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ENFORCEABILITY OF MEDIATION SETTLEMENT AGREEMENTS: UKRAINIAN PERSPECTIVE IN THE LIGHT OF CURENT TRENDS

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Abstract. In the light of active discussions concerning the recent introduction of the Singapore Convention, the issue of enforcement of mediation settlement agreements has become more topical. The following article is devoted to the study of international experience in the enforceability of agreements resulting from mediation, and the current Ukrainian situation in this context. While most European countries provide effective mechanisms of enforcement, in Ukraine this issue remains unresolved. Due to the lack of a special legislative act devoted to mediation, there is no explicit approach to the mode of enforcement. Therefore, the authors study ongoing legislative works on the Draft Law of Ukraine on Mediation and the impact of the Singapore Convention alongside possible modes of implementation.

Keywords: mediation, mediation settlement agreement, the Singapore Convention, EU Mediation Directive, the Draft Law of Ukraine on Mediation

Introduction

The most distinguishing features of a lawyer's skills and knowledge are demonstrated not by winning a case in the courtroom but by meeting and satisfying a client's genuine needs and interests in a dispute. In this case, litigation procedure is not always the best guarantee, and alternative methods of conflict resolution could be significantly more successful. One such method is mediation, a rapidly developing institute which has a long-standing reputation as an effective tool for amicable dispute resolution. The uniqueness of this process lies in its foundational principles, which allow parties to undertake the burden of decision making, to control the situation, and to have an influence on an outcome which is not based on the accepted formal template following strict legal requirements. Considering the fundamentals of mediation such as autonomy, voluntariness, and full involvement in the resolution, parties are leaders of their process and as such are the main decision makers. However, the reality is that the agreement is considered to be reached not when it is signed but rather when it is properly performed, and both parties are satisfied with the outcome. This is why participants in the process face a difficult task – to decide and agree on the terms which will unconditionally be performed in the future. From this perspective, mediators as facilitators shall perform a solid reality check, which will help parties to understand whether this is

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what they actually want, to consider the validity of the other party's perspective, and to honestly evaluate the benefits or disadvantages of a failure to settle (Quek Anderson, 2015).

Despite the fact that, generally, agreements resulting from mediation have a higher chance of performance in comparison with court decisions (Steffek, 2012), the effective mechanism for the enforcement of mediation settlements is not redundant. Many reasons might cause a party to retreat from an agreement that has been reached, particularly: a party changing their mind immediately after the mediation is over; the circumstances which were supposed to encourage the performance of the agreed solution having changed; an agreement being reached which fails to concern a material term of the dispute; external factors being involved, such as currency fluctuations, that suddenly change a good deal into a bad deal; or the impossibility of performance for a variety of other reasons.

For these reasons, it is appropriate to establish an efficient mechanism to guarantee the performance of the agreement. It is natural that the parties, while initiating the mediation process, have some reasonable expectations for the result. This might be the case if the obligations agreed on are far in the future, or if the parties have specific financial, emotional, or security needs (Steffek, 2012). Therefore, the confidence that results will be enforced is beneficial for encouraging parties to participate in mediation. Additionally, this helps to create a sense of trust in the mediation process as a whole.

Further, the UN General Assembly introduced the Convention on International Settlement Agreements Resulting from Mediation as a result of discussions about the necessity of establishing the basic framework for the enforcement of settlements arising out of cross-border mediations. The signing ceremony took place in Singapore in August 2019 (UNCITRAL, 2019). Bearing in mind the fact that the Convention itself does not present a new universal mode of enforcement, the issue of existing enforcement models became more relevant. Due to the fact that Ukraine is considered to be a beginner in implementing mediation activities on a regular basis, the aim of this article is to determine the possible model of enforcement for agreements resulting from mediation which can be used in the country. Additionally, there is a need to address the question of implementation of the Convention from the perspective of Ukrainian law.

Accordingly, the tasks of the research are as follows: 1) to discuss foreign experience in enforceability of mediation agreements (models of enforceability); 2) to produce an overview of the main aspects of the Singapore Convention and current issues of its implementation in the national legal system; 3) to highlight the current condition of mediation in Ukraine and ongoing legislative works in this field, discuss the impact of the Singapore Convention, and develop suggestions for legislative changes regarding the enforcement of mediated agreements. This will culminate in the creation of a basis for the successful implementation of mediation in Ukraine.

