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## Institute of Dispute Resolution by the Participation of a Judge in the Court of Ukraine: Joint and Different Characteristics with the Institute of Mediation in Ukraine

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### Abstract:

The relevance of this article is explained by the fact that in 2017 a new procedural institute – dispute resolution by the participation of a judge was introduced into the legal science of Ukraine, as well as in the judicial practice of Ukraine. In the jurisprudence of Ukraine, there is no consensus on the unity or difference between the institute of mediation in Ukraine and the institute of dispute resolution by the participation of a judge in Ukraine. The purpose of the article is the scientific and practical analysis of the norms of the Civil Procedural Code of Ukraine, the Commercial and Procedural Code of Ukraine and the Code of Administrative Proceedings of Ukraine in terms of determining the procedure for resolving a dispute by the participation of a judge, as well as determining the common and distinctive features of the mediation institute and the institute of dispute resolution by the participation of a judge under Ukrainian law. The article proposes improvements of Ukrainian legislation.

**Keywords:** dispute resolving involving a judge; mediation, civil litigation, economic litigation, administrative litigation.

**JEL Classification:** K15; K40; K41.

### Introduction

The relevance of this article is explained by the fact that in 2017 a new procedural institute – dispute resolution by the participation of a judge was introduced into the legal science of Ukraine, as well as in the judicial practice of Ukraine. It is enshrined in the new editions of the Civil Procedural Code of Ukraine, the Commercial and Procedural Code of Ukraine and the Code of Administrative Proceedings of Ukraine. It should be noted that in the

jurisprudence of Ukraine there is no unanimity about the unity or difference between the institute of mediation in Ukraine and the institute of resolving a dispute by the participation of a judge in Ukraine, disclosure of their content and legal nature, etc. In addition, the relevance of the study is also indicated by the fact that a significant part of Ukrainian citizens are not yet acquainted with the legal categories 'mediation' or 'resolving a dispute by the participation of a judge', and therefore, in the application of the norms of the procedural codes of Ukraine, in practice, problems may arise in the parties of the court case. We also pay attention to the fact that Ukraine's legislation on dispute resolution with the participation of a judge has controversial provisions, and the law on mediation in Ukraine is absent.

The purpose of the article is the scientific and practical analysis of the norms of the Civil Procedural Code of Ukraine (Civil Procedural Code of Ukraine 2004), the Commercial and Procedural Code of Ukraine (Commercial and Procedural Code of Ukraine 1992) and the Code of Administrative Proceedings of Ukraine (Code of Administrative Proceedings of Ukraine 2005) in terms of determining the procedure for resolving a dispute by the participation of a judge, as well as determining the common and distinctive features of the mediation institute and the institute of dispute resolution by the participation of a judge under Ukrainian law. The article proposes improvements of Ukrainian legislation.

The research includes a combination of empirical assumptions, logical and experimental generalizations, as well as modeling and formalizing the scientific result. With the help of the inductive method, a conclusion is made on the content of the concepts of 'resolving a dispute by the participation of a judge' and 'mediation'. The deductive method contributed to the discovery of signs of the mediation institute and the institute of resolving a dispute by the participation of a judge. Using the legal comparative method has allowed to single out the common and distinctive features of these procedural institutes according to the legislation of Ukraine. The method of interpretation of the law contributed to the disclosure of the content of key concepts in the context of protecting the rights of individuals in the courts of Ukraine.

The analysis of norms of the Civil Procedural Code of Ukraine, the Commercial and Procedural Code of Ukraine and the Code of Administrative Proceedings of Ukraine allows us to conclude that the procedures for resolving a dispute involving a judge in the economic, civil and administrative legal proceedings of Ukraine are almost identical. As of January 2019, a law on mediation in Ukraine has not been adopted in Ukraine, but the draft law has already been subject to consideration by the Verkhovna Rada of Ukraine (On mediation 2015). Institute of resolving disputes involving judges and mediation institute in Ukraine are not identical. At the same time, these institutions are based on the same principles of conflict management and resolution that are aimed at 'peaceful' resolving by the parties of the dispute. For example, the principle of the parties' equality, under which the parties of the conflict have equal rights and responsibilities, the principle of independence and impartiality of the mediator and judge, on the basis of which they act objectively, impartially and without any influence, as well as the principles of voluntariness, honesty, conscientiousness, non-confrontational negotiation, etc.

