

## Reform Forum Note

# LAW OF UKRAINE 'ON MEDIATION': MAIN ACHIEVEMENTS AND FURTHER STEPS OF DEVELOPING MEDIATION IN UKRAINE

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## ABSTRACT

**Background:** 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 the mediation community had been growing. Eventually, the Law of Ukraine 'On mediation' was adopted on 16 November 2021.

**Methods:** The article is devoted to distinctive features of the new Ukrainian legislative mediation regulation that are decisive for the national mediation model, such as the definition and principle of mediation, its principles and scope, requirements for mediators, etc. Special attention is paid to the perspective and challenges for the mandatory mediation in terms of the provisions of Art. 124 of the Constitution of Ukraine and European standards for access to court (para. 1 Art. 6 of the ECHR). The article addresses organisational and procedural aspects of integrating mediation into judicial proceedings. Different models of integrating mediation into the Ukrainian court system piloted in Ukraine are analysed. The authors define current trends in the development of mediation in Ukraine.

**Results and Conclusions:** The authors conclude that the adoption of the Law 'On mediation' contributes to the ADR movement in Ukraine but needs some further steps, such as developing a national model of court mediation, the amendment of procedural legislation introducing a special procedure that would lead to the enforcement of agreements resulting from international mediation in commercial disputes, and the adoption of special regulation for integrating mediation into other jurisdictional activities (notariat, system of legal aid).

**Keywords:** mediation; court mediation; mandatory mediation; mediator; Ukraine

## 1 INTRODUCTION

Mediation is one of the most popular methods of alternative dispute resolution (hereinafter – ADR) worldwide. It is considered a part of the international standard of access to justice, which is interpreted today not only as access to courts of a classical kind but also as access to ADR.<sup>3</sup> The development of ADR methods in general and mediation in particular is recognised as one of the aims of the justice sector reform in Ukraine.<sup>4</sup> As a result, on 16 November 2021, the Law of Ukraine 'On mediation' (hereinafter – the Law 'On mediation')<sup>5</sup> was adopted. The mediator community had been waiting for this regulation for more than 25 years since the first mediators were trained with the support of the donor community,<sup>6</sup> and nowadays, many

3 See V Komarov, T Tsvina, 'The Impact of the ECHR and the Case law of the ECtHR on Civil Procedure in Ukraine' (2021) 1(9) Access to Justice in Eastern Europe 79-101. DOI: 10.33327/AJEE-18-4.1-a000047; V Komarov, T Tsvina, 'International standard of access to justice and subject of civil procedural law' (2021) 28(3) Journal of the National Academy of Legal Sciences of Ukraine 197-208. DOI: 10.37635/jnalsu.28(3).

4 Decree of the President of Ukraine of 11 June 2021 'On the Strategy for the Development of the Justice System and Constitutional Judiciary for 2021-2023' <<https://zakon.rada.gov.ua/laws/show/231/2021#n10>> accessed 1 January 2022;

5 Law of Ukraine 'On mediation' of 16 November 2021 <<https://zakon.rada.gov.ua/laws/show/1875-20?lang=en#Text>> accessed 1 January 2022.

6 See the collection of articles '5 Years of Dialogue and 25 Years of Mediation in Ukraine: from Division to Cohesion' (Kyiv, VAITE 2019) 340 <<https://www.osce.org/project-coordinator-in-ukraine/448165>> accessed 1 January 2022; I Izarova, 'Sustainable Civil Justice Through Open Enforcement – The Ukrainian Experience Studying' (2020) 9(5) Academic Journal of Interdisciplinary Research 206-216 <<https://doi.org/10.36941/ajis-2020-0098>> accessed 1 January 2022; I Izarova, V Nekrošius, V Vėbraitė, Y Prytyka 'Legal, Social and Cultural Prerequisites for the Development of ADR Forms in Lithuania and Ukraine' (2020) 116 Teise (Law) 8-23 <<https://doi.org/10.15388/Teise.2020.116.1>> accessed 1 January 2022.

hopes are placed on it. It is supposed to have a positive effect on the development of the ADR movement in Ukraine and an improvement of access to justice and its effectiveness. At the same time, the Law 'On mediation' is a framework and needs some further steps to be put into practice.

