

## MEDIATION AS AN ALTERNATIVE OF PRE-JUDICIAL DISPUTES RESOLUTION ON FORCED ALIENATION OF PROPERTY

### МЕДІАЦІЯ ЯК АЛЬТЕРНАТИВА ДОСУДОВОГО ВИРІШЕННЯ СПОРІВ ЩОДО ПРИМУСОВОГО ВІДЧУЖЕННЯ МАЙНА

**Opatsky R.M., Dr. of Law, Associate Professor,  
Docent of Administrative Law  
and Procedure Department  
Dnipro State University of Internal Affairs**

Under current legal regulation, the mechanism of forced alienation of property is of considerable interest among scholars and practitioners. Pre-judicial resolution of disputes related to forced alienation is an important aspect of law enforcement, as it allows to avoid lengthy trials, reduce the burden on the judicial system and contribute to more effective protection of property owners rights. One of the most promising alternative methods of resolving such conflicts is a mediation.

Mediation as a form of alternative dispute resolution involves the engagement of an independent mediator who helps parties to reach a mutually beneficial solution. Mediation is particularly relevant in cases of forced alienation, where the parties often have polar positions and acute conflicts regarding the cost of compensation, the legality of the alienation procedure and other important aspects. The effectiveness of mediation is due to its voluntary nature, confidentiality, economic feasibility and the possibility of maintaining partnership relations between parties.

The author has paid special attention to practical aspects of using mediation in cases of forced alienation of property for public needs. He has considered the main stages of mediation process, negotiation methods and features of dialogue between parties. The role of the mediator in preventing conflict escalation and ensuring the fairness of decisions has been studied. In addition, examples of successful use of the mediation approach in resolving such disputes in foreign practice have been given.

The author's conclusions emphasize the need to develop the institution of mediation in Ukraine as an effective method of pre-judicial resolution of disputes regarding the forced alienation of property. The author offers specific recommendations for improving the legislative framework, training mediators, and popularizing mediation among the population. He believes that the implementation of these measures will contribute to raising the level of legal culture and ensuring effective protection of all interested parties rights in the course of forced alienation.

**Key words:** executive proceedings, fulfilment of court decisions, dispute on forced alienation, mediation, alternative dispute resolution methods, court, enforcement agent, appeal for execution, settlement agreement, agreement based on mediation results.

У сучасних умовах правового регулювання механізм примусового відчуження майна значний інтерес серед науковців і практиків. Досудове вирішення спорів, пов'язаних із примусовим відчуженням, є важливим аспектом правозастосування, оскільки воно дозволяє уникнути тривалих судових процесів, зменшити навантаження на судову систему та сприяти більш ефективному захисту прав власників майна. Одним із найбільш перспективних альтернативних методів розв'язання таких конфліктів є медіація.

Медіація як форма альтернативного вирішення спорів передбачає залучення незалежного посередника, який допомагає сторонам досягти взаємовигідного рішення. Особливої актуальності медіація набуває у випадках примусового відчуження, де сторони часто мають полярні позиції та гострі конфлікти щодо вартості компенсації, правомірності процедури відчуження та інших важливих аспектів. Ефективність медіації обумовлена її добровільним характером, конфіденційністю, економічною доцільністю та можливістю збереження партнерських відносин між сторонами.

Окрему увагу приділено практичним аспектам застосування медіації у справах щодо примусового відчуження майна для суспільних потреб. Розглянуто основні етапи медіаційного процесу, методи переговорів та особливості ведення діалогу між сторонами. Досліджено роль медіатора у запобіганні ескалації конфлікту та забезпеченні справедливості прийнятих рішень. Крім того, наведено приклади успішного використання медіаційного підходу у вирішенні таких спорів у зарубіжній практиці.

У висновках наголошується на необхідності розвитку інституту медіації в Україні як ефективного способу досудового врегулювання спорів щодо примусового відчуження майна. Запропоновано конкретні рекомендації щодо вдосконалення законодавчої бази, підготовки медіаторів та популяризації медіації серед населення. Впровадження цих заходів сприятиме підвищенню рівня правової культури та забезпеченню ефективного захисту прав усіх зацікавлених сторін у процесі примусового відчуження.

**Ключові слова:** виконавче провадження, виконання рішень судів, спір щодо примусового відчуження, медіація, альтернативні способи вирішення спорів, суд, виконавець, звернення стягнення, мирова угода, угода за результатами медіації.

**Relevance of the study.** Under current development of the Ukrainian legal system, the issue of effective settlement of disputes regarding the forced alienation of property is of particular importance. Such conflicts are often accompanied by lengthy litigations, which causes additional financial costs and social tension. In this regard, mediation is considered to be one of the promising alternative forms of resolving such disputes, which allows reaching a mutually beneficial compromise between the parties.

