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Mediation as an effective tool for the prevention of violation and protection of rights in Ukraine through the prism of international experience internacional

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Secção I

Investigação Científica*

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Mediation as an effective tool for the prevention of violation and protection of rights in Ukraine through the prism of international experience

A mediação como instrumento eficaz para a prevenção da violação e a protecção dos direitos na Ucrânia através do prisma da experiência internacional

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ABSTRACT: The paper analyzes mediation as an alternative dispute resolution tool in national civil legislation, taking into account international experience. The consequences of martial law in Ukraine, in addition to the general negative impact on the economy and social relations in the state, created limited access to judiciary resources, which prompted the search for effective ways to resolve the dispute. The aspiration for European integration has determined the vector of rebuilding Ukraine to increase public confidence in the institution of law, guaranteeing rights, freedoms, and legitimate interests. One of the challenges to the restoration of our state is the development of an area for implementing mediation in the national legal dispute resolution system, ensuring its broad support by interested parties and civil society. The primary purpose of mediation in dispute resolution is to find a solution that would satisfy all parties and maintain, preserve, or restore productive relations between the parties. The introduction and development of mediation in the Ukrainian legal space require institutional support and dissemination of positive international practices. The fundamental principles of legal regulation of mediation are to ensure the necessary standards with minimal state interference in these relations and to provide the parties to the dispute with maximum freedom and the ability to dispose of their rights.
KEYWORDS: Mediation; access to justice; principle of a safe environment; regulatory models of mediation; conciliation procedures.

RESUMO: O documento analisa a mediação como um instrumento alternativo de resolução de litígios na legislação civil da Ukrania, tendo em conta a experiência internacional. As consequências da lei marcial na Ucrânia, para além do impacto negativo geral na economia e nas relações sociais do Estado, criaram um acesso limitado aos recursos judiciais, o que motivou a procura de formas eficazes de resolver o litígio. A aspiração à integração europeia determinou o vector da reconstrução da Ucrânia para aumentar a confiança pública na instituição do direito, garantindo direitos, liberdades, e interesses legítimos. Um dos desafios para a restauração do nosso

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Estado é o desenvolvimento de uma área para a implementação da mediação no sistema nacional de resolução de litígios jurídicos, garantindo o seu amplo apoio pelas partes interessadas e pela sociedade civil. O principal objectivo da mediação na resolução de disputas é encontrar uma solução que satisfaça todas as partes e manter, preservar, ou restaurar relações produtivas entre as partes. A introdução e o desenvolvimento da mediação no espaço jurídico ucraniano requerem apoio institucional e a disseminação de práticas internacionais positivas. Os princípios fundamentais da regulamentação legal da mediação são assegurar as normas necessárias com a mínima interferência do Estado nestas relações e proporcionar às partes em litígio a máxima liberdade e a capacidade de dispor dos seus direitos.
PALAVRAS-CHAVE: Mediação; acesso à justiça; princípio do ambiente seguro; modelos regulamentares de mediação; procedimentos de conciliação.

Introduction

The full-scale invasion of the Russian Federation on the territory of Ukraine dramatically changed the perception of Ukrainian society in all spheres of civil life. In connection with the military operations on the territory of Ukraine, there were certain restrictions on constitutional rights and obstacles to the implementation of legal proceedings. At the beginning of the war, the Ukrainian Chamber of Commerce and Industry recognized military aggression as a force majeure event in business processes. However, a reference to these circumstances does not automatically release one of the parties from liability for the non-fulfillment of obligations. Current judicial practice shows that the existence of exceptional circumstances requires proof in each specific situation. In particular, the Economic Court of Cassation, as part of the Supreme Court, notes in its decision in case No. 904/3886/21 as of January 25, 2022[4] that the party referring to the specific circumstances must prove that such circumstances are force majeure. Also, their inevitability and extreme nature are subject to proof. At the same time, force majeure does not have a pre-established prejudicial character. Accordingly, the main disadvantages of the current state of dispute resolution are the workload of the courts, the duration, and complexity of the trial, the delay in consideration of cases, the presence of additional costs for legal assistance, the risks of information disclosure, etc. We are convinced that guarantees of the right to a fair dispute hearing are not provided exclusively by the judicial system. The lack of effective dispute-resolution mechanisms remains an urgent problem.

