

# АКТУАЛЬНІ ПРОБЛЕМИ МІЖНАРОДНОГО ПРАВА

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## COMPARATIVE LEGAL ANALYSIS OF RESOLVING TAX DISPUTES THROUGH MEDIATION: INTERNATIONAL AND UKRAINIAN PERSPECTIVES

**Summary.** Mediation as a form of realization of the protective function in tax-tort proceedings. The article is devoted to the institute of mediation in resolving tax disputes. The author focuses on mediation both in European countries and in the national system of the country – Ukraine. The main factors influencing the degree of efficiency of mediation processes, possible complications and ways to overcome them are systematized. The study also addresses the still not frequently covered aspect of international mediation in the system of internal tax conflicts. However, most of these studies are based on mediation data in Ukraine and at the individual level of most foreign countries. The author uses a dialectical method to define the concept of tax mediation and comparative law method, which highlights the features of the legal regulation of mediation. The author's study of mediation in Ukraine and its application in resolving tax disputes made it possible not only to focus on this problem, but also to monitor the dynamic indicators of readiness for the introduction of this institution in Ukraine. The author proposes changes to national legislation based on positive foreign experience. The author's study in 2019–2020, which accepted 2 376 people, also indicates the impossibility of introducing mediation in tax disputes as an alternative way to resolve tax disputes in Ukraine. Legal consolidation of mechanisms in the alternative settlement of tax disputes, which limits taxpayers in additional ways of protection. The article consists of an analysis of the current situation of mediation in Ukraine, possible integration scenarios and recommendations for further action.

**Key words:** mediation, tax dispute, taxpayer, fiscal authority, alternative tax dispute resolution (ADR).

**Formulation of the problem.** The growth of private cases between taxpayers and fiscal authorities always ends in the field of litigation. A court dispute resolution system that does not guarantee confidentiality, hostile disagreements between trials, and lengthy litigation is a costly issue that many parties choose to resolve by alternative dispute resolution.

In this modern age, resolving tax disputes through mediation is the choice for most people. Almost every foreign country already uses such an important institution as mediation. For example, the United States, the Netherlands, Portugal, Norway, Denmark, Azerbaijan, Serbia, but this institution has not yet been reflected in the legal system of Ukraine.

Unsurprisingly, alternative tax dispute resolution (ADR) in Ukraine causes a lot of controversy, as neither the taxpayer nor the fiscal authority sees the expediency of using mediation, as they consider it ineffective. All cases of tax dispute are settled in administrative (by appealing the decision to a higher fiscal authority) or in court.

Despite significant court receipts of tax cases in 2016–2018, the annual increase in disputes between regulators and taxpayers is constantly in the process of escalation, as evidenced by foreign experience in creating an effective mechanism for resolving tax disputes on the use of mediation.

The term “mediation” has not yet been introduced into the Tax Code of Ukraine and the Law of Ukraine on Mediation has not been adopted, but mediation is the basis for alternative dispute resolution.

The most common reason for countries to use mediation is to deal with excessive and growing tax returns. Mediation in foreign countries is a more effective, less expensive and faster way to prevent or resolve tax complaints. In some countries, mediation seems to be very successful in resolving tax disputes and yields excellent results. In mediation, the interests of the parties are paramount and this is the starting point for resolving disputes. It also means that the approach is individual to each dispute, the emotions of each party are taken into account to resolve disputes and this is really important for a tax dispute.

Since the improvement of tax dispute resolution procedures is influenced more than just the law, the authors discuss the practical aspects of mediation in terms of tax law. In the scope of this study, it is not possible to discuss the whole set of mediation processes regarding the resolution of tax disputes and types of mediation, so the authors focus on the legal basis of the institute of mediation in tax law of Ukraine and foreign countries.

**Analysis of recent research and publications.** Mediation is a process of reconciliation between the disputing parties through the assistance of a mediator for the sake of justice without spending a lot of expenses, yet remains effective and sincerely accepted by the disputing parties [1].