Reforming the legislation of Ukraine, in particular the adopting of the Law "On Mediation" opens up new opportunities for its implementation in the field of forced alienation of property. At the same time, the effectiveness of mediation as an alternative mechanism largely depends on the level of citizens' legal awareness, the mediators' professionalism and proper regulatory framework.

Thus, researching possibilities and prospects for using mediation in disputes on forced alienation is extremely relevant both theoretically and practically, as it contributes to

the development of alternative methods of conflict resolution, reducing the judicial burden, and ensuring a balance of all parties interests.

**Recent publications overview.** Mediation in national legislation is a relatively new institution and is on the stage of active development. This is evidenced by a number of research works made by such scholars as O. Belinska, H. Yeryomenko, K. Pisots'ka, L. Momot, Yu. Prytyka, D. Protsenko, O. Sobakar', H. Ulyanova and others.

However, despite significant activity in this area, due to its novelty, in Ukraine there are no research concerning mediation as an alternative to pre-judicial resolution of disputes on forced alienation of property.

The study of mediation has become particularly relevant with the adopting of the Law of Ukraine "On Mediation" of November 16, 2021. It is this state of scientific coverage of mediation as an alternative to pre-judicial resolution of disputes regarding the forced alienation of property that prompted us to start research in this direction.

**The research paper's objective.** The purpose of our research is to reveal mediation as an alternative to pre-judicial resolution of disputes regarding the forced alienation of property, and to provide suggestions based on this analysis. To achieve this goal, it is necessary to perform the following tasks: to reveal and describe mediation in the system of pre-judicial resolution of disputes on forced alienation of property; based on the analysis, to develop proposals for improving the use of the specified institution.

**Discussion.** Before clarifying features of out-of-court resolution of disputes regarding the forced alienation of property through the mediation procedure, it is advisable to reveal the essence of the mediation procedure, the principles and legal foundations of its implementation in public legal relations.

Prior to the adoption of the Law "On Mediation" of November 16, 2021 No. 1875-IX (hereinafter – the Law) [1], there was no consensus in the journalistic and scientific legal areas concerning the institution of mediation, in particular regarding the functions of the mediator and his/her legal status, stages and phases of its conduct. In addition, even today, some authors refer to mediation not as a pre-judicial procedure for resolving a public-law dispute, but as judicial mediation conducted by a judge.

One of the first monographic studies of methods of pre-trial settlement of administrative legal disputes in the field of modern scientific thought is the dissertation by S. Biluha. In this work the author "proposed the definition of pre-judicial settlement of an administrative legal dispute as a special conciliatory procedure for coordinating the parties positions to an administrative dispute due to a judge-mediator (mediator) by conducting negotiations aimed at making a compromise decision and satisfying the interests of the dispute parties" [2, p. 24].

For her part, N. Bozhenko, studying mediation as a method of resolving administrative disputes, has concluded that "mediation is a voluntary process during which a third person, who must be impartial, helps the parties to resolve the dispute; an independent third party with appropriate qualifications, knowledge and experience – a mediator, manages the negotiation process and helps the parties to find a mutually beneficial solution; the parties independently decide on the method of resolving the dispute, can directly influence its course and results, the mediator cannot impose his/her position on them in any way" and also suggests to settle the mandatory mediation procedure for certain categories of administrative-legal disputes [3, p. 18].

As a result of the study, this author nevertheless tends to believe that, in essence, pre-judicial resolution of an administrative dispute aims to settle the dispute outside the boundaries of administrative proceedings and is based on the principles of the mediation procedure and corresponds to almost all of its features, therefore, in the future it requires complete separation from the judicial proceedings and registration as a specific legal institution of administrative procedural law [2, p. 24].

Another researcher of the institute of mediation in administrative procedure, A. Bortnikova, studying legal principles of using mediation as a method of resolving public-law disputes, comes to the conclusion that "mediation as a method of resolving public-law disputes should be understood as a flexible, structured, confidential procedure organized by a mediator, built on the principles of voluntariness, equality and cooperation, within the framework of which the parties try to reach a consensus to eliminate the public-law dispute" [4, p. 205].

In further studies of the mediation procedure for resolving public law disputes, the authors provide convincing arguments for separating it from the judicial administrative process [5, p. 15].

In particular, I. Proskuryakova considers mediation as an alternative method of resolving a public-law dispute in a pre-judicial procedure with the participation of a mediator

and resolving the dispute with the participation of a judge as a method of simplified judicial procedure for resolving such a dispute [6, p. 3] and provides interesting proposals regarding the procedures for proceeding it.