[4] Cassation Economic Court of the Supreme Court of Ukraine. Resolution No. 904/3886/21 as of January 25, 2022.

The course of European integration has determined the vector of restoring Ukraine to increase public confidence in the institution of law, guaranteeing rights and freedoms. One of the challenges of restoring post-war Ukraine is the issue of developing an area for introducing mediation into the national dispute resolution system and finding an effective mechanism to ensure its broad support by stakeholders and society. The primary purpose of mediation in dispute resolution is to find a solution that would satisfy all parties and maintain, preserve, or restore productive relations between the parties.

Given the considerable scientific and applied interest, the issue of forming a more effective dispute resolution mechanism through the introduction of mediation remains procedurally unresolved, causes discussions, and requires a comprehensive study.

The Ukrainian legislator, by the Law of Ukraine on Mediation No. 1875-IX of December 16, 2021, granted mediation the status of an out-of-court procedure as an alternative judicial method of dispute resolution. This law provides that mediation is conducted by mutual agreement of the mediation parties, taking into account the principles of voluntary, confidentiality, neutrality, independence, impartiality of the mediator, self-determination, and equal rights of the mediation parties[5].

The basis of the legal regulation of mediation is to ensure the necessary standards with minimal state interference in these relations, providing the parties to the dispute with maximum freedom and the opportunity to exercise their rights. As a purposeful action, it is independent of the value of the processes accompanying it: restoring communication between the parties; analyzing the conflict situation; understanding the interests, needs, and motivations of the parties[6]. Mediation is based on free self-determination, the parties' will, voluntary nature, and conscious responsibility for their words and actions that determine the outcome of dispute resolution. Excessive regulation of the mediation procedure increases the risks of limiting these principles.

[5] On Mediation: Law of Ukraine No. 1875-IX of 16.11.2021. Available from: https://zakon.rada.gov.ua/laws/show/1875-20#Text.

[6] JAKUBIAK-MIROŃCZUK, A. Effectiveness of Mediation - Between Effort and Result, Studia Juridica Lublinensia, 2018, Volume 27, No. 3. Available from: https://journals.umcs.pl/sil/article/view/7055/pdf_1.

The market approach to development is based on the principles of contract law, freedom of choice, competition, and the mechanism of supply and demand without state intervention. Self-regulation is implemented through professional organizations and associations, standards for training mediators, development, and implementation of ethical codes of mediators, and rules for conducting mediation[7].

Regulatory models of mediation in countries worldwide

The formal framework approach applies the principle of "self-regulation" with the simultaneous establishment by international organizations of legislative or executive instruments: international conventions, directives, legislation, and model laws within which more lenient forms of regulation are applied. An example is Directive 2008/52/EC, which sets out the scope of application and defines the most important aspects of mediation while recommending the member states encourage mediators and organizations of mediators to comply with codes of conduct and other quality control mechanisms. The official legislative model of mediation is based on general rules of regulation (national laws on mediation), special provisions (on mediation in criminal cases, labor and family disputes) and sectoral legislation (separate sections or rules of mediation in procedural codes). National legislation generally covers the main aspects of the process: access to mediation, start, end of mediation, confidentiality, quality of mediation services. The instruments of international law, in turn, relate to more global aspects and provide opportunities for states to adapt mediation to their socio-legal and cultural conditions. These regulatory models of mediation are present in most countries in different proportions. The largest share is occupied by self-regulation mechanisms proposed by intermediary organizations and supported market mechanisms. States prefer to take the position of least interference in these activities[8].

