MEDIATION IN THE WORLD AND IN UKRAINE: HISTORY, DEVELOPMENT, AND CURRENT PERSPECTIVES

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Abstract. Although mediation is considered one of the most popular ways of consensual dispute resolution, for many years, mediation in Ukraine had no legislative regulation. This was one of the obstacles that restrained the development of alternative dispute resolution in Ukraine, even though the mediation community had been growing. Eventually, the Law of Ukraine "On Mediation" was adopted on November 16, 2021. This article presents diverse approaches towards adopting and perceiving mediation in the world, particularly in the EU, USA, and Ukraine. The formation and legislative integration of mediation, including the comparison of primary sources, legal documents, and scientific approaches, is analyzed. This article is devoted to the distinctive features of the new Ukrainian legislative mediation regulation that are decisive for the national mediation model.

Keywords: mediation, Ukraine, development of mediation, perspective of mediation.

Introduction

The rule of law underpins the protection of the rights of its citizens against unlawful violations. Protection of rights should cover not only litigation but also alternative dispute resolution. Mediation is an effective alternative way to find a solution to a dispute. The validation of mediation and its widespread application have a long history of development, until the essential principles of the mediation process were formed and established. The mediation method is recommended to speed up and facilitate the resolution of a dispute, as this allows for non-recourse to the courts. State-administered litigation is complex and time-consuming, and the use of mediation reduces the number of court cases.

The Law on Mediation in Ukraine was only adopted in the autumn of 2021. The law provides that mediation is a confidential form of dispute resolution outside the courtroom. It takes place before a neutral third party, the mediator, who helps the parties to settle their dispute amicably, speedily, and without lengthy and sometimes expensive court proceedings.[1] However, the factors that would encourage citizens to use this procedure need to be assessed.

The scientific novelty of this research contributes to the legal progress of the adoption of mediation in the world, and in particular in Ukraine. This article analyzes how people can benefit from mediation and what remedies should be used in order to encourage people towards the use of this alternative dispute resolution method.

This researched problem has been addressed by both Ukrainian and international scholars. The history of conciliation and meditation procedures was examined by L.O. Makhova and A. O. Vyprytsky,[2] D. L.

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1 "Law of Ukraine of November 16, 2021 No. 1875-IX. On Mediation", CIS legislation, https://cis-legislation.com/document.fwx?rgn=136707

2 Larisa O. Makhova and A. O. Vyprytsky, "History of International Development and the Current State of the Institute of Mediation in Ukraine", Pravo i suspilstvo 5, 2 (2018): 245, http://pravoisuspilstvo. org.ua/archive/2018/5_2018/part_2/42.pdf.

Davydenko,[3] Coleman Phillipson,[4] and Jay Folberg[5]. The implementation of mediation in the legal system was examined by N. V. Shyshka,[6] M. M. Lazarenko,[7] V. Komarov and T. Tsuvina,[8] N. Alexander,[9] and C. H. Van Rhee.[10] The application of mediation in Ukraine has been examined by L. O. Andrievskaya and M. V. Zelenina,[11] A. V. Gaiduk,[12] V. Komarov and T. Tsuvina,[13] and I. Izarova.[14] Finally, Tetiana Tsuvina and Tetiana Vakhonieva examined the newly adopted Law on Mediation in Ukraine.

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3 Dmitry L. Davydenko, "From the history of conciliation procedures in Western Europe and the United States," *Bulletin of the Supreme Arbitration Court of the Russian Federation: the official monthly printed edition of the Supreme Arbitration Court of the Russian Federation* 1 (2004): 163–165; Dmitry L. Davydenko, "Conciliation and Arbitration in Ancient Greece", Tretejskij Sud 5 (2010): 166–167.).

4 Coleman Phillipson, *International Law and Custom of Ancient Greece and Rome* (Cambridge University Press, 2012

5 Jay Folberg, "A Mediation Overview: History and Dimensions of Practice", *Mediation Quarterly* 1 (1983): 4.

6 N. V. Shyshka, "The concept of "mediation" as an alternative form of dispute resolution: to the problem of legal understanding", *Legal Scientific Electronic Journal* 4 (2021): 297-30, http://lsej.org.ua/4_2021/74.pdf.

7 Maksim M. Lazarenko, "Implementation of mediation in the legal system: international experience and prospects of institutionalization in Ukraine", *Aktualni problemy mizhnarodnykh vidnosyn* 124, 2 (2015): 111

8 Vladimir Komarov and Tetiana Tsuvina, "International standard of access to justice and subject of civil procedural law", *Journal of the National Academy of Legal Sciences of Ukraine* 28, 3 (2021): 197–208.