It is advisable to clarify legal principles of out-of-court resolution of disputes on the forced alienation of property through the use of the institution of mediation. Currently, the possibility of out-of-court resolving a public law dispute (mediation) has appeared regarding the adoption and entry into force of the Law of Ukraine "On Mediation" of November 16, 2021 No. 1875-IX [1]. The law defined the legal principles and procedure for conducting mediation as an out-of-court procedure for resolving a conflict (dispute), the principles of mediation, the mediator's status, requirements for his/her skills and other issues related to this procedure. Its effect extends to public relations concerning the mediation to prevent future conflicts (disputes) or to resolve any conflicts (disputes), including civil, family, labor, economic and administrative ones, as well as in cases of administrative offenses and in criminal proceedings to reconcile the victim with the suspect. The legal community and the parties of an administrative-legal dispute are waiting for the final introduction of this procedure, which will significantly reduce the number of public-legal disputes subject to judicial review.

That is, this law removed the mediation procedure as one of the pre-trial (extrajudicial) methods of resolving a public law dispute from the scope of administrative proceedings, however, the final and transitional provisions of this Law made amendments, in particular, to the Code of Administrative Procedure of Ukraine (hereinafter referred to as the CAPU), in particular regarding the regulation of the parties' right to use the mediator's services, which excludes legal proceedings in the event of reaching an amicable agreement in the dispute [7].

Thus, according to the Law, "individuals and legal entities will be able to contact a mediator for mediation both before applying to court and during litigation" [1].

Due to the Law, "mediation shall be conducted by mutual consent of the mediation parties in accordance with the principles of voluntariness; confidentiality; independence and neutrality, the mediator's impartiality; self-determination and equality of rights of the mediation parties. The dispute parties shall have the opportunity to use the services of a professional mediator to resolve it" [1].

The law defines rights and obligations of the mediator and the mediation parties, the procedure for conducting mediation, as well as the requirements for the mediation agreement and the agreement on the settlement of the conflict (dispute) based on the mediation results.

Any individual possessing a higher education and a basic training in the field of mediation in Ukraine or abroad will be able to acquire the status of a mediator. Mediation training will consist of at least 90 hours of mediator training, including 45 hours of practical training, and will include theoretical knowledge and practical skills in the principles, procedure and methods of conducting mediation, legal regulation of mediation, mediator ethics, negotiation and conflict (dispute) resolution. Mediation training will be carried out by educational institutions, as well as organizations that provide mediation, associations of mediators, business entities of any form of ownership and organizational-legal form that have the right to provide mediation services or organize their provision in accordance with the legislation. Registers of mediators will be able to be administered by mediators associations, organizations that provide mediation, as well as state authorities and local self-governments bodies involving mediators or using their services.

The Law also defines rights and duties of the mediator and the mediation parties, the procedure for conducting mediation, as well as requirements for the mediation agreement and the agreement on the conflict (dispute) settlement based on the mediation results.

In addition, in accordance with the final and transitional provisions of the Law, amendments were made, in particular, to the Code of Administrative Procedure of Ukraine (hereinafter referred - the CAPU) [7], which stipulate: in paragraph 5 of Article 47 “Procedural rights and obligations of the parties”, that “the parties may reach reconciliation, including through mediation, at any stage of the litigation, which is the basis for closing the proceedings in an administrative case; Part 1 of Article 180 regulates that during the preparatory session the court shall ascertain whether the parties wish to conduct an out-of-court settlement of the dispute through mediation, the right of the court to announce a break in the preparatory session if the parties have decided to conduct an out-of-court settlement of the dispute through mediation, the right of the court to suspend the proceedings in the case if both parties file a motion to suspend the proceedings in the case in connection with the mediation, the period of such suspension and the possibility of suspending the proceedings in the case at the stage of its consideration on the merits” [7].

At the same time, it should be noted that the Law of Ukraine “On Mediation” of November 16, 2021 regulates only general provisions on the mediation procedure without exposing its features, in particular, regarding the resolution of administrative-legal disputes. Therefore, it is obvious that in order to properly regulate the procedure for pre-judicial (out-

of-court) resolution of these and other categories of public-law disputes through mediation, it is advisable: to develop and adopt Standard Rules (Regulations) for conducting the mediation procedure, which will define in detail all its stages and phases, as has already been noted by individual researchers of the problems of introducing mediation in administrative-legal disputes [8, pp. 173–180].

**Conclusions.** Mediation is an effective tool for alternative dispute resolution in the field of forced alienation of property, as it helps to reduce the court burden, accelerate the resolution of conflicts and reduce the parties’ financial costs. The study showed that the use of mediation in such cases allows for reaching compromise solutions that take into account both interests of property owners and the government or public needs.

The use of mediation in this context requires improving the regulatory framework, raising the level of the society’s legal culture, and expanding the practice of involving qualified mediators. The introduction of appropriate mechanisms will contribute to the development of alternative methods of dispute resolution, which, in turn, will increase the level of legal protection of citizens and contribute to a more effective balancing of private and public interests.

Thus, mediation can become a promising direction in the field of forced alienation, providing a more flexible, fast and fair mechanism for resolving conflicts.

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