for settling the dispute with the participation of a judge, the court issues a ruling, which simultaneously suspends the proceedings. In case the parties do not reach a peaceful settlement of the dispute as a result of the settlement of the dispute, re-settlement of the dispute with the participation of a judge is not allowed.

In the period from the end of 2017 (the year of the institute's introduction) to the present day, only 323 cases were considered in the SSRCD (Single State

Register of Court Decisions), which were considered in civil proceedings<sup>16</sup>. If you look at the breakdown by year, it looked as follows: 2017 - 9 cases, 2018 - 62 cases, 2019 - 104 cases, 2020 - 119 cases and for three months of this year - 29 cases. If you look at the categories of cases, it is most often used in family matters, cases arising from credit relations and leases.

Thus, as can be seen from the statistics, the total number of cases with the initiation/application of the institution of dispute resolution with the participation of a judge is too small compared to the total number of cases (over 2 million). Although this institute is used, it is done very rarely.

What are the reasons for this situation? Let's look at the generalizations of case law made by different courts of Kyiv.

The Obolon District Court of Kyiv conducted a generalization of judicial practice for the first half of 2018 on the topic "Settlement of a dispute with a judge: practical implementation of the novella of Chapter 4 of Section III of the CPC of Ukraine." Thus, according to statistics for the first half of 2018, in the proceeding of the judges of the Obolon District Court of Kyiv were 6035 civil cases and materials, received in this period 3206 cases/materials, 3164 of civil cases and materials were considered, but in the course of generalization only 1 (one) civil case was revealed, the consideration of which was carried out in the manner prescribed by Chapter 4 of Section III of the CPC of Ukraine<sup>17</sup>.

Thus, the decision of the Obolon District Court of Kyiv from April 13, 2018 (unique №756/3064/13-c; proceedings №2/756/238/18) in the case of division of joint property of the spouses granted the request of the parties to conduct a settlement procedure dispute with the participation of a judge. And on May 5, 2018, by the decision of the Obolonsky District Court of Kyiv, the proceedings in this case were resumed and the dispute settlement procedure with the participation of a judge was terminated, as the parties did not reach an agreement. Currently, this case is under consideration, the court decision has not been made.

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<sup>16</sup> To search for cases in which there was an initiation or use of this institution, the Single State Register of Judgments was used with the use of a combined method of searching by filters and keywords – <https://reyestr.court.gov.ua/>.

<sup>17</sup> Generalization of judicial practice of the Obolonsky district court of the city of Kyiv for the first half of 2018 on the topic "Settlement of a dispute with the participation of a judge: practical implementation of the novella of Chapter 4 of the investigation of section third CPC of Ukraine".

During the period under study, the Podilsky District Court of Kyiv made 9 rulings on the dispute settlement procedure with the participation of a judge, 2 disputes were settled by recognizing the settlement agreement by the court and 1 case was left without consideration. In the other 6 cases, the settlement of the dispute with the participation of a judge did not achieve a positive result, the proceedings were resumed and referred to another judge, determined in accordance with Art. 33 of the CPC of Ukraine.

The decision of the Podilsky District Court of Kyiv of February 12, 2019 in case №758/10896/17 approved a settlement agreement between the parties. From the motivating part of the decision it is seen that the court decision of 30.01.2019 was intended to settle the dispute with the participation of a judge with the appointment of a joint meeting with the parties on 08.02.2019. During the joint meetings, the parties agreed to settle the dispute on the basis of mutual concessions by concluding an settlement agreement<sup>18</sup>.

On November 29, 2018, the Podilsky District Court of Kyiv issued a ruling in the case № 758/6108/18, which granted the parties' request to settle the dispute with the participation of a judge<sup>19</sup>. The decision of the Podilsky District Court of Kyiv of February 15, 2019 in the case №758/6108/18 recognized the settlement agreement between the parties<sup>20</sup>.

In addition, as a result of the dispute settlement procedure with the participation of a judge, a decision was made granting the plaintiff's request to leave the claim without consideration<sup>21, 22</sup>.

During the period from 2018 to the present, the Holosiivskyi District Court of Kyiv has ruled on 8 rulings on the dispute settlement procedure with the participation of a judge, and 3 disputes have been settled based on the results of this procedure.