The article is devoted to the analysis of the main features of the new Ukrainian Law 'On mediation' and its gaps, as well as further directions in the promotion of mediation in Ukraine. The article consists of the introduction, three parts, and the conclusion. In the first part of the article, a general review of the Law 'On mediation' is made. In the second part, the authors focus on mandatory mediation in terms of the constitutional provisions on court jurisdiction. In the third part, the authors address the organisational and procedural aspects of integrating mediation into judicial proceedings. In the conclusion, the authors identify current trends and further steps for developing mediation in the Ukrainian legal system.

## 2 A LONG WAY TO LEGISLATIVE REGULATION: MAIN ACHIEVEMENTS OF THE LAW 'ON MEDIATION'

The institutionalisation of mediation in Ukraine has come a long way. As a result, the Law 'On mediation' has several distinguishing features. Firstly, the law was developed on the basis of the international mediation standards, such as Directive 2008/52/EC of the European Parliament and of the Council of Europe on certain aspects of mediation in civil and commercial matters,<sup>7</sup> Council of Europe mediation recommendations for various categories of cases,<sup>8</sup> guidelines for better implementation of the above-mentioned recommendations developed by the European Commission for the Efficiency of Justice,<sup>9</sup> UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation,<sup>10</sup> etc. Secondly, the Law 'On mediation' reflects the best foreign countries' practices of mediation legislative regulation.<sup>11</sup> Thirdly, the work on the draft law was conducted with the broad involvement of all interested parties – mediators' community,

7 Directive 2008/52/EC of the European Parliament and of the Council of Europe of 21 May 2008 on certain aspects of mediation in civil and commercial matters <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF>> accessed 1 January 2022.

8 Recommendation Rec (2002)10 of the Committee of Ministers to member States on mediation in civil matters, adopted by the Committee of Ministers on 18 September 2002 at the 808th meeting of the Ministers' Deputies <<https://rm.coe.int/16805e1f76>> accessed 1 January 2022; Recommendation No R (98)1 on family mediation, adopted by the Committee of Ministers on 21 January 1998 at the 616th meeting of the Ministers' Deputies <<https://rm.coe.int/1680747b77>> accessed 1 January 2022; Recommendation Rec (2001) 9 of the Committee of Ministers to Member States on Alternatives to Litigation between Administrative Authorities and Private Parties adopted by the Committee of Ministers on 5 September 2001 at the 762nd meeting of the Ministers' Deputies <<https://rm.coe.int/16805e2b59>> accessed 1 January 2022; Recommendation No R (99) 19 of the Committee of Ministers to Member States on Mediation in Penal Matters, adopted by the Committee of Ministers on 15 September 1999 at the 679th meeting of the Ministers' Deputies <<https://rm.coe.int/1680706970>> accessed 01 January 2022.

9 CEPEJ Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters <<https://rm.coe.int/16807475b6>> accessed 1 January 2022; CEPEJ Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters <<https://rm.coe.int/1680747759>> accessed 1 January 2022 etc.

10 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002) <[https://www.uncitral.org/pdf/english/commissionssessions/51stsession/Annex\\_II.pdf](https://www.uncitral.org/pdf/english/commissionssessions/51stsession/Annex_II.pdf)> accessed 1 January 2022.

11 See CEPEJ European Handbook for mediation Lawmaking, adopted at the 32nd plenary meeting of the CEPEJ Strasbourg, 13 and 14 June 2019 <<https://rm.coe.int/cepej-2019-9-en-handbook/1680951928>> accessed 1 January 2022.

legal practitioners, state authorities, and scholars, taking into account the interests of all stakeholders. All of the mentioned features determine the national model of mediation in Ukraine enshrined in the Law 'On mediation'.

