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ORCID ID 0000-0003-2627-8871

DOI <https://doi.org/10.32703/2663-6352/2021-2-10-33-43>*Добкіна Катерина Робертівна,**доктор юридичних наук, доцент**декан юридичного факультету**Інституту управління, технологій та права
Державного університету інфраструктури та**технологій**м. Київ, Україна*

ORCID ID 0000-0003-4753-837X

*Куліш Світлана Василівна,**студентка II курсу магістратури**Державного університету інфраструктури та
технологій**м. Київ, Україна*

CONTRACTUAL REGULATION OF MEDIATION IN UKRAINE: CURRENT STATE AND DEVELOPMENT PROSPECTS

Анотація. У статті розглядаються актуальні питання договірного регулювання посередництва в Україні, його сучасний стан та перспективи розвитку. Особлива увага приділена правовому регулюванню посередницьких договорів в Україні. Проводиться дослідження основних видів договорів посередницької групи та їх місця в системі цивільно-правових зобов'язань. Визначено основні шляхи вирішення проблеми з гармонізації правових норм, які регулюють інститут посередництва через уніфікацію права про комерційне посередництво на території держав-членів Європейського Союзу за допомогою чіткого визначення його місця в системі цивільно-правових зобов'язань та впорядкування термінології за єдиним зразком, в тому числі, конкретно розмежувати посередницьку і агентську діяльність.

Ключові слова: посередництво, представництво, договір комісії, договір доручення, консигнація, агентський договір.

Annotation. This article discusses current issues of contractual regulation of mediation in Ukraine, its current status and prospects for development. Particular attention is paid to the legal regulation of intermediary contracts in Ukraine. Investigation of the main types of contracts of the intermediary group and their place in the system of civil-law obligations is carried out. Identified the main ways of solving the problem of harmonization of legal norms, regulating the institute of mediation through unification of the law of commercial mediation on the territory of the European Union member states by means of clear identification of its place in the system of civil-

law obligations and arrangement of terminology in a unified manner, Including specifically distinguish between intermediary and agency activities.

Today Ukraine belongs to those countries that, due to certain circumstances, are not yet member countries of the European Union. However, this circumstance should further encourage harmonization and unification of Ukrainian legislation. This is also driven by the need to convey to members of the European community the real readiness of Ukraine to accept European legal standards, develop and promote EU values. A key element of Ukraine's successful integration into the European Union is reaching a certain level of harmonization of our country's legislation with the legal norms of the European Union.

Mediation agreements are very widespread contracts, because they are contracts under which one party acts on behalf of and in the interests of another person, which he represents. That is, they assist in acquiring and/or exercising the rights and obligations of other persons.

Intermediaries are contracts for the provision of services, which are aimed at changing public relations, and mediation is, as a rule, voluntary activities. The mediation relationship itself is a type of binding legal relationship that arises on the basis of such a legal fact as a contract. If it is a non-contractual authorization of a person to act in the interests of third parties - it is a representation.

Key words: *mediation, representation, commission agreement, power of attorney agreement, consignment, agency agreement.*

Ukraine celebrated its 30th anniversary of independence. During this time there have been a large number of changes that have affected, including market economic relations, characterized by the activation of all spheres of public life, especially production growth, increased turnover, expanding the range of existing services and new ones. Market relations have revived the institution of mediation, which, in turn, in its various forms contributes to the effective development of market infrastructure.

Within the framework of Ukraine's integration into the European Union, it is necessary to achieve a certain level of harmonization of our country's legislation with the legal norms of the European Union. Instead, as of today, there are differences and contradictions in the regulation of certain issues, in particular, mediation agreements at the national level, which, in turn, has a negative impact on the practice of its application.

Today, the service sector, as practice shows, is one of the most promising sectors of the economy, which is developing rapidly, and the vast majority of organizations to some extent provide services for a fairly wide range of activities. Relations between producers and consumers or with the participation of economic and legal intermediaries acting in the interests of producers and / or consumers "in order to create conditions for the emergence of new legal relations in the field of business" for the sale of goods and / or services may be legally mediated by contracts.