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<sup>18</sup> Decision of the Podilsky District Court of Kyiv of February 12, 2019 in the case № 758/10896/17 // Single State Register of Court Decisions. URL: <https://reyestr.court.gov.ua/Review/80287531>.

<sup>19</sup> Decision of the Podilsky District Court of Kyiv of November 29, 2019 in the case № 758/6108/18 // Single State Register of Court Decisions. URL: <https://reyestr.court.gov.ua/Review/78242710#>

<sup>20</sup> Decision of the Podilsky District Court of Kyiv of February 15, 2019 in the case № 758/6108/18 // Single State Register of Court Decisions. URL: <https://reyestr.court.gov.ua/Review/81541994>

<sup>21</sup> Decision of the Podilsky District Court of Kyiv of December 12, 2019 in the case № 758/8143/19 // Single State Register of Court Decisions. URL: <https://reyestr.court.gov.ua/Review/86430983#>

<sup>22</sup> Decision of the Podilsky District Court of Kyiv of January 3, 2020 in the case № 758/8143/19 // Single State Register of Court Decisions. URL: <https://reyestr.court.gov.ua/Review/87300720>

The decision of the Holosiivskyi District Court of Kyiv from February 22, 2018 in case №752/12388/17 approved the settlement agreement between the parties. The reason was that during the joint meeting with the participation of the parties the text of the settlement agreement and the joint statement of the parties on the approval of its terms were provided, in connection with which the dispute settlement procedure was terminated<sup>23</sup>.

The decision of the Holosiivskyi District Court of Kyiv from February 22, 2018 in case №752/9607/17 approved an settlement agreement between the parties in a civil case on a claim for compensation of property and non-property (moral) damage<sup>24</sup>.

After the dispute settlement procedure with the participation of a judge by the decision of the Holosiivskyi District Court of Kyiv of May 23, 2018 in the case №752/15213/17 the settlement agreement was approved, the proceedings were closed<sup>25</sup>.

Desniansky District Court of Kyiv for the period from 2018 to the present has issued 4 rulings on the dispute settlement procedure with the participation of a judge. The results of this procedure settled 3 disputes by recognizing settlement agreements between the parties.

In particular, the decision of the Desniansky district court of Kyiv from June 15, 2018 in case № 754/13227/17 decided to settle the dispute with the participation of a judge in the case on the statement of claim of PERSON\_1 to PERSON\_2, third party: Service in cases of Children of Desnyansky district in the Kyiv State Administration on determining the child's place of residence and recovery of alimony and counterclaim from PERSON\_2 to PERSON\_1, third person: Service in cases of Children of Desnyansky district in Kyiv State Administration on determining the child's place of residence with the mother and recovery of alimony and additional costs<sup>26</sup>. After the settlement procedure, the

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<sup>23</sup> Decision of the Holosiivskyi District Court of Kyiv of February 22, 2018 in case 752/12388/17 // Single State Register of Court Decisions. URL: <https://reyestr.court.gov.ua/Review/72689187>

<sup>24</sup> Decision of the Holosiivskyi District Court of Kyiv of February 22, 2018 in case 752/9607/17 // Single State Register of Court Decisions. URL: <https://reyestr.court.gov.ua/Review/72430263>

<sup>25</sup> Decision of the Holosiivskyi District Court of Kyiv of May 23, 2018 in case № 752/15213/17 // Single State Register of Court Decisions. URL: <https://reyestr.court.gov.ua/Review/74307924>

<sup>26</sup> Decision of the Desniansky District Court of Kyiv of June 15, 2018 in case № 754/13227/17 // Single State Register of Court Decisions. URL: <https://reyestr.court.gov.ua/Review/74711968#>

Desniansky District Court of Kyiv recognized the settlement agreement between the parties by a decision of June 23, 2018, and the proceedings were closed<sup>27</sup>.

In view of the above, in our opinion, the novella of Chapter 4 of Section III of the CPC of Ukraine has advantages in terms of rapid settlement of the dispute at an early stage; the parties significantly save their time and significant court costs (the state returns part of the court fee); holding meetings in private on a confidential basis; the dispute is settled if both parties are satisfied with the agreement.

