

PECULIARITIES OF PRE-TRIAL SETTLEMENT OF ADMINISTRATIVE DISPUTES IN UKRAINE AND FOREIGN COUNTRIES

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Annotation. In the article, the author examines the pre-trial settlement of administrative disputes in Ukraine and foreign countries. Attention is focused on the fact that in connection with the introduction of the state of war in Ukraine, the burden on those courts that have the opportunity to hear cases is increasing because there is a sufficient number of judges, hostilities are not taking place, or the territory on which the court is located is de-occupied. In such conditions, there is a growing need to use alternative methods of dispute settlement, namely mediation and conciliation.

The author highlights the issue of applying these methods – the subject composition of a public-law dispute as a civil servant who does not have a sufficient number of powers to use alternative methods of dispute settlement stays as the mandatory participant in such a dispute, he is limited in decision-making. Therefore, the article provides a suggestion to expand the discretionary powers of the subject of authority.

The positive aspects of mediation are indicated. It contributes to the increase of trust and the establishment of partnership relations between the subject of authority and a private person. A necessary step is to introduce changes to the current legislation of Ukraine and grant the subject of authority the right to offer individuals or legal entities a mediation procedure in order to find a mutually beneficial solution. The author pays particular focus to the use of mediation in Israel. The use of mediation in the member states of the European Union, in particular Italy and Poland, is also being studied. The positive sides of conciliation in Ukraine and the United Kingdom are also studied, and the problems that arise in practice and ways to solve them are specified.

The author comes to the conclusion that in the conditions of the state of war, it is indispensable to use alternative methods of resolving disputes, as this will lead to the relief of the judicial branch of government, the search for a mutually beneficial solution for both parties, the absence of corruption, preserving time and money for both individuals and legal entities, as well as for the subject of authority.

Key words: state of war, mediation, conciliation, court, public-law dispute, subject of authority, law, settlement agreement.

1. Formulation of the scientific problem.

Due to the martial law introduction in Ukraine, the number of cases filed with courts located on the territory where active hostilities are not taking place or which are de-occupied is increasing. Based on the Order of the Chief Justice of the Supreme Court of 08.03.2022 No. 2/0/9-22 "On Changing the Territorial Jurisdiction of Court Cases under Martial Law" [1], in accordance with part seven of Article 147 of the Law of Ukraine "On the Judiciary and the Status of Judges" [2], the territorial jurisdiction of court cases has been changed. Thus, to ensure access to justice in the case of termination of the court that was supposed to hear the case, the other nearest court conducts judicial proceedings. In practice, the availability of judges in the court to which the case is referred is also examined, as there are courts in Ukraine where there are no judges at all.

Therefore, under martial law, there is a growing need to resort to alternative methods of resolving administrative disputes, such as conciliation and mediation. The topic of the article is **relevant** considering the need to relieve the judicial branch in the context of the Russian Federation's war against Ukraine.

2. The aim of the article is to examine the peculiarities of pre-trial settlement of administrative disputes in Ukraine and to study the experience of foreign countries with the purpose of implementing it into Ukrainian legislation.

3. The main body of the article.

Currently, there are two pre-trial options for resolving public law disputes: conciliation and mediation. However, the issue is that the nature of public law disputes is peculiar, as the obligatory party to administrative disputes is a subject of authority, and the relationship between them and a private person is determined by the "authoritative order - subordination" scheme.

Chapter 4 and Article 190 of the Code of Administrative Procedure of Ukraine (hereinafter - the CAP of Ukraine) define the procedure for mediation in court and conciliation procedures [3]. Mediation is the judge's involvement in resolving a dispute. The process of conciliation in court is only the approval of a settlement agreement by a judge. In accordance with part five of Article 47 of the CAP of Ukraine, the parties may reach reconciliation, in particular via mediation, at any stage of the court process, which is the basis for the proceedings' closure in an administrative case [3].