Intermediation agreements are quite common agreements, as they are agreements under which one party acts on behalf of and in the interests of another person he represents. That is, they help to acquire and / or exercise the rights and responsibilities of others. Article 21 of the Constitution of Ukraine stipulates that all people are free and equal in their dignity and rights. As a general rule, participants in civil relations personally acquire civil rights and obligations by concluding transactions. However,

often individuals and legal entities are forced to use the services of persons who perform various actions for them, which entail the emergence, change or termination of civil relations for such a person.

According to V.A. Vasiliev, the very institution of mediation arose simultaneously with the emergence of economic exchange in the era of free formation of elements of a market economy, when commodity production became general. In a developed society, such activity is one of the priorities, as a mechanism that promotes the establishment and development of economic relations [1, p.26].

The literature even substantiates the classification of different types of actual complicity, the main feature of which, according to N.O. Nersesov, is that the mediator only directs the will of the principal; that is, the actual accomplice conveys, expresses, or carries out only the will of others, not his own. The representative enters into an agreement independently, expressing his own will, which has legal consequences for the person he represents [2, p.30-31].

That is, mediation agreements are contracts for the provision of services aimed at changing public relations, and mediation is, as a rule, voluntary activities. The mediation relationship itself is a type of binding legal relationship that arises on the basis of such a legal fact as a contract. If it is a non-contractual authorization of a person to act in the interests of third parties - it is a representation.

All named mediation agreements refer to a mediator - a representative, commission agent, consignor, agent, manager, who acts in civil circulation on behalf of the founder of mediation or on his own behalf, but in his interests. Criteria for entry into circulation on behalf of the authorizing officer or on his own behalf is the basis for the division of mediation into direct and indirect [3, p.808].

The parties to intermediary transactions are always capable persons. Services provided by attorneys, commissioners, consignors, managers, agents, will be legal only because they show their own will, which in its purpose is aimed at creating a legal result in another, third party. The peculiarity of the mediation relationship is the presence in its basis of authority, which is decisive for its content. Mediation is an opportunity to realize legal personality through the actions of others. As a result of mediation, the scope of rights and responsibilities of another person changes. [3, p.809].

The criteria for distinguishing intermediary services are:

- 1) actions in the interests of others;
- 2) actions on the basis of and within the limits of the powers granted;
- 3) actions at someone else's expense.

The peculiarity of the mediation agreement is the duality of its subject. The subject of the mediation agreement are lawful actions that are recognized by law as legal facts committed in the interests of others and for the purpose of legal substitution, and which can be directed to the objects of the material world [3, p.809].

That is, the intermediary never owns the ownership of the material object of the intermediary obligation, because the intermediary always acts between the owner and the future owner. The mediator is given the right to dispose of the object at his own discretion or of his own free will only within the limits of the powers granted, or, in other words, these are the criteria for distinguishing between the authority-obligation and the authority of the owner.

When qualifying a legal relationship as one that mediates mediation services, the notion of “performing actions of a legal nature” should not be replaced by the provision of legal services. Any lawful action that has caused (even without prior focus) legal consequences, will be considered to be of a legal nature [3, p.810].

Elements of mediation are present in other contractual types, such as transport forwarding, financial services. This is evidence, on the one hand, of the mixture of contractual types, and on the other - the need to find civil forms of economic mediation, which is a much broader category than legal mediation. In the economic sense, intermediary are all the obligations that mediate the movement of goods from producer to direct consumer [3, p.810].

However, mediation agreements are quite common not only in civil but also in economic turnover, because quite often business entities are forced to seek help from others (professional intermediaries who can provide an intermediary service for a fee) because of the different reasons can't independently perform certain legal and / or factual actions - to negotiate with potential counterparties, enter into a business agreement, sell goods or rent the premises.

