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Prospects for the Development of Mediation Institute in Notarial Activities

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Abstract The article examines the prospects for the development of the institution of mediation in notarial activity, taking into account European documents recommending the introduction of mediation into national legal systems. The legal nature of mediation, including concepts, signs, principles, and legal status of the participants in the process, has been studied. The opinions of scientists regarding notarial mediation and the legislation and experience of countries where notarial mediation has been implemented are analyzed. The role of the notary in the legal system in general, as well as the elements of cross-border notarial mediation, the effectiveness of mediation in various categories of disputes are considered. It has been established that the professional approach of the notary in the mediation process ensures a high standard of services, guaranteeing the fairness and compliance of the procedure with the current requirements of the law. It was determined that the availability of notarial mediation for citizens is an important factor in solving legal issues, contributing to this tool's widespread use among the population.

Index Terms judicial protection, pre-trial protection, out-of-court protection, alternative dispute resolution, notary, conciliation

I. Introduction

The growing interest in alternative dispute resolution methods is reflected in the development of legal systems. The modern dynamics associated with the variety of legal relations and the increase in the number of conflicts force us to pay attention to effective and affordable ways of solving problems outside the court. In this context, mediation becomes one of the key alternatives, characterized by high efficiency and ability to resolve various legal conflicts.

Providing constructive resolution of conflicts through mediation is recognized not only as a necessity of the modern legal environment but also as a strategic requirement for achieving harmony and stability in society. European documents, in particular [1], 10 of the Committee of Ministers of the Council of Europe on mediation in civil matters, Directive 2008/52/EC of the European Parliament and of the Council on aspects of mediation in civil and commercial legal relations [1], [2] 19 of the Committee of Ministers of the Council of Europe on the organization of mediation in criminal cases [2], testify to the relevance and importance of such an approach to the resolution of legal conflicts.

In Ukraine, which is experiencing war events, there is a real need to find non-conflict methods of resolving disputes against the background of emotional exhaustion of society. State bodies, including the courts, are under great strain in wartime conditions. In this regard, legislators, lawyers, and the scientific community are actively considering the possibility of introducing and developing mediation as an effective and affordable tool for conflict resolution.

However, the question arises about the role, education and professional competence of the mediator in those countries where this institution is not yet widespread. Ukraine and its citizens, being in the conditions of war, experience great stress and emotional exhaustion. In conditions where courts and public authorities work under stressful conditions, the national legal system is looking for ways to improve the accessibility and efficiency of dispute resolution.

In response to existing social challenges, norms related to mediation appeared in the legislation of Ukraine, in particular in the Law of Ukraine "On Notaries". The Notary Chamber

of Ukraine coordinates training notaries in mediation and registers specialists who have successfully completed such training [3]. In our opinion, this innovation is a step in the direction of popularization and effective use of mediation in notarial activities.

In order to successfully develop the institution of mediation in the notarial sphere, the scientific community in Ukraine should carefully study the experience of other countries, taking into account the peculiarities of traditional notarial activity. Emphasis on the availability and professionalism of the mediator determines the key requirements for the effective implementation of mediation in the notarial sphere. This approach will contribute to the most accessible and constructive resolution of conflicts, which, in turn, will positively affect the legal culture and the general situation of society.

II. Methods

The methodological basis of the research of the article includes general scientific and special methods of scientific knowledge. In connection with the study of European documents recommending the introduction of mediation into national legal systems, an analytical method was used to analyze these documents and determine their impact on the legal system of countries, particularly Ukraine.

The question of the role, education and profession of the mediator can also be investigated using the sociological method. The comparative legal method was also used to study the peculiarities of mediation practices in different countries.

The description of the legal nature of mediation, including concepts, features, principles, and participants, was carried out using a systematic and logical analysis. The method of literary analysis was used to highlight the opinions of scientists.

The analysis of the countries where a notary can conduct mediation included a comparative method, and the reference to their legal acts required a juridical-dogmatic method. The study of the role of the notary in law was carried out with the help of structural and functional analysis.