In Ukraine, a number of works are devoted to problems of resolving a dispute involving a judge in legal proceedings. In particular, there are works by Karmaza 2017:24-28; Koroied 2017: 79-88; Mozhaykina 2018: 174-180; Butyrskaya 2017:79-83; Tsvina 2017:195-200; Tykhanskyi 2018:31-39) and other Ukrainian scholars. Nevertheless, the doctrine of Ukraine does not produce common principles and approaches to the concept, content and essence of the dispute resolution institute involving the judge and the mediation institute in Ukraine. Therefore, this article is interesting for both scientists and practitioners, since, from the scientific and practical point of view, it reveals the peculiarities of the procedure for resolving a dispute involving a judge in the legal proceedings of Ukraine, focuses on the features that distinguish this procedure from the mediation process, which is the subject of consideration by people's deputies of Ukraine, etc.

## 1. Analysis of Norms of Ukrainian Legislation on Dispute Resolution Involving a Judge

According to Article 55 of the Constitution of Ukraine, the rights and freedoms of a person and a citizen are protected by a court. According to Article 124 of the Constitution of Ukraine, the only state authority that carries out justice in Ukraine is a court (Constitution of Ukraine 1996). Currently, in Ukraine, unlike foreign countries, in particular Germany and the US, there is no alternative, legally-defined mechanism for resolving disputes. Nevertheless, certain steps have been taken in this direction by the Verkhovna Rada of Ukraine, namely, the draft Law of Ukraine 'On Mediation' (Reg. No. 3665) was adopted as a basis, which promotes the development of the mediation institute in Ukraine (On mediation 2015).

As for the dispute-resolving institute involving a judge, this institute is new for the law of Ukraine. The procedural rules governing the dispute resolving procedure involving a judge are contained in the provisions of the new editions of the Civil Procedural Code of Ukraine (Art. 201-205) (Civil Procedural Code of Ukraine 2004),

the Commercial and Procedural Code of Ukraine (Art. 186-190) (Commercial and Procedural Code of Ukraine 1992) and the Code of Administrative Proceedings of Ukraine (Art. 184-188) (Code of Administrative Proceedings of Ukraine 2005), which came into force in December 2017. An analysis of the dispute resolving procedure involving a judge in economic, civil and administrative proceedings gives grounds for asserting that it is almost identical, except for categories of cases in which the settlement of a dispute with the participation of a judge is not allowed. So let's consider it.

It should be noted that the resolving of a dispute with the participation of a judge takes place at the preparatory stage of consideration of the case. So, according to Art. 182 of the Commercial and Procedural Code of Ukraine, Art. 197 of the Civil Procedural Code of Ukraine and Art. 180 of the Code of Administrative Proceedings of Ukraine, in the preparatory meeting the court finds whether the parties want to apply to the court for the resolving of the dispute with the participation of the judge, establish the terms and procedure for resolving the dispute involving the judge, if the parties agree to conduct it. Thus, in order to satisfy the interests of the parties to the dispute, at their request, before proceeding on the merits, in due time and provided that the Commercial and Procedural Code of Ukraine, the Civil Procedural Code of Ukraine or the Code of Administrative Proceedings of Ukraine allows resolving of the dispute in the case involving the judge, as well as in the order determined in the Commercial and Procedural Code of Ukraine, the Civil Procedural Code of Ukraine or the Code of Administrative Proceedings of Ukraine, the resolving of a dispute takes place involving a judge, on which a judge makes a ruling and stops the proceedings.

Procedural actions aimed at resolving a dispute involving a judge are carried out within the time limits specified in the specified codes. (Art. 190 of the Commercial and Procedural Code of Ukraine, Art. 205 of the Civil Procedural Code of Ukraine and Art. 188 Code of Administrative Proceedings of Ukraine). So, according to Art. 205 of the Civil Procedural Code of Ukraine resolving of a dispute involving a judge shall be conducted within a reasonable time, but no more than 30 days from the date of the decision to hold it. The term can not be continued. The content of the rules of the Commercial and Procedural Code of Ukraine and the Code of Administrative Proceedings of Ukraine is similar.