As I. Hrushchynsky rightly emphasizes, it is the contractual form that creates opportunities for the subjects of business relations to fully satisfy their interests. The contractual form is also decisive in choosing contractors. In today's conditions, as the author notes, the contract becomes the main form of regulation of property relations between participants in economic turnover, through which they mutually realize their potential and achieve a common goal [4, p. 36–38].

Some researchers distinguish in the system of economic agreements "agreements of the representative group". For example, V.N. Belov refers to such contracts of commission, commission, agency, dealer service, jumping, consignment, franchising, trust management, leasing, etc. [5, p. 3–32].

As a criterion for assigning contracts to a representative group, some authors single out the fact that one person has exercised the rights and / or fulfilled the obligations under the contract in the economic interests of another person. According to this approach: mediation agreements are part of a broader concept - "representative group agreements". Other authors believe that under an intermediary agreement concluded in writing, one party (intermediary) provides the other party (individual or legal entity - entrepreneur) with mediation services on its own behalf, but at the expense and in the interests of the other party. in the field of entrepreneurial activity for the remuneration stipulated by the parties. The mediation agreement is sometimes considered also: 1) as a kind of power of attorney agreement; 2) as a kind of agency agreement; 3) as a kind of commission agreement; 4) as an independent unnamed mediation agreement; 5) as a mixed contract containing elements of several named contracts, primarily such as a contract of agency, commission, agency agreement, etc .; 6) as an organizational agreement, on the basis of which contracts of agency, commissions, agency agreement, etc. are concluded [6, p.76].

Summarizing the views described in the legal literature, we can identify two main approaches to determining the legal nature of the relationship arising from the mediation agreement. In the first approach, the mediation agreement is considered as an independent agreement, which cannot be reduced to a contract of agency, commission, agency agreement or any other agreement [7, p. 55–61]. In favor of this approach is the

thesis of G.N. Budnev that the parties may enter into contracts both provided and not provided by laws and / or other regulations [8, p. 8].

The second approach is characterized by the interpretation of the mediator's activity as the activity of the attorney, which is characterized by specific features [9, p. 207]. Hence, the mediation agreement is interpreted as a kind of power of attorney agreement, ie one that belongs to the so-called "representative group". Instead, such an author as S.V. Melnyk refers to mediation agreements: power of attorney agreement, commission agreement, agency agreement, commercial concession agreement, professional (commercial) representation agreement. The author remarks that the list of these mediation agreements is not closed. Contracts of agency, commercial representation, commission, agency and other types of them form a group of agreements related to actions in the interests of others on the order (order) of the person concerned. Common in determining the characteristics of this group of contracts is the endowment of the mediator (attorney, commercial representative, commission agent or agent) powers under which he is obliged to act in the interests and at the expense of the person who gave him such powers [2, p. 113].

In each case, the mediation relationship is expressed in the contract for the provision of mediation services. In general, all brokerage contracts are service contracts. This position is generally accepted and seems quite justified, objectively determined. However, there are opposing views, although not convincing.

Dzera O.V., noted that among the contracts that formalize the mediation obligations include contracts of agency, commissions, consignments, agency agreements and trust management agreement [3, p.808].

If we talk about the sources of Ukrainian law governing these relations, then, first of all, it is necessary to mention the general rules contained in civil law, in particular, the provisions on obligations, responsibilities, general rules for the provision of services and special rules, including rules on power of attorney, commercial representation, commission.

Section III of the Civil Code of Ukraine defines the provisions for certain types of obligations, which include contractual obligations. The norms of the Civil Code of Ukraine define the concept of power of attorney agreements, commissions, which, despite the common features, because the executor (trustee, commissioner) acts in the interests and at the expense of the principal under the power of attorney and the commission agreement. the service provider is not so much the process of mediation, as the result of this activity, which ends with a transaction with a third party.

Also, Article 243 of the Civil Code of Ukraine provides for such a subtype of contractual representation as commercial representation, which is used in the field of entrepreneurial activity. Paragraph 1 of this article states that "A commercial representative is a person who constantly and independently acts as a representative on behalf of entrepreneurs in concluding contracts in the field of entrepreneurial activity." The basis for the representation is a written agreement between the representative and the person he represents.