Problematic aspects, particularly the expediency of notarizing agreements after mediation, were considered through philosophical analysis and argumentation methods. The need for the development of national levels of methodological recommendations for notaries was highlighted through the sociological method of researching the needs of society.

The research's normative and legal basis is Ukraine's legislation on mediation and notary. In addition, attention is paid to the recommendations of the Council of Europe in the field of mediation, as well as international treaties and legal acts of foreign countries.

III. Results and Discussion

As a result of the adoption of the Law of Ukraine "On Mediation" on November 16, 2021, by the Parliament of Ukraine [3], the national legal system has undergone significant transformations, providing legal foundations and standards for regulating mediation as an effective tool for out-of-court conflict resolution. This law defines the key elements of mediation, including the principles of conducting the procedure, the status of the mediator, and the requirements for his training. At the same time, in our opinion, the introduction of mediation into the country's legal system was a step toward increasing the availability and efficiency of conflict and dispute resolution mechanisms.

The Chamber of Notaries of Ukraine, noting the importance of introducing mediation into notarial activity, took the initiative to create the Mediation Center [4]. The main goal of the Center is to promote the association of notaries engaged in mediation to protect their rights and professional interests. In addition, the Center actively undertook the study of draft laws and regulatory acts related to mediation in order to develop constructive proposals and conclusions.

An important step is also the creation of the course "Mediation: basic skills for a notary", which is designed specifically for notary professionals [4]. This course is aimed at forming not only technical skills but also a deep understanding of the principles and processes of mediation. At the same time, the opportunity for notaries who have successfully completed the course to become trainers and lecturers is recognized as an effective mechanism for transferring knowledge and maintaining mediation experience in their own team.

After notaries were empowered to conduct mediation procedures, notarial mediation became institutionalized. The specified step became a turning point in the development of the field of mediation in Ukraine, which indicates the transition to a new stage of the implementation of alternative methods of resolving legal conflicts.

We believe that within the scope of spreading and popularizing mediation in Ukraine, the actions of the Notary Chamber contribute not only to the development of the professional competence of notaries but also to the formation of a new approach to resolving legal conflicts. This approach is determined not only by legal principles based on international standards but also by taking into account the specifics of the Ukrainian legal environment and socio-political realities. Thus, the introduction of mediation in the field of notary has the potential to transform approaches to the resolution of legal disputes and contribute to raising the level of legal culture in society.

Deepening the understanding of the principles of mediation among notaries acquires special importance within the framework of the legal regime of martial law in Ukraine. Considering the importance of minimizing the length and complexity of resolving legal issues in conflict situations, it is important to consider the concept of mediation as an effective tool for resolving disputes out of court.

Many national legal systems of various countries around the world are faced with court congestion, which leads to delays in court proceedings and too long waiting times for a court decision, including Ukraine. The Ukrainian system of judicial protection was imperfect even before the beginning of the full-scale invasion of the aggressor country, however, in the conditions of the security crisis, justice is increasingly challenged. The traditional judicial system, although effective, does not

always facilitate the resolution of conflicts through dialogue and compromise between the parties. Whereas in mediation, the parties retain their own control over the process and outcome of negotiations, as they independently and voluntarily decide on the terms of the agreement. Mediation facilitates conflict resolution through the interaction and cooperation of the parties, which can lead to more lasting and peaceful solutions. Out-of-court protection can be more flexible and adaptable to the individual needs and situations of the parties, as it is not limited by clear and strict rules and procedures of the judicial process.

According to the legislation of Ukraine, mediation is considered as an out-of-court, voluntary, confidential and structured process. According to the legal definition, the parties to the conflict, with the participation of a mediator or mediators, actively seek to prevent the occurrence or resolve the conflict or dispute through negotiations [5]

Zapara considers mediation as an alternative, voluntary dispute resolution mechanism, which is based on the principle of voluntariness and is based on an agreement between the parties. With the help of an independent third party acting as a mediator, the mediation process contributes to the development of a mutually acceptable solution to the conflict, thus contributing to positive transformations in the relationship between the parties [6].