The consequences of these procedural actions in resolving a dispute with the participation of a judge may be: (1) court approval of a settlement agreement; (2) withdrawal of the claim without consideration; (3) refusal of a claim; (4) recognition of a claim; (5) termination of procedural actions related to the settlement of a dispute on the initiative of the party; (6) termination of procedural actions connected with the settlement of a dispute in connection with the expiration of the term specified by the code; (7) termination of procedural actions connected with the settlement of a dispute on the initiative of the court in the foreseeable cases (for example, delaying of consideration). Repeated resolving of a dispute involving a judge is not allowed.

It should be noted that the grounds for termination of procedural actions related to the settlement of a dispute with the participation of a judge are specified in separate norms in the Commercial and Procedural Code of Ukraine, the Civil Procedural Code of Ukraine and the Code of Administrative Proceedings of Ukraine. For example, according to Art. 204 of the Civil Procedural Code of Ukraine, the resolving of a dispute involving a judge is terminated: (1) in case of submission by the party of a statement on the termination of the resolving of a dispute involving a judge; (2) in case of expiration of the dispute resolving involving a judge; (3) on the initiative of a judge in case of delaying the settlement of a dispute by any of the parties; (4) in case of conclusion of the agreement by the parties and appeal to the court with an application on its approval or the petition of the plaintiff in court with a statement about leaving the claim without consideration, or in case of refusal of the plaintiff from the claim or recognition of the claim by the defendant. A decision to terminate a dispute resolving involving a judge is issued, which is not subject to appeal.

The above grounds for suspension should be divided into such groups. For example, in the case where the legal consequences arising after the termination of procedural actions related to the a dispute resolving involving a judge is a criterion for division, grounds for termination are divided into:

- (1) grounds that lead to the restart of the case and transfer of the case to another judge for consideration (not resolving of the dispute): in case of submission by the party of an application on the termination of dispute resolving involving a judge; in case of expiration of the term of dispute resolving involving a judge; on the initiative of a judge in case of delaying the resolving of a dispute by any of the parties;
- (2) grounds which lead to the closure of the proceedings (peaceful settlement of the dispute): in case of conclusion of the agreement by the parties and appeal to the court with an application on its approval or the plaintiff's appeal to the court to leave the claim without consideration, or in case of refusal of the plaintiff from the claim or recognition of the claim by the defendant.

The Commercial and Procedural Code of Ukraine, the Civil Procedural Code of Ukraine and the Code of Administrative Proceedings of Ukraine establish cases where the dispute resolving with the participation of a judge is not allowed. Yes, according to Art. 201 Civil Procedural Code of Ukraine dispute resolving with the participation of a judge is not allowed in case if a third person, who claims independent claims on the subject of the dispute, entered the case. Art. 186 of the Commercial and Procedural Code of Ukraine provides that the dispute resolving with the participation of a judge is not allowed in disputes (cases): (1) on the restoration of the debtor's solvency or recognition of bankruptcy; (2) on applications for approval of plans to reorganize the debtor before the opening of proceedings in bankruptcy; (3) in the case of a third party claiming an independent claim regarding the subject matter of the dispute. According to Art. 184 of the Code of Administrative Proceedings of Ukraine resolving of a dispute with the participation of a judge is not allowed: (1) in administrative cases, as defined in Chapter 11 of Section II of this Code, with the exception of cases specified in Article 267 of this Code, and typical cases; (2) in the case of a third party claiming an independent claim regarding the subject matter of the dispute.

Consequently, the codes contain a closed list of cases when the dispute resolving with the participation of a judge is not allowed. However, in the case 'a third party claiming an independent claim regarding the subject matter of the dispute', is repeating in the Commercial and Procedural Code of Ukraine, the Civil Procedural Code of Ukraine and the Code of Administrative Proceedings of Ukraine; all other cases are related to the legal and judicial powers regarding economic and administrative disputes.