*Definition of mediation.* In the literature, one can find various classifications of mediation models or types.<sup>12</sup> In the broadest sense, there are two models of mediation depending on the role and intervention of the mediator – facilitative and evaluative.<sup>13</sup> In the former, the mediator is responsible for the managing of the procedure but cannot offer his or her own proposals for dispute resolution variants. In the latter, the mediator has broader powers: he or she can help parties by making formal or informal recommendations, offering the variants of the settlement, etc. The Law 'On mediation' enshrines the classical facilitative mediation model. It draws on the definition of mediation as 'an extrajudicial voluntary, confidential, structured procedure, during which the parties with the mediator (mediators) try to prevent or resolve the conflict (dispute) through negotiations.'<sup>14</sup> It is also evidenced by other legislative provisions. In particular, the mediator is obliged to manage the mediation procedure,<sup>15</sup> but he or she cannot provide advice and recommendations to the mediation parties about the decision on the merits of the dispute or make such decisions.<sup>16</sup> The mediator's advice and recommendations can only be related to the mediation procedure and finalisation of its results.<sup>17</sup> The parties independently determine the list of issues to be discussed during the mediation, options for resolving the dispute, the content of the agreement resulting from mediation, terms and methods of its execution, and other issues related to the dispute and mediation procedure.<sup>18</sup>

*Mediator.* The mediator is defined as 'a specially prepared neutral, independent, impartial person who conducts the mediation.'<sup>19</sup> There are no minimum age requirements for the mediators, but persons with limited civil capacity or incapable persons, as well as persons with a criminal record, cannot act as mediators. The legislation of some post-soviet countries distinguishes professional and non-professional mediators:<sup>20</sup> the former should have completed special training on mediation and obtained a mediator's certificate; the latter have no special education and can conduct the mediation if parties have agreed to such a person as a mediator in their case. Ukraine does not endorse such a distinction: only those who have completed the basic mediation course in Ukraine or abroad are entitled to act as mediators. Basic mediation courses should have at least 90 hours, including no less than 45 hours of practical skills training.<sup>21</sup> The training of mediators, in addition to the basic training, may include specialised trainings. Additionally, parties, public authorities, different institutions, and other persons may impose additional requirements on mediators they engage, for

- 12 See N Alexander 'The mediation metamodel: Understanding practice' (2008) 26 (1) Conflict Resolution Quarterly 97-123 DOI: <https://doi.org/10.1002/crq.225>; L Riskin 'Mediator Orientation, Strategies and Techniques' (1994) 12 Alternatives to the High Cost of Litigation 111-114 DOI: <https://doi.org/10.1002/alt.3810120904>.
- 13 K M Roberts 'Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement' (2007) 39 Loyola University Chicago Law Journal 187-213.
- 14 Para 4 Part 1 of Art 1 of the Law 'On mediation'.
- 15 Para 7 Part 1 of Art 12 of the Law 'On mediation'.
- 16 Para 2-3 Part 2 of Art 7 of the Law 'On mediation'.
- 17 Part 5 of Art 7 of the Law 'On mediation'.
- 18 Part 2 of Art 8 of the Law 'On mediation'.
- 19 Para 2 Part 1 of Art 1 of the Law 'On mediation'.
- 20 For example, in Kazakhstan, mediators are divided into two groups: professional and non-professional. Non-professional mediators are, for example, all judges during conciliation proceedings in court in accordance with the Civil Procedure Code of the Republic of Kazakhstan and the Administrative Procedure Code of the Republic of Kazakhstan (Part 2 Article 9 the Law of Kazakhstan 'On mediation' <[https://online.zakon.kz/Document/?doc\\_id=30927376&pos=3;-106#pos=3;-106](https://online.zakon.kz/Document/?doc_id=30927376&pos=3;-106#pos=3;-106)> accessed 1 January 2022).
- 21 Part 1 of Art 10 of the Law 'On mediation'.

example, special trainings, age, education, experience, etc.<sup>22</sup> Also, persons who have been trained in basic mediator skills for at least 48 hours, which is confirmed by the relevant certificates before the entry into force of the Law 'On mediation', can act as a mediator. It is worth noting that the Law 'On mediation' allows notaries to conduct a mediation if they obtained the basic mediation course,<sup>23</sup> and the Notary Chamber of Ukraine is allowed to conduct a basic mediation course and keep a register of notaries who can act as mediators.