However, in our opinion, as can be seen from the statistics, the settlement of a dispute involving a judge is not yet effective. The main reasons for this situation are: 1) distrust of this institution by the parties; 2) the reluctance of the parties themselves to reconcile.

In addition, it is worth noting certain shortcomings of the legal provision of such a procedure, as it limits the ability of the parties to resolve the dispute with the participation of a judge only before the hearing and does not allow such an opportunity during the trial.

However, another aspect of the application of this institution is possible. Namely, there is a high risk that unscrupulous parties will use the mechanism of intentional settlement of a dispute with the participation of a judge as an alternative to removing the latter. That is, in this case, it is possible to abuse the procedural rights of the parties to the dispute, the purpose of which is to manipulate the automated distribution of cases between judges.

#### **4. Business ombudsman as one of the best examples of activity of the specialized ombudsman institute in Ukraine**

Created with the support of Ukraine's international partners, namely the EBRD, the business ombudsman began its work in 2014. The legal basis for the activity so far is the Regulation on the Business Ombudsman Council, which was approved by the Resolution of the Cabinet of Ministers of Ukraine of November

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<sup>27</sup> Decision of the Desniansky District Court of Kyiv of June 23, 2018 in case № 754/13227/17 // Single State Register of Court Decisions. URL: <https://reyestr.court.gov.ua/Review/74891029>.

26, 2014 № 691<sup>28</sup>. In addition, procedural issues of the business ombudsman are regulated in the Regulations.

The Ukrainian business ombudsman is structured on the examples of similar institutions in foreign countries. The Council of the Business Ombudsman is headed by one person, assisted by the staff.

The basic principles in the organization of the business ombudsman are independence, impartiality, openness, transparency, free of charge services.

Complaints to the business ombudsman can be filed only by legal entities or natural persons-entrepreneurs for actions or inaction of public authorities. The business ombudsman does not consider a complaint if a case has already been initiated in court. Complaints are submitted and considered free of charge. The term for consideration of complaints is up to 90 days.

The Business Ombudsman prepares annual and systematic reports, as well as provides recommendations to government agencies on how to improve the situation. In total, over the years (since 2015), the Business Ombudsman has considered 8,265 complaints. In 2020, the business ombudsman considered 1,737 complaints, of which 1,159 had a positive effect<sup>29</sup>. As practice shows, the number of complaints to the business ombudsman is growing due to the trust in this institution.

The activity of this type of specialized ombudsman is a vivid example of the effectiveness and expediency of such an alternative way of resolving a dispute, which should be taken as a basis for creating new types of specialized ombudsmen in Ukraine and developing existing ones.

## **5. Problems of the Ombudsman Institute as an ADR and prospects for its development**

It should be noted that at present, thorough scientific works are devoted only to the Verkhovna Rada Commissioner for Human Rights. Therefore, it can be argued that at present in Ukraine the institution of a specialized ombudsman

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<sup>28</sup> Resolution of the Cabinet of Ministers of Ukraine "On the establishment of the Council of Business Ombudsman", <https://zakon.rada.gov.ua/laws/show/691-2014-%D0%BF>.

<sup>29</sup> Statistics are taken from the quarterly report for October-December 2020., [https://boi.org.ua/files/lm/y6/4q\\_20\\_ua21.pdf](https://boi.org.ua/files/lm/y6/4q_20_ua21.pdf)

has not received sufficient scientific justification<sup>30</sup>, which also does not contribute to its development and does not allow to clearly propose the concept of legal regulation.

Regardless of the above, in recent years the institution of a specialized ombudsman has begun to receive attention and practice and is actively discussed at various events. In line with current needs, especially in the context of the pandemic and the war in eastern Ukraine, the possibility of introducing a veteran ombudsman and a patient ombudsman is being discussed among new types of specialized ombudsmen.