According to the definition of V. Reznikova, mediation can be conceptualized as the activity of competent, neutral (independent and dispassionate) mediators, conducted on the principles of confidentiality, good faith, and equality of the parties. Such activities include actual measures or a sequence of measures aimed at facilitating the discovery of a compromise and the independent settlement of the dispute by the conflicting parties [7].

The main characteristic of the mediation process is the interaction of the mediator, who facilitates the exchange of information, stimulates mutual understanding between the conflicting parties, and actively contributes to their joint search for effective ways to resolve the dispute [8].

Thus, mediation can be defined as a professional and neutral process based on the principles of confidentiality, good faith, and equality between the parties to the conflict. This method covers the actions of qualified mediators, aimed at building an effective communication "bridge" between conflicting parties, with the aim of facilitating their independent resolution of the dispute and reaching mutually acceptable compromises.

However, mediation encompasses more principles than those listed by researchers. According to the Law of Ukraine "On Mediation", it also provides for the principles of neutrality, independence and impartiality of the mediator, as well as the principles of self-determination and equal rights of the parties participating in the mediation process [5].

Dyakovych's opinion that mediation actually constitutes a necessary component of the functions of a notary is quite appropriate [9]. This is justified not only by the need to settle legal conflicts in modern society but also by the expansion of the role of the notary as a professional mediator in this process. The formation of mediation as an important tool for out-of-court settlement of cases takes place in the context of the development of the legal system and in accordance with the needs of modern society in effective conflict resolution mechanisms.

At the same time, some researchers suggest that lawyers may find it difficult to adapt to the more client-oriented approach to conflict resolution that is likely to be central to mediation. They also point out that some lawyers may feel uncomfortable abandoning normal negotiation practices and using mediation as an alternative method of conflict resolution [10]. Such a position suggests the need to improve skills and prepare lawyers for the effective use of mediation methods in their professional activities.

In the paradigm of activity of notary mediators, it is right to focus on their ability to clearly understand the scope and significance of the decisions made within their own practice [11]. It is important that notary mediators refrain from overemphasizing the importance of their own decisions, which exceeds the objective weight and significance that they actually have.

Purnamawati's position that the notary is morally responsible for the document drawn up by him in the event of a dispute between the parties is noted as important in notarial activity. Within the framework of this belief, it is important to consider that the notary, as a professional mediator, is able to influence the reality of legal relations through the creation of documents that are added in the context of legal relations between the parties [12].

Nana Rosepashvili and Maka Tkebuchava note that the mediation institute has both positive and negative elements. Among the positive aspects of using mediation, one can single out the financial availability of the procedure, speed of conflict resolution, preservation of relations between participants, ensuring confidentiality, reaching consensus between the parties, and understanding objective positions in the dispute. Among the negative elements, it should be noted the possibility of one of the parties refusing to participate in the mediation process, as well as the lack of a guarantee of a successful settlement of the dispute. The notarial deed is not always the result of the mediation process, because, despite the participation of the notary, the parties may not agree, and the certifications of the document will not be completed, for example, in case of failure to reach an agreement on the essence of the agreement (subject, price, etc.). However, notarial mediation must be related to the execution of a notarial document required by the parties, which is provided by law or agreement [13].

Regarding the role of the notary in law in general, it should be noted that it is revealed through his functions, which change with the development of Ukraine and its legislation. In general, this subject is a trusted person who ensures the authenticity and legal validity of transactions that are important for individuals and legal entities. Researchers single out various types and functions of notary, however, in our opinion, the most general are the functions outlined by Komarov and Barankova [14]. 1) the function of ensuring the indisputability and probative value of documents; 2) the function of ensuring

legality when concluding agreements (control function); 3) the function of providing legal assistance to persons applying for the performance of notarial acts.

In addition to the defined functions of the notary, its role in facilitating mediation as a means of alternative conflict resolution is important. M. Dyakovych emphasizes the fact that before the adoption of the Law of Ukraine "On Mediation", notaries in the country, in accordance with their professional duties, defined by legislation, acts of the Ministry of Justice and the characteristic psychological and moral qualities inherent in this category of specialists, were already performing functions of a mediator in the framework of his notarial activity [15].

