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MEDIATION IN INTERNATIONAL LAW

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Summary. *This article analyses mediation in international law and focuses on the advantages of this legal institution. The author also defines the concept of "mediation" and identifies its types. Special attention is given to the issue of mediation in international law and in the practice of international law enforcement.*
The author suggests that the concept of mediation should be understood as a method of out-of-court settlement of a conflict (dispute) arising between the conflicting parties using all permissible legal instruments to find a compromise to resolve the subject matter of an international dispute between the parties thereto.
The author determines that the types of mediation include: power (imperative) and consultative (conciliatory) - depending on the nature; domestic and international - depending on the scope; non-resident entities, legal entities, states - depending on the parties involved in the dispute; individual, politician, state - depending on the status of the mediator; individual and collective - depending on the number of mediators involved in the settlement of an international dispute.
Keywords: *mediation, peace treaty, international dispute, international relations, international law.*

Statement of the problem. An important trend in modern global models of legal relations is the gradual abandonment of the judicial method of resolving minor legal disputes. In such disputes, the parties may establish their own rules of dispute resolution, define specific tasks and objectives of out-of-court settlement of a legal dispute and, without going to court, obtain the desired, effective settlement of the dispute within a very short time. However, it should be borne in mind that the out-of-court settlement of disputes must comply with all legal norms, must not violate applicable law and must fully implement the agreements resulting from the out-of-court settlement of disputes. Foreign experience in ADR and modern international standards play an important role in this respect.

Research and publication analysis. In the process of studying international standards and foreign experience of out-of-court settlement of legal disputes, significant scientific importance is given to the works of such domestic and foreign scholars as: N. V. Bozhenko, N. S. Butryn- Boka, A. O. Vyprytskyi, V. Gansetskyi, L. O. Makhova, T. Podkovenko, O. S. Tkachuk, R. Hanik-Pospolitak and others.

The regulatory framework of the study is based on the following documents: The Law of Ukraine ‘On Mediation’, Directive 2008/52/EC of the European Parliament and of the Council of 21.04.2008 on certain aspects of mediation in civil and commercial legal relations, Directive 2013/11/EU of the European Parliament and of the Council of 21.04.2013 on alternative dispute resolution in the field of consumer

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protection, recommendations of the Committee of Ministers of the Council of Europe and other documents.

Purpose of the work. Analysis of international standards and foreign experience of out-of-court settlement of disputes and determination of the possibility of introducing foreign experience of out-of-court settlement of disputes into the legal system of Ukraine.

Presentation of the main material. To date, the judicial process for resolving legal disputes has not been without its drawbacks. As current court practice shows, courts are overloaded and litigation itself is a rather expensive and time-consuming process, as procedural rights are often abused and the services of highly qualified lawyers are not always available to most citizens. Enforcement mechanisms also often fail, especially when debtors are unwilling to comply with court decisions. Of course, in the vast majority of cases, this situation is not so much due to imperfect legislation as to the human factor, but the main drawback of legal protection is that even if a court makes a perfectly legal and justified decision, the legal dispute is not exhausted. Therefore, the introduction of out-of-court dispute resolution as an alternative to judicial protection, which is characterised by the active participation of the parties to a legal dispute in its resolution, is becoming increasingly important.

It should also be noted that a large number of scholars, such as R. Hanik-Pospolitak, V. Pospolitak, equate the terms "pre-trial", "out-of-court", "alternative", since they all arise before a formal application to the court. It is therefore worth considering various aspects of out-of-court settlement of disputes [5, c. 39–41].

Despite the long existence of this concept, the question of the theoretical understanding of “alternative” arises. Alternative means the possibility of choosing one option among many existing options, which allows using the term alternative dispute resolution methods, which is common to all procedures. Therefore, the term “alternative” is perfectly acceptable for out-of-court methods of settling disputes, as they are an alternative to judicial protection.

When studying international standards and foreign experience of out-of-court settlement of legal disputes, it is necessary to identify possible types of their application.

Methods of settling legal disputes “settlement of a dispute by the parties themselves through negotiation; settlement of a dispute with the help of an independent mediator who helps the parties to reach an agreement (mediation); settlement of a dispute with the help of an arbitrator who, in the event of failure to reach an agreement, is authorised to settle the dispute by arbitration; settlement of a dispute with the participation of company managers, their lawyers and a third independent person who presides over the hearing”.