Another type of agreement that is widely used by business entities, but not legalized in the current Civil Code of Ukraine, is the consignment agreement. The term "consignment" comes from the Latin word "consignatio" - written proof, document. In

the dictionaries of Soviet times, consignment was defined as a form of commission sale of goods from the consignor in capitalist countries [3, p.831].

Currently, the definition of the consignment agreement is contained in paragraph 2 of the resolution of the Cabinet of Ministers of Ukraine "On approval of the Procedure for issuing an opinion on extending the deadlines for certain transactions on export and import of goods established by the National Bank" of February 13, 2019 № 104 consignment is a transaction for the sale of goods, according to which one party (consignor) undertakes on behalf of the other party (consignor) to sell within a certain period of the consignment agreement for a specified fee from the consignment warehouse on its own behalf goods belonging to the consignor.

However, despite the variety of mediation agreements contained in the current Civil Code of Ukraine, they do not cover the regulation of all the variety of relationships that arise in the process of entrepreneurs. The parties seek to create a model of intermediary relations that would allow to remove as much as possible the restrictions and requirements for obligations under the contracts of commission and power of attorney, and the need for service that involves stable long-term relationships between contractors is in increasing demand. Therefore, there is another type of mediation agreement - agency.

The Civil Code of Ukraine did not legalize such an independently existing construction as an agency agreement. Legal regulation of the conclusion, execution, amendment and termination of the agency agreement is carried out in accordance with the provisions of ch. 31 of the Commercial Code of Ukraine "Commercial intermediation (agency activities) in the field of management." In addition, the possibility of providing agency services is stated in Art. 4 of the Law of Ukraine "On Foreign Economic Activity", Art. 14.1.36 of the Tax Code of Ukraine, Art. 116-119 of the Code of Merchant Shipping of Ukraine and other acts.

It should be noted that until 1992, commercial mediation was considered a crime (Article 151 of the Criminal Code of Ukraine "Commercial Mediation" as amended in 1960 provided a rather severe punishment, was excluded on the basis of the Law "On Amendments to the Criminal Code of Ukraine, Criminal Procedure Code of the Ukrainian SSR and the Code of the Ukrainian SSR on Administrative Offenses" of 07.07.1992). The change in the economic and political situation led to the transfer of this type of activity to the plane of entrepreneurship, and as an economic and legal institution, appeared only with the adoption of the Civil Code of Ukraine.

Freedom of contract gives the opportunity to create new models of contracts that are not provided by law. And considering one of such agreements as the agency agreement, it should be noted that it has become widely used in recent years, but has not acquired sufficient legislative regulation. Despite the fact that it is mentioned in many legal acts of Ukraine, which have already been mentioned above, the Civil Code of Ukraine has not enshrined the definition of "agency agreement". Although this would allow to legalize the relations that have developed in commercial turnover, not to narrow them to the existing legal structures of the power of attorney and the commission and to enshrine the legal nature of this institution in a single legal act.

In the theory of civil law there is a practice to call the agency agreement the term "agreement", "agreement" or "contract" and not to give special names to its parties. In many cases, the legislator uses the term "agency agreement" - for example, the Laws

of Ukraine "On the use of registrars of settlement transactions in trade, catering and services", "On transit of goods". Sometimes the term "agency agreement" or "agency agreement" is used. It can also be noted that for certain special types of agents and transactions concluded with them, special terms are used (for example, "consignment agreement", "consignor and consignor", "principal", "attorney") [10, p.14].

