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## UKRAINE OFFICIALLY INTRODUCES MEDIATION AS A MEANS OF DISPUTE RESOLUTION

On 10 December 2021, the President of Ukraine signed the Law "On Mediation" (the "**Mediation Law**"), which was already passed by the Parliament of Ukraine. The Mediation Law will come into effect immediately upon publication.

### BACKGROUND

The economic crisis of the last few years and the outcomes of the pandemic have forced businesses to reflect on their approach to resolving disputes outside the courtroom. In addition, Ukraine's judicial system has been facing staff shortages for quite some time, as courts are underfunded. This triggers delays in trial proceedings, court correspondence and document exchange. In this light, mediation could potentially be an effective solution for dispute settlement.

The Mediation Law sets out *the legal framework for mediation as an out-of-court procedure for dispute resolution, the principles of mediation, the status of mediators and their professional qualification requirements and applicable procedures.*

While mediation is a compulsory tool of an alternative dispute resolution in some jurisdictions abroad, in Ukraine it is still expected to be a voluntary option for resolving commercial, civil, labour, family, and administrative disputes, as well as for cases of administrative offenses and criminal proceedings to reconcile the victim with the suspect (accused).

### STATUS OF A MEDIATOR

In order to be accredited as a mediator, an individual should complete at least basic mediation education in Ukraine or abroad and should be trained in both the theory and practice of mediation. The information about mediators, their education, language proficiency and spheres of expertise will be public. The parties, engaged in mediation, authorities, companies and professional mediation associations may specify additional requirements related to special training, age, education and work experience for a mediator they would want to appoint.

The mediator's activity is based on **neutrality**, meaning that a mediator does not issue a binding decision. While remaining independent, the role of the mediator is to facilitate the process and guide the parties in their attempts to reach a business-oriented solution. The mediator must treat all the

information as **confidential**. Importantly, the mediator cannot be interrogated or examined as a witness regarding the case that he/she mediated.

## WHAT DISPUTES AND ISSUES CAN BE TACKLED THROUGH MEDIATION?

The newly introduced mediation regime will have a significant impact on commercial, labour and land related matters.

Issues or disputes that arise between employers and employees may be referred to mediation. In this regard, the employment agreement should not necessarily provide for mediation as a means of dispute resolution. Once and if resolved in mediation, the resolution shall be formalised in a mediation settlement agreement. For this purpose, in order for a mediation agreement to be enforceable, it must be in writing. Should any party then breach the mediation settlement agreement, the opposing party is entitled to refer the case to the labour dispute commission or court.

A very similar procedure as discussed above applies **to land disputes**, whereby the local authorities and courts, which are currently the ultimate bodies for settling land related disputes, should encourage the parties in a dispute to find a mutually satisfactory solution through mediation.

Mediation does not affect the limitation period for bringing a court or arbitration claim. Thus, it is an important consideration for a claimant who is entering the mediation process at the latest stages of the limitation period, if the deadline to bring a court claim is running out. Unlike in some foreign jurisdictions, where the mediation can actually 'stop the clock' and buy some time before the limitation period expires, in Ukraine it is important to remember that a long-term mediation process or a late decision to mediate can deprive the claimant of the right to enforce the claim in court.

Therefore, in order not to lose the right to protect one's interests in court, the aggrieved party should file a claim in court or otherwise interrupt the limitation period. There is also an option of executing a so-called 'standstill agreement', which can be a rather effective tool to suspend or extend the statutory or contractual limitation period and to gain some time for an amicable settlement of a dispute through mediation.

Mediation can be effectively combined with traditional litigation or arbitration as an aid to **commercial** dispute settlement. Through mediation, the parties may explore a better business-minded way for a settlement of their dispute. Moreover, in any commercial or other dispute, the parties can resort to mediation at any stage of trial proceedings as well as at the stage of enforcement of a court decision. If the parties decide to turn to mediation during trial proceedings, they may ask the court to grant a stay of the trial proceedings for the time of mediation proceedings (which shall not exceed 90 days). However, it is still unclear whether the court has discretion on granting a stay or whether it is highly dependent on the circumstances of the case.

To settle the dispute, the parties engaged in mediation may **go beyond the subject of the conflict** (dispute) specified in the mediation settlement agreement or claim (if the mediation is conducted during pre-trial investigation, court proceedings, arbitration or the enforcement of a court judgment). However, in doing so, the parties may not breach any rights of third parties who are not participating in the mediation process.

Similar to the commercial arbitration procedures, the parties may opt for mediation by entering into a respective mediation agreement (whether a separate agreement or simply a clause in a contract). Such an agreement or a clause must include the information regarding the mediator and the mediator's liability before the parties, the parties' rights and obligations, non-disclosure terms, etc.

Mediation can be particularly considered if the parties are willing to negotiate and enter into a settlement agreement, but do not wish to initiate a trial for this purpose. It must be emphasised that currently, a binding settlement agreement can be entered into by the parties only if they are the parties to trial proceedings. At the same time, the parties should not forget that in the case of a breach of the mediation settlement agreement, the parties will not be able to enforce the agreement itself but will need to initiate litigation or arbitration against the party in breach of the agreement. In some cases, enforcement through these means may be considered as an institutional weakness of the mediation regime.

As a new tool for dispute settlement in Ukraine, mediation will need to go through various types of practical testing, which will inevitably involve both private and state parties. However, mediation has a chance in Ukraine of proving itself as an efficient, cost-effective and confidential dispute resolution mechanism.

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