The first type of out-of-court dispute resolution is the simplest and has only one requirement – compliance with the law. In the first method, the dispute is resolved very quickly and the parties can come to an agreement quickly, but sometimes individuals do not “meet the other half” and therefore may seek the assistance of an independent mediator or arbitrator and company executives when a dispute arises in the company.

The mediation process deserves a closer look. In general, the concept of mediation originated in the United States and later spread to a number of Anglo-

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Saxon countries such as the United Kingdom and Australia. According to the research of A.O. Vyprytskyi, we can trace the history of its introduction into the American legal system: "In 1982, the first mediation courses were opened in America. Since 1993, online mediation has become popular, especially in domain disputes. Private alternative dispute resolution is also spreading. Printed resources on mediation issues are being published. The legal framework for mediation in the United States is the Uniform Mediation Act of 2001" [3, c. 242].

More generally, on 21 May 2008, the European Union adopted Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial disputes, the main purpose of which is to facilitate access to alternative dispute resolution methods and to promote the peaceful settlement of disputes by encouraging the use of mediation and ensuring a balanced relationship between mediation and judicial proceedings [4].

The principles of out-of-court settlement of disputes are also enshrined in a number of the following Recommendations of the Committee of Ministers of the Council of Europe: Recommendation No. R (98) 1 of the Committee of Ministers to Member States on family mediation of 21 January 1998; Recommendation No. R (99) 19 of the Committee of Ministers on mediation in criminal proceedings of 15 September 1999; Recommendation Rec (2002) 10 of the Committee of Ministers to Member States on mediation in civil proceedings of 18 September 2002. They are also important because they encourage Member States to introduce and strengthen mediation in different areas: civil law, commercial law, administrative law and criminal law. In criminal law, however, it is more common to use a mediation procedure in which the State is responsible for the person in any case, but with mitigating factors such as reparation, sincere remorse, etc.

As noted by N.S. Butryn-Boka, special mention should be made of the Green Paper on Alternative Dispute Resolution in Civil and Commercial Matters (2002) prepared by the European Community Commission in Brussels, which aimed to study and summarise national practices of alternative dispute resolution with a view to developing common standards in this area, as well as the EU Directive 2008-52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of alternative dispute resolution.), which aimed to study and summarise national practices of alternative dispute resolution with a view to developing common standards in this area, as well as the EU 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 [1, p. 20].

Also of great importance is Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution in the field of consumer protection, which sets out the following principles of ADR: independence and impartiality, transparency, fairness, efficiency, freedom and legality [6].

It should be noted that the Directive does not establish the important principle of confidentiality. It is often important for the parties to a dispute that information about the dispute and the substance of the legal relationship is not disclosed to third parties. This may help to preserve business reputation and to maintain further business relations between the parties to the dispute.

There is a question of introducing an alternative way of settling disputes. A significant number of European countries have enshrined this institution in law. In

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France, for example, the court is obliged to offer the parties the opportunity to resolve the dispute through an ADR mechanism, but in England the court has the right to impose a fine if a party refuses to mediate.

In Germany mediation is harmoniously integrated into the judicial system. For example, mediators work directly with the courts, which significantly reduces the number of possible court cases. A mediator is a judge of a regional court who does not directly consider the dispute, does not make decisions on it and is not a member of the jury (although there are private mediators and professional associations providing mediation services in the country).

In the United States, the entire legal system is geared towards the voluntary resolution of most disputes in court. The court can even be postponed so that the parties can contact a mediator. No serious negotiation process in this country takes place without mediators from business, politics and economics. It publishes mediation journals, has a National Institute for Dispute Resolution and private and public mediation services.

Article 15 of the Law of the Republic of Kazakhstan "On Mediation" contains a provision according to which, in addition to mediators who carry out their activity on a non-professional basis, mediation may be carried out by members of the territorial community who have a wealthy status, life experience, are specially selected for this purpose by the meeting of the local authority and have an impeccable reputation.