It is known that not only in Ukraine, but also in a number of other countries, a notary has the right to conduct mediation. However, countries' approaches to determining the qualifications of persons who can act as mediators differ. In addition, special requirements for their education and peculiarities of legal status are established.

For example, in the United States of America, the legal position regarding mediators is more flexible, and mediators can be both notaries and other professionals with appropriate skills and training. Requirements for mediators vary by state. States with official lists of court mediators often require 20 to 40 hours of approved mediation training, and in those states that have comprehensive statewide standards, the requirements for mediators specializing in family disputes are usually higher. For experience, the requirements include a minimum number of mediation sessions conducted independently or under the supervision of a mentor-mediator, and may recognize mediation experience as an alternative to other requirements. Some states also require a law degree or bachelor's degree to qualify as a mediator [16].

In France, the current legislation does not provide for special mandatory mediation training for mediators. At the moment, the country has a system of obtaining a state diploma of a family ombudsman (DEMF), but this is not a mandatory prerequisite for family mediation. Such a diploma is necessary only to work in an accredited family mediation service. In cases of criminal cases, natural persons and duly notified associations have the right to act as mediators in accordance with established procedures [17].

The mediation center of notaries in Paris is an important element in the system of alternative dispute resolution in the French legal environment. Founded by the Paris Chamber of Notaries, this center has become the go-to resource for many individuals looking for an efficient and objective way to resolve conflicts. In particular, the mediators working as part of the center are experienced notaries, specially trained in the field of mediation [18].

Mediation is used in a variety of areas, including neighborhood disputes, family disputes, landlord-tenant disputes, corporate disputes, and disputes with public administrations and local authorities [17].

In Greece, the process of becoming a mediator in the field of notary involves a sequential series of steps, including obtaining a scientific degree regardless of specialization [19]. It is important to note that an applicant for the title of mediator does not necessarily have to be a lawyer; it can represent various professional fields, including doctors, engineers, architects, and others. According to the provisions of Law 4640/2019, the system of notarial mediation in Greece is ensured through the training and certification of mediators in specialized educational institutions. According to Art. 22 of the specified law, educational institutions are obliged to train candidate mediators aimed at mastering the principles, process and skills necessary for successful mediation [20].

Researchers believe that the current legislation in Poland is ineffective in ensuring a high level of qualification of mediators and guaranteeing the proper quality of their work. In Poland, there are no mandatory laws that would specifically define the requirements for educational institutions, the qualifications of educational personnel, guidelines for educational programs and courses, or the mandatory number of educational hours [21]. We believe that this issue in the framework of notarial mediation acquires special importance, since notaries, acting as mediators, must be highly qualified and reliable. The lack of clear legal requirements for training and certification of mediators can undermine the authority of the specified profession and affect public confidence in notarial mediation as a whole.

The institutional model of notarial mediation is actively used in Belgium, where the implementation of this model is supported by the Federal Mediation Commission and the Royal Federation of Belgian Notaries. A special regulatory document - the Code of Ethics of Notarial Mediation – functions within this system [22]. The analysis of the provisions of the code indicates that in the case of voluntary mediation, the mediator is appointed on the basis of an agreement freely concluded by all parties to the conflict. As for procedural mediation, the mediator is appointed by the judge based on a joint application of the parties or on his own initiative, but with the agreement of the parties. This approach to the appointment of a mediator allows to ensure objectivity and trust in the mediation process, and also ensures compliance of the procedures with the requirements of fair and effective resolution of conflicts in the notarial practice of Belgium. Among the most common areas of application of mediation is civil law, in particular family matters [17].

Thus, in many countries, notaries act as key participants in the resolution of legal conflicts through mediation, but not in all. For example, in Lithuania, there is a direct ban on mediation activities by notaries. The Finnish judicial mediation system allows only judges to act as mediators [23].

It is scientifically important to note that European approaches to mediation are not universal and should be considered as conceptual foundations for the further development of mediation practice in Ukraine [24]. Mediation models should be the foundation for the definition and practical application of various mediation technologies, which will allow the parties to the conflict to reach an understanding and find an optimal solution [25].