Having analyzed the rules of Commercial and Procedural Code of Ukraine, the Civil Procedural Code of Ukraine and the Code of Administrative Proceedings of Ukraine, we can conclude that the norms establish two forms of dispute resolving with the participation of a judge, namely: joint and closed meetings; joint or closed meetings. It is also foreseen that joint meetings will be held with the participation of all parties, their representatives and judges, and closed meetings are held at the initiative of the judge with each side individually. However, the norms do not foresee the 'initiator' of the choice of the form of conduct. As a rule, the judge independently determines the form of the settlement of the dispute, that is, the form of communication with the parties. However, the codes do not forbid the parties to choose the form of holding. For example, according to Art. 5 of the Civil Procedural Code of Ukraine, in administering justice, the court protects the rights, freedoms and interests of individuals, rights and interests of legal entities, state and public interests in the manner prescribed by law or agreement. Therefore, we believe that if the parties agree to settle the dispute with the participation of a judge and determine the form in the contract (they have chosen one of the two above), the court must adhere to the form specified in the contract for settlement of the dispute.

Having analyzed the rules of the codes, we arrive at the conclusion that they provide the powers of a judge in settling the dispute with the participation of a judge. However, the codes do not contain norms defining the general rights and obligations of the parties in closed or joint meetings, which, in our opinion, indicates a lack of regulation of these relations. However, the judge and the parties must adhere to the general principles of civil, economic and administrative justice. In addition, it needs to be reflected in the rules of the code, for example, the question of how much time (days, hours) a judge should give the parties, so that they are not charged with violating the basic principles of legal proceedings.

So, according to Art. 203 of the Civil Procedural Code of Ukraine at the beginning of the first joint dispute-resolving meeting, the judge shall explain to the parties the purpose, the procedure for dispute resolving with the participation of the judge, the rights and obligations of the parties. In conducting joint meetings, the judge finds out the grounds and subject of the claim, the grounds for objections, clarifies to the parties the subject of evidence in the category of the dispute being considered, invites the parties to submit proposals on ways of peaceful dispute settlement and carries out other actions aimed at resolving the dispute by the parties. The judge may offer the parties a possible way of peaceful settlement of the dispute. During closed sessions, the judge has the right to draw the parties' attention to court practice in similar disputes, to suggest to the party and/or their representative the possible ways of peaceful settlement of the dispute.

That is, during a joint meeting, the judge can offer the parties a possible (one) peaceful settlement of the dispute, and during closed sessions – to suggest possible ways (a few) for a peaceful settlement of the dispute. At the same time, the codes contain certain safeguards, namely: 'during the settlement of a dispute the judge has no right to provide legal advice and recommendations to the parties, to provide an assessment of the evidence in the case' (Art. 203 of the Civil Procedural Code of Ukraine, Art. 186 of the Code of Administrative Proceedings of Ukraine, Art. 188 of the Commercial and Procedural Code of Ukraine). Therefore, the question arises as to whether the judge's proposal for a 'dispute resolution path' is 'legal advice and recommendation' that judges are prohibited from giving, which should be understood under legal constructions: 'the possible way of a

peaceful settlement of a dispute' and 'legal advice and recommendations'. In this regard, the judge must clearly understand what the content of the legal construct 'legal advice and recommendations' is, and what content the legislator has put in the phrase 'to offer the parties a possible way of peaceful settlement of the dispute'. We believe that the codes in this part require substantial changes.

During the settlement of a dispute with the participation of a judge, the minutes of the meeting are not held and fixation by technical means is not carried out. When settling a dispute with the participation of a judge, it is prohibited to use portable audio devices, as well as perform photo and film, video and audio recording. In our opinion, it should be allowed to keep the judge's own notes, so as not to forget the information received from the parties during the meetings.

However, the Commercial and Procedural Code of Ukraine, the Civil Procedural Code of Ukraine and the Code of Administrative Proceedings of Ukraine provide that the parties shall have the right to participate in such meetings in a videoconference mode, in the order specified by these codes. In our opinion, videoconference meetings may violate the principle of confidentiality, because the judge will not be able to track the presence or absence of recorders in the parties involved in such meetings in the videoconference mode.

