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SETTLING LAND DISPUTES TROUGH MEDIATION: IN SEARCH OF LEGISLATIVE CONSENSUS

Current global social and economic climates there is much focus on forming the appropriate legal framework for pre-trial settlement of any dispute. Among such disputes is a special category – land use disputes. The present article is fully devoted to this type of mediation, as it allows the disputed parties to get social and economic benefits from the conflict arisen within the land use. The author draws her attention to three crucial aspects of land use mediation. The first one relates to the conceptual underpinnings of the investigated phenomenon. This gives the opportunity to reveal the second aspect of the land use mediation – its international "crystallization". And the final third aspect is the necessity to stipulate the land use mediation in Ukrainian legislation. As a conclusion, it is argued the mediation mechanism should be definitely consolidated in the domestic legal system.
Keywords: land dispute, land conflict, land use mediation, Ukrainian legal system.

Introductory remarks

In due course of time, M. P. Thomson has proven an axiomatically-oriented assertion: "Land is an important commodity in society. It also differs from other form of property in that it is both permanent and indestructible. Because of these two features, it is quite possible for more than one person to have a relationship with the land; …"[1]. In the context of European integration, the issue of access to justice becomes more significant. Basically, aforesaid arises in two crucial aspects. First, it is questionable whether the national legal systems may be to constitute a flexible forms of access to justice, which without a doubt is one of the indispensable aspects of the rule of law. On the other hand, it revolves around the economic structures inside the particular state, since for the last couple of years' traditional forms of legal dispute resolution may be complex and burden significantly the social lives of the citizens.

Thus, in the pluralistic scenery of legal orders, national practices of elaboration of alternative methods of dispute resolution becomes more important and progressive for the guaranteeing natural human rights. Within this context, mediation as one of the most legally convenient method of alternative dispute resolution should be investigated. And in the context of land use, it becomes more pertinent because land by its very nature is a valuable social resource.

The present paper *examines how land use mediation may be understood* in the due course of legal globalization and convergence of legal systems. Accordingly, its central argument is that land use mediation shall be stipulated in Ukrainian legislation in order to facilitate the access to justice as the common social value in Europe.

I. Land dispute resolution via mediation: methodological baseline

In brief, the first lesson to be learnt about mediation is that it is "about disputing parties appointing a skilled third party – the mediator – to assist them in finding a mutually acceptable solution to their differences"[2]. Such like definition is to some extent classical and elaborated by the majority of legal thinkers specializing in mediation. Generally speaking, mediation is the kind of dispute resolution, which does not involve judicial procedures in their traditional sense. Some practitioners go further and expand the term "mediation" in the following manner: it is a several-staged process, where the manager (mediator) "transmits" other people's negotiations in way that satisfies the needs of all parties. Conceptualizing the mediation as the "exercise in problem solving", this model sees the mediator as the person who controls the process of negotiation, and the mediation parties – as the persons who shape the content of such negotiation[3]. Indeed, special literature suggests a myriads of approach to the understanding the true essence of mediation. Nevertheless, taking into account the central task of the present paper, we shall not deeply focus on all approaches to this phenomenon.

[1] Thompson, M. P. (2012). *Modern Land Law*. Oxford: OUP Oxford, 1.
[2] Noone, M. (1996). *Mediation*. London: Cavendish Pub., 3.
[3] Haynes, J., Haynes, G., Fong, L. (2012). *Mediation: Positive Conflict Management*. New York: SUNY Press, 3.