9 Nadja Alexander, "The mediation metamodel: Understanding practice", *Conflict Resolution Quarterly* 26, 1 (2008): 97–123.

10 Remco Van Rhee, "Mandatory Mediation before Litigation in Civil and Commercial Matters: A European Perspective", *Access to Justice in Eastern Europe* 4, 12 (2021): 7–24.

11 L. O. Andrievskaya and M. V. Zelenina, "On the question of the relationship between the settlement of a dispute with the participation of a judge and mediation in accordance with the civil legislation of Ukraine", *Aktualni problemy vitchyznianoi yurysprudentsii* 3 (2019): 55, http://www.lsej.org.ua/3_2019/14.pdf.

12 A. V. Gaiduk, "Problems of legislative support of mediation in Ukraine", *Chasopys Akademiï advokatury Ukrainy* 3 (2013): 3.

13 Vladimir Komarov and Tetiana Tsuvina, "The Impact of the ECHR and the Case law of the ECtHR on Civil Procedure in Ukraine", *Access to Justice in Eastern Europe* 1, 9 (2021):79–101.

14 Iryna Izarova, "Sustainable Civil Justice Through Open Enforcement – The Ukrainian Experience Studying", *Academic Journal of Interdisciplinary Research* 9, 5 (2020): 206–216; Iryna Izarova, Vytautas Nekrošius, Vigita Vėbraitė and Yurii Prytyka, "Legal, Social and Cultural Prerequisites for the Development of ADR Forms in Lithuania and Ukraine", Teise (Law) 116 (2020): 8–23.

[15]Nevertheless, this problem is still relevant due to the uneven approaches towards the notion of mediation and its place among other methods of dispute resolution. The legal doctrine needs further scientific development in this sphere.

The purpose of this article is to research the history and recent developments of mediation in the world in order to present the necessity of its existence as an autonomous legal institution in Ukraine for resolving disputes. The object of this research is the development of mediation in the United States and the European Union, as well as current perspectives on mediation in Ukraine.

This research is significant for policy makers and legal practitioners in that it will promote the understanding of what problems and benefits are involved in the adoption of mediation. This article will also be useful for law students who are interested in alternative dispute resolution methods, as it presents the global history of mediation and current perspectives of mediation in Ukraine.

The methodology used includes a comparative analysis of the formation and legislative integration of mediation, involving the comparison of primary sources, legal documents, and scientific approaches. The etymological method provides for a more in-depth examination of the concept of mediation and its aspects. The historical method enables a thorough investigation of the processes that directly led to the emergence of mediation. This analysis is required in order to present a comprehensive evaluation of the object of the research.

Chapter 1 of this article covers the global history of mediation. The first section of this chapter reveals the ancient origins of mediation that can be traced in China, Rome, and Greece, and that could be regarded as evidence of mediation's relevance and its similarities with the current legal notion. The following section exposes the factors that led to the adoption and implementation of mediation in the USA. It also covers the present stage of mediation and highlights demand for it in society. The final section turns its attention towards EU experience in the integration of mediation, outlines the primary legal documents that influenced the popularization of this legal concept among the Member States, and presents innovative approaches to online mediation.

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[15] Tetiana Tsuvina and Tetiana Vakhonieva, "Law of Ukraine 'On Mediation': Main Achievements and Further Steps of Developing Mediation in Ukraine", *Access to Justice in Eastern Europe* (2022): 142–153

Chapter 2 reviews the current situation regarding mediation in Ukraine and considers perspectives on mediation.

1. The history of mediation

In this chapter of the research, we explore the history of mediation until its modern consolidation. Firstly, ancient experiences are presented in order to clarify how past societies applied mediation procedures. Then, the modern history of mediation is referred to, underlining legislative and social perspectives in the USA in regard to mediation. Finally, we analyze how mediation is incorporated and used in the EU.

1.1. The concept of mediation in ancient times

The origins of mediation procedures are extensive and can be traced back to ancient times. The concept of modern mediation was already formed in antiquity, and was characterized by features that still form the essential principles of out-of-court settlement of a dispute. Etymological research shows that the term "mediation" comes from: the Greek word medos – "neutral"; Latin mediatio – "mediation"; and mediare – "to be a mediator". The Greek word medos refers to the quality of the subject, and is a basic principle of the process. The Latin words display the entire process and the third party who acts a mediator in it.[16]

1.1.1. The Chinese tradition of amicable dispute resolution

Traces of mediation can be seen in ancient China, where, due to cultural and religious reasons, the amicable resolution of conflicts without the participation of government officials was a priority. Furthermore, influence was exerted by the philosophical teachings of Confucius, who focused on persuasion and consent as the best ways to resolve a dispute. Competition, in this case, would lead to the destruction of harmonious relations, the anger of the participants, and would contradict the essence of resolving a dispute.[17] The pillars of "correct" behavior were cooperation, tolerance, and openness. These teachings became the basis for the tradi-