Accordingly, it is necessary to streamline the terminology in the legislation of Ukraine according to a single model, in particular to use the phrase "agency agreement" in order to avoid ambiguous interpretation. The terms "mediation" and "agency activity" should not be equated, as agency is only one of the forms of civil mediation, the ultimate goal of which is to establish contractual obligations between the principal and a third party [11, p.45]. It is also quite reasonable to consider the position that the terminology proposed by the Civil Code of Ukraine in determining the parties to the agency agreement does not correspond to the idea of harmonizing Ukrainian legislation with European and should take into account the general terminology of the Civil Code of Ukraine on representation. It is necessary to clearly define at the level of legislation the ratio of intermediary and agency activities, representation, commercial representation. In this case, "mediation" is proposed to be considered in a broad sense - it covers representation, which, in turn, includes its type as commercial representation, as well as mediation in the narrow sense (assistance in committing transactions) [12, p. 105]. The basis for the emergence of commercial mediation relations may be an agency agreement, the construction of which should be expanded by introducing the ability to perform legal and factual actions (provide services) on its own behalf, but at the expense of the principal, and to promote only transactions (13, p. 39].

The lack of a clearly defined place of the agency agreement in the system of civil law obligations leads either to the identification of the agency agreement with the power of attorney or to commercial representation, which, given the need to give such a relationship the form of an agreement, is the same. In practice, an agency agreement is often identified with a power of attorney agreement and provisions similar to those governing the power of attorney agreement are applied to it. Therefore, it is also important to address the relationship between the agency agreement and related agreements (eg, power of attorney and commission agreement). The similarity of these agreements is that they belong to the representative agreements and provide for the activities of one party at the expense of another. Only the nature of representation in the relationship between the agent and third parties (direct or indirect) changes. The first feature that distinguishes an agency agreement from a power of attorney and a commission is the model by which the agent's relationship with third parties is built (agency agreement is aimed at assisting one person in exercising subjective rights and obligations and exercising these rights in relations with third parties persons). The second difference is the subject of the agency agreement (legal and / or factual actions), so it can be applied in a broader area of relations than the commission and instructions, and have an organizational nature. The third feature that distinguishes the agency agreement is the nature of the agent's actions. The relationship under the agency agreement is ongoing, ie the agent undertakes to perform, not perform for the principal various actions [14, p. 236].

If we take the example of the developed countries of the European Union, then there about half of the foreign trade turnover of goods and services is carried out with

the involvement of intermediaries. This, in particular, explains the adoption within the EU of a number of regulations aimed at establishing uniform legal regulation and designed to promote the development of economic ties between EU countries. Thus, the Convention on the Law Applicable to Contractual Obligations, adopted within the framework of the EU in Rome on June 19, 1980, is devoted to resolving conflicting issues in contractual relations. The Convention regulates the issue of conflicts in the choice of due law in the conclusion, amendment or performance of contracts and applies, inter alia, to mediation.

According to Article 1, the Convention applies to contractual obligations in any situation involving a choice between the laws of different States.

The 1980 Rome Convention establishes rules for freedom of choice of law. The contract is governed by the law chosen by the parties. In this case, the agreement on such a choice must be clearly expressed or directly follow from the terms of the contract or the circumstances of a particular case (Article 3).

According to Art. 2 of the Convention, the law agreed upon under this Convention shall apply even if it is not the law of a State Party. That is, the parties to a foreign economic agreement from two countries party to the Convention may choose the law of any third state as the appropriate law. The parties may at any time agree to subordinate the contract to any law other than the law previously governed by it, even if it was a more appropriate choice under Art. 3 or other provisions of the Convention.

Another document aimed at unifying the right to commercial intermediation in the territory of the EU Member States is, first of all, the EU Directive of 18 December 1986 № 86/653 "On the coordination of the laws of the Member States relating to independent sales agents" (hereinafter - the Directive), on the basis of which the corresponding uniform regulation of trade representation in the legislation of all EU member states was established. The directive is aimed at regulating the basic principles in the relationship between the principal and the agent [8, p.40].

An exceptionally important example of the unofficial codification of the rules of international trade is the Principles of European Contract Law (hereinafter referred to as the Principles) prepared by the European Parliament's European Contract Law Commission and published in May 1995. The principles are a guideline and are intended to apply as general rules of contract law in the European Communities and apply if the parties have incorporated them into their contract or their contract should be governed by them [9, p.119].

