UDC 341; 347
DOI https://doi.org/10.32782/392231

Kyrdan B. V.,
Candidate of Law Sciences,
Associate Professor at the Department of Civil Law Disciplines
National Academy of Internal Affairs

Shyrokovska O. O.,
Postgraduate Student at the Department of Civil Law Disciplines
National Academy of Internal Affairs

МІЖНАРОДНІ ПРИНЦИПИ МЕДІАЦІЇ

INTERNATIONAL PRINCIPLES OF MEDIATION

Метою статті є аналіз і характеристика міжнародних принципів медіації, з'ясування їх змісту в різних сферах суспільного життя. У Законі України «Про медіацію» передбачений інститут медіації як альтернативний спосіб вирішення спорів (конфліктів). Однією із складових частин інституту медіації є принципи медіації. Проте інститут медіації в Україні сьогодні не є поширеним, тому вважаємо за можливе проаналізувати деякі аспекти міжнародних засад медіації. У рамках цієї статті ми проаналізували низку іноземних документів, що визначають стандарти медіації, зокрема: Рекомендації Комітету міністрів Ради Європи про сімейну медіацію (№ R (98) 1 від 21 січня 1998 р.), про медіацію у кримінальних справах (№ R (99) 19 від 15 вересня 1999 р.), про альтернативи судовому процесу між адміністративними органами та приватними особами (№ R (2001) 9 від 09 вересня 2001 року), про медіацію у цивільних справах (№ R (2002) 10 від 18 вересня 2002 року), про заходи щодо полегшення доступу до правосуддя (№ R (81) 7 від 14 травня 1981 р.), Директиву Європейського Парламенту та Ради Європейського Союзу про деякі аспекти медіації у цивільних і комерційних справах від 21 травня 2008 р. № 2008 /52/ЕС та Директиву 2013/11/ЄС Європейського Парламенту та Ради від 21 травня 2013 року про альтернативне вирішення споживчих спорів. З'ясовано, що у Законі України «Про медіацію» визначені такі принципи медіації: добровільності, конфіденційності, нейтральності, незалежності та неупередженості медіатора, самовизначення та рівності прав сторін медіації. Аналіз міжнародних документів, нормативно-правових актів зарубіжних країн дає підстави стверджувати, що ці принципи взаємопов'язані і повною мірою є керівними принципами медіації. Таким чином, під міжнародними принципами медіації слід розуміти фундаментальні принципи, орієнтири та ідеї, що є основою процедури вирішення конфлікту (спору). Міжнародні принципи медіації пов'язані з національними принципами. Невід'ємною частиною інституту медіації є принципи медіації.

Ключові слова: *медіація, вирішення спорів, примирні процедури, медіатор, принципи медіації.*

The aim of the article is to analyze and characterize the international principles of mediation, to clarify their content in various spheres of public life. The Law of Ukraine "On Mediation" established the institution of mediation as an alternative way of resolving disputes (conflicts). One of the components of the institute of mediation is the principles of mediation. However, the institute of mediation in Ukraine is not widespread today, so we consider it possible to analyze some aspects of international principles of mediation. Within this article we have analyzed a number of foreign documents defining the standards of mediation, in particular: Recommendations of the Committee of Ministers of the Council of Europe: on family mediation (№ R (98) 1 of 21 January 1998), on mediation in penal matters (№ R (99) 19 of 15 September 1999); on alternatives to litigation between administrative authorities and private parties (№ R (2001) 9 of 09 September 2001), on mediation in civil matters (№ R (2002) 10 of 18 September 2002); on measures to facilitate access to justice (№ R (81) 7 of 14 May 1981) and the Directive of the European Parliament and of the Council of the European Union on certain aspects of mediation in civil and commercial matters of 21 May 2008 № 2008/52/EC and the Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes. It was found that the Law of Ukraine "On Mediation" defines the principles of mediation, which include: voluntariness, confidentiality, neutrality, independence and impartiality of the mediator, self-determination and equality of rights of the parties to mediation. Analysis of international documents, regulations of foreign countries gives grounds to argue that these principles are interrelated and are fully the guiding principles of mediation. Thus, the international principles of mediation should be understood as fundamental principles, guidelines and ideas that are the basis of the procedure for resolving the conflict (dispute). International principles of mediation are interrelated with national principles. The principles of mediation are an integral part of the institute of mediation.

Key words: *mediation, settlement of disputes, conciliation procedures, mediator, principles of mediation.*

Introduction. Mediation in Ukraine has existed during the 21st century; however, it became legal on 16 November 2021 with its enshrinement in the Law of Ukraine "On Mediation".