[16] Shyshka, *supra note*, 6.
[17] Folberg, *supra note*, 5.

tion of resolving disputes within a family, clan, or village with an elder or other third party who acted as a mediator and led to a peaceful way of resolving disputes by searching for a compromise.[18] The legal systems of the ancient Chinese and Japanese communities and their cultural-religious contexts also played an important role in the development of mediation. The Eastern mediation period made a significant contribution to shaping the content, meaning, and place of private and judicial mediation in the legal system and in public life, although during this historical period the mediation process was inseparable from mediation and religious rites, and focused on personal, family, property, or work settlement of disputes arising out of these relationships.

1.1.2. Mediation as a remedy to maintain friendly relationships in Greece

In ancient Greece, since the 7th century BC, the legal concept of proxenia was the basis for further development in out-of-court dispute resolution.[19] In the 5th century BC, the procedure became widespread. It aimed to establish, negotiate, and maintain relationships between parties to a dispute by involving a mediator, also known as a proxenos. However, the primary purpose of the procedure was to end hostility and violence between people. The mediator considered parties' interests and social positions throughout the mediation procedure to obtain a mutually beneficial outcome. It is worth mentioning that only a highly respected, experienced, wise, and eloquent person could act as a mediator.[20]

1.1.3. The Talion principle as the precondition of mediation in Rome

A procedure similar to the Chinese dispute resolution method was developed in Rome that ensured the survival and maintenance of friendly relations in society. This procedure was necessary – in contrast to the Talion principle, which only gave rise to the emergence of conflict and violence. The role of the mediator was delegated to community meetings and elders who, due to their life experience and wisdom, were able to suggest

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18 James A. Wall and Michael Blum, "Community Mediation in the People's Republic of China", *The Journal of Conflict Resolution* 35, 1 (1991): 4

19 Phillipson, *supra note*, 4

20 Davydenko, "Conciliation and Arbitration in Ancient Greece", *supra note*, 3: 166–167.

and determine possible solutions to a situation. It is worth mentioning that this procedure was not entirely similar to mediation in its classical sense, since the mediator had the opportunity to impose their opinion on the parties, and the dispute could end peacefully, but not with the satisfaction of both parties. At the same time, this procedure was not similar to arbitration because parties could derogate from the given advice. The concept of a settlement agreement was secured for the first time in Roman law in the 5th century BC. Thus, the Laws of the Twelve Tables provided for the possibility of a settlement agreement before the commencement of legal proceedings. Later, the settlement agreement would be called transactio, the purpose of which was to terminate the contentious relationships that had arisen between the parties.[21]

In ancient civilizations, covering the periods of ancient Greece and Rome, the formation and spread of what we now call Western culture began, leading to political, economic, and social changes and changes in the structure and functions of the legal system. The main heritage of this period in the context of mediation is the emergence and diversity of new mediator roles, the practice of public and formal litigation, and the beginnings of international arbitration.

1.2. The experience of mediation in the USA

The modern concept of mediation was developed in the USA in the 1940s, when the Federal Mediation and Conciliation Service (hereinafter – FMCS) was created on the basis of The Labor Management Relations Act of 1947. The agency's creation was due to massive employee strikes, and mediation made it possible to ensure productivity for employers and avoid negative consequences for the state. The agency's primary mission was: "to prevent or minimize the impact of labor-management disputes on the free flow of commerce by providing mediation, conciliation, and voluntary arbitration."[22]

The crucial point for the further spread of mediation was the Roscoe Pound Conference that was held in 1976, the turning point of which was

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21 Davydenko, "From the history of conciliation procedures in Western Europe and the United States", *supra note,* 3: 163–165.

22 "A Timeline of Events in Modern American Labor Relations", Federal Mediation and Conciliation Service, accessed November 9, 2021, https://www.fmcs.gov/aboutus/our-history/.

to subdue the judicial model of dispute resolution by ideas of harmony and efficiency – alternative dispute resolution (hereinafter – ADR) methods. This conference was supposed to initiate cultural changes that would affect society's most critical problems and vital procedural issues of litigation. The event was what anthropologists have called "a key social drama."[23]Warren Burger, proceeding from his position of the Chief Justice, caught the majority's position by saying that standard ways of resolving conflicts in court tear society apart with their excessive protraction and scrupulousness. In contrast, alternative dispute resolution methods are more civilized. Professor F. Sander presented the idea of a court where a special officer would preview the claims submitted to the court and suggest a variety of options, including the method of dispute resolution that would most fully satisfy the needs of parties in a particular case. The speech of the Chief Justice and the presentation given by professor F. Sander formed the basis for the future political platform of the ADR movement in the United States and around the world.[24]