However, a more common approach today is that mediation is not a conciliation procedure, a process in which a third party advises the parties to a dispute in order to reach a compromise that would suit both parties. At the same time, mediation does not include arbitration, which is defined as a process in which an

impartial third party, after hearing both parties to a dispute, makes a final and generally binding decision [10].

According to A. Jeremy, a distinctive feature of the mediation procedure as a dispute resolution procedure is its goal, which is to achieve a voluntary and agreed result, as well as the lack of authority of the mediator to impose on the parties any mandatory until the execution of the dispute. Ideally, the mediation procedure is a creative and flexible process that allows for confidentiality, direct participation of the parties to the dispute, as well as their control, which increases the degree of independence of the parties [6].

According to Anil Xavier, mediation is considered a competitive approach to resolving conflicts and disputes. The main role of the mediator is to ensure interaction between the parties, help them focus on the real aspects of the dispute and offer solutions to the problem that meet the interests and needs of the parties, he acts as a bridge between the parties, helping to smooth out inequalities. at the discretion of the parties. It is important to note that mediation is not a substitute for obtaining legal advice. Mediation can be seen as a procedure that provides interaction with the other party, as well as one that simply organizes a person's thoughts about the conflict in the right direction and determines his attitude to the conflict [12].

**Formation of the goals of the article:**

- to reveal the features of conflicts (disputes) in tax disputes;
- identify the main ways to resolve tax disputes and the problems of mediation;
- generalize the theoretical foundations of mediation as an alternative way of resolving disputes;
- find out the essence of alternative ways of resolving disputes and show the place of mediation in the ABC system at the present stage of their development;
- to analyze the legal and organizational principles of the ABC in international and Ukrainian law;
- to study foreign experience and determine the peculiarities of the formation of mediation in the settlement of tax conflicts;
- identify the prerequisites and justify the need introduction of the institute of mediation in Ukraine;
- provide recommendations on the introduction of mediation taking into account foreign experience.

**Presentation of the main research material.** Under the United Nations Unified Mediation Act of 2001, mediation means “the process by which a mediator facilitates communication and negotiation between the parties to help them reach a voluntary agreement on their dispute” [11].

In Germany, “mediator is an independent and impartial person without any decision-making power who guides the parties through mediation” [5].

European Code of Conduct for Mediation Providers “Mediation Provider” means any public or private entity (including court-related mediation schemes) which manages or administrators a mediation process conducted by a third-party

neutral mediator of whatever denomination or profession, (hereafter “mediator”) Who provides service under its auspices in assisting parties to amicably resolve their dispute [4].

In the legislation of Azerbaijan mediation Settlement agreement [mediation settlement] – written agreement concluded between parties as a result of mediation process [7].

Unfortunately, in our state the bill on mediation was rejected and there is no legal definition of mediation. Although a well-known feature of any field of science and law is pluralism of opinion, mediation is no exception. And in most foreign law it is traced. Therefore, this should be taken into account when trying to create an institution of mediation.

Tax mediation has four characteristics that are inherent in it: accessibility, voluntariness, confidentiality, simplification [13].

Subject to subsection (2) and section 17, all communications (including oral statements) and all records and notes relating to the mediation shall be confidential and shall not be disclosed in any proceedings before a court or otherwise [8].

The mediator may, if he considers it appropriate, communicate and hold meetings with the parties separately, and any information disclosed to mediators by any of the parties shall be confidential and shall not be disclosed to the other party, or to any third party without prior permission of the party giving the said information [9].

Regarding the countries that reported the number of conducted mediation processes, official or estimated, the lowest data in 2016 were shown by Moldova – 6 processes, and Poland 54 of them 30 processes were resolved in the mediation process. Montenegro reported the largest number of administrative mediations in 2016 out of more than 9,000 cases in 2016. Albania reported 861 administrative mediation processes, of which 670 were settled in 2016, Montenegro 9 175 of which 4 414 were positively resolved. Bosnia and Herzegovina, out of 15 tax disputes in 2016, were all resolved through mediation. Armenia, Georgia, Ireland, Serbia, Sweden in 2016 did not have cases settled by mediation in tax disputes. Some states, such as Denmark, have noted that tax mediation disputes are included in the number of civil mediations and are not taken into account separately [2].