According to the Law of Ukraine "On Mediation", mediation in Ukraine is non-judicial, voluntary, confidential, structured procedure, during which the parties with the help of a mediator (mediators) try to prevent or resolve a conflict (dispute) through negotiations.

Researchers have looked at issues related to the use of alternative dispute resolution in one way or another. In particular, the issue of mediation has been the subject of research by scientists: Kh. Alikperov, O. Allakhverdov, A. Arutiunian, S. Bychkova, S. Bobrovnyk, C. Husariev, N. Hren, S. Demchenko, M. Karpenko, S. Kurochkin, Yu. Mykytyn, L. Holovko, O. Kariahina, B. Lisytsyn, O. Popadenko, O.Spektor, A. Horova, O. Kopylenko, T. Kyselova, V. Ladychenko, V. Maliarenko, V. Zemlianska, Yu. Kuvaldina, D. Matkina, T. Mikhailina, N. Onishchenko, Yu. Prytyka, V. Tsymbaliuk, S. Shapovalova, N. Shatikhina, V. Yakovliev, I. Yasynovskyyi and others.

The purpose of the proposed article is to analyze and characterize the international principles of mediation, and clarify their content in various spheres of public life.

Research results. Mediation has been recognized and used in many countries since the 20th century, and successfully, as the experience has shown. For example, Austria, Bulgaria, the United Kingdom, Germany, Norway, the United States, Canada, Finland, France, Poland and other European countries have enacted special laws protecting the mediator's right to confidentiality of information obtained from parties in the mediation process. Special legal norms have been adopted in some countries, according to which the parties should try to resolve their dispute by mediation. The practice of mediation is spreading in the Eastern Europe [1, p. 131].

It should be noted that there are international declarations that define mediation standards developed within multilateral international cooperation during UN Congresses (end with a final declaration, which may subsequently be adopted by the UN General Assembly Resolution). Such declarations often set out the conditions and procedure for implementing mediation procedures.

The Council of Europe and its agencies pay considerable attention to mediation issues in the context of the right to a fair trial, as enshrined in the programmatic declarations of this international organization. For example, the Declaration of the May 2005 Warsaw Summit states that the Council of Europe should assist Member States in developing alternative dispute resolution [5, p. 293].

However, mediation standards require a separate detailed analysis, and therefore are promising areas for further research.

Significant body of documents defining mediation standards in European legal space has been developed by the Council of Europe. In particular, as in the case of the United Nations, the Council of Europe has drawn up international instruments whose provisions are binding on ratifying States. The European Convention for the Protection of the Rights of the Child of 25 January 1996, to which Ukraine has been a party since 03 August 2006, is among the treaties, enshrining provisions aimed at guaranteeing mediation procedures. The provisions of Article 13 of the Convention provide: "In order to prevent or resolve disputes or to avoid proceedings before a judicial authority affecting children, Parties shall encourage the provision of mediation or other processes to resolve disputes" [11].

Recommendations prepared and issued by the Committee of Ministers of the Council of Europe pay special attention to the mediation standards. It is important that, unlike the instruments developed within the framework of the United Nations; these Recommendations directly address issues and guarantees of mediation. They concern the principles of mediation in various fields. These Recommendations were the first documents to recognize the importance of mediation for the European communities in a changing social context. In addition, they are relevant as they encourage Member States to introduce and strengthen mediation in three areas: Family Law, Criminal Law and Civil Law.

These include in particular: Recommendation No. R (98) 1 of the Committee of Ministers to Member States on family mediation (Adopted by the Committee of Ministers on 21 January 1998 at the 616th meeting of the Ministers' Deputies), Comments on Recommendation No. R (99) 19

of the Committee of Ministers to Member States concerning mediation in penal matters (№ R (99) 19 of September 15, 1999), Recommendation Rec(2001)9 of the Committee of Ministers to Member States on alternatives to litigation between administrative authorities and private parties (adopted by the Committee of Ministers on 05 September 2001 at the 762nd meeting of the Ministers' Deputies), Recommendation Rec (2002)10 of the Committee of Ministers to Member States on mediation in civil matters (adopted by the Committee of Ministers on 18 September 2002 at the 808th meeting of the Ministers' Deputies), Recommendation No. R (81) 7 of the Committee of Ministers to Member States on measures facilitating access to justice (adopted by the Committee of Ministers on 14 may 1981 at its 68th session) [6, p. 49].