Rapid development characterizes the next 30 years of US mediation history, as mediation becomes more widely used in practice. An unlimited number of mediation organizations appear alongside numerous doctrinal works and legislative regulations.[25] In 2001, the National Conference of Commissioners on Uniform State Laws completed the Uniform Mediation Act, the principal document that harmonized the process of mediation in the USA. This document promoted the integrity of the mediation process by consolidating confidentiality as the primary principle, enabling disclosure of all the relevant information to a mediator in order to fully understand – and, at the same time, secure – the interests of parties. According to the aforementioned act, mediation is "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."[26]

In the modern world, mediation is frequently used in different catego-

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23 Laura Nader, "The ADR Explosion - The Implications of Rhetoric in Legal Reform", *Windsor Yearbook of Access to Justice* 8 (1988): 273–276.

24 Tatiana Kiselyova, "Legal regulation of relations on the provision of mediation services in foreign countries" *Pravo Ukrainy* 11-12 (2011): 228

25 Lazarenko, *supra note*, 7: 111.

26 "National Conference of Commissioners on Uniform State Laws. Uniform Mediation Act, 2001", https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=2d5cc2d9-2219-f0b7-808b-27b8b08a6471&forceDialog=0, § 2(1).

ries of cases across the USA – even those that have significant government policy implications, or when it is important to produce a full public record of the proceedings.[27] According to the Equal Employment Opportunity Commission report, approximately 70% of cases resolved through mediation in 2020 were significant.[28] Another statistics report was presented by FMCS, whose commissioners mediated 2,722 collective bargaining cases, 1,945 high-impact grievance cases, 1,500 ADR cases, and implemented over 1,675 training and intervention programs in 2020.[29] This illustrates the successful implementation and demand for mediation in the USA.

Important historical events, world wars, socio-economic phenomena, and rapid urbanization and technological development have led to the formation of human rights protection and civic mechanisms. The implementation of welfare state-building strategies has fully increased citizens' legal awareness, literacy, and activism in defending violated rights. Such changes have necessitated the development of judicial institutions and a legal framework to address these situations. Mediation as a phenomenon has, from its earliest beginnings, been perceived and developed as involving the education and awareness-raising of the parties to a dispute, seeking social and constructive ways of resolving a dispute and encouraging the parties to seek a peaceful solution to the dispute themselves.

1.3. The implementation of mediation in Europe and the European Union: background and realities

European countries followed the early success of the USA in mediation.

1.3.1. Council of Europe

European countries stimulated alternative dispute resolutions to rec-

27 EEO Mediation Guide", The Office of Civil Rights of America (OCR), accessed November 8, 2021, https://www.commerce.gov/cr/reports-and-resources/eeo-mediation-guide.

28 "EEOC Mediation Statistics FY 1999 through FY 2020", Equal Employment Opportunity Commission, accessed November 8, 2021, https://www.eeoc.gov/eeoc-mediation-statistics-fy-1999-through-fy-2020

29 "Fast facts about the agency", Federal Mediation and Conciliation Service, accessed November 8, 2021, https://www.fmcs.gov/wp-content/uploads/2021/02/FMCS-Fast-Facts-FY2020-update-Feb-2021.pdf.

tify the growing problem of access to justice, which is a fundamental right enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[30]

The process of adopting mediation started from the Recommendation on mediation in family matters in 1998. This document laid down a definition of mediation, according to which: *"mediation is a process in which a third party, the mediator, impartial and neutral, assists the parties themselves to negotiate over the issues in dispute and reach their own joint agreements."* The principles of neutrality, confidentiality, and impartiality were defined, significantly impacting the understanding of mediation within the society.[31] The growing number of family disputes, the protection of the child's best interests and welfare, and the high social and economic cost to states led to the necessity of mediation in family disputes. Following mediation in family matters, the Council of Europe adopted another Recommendation on mediation in penal matters in 1999[32] in order to prevent and handle crime, enhance the personal participation of victims and defendants in proceedings, and promote more effective outcomes in penal matters.[33]

The next important steps were the Recommendation on alternatives to litigation between administrative authorities and private parties in 2001,[34] the Recommendation on mediation in civil matters,[35] and The

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30 "European Convention for the Protection of Human Rights and Fundamental Freedoms of 4.11.1950", European Court of Human Rights, accessed November 9, 2021, https://www.echr.coe.int/documents/convention_eng.pdf.

31 "Recommendation № R (98) 1 of the Committee of Ministers to member states on family mediation of 21.01.1998", RM, accessed April 7, 2022, https://rm.coe.int/09000016804ecb6e.