In the Netherlands, for example, the use of mediation to resolve tax disputes has yielded tremendous results, as evidenced by the reduction in tax lawsuits [3].

Mediation is not used in Ukraine, only certain pilot projects existed in Vinnytsia, Donetsk, Ivano-Frankivsk regions. From July 2010 to November 2010 alone, 28 cases were referred to mediation in the Vinnytsia District Administrative Court, 26 cases were mediated, of which 18 cases were successful, which led the legislator to create a draft Law of Ukraine on Mediation, but will it become an effective mechanism? in resolving tax disputes, the answer to this question can be found in a study of author conducted in Kyiv and Kyiv region in the Taxpayer Service Centers of 2019–2020, which was attended by 2 376 people, of whom 1% had never heard of mediation and mechanism for its use as a pre-trial dis-

pute resolution procedure, 67% consider it ineffective for resolving tax disputes, 29% agree that it is necessary for pre-trial settlement of tax disputes and only employees in Ukraine. According to a study conducted in Ukraine, mediation in tax matters is sometimes perceived as impossible at all. Mediation is not a popular way of resolving disputes in our country. Low awareness and paternalistic beliefs, which form the framework of the legal consciousness of our fellow citizens, stand in the way.

The attitude of Ukrainian lawyers to mediation remains uncertain. On the one hand the Bar Association of Ukraine and the National Bar Association of Ukraine publicly expressed their support for mediation and organized a number of joint events with the aim to promote mediation among lawyers. In 2016, the Committee on mediation issues of the National Bar Association of Ukraine [14] on the other hand, this study showed that lawyers do feel threatened by their profession by mediators and try to compete with mediators, non-lawyers by acquiring mediation skills and integrating mediation into legal practice. Recently, a number of law firms have started offering mediation as one of services. However, this study could not identify any statistics on such services, so mediation in this area is likely to remain a marketing mechanism for attracting clients of legal services.

Despite its advantages, mediation is not a universal method of conflict resolution. For example, mediation is not possible in disputes that require precedent, or in cases where one of the parties seeks public rehabilitation or requires an independent (legal) assessment of the dispute.

The integration of mediation into the judiciary should be based on gradual creation legal framework, starting with the framework law on mediation and amendments to procedural codes, ending, if necessary, with specialized regulations acts on mediation. Mediation legislation should be based on international standards, in particular on the recommendations on mediation of the Council of Europe, EU Directives.

The practice of Georgia is interesting, where the Mediation Service was established within the structure of tax authorities. In essence, this body resembles the Ukrainian administrative settlement of the dispute, but the main difference is still is the fact that a separate organization of specialists conducts inspections and makes decisions: reject the taxpayer's complaint in full; partially satisfy the payer's requirements taxes; fully satisfy the requirements of the taxpayer; make an independent decision on to one or another issue [15].

There is no such institution of mediation in Ukraine, as there is a legal basis that would regulate this question, but in the projects there is information that changes will be made to the Tax code. Ukraine has experience in applying a procedure similar to mediation in tax disputes. In particular, in accordance with the order of the Ministry of Revenue and Duties "On the organization work aimed at filling the budget" from 15.11.2013 № 369-r was conducted experiment to achieve reconciliation in court cases. Thus for 1,5 months of action of it reconciliation reached a total amount of UAH 5.5 billion. Only for the period from 15.11.2013 to 01.01.2014 it provided the actual budget revenue of about 2.2 bil-

lion UAH, which is more than the receipts received as a result of several months of application advertised tax compromise [15]. As a result, through mediation funds came to the state budget faster.

Thus, there is a public demand for the adoption of the relevant law on mediation, and the Constitution of Ukraine allows to establish a mandatory pre-trial procedure for dispute resolution through mediation.

**Conclusions from the study and prospects for further exploration in this scientific area.** Extrapolating achievements of foreign legislation on mediation indicate different levels of legal awareness of Ukrainian citizens. This is due to the mentality of the citizens, the legal culture and the awareness of the population. Pilot projects that should be implemented in Ukraine as well as the legislation on mediation have failed, as evidenced by the unpreparedness of the population for such an institution and its rejection.