Instead, it is more practical if we outline major **conceptual models** of mediation as one of the types of alternative dispute resolution. The first *settlement* model sees the mediation as the tracing process of compromise. The latter serves as the common denominator in party's demands. In contrast, the second model of mediation – *facilitative* – presupposes it as the way of conflict resolution where the successful result is when at least one of the parties of dispute is satisfied with the results of negotiation process. The third – *transformative* model of mediation – means that in the negotiation process mediator tries to identify not short-term problems, but rather intends to achieve long-term changes in social lives for each party of negotiation process. Originally suggested by Robert A. Baruch Bush and Joseph P. Folger, transformative model of mediation is premised on the skill-based empowerment and mutual recognition in the process of conflict resolution. This model of mediation primarily performs such function as reconciliation. And, finally, the last fourth model of mediation is evaluative, which means that mediation reveals it-self predominantly as the process as the providing information, piece of advice and professional expertise of the existing conflict strictly in line with the commercial interests[1]. As can be seen from the above suggested diversification, the understanding of mediation and its role in conflict resolution can vary across socio-economic environments in municipal legal systems. In our investigation, we will elaborate the first variation of mediation – the model of settlement. Whatever its specific characteristics, mediation must in essence be seen as the socio-legal mechanism for resolving legal conflicts which via the complex of social and legal means aimed at settlement and resolution of a dispute that has arisen, that is, restoring a violated right by making a mutually acceptable decision.

Suggested methodological reflections allow us to move forward to the special type of mediation – mediation in land disputes. Admittedly, land and legal relations are complex and multilayered in their nature. Even so, many legal systems (including international) have recognized the need to simplify the procedures of addressing the land conflicts, not involving judicial machinery. Therefore, along with such types of mediation as business or family mediation, mediation in the field of a land law (notionally named by us as "land mediation") is likely to become an increasingly popular and effective means of resolving legal conflicts. However, despite the variety of approaches used to define general meaning of mediation, comprehensive understanding of land mediation is still "hanging in the air".

Despite this fact, some legal thinkers nevertheless contributed significantly to theory-building in the investigated field of expertise. For instance, E. Sullivan and A. Solomou suggest, the nature of mediation in this area is primarily attributable to the specifics of planning law, the norms of which by their selves determine a particular type of legal conflict[2]. In this approach, the authors identify land mediation with legal conflicts may possible arise within violation of legal norms, prescribed in zoning laws, subdivision regulation, rent and sign controls, growth management and other legal acts devoted to the protection of human health and ecological integrity. Suggested position shows the trend toward greater recognition of the extensive scope of land mediation. While accepting in the part authors' thoughts, it should be emphasized that land mediation has to some extend a broad scope of conflict resolution, but it cannot substitute legal mechanisms employed in case of disputes with governmental agencies. With regard to this observation, E. Netter – a land use attorney and professional mediator – has rightly stated that mediation in land law sphere "should be considered for those land use disputes that allow discretion on the part of decision-makers"[3].

In addition, Susskind *et al.* analyzing pros and cons of mediating Land Use disputes, underline that land use mediation is the effective method of land conflict resolution as its major challenge is to ensure that the allocation of land uses takes place in a way that is viewed as fair by all stakeholders and that all possible joint gains are incorporated into a technically feasible agreement that can be implemented easily[4].

As can be seen from the above conducted analysis, there is broad consensus on what land use mediation means. Through the general literature review, it can be deduced that land use mediation,

[1] Spencer, D., Brogan, M. (2006). *Mediation Law and Practice*. Cambridge: Cambridge University Press,100-102.
[2] Sullivan, E., Solomou, A. (2011). Alternative Dispute Resolution in Land Law Disputes – Two Continents and Two Approaches. *The Urban Lawyer*, *43, 04*, 1035-1059.
[3] Netter, E. M., (1992). Land Use Mediation: A new Way to Resolve Conflicts. Planning Commissioners Journal, 6-9. *PlannersWeb: News&Information for Citizen Planners*. <http://plannersweb.com/wp-content/uploads/2012/08/529.pdf> (2019, August, 15).
[4] Susskind, L., van der Wansem, M., Ciccarelli, A. (2000). *Mediating Land Use Disputes: Pros and Cons* (Policy Focus Reports). Lincoln Institute of Land Policy, 6.