32 "Recommendation No. R (99) 19 of the Council of Europe concerning mediation in penal matters of 15.09.1999", Legislation Online, accessed April 7, 2022, https://www.legislationline.org/documents/id/8112.

33 "Comments on Recommendation No. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters of 27.03.2017", RM, accessed April 7, 2022, https://rm.coe.int/1680706970.

34 "Recommendation of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties of 5.09.2021", RM, accessed April 7, 2022, https://rm.coe.int/16805e2b59.

35 "Recommendation of the Committee of Ministers to member states on mediation in civil matters of 18.09.2021", RM, accessed April 7, 2022, https://rm.coe.int/16805e1f76.

Green Paper in 2002.[36]

The European code of conduct for mediators[37] strengthened the progress of mediation in 2004. This document intended to raise the level of trust in mediation by introducing the principles used during the procedure, and was helpful for both citizens and professional mediators. The principles referred to payments and fees for services, the competence and appointment of mediators, independence, impartiality, confidentiality, and the mediation agreement.

The European Commission for the efficiency of justice's (CEPEJ) "Working Group on mediation (CEPEJ-GT-MED) has worked on developing mediation practices in Europe from 2006 to 2007 and from 2017 to 2019. During its first mandate, the GT-MED had conducted a study on the impact of the Committee of Ministers' Recommendations concerning family mediation, mediation in criminal matters, alternatives to litigation between administrative authorities and private parties and mediation in civil matters. The GT-MED has also drawn up guidelines in these areas as well as specific measures to ensure effective implementation of these recommendations in Council of Europe member states. Ten years later, from 2017 to 2019, the GT-MED was entrusted to facilitate the implementation of the Recommendations of the Committee of Ministers to Member States concerning mediation."[38] "The European Handbook for Mediation Lawmaking is an essential document for states wishing to develop a legal framework conducive to the development of mediation by drawing inspiration from best practices from other European countries."[39]

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36 "European Commission, *Green Paper on alternative dispute resolution in civil and commercial law*, COM (2002) 196 final", EUR-Lex, accessed April 7, 2022, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52002DC0196.

37 "European code of conduct for mediators", Euromed-justice, accessed April 7, 2022, https://www.euromed-justice.eu/en/system/files/20090128130552_adr_ec_code_conduct_en.pdf.

38 Council of Europe, „Mediation", *The European Commission for the efficiency of justice (CEPEJ)*, accessed April 7, 2022, https://www.coe.int/en/web/cepej/cepej-work/mediation.

39 European Commission for the Efficiency of Justice (CEPEJ), *European Handbook for Mediation Lawmaking* (2019), https://rm.coe.int/cepej-2019-9-en-handbook/1680951928

1.3.2. The European Union

The decisive stage of implementation of mediation in the EU was the Directive on mediation in civil and commercial matters[40] that is now transferred to domestic legislations across the EU – except in Denmark, which did not take part in the adoption of this Directive and was not bound by it. According to its articles, this directive intended to promote the amicable settlement of disputes by strengthening mediation, rectify the problem of access to justice, encourage the provision of information to the general public about existing mediators and organizations providing mediation services, and stimulate the conventional functioning of mediation services on the internal market. It was highlighted that mediation is not a lesser alternative to judicial proceedings, basing this argument on the obligation of the Member States to ensure that the parties to a written agreement resulting from mediation can have enforceable content to their agreement.[41]

The innovative procedure for online ADR was prescribed by the Regulation on online dispute resolution for consumer disputes in 2013. "Online ADR is a new process for settling disputes through virtual interaction. Over the past few years, there has also been a change in resolving disputes through ADR. The ADR process is transformed taking into account the requirement and necessity of the people. The advanced technology has allowed it to creep into alternative dispute resolution. The online Alternative Dispute Resolution has widened."[42] The Regulation requires Member States to make ADR more accessible to EU consumers and to guarantee that they can turn to quality-certified ADR institutions to settle conflicts

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40 "Directive 2008/52/EC of the European Council and of the Parliament of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters", EUR-Lex, 3, accessed April 7, 2022, http://eur- lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF.

41 European Parliament, "Resolution on the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (the 'Mediation Directive')", *European Parliament*, accessed April 7, 2022, https://www.europarl.europa.eu/doceo/document/TA-8-2017-0321_EN.html?redirect.