*Scope of the Law 'On mediation'.* The scope of the Law 'On mediation' is quite broad. It is identified as

relationships pertaining to conduct of mediation for the purposes of preventing the onset of conflicts (disputes) in the future or settling any conflicts (disputes) including civil, family, labor, commercial, administrative ones as well as those in administrative offense and criminal proceedings in order to reconcile a victim with a suspect (defendant).<sup>24</sup>

At the same time, the legislation may contain specific regulations of mediation procedures for different categories of disputes. As we can see, 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*, which takes place before the commencement of a trial and can be a mandatory pre-trial procedure for resolving a dispute, the non-use of which makes it impossible to initiate court proceedings; b) *mediation in the court of first instance*, which takes place during the preparatory proceedings or trial of the case on the merits before the court judgment; c) *mediation in higher courts* during the review of court judgments in appellate or cassation courts; d) *mediation in enforcement proceedings*, or post-judicial mediation, conducted during the enforcement of a court judgment. The same is relevant for integrating mediation into arbitration.

*Principles of mediation.* The Law 'On mediation' recognises classical principles of facilitative mediation, such as: voluntariness (Art. 5), confidentiality (Art. 6), neutrality, independence, and impartiality of the mediator (Art. 7), self-determination of the parties, and equality of the rights of the parties of mediation (Art. 8).

### 3 MANDATORY MEDIATION AND CONSTITUTIONAL PROVISIONS

The Law 'On mediation' says nothing about mandatory mediation while proclaiming voluntariness to be one of the basic principles of mediation, according to which the parties can only voluntarily, by mutual consent, apply to the chosen mediator, no one can be forced to participate in the mediation, and the procedure can be stopped at any time at the initiative of one of the parties.<sup>25</sup> It may seem that the Law 'On mediation' enshrines a classic voluntary model of mediation. But nowadays, more and more countries establish different

22 Part 3 of Art 9 of the Law 'On mediation'.

23 Part 3 of Art 1 of the Law of Ukraine 'About notaries' <<https://zakon.rada.gov.ua/laws/show/3425-12#Text>> accessed 1 January 2022.

24 Part 1 of Article 3 of the Law 'On mediation'.

25 Art 5 of the Law 'On mediation'.

kinds of mandatory mediation for some categories of cases.<sup>26</sup> The first country in Europe to develop such a provision was Italy, where mediation is a mandatory pre-trial procedure, for example, in condominium co-owner disputes, medical negligence disputes, defamation disputes, and disputes arising from banking and insurance contracts, etc.<sup>27</sup> This tendency caused a shift in the interpretation of the voluntariness principle from the voluntary entering into the mediation procedure to the voluntary ending of such a procedure. Nowadays, the introduction of different kinds of mandatory mediation have become the global trend in the legal regulation of mediation.

We can identify different kinds of mediation depending on the division of initiative between the parties and the court in deciding on the use of mediation: a) completely voluntary mediation, initiated by the parties; b) mediation initiated by at least one party, which obliges the other party to participate in mediation without the right to refuse; c) mediation, initiated by the court: i) mediation on the recommendation of the court, when the judge has only the right to recommend mediation and explain its advantages and sanctions for refusal to use mediation according to national legislation; ii) mediation by appointment or direction of the court, which reflects the greater degree of binding nature of this procedure, and the obligation in this case may relate to attending an information session or the mediation itself; d) mediation as a statutory pre-trial procedure established by law, which means that the plaintiff could not bring the action unless parties try to resolve their dispute by the means of mediation.<sup>28</sup>

Art. 124 of the Constitution of Ukraine provides that the jurisdiction of the courts extends to any legal dispute and any criminal charge. In cases provided by law, courts also consider other cases. The law may provide for a mandatory pre-trial dispute resolution procedure.<sup>29</sup> This constitutional provision opens the door for the legislator to introduce mandatory mediation in certain categories of cases in the future in spite of the fact that the Law 'On mediation' does not regulate any kind of mandatory mediation.

