MEDIATION OF LABOUR DISPUTES: LEGAL AND PRACTICAL ASPECTS

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Currently, the institute of mediation has gained a highly positive reputation due to its successful application in Western countries. The United States was the first country, where they began to resort to mediation in resolving various disputes. Having proven itself well, the institution of mediation has spilled over to the countries of continental Europe, Canada, Australia, Great Britain and other states. According to the Center for Effective Dispute Resolution report, 85% of the disputes that were resolved through mediation at that center ended with the conclusion of a settlement agreement (with an average duration of mediation in one and a half days), 6% were peacefully settled within three months after mediation and only 9% of the disputes were submitted to the court [1]. This practice is widespread in the developed countries and represents a separate institute of the pre-trial practice for resolving legal disputes. In Ukraine the mediation institution has not yet gained popularity, though it is recognized as quite successful and effective.

In general, mediation is a way to settle disputes with the assistance of a mediator, based on the voluntary consent of the parties, in order to reach a mutually acceptable solution. In other words, it is an alternative court procedure for resolving disputes involving a third neutral, impartial party, not interested in the conflict, which helps the parties to reach an agreement over a disputed issue or issues [2]. It should be noted, that the method of mediation, particularly in the labor conflicts, can be an effective way of solving them at the macro level.

Important and actual issues of mediation in conflicts are elucidated in the works by P. A. Astakhov, V. S. Hopanchuk, O. A. Bryzhynsky, D. A. Davydenko, D. B. Elisieev, S. I. Zapara, A. M. Lushnikov, C. I. Kalashnikova and others Although considerable amount of research has been devoted to the method of mediation in general, little research has been undertaken to study the rationale of implementing this method as an effective means for managing relations within and beyond the organization.

The world practice uses three basic mediation models:

1) private (extrajudicial) mediation, characterized by complete independence from the process of considering a dispute by a court;

2) mediation, which has some coordination with the court process, but is procedurally separated from the court as an institution;

3) mediation within the judicial process, characterized by a local and personal

connection with the court and the actions that are implemented within the consideration of the case by court [3, p. 53]

According to the current Labor Code of Ukraine primary authority in resolving individual labor disputes is the Labor Dispute Commission (LDC), although the law provides that the parties may apply directly to the court. Effective LDC activity is currently quite rare due to a number of factors:

1) a significant number of labor disputes can be considered only in the courts;

2) in many organizations there is no LDC at all – either because of the lack of initiative on the part of the employees and/or the employer or because the number of employees at the enterprise is small;

3) stipulated by Art. 223 of Labor Code of Ukraine extra duties of the authority or the body authorized by him regarding the organizational and technical support of the LDC (provision of the equipped premises, printing and other equipment, necessary literature, organization of record keeping, registration and storage of statements of employees and cases, preparation and issuance of the decisions copies, etc.) do not stimulate the owner to create a Labor Dispute Commission at his enterprise;

4) insufficient competence of the members of the LDC, who are not always able to understand the complex issues of the current legislation due to lack of legal training or the lack of relevant experience, etc.;

5) the decisions taken by the Labor Dispute Commission are often not implemented by the employer voluntarily since the LDC is not really an authoritative body for the employer [4, p. 79].

The resolution of the collective labor disputes (conflicts) in Ukraine is entrusted to the National Mediation and Conciliation Service. However, some scholars question the effectiveness of its work when comparing the number of the resolved disputes and the expenditures from the state budget for the maintenance of the specified structure [3, p. 42]. In view of the above mentioned, it is the mediation system that many scholars regard as an effective alternative to the existing ways of resolving labor disputes. The current mediation procedure in Ukraine remains unregulated by the legislation. The experts have submitted to the Verkhovna Rada of Ukraine three bills, which are at different stages of consideration:

- «On Amendments to the Tax Code of Ukraine (regarding the introduction of the procedure for mediation)» dated 28.12.2014 under No. 1666;
- «On mediation» dated 17.12.2015 under No.3665;
- «On mediation» dated 29.12.2015 under No.3665-1.