Dispute resolution through mediation is required in many countries. International organizations (UN, EU, UNCITRAL, Council of Europe) pay attention to encouraging parties to meditate, influence national legal systems, and offer basic

[7] ALEXANDER, N. Mediation and the Art of Regulation. *Law and Justice Journal*, 2008. No. 1, p. 18.
[8] Ibid. 19.

regulations based on mediation values and potential. International institutions focus their activities on achieving such goals as popularizing the idea of mediation, raising public awareness of alternative dispute resolution methods; improving the relevant regulatory framework; creating and developing a network of cooperation between official agencies and associations of mediators, both at the local and pan-European level[9]. The adoption of mediation procedures in 2008 has significantly impacted the implementation and application of mediation procedures in the European Union countries. Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters[10]. The directive sets out regulatory standards for mediation for implementation in national legal systems. EU member states have a free choice in adopting this regulatory act, using it as a basis at their discretion or choosing it as a standard. The directive aims to facilitate access to alternative dispute resolution, promote amicable dispute resolution, use mediation, and balance mediation and litigation. The effectiveness of mediation is manifested mainly in civil and commercial issues. The directive contains a provision according to which the procedure can only be applied to parties that are free to make decisions due to the operation of legislation.

The implementation of Directive 2008/52/EC varies between member states, depending on whether mediation exists in the national system. Some countries have chosen to implement the directive's provisions, while others have carefully explored alternative means of administering justice, believing that existing national rules already comply with Directive 2008/52/EC.

The report of the Legal Committee of the European Parliament On the Implementation of Directive 2008/52/EC of 27 June 2017 assessed the directive's impact on citizens and businesses. The report notes that almost all member states have decided to extend the requirements of the directive to national affairs; the majority of countries allow mediation in civil and commercial matters, including family matters; all member states have introduced the ability for courts to offer mediation; less than half have provided for duty in their national legislation

[9] PODKOVENKO, T., FIGUN, N. Legal regulation of mediation in european law. *Actual Problems of Jurisprudence*. 2019, Issue 4. p. 27, ISSN 2524-0129.

[10] Directive 2008/52, of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, 2008. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008L0052.

to disseminate information about mediation; 18 states have mandatory mechanisms to control the quality of mediation services; codes of conduct are being developed in 19 member states; 17 member states encourage or regulate training in their national legislation[11].

The difficulties encountered in implementing the Directive largely reflect the differences between national legal systems in terms of legal culture. European judicial networks have repeatedly raised the issue of the priority of changing the legal mentality by developing a culture of mediation and peaceful dispute resolution.

Giuseppe De Palo, United Nations Ombudsman for Funds and Programmes, professor of Alternative Law and Dispute Resolution Practice at the Mitchell Hamline School of Law, St. Paul, USA, in a study for the EU Parliament, emphasizes that ten years after the adoption of the EU mediation Directive, the promotion of mediation remains far from achieving its goals. This is especially true for achieving a "balanced relationship between mediation and judicial proceedings" (Article 1). The paradox is that mediation, while generally accepted, is used in less than 1% of cases in civil and commercial litigation and has a low growth rate[12].

To implement the European Directive 2008/52/EC, the Italian legislator adopted Legislative Decree No. 28/2010, which provides for mediation as a prerequisite for judicial proceedings in specific categories of cases: on the activities of associations of co-owners of residential buildings, property rights, inheritance, family contracts, leases, loans, businesses, compensation for damage from medical liability, compensation for damage in case of false information, advertising media, insurance, banking, financial contracts. Legislative decree 28/2010 defined mediation as a prerequisite for judicial proceedings in cases that account for approximately 9% of civil cases.

[11] Report on the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters: the mediation directive (2016/2066 (INI)). European Parliament. http://surl.li/dcooc (accessed: 03.04.2023).

[12] DE PALO, G. A Ten-Year-Long “EU Mediation Paradox”. When an EU Directive Needs to Be More …Directive. [viewed 19.04.2023]. Available from: https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL_BRI(2018)608847_EN.pdf.

As a result of the decision of the Italian Constitutional Court in October 2012, Legislative Decree No. 28/2010 was declared unconstitutional for procedural reasons, which led to Italy's return to an entirely voluntary mediation system in all civil and commercial disputes. The court did not provide a meaningful conclusion on the mandatory mediation process and left the decision on this issue to the legislator's discretion.