Mandatory mediation causes challenges for Ukraine. Adopting the provisions on the mandatory mediation, the state extends to this procedure the effect of para. 1 of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (hereinafter – the ECHR) in terms of the positive obligation of the state to guarantee access to court. In spite of the fact that in light of the European Court of Human Rights (hereinafter – the ECtHR), case-law mandatory mediation does not violate the access to court requirement, in every case, the proportionality principle should be met. The classical structure of the proportionality test for the cases concerning access to court reads as follows:

- 1) the aim of the access to court restriction enshrined by law should be legitimate;
- 2) means which were used for the restriction should be minimally burdensome and necessary in a democratic society;
- 3) there was a reasonable and proportionate relationship between the means employed and the aim sought to be achieved;
- 4) the restriction under consideration does not contradict the very essence of the access to court right, because the person cannot be deprived of the right to judicial

26 See CH van Rhee 'Mandatory Mediation before Litigation in Civil and Commercial Matters: A European Perspective' (2021) 4(12) Access to Justice in Eastern Europe 7-24 DOI: <https://doi.org/10.33327/AJEE-18-4.4-a000082>.

27 See E Silvestri, R Jagtenberg, 'Tweeluit – Diptych: Juggling a Red Hot Potato: Italy, the EU, and Mandatory Mediation' (2013) 17(1) *Nederlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement* 29-45.

28 See T Tsvina, A Serhieieva 'Comprehensive Analysis of the Current Situation, Barriers and Possibilities of Mediation Development: with Recommendations for the Promotion and Implementation of Mediation in Ukraine' (2019) 38-41.

29 Constitution of Ukraine <<https://zakon.rada.gov.ua/laws/show/254к/96-бп#Text>> accessed 1 January 2022.

protection due to the restriction and there should always be alternative ways to protect violated rights, freedoms or interests, if the consideration of certain cases is excluded from the court jurisdiction.<sup>30</sup>

In view of the above, it can be concluded from the interpretation of mediation as a mandatory pre-trial procedure that such procedure pursues a legitimate aim which has two aspects: on the one hand, it pursues the public interest in access to justice for all and its effectiveness, as well as caseload relief; on the other hand, it aims to satisfy the private interest of the parties, which is to ensure the use of an effective and appropriate consensual way to resolve their dispute. If the parties are given the opportunity to voluntarily end the mediation procedure, the means employed for the restriction are minimally burdensome and proportionate with the aim of restrictions.

At the same time, the question arises as to whether such a legislative provision will not cause situations where, in reality, a person will be deprived of the right to a fair trial at all, taking into account the real development of mediation in Ukraine and quantity of certificated mediators. The introduction of mediation as a mandatory pre-trial procedure for resolving disputes, even in some categories of cases, implies a positive obligation of the state to ensure unimpeded access to mediation throughout the state. At the same time, in cases where parties have the right to legal aid, mediation should be provided free of charge at the expense of the state budget.<sup>31</sup> In our opinion, this task is unachievable in the current situation in Ukraine, taking into account the number of mediators, large territory of the country, and diversification of the judicial system. As a result, it may lead, on the one hand, to additional burdens on the budget and, on the other hand, to violation of the rights to a fair trial (para. 1 Art. 6 ECHR). Yet now, there are several pro-bono projects of mediators' associations and legal aid systems in large cities and online mediation projects in small cities. All in all, it is important to remember that compulsory mediation can increase the number of mediations but will not increase the number of settled disputes, as the parties and lawyers will often see such a procedure as a formality before filing a lawsuit. According to these considerations, before introducing mediation as a mandatory pre-trial procedure, the state needs to do some serious work on the popularisation of mediation and increasing the number of mediators.