These Recommendations define the basic principles of mediation (voluntariness, confidentiality, accessibility, independence, etc.); basic principles of the process of organizing mediation; status of potential results of mediation, etc. It was especially important that these Recommendations also contained provisions on the role of the mediator and stated that "mediation requires certain skills, abilities, accredited education". In the future, this contributed to the development of educational projects in the area of mediation and educational programs for the training of professional mediators.

One of the first is the Recommendation № R (98) 1 of 21 January 1998 on Family mediation, the Par. 7 of which states that taking into account the results of research into the use of mediation and experiences in this area in several countries, which show that the use of family mediation has the potential to: improve communication between members of the family; reduce conflict between parties in dispute; produce amicable settlements; provide continuity of personal contacts between parents and children; lower the social and economic costs of separation and divorce for the parties themselves and states; reduce the length of time otherwise required to settle conflict [9].

Recommendation No. R (99) 19 of the Committee of Ministers to Member States concerning mediation in penal matters of 15 September 15 states that mediation in penal matters is a flexible, comprehensive, problem-solving, participatory option complementary or alternative to traditional criminal proceedings. Mediation may increase awareness of the important role of the individual and the community in preventing and handling crime and resolving its associated conflicts, thus encouraging more constructive and less repressive criminal justice outcomes; it also reduce the number of prison sentences and eventually reduce the cost of the prison system [8].

Recommendation Rec (2002)10 of the Committee of Ministers to Member States on mediation in civil matters of 18 September 2002 states that mediation may be particularly useful where judicial procedures alone are less appropriate for the parties, especially owing to the costs, the formal nature of judicial procedures, or where there is a need to maintain dialogue or contacts between the parties. States should take into consideration the opportunity of setting up and providing wholly or partly free mediation or providing legal aid for mediation in particular if the interests of one of the parties require special protection [10].

In particular, Recommendation Rec (2001) 9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties of 05 September 2001 emphasizes the advantages of alternatives to judicial settlement of disputes between administrative authorities and private parties and recommends the Member State governments to promote the use of alternative means of resolving disputes, such as internal review, conciliation and mediation, negotiation and arbitration between administrative authorities and private parties. Considering that the principal advantages of alternative means of resolving administrative disputes may be, depending on the case, simpler and more flexible procedures, allowing for a speedier and less expensive resolution, friendly settlement, expert dispute resolution, resolving of disputes according to equitable principles and not just according to strict legal rules, and greater discretion [7].

Subsequently, some of these Recommendations (№ R (2001) 9, № R (98) 1 and № R (2002) 10) have been supplemented by specific "Guidelines" for their better implementation. These Guidelines have been adopted "to propose concrete measures to promote the effective implementation of these Recommendations, which will improve the adoption of the principles of mediation enshrined in them".

They were developed by the subsidiary agency of the Council of Europe – the European Commission for the Efficiency of Justice of the Council of Europe (CEPEJ) [6, p. 48].

These Guidelines are the practical tool for the Member States (national legislators, politicians, judges and all stakeholders in general), which help them to adapt the Guidelines and find a basis in existing international and regional instruments, identifying how such provisions can best be implemented in the development of new standards in the areas with legal gaps. The Guiding Principles are based on three concepts: "availability", "accessibility", "awareness", known as "the three main components of the mnemonic scheme"; these are the three elements on which mediation development schemes are based.

In particular, Par. 11 (Part 1.2.) of the Guidelines № 13 for a better implementation of the existing recommendation concerning mediation in penal matters (adopted by the European Commission for the Efficiency of Justice on 07 December 2007) emphasizes that "judges, prosecutors and other criminal justice authorities have an important role in the development of mediation. They should be able to give information, arrange information sessions on mediation and, where applicable, invite victims and/or offenders to use mediation and/or refer the case to mediation. Member states are encouraged to establish and/or improve co-operation between criminal justice authorities and mediation services to reach victims and offenders more effectively" [4].

Guidelines № 14 interpret and clarify Recommendations № R (98) 1 and № R (2002) 10. They identify obstacles to the development of mediation procedures in these areas, and formulate proposals for their solution and improvement. They contain provisions on the status and powers of the participants in the mediation procedure, as well as on the further implementation of the States' obligations in this area, including: raising public awareness of the possibilities of mediation procedures, including judges and lawyers; reducing the cost of mediation in disputes with administrative authorities; adopting national programs for the use of alternative dispute resolution methods by the States, which would facilitate the implementation of these standards, etc. They state that Member States should recognize the usefulness of mediation models and promote the implementation of both existing and new models through financial and other support. Where States have established successful mediation programmes, the latter should increase the availability of mediation by providing appropriate information, training and supervision [4].