A sharp decrease in the number of cases referred to mediation, an increase in those considered in courts, served as the basis for the adoption by the Italian legislator of laws No. 295/2009 and No. 69/2013 on amendments to Legislative Decree No. 28/2010. The mandatory provision for holding the first mediation session for specific categories of cases was re-introduced for a limited period of four years. Thus, Italy changed the obligation to go through and pay for the entire mediation process upon request to participate in the first mediation session for a specific category of cases[13].

The long-term experience of Italy shows that mandatory participation undoubtedly contributes to an increase in the number of applications to mediation. In particular, in 2015, almost 180 thousand civil and commercial cases were initiated in Italy. This result is 20 times higher than in the UK, Germany, and the Netherlands, and 400 times higher than in Greece, Sweden, and Portugal[14].

The European Parliament's study Revision of the Mediation Directive shows an increase in mediation cases and its integration as a mandatory stage of civil proceedings.

Directive 2008/52/EC provides the possibility of mandatory mediation, provided that it does not interfere with exercising the right to appeal to the court. The concept of mandatory mediation remains the subject of discussion among scientists, mediators, politicians, and the public worldwide. The main objection to mandatory mediation is to influence self-determination, the will of the parties to the dispute, which undermines the idea of mediation. The argument against mandatory mediation is the violation of the right of free access to justice for all citizens, taking into account the necessary expenses of the parties for the services of a mediator. The introduction of an additional pre-trial stage of

[13] DE PALO, G. The Italian model and experiences before the EU institutions. | ADR Center. [viewed 19.04.2023]. Available from: http://surl.li/htyki.
[14] *Ibidem*.

proceedings entails additional costs, reducing the financial viability of the parties to the dispute and potentially depriving them of free access to justice.

The fact that mandatory mediation does not replace judicial proceedings testifies in favor of it. Even if mediation has started as a mandatory stage before applying to the court, the parties come to a joint decision, adhering to the principle of voluntariness. In addition, alternative dispute resolution methods, including mandatory mediation, ensure the effectiveness of justice burdened with many cases. Countries that have experienced a crisis in the judicial system, its financial and personnel problems, and the overload of courts are the first to introduce mandatory mediation as a dispute resolution mechanism.

For example, in the United States, a court obliges or strongly recommends that the parties to a dispute contact a mediator. Several US states have introduced mandatory mediation programs. For example, in California regarding child custody and visitation. In the U.S. District Court for the Southern District of New York, the court's rules stipulate that all claims of employment discrimination are automatically referred to mediation, cases under the Fair Labor Standards Act (FLSA) assigned to specific judges in the Southern District of New York are automatically referred to mediation.

An Amendment to the Rules of Procedure of the Supreme Court of the Republic of South Africa (rule 41A), which entered into force on 9 March 2020, required the parties to consider mediation at the beginning of any prescribed judicial process[15].

Canada demonstrates the successful experience of introducing mandatory mediation. The mandatory mediation program in Ontario began in Toronto on January 4, 1999, Ottawa, and Essex County (Windsor) on December 31, 2002. Under paragraph 24.1 of the Rules of Civil Procedure to the law on courts[16], civil claims considered by the court are subject to mandatory mediation. The court oversees cases and sets strict deadlines for decisions during pre-trial and trial proceedings. Some civil cases, for example, family disputes, are not subject to mandatory mediation. Thus, cases are referred to a mediation session at the

[15] BRAND, J. Rule 41a – what does it mean for parties to litigation in the high courts of south Africa? Conflict dynamics. [viewed 19 .04.2023]. Available from: http://surl.li/fpjnx.
[16] *Ibidem*.

beginning of the trial to allow the parties to discuss disputed issues and find settlement options to avoid legal proceedings[17].

More than 90% of all claims are resolved before they reach the trial stage. A detailed analysis of the results of the mandatory mediation project was published in 2001 under the title "Evaluation of the Ontario Mediation Program (Rule 24.1) Final Report: The First 23 Months" (the Hann Report). This report is based on a study of data from 23 thousand cases, 3 thousand mediations conducted under clause 24.1, and answers to specially designed questionnaires filled out by 600 parties in court, 1,130 lawyers, and 1,243 mediators. The report specifies that mandatory mediation has led to (1) a significant reduction in the time spent on dispute resolution; (2) a reduction in costs for participants in the trial; (3) the resolution of a significant share of disputes (approximately 40%) in the initial stages of the trial[18].