As noted by N. Vasylyn and V. Hansetska, there are also positive experiences in the field of mediation in such countries as the Czech Republic, Slovakia, Finland and Austria. In the Czech Republic, for example, there is a conciliation and mediation service under the Ministry of Justice. In France, mediators must be authorised by a public prosecutor, after which they can sign a contract with the French Ministry of Justice to provide mediation services. In Austria, mediation services are provided by a department of the Ministry of Justice and the Association for Probation and Social Work. And in all countries, mediators must have professional qualifications in law, social work or psychology [2, pp. 16-17].

In countries such as Belgium, the Netherlands, France, Latin America, Indonesia, etc., disputes must be resolved by an official arbitrator. Abroad, arbitration does not have the same restrictions as in Ukraine, and arbitration has gone the way of specialisation. If we look at the world experience, the most popular are labour arbitration, arbitration of consumer protection disputes and arbitration of land relations.

In the field of taxation, it can be concluded that in most countries of the world the pre-trial procedure for settling legal disputes is obligatory, such countries include Australia, Austria, Belgium, Canada, Denmark, Finland, Greece, Hungary, Israel, Japan, Germany, the Netherlands, Poland, Slovenia, Spain, Switzerland, the United Kingdom and others. The approach used in Ukraine, according to which a citizen can exercise his right to appeal to a court at his own discretion, is also used in the legislation of such countries as Argentina, India, Ireland, Mexico, Norway, Portugal, Turkey and others.

A rather peculiar and no less effective way of settling disputes out of court, especially in civil cases, is the institution of a settlement agreement. It is widely used

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in the judicial practice of many countries for the peaceful settlement of a conflict situation without the involvement of a court. The legal literature distinguishes the following models of procedures common in international practice.

1. Settlement agreement as an alternative to litigation, the use of out-of-court means to reach a settlement due to the complexity, length and cost of litigation (USA, England);

2. The use of a settlement agreement as a pre-trial option for conflict resolution (the right of parties to a conflict to resolve it peacefully without resorting to legal proceedings (France, Spain, the Netherlands));

3. The conclusion of a settlement agreement is the responsibility of the court (Japan).

It can thus be concluded that each of these forms is characterised by its own specific procedure for handling and resolving legal disputes. The need to create out-of-court forms arose in connection with European integration processes and Ukraine's desire to reach international standards. After all, foreign countries are actively pursuing a policy of reducing the role of judges in resolving minor disputes that can be settled without going to court. Out-of-court forms are designed to reduce the workload of the courts, but at the same time allow anyone to resolve a dispute efficiently. At the current stage of development in Ukraine, out-of-court dispute resolution is only beginning to gain momentum and be enshrined in law.

Conclusions and suggestions. In general, it can be said that the global practice of using out-of-court methods to resolve legal disputes is becoming more widespread. ADRs have long been recognised as an effective way of resolving disputes and are used in many countries around the world. Currently, there are countless ways to achieve reconciliation between parties to a disputed legal relationship without the direct involvement of the court. In this regard, it is of great importance to study the peculiarities of the development of methods of out-of-court settlement of disputes and the prospects of their implementation in the legal system of Ukraine.

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МЕДІАЦІЯ В МІЖНАРОДНОМУ ПРАВІ

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Анотація. *У даній статті проаналізовано медіацію в міжнародному праві, а також, сконцентровано увагу на перевагах цього правничого інституту. Також, було визначено поняття «медіації» та виділено її види. Особливої уваги було присвячено розкриттю проблеми медіації в міжнародному законодавстві та міжнародній правозастосовній практиці.*

Запропоновано розуміти під поняттям медіація – метод позасудового урегулювання конфлікту (спору), який виник між конфліктуючими сторонами, застосовуючи всі допустимі юридичні інструменти для знаходження компромісу для вирішення предмету міжнародного спору між його сторонами.

Визначено, що до видів медіації віднесено: владна (імперативна) та консультативна (догорівна) – в залежності від характеру; внутрішня та міжнародна – залежить від масштабів; суб'єкти нерезиденти, юридичні особи, держави – в залежності від сторін, які приймають участь у спорі; фізична особа, політичний діяч, держави – залежить від статусу медіатора; одноособові та колективні – в залежності від кількості медіаторів, що задіяні при вирішенні міжнародного спору.

Ключові слова: *медіація, мирний договір, міжнародний спір, міжнародні відносини, міжнародне право,*

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