On 07 December 2007, the European Commission for the Efficiency of Justice adopted Guidelines № 15 for a better implementation of the existing Recommendation on alternatives to litigation between administrative authorities and private parties. The European Commission on the Efficiency of Justice noted the following obstacles to the introduction of alternative dispute resolution between administrative authorities and private parties: lack of awareness of the potential utility and effectiveness of alternative dispute resolution between administrative agencies and private parties; lack of awareness of the benefits of alternative dispute resolution models to administrative authorities, which may lead to unconventional, effective and rational results; mistrust of courts in developing non-judicial alternatives to judicial dispute resolution in the administrative sphere; lack of awareness of various alternative dispute resolution methods in this particular area; lack of specially trained neutral intermediaries in this area; little research on alternatives to adjudication of administrative disputes [3].

The Law of Ukraine "On Mediation" also defines the principles of mediation, which include: voluntariness, confidentiality, neutrality, independence and impartiality of the mediator, self-determination and equality of rights of the parties to mediation.

Analysis of international documents, regulations of foreign countries gives grounds to claim that these principles are interrelated and are fully the guiding principles of mediation.

Conclusions. Thus, the international principles of mediation should be understood as the fundamental principles, guidelines and ideas that are the basis for the procedure for resolving the conflict (dispute). International principles of mediation are interrelated with national principles. The principles of mediation are an integral part of the institute of mediation.

REFERENCES:

1. Альтернативні підходи до розв'язання конфліктів: теорія і практика застосування / уклад. : Н. Гайдук, І. Сенюта, О. Бік, Х. Терешко. Львів : ПАІС, 2007. 296 с.

2. Керівні принципи № 13 для кращого виконання наявної Рекомендації щодо медіації в кримінальних справах від 7 грудня 2007 р. / Європейська комісія з ефективності правосуддя. URL: https://newjustice.org.ua/wp-content/uploads/2018/05/Curriculum_Mediation_print.pdf. (in English).

3. Керівні принципи № 15 для кращого виконання наявної Рекомендації щодо альтернатив судовому розгляду спорів між адміністративними органами і сторонами-приватними особами від 7 грудня 2007 р. / Європейська комісія з ефективності правосуддя. URL: https://newjustice.org.ua/wp-content/uploads/2018/05/Curriculum_Mediation_print.pdf. (in English).

4. Керівні принципи № 14 для кращого виконання наявних Рекомендацій щодо медіації в сімейних справах і щодо медіації в цивільних справах від 7 грудня 2007 р. / Європейська комісія з ефективності правосуддя. URL: https://newjustice.org.ua/wp-content/uploads/2018/05/Curriculum_Mediation_print.pdf. (in English).

5. Медіація у професійній діяльності юриста : підручник / Т. Білик, Р. Гаврилюк, І. Городиський та ін. ; за ред. Н. Крестовської, Л. Романадзе. Одеса : Екологія, 2019. 456 с. URL: http://dspace.onua.edu.ua/handle/11300/12406.

6. Подковенко Т.О. Медіація: міжнародно-правові стандарти. *Актуальні проблеми правознавства*. 2017. Вип. 4. С. 47–54.

7. Рекомендація Rec (2001) 9 Комітету Міністрів Ради Європи державам-членам щодо альтернатив судовому розгляду спорів між адміністративними органами й сторонами — приватними особами – від 5 вересня 2001 року. URL: https://supreme.court.gov.ua/userfiles/Rec_2001_9_2001_09_05.pdf.

8. Рекомендація № R (99) 19 Комітету міністрів Ради Європи державам – членам Ради, які зацікавлені в організації медіації у кримінальних справах, від 15 вересня 1999 р. URL: http://zakon2.rada.gov.ua/laws/show/994_828.

9. Рекомендация № R (98) 1 Комитета министров государствам-членам о семейной медиации от 21 января 1998 г. URL: https://wcd.coe.int/ViewDoc.jsp?id=1116317&Site=CM.

10. Рекомендація Rec (2002) 10 Комітету міністрів державам-членам щодо медіації в цивільних справах від 18 вересня 2002 р. URL: https://wcd.coe.int/ViewDoc.jsp?id=1568851&Site=COE/.

11. Європейська конвенція про здійснення прав дітей від 25 січня 1996 р. URL: https://zakon.rada.gov.ua/laws/show/994_135.

12. Про медіацію : Закон України від 16 листопада 2021 року № 1875-IX. URL: https://zakon.rada.gov.ua/laws/show/1875-20#Text.