in contrast to other types of conflict resolution, has its **own defining features**. They are as follows: 1) intermediated by the category of "public good", as the "land" by its very nature is the resource of national significance; 2) the crucial and central subject matter is the land conflict; 3) is a voluntary-consensual form of assisted informal negotiation based on the local land circumstances; 4) is based on the consensual relationships oriented on the achieving a balance of land interest between disputed parties; 5) highly-structured problem-solving process, which focuses on the substantive economic and social concerns underlying the land conflict; 6) accompanied by the specific pre-mediation and assessment stage, involving a number of awareness creation activities of mediation and the mapping of land areas serving as the subject of a particular land conflict; 7) in its result presupposes fair compensation for the parties, whose interests were upset.

Against this backdrop, ***land use mediation*** can be defined as the *flexible form of conflict resolution, which reveals itself as the voluntary, consensual and private process of intervention by a third neutral party (mediator) aimed at the transformation of arisen land use conflict into mutually acceptable settlement that will contribute to the economic and social needs of all disputed parties.*

II. The need for the establishment legal contours in land use mediation

As was mentioned in previous section, land use mediation is a relatively new type of mediation. Despite this fact, legal basis, regulating the process of legal disputes resolution via mediation, is already exists at the international level. In this part of the presented research we will focus on main supranational legislative acts that stipulate a legal instrument allowing domestic legal systems (like Ukraine) to "extract" these basic legal guidance in municipal mediation practices. On the one hand, the conducted below examination will have significant implications on the scope and nature of the national legal framework. On the other hand, it will provide a more suitable way to resolve land conflicts effectively, thus ensuring the principle of the rule of law (namely, access to justice as one of its central element).

Compared with national normative framework, the international regulatory basis is characterized by a much greater number of legal documents outlining the specifics of land use mediation. As a preliminary remark, we need to point out that at the level of international law issues concerning the land use mediation are considered from the perspective of general legal norms on mediation.

In order to reveal the complexity of **international regulation** of land use mediation, we make following chronological **systematization of law-creating instruments**:

1) *Recommendation Rec (2001) 9 of the Committee of Ministers to member states on alternative to litigation between administrative authorities and private parties*. Particular Recommendation places significant emphasize on the regulation of alternative methods of conflict resolution, which should include either their institutionalization, or their application individually by decision of interested parties[1].

2) *Recommendation Rec (2002) 10 issued by the Committee of Ministers of Council of Europe regarding the mediation in civil matters.* Facilitating the development of dispute resolution tools that provide an alternative means to judicial proceedings, this Recommendation declares that States should take into account the possibility of guaranteeing and providing full or partially free mediation for disputed parties, or provide free legal aid for the mediation procedure, namely when the interests of one of the parties require special protection[2];

3) *Green paper on alternative dispute resolution in civil and commercial law COM/2002/0196 adopted by European Commission*. It identifies mediation among the means of achieving social harmony and sets out minimum quality standards which allow to make conflict resolution procedure more flexible and effective[3].

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[1] Recommendation Rec (2001). 9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties. *Council of Europe* <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2b59> (2019, August, 15).

[2] Recommendation Rec (2002). *10 of the Committee of Ministers to member States on mediation in civil matters. Council of Europe* <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e1f76> (2019, August, 15).

[3] *Green Paper on alternative dispute resolution in civil and commercial law, 2002* (European Commission). *Access to European Union law* <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52002DC0196> (2019, August, 15).

4) *Directive 2008/52/EC of the European Parliament and the Council on certain aspects of mediation in civil and commercial matters* devoted to the facilitation of access to alternative dispute resolution, where the interests of the parties will be well-balanced[1].