The main problems in the activities of all types of specialized ombudsmen are the following:

- 1) the lack of legislative regulation of their activities, which would clearly define the principles of their activities and competence. This problem, in our opinion, needs to be solved as soon as possible. This will help the parties to the conflict understand the procedure for resolving the dispute from the moment of applying to the relevant institution until the moment of making a decision. In addition, it is important to establish the grounds and procedure for reviewing the ombudsman's decisions in the event of disagreement with one of the parties to the conflict.
- 2) determination of the legal force of decisions made by specialized ombudsmen based on the results of dispute resolution for the parties to the conflict. Solving this problem is important, as it will depend on the possibility of applying the enforcement procedure.

Unfortunately, it should be noted that in Ukraine the dynamics of execution of court decisions on a voluntary basis is not very positive yet. And the implementation of decisions of other institutions, in particular ADR, on a voluntary basis seems very illusory. Therefore, the possibility of applying a coercive procedure to enforce a decision of a specialized ombudsman may be crucial when a person decides whether to go to court or to a specialized ombudsman. At present, the decisions of the current specialized ombudsmen are of purely recommendatory nature.

- 3) lack of trust. No complete distrust of the institution of a specialized ombudsman can be claimed at this point. And this is evidenced by the activities of the business

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<sup>30</sup> An exception is the dissertation of O. Ageev "Constitutional and legal status of the ombudsman on migration: foreign models and prospects for implementation in Ukraine" (2017)

ombudsman. However, for other existing types, there is a need to clarify all the positive aspects of their activities, such as the independence of the ombudsman. Because, as practice shows, potential clients of a specialized ombudsman sometimes have doubts about this. As an example, on the page of the energy ombudsman in FB, the users repeatedly raise this aspect. Namely, whether the energy ombudsman will defend the interests of consumers if it is funded by the relevant service provider.<sup>31</sup>

As for the further development of the institution of a specialized ombudsman and their legislative consolidation, except for the business ombudsman, so far everything remains in most cases at the level of concepts.

Thus, in particular, with regard to the Energy Ombudsman, the USAID Energy Security Project proposes to consider two main concepts of the Energy Ombudsman Institute. According to the first (implemented in the United States, Georgia and other countries), the energy ombudsman advocates for the rights of household consumers and small businesses in the energy markets. The second concept (exemplified by some EU countries or Australia) is that the energy ombudsman is an alternative judicial body, an arbitrator who resolves disputes where the consumer (household consumer or small business) is one of the parties.<sup>32</sup>

The issue of creating a financial ombudsman is still on hold. It is possible that the work on its creation will intensify after the update of the legislation governing the activities of financial service providers.

In addition to the business ombudsman, the draft Law “On the Government Commissioner for Medical Affairs”<sup>33</sup> (medical ombudsman) was also registered in Ukraine. However, we consider this project to be quite imperfect, as it does not contain answers to the main questions, namely the procedures for appealing to the medical ombudsman, consideration of complaints of patients and doctors and the legal force of his decisions.

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<sup>31</sup> <https://www.facebook.com/energy.ombudsman.ua/>

I. <sup>32</sup> Energy Ombudsman for Ukraine and its functions - <https://energysecurityua.org/ua/novyny/energetichnii-ombudsman-dlia-ukrayiny-yogo-funktssiyi/>

<sup>33</sup> [https://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=71724](https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=71724)



Thus, the prospects for specialized types of ombudsmen are quite realistic. However, their development and perception by society requires time, legal basis and educational work.

## **Conclusions**

The emergence of a procedural institution for the settlement of a dispute with the participation of a judge is a clear positive step forward and provides the parties to the conflict with additional opportunities for a faster and more effective settlement of the dispute. At present, this institute is not very used in practice, but we believe that in the coming years it will become more popular.

The Institute of Specialized Ombudsman as ADR has more than 10 years of history in Ukraine. Despite repeated attempts to legislate for a specialized ombudsman in various areas of private or public law, they have not yet succeeded. However, some types of specialized ombudsmen already operate in Ukraine, one of the most successful is the business ombudsman. It is the activities of this type of specialized ombudsman that should serve as an example for the creation of new specialized ombudsmen in Ukraine in the coming years, which will contribute to the needs of society in out-of-court settlement of disputes.

The example of the activity of institutes of specialized ombudsman and dispute settlement with the participation of a judge testifies to Ukraine's desire to adopt the best world practices of dispute settlement, which will contribute to faster, more effective settlement of the conflict without trial.

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