42 "Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR)", Official Journal of European Union L165/63.

with EU traders over the purchase of a product or service. Consumers can use the platform to submit their contractual dispute and begin the ADR procedure online. The platform developed from the EU project to provide a fast and inexpensive way of resolving disputes resulting from the sale of goods/services, in the context of cross-border and domestic commerce, regardless of whether the purchase was made online or offline.[43] According to the report,[44] 2.8 million people visited the platform in 2019, an average of 200,000 unique visitors per month. Most complaints were filed in Germany (over 6,000) and Gibraltar (over 5,000). Of consumers who filed a complaint, 20% said that their dispute was resolved either on or outside the platform. Another 18% said they were still discussing with the trader. Only 2% of the complaints reached an ADR body.

Nevertheless, mediation in the EU has yet to achieve its stated objectives, in particular a well-balanced connection between mediation and judicial processes.[45]

2. Mediation in Ukraine: regulatory framework and perspectives

Chapter 2 reviews the current situation regarding mediation in Ukraine and the perspectives of mediation. The assumptions and experiences that led to the need for mediation and the social issues that limit the popularity of mediation are examined.

"Although mediation is considered one of the most popular ways of consensual dispute resolution, for many years, mediation in Ukraine had no legislative regulation. This was one of the obstacles that restrained alternative dispute resolution (ADR) development in Ukraine, even though

[43] European Commission, "Report from Commission to the European Parliament, the Council, the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes", EUR-Lex, accessed April 7, 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2019:425:FIN.

[44] European Commission, *3rd Report on the Online Dispute Resolution Platform*, December, 2020.

[45] EU Parliament, "A Ten-Year Long "EU Mediation Paradox", When an EU Directive Needs To Be More Directive", accessed April 7, 2022, https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL_BRI(2018)608847_EN.pdf.

the mediation community had been growing. Eventually, the Law of Ukraine 'On Mediation'[46] was adopted on 16 November 2021."[47] However, Ukrainian researchers conclude that further steps are needed, such as the establishment of a national model for judicial mediation, the amendment of procedural legislation, the introduction of special arrangements to implement agreements on international mediation in commercial disputes, and the adoption of special regulations for the integration of mediation into other jurisdictional activities (notary, legal aid system).[48]

2.1. Possibilities of legal mediation provided by the legislation of Ukraine

Article 124 of the Constitution of Ukraine[49] stipulates that an obligatory pre-trial procedure for resolving a dispute may be established by law. The legislation also initiates dispute resolution through the establishment of an amicable agreement (Article 207 of the Code of Civil Procedure of Ukraine,[50] Article 192 of the Economic Procedure Code of Ukraine[51]). An amicable agreement can be reached at any time throughout the trial, after which it is assumed that the parties have reached an agreement on a contentious subject that is acceptable to both of them and have decided to end the litigation. A statement of conciliation (Article 190 of The Code of Administrative Procedure of Ukraine[52]) is offered in public law disputes, pursuant to which the parties can entirely or partially settle the dispute based on mutual concessions. However, an amicable agreement and an agreement in the mediation process are not identical concepts. Makhova

46 "Law of Ukraine of November 16, 2021 No. 1875-IX. On Mediation", *supra note*, 1

47 Tsuvina, *supra note*, 15: 142–153.

48 *Ibid.*

49 "Constitution of Ukraine. Adopted at the Fifth Session of the Verkhovna Rada of Ukraine on June 28, 1996", accessed April 7, 2022, https://www.refworld.org/pdfid/44a280124.pdf.

50 "Code of Civil Procedure of Ukraine of March 18, 2004 No. 1618-IV (as amended on 16-12-2020)", CIS, accessed April 7, 2022, https://cis-legislation.com/document.fwx?rgn=8686.

51 "Economic Procedure Code of Ukraine of November 6, 1991 No. 1798-XII (as amended on 16-11-2021)", CIS, accessed April 7, 2022, https://cis-legislation.com/document.fwx?rgn=8694

52 "Code of Administrative Legal Proceedings of Ukraine of July 6, 2005 No. 2747-IV (as amended on 30-11-2021)", CIS, accessed April 7, 2022, https://cis-legislation.com/document.fwx?rgn=10720.

L.A. and Vypritsky A.O. prove that within the framework of an amicable agreement, the parties cannot go beyond the subject of the dispute. During mediation, the "field for negotiations" is maximally expanded, which serves as the most effective resolution of the dispute.[53]

Another precondition is a dispute resolution procedure with the participation of a judge, or "judicial mediation,"[54] which was incorporated into Ukrainian legislation in 2017. The concept of this institution is that a dispute can be settled by a judge prior to the start of the consideration of the case on the merits. However, due to differences in the status of the subject of mediation, the moment of transfer of the dispute to mediation, and the consideration process, this procedure has little in common with the classical mediation model and exists in Ukrainian practice as a hybrid trial procedure.[55] Fedorova T.S. presents a similar position, underlining that the settlement of a dispute with the participation of a judge is an independent type of conciliation procedure aimed at finding consensus and joint settlement of the dispute between the parties.[56]