The introduction of mediation can actively and positively influence the existing practice of resolving disputes in various areas of national law. Given the substantial nature of aforesaid international law instruments, it is possible to outline their practical significance for establishment legal contours in national contexts. Thus, *for municipal legal systems internationally constructed legal guidance on mediation can be useful for national practices on land use mediation for several reasons*. Firstly, they offer opportunities to the States in support the training of land use mediators and development of relative ethical codes. Secondly, they allow the parties to conclude an agreement in the mediation process, the status of which allows to give executive force to the taken decision. This can be achieved through a court ruling (approval) or a notarial certificate. Thirdly, they provide guarantees that land use mediation takes place in an atmosphere of confidentiality and that information obtained or provided by the parties in the mediation process cannot be used in legal proceedings against the party that provided this information, in case when mediation mechanisms are incapable for addressing the conflict. Fourthly, their legal norms during the period of limitations and prescription guarantee to the parties who redirected the dispute from the court to the mediation procedure that their right to sue in the same dispute will not be limited due to the choice of mediation as a way to resolve the dispute between them.

From the perspective of organization of public relations, land use mediation can be considered *as a set of means that should resolve social contradictions related with land resource management by voluntary achievements of a land compromise between the disputed parties*. In the framework of the foregoing analysis of international legal acts devoted to the regulation of mediation, in the next section of the article we will identify the essence of the domestic context in the development of internal legislative acts. The above will give a real opportunity to assess the current situation and prospects of introducing mediation procedures for resolving land disputes in the legal system of Ukraine.

III. Domestic legislative practice of settling land disputes through mediation: current "state-of-the-art" in normative regulation and its further perspectives

Since the launch of democratic reforms in 1996, Ukraine has experienced major changes in its legal system, as well social and economic structures. Nevertheless, the pace of legal changes continues to be dramatic. On the one hand – Ukraine legal regulation become more European and oriented at the adherence to the rule of law principle. From the other, domestic law-making as well as legal practice are still full of gaps and blinds pots. Legislation on land use mediation (along with the mediation at whole) has been no exception.

Despite the ratification of various international legal documents, still in Ukraine there is **no any stable and comprehensive framework for land use mediation**. Initially, back in 2013, the Draft Law No 2425a[2] and its alternative version 2425a-1[3] "On Mediation" was submitted and registered at Verkhovna Rada of Ukraine, but they were withdrawn in 2014.

Later, according to the Decree of the President of Ukraine No. 276/2015 from 20 May, 2015, the Strategy for 2015-2020 involving the overhaul of the judicial system, legal proceedings and related legal institutions was adopted. Aforesaid strategy has stipulated the pressuring need to expand the methods of alternative (out-of-court) dispute resolution (including through the practical implementation of the institution of mediation)[4]. In this regard, in 2015 in parliament there were several Draft Laws regarding the legal regulation on mediation procedures. Among them are: 1) key Draft Law No 3665[5] and

[1] *Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters* 2008 (European Parliament and the Council) *Access to European Union law* <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008L0052> (2019, August, 15).

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[4] *Указ про Стратегію реформування судоустрою, судочинства та суміжних правових інститутів на 2015-2020 роки, 2015* (Президент України). *Офіційний сайт Верховної Ради України*. <https://zakon.rada.gov.ua/laws/show/276/2015> (2019, August, 15).

[5] *Проект Закону про медіацію, 2015* (Верховна Рада України) *Офіційний сайт Верховної Ради України*. <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=57463> (2019, August, 15).

2) alternative Draft Law No 3665-1[1]. But at the present moment, both of them were rejected at the parliamentary hearings.

Nevertheless, on July 5, 2019 there was registered Draft Law No 10425 "On Activities in the mediation sphere". It is expected that this Law will determine normatively the legal framework and procedure for resolving a legal conflict (dispute) via the mediation mechanism, as well as its principles. legal status of mediator, mediators' disciplinary responsibility and self-administration, training necessary for effective and result-oriented mediation. As stipulated in Article 3 of the current Draft Law, mediation can be used in any legal conflicts (disputes), including civil, family, labor, commercial, administrative, as well as alternative form of dispute resolution in criminal proceedings (specifically, for misdemeanor, minor or medium-gravity offenses) in the form of private prosecution[2]. Despite the reference to "inexhaustive" list of legal disputes which can be resolved with the aid of mediation procedures, land use disputes are omitted in the text of the Draft Law.