In order to achieve the aim and perform the tasks of the present article, we will use formal dogmatic methods that will be useful in order to identify the legal provisions concerning the enforcement of mediated agreements. Additionally, hermeneutic methods will be applied while studying all the relevant legal articles and works of other researchers. The comparative method and methods of analysis and synthesis will be engaged.

1. Enforcement of Mediation Settlements: Existing Models

Within the EU community, the question of enforcement of mediated settlement agreements is regulated by the EU Mediation Directive. The basis for the implementation of the Directive into national provisions is that 'mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties' (para 19). Particularly, Art. 6 states that Member States shall ensure the possibility for parties (or one of them) to request the enforcement of their mediation settlement. The Directive leaves a space for States' own consideration on the method of enforcement: by court or other competent authority in the form of judgment, or another authentic instrument. Therefore, if a mediation agreement leads to a settlement in the court, it is enforceable under the national rules and Art. 58 Brussels I (Regulation 2001/44/EC). At the same time, if the mediation agreement is fixed as an authentic instrument, it is

enforceable under the national rules on such instruments and Art. 57 Brussels I (Steffek, 2012). These provisions set a legal ground for the recognition of enforcement mechanisms. Nevertheless, the Directive itself does not provide the Member States with a concrete, common model for the enforcement of mediated agreements, and for this reason each country has to decide on this matter at its own discretion.

When discussing existing models of enforcement, it is important to note that the legislative framework of European countries introduces different options to enforce the decision reached. Specifically, this can be done in the form of court orders, notarial deeds, or arbitral awards. Some countries provide the possibility to use all of the above-mentioned methods (Alexander et al., 2017). This mere fact demonstrates that the problem of enforcement has been regarded by the Member States, and has resulted in the establishment of various options intended to guarantee the execution of mediated agreements. Hence, for the purposes of the present article, we will classify the existing models into several groups. Mediation settlement can be enforced as a contract, as a judgment or court order, as a notarial deed, as an arbitral award, or in several ‘non-traditional’ ways.

Firstly, the agreement resulting from mediation is considered to be a contract, thus general principles of contract enforcement can be applied. As an example, in Ireland ‘a mediation settlement shall have the same effect as a contract between the parties to the settlement except where it is expressly stated to have no legal force until it is incorporated into a formal legal agreement or contract to be signed by the parties’ (section 11 of Mediation Bill, 2017). Most jurisdictions do not set a strict requirement for the private contract to be in writing and to be enforceable. However, in the mediation process it is quite risky to rely on a non-written agreement. Hence, both from an evidential perspective and from the perspective of avoiding risk, a settlement agreement should always be recorded in writing (Lambert & Finlayson, 2019). Subsequently, most countries set the requirement for the settlement agreement to be in writing, and the EU Mediation Directive specifies this requirement as well (Art. 6).

Taking into account the fact that parties have enhanced control over the process of mediation, they can agree on the matters which they have voluntarily chosen. Still, there can be certain limitations in this regard. For instance, the settlement agreement cannot be contrary to the public policy and mandatory rules, and the agreement cannot affect those rights which parties cannot freely dispose (Alexander et al., 2017). These requirements are applied in almost all provisions governing mediation settlements. As with all contracts, a mediation settlement can be challenged on the grounds of mistake, frustration, fraud, or illegality. It can also be set aside on the grounds of misrepresentation, duress, or undue influence (Sussman, 2009). However, the problem with the enforcement of mediated agreements as contracts lies in the fact that parties have to initiate court proceedings, and then have to experience the costly and time-consuming judicial process. Consequently, it is a question of efficiency, rationality, and whether it is reasonable to initiate mediation as an alternative tool for dispute resolution and, ultimately, to finish the process in the court enforcing the final agreement.