## 2. The Process of Mediation and Its Differences with the Dispute Resolving Involving a Judge Process

At first glance, the content of the articles of the Commercial and Procedural Code of Ukraine, the Civil Procedural Code of Ukraine and the Code of Administrative Proceedings of Ukraine gives reason to assert that the process of resolving a dispute with the participation of a judge and the process of mediation are identical. However, this is a false conclusion. We believe that these are different legal institutions in Ukrainian law, but they have common features. For example, the basis of these institutions is the same principles of conflict management and resolution that are aimed at 'peaceful' settlement of the parties to the dispute, etc. In particular, it refers to the principle of equal rights of the parties, in which the parties to the dispute have equal rights and obligations, the principle of independence and impartiality of the mediator and judge, on the basis of which they act objectively, impartially and without any influence, as well as the principles of voluntariness, honesty, conscientiousness, non-confrontational negotiations, etc.

The content of the term 'mediation' is disclosed in the laws of foreign states. For example, Article 2 of the Mediation Act of Malta states that 'mediation' is a process in which the mediator facilitates negotiations between the parties to help them reach a settlement agreement on the dispute. Article 1 of the Romanian Law on Mediation and the Organization of the Mediator's Profession states that mediation is an additional way of resolving conflicts by means of reconciliation with the help of a third person who has the specialty of the mediator in a neutral, fair and confidential environment. According to Section 2 (1) of the United States Mediation Act, mediation is a process in which the mediator facilitates communication and negotiation between the parties to help achieve voluntary agreement on their dispute. According to Art. 2 of the draft law on mediation of Ukraine, mediation is an alternative (out-of-court) dispute resolution method by which two or more parties to the dispute try to reach an agreement to resolve their dispute within the structured process with the participation of the mediator.

That is, mediation is an alternative way of resolving disputes involving a mediator. Its task is to establish and facilitate constructive dialogue between the parties to the dispute in order to find a mutually beneficial solution for these parties to the dispute. Unlike the legal proceeding, mediation parties decide on a dispute on their own.

The basic concept embodied in the legislation of foreign countries, as well as the draft law, is the voluntary nature of the mediation process and the mutual consent of the parties to mediation. For example, in the Recommendation of the Committee of Ministers of the Council of Europe on Family Mediation No. R (98) 1 on January 21, 1998, it is provided that 'mediation should not be compulsory' (Recommendation No. R (98) 1 1998).

The analysis of norms of the Commercial and Procedural Code of Ukraine, the Civil Procedural Code of Ukraine and the Code of Administrative Proceedings of Ukraine, as well as the norms of the draft law on mediation of Ukraine, gives grounds for highlighting such distinctive features of the dispute settlement institution with the participation of a judge and a mediation institution (Karmaza 2018: 144-148). For example, let's take the rules of the Commercial and Procedural Code of Ukraine.

Firstly, the procedure for settling a dispute with the participation of a judge, in contrast to the mediation process, is clearly defined by the rules. For example, Art. 188 of the Commercial and Procedural Code of Ukraine provide that the settlement of a dispute with the participation of a judge is carried out in the form of joint and (or) closed meetings. As for mediation, the special law on mediation in Ukraine is not adopted.

Second, the judge, when conducting procedural actions regarding the peaceful settlement of the dispute, in contrast to the mediator, is a representative of the judicial branch of the government and decides the

procedural decisions in the form of a decree in the name of Ukraine, which are obligatory for execution. For example, according to Art. 189 of the Commercial and Procedural Code of Ukraine the decision on the termination of the settlement of a dispute with the participation of a judge is issued a ruling, which is not subject to appeal. The mediator does not approve the relevant procedural decisions in the mediation process.

Thirdly, unlike the dispute resolution institution with the participation of a judge, the parties choose the mediator independently and freely. In settling a dispute with the participation of judges, the parties do not have the right to choose a judge, since the judge is determined by the automated system of document circulation of the court according to the general rules of the Commercial and Procedural Code of Ukraine (Art. 6 of the Commercial and Procedural Code of Ukraine).