The Directive defines the concept of a commercial agent - an independent intermediary who has permanent authority to agree on the terms of sale of goods for the benefit of another person (principal), as well as to negotiate and conduct relevant transactions on behalf and at the expense of the principal .1).

Thus, the Directive treats a commercial mediation contract as a contract of agency, ie it is based on direct representation accepted in continental European countries, in contrast to the 1978 Hague Convention on the Law Applicable to Contracts of Representation (Part 1, Paragraph 3, Article 1)., and the 1983 Geneva Convention on the Representation in International Sale of Goods (Article 4, paragraph 4), which adopted the existing theory of single representation in common law countries.

The Directive aims to regulate the basic principles of the principal-agent relationship and applies only to independent agents in the absence of subordination, i.e.

it does not apply to employees of the company whose activities are based on employment contracts and are mostly governed by labor law. The Directive establishes the notion of an independent commercial agent as an independent intermediary empowered to discuss the terms of purchase and sale of goods on behalf of another person (principal) or to discuss and conclude such agreements on behalf of and in the interests of the principal and agency agreement, and actual actions, the ultimate goal of which is to establish a contractual relationship between the principal and a third party.

The Hague Conference on Private International Law plays a significant role in the unification of conflict-of-law rules. This permanent intergovernmental organization, which was established in 1897, deals with conflicts of law, conflict of jurisdiction and legal aid.

Geneva Convention on Representation in International Sales of Goods, signed on 17 February 1983 in Geneva as an addendum to the Vienna Convention on Contracts for the International Sale of Goods: Applies if the principal and a third party belong to different states and the agent is authorized by the principal for concluding contracts of sale of goods;

The Hague Convention on the Law of March 14, 1978: establishes - as a general rule - the principle: the priority of the law agreed by the parties applicable in international agency relations, and in the absence of such agreement - the rules for determining national applicable law: 1) agency agreement commercial intermediation) is subject to the law of the agent's state (ie the law of the state in whose territory the agent's commercial enterprise is located); b) in case of absence of the agent of the commercial enterprise - the law of the permanent location of the agent is applied; c) if the agent and the principal have several enterprises located in different states, the law of the state on the territory of which the enterprise with which the agency relations are most closely connected shall apply to commercial mediation relations on the basis of an agency agreement; d) additional binding: the relations under the agency agreement are regulated by the law of the country in which the agent carries out the main activity, provided that in this state the principal has a permanent residence or the enterprise.

Acts of the ICC: Model Commercial Agency Contract (ICC Publication, November 1991), ICC Guidelines for Commercial Agency Contracts (ICC Publication 1983), Commentary on the International Chamber of Commerce's Model Commercial Agency Contract (Publication № 512).

Unification of legal regulation of commercial intermediation in the EU is carried out at the non-state level by preparing standard terms of contracts by various European (domestic and international) associations of commercial intermediaries, examples of which are the Central Association of German Economic Unions for Trade Intermediation, Nordic Trade Federation agents and others [43, p. 120].

As for the importance of unification of law, it is to facilitate international legal cooperation. Unified law reduces specific "legal risks" and creates the preconditions for a higher degree of stability of the legal space. The experience of EU countries in the legal regulation of certain spheres of public life, in particular civil law treaties, can be used to improve Ukrainian legislation in this area and unification will ensure a certain level of harmonization of EU and Ukrainian legislation.

In summary, it should be noted that mediation is a contract for the provision of services aimed at changing public relations, and mediation is, as a rule, voluntary

activities. The mediation relationship itself is a type of binding legal relationship that arises on the basis of such a legal fact as a contract. If it is a non-contractual authorization of a person to act in the interests of third parties - it is a representation.

We will note that despite attempts of regulation of activity of intermediaries in a certain sphere of economic life by various branch regulations, it didn't solve a question of legal regulation of mediation.

With regard to the legal regulation of the agency agreement, it is necessary to clearly define its place in the system of civil law obligations and its relationship with other agreements, as well as to organize the terminology according to a single model, including specifically distinguishing between mediation and agency activities.

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