However, court involvement in the enforcement of mediation settlements does not necessarily mean initiating entire litigation procedures. It could instead be conducted in the form of the approval of mediation outcomes by a judgment or court order. This is quite common, as it is considered to be an optimal way to avoid a potential declaration of the agreement as null or void, and to ensure its finality by granting the power of *res judicata*. It has a set of advantages, such as direct enforceability and prevention of a potential court ‘detour’ like in private contracts. For instance, in Austria the mediation settlement is not directly enforceable unless it is concluded before the judge in the court (Austrian Civil Procedure Code, 1895). On the contrary, in Croatia the mediated agreement could contain an enforcement clause that means that it is directly enforceable. However, in order to enhance legal certainty, it could be concluded in the form of court settlement (Art. 13 of Bulgarian Mediation Act, 2003). Belgian legislation states that, in order to make mediation settlement enforceable, the parties have to address the issue to the court (Law on Mediation, 2005). According to Art. 1736 of the Judicial Code, mediation settlement either partly or in whole may be homologated by the court (Belgian Judicial Code, Part 7: Mediation, n.d.). In civil and commercial matters, this can be the Justice of the Peace, the Commercial Court, the Court of First Instance, or the Court of Appeal (Alexander et al., 2017). In Cyprus, the model of court enforcement is also actively used. According to the Law on Certain Aspects of Mediation in Civil Matters, the enforcement could be requested in

court by both parties or one of them with the explicit consent of the other. Then, the court may issue a decision which reflects the content of a settlement agreement (Art. 32 of the Law on Certain Aspects of Mediation in Civil Matters, 2012). It is a disputable issue whether both parties should express their consent for filling such a request, as it provides them with an additional possibility to reconsider and refuse the performance of the already agreed settlement. In Bulgaria, the Mediation Act stipulates that mediation settlement shall have the effect of a court settlement, and shall be subject to approval by regional courts if it does not contradict the law and principles of morality (Art. 18 of Bulgarian Mediation Act, 2004). Hence, as soon as parties confirm their agreement and it has been approved by the court, the mediated agreement has the power of *res judicata*.

In the United Kingdom, this process is regulated by the Civil Procedure Rules, which were implemented in accordance with the Art. 6 of the Mediation Directive. These provisions address the enforcement of settlement agreements, and require that a party has written to the court consenting to the application for the mediation settlement enforcement order. In case the court will not have the evidence of such consent, it will not make the order for enforcement (part 78.24 of the Civil Procedure Rules, 1998). The mediation settlement could have a form of Tomlin order, which permits either party to apply to the court directly to enforce the terms of the order, avoiding the start of the new proceeding (Chern, 2014). It is worth mentioning that, since Brexit, the UK national laws in the sphere of mediation will continue to apply as long as legislators do not amend or abolish them (Gowling WLG, n.d.). Therefore, at this moment, provisions regarding the procedure of enforcement in case of cross-border agreements remain unchanged.

Court enforcement can raise several questions because of the need to respect the exercise of the parties' autonomy while reaching an agreement (Quek Anderson, 2015). In this regard, the court's task is 'not to intervene into the substantive justice of the outcome, but to give significant weight to the parties' agreement, thereby respecting the parties' personal choices in determining what is just and equitable in the present circumstances' (Quek Anderson, 2015). In the case of the enforcement of mediated settlements, such intervention has to be 'effectively limited only to the "procedural justice", including whether the parties had the benefit of legal advice; whether they had freely and voluntarily agreed; whether the mediation process was properly followed; whether parties participated in the mediation; and whether the court was satisfied that they had only decided after a well-considered process. And these elements had to amount to good and substantial grounds for concluding that enforcement of the agreement would cause an injustice' (Quek Anderson, 2015). For example, in Ireland, the Mediation Bill states that, in case of family mediations, the court will not enforce the settlement which:

- does not adequately protect the rights and entitlements of the parties and their dependents (if any);
- is not based on the full and mutual disclosure of assets, or is otherwise contrary to public policy;
- a party to the mediation settlement has been overborne or unduly influenced by any other party in reaching the mediation settlement (Mediation Bill, 2017).

This means that, along with a range of positive aspects of judicial enforcement of mediated settlements, it should be remembered that the court's involvement in the process cannot contradict the primary nature of mediation as an independent method of dispute resolution. In short, its role should be limited to the 'tool' for the enforcement of an agreement that has been reached. Despite the fact that the court has to control the compliance of such an agreement with the mandatory rules and public policy, its influence on the decision cannot extend beyond these limits.

One more form of enforcement of mediation settlements is a notarial deed, which is also used in Austria, Belgium, Slovenia, Estonia, Croatia, Bulgaria, and other countries (Alexander et al., 2017). In Slovenia, a notarial deed is enforceable in cases where a person, who has an obligation and is determined in the deed, consents to direct enforceability in the same or in another notarial deed (The Notary Act, 2007). What is more, in Estonia, while enforcing mediation settlement, the notary has to verify the fact that the settlement agreement was concluded as a result of mediation proceedings (Art. 14 of the Conciliation Act, 2009) in order to avoid a potential misuse of this way of enforcement by the involved parties. This model is rather convenient for the disputants, who initiate

mediation not being in court and arbitral proceedings. It provides the parties with a directly executable act which confirms mutual rights and obligations according to the agreement.