Fourth, the judge in the process of settling the dispute with the participation of a judge, taking into account the requirements of Art. 19 of the Constitution of Ukraine and requirements of Art. 2 of the Commercial and Procedural Code of Ukraine, must adhere to the order determined by the rules of the Commercial and Procedural Code of Ukraine, while the mediator has the right to apply the principle of the flexibility of the mediation process, that is to adhere to the basic structure of the mediation process, but can act without adhering to it in detail. That is, 'move away' from the procedural order.

Fifthly, the process of mediation is allowed at any stage of proceedings, while under Art. 186 of the Commercial and Procedural Code of Ukraine the settlement of a dispute with the participation of a judge is conducted before the beginning of the consideration of the case on the merits.

Sixth, the terms of the mediation process are determined by the agreement of the parties, whereas under Art. 190 of the Commercial and Procedural Code of Ukraine the settlement of a dispute with the participation of a judge shall be conducted within a reasonable time, but no more than thirty days from the date of the decision to hold it. The term of the settlement of a dispute with the participation of a judge is not subject to extension.

Seventh, the parties with consent, as indicated in the agreement, choose the place of mediation. Instead, in the process of settling a dispute with the participation of a judge, territorial jurisdiction is defined by the Commercial and Procedural Code of Ukraine.

Eighth, the court fee and other mandatory payments to the budget of Ukraine, determined by the norms of the Commercial and Procedural Code of Ukraine, are not levied during the mediation. Therefore, in general, mediation may be cheaper than a court order dispute resolution.

Ninth, the norms of Art. 189 of the Commercial and Procedural Code of Ukraine establishes an exclusive list of reasons for terminating the settlement of a dispute with the participation of a judge. In particular, such a reason is 'the expiration of the term for settling the dispute with the participation of a judge'. That is, in the course of settling a dispute with the participation of a judge, the parties may not settle the dispute, because the term for this is over. At the same time, the principle of the flexibility of the mediation process guarantees the parties the achievement of understanding in the conflict.

In addition, the peculiarities of mediation may also include: the absence of the principle of adversarial parties and as a consequence of ensuring the psychological comfort of participants, the confidentiality of the mediation procedure, which is that it can not be divulged even in court, the presence of mutual benefit and interest of the parties, both in decision-making and in its execution, etc. We also note that the mediator does not make any decision personally, but only through negotiation and explanation of the benefits of certain concessions to each party promotes the independent acceptance by the parties of a certain agreement, which is drawn up by a contract or a peace agreement, if the mediation takes place in parallel with the court. However, as noted above, the judge may suggest ways to resolve the dispute.

## Conclusions and Further Research

In Ukraine, the legal rules that promote the reduction of tension in society raise the issue of peaceful settlement of the dispute to a higher level, are adopted, and thus they create conditions for the settlement of these relations on the basis of the rule of law principle, etc. Institute for settling disputes with the participation of a judge in the editions of the Commercial and Procedural Code of Ukraine, the Civil Procedural Code of Ukraine and the Code of Administrative Proceedings of Ukraine are new to modern Ukrainian law and require further scientific research, and the norms of the Ukrainian codes are to be finalized. The adoption of the law on mediation, which has previously been considered by the Verkhovna Rada of Ukraine, is required. A systemic analysis of the rules of the dispute resolution institute with the participation of a judge and mediation institute has shown that these institutions have common and distinctive features and are different in terms of content and order of institutions.

The dispute resolution institute with the participation of a judge has both advantages and disadvantages that follow from the content of the relevant norms of the codes of Ukraine. In particular, the benefits include:

settlement of the dispute before the start of the case on the merits; conducting court hearings under confidentiality conditions; prohibition of judicial appeal; saving of time and money, in particular, the state will return part of the court fee, etc.. The disadvantages are: the presence of corruption risks during closed meetings, a short time to resolve a dispute involving a judge (30 days) and the impossibility of extending it, indistinct meaning of some code norms, etc..

The legally regulated mediation process in Ukraine will facilitate the prompt and effective resolution of civil, economic, family, labor, and administrative disputes without raising funds from the state or local budgets, will reduce the amount of court cases in court for a judge, will increase the level of public confidence in the court, and the agreements reached in the process of mediation will be respected.

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