Mandatory mediation reduces the burden on the courts, as pre-trial settlement leads to fewer applications and trials filed, promotes access to justice, and faster resolution of cases with lower court costs.

The issue of introducing mediation has become particularly relevant in connection with the COVID-19 pandemic. The courts worked in a limited mode. Online mediation has demonstrated its effectiveness. According to Canadian lawyer and mediator Jennifer Egsgard, mediation is a practical tool that allows the parties to settle a dispute, despite restrictions on physical meetings and court closures[19].

The introduction of mandatory mediation is actively discussed in England. In the summer of 2021, the Civil Justice Council published a report recommending more extensive use of mandatory alternative dispute resolution methods, including mediation, in the Civil Courts of England and Wales. Key practical objections to mandatory mediation were discussed. The opinion about creating obstacles between the parties to the dispute and the courts has been refuted. The report includes specific conditions and principles under which coercion to participate in an alternative method of dispute resolution may be desirable and effective. The

[17] Rule 24.1 mandatory mediation. Available from: http://www.ontariocourts.ca/coa/en/archives/civilrules/Rule24_1.pdf.

[18] Evaluation of the Ontario Mediation Program (Rule 24.1) Final Report: The First 23 Months. [viewed 19.04.2023]. Available from: http://surl.li/fpjzg.

[19] EGSGARD, J. Should mediation be mandatory? 2021. March. [viewed 19.04.2023]. Available from: http://surl.li/fpkcc.

key points are the absence of financial costs for the parties, the settlement of the dispute at a sufficient level, and availability. Thus, in the report, the Civil Justice Council concluded that the parties could be lawfully forced to participate in an alternative way of resolving the dispute and determined their conditions[20].

At the same time, most European countries emphasize the voluntary nature of mediation (for example, Austria, Azerbaijan, Belgium, Croatia, Cyprus, Germany, Ireland, Poland, Slovenia, and Spain). One of the basic principles of mediation continues to cause misunderstandings.

Well-known mediation researcher Dorcas Quek argues that mediation contradicts the principle of voluntary referral of the case by the judge for mediation without taking into account the specific circumstances of the case, as well as the incommensurability of the sanction for refusal to participate in mediation; excessive verification by the court of the parties' compliance with the mediation order and control over the procedure itself. According to the scientist, mandatory mediation, as a temporary measure, is justified and can be implemented in any jurisdiction to increase awareness of mediation in society. At the same time, the obligation must be well thought out, avoiding technical details, and strict requirements contradicting the nature of mediation[21].

The European Commission on the Efficiency of Justice (CEPEJ) emphasizes that one possible means of encouraging mediation requires the parties to participate in an introductory meeting with a professional mediator as a prerequisite for judicial proceedings. However, the requirement of the parties to participate in the first meeting with the mediator retains a certain level of compulsion to start the process. In view of this, the national legislator should take into account the principle of effective judicial protection, which follows from the constitutional traditions common to member states, enshrined in Articles 6 and 13 of the European Convention on Human Rights, confirmed by Article 47 of the Charter of Fundamental Rights of the European Union[22].

[20] Report of the Council on Civil Justice. The resolution of small claims. [viewed 19.04.2023]. Available from: http://surl.li/fpkdl.

[21] QUEK, D. Mandatory Mediation: An Oxymoron – Examining the Feasibility of Implementing a Court-Mandated Mediation Program. *Cardozo Journal of Conflict Resolution*. 2010. No. 11(2) (Spring). p. 505.

[22] European commission for the efficiency of justice: European handbook for mediation lawmaking. [viewed 19.04.2023]. Available from: http://surl.li/dcopj.

An analysis of the experience of countries in introducing mandatory mediation shows that this practice has a positive impact on reducing the burden on the judicial system. It has the consequence of strengthening the implementation of the postulate of the existence of pluralism of forms of justice[23]. We consider mandatory mediation promising for our country in resolving disputes with a high conflict index (for example, family disputes or disputes between neighbors).