Another possibility for enforcement is to transform the mediation settlement into the arbitral consent award. This model is effective for the parties which initiated mediation already being involved in the arbitration process. At this point, parties can request the arbitrator to record the settlement as a consent award which is enforceable under the New York Convention (Lye & Robbins, 2016). Art. 34 of the Slovenian Arbitration Act, 2008, stipulates that the arbitral tribunal terminates proceedings in case parties conclude a settlement in the form of an arbitral award, which has the same effects as any other arbitral award - the effects of a final judgment. As was mentioned before, this option is mostly suitable for those parties who try mediation during the arbitration proceedings. Otherwise, it would not be reasonable to initiate arbitration proceedings with the sole intention of enforcing the agreement resulting from mediation (Jovin-Hrastnik, 2011). One of the benefits of the application of this model is a credibility connected with high levels of enforceability of arbitration agreements. In this case, an arbitrator has the role of the so-called 'filing clerk' (Tchakoua, 2002). For parties this option may seem very attractive as *de facto* they are deciding on the outcomes of the dispute by themselves but, ultimately, still have a recognized enforceable document of imperative nature.

Along with commonly used models of enforcement, there are perhaps more 'non-traditional' ones. For instance, in Estonia there is a special mediation (conciliation) body which also can have the authority to validate a settlement. According to Art. 28 of the Conciliation Act, the agreement reached must be performed within 30 days, and in case of failure of performance the party is entitled to present the settlement agreement validated by a conciliation body to a bailiff for enforcement. In Italy the approval of parties' lawyers can give a value of enforceability to the mediation agreement attached to the mediation report, certifying that the agreement complies with the mandatory rules and public order (Art. 12 of the Legislative Decree No. 28, 2010). On the one hand, this option is additional evidence that the mediated agreement was signed according to the law, and such a model minimizes the potential challenges on the basis of breach of contract law principles. However, additional concerns might evolve regarding responsibility for such approvals and how to avoid the abuse of authority by lawyers or mediators. Additionally, the genuinely imperative institute of enforcement does not comply with a mediator's neutral and not forcing role in the process.

Therefore, there is a set of possible options to enforce any decision reached. It is difficult to evaluate the most appropriate one as it depends on the circumstances which lead parties to the mediation. In the case of parties' initiated mediation already being in arbitration proceedings, the best way would certainly be to enforce mediation settlement via arbitral award. Similarly, the court-initiated mediation shall be enforced by judgment. The form of a notary deed is convenient for parties in out-of-court mediations. When discussing 'non-traditional' ways of enforcement, it might be questionable whether it would be appropriate to use them in certain categories of cases, such as commercial disputes concerning major transactions, disputes involving property issues, criminal cases, and so forth. Enforcement by mediators themselves could cause additional concerns regarding the mediator's status and could negatively affect the principal nature of mediation as an institute, where the mediator is an independent actor with no authority to force a decision. Another model, the approval of a party's lawyer, essentially has the same effect as the enforcement under contract law provisions, along with the additional guarantee that the settlement complies with legislative provisions.

2. The Singapore Convention: Main Aspects and Challenges

The discussions concerning the development of the international legal framework establishing common standards of the enforcement of agreements resulting from cross-border mediations merged a long time ago. Along with the existence of the New York Convention on the Enforcement of Arbitral Settlements, it became necessary to develop a similar mechanism concerning agreements resulting from cross-border mediation (Schnabel, 2019). The working group was established in 2015, and all drafting works have led to the signing of the United Nations Convention

on International Settlement Agreements Resulting from Mediation (also known as the Singapore Convention) in August 2019. The Convention is widely perceived as ‘an instrument for the facilitation of international trade and the promotion of mediation as an alternative and effective method of resolving trade disputes. Being a binding international instrument, it is expected to bring certainty and stability to the international framework on mediation’ (UNCITRAL, 2018). The Convention will be applied to the international agreements concluded as a result of mediation in commercial disputes between two actors from different States (parties to the Convention). Thus, it establishes a uniform legal framework for the recognition and enforcement of such agreements in different jurisdictions.