The application of European approaches to mediation can become an important starting point for the development of cross-border cooperation mechanisms, in particular in the field of notarial mediation. Currently, due to armed conflicts and active hostilities, many families are forced to move and separate, settling in different countries. This creates complex situations where legal issues arise regarding custody of children, division of property and other legal aspects that need to be considered and resolved.

In 2018, the Council of Notaries of the European Union completed a significant stage in the implementation of the European cross-border mediation project. As part of this project, a practical guide was developed aimed at improving the process of cross-border dispute settlement [26]. The manual contains practical tools and recommendations for effective resolution of conflicts that arise in international relations and require the participation of notaries.

We believe that notarial mediation, including cross-border mediation, in family disputes, land disputes, before concluding contracts, etc., will be particularly relevant and effective in Ukrainian society today.

First, in the conditions of war, the legal system has a high load, which complicates the functioning of traditional mechanisms of judicial protection, conflict resolution, and resolution of legal disputes. In such conditions, notarial mediation becomes an effective tool for resolving disputes, as it is based on the principles of mutual understanding, constructive dialogue and the search for compromises.

Secondly, cross-border notarial mediation allows you to resolve disputes between persons located in different countries and take into account the peculiarities of international law and international relations. This approach is especially important in the conditions of the growing number of refugees due to Russian armed aggression on the territory of Ukraine, because this has caused irreversible social changes and led to the emergence of many disputes, for example, in the field of family legal relations.

Among the urgent issues that need to be resolved, it is worth highlighting the problematic and unresolved issue regarding the expediency of notarizing agreements as a result of mediation. In legal practice, there are certain contradictions and disagreements regarding the specified problem. The controversial point is the need for such a certificate and the participation of the same notary who conducted the mediation process in certifying the agreement.

On the one hand, notarization of agreements can provide an additional level of legal certainty of the parties in their rights and obligations, increase the stability of concluded agreements and facilitate their implementation. On the other hand, there is an opinion that notarization can complicate the mediation process and violate the principles of confidentiality and autonomy of the parties, which are key to successful conflict resolution.

We believe that solving this issue requires careful analysis and consideration of various aspects, including the needs and interests of mediation participants, the specifics of legislation and practice in a specific country, as well as the principles and goals behind the mediation and notary institution. Given that the legal regulation of notarial mediation does not differ from ordinary mediation, it can be predicted that notaries, due to their high professional level and trust in society, are ideal candidates for conducting mediation procedures. In our opinion, there is a need to define methodological recommendations for conducting mediation by notaries, taking into account their experience and status in society. In such recommendations, it is important to establish clear rules for initiating mediation, conducting it and concluding an agreement in the event of a successful resolution of the conflict. In addition, the role of the notary in the execution of the agreement should be defined and strict requirements for his activity within the process should be established. Such recommendations will be an important step in creating an effective system of notarial mediation, which will ensure a high-quality resolution of conflicts in society.

IV. Conclusion

Within the framework of the modern development of the legal system in Ukraine, the institution of mediation in notarial activity is defined as a promising direction capable of providing effective and non-conflictual solutions to legal disputes. The importance of notarial mediation lies in its professional nature, accessibility for citizens, as well as the fact that it is recognized by society as a norm due to the usual trust in notaries. A notary, as a neutral and objective mediator, can implement mediation in his practice, using his authority and high professional status to support the peaceful resolution of conflicts.

On the one hand, the professional approach of the notary in the mediation process ensures a high standard of services, guaranteeing the fairness and compliance of the procedure with the current requirements of the law. On the other hand, the availability of notarial mediation for citizens is an important factor in solving legal issues, which contributes to the widespread use of this tool among the population.

However, in order to realize the full potential of mediation in the notarial sphere, it is necessary to develop a national policy for the development of mediation, taking into account the peculiarities of the notarial profession and the high standards of its implementation. Recommendations and general rules for the mediation procedure should ensure the strictness of the requirements for the notary, but at the same time preserve the flexibility of the mediation process itself as an informal mechanism for conflict resolution. Such a balance will make it possible to effectively introduce mediation into notarial activity, providing citizens with access to high-quality legal services in the form of out-of-court dispute resolution.

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