The prospect of integrating mediation into civil proceedings

We are convinced that courts should play a key role in popularizing the culture of mediation, taking into account their authority and influence on public opinion. Information provided directly by the court about the benefits of mediation at the initial trial stage gives the parties the impetus to try to apply it. For example, in Poland, since January 2016, judges have been assigned a range of responsibilities related to the popularization of the mediation Institute. According to Article 10 of the Polish Code of Civil Procedure[24], the court should strive for a settlement agreement at each stage of the proceedings in cases where it is permissible to conclude a settlement agreement. In these situations, the parties can also settle a dispute with the help of a mediator.

Most states that have implemented mediation face the problem of building trust in this method of dispute resolution. For example, Judit Revesz explained the lack of trust in mediation by the brutal events in the history of Hungary in the twentieth century as one of the biggest obstacles to the introduction of mediation in the Hungarian dispute resolution system[25]. The problem of trust in mediation is objective. It requires several efforts to change the consciousness of citizens who are used to resolving disputes exclusively in court and must focus more on finding a compromise.

The Commission's Report to the European Parliament, the Council, and the European Economic and Social Committee noted the following obstacles related

[23] ZIENKIEWICZ, A. Mandatory mediation - remarks on determining a dispute's suitability for mediation and the parties' concerns regarding mediation. *Studia Iuridica Lublinensia* [online]. 2018, vol. 27. n. 3. Available from: https://journals.umcs.pl/sil/article/view/7056/pdf_1.ISSN: 1731-6375.

[24] Poland, Code of Civil Procedure. Available from: https://sip.lex.pl/akty-prawne/dzu-dziennik-ustaw/kodeks-postepowania-cywilnego-16786199.

[25] REVESZ, J. Mediation without trust: critique of the hungarian mediation law. Available from: http://surl.li/ewjoq.

to the functioning of national mediation systems in practice: (1) lack of a "culture" of mediation in member states, (2) insufficient awareness of mediation and the functioning of quality control mechanisms for mediators[26].

Among the factors influencing the spread of mediation in the state, citizens' trust in the mediator plays a key role. All European member states require mediators to be competent in resolving the dispute. Most states have adopted the European Code of Conduct for mediators, which contains general principles. To ensure the high quality of mediation, many states establish a procedure for registering or accrediting mediators and require initial training and special education. The experience of Belgium is indicative, where the Federal Mediation Commission, established under the law on mediation, controls the quality of intermediary services, guarantees the quality of educational institutions and courses, and provides the legally protected title of a recognized mediator to professionals who demonstrate the proper training necessary for the profession of a mediator[27].

In Belgium, the specialization of mediators existed until 2018, before its abolition. The legislator recognized that the specialization of mediators does not affect the practice of mediation. Many procedures combine family/business or business/social aspects. The Belgian legislator recognizes a mediator as a mediator who can mediate in all types of disputes. In addition to general training, a recognized mediator must receive special training. Accordingly, the authorities consider the intermediary as a "general specialist"[28].

A crucial factor influencing the development of mediation is the issue of payment, the cost of the mediator's services. When introducing mediation as a method of dispute resolution, each state chooses its practice of resolving this issue to encourage the parties to participate in mediation. The experience of states that have introduced mandatory mediation or a first mandatory meeting with a mediator shows that countries undertake to pay for mediation services. Thus, mediation for dispute participants is free of charge or has a symbolic cost. For

[26] Rapport de la commission au parlement européen, au conseil et au comité économique et social européen sur l'application de la directive 2008/528/CE du Parlement européen et du Conseil sur certains aspects de la médiation en matière civile et commerciale COM/2016/0542 final.

[27] DE BEIR, T., MEUWISSEN, W. Wat kunnen België en Nederland van elkaar leren over zakelijke bemiddeling? *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement.* 2019. p. 21. Available from: http://surl.li/ewjov. ISSN 2213-8919 - 23:1.

[28] Ibid.

example, in Italy, an administrative fee of 40 euros is provided for the first mediation session. Private organizations included in the Register of the Ministry of Justice have their tariffs approved by the Ministry of Justice. Mediation costs are paid jointly and severally by each party that has joined the procedure. Mediation remains free of charge for persons entitled to free legal aid[29].