A major step in the development of legal regulation of alternative dispute resolution procedures was made towards the introduction of amendments to Art. 124 of Constitution of Ukraine. In particular, part 3 of this article has stipulated following disposition: Law may determine compulsory pre-trial procedure for settlement of a dispute[3]. It is believed that the key motive for introducing such a change is to reduce the burden on the courts and provide an appropriate basis for the development of alternative dispute resolution methods. At the present moment, there are hard-hitting debates among scholars and legal experts about the "legal appropriateness" of establishing aforesaid provisions. In particular, it is alleged that the legislator leveled the importance of human rights, the implementation and enforcement of which in accordance with Art. 3 of the Constitution of Ukraine is the main duty of the state[4]. Nevertheless, these changes indicate a significant stride in the "legal recognition" of the effectiveness of the normative regulation of mediation in Ukraine.

As was mentioned in previous sections, resolution of land disputes is one of the ways to protect the rights and legitimate interests of land owners and land users. Domestic legal practice has shown that land disputes are resolved by local executive committees in accordance with their competence and (or) in court. Indeed, land disputes related to the right to own private property, inheritance of land, disputes between participants in joint ownership, persons having capital structures (buildings, structures) in common ownership, and disputes related to damages awarding are resolved directly in court. Thus, the Ukraine, participating in the resolution of land disputes via its authorized state bodies, performs a protective function in the state regulation of land relations. In this light, it is believed that new Draft Law on mediation should stipulate among the types of legal disputes also disputes arisen within the land use specifics. The advantages of using mediation in resolving land disputes over litigation are in its principles: voluntariness; equal rights of parties; impartiality of the mediator; confidentiality and search for the social and economic balance.

Apart from this, we are of the opinion that legal framework for the land use mediation should be built around the crucial importance of formalization of three following legal documents: 1. Agreement on the application of the mediation procedure (so-called "mediation clause"). 2. Agreement to undertake a mediation (defines the specifics of particular land use conflict). 3. Agreement that will formalize the final results of mediation (mediation agreement which includes the outputs of the consensual negotiation).

Concluding remarks

It is universally recognized fact: when we refer to the category of "land dispute", most of people frequently associate it with traditional form of dispute resolution – judicial settlement, or, in other words, court proceedings. Instead, settling land dispute via the alternative methods of dispute resolution is most likely interpreted as something strange and non-working. Without a doubt, approaching this phenomenon for the first time can seem a daunting prospect. Within this backdrop, the author outlined a few methodologically important aspects of mediation as the legal category. Moreover, in this investigation, we

[1] *Альтернативний проект Закону про медіацію, 2015* (Верховна Рада України). *Офіційний сайт Верховної Ради України*. <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=57620> (2019, August, 15).
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[4] Ibid.

have tried to identified the nature of the specific type of mediation – land use mediation, thus summarizing its defining features. Through this exploration, we aspire to define the land use mediation as the result-oriented and voluntary process, where neutral person intervenes in to the land conflicts arisen between two or more parties, thus directing this conflict towards the successful resolving via the guaranteeing win-win result for all disputed parties. Despite numerous international legal acts on general mediation issues, there is no any special normative framework for the conducting this type of alternative dispute resolution in land use domain. Consequently, it can be considered that land use mediation is in its early phase of establishing. However, in majority of countries land use mediation is regulated in the general normative acts devoted to the mechanisms of alternative dispute resolution. This renders it unimaginable to ignore the issues of national legal basis on mediation procedures. Providing a short analysis of current situation on mediation regulation, it is identified the needs to formalize legally and stipulated norms on land law mediation. Especially, the main challenge is to develop special set of documents which would formally consolidate the whole process of land use mediation. In the end, advancing the Ukrainian legal politics of mediation might not only require the involvement of practicing mediators, but also coherent nexus between needs of Ukrainian society and economic potential of the state.

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