The issue concerning the application of conciliation procedures lies in the particularities of public law disputes since the mandatory participant is a subject of authority. According to part 2 of Article 19 of the Fundamental Law of Ukraine, "government authorities and local government and their officials shall be obliged to act only on the grounds, within the powers, and in the manner envisaged by the Constitution and the laws of Ukraine." [4], but the CAP of Ukraine requires that "the terms of conciliation shall not contradict the law or exceed the competence of a subject of authority." [3] Therefore, officials are limited in their decision-making.

For instance, the positive aspects of mediation are its efficiency, time and cost saving, and the absence of corruption. This type of pre-trial dispute resolution contributes to the development of the legal culture of the population, raising legal awareness, and most importantly, relieving the system of administrative courts, which is essential in wartime. In our opinion, only complex cases that cannot be settled through mediation should be resolved in court.

The institution of mediation has been effectively established and operates in European countries. For example, in Poland, some courts have a specialized department dedicated to resolving disputes through mediation. Alternatively, mediation can be conducted by a judge or judicial officer possessing the necessary knowledge to conduct mediation.

In Israel, mediation and gishur are alternatives to court proceedings. These procedures can also be conducted over the Internet via Skype. The main goal is reconciliation. This process does not require prior consent, and either party may invite the other party to appoint a megasher. If several mediators are involved in the process, they must cooperate. The parties can propose a way to resolve the dispute, while the latter can prepare an agreement with terms and conditions to be sent to the parties for consideration and approval. By signing the agreement, the parties are bound by it. Mediation is an efficient, comprehensive programme for conflict settlement and resolution, the implementation of which necessarily leads to an agreement between the conflicting parties and a mutually beneficial compromise [5].

In Israel, the parties during mediation can control the process, and its results, or even end it at any stage, as well as seek their own solution to the dispute that will satisfy their interests. The mediation process does not automatically end with a binding decision unless the parties agree on it.

Mediation in Israel is characterised by confidentiality. All data and information received from the parties is strictly confidential and is not disclosed to third parties without the consent of the parties or a court order. This creates trust between the parties and allows them to freely discuss issues and propose solutions not

being afraid that their words will be used against them in the future. Confidentiality is a positive aspect and helps to increase the level of trust between the parties, allowing them to discuss issues and propose solutions. Confidentiality can also facilitate faster dispute resolution, as the parties do not have to spend time and resources on public litigation and there is no risk of public disapproval or breach of confidentiality. However, some exceptions occur when the information obtained in the course of mediation may be disclosed in cases where a legal conflict resolution is required when a court requests such information [6].

Another positive aspect of mediation is that it helps to increase trust and build partnerships between the subject of authority and a private person. Mediation helps to find a fair, mutually beneficial solution for both parties on the basis of parity.

To reduce the courts' workload during wartime, it would be prudent to introduce mandatory mediation to resolve disputes. For example, in Italy, the law introduced mandatory mediation before filing a lawsuit to reduce the number of cases in courts [7].

Nevertheless, many sceptics of mediation argue that most cases resolved through mediation are still sent to court, as the public's trust in the judiciary is stronger than in mediators. In our opinion, however, during wartime, it would be relevant to engage mediators and resolve the case quickly and efficiently, thereby relieving the courts of their workload.

Another positive aspect of mediation in administrative proceedings is its reduction of costs for the subject of authority and quick execution of a generally accepted decision on a case without recourse to the state executive service.

It should be noted that mediation gives a positive result in the UK in resolving disputes with the Treasury Department (a dispute related to claims of prisoners against the penitentiary service), HM Revenue & Customs (tax disputes), the Ministry of Defence (a dispute with the parents of a serviceman who died during military training) [8, p. 257]. Therefore, it would be reasonable to use the services of mediators in Ukraine as well.

According to O. Melnychuk, based on the analysis of current legislation and European practice, disputes possible to resolve through mediation include those on "tax debt collection, passage and dismissal from public service, appealing against decisions of local governments on tariff setting and transfer of communal property, provision of land plots by local governments for ownership or lease, obtaining public information, appealing against the local council's refusal to grant permission to develop a land management project, collection of land fees, etc." [9, p. 79].