This approach persists in South Africa as well. Dispute resolution services provided by the Reconciliation, Mediation and Arbitration Commission are free of charge. The commission receives funding from the government. If the parties decide to use the services of private intermediaries, the service will be paid. Most applicants applying for dispute resolution are employees, often unable to pay bail. Mandatory payment for mediation complicates the process of access to justice. Thus, mandatory paid mediation in certain circumstances restricts the exercise by a citizen of their fundamental constitutional right of access to the courts[30].

The European Commission on the Efficiency of Justice focuses on the need for national legislators to introduce financial incentives for sanctions to facilitate the use of mediation. At the national level, states should ensure the availability of mediation by guaranteeing its use to persons with limited financial resources. Three main types of financial incentives can be found in national laws: (1) sanctions; (2) reduction or cancellation of state or other court fees; and (3) subsidies for the use of mediation. Sanctions in Ireland, Italy, Lithuania, Poland, and Slovenia are provided as a fine or by distributing procedural costs. For example, in Turkey, the law provides a mechanism for transferring funds to encourage parties to participate in the mandatory mediation process. If the party did not attend the first mediation session, it pays court costs. Reducing the court fee (for example, Lithuania, Poland, and Serbia) in the short term may lead to an additional monetary burden on the state budget and, in the long term – a decrease in the number of court proceedings due to the growing popularity of mediation. Moreover, such cuts increase awareness of mediation and its accessibility[31].

[29] Civil mediation organization and educational institution. The Cost of Mediation in Italy. Available from: https://www.101mediatori.it/pagina/tabella-dei-costi.

[30] VETTORI, S. Mandatory mediation: An obstacle to access to justice? *African Human Rights Law Journal*. 2015. 15(2). pp. 355−377.

[31] European Commission for the Efficiency of Justice (CEPEJ). European Handbook for Mediation Lawmaking As adopted at the 32nd plenary meeting of the CEPEJ. Strasbourg, 13 and 14 June 2019.

In Sweden, the parties are jointly and severally liable for the costs of the mediator's services if the price is too high compared to the disputed amount. Therefore, they prefer a judicial settlement, provided free of charge. Thus, in Sweden, the parties are jointly and severally liable for the costs of the mediator's services. They refuse to pay if the cost is too high compared to the disputed amount. Therefore, preference is given to a judicial settlement, which can be free of charge. The remedy for this situation is to pay the insured amount of legal insurance, which usually covers the cost of the mediator's services. One of the terms of the insurance contract is the requirement that the mediator is appointed by the court. Thus, out-of-court mediation does not provide for insurance payments.

Undoubtedly, there are categories of conflicts that are almost impossible to resolve peacefully, through compromise and active interaction of the parties, with the help of an independent mediator. Procedural obstacles to more frequent and effective use of mediation in civil proceedings are short terms of consideration of cases, small amounts of court fees in some categories of cases, reduction by courts of the cost of paying for the services of a representative, the absence of mandatory mediation, the lack of regulation by the procedural legislation of the issue of procedural terms for the mediation procedure.

However, the following reasons should be noted for the low popularity of mediation: a) organizational: the relative novelty of the mediation procedure; the lack of advertising on the market of professional mediators, the widespread practice of using such a procedure, premises suitable for reconciliation; low activity of educational work at the level of state agencies and local self-government; b) economic: the high cost of professional mediators' services; the procedural passivity of the parties in resolving civil disputes, unwillingness to bear additional financial costs; the lack of desire for judicial representatives to reconcile the parties, which is associated with the amount of payment for their services; c) subjective (psychological): a high degree of conflict in relations in society; ignorance of citizens and a well-established mentality to apply exclusively to the judiciary to resolve legal issues[32]; lack of negotiation skills and

[32] PRYTYKA, Y., ŽUKAUSKAITĖ-TATORĖ, M., TEREKH, O. (2022). To the Question of Application Alternative Methods of Resolving Labour Disputes in Ukraine and Lithuania. *Revista Jurídica Portucalense*, p.180. Available from: https://revistas.rcaap.pt/juridica/article/view/26280.

traditions; distrust in the mediator; the desire of the person whose right is violated, by any means to bring to justice the violator of subjective rights; unwillingness to take responsibility; dispute resolution in court as a delay in fulfilling obligations to counterparties for unscrupulous persons; low level of legal culture.