The Convention sets several main directions for the regulation of settlement agreements resulting from mediation. Specifically: nature, content, formalities, and other requirements of settlement agreements; agreement to submit a dispute to mediation; international recognition of settlement agreements; direct enforcement or review mechanism; defenses to enforcement of settlement agreements; and possible forms that the instrument could take (Coo, 2017). The Convention shall be applied if the dispute is international and the settlement agreement was concluded in writing and was not enforced before (Art. 1).

The presence of the Singapore Convention on the international arena is, without doubt, a great step forward to the world-wide recognition of mediation as a reliable tool for dispute resolution. However, it was well stressed that ‘it is only the beginning of the long journey’ (White, 2019).

First of all, States need time to adopt its terms and to adjust the method of the application according to their own legislation (White, 2019). At this moment, only 3 countries have already ratified the Convention: Singapore, Fiji, and Qatar. Therefore, 6 months after the third ratification, the Convention will take action (on 12 September 2020).

Secondly, big actors in the international commercial arena such as the EU, the United Kingdom, Canada, and Australia have not signed the Convention yet, and in the long run that could be an impeding factor. The reasons why these actors are refraining from signing the Convention are different. There is an opinion that the EU is still considering whether to join the Convention as a block, or whether each country should do so separately (Bate, 2020). Additionally, there are concerns about reservation provisions in the Convention (Art. 8), which *de facto* provide States with an option to exclude the application of the Convention in certain cases.

Thirdly, as already mentioned, the Convention does not provide a new universal mode of enforcement. It rather sets preconditions to the enforcement of a settlement agreement (White, 2019), while States have to maintain their own models of enforcement. Thus, in the case of countries which do not have any, it is high time to initiate reforms and working groups in this regard. In order to successfully implement the conventional provisions, parties have to make changes in the domestic legislation recognizing the possibility of enforcing mediated settlements.

Furthermore, other Conventional provisions have raised many debates and doubts about their applicability. For instance, Art. 5 sets the grounds upon which a court may refuse to grant relief at the request of the disputing party. It could be done in case of a serious breach of standards by the mediator, without which that party would not have entered into the settlement agreement, or in case of a failure by the mediator to disclose any circumstances to the parties, that raise justifiable doubts as to the mediator’s impartiality or independence and that result in a material impact or undue influence on a party, without which that party would not have entered into the settlement agreement. ‘What will constitute a justifiable doubt still remains unclear, but again, this text raises the difficulty of the motivation of the party seeking to resist enforcement for getting into the mediated settlement agreement – an incontrovertible fact that could also be difficult to prove’ (Jhangiani & Looy, 2019). It is hard to imagine the process of proving the breach of standards and the criteria according to which it can be considered as serious. As it is known, there is no universal code of mediator’s conduct. It is suggested that, until this is formulated, mediators working under the Singapore Convention should identify the applicable code of conduct in their mediation agreements (Kallipetis, 2020). However, this can lead to uncertainty and discrepancy among these conduct

standards, and therefore the reasons to refuse enforcement can vary significantly depending on the mediator or institution which manages the process.

Despite the problematic issues mentioned above, it is worth mentioning that the Singapore Convention is a rather promotional step towards the demonstration of the reliability of this institute in the international community, which could be used as a basis for implementing settlement agreements. However, from a practical standpoint, we cannot consider it as an effective tool for the enforcement of mediation settlement unless it is ratified by the majority of its signatories. Additionally, if future recognition of the Convention is acknowledged by the EU, the United Kingdom, Canada, and Australia, it will have a greater significance and scope of world-wide application.

3. The Current Situation Regarding the Enforcement of Mediated Agreements in Ukraine

The relevance and popularity of mediation in Ukraine is rapidly growing and appears to be very promising. The mere idea of mediation as an ADR form is actively promoted by self-regulatory and non-profit mediation organizations. One of them is the National Association of Mediators of Ukraine (hereinafter NAMU), which was established in 2014 as a part of the EU Integration process. Its primary role is to promote the establishment, popularization, and development of mediation as a specific method of dispute resolution. In 2017, this organization published the Code of Mediator's Ethics, which was elaborated on according to European standards. Additionally, NAMU is running a Register of Mediators, which currently could be considered to be a major one in Ukraine and which includes data on over 150 mediators.³ Another leading organization is the Ukrainian Mediation Center, which offers mediators training, internships, educational courses, and consulting services.⁴ One of its latest successful initiatives is a 'Mediation theatre' – a live simulation of possible mediation cases conducted by professionals. Additionally, there are mediation centers and societies in other Ukrainian regions (Lviv, Kharkiv, Odesa, and Chernivtsi).