#### 4 INTEGRATION OF MEDIATION INTO JUDICIAL PROCEEDINGS

Though historically, mediation appears as an alternative to the classical judicial proceedings, over time, the effectiveness of mediation has led to the integration of mediation into judicial proceedings. Mediation seeks to lighten the load on the judicial system and help in combating such negative trends in civil procedure as the excessive length of a trial, high court fees, and the complexity of litigation, which characterise the crisis of civil justice in the second half of the 20th century.<sup>32</sup> It is currently recognised that mediation can improve the accessibility and efficiency of justice, enrich judicial practice, increase flexibility and adaptability of litigation to the nature of the dispute, etc. As a result, on the one hand, it may increase trust in the justice sector and the level of satisfaction of ordinary people by a judiciary, and on the other hand, it allows parties to choose the most appropriate way to solve their dispute.

30 See among others: *Golder v United Kingdom* App No 4451/70 (ECtHR, 21 February 1975) para 34; *Ashingdane v the United Kingdom* App No 8225/78 (ECtHR, 28 May 1985); *Stanev v Bulgaria* [GC] App No 36760/06 (ECtHR, 17 January 2012).

31 See Para 4 Part 1 of Art 1 of Law of Ukraine 'On Free Legal Aid' <<https://zakon.rada.gov.ua/laws/show/3460-17#Text>> accessed 19 June 2021.

32 See AA Zukerman, *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford University Press 1999).

Modern trends in strengthening the interaction between mediation and legal proceedings allow us to distinguish court mediation, which is integrated into judicial proceedings and provided with the assistance of the court. In general, the development of a strategy for integrating mediation into the court proceedings concerns two main aspects: an organisational one, which is associated with the development of an optimal model of court mediation, as well as procedural, which is focused on the procedural features of such integration.

## 4.1 ORGANISATIONAL ASPECT OF INTEGRATION

Analysis of legislation and practice of implementation of pilot projects for mediation integrated into judicial proceedings in foreign countries allows to distinguish the following models of court mediation:

- a) judicial mediation, or 'judge-mediator' model, which is conducted directly in court by judges who have passed special mediation training;
- b) court-related mediation of two types:
  - i) internal court-related mediation, in which mediation is carried out in the centre of the mediation or ADR centre in court, so the mediation is supposed to be conducted 'inside' the court by inside mediators;
  - ii) external court-related mediation, in which cases for mediation are sent to external public or private mediation centres or mediators.<sup>33</sup>

There were several pilot schemes of court mediation in Ukraine supported by the donor organisations. The following models of mediation integrated into judicial proceedings were presented:

- external court-related mediation ('Support for mediation development in eight courts of the Volyn region as an alternative way to resolve the conflict' with the support of USAID within the framework of the Fair Justice Project);
- judicial mediation, in which specially trained judges acted as mediators (grant of the European Commission and the Council of Europe 'The procedure for selection and appointment of judges, their preparation, bringing to disciplinary responsibility, distribution of cases and alternative dispute resolution' in 2006-2007 and 'Transparency and effectiveness of the justice system in Ukraine' in 2008-2011);
- a special procedure for settling a dispute with the participation of a judge as a special kind of the conciliatory procedure held by a judge (project 'Education of Judges for Economic Growth' with the support of the Canadian National Judicial Institute).

Within these projects, the following results were obtained. According to statistics, within the framework of an external mediation that was implemented in eight courts of the Volyn region, 142 persons were involved in the mediation process, 108 information-evaluation meetings with parties, and 38 mediations were conducted, 14 of which were successful (among them –

33 T Tsuvina, A Serhieieva, 'Comprehensive Analysis of the Current Situation, Barriers and Possibilities of Mediation Development: with Recommendations for the Promotion and Implementation of Mediation in Ukraine' (2019) 24-25.

two inheritance disputes, three land disputes, four family disputes, five civil disputes). After conducting a successful mediation, parties were asked to answer the questionnaire: 20 of the 24 persons indicated that they did not expect such a result; 18 of 24 persons reported that the judge fully understood the essence of the problem and contributed to the resolution of a dispute as much as possible and recommended them the mediation; 16 of 24 persons said that in the future they would first try to use mediation in order to save money and time. At the same time, among 24 cases in which mediation was not successful: 4 mediations were stopped by the mediator (including three mediations, during which mediators were informed about violence), and in five cases, the mediation was stopped because of parties' legal representative position in the case.<sup>34</sup>