The result of mediation is mainly aimed at paying monetary compensation, which does not always lead to the restoration of the violated right and gives rise to a latent offense. A crucial factor influencing the development of mediation is state support, legislative support for the procedure for conducting, financing, and encouraging the court to use mediation[33]. The state's active position to increase the competitiveness of mediation will increase the demand for this procedure.

Professional centers and associations played a key role in spreading the idea of mediation in society and creating a legal basis for its functioning. Thus, in the Czech Republic – the Association of Mediators of the Czech Republic (Asociaci mediátor č ČR), in Slovakia – the Slovak Chamber of Mediators (Slovenská komora mediátorov), in Poland – the Polish Mediation Center. These associations aim to improve the professional, ethical, moral, and social level of mediation activities of the association's members, unifying methods and procedures, introducing tools to raise public awareness about mediation and its consequences, and providing professional, methodological support[34]. Such associations of mediators played a significant role in familiarizing the population with alternative dispute resolution methods and popularizing them. Successful implementation of mediation requires understanding, public support for mediation, and awareness of its capabilities and benefits. The traditions and culture of introducing alternative dispute resolution methods play an essential role in this process.

Conclusions

The consequences of martial law in Ukraine, in addition to the general negative impact on the economy and public relations in the state, created limited access

[33] HRES, N. Formation and development of mediation in labor dispute resolution: experience of foreign countries. *Journal of Eastern European Law.* 2019. No. 63. pp. 177-183.

[34] FIHUN, N. Establishment of the institute of mediation in the Visegrad Group countries. *Actual problems of law,* [S. l.], n. 1, p. 21, May 2021. ISSN 2524-0129. Available from: http://appj.wunu.edu.ua/index.php/apl/article/view/1123. doi: https://doi.org/10.35774/app2021.01.019.

to the judiciary's resources, which encourages the search for alternative effective dispute resolution tools, among which mediation occupies a special place. It does not replace the judicial process, creates additional opportunities for participants in the dispute, increases their role, significance, and mutual responsibility, and confirms the pluralism of forms of justice.

Mediation in the civil law of Ukraine is proposed to be considered a voluntary, confidential, informal procedure during which the parties to a dispute, with the help of an independent, neutral intermediary, reach a mutual agreement in its resolution.

Due to the full-scale aggressive invasion of the Russian Federation in Ukraine, preliminary quarantine restrictive measures related to the COVID-19 pandemic and safe environmental conditions are essential. A protected environment and psychologically safe space create trust between the procedure participants and promote their mutual understanding. Consideration of a dispute with the participation of a mediator guarantees a person the possibility of using legal remedies, which is especially important in emergencies: military operations, quarantine measures, and natural force majeure in the context of climate change.

The main challenge today is creating an effective mechanism for preventing violations and protecting the rights of participants in civil relations. Accordingly, mediation should play a role in developing a culture of peaceful dispute resolution, an element of the civilized development of civil society, and the formation of the rule of law.

The introduction and development of mediation in the Ukrainian legal space require institutional support and dissemination of positive international practices. The analysis of the experience of foreign countries in introducing mandatory mediation suggests that this approach has a positive effect on reducing the burden on the judicial system. We consider mandatory mediation to be a promising area for Ukraine in resolving disputes with a high conflict index.

Today, there is a need to develop legal regulation of out-of-court ways to resolve disputes in contractual obligations and transactions. The spread of the practice of including in contracts the possibility of resolving a dispute with the help of a mediator, the issue of costs for mediation in solidarity, can significantly develop out-of-court ways of resolving disputes, thus reducing the burden on Ukrainian courts.

The popularization of mediation is possible through a large-scale information and educational campaign involving the legal and mediation community. The state should show interest in creating a culture of alternative dispute resolution and provide appropriate organizational and financial support.

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