Several years ago, the Government took an intensive course on developing this institute as part of implementing the Strategy for the Reform of Judiciary and Related Legal Institutions for 2015–2020 (Presidential Decree of Ukraine of 20 May 2015, No. 276/2015), and several positive outcomes can already be noted. Additionally, great assistance is coming from the USAID New Justice Program which is actively cooperating for the implementation of international standards of mediation in Ukraine. As a result of the consolidated efforts of the community of Ukrainian mediators and USAID, the *Handbook on Mediation in Lawyer's Professional Activity* was published (NAMU, 2019).

At the same time, current legislation in the field of mediation remains within the development process. The need for drafting a special legal act which would be able to legalize mediation and set a unified basis for conducting activities in this field emerged long before. Even though society is becoming more and more aware of the idea of mediation, the legal recognition of this institute is crucial for developing more confidence in the process, unloading cases from the judicial system, and setting the basis for mediation activity as a profession.

Over the last few years, legislators are actively working on the adoption of the Law on Mediation. Several of these drafts, such as the Law of Ukraine on Mediation No. 2425a-1, the Law of Ukraine on Mediation No. 2480, The Law of Ukraine on Activities in the Field of Mediation, and several others have not been successful and did not proceed to the further considerations. Nevertheless, on 22 April the Ukrainian Government (the Cabinet of Ministers) approved the latest version – the draft of the Law of Ukraine on Mediation, providing that it will be finalized and taking into account a number of comments. This already represents huge progress as, unlike all previous drafts, this document is expected to set out the basic provisions for the mediation process, principles, mediators' status, and the procedures for involving mediators in different procedural codes. Mediation will be conducted by mutual consent of the parties to the mediation in accordance with the principles of voluntariness,

³ National Association of Mediators of Ukraine, Official website, <http://namu.com.ua/ua/>

⁴ Ukrainian Mediation Center, Official website, <http://www.ukrmediation.com.ua/en/>

confidentiality, independence, neutrality, and the impartiality of the mediator (Cabinet of Ministers of Ukraine, 2020). It is worthy to note that the draft law would remain only as a ‘framing’ document, which does not ‘overregulate’ this institute and does not impose too many strict State limitations, but still creates a legal basis for conducting a mediation.

Additionally, it is important to mention that Ukraine is among the signatories of the Singapore Convention. This fact alone demonstrates the willingness to launch into mediation in different kinds of disputes, and to assure the enforcement of the settlement agreement. In the long run, this will create a more favorable investment climate in Ukraine, helping businesses to reduce the cost and time of dispute resolution. Nevertheless, at this moment Ukraine has not ratified Convention yet and, apparently, the process of ratification is delayed due to the unpreparedness of the national legal framework in the field of mediation. Thus, at present the primary focus should be put on the elaboration of local legislation in this sphere, particularly leading the latest draft of Law on Mediation No. 3504 to the phase of adoption and becoming effective.

It is reasonable to look at the provisions on the mediation settlement agreement from the Ukrainian’s legislator’s perspective. The draft law defines it as an ‘agreement on the settlement of conflict (dispute) resulting from the mediation’. Art. 16 of the draft entitles parties to apply to the court, arbitration court, or international commercial arbitration in case of non-performance or improper performance of the mediation settlement agreement. Furthermore, Art. 17 imposes an obligation to execute this agreement in accordance with the procedure and terms established by it. This combination of the right and obligation provides a good basis for further considerations about enforcement mechanisms.

Further, the draft law states that a settlement agreement should be in writing and contain information about: 1) the date and place of the agreement; 2) parties to mediation and their representatives; 3) mediator/mediators, mediation agreements, or mediation rules; 4) terms of the settlement agreement and the methods and time limits of its performance, as well as the consequences of non-performance; 5) other terms, prescribed by parties. Additionally, such an agreement could be signed by the mediator, but this is not a mandatory requirement. These provisions create a foundation for evidencing that an agreement was reached in mediation.