Instead, in the pilot project of the judicial mediation (model 'judge-mediator') which was held in four courts (Bila Tserkva City Court of Kyiv Oblast, Vinnytsya District Administrative Court, Donetsk Administrative Court of Appeal, Ivano-Frankivsk City Court) during the period from 5 July 2010 to 15 November 2010, 83 cases were transferred to mediation, in 50 cases mediation took place, 36 mediations ended successfully, and in 33 cases settlement mediation agreements were concluded.<sup>35</sup>

The project connected with the implementation of the procedure for settling a dispute with the participation of a judge even became a basis for the amendments to the procedural legislation in 2017. In fact, it is not mediation – it is a kind of conciliation led by the judge who conducted the trial.

Although different kinds of integrating mediation were piloted in Ukraine, the new Law 'On mediation' says nothing about the possibility of conducting mediation by judges or other court staff, so we can conclude that in Ukraine, external court-annexed mediation will be developed in the future. From this point of view, the main question is how and by whom the mediators for this kind of mediation will be selected and who will form and keep the register of such mediators.

## 4.2 PROCEDURAL ASPECTS OF INTEGRATION

Even before the adoption of the Law 'On mediation', mediation could be used in parallel with court proceedings due to the existence of legal provisions on the possibility of reaching a settlement agreement between the parties at any stage of civil, commercial, or administrative proceedings, including appellate and cassation proceedings and enforcement proceedings. In practice, if parties of litigation use mediation and find an amicable solution, they can bring it to the court, and it can be approved by the court as a settlement agreement. Moreover, although there was no legislative regulation of mediation, since 2017, the mediator's immunity has already been enshrined in procedural law,<sup>36</sup> which effectively made it impossible to interrogate a mediator as a witness about the facts which became known to him or her during the mediation.

Simultaneously with the adoption of the Law 'On mediation' amendments to procedural codes – the Civil Procedure Code (hereinafter – the CPC), the Commercial Procedure Code (hereinafter – the ComPC), and the Code of Administrative Procedure (hereinafter –

34 OM Matviychuk, OG Zavydovska, *Mediation in the courts: myth or reality?* (Lutsk: B.v. 2016).

35 Transparency and Efficiency of the Judicial System of Ukraine: Materials for Training Mediators from the Circle of Judges of the Supreme Court of Ukraine, Higher Specialized Courts and Representatives of Higher Education Institutions in the Framework of the Joint Program of the European Union and the Council of Europe, 20-25 March 2011 6.

36 Para 2 Part 1 of Art 70 of the CPC; Para 2 Part 1 of Art 66 of the ComPC.

the CAP) – were made. The main judicial guarantees in case of mediation usage can be summarised as follows:

- A) Procedural law explicitly stipulates that the parties may reconcile, including through mediation, at any stage of the judicial proceedings, and the result of the parties' agreement may be approved as a judicial settlement agreement.<sup>37</sup>
- B) Special guaranty of the neutrality principle is connected with the prohibition to combine two roles – mediator and legal representative: a person who acted as a mediator in a dispute related to a case before a court cannot act as a representative in the same case.<sup>38</sup>
- C) The judge is now obliged to find out during the preparatory hearing in the case whether the parties wish to settle the dispute out of court through mediation.<sup>39</sup>
- D) If the parties agreed to conduct an out-of-court mediation on preparatory stage, a court can adjourn the preparatory hearing;<sup>40</sup> at the same time, the court is obliged to suspend the proceedings if both parties request to suspend the proceedings during the conduction of mediation before them for the period of the mediation but not more than 90 days from the date of the decision to suspend the proceedings.<sup>41</sup> After the resumption of proceedings, if the parties reached a mediation settlement agreement, a court may close the proceedings and approve such an agreement. Other options are to close the proceedings because of the plaintiff's waiver of the claim or to deliver court judgment in case of admitting the claim by the defendant. In case of unsuccessful mediation, the court after resuming the proceedings must consider the case on the merits and deliver a judgment.
- E) The use of mediation procedure is incentivised by the rules on court fee return: in case of the settlement agreement, plaintiff's waiver of the claim or recognition of the claim by the defendant resulting from the mediation, 60 percent of the court fees in the first, appeal or cassation instances are reimbursed.<sup>42</sup>
- F) A special rule is established for administrative proceedings, which sets deadlines for filing suits: mediation does not suspend the duration of the period for filing a suit to the administrative court.<sup>43</sup> The same relates to the limitation period for all types of non-criminal cases.<sup>44</sup>