The draft of Labor Code of Ukraine, prepared for the second reading, does not contain any norms on mediation as a way of resolving labor disputes. At the same time, it preserves the possiblity to resolve individual labor disputes not through a commission on labor disputes, but in the court, which is specified in the law as the main body.

Analyzing the bills on mediation, O.S. Shchukin draws the conclusion that

they violate the fundamental principle of mediation – voluntariness. In particular, according to the scholar, this is manifested in the statement that mediation should be carried out exclusively on a professional basis. O.S. Shchukin interprets this norm as an interference of the state into the sphere of civil society. In his opinion, the voluntary agreement of the parties of an individual labor dispute regarding the direct application of mediation must necessarily be in writing and tripartite. The scholar also objects to the leading role of a mediator when choosing the media and methods of mediation, since the final decision must always remain for the parties to mediation. The scientist believes that the mediator may refuse to participate in the mediation procedure only under the following circumstances (especially in the case with the professional mediators): if he is not sure that he will be able to keep neutral or if he believes that he is not qualified or competent enough to resolve the conflict. According to O.S.Shchukin, the item concerning implementation of the mediation agreement should be included in the mediation procedure [5].

Table 1

The mediator functions in resolving labor disputes

Function	Content
Analytical	prompts opponents to analyze carefully the conflict situation, tries to make the parties promulgate the available information on the dispute and determines the most significant moments of the conflict.
Active hearing/listening to the parties (therapeutic)	shows attention to both conflicting parties, but at the same time trying to separate openly the facts and feelings/emotions.
Organizational (procedural)	organizes negotiations, promotes an agreement on the correctness of relations between the parties in the negotiation process, sets the tone for negotiations, announces breaks and requires confidential conversations (caucus) from each of the parties alternately.
Generating ideas (creative)	provides participants of the conflict with information or helps them to find the necessary information, but only the facts.
Expanding the resources of the opponents (informational and consultative)	provides participants of the conflict with information or helps them to find the necessary information, but only the facts.
Controling	controls the actuality of the ideas expressed and the implementation of the agreed arrangements
Educational	teaches to think, act and negotiate with the directive of mutual cooperation, reminds the parties not to use the «prohibited» techniques, to see the problems from the perspective of the opposite side, properly manages the negotiations.

Source: [designed on the materials of 7].

Y.P. Lyubchenko also points out a number of shortcomings in the existing legislature. For example, the bill does not specify the types, extent of liability, organization or institution, whose competence will include bringing the mediators to justice. The scientist considers as mistaken the definition of the moment of the

mediation starting – the day when the parties agreed to meet with the mediator for the procedure of motivation. Y.P. Lyubchenko offers the following wording as more expedient: «when one party turned to a mediator and the other agreed to participate in the mediation», ie accepted the offer. The scientist considers controversial the issues regarding the requirements for a status of mediator – the training must include at least 90 academic hours of initial training, including at least 45 academic hours of training in practical skills. However, the bill does not specify what such initial training is and what is training practical skills [6].

Consequently, the adoption of one of the above-mentioned bills in the presented form will not solve the problem of labor conflicts, on the contrary, they may create new threats for the new conflicts occurrence.

The reasons for conflicts that arise in a modern organization are multifaceted and can be caused both by the subjective and objective factors. The consequence or result of the conflict can be positive (constructive conflict) or negative (destructive conflict). But, in our opinion, the mediator services are beneficial in both cases. This is due to the functions it performs (Table 1).

Naturally, the mediator is, first of all, an individuality with his/her peculiarities of character, temperament, style of behavior. Therefore, when mediating a conflict, one can observe different styles of a mediator behavior (depending on the situational and personality factors), (Fig. 1.)