Attempts to incorporate mediation into legislation were traced in the Joint Program of the European Union and the Council of Europe – "Transparency and Effectiveness of Ukraine's Judicial System." In 2010, mediation was implemented in four pilot courts across the country (the Belotserkovsky City Court of the Kyiv Region, the Vinnytsia District Administrative Court, the Administrative Court of Appeal of the Donetsk Region, and the Ivano-Frankivsk City Court) as a means of reducing the number of cases that have to be considered by the courts and increasing their economic efficiency. In 36 cases, the mediation ended successfully, and a mediation agreement was concluded in 33 cases.[57] Following previous experiences, the President of Ukraine issued a Decree "On the Strategy for Reforming the Judiciary Proceedings, and Related Legal Institutions for 2015–2020"[58] to expand alternative dispute resolution meth-

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53 Makhova, *supra note*, 2: 245.

54 Andrievskaya, *supra note*, 11: 55

55 Ksenia Tokareva, "Comparative aspect of dispute resolution with the participation of a judge and with the help of mediation", *Scientific works of the National Aviation University. Legal Bulletin "Air and Space Law"* 4, 57 (2020): 83–85, https://doi.org/10.18372/2307-9061.57.15068.

56 Tatiana S. Fedorova, "Economic justice in the system of institutes of the modern state" (the candidate of legal sciences thesis, Odessa Law Academy (2018)): 17.

57 Gaiduk, *supra note*, 12: 3.

58 "Presidential Decree of Ukraine of May 20, 2015 No. 276/2015 About the Strate-

ods, including the incorporation of mediation into Ukrainian legislation. However, the implementation procedure was only completed 2021.

2.2. Integration of mediation in Ukrainian legal proceedings

In light of a judicial personnel deficit, Ukrainians' established practice of filing a lawsuit in any dispute has resulted in an overload of public facilities, which has a detrimental impact on the efficiency and quality of trials and the number of unresolved cases. Consequently, in 2020, with 4,991 judges, around 3,675,900 cases and documents were presented to courts. Olexander Oleinik, the Director of the Directorate of Justice and Criminal Justice, stated that the best solution to improving access to justice and reducing the load on courts is to use other methods of dispute resolution; in particular, mediation.[59] At the same time, mediation cannot be regarded merely as a method of unloading regular courts. This is a unique kind of justice that is neither a last resort nor a less valuable form of dispute resolution. It is a unique kind of justice that mobilizes appropriate resources, and is at least equal in importance to those involved in traditional justice.[60]

On November 16, 2021, the Verkhovna Rada adopted the draft Law on Mediation.[61] Undoubtedly, the adoption of this Law was aimed at reducing the workload of the national judicial system, as it is clear that most disputes pending before the court may potentially be resolved amicably out of court. Mediation is assumed to be the mechanism that will contribute to such effective resolution of disputes due to the professional assistance of a mediator and the maximum deregulation of the process.

The law provides that: "*mediation* – the extrajudicial voluntary, con-

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gy of reforming of judicial system, legal proceedings and adjacent legal institutions for 2015–2020", CIS, accessed April 7, 2022, https://cis-legislation.com/document.fwx?rgn=89173.

59 Oleksandr Oliynyk, "Mediation is the best alternative to improving access to justice and reducing the workload on the courts", Ministry of Justice, 24.08.2021, https://minjust.gov.ua/news/ministry/oleksandr-oliynik-mediatsiya-naykrascha-alternativa-pokraschennya-dostupu-do-pravosuddya-ta-zmenshennya-navantajennya-na-sudi

60 G. Kanive, "Conducting a Mediation Policy in the Field of Civil Law, Organizational and Logistic Approach" (Paper presented at the Russian-French Conference on Mediation, Moscow, 30.09.2010): 5.

61 „Law of Ukraine of November 16, 2021 No. 1875-IX. On Mediation", *supra note*, 1.

fidential, structured procedure during which the parties by means of *mediator* (mediators) try to prevent origin or to settle the conflict (dispute) by negotiations"; "mediator – specially prepared neutral, impartial physical person which carries out mediation"; and "*the agreement on mediation* – the service provision agreement on carrying out mediation for the purpose of prevention or settlement of the conflict (dispute) concluded by the parties of the possible or existing conflict (dispute) and mediator (mediators) in approved by them to oral or written form which conforms to requirements of the law."[62]