## 5 CONCLUSIONS: CURRENT TRENDS IN THE DEVELOPMENT OF MEDIATION IN UKRAINE

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, a lot of problems are still open for discussion.

37 Part 7 of Art 46 ComPC; Part 7 of Art 49 CPC; Part 5 of Art 47 CAP.

38 Para 5 Part 5 of Art 183 ComPC; Para 5 Part 5 of Art 198 CPC; Para 5 Part 6 of Art 181 CAP.

39 Para 2 Part 2 of Art 182 ComPC; Para 2 Part 2 of Art 197 CPC; Para 2 Part 2 of Art 180 CAP.

40 Para 5 Part 5 of Art 183 ComPC; Para 5 Part 5 of Art 198 CPC; Para 5 Part 6 of Art 181 CAP.

41 Para 3-1 Part 1 of Art 227 ComPC; Para 4-1 Part 1 of Art 251 CPC; Para 4 Part 1 of Art 236 CAP.

42 Part 1, 2 of Art 130 ComPC; Part 1, 2 of Article 142 CPC.

43 Part 6 of Art 122 CAP.

44 Part 2 Art 3 Law 'On mediation'.

Firstly, the law focuses on general issues of developing mediation in Ukraine without providing general guidelines for any specific model of court mediation. Yet, the development of the latter 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 organisational and quality standards of court mediation, as well as the introduction of mandatory mediation in specific types of cases in the context of the implementation of the provisions of Art. 124 of the Constitution of Ukraine.

Secondly, in 2019, Ukraine signed the United Nations Convention on International Settlement Agreements Resulting from Mediation (hereinafter – the Singapore Convention).<sup>45</sup> Therefore, further changes will be aimed at amending the procedural legislation, in particular, introducing a special procedure that would lead to the enforcement of agreements resulting from international mediation in commercial disputes, similar to that provided for arbitration by the New York Convention on the recognition and enforcement of foreign arbitral awards.<sup>46</sup> The Ministry of Justice organised the working group for the ratification of the Singapore Convention at the same time as the working group at the draft Law ‘On mediation’ was organised. Now, this group is working on the amendments to the procedural law, taking into account the Law ‘On mediation’. It should be noted that signing the Singapore Convention can bring 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.

Thirdly, 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.

Fourthly, the legislation does not pay due attention to the integration of mediation into arbitration and international commercial arbitration. The practice of so-called hybrid procedures, in particular med-arb and arb-med, based on a combination of mediation and arbitration in different variations, is popular all over the world. The status of mediation agreements and mediation clauses remains unclear in the Law ‘On mediation’. A systematic analysis of the rules of national procedural law suggests that they are not mandatory. An important issue in the context of promoting mediation and developing a culture of ADR is the need for mediation clauses contained in contracts, as well as mediation agreements to be binding for the parties.

Fifthly, the information policy of the state is needed to popularise mediation in society. It should explain the advantages of mediation, its principles, and benefits; foster layperson’s trust in this institution and the desire to use non-competitive ways of resolving disputes, create a positive image of mediators and raise awareness of their mission in society, etc.

45 United States Convention on International Settlement Agreements Resulting from Mediation <[https://uncitral.un.org/sites/uncitral.un.org/files/singapore\\_convention\\_eng.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf)> accessed 1 January 2022.

46 Convention on the Recognition and Enforcement of Foreign Arbitral Awards <<https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>> accessed 1 January 2022.

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