Fig. 1. Mediation Styles [7]

In any case, the mediation procedure should be conducted in accordance with the strict principles (Fig. 2).

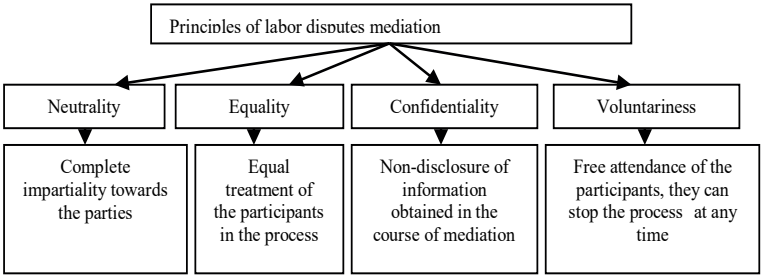

Fig. 2. Immutable Mediation Principles [designed on basis of [8]

The mediation procedure can be highlighted from the standpoint of the systemic and process approaches. We will focus on the latter (Fig. 3).

The parties, who started the mediation process are not obliged to bring it to the end and the mediator does not have the authority of a judge, he can not make a decision and obligate the parties to execute this decision, he only serves as a catalyst for negotiations and helps to negotiate more effectively, directing the talks in the right direction.

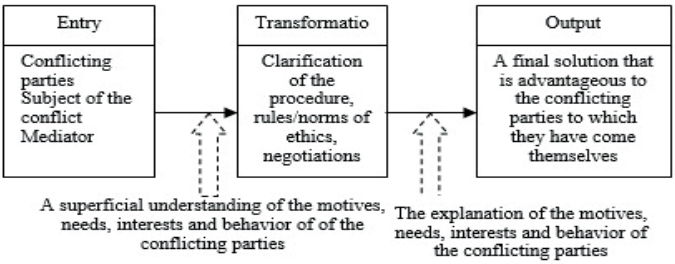

Fig. 3. Mediation as a process [author's development]

We want to draw attention to the mediation method functioning within the organization, the employment of «regular/salaried» mediators. In our opinion, modern organizations must necessarily have appropriately trained specialists who can even be integrated into the mediation service. It is expedient to appoint for the position of mediator graduate students who have higher education and who have taken the appropriate vocational training program (mediator school). The procedure for creating a mediator service should include:

- informing about the initiative of creating a mediation service;
- motivating measures for joining this service;
- development of procedure and coordinated actions of the mediation services;
- teaching the methodology of mediation to the employees;
- networking with counseling organizations (to ensure continuous improvement of the mediation skills).

In our opinion, neither the mediation service nor some specialists who have received the appropriate training should not be an official structure or post in the company's staff. Under the conditions of most Ukrainian organizations this is inappropriate. But, in our opinion, mastering the method of mediation is obligatory for the leadership (at all levels), part of the specialists (mostly non-formal leaders) of the organization.

It is important to remember that the main thing in mediation is careful attentive attitude towards people, attention to their needs. The task of the mediator is to help the conflicting parties to show themselves to the maximum, which will allow them eventually to develop a unique solution that exactly satisfies their needs.

It is worth knowing for all parties of the conflict that the mediator acts as a neutral person, but at the same time he manages the procedure, studies the problem and the cause of the conflict and promotes decision-making by the conflicting parties themselves. The mediator does not judge the parties to the dispute. The range of the techniques and methods of the mediation process is unlimited

The use of the mediation method for managing labor conflicts/disputes is beneficial for the state, for the organization and for the conflicting parties. For the organization – a positive image is maintained, productive cooperation is being established (people better perceive and execute the decisions that they have adopted themselves), conditions are created for improving the moral and psychological climate in the team and loyalty of the staff increases. For the conflicting parties – meeting their needs, motives, maintaining working relationships, saving time and money, psychological and emotional satisfaction.

Thus, mediation teaches to live in conflict without destroying relationships, use dispute for development and get benefits from it.

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