Nonetheless, at present the process of enforcing the agreements resulting from mediation is not clear. Due to the fact that, currently, Ukraine does not have any concrete enforcement mechanism for mediated settlements, they can be discussed only based on the legal nature of the agreement in question. Mediation settlement should be performed according to the principles of the voluntariness and good faith of the parties, along with the principle of *pacta sunt servanda*. If the agreement is not performed, the non-defaulting party can use the civil law remedies provided in Chapter 3 of the Civil Code of Ukraine. However, this option is radically opposite to all of the benefits of mediation as an ADR option. Therefore, there is a strong need for a statutory mechanism of enforcing mediation settlement agreements (Mazaraki, 2018).

For the purpose of establishing an effective enforcement mechanism, primarily, it is necessary to adopt such provision which clearly stipulates concrete requirements for agreements resulting from mediation that later on could be subject to enforcement. First of all, the agreement should be in writing, and contain information about disputants, mediators, and process rules. Secondly, such an agreement should clearly indicate the terms, and contain a declaration that parties acknowledged with rules of mediation and were acting in good faith, expressing consent that the final agreement could be addressed for enforcement by one of the parties. In case such agreement is contrary to the public policy, mandatory rules, or unlawfully affects the rights of third parties, enforcement will be refused. What is more, mirroring the provisions of the Singapore Convention, it is recommended to prescribe the clause of the mediator’s signature as a necessary condition and as additional evidence that the agreement was reached exactly in mediation.

Besides the introduction of a specialized mediation law, amendments to the procedural legislation should be made. Particularly, procedural codes should contain a provision addressing the possibility to conclude a mediation

settlement agreement. This way, the parties would have the possibility to end the proceedings by concluding such a settlement, which will be further approved by the court. The aforementioned model could be enforced in the same way as a settlement agreement in court proceedings according to the provisions of the Law of Ukraine on Enforcement Proceedings (2016). Therefore, the mediation settlement will be approved by court order and will have the status of an enforcement title. Additionally, the fact that enforcement has such a form will ensure more confidence in the mediation process in a traditional 'litigation-oriented' society. If participation in mediation will be highly encouraged during the preparatory stage of the litigation, the agreement reached could be enforced within the same court proceeding. As mentioned above, the draft Law on Mediation provides the possibility to apply to the court, arbitration court, or international commercial arbitration for the enforcement of the agreement reached. Considering the fact that providing different options for the enforcement of mediated settlements will be only beneficial, it is recommended to complete the mentioned provision with the opportunity to enforce such settlements by notaries.

Following the aforementioned, we can see positive changes in the establishment of the mediation institute at the legislative level. The recent approval of the draft law was accelerated due to the necessity of creating a basis for the ratification of the Singapore Convention. Unequivocally, the ratification of the Convention is important for Ukraine from the perspective of business and international trade relations. However, its practical significance could be evaluated as far higher when it is ratified by the majority of countries.

Conclusions

The effectiveness of the mediation process is unquestionable, and it is significant that Ukraine is moving in the direction of its recognition at the level of special law. As the process has already begun, the main task for legislators is to not take too long for its conclusion. The legal recognition of mediation is crucial for Ukraine as it will establish the basis for conducting mediation activities and, by means of this tool of amicable dispute resolution, will help to unburden the current judicial system.

While addressing the issue of enforceability of agreements resulting from mediation, it is recommended to follow the experience of countries with established mediation practices. Particularly, in order to ensure effective enforcement, the following should be clarified: essential elements of the enforcement mediation settlement agreement; setting limitations under which enforcement of the agreement could be refused (e.g. contrary to the public policy, mandatory rules); institutions, which can approve the mediation settlements; and the legal consequences for non-performance of the mediation settlement agreements.

Further, it is considered that the most reasonable and realistic option in Ukraine in the context of the present day would be the enforcement of the settlement in court. Once the demand for mediation services in Ukraine increases, it will be reasonable to consider the possibility of providing parties with a choice between other models of enforcement. For instance, using notary services for the enforcement of settlements in the case of mediation which was initiated without court proceedings.

What is more, solving the problem of the enforcement of settlement agreements will ensure that current legislation in Ukraine is brought into accordance with EU standards and, over the longer term, enable the implementation of the EU Mediation Directive in national legislation in Ukraine, which will create conditions for the work of mediators within common European standards. Additionally, this will be of great advantage to Ukraine as a party to the Singapore Convention. As Ukraine has already undertaken a commitment to continue development in the direction of the enforcement of mediation agreements, it is difficult to satisfy this requirement if there is no concrete mechanism to do so within the country.

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