The study conducted in 2019–2020 emphasizes this. The legislation of foreign countries on mediation gives a clear picture not only of the definitions, but also of the subtleties of mediation, which even in the draft law on mediation in Ukraine, which was rejected at the legislative level, could not be seen. Recalling the bill, it is important to note that excessive standardization of mediation is a danger of any regulatory regulation of the mediation procedure. After all, the draft law “On Mediation” [16], which was to be adopted by the Verkhovna Rada of Ukraine, should regulate only the basic principles of mediation, such as voluntary participation, neutrality, independence, confidentiality. Other issues, such as the professional ethics of mediators, should be governed by a code of ethics for mediators, which should be based on a model document, the European Code of Conduct for Mediators [17], developed by an initiative group of mediators with the support of the European Commission.

The reflection of the mediation of foreign countries is certain. coherence, which is reflected both at the legislative level and in the doctrinal approaches of scholars, which is not yet the case with Ukrainian mediation.

So, summarizing the main positive effect of the mediation process is that after its completion, the parties clearly know that the result they came to was produced by them directly. A contract entered into by the parties as a result of mediation may distribute the rights, obligations of the parties, their benefits or any acquisitions in a completely different way than specified in the court decision, based on the rules of law. The main meaning and purpose of any world negotiations and mediation processes is to reach a consensus on both sides and to be morally ready for the course of events in this way.

In conclusion, it should be noted that currently Ukraine is only at the stage of forming a national model of alternative dispute resolution ADR. All the above methods of ADR can be effectively used to resolve legal disputes in our country (except for tax disputes), provided that their quality legislation at the level of individual laws and codified acts.

Ukraine should adopt the positive experience of foreign countries and try to implement it again, taking into account all the previous shortcomings that

stood in the way of mediation. Although it is tax mediation that will not be able to be implemented by our state due to the moral unpreparedness of both the citizens themselves and the legislative changes that will need to be implemented in the regulatory framework.

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**Березенко І. В. Порівняльно-правовий аналіз вирішення податкових спорів за допомогою медіації: міжнародні та українські перспективи**

**Анотація.** Медіація як форма реалізації захисної функції в податково-деліктному провадженні. Стаття присвячена інституту медіації під час розв'язання податкових спорів. Автор зосереджується на медіації як в європейських країнах, так і в національній системі країни України. Систематизовано основні фактори, що впливають на ступінь ефективності медіаційних процесів, можливі ускладнення та шляхи їх подолання. Дослідження також торкається все ще не часто викладеного аспекту міжнародного посередництва в системі внутрішніх податкових конфліктів. Однак більшість цих досліджень базуються на даних посередництва в Україні й на індивідуальному рівні більшості зарубіжних країн. Автор використовує діалектичний метод для визначення поняття податкового посередництва й порівняльно-правовий метод, що викладає особливості правового регулювання медіації. Авторське дослідження медіації в Україні та її застосування в розв'язанні податкових суперечок дало можливість не лише зосередитись на цій проблемі, а й відстежити динамічні показники готовності до запровадження цього інституту в Україні. Автор пропонує зміни до національного законодавства на основі позитивного зарубіжного досвіду. Авторське дослідження у 2019–2020 роках, яке прийняло 2 376 осіб, також вказує на неможливість запровадження медіації в податкових спорах як альтернативного способу розв'язання податкових суперечок в Україні. За таких умов платники податків відповідно до податкового законодавства України позбавлені доступу до податкових правовідносин через відсутність нормативно-правового закріплення механізмів альтернативного розв'язання податкових спорів, що обмежує платників податків у додаткових способах захисту. Стаття складається з аналізу поточної ситуації розвитку медіації в Україні, можливих сценаріїв інтеграції та рекомендацій щодо подальших дій.

**Ключові слова:** медіація, податковий спір, платник податків, фіскальний орган, альтернативне розв'язання податкових спорів (ADR).