Subjects of authority do not have sufficient powers to apply mediation in disputes with natural or legal persons in Ukraine. Therefore, it is reasonable to adopt the experience of Poland, which has a separate Chapter called "Mediation" in its Code of Administrative Procedure and provides for the right of officials to initiate mediation [10]. Therefore, it is necessary to amend the current legislation of Ukraine and grant the subject of authority the right to offer mediation to natural or legal persons in order to find a mutually beneficial solution. This would help to relieve the judicial branch in Ukraine, which is crucial under martial law.

According to I. Zheltobriukh, the features of the reconciliation institute in administrative proceedings include the following:

- reconciliation can be complete or partial; примирення може бути повним або частковим;
- reconciliation occurs when the parties make mutual concessions;
- it is possible to go beyond the subject matter of the dispute in the process of reconciliation, if such conditions do not violate the interests of third parties;
- reconciliation is always interconnected with the rights and obligations of the parties;
- reconciliation cannot contravene the law and go beyond the competence of the official;
- based on the results of the reconciliation, the court issues a ruling approving the terms of the reconciliation, which is an enforcement document and can be submitted for execution to the state executive service [11].

According to A. Zavydniak, reconciliation of the parties is not the main purpose and task of the preparatory proceedings, since Chapter 4 of the CAP of Ukraine "Settlement of a dispute with the participation of a judge" extends beyond the scope of the preparatory proceedings. Therefore, the scholar suggests that Article 173 of the CAP of Ukraine should be "supplemented with a provision on the ability of the court to facilitate reconciliation of the parties, which involves the participation of a judge to assist and support the parties in the process of dispute resolution" [12, p. 183]. We agree with the opinion of O. Sydielnikov that it is necessary to expand the powers of the administrative court judge to facilitate the reconciliation of the parties. Furthermore, it is necessary to impose additional responsibilities on the judge to explain to the parties the benefits of a settlement agreement conclusion. Such novelties would enable the improvement of the relevant indicators of reconciliation at the stage of preparatory proceedings [13, p.15].

It is worth noting that the conciliation procedure in Ukraine does not differ considerably from conciliation in other countries. For example, if the parties want to reconcile in the United Kingdom, the plaintiff must submit to the court a document with the reasoned resolution of the case. Moreover, a draft court decision that sets out the terms of the reconciliation agreed between the parties must be submitted. The decision must be marked "by agreement of the parties" and must be signed by the parties [14].

According to M. Smokovych, the conciliation procedure is complicated in practice by insufficient discretionary powers of the official to make a relevant decision. For instance, the State Fiscal Service of Ukraine lacks the authority under the current legislation to annul its own tax assessment notices. Such a shortfall hinders reconciliation. Even in case of settlement agreement approval, major difficulties may occur, as it will not be enforced. Often, courts do not issue such a ruling at all, because the terms of the settlement cannot contradict the law or go beyond the official's competence [15]. Should such a settlement agreement be implemented, the official's actions may be regarded as an abuse of office. Therefore, a necessary step on the part of the legislator is to expand the powers of the subjects of authority, since conciliation and mediation are essential to ensure a prompt resolution of the dispute during wartime.

Nevertheless, the extension of discretionary powers raises concerns, as it may lead to misconduct of officials and trigger corruption offences in Ukraine. Therefore, when making a decision, the subject of authority must adhere to the principles of legality, relevance, and rationality [13, p. 7].

4. Conclusions.

In practice, it is rare for an authority to use alternative dispute settlement methods. Thus, in our opinion, an important step on the part of the legislator should be to expand the powers of the subjects of authority, since the settlement agreement conclusion or mediation are aimed at a quick and efficient dispute resolution, and the results of these procedures should not be considered as an official's abuse of office. Extrajudicial dispute resolution methods have many benefits. Therefore, it is sensible to employ them to relieve the judicial branch of power. Both mediation and conciliation contribute to the efficient settlement of disputes. For instance, conciliation is based on the judge's approval of mutually beneficial terms for both parties to the conflict, and the judge will not approve a settlement agreement unless it is favourable to both parties. Mediation aims to resolve the dispute quickly and reach a mutually beneficial solution.

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