"The Law 'On Mediation' regulates not only the mediation of dispute settlement but also a so-called preventive mediation, i.e., mediation of the dispute which can only appear in the future, for example, mediation of the conclusion of a contract or premarital agreement. Mediation can also be integrated into litigation at different stages. In view of this criterion, the following types of mediation can be distinguished: a) pre-trial mediation, b) mediation in the court of first instance, d) mediation in enforcement proceedings, or post-judicial mediation, conducted during the enforcement of a court judgment."[63]

The Law on Mediation recognizes the classical principles of facilitative mediation, such as: voluntariness (Article 5); confidentiality (Article 6); neutrality, independence, and impartiality of the mediator (Article 7); and the self-determination and equality of the rights of the parties of mediation (Article 8).[64]

Legislative regulation of the mediation procedure will enlarge alternative dispute resolution methods and allow parties to settle disputes outside of court, contributing to the improvement of mechanisms for the protection of human and civil rights in Ukraine. Nevertheless, this is only one step towards increasing the popularity of mediation in Ukraine. Factors such as a low level of legal culture within society, a low level of trust in mediation services, a lack of citizen knowledge about mediation and its benefits, the unwillingness of parties to find a compromise, and a lack of adequate financial support[65] restrain Ukraine from implementing mediation into day-to-day dispute resolution methods. Simultaneously,

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62 *Ibid.*

63 Tsuvina, *supra note*, 15: 142–153

64 „Law of Ukraine of November 16, 2021 No. 1875-IX. On Mediation", *supra note,* 1.

65 Igor G. Yasinovsky, "Problems of implementation and conduct of mediation in Ukraine", *Aktualni problemy polityky* 55 (2015): 261–264.

there should be a full informing of the public on the available remedies to protect citizens' rights, including through representatives of the judiciary, because citizens come to the court to resolve emergent disputes. In addition, mediation should be promoted by financial assistance from the state, establishing a scientific discipline for the training of certified specialists, and organizing scientific seminars and conferences. The creation of the necessity for legislative regulation of mediation is a logical result of the evolution of society.

In 2019, Ukraine signed the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention).[66] Therefore, further changes will be aimed at amending the procedural legislation. Signing the Singapore Convention can elevate the practice of mediation to a new level, significantly increasing its use in cross-border commercial disputes, which will have a positive impact on Ukraine's image on the world stage and the development of mediation in Ukraine.

"The Law 'On Mediation' envisages integration of mediation into other jurisdictional activities, such as that of notaries and bailiffs and systems of legal aid, yet there is no special regulation on mediation in this context. Some further steps should be taken by the Ministry of Justice to find an effective model for integrating mediation into these areas."[67]

It is difficult to expect any significant percentage of disputes to be resolved under the mediation procedure rather than in court after the entry of the Law into force. However, the practice of mediation is expected to be activated and to take its place among alternative dispute resolution methods. A state information policy is needed in order to popularize mediation in society; it should explain the advantages of mediation, its principles and benefits, and foster laypersons' trust.

Conclusions

Mediation has undergone an extensive history of development and demonstrated its autonomous character. It is an independent method of

[66] „United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation") Date of adoption: 20 December 2018", United Nations, accessed April 7, 2022, https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements.

[67] Tsuvina, *supra note*, 15: 142–153

dispute resolution and should not be considered a means to facilitate judiciary. Mediation is characterized by the voluntary and confidential nature of the process, the cooperation of parties, and the impartial and independent mediator.

The experience of the USA and European countries has demonstrated that the process of mediation is in public demand due to the opportunity to maintain amicable relationships, save money and time, and remain confidential.

Understanding the principle of the operation of the mediation procedure and its goals in a broad sense not only provides a perspective for resolving disputes peacefully, but also teaches people the skills of conflict management aimed at interaction between the parties to the dispute in the future. Disseminating information about the broad added value of the objectives of this procedure – not only at the legal level, but also by actively engaging in education with as wide a range of people as possible in non-controversial categories – would raise awareness of the substance of conflict and the importance of mediation. In order to realize the development of mediation in a broad sense, it is necessary not only to improve the existing legal framework, but also to spread the idea of applying the broad meaning of mediation through all possible channels.

Mediation should be popularized through public authorities, as in order to resolve the dispute through mediation, the parties must be aware of the existence of such a possibility and understand the peculiarities and consequences of the procedure. Taking into consideration modern tendencies, the establishment of an online mediation platform will also facilitate the disputing parties in finding an amicable solution.

The Law on Mediation opened a new page in the ADR movement in Ukraine in terms of the rule of law and access to justice. Despite its expected positive effect, many problems are still open for discussion. This development is one of the strategic goals for the promotion of ADR in Ukraine and justice sector reform. From this point of view, the next steps may relate to the development of organizational and quality standards of court mediation, as well as the introduction of mandatory mediation in specific types of cases.