

Research Article

THE IMPLEMENTATION OF CONSENSUAL TENET IN MODERN CIVIL PROCEDURE: COMPARATIVE ANALYSIS OF COURT-CONNECTED SETTLEMENT PROCEDURES APPLIED IN AUSTRIA, LITHUANIA, AND UKRAINE

Tetiana Tsuvina*, **Sascha Ferz**, **Agnė Tvaronavičienė** and **Paula Rieni**r

ABSTRACT

Background: In this article, the co-authors continue exploring the observable changes in the orientation of civil procedure, moving from competitive and adversarial models towards more cooperative and consensual approaches. Specifically, this work aims to disclose the peculiarities of practically implementing the principles of mutual cooperation and consensuality in civil procedure. The research delves into court-connected settlement procedures in three European countries: Austria, Lithuania, and Ukraine. Through a comparative analysis of the legal regulations and practices in the selected countries, the article evaluates the impact of the application of settlement-oriented procedures on fostering a more amicable resolution of civil disputes.

Methods: Research commenced with a review of the existing scientific literature, a brief historical analysis, and a document analysis concerning the legal framework of settlement-oriented procedures applied in the civil process in selected countries. This work is the continuation of the previous research of the co-authors, aiming to explore how the identified global trend of the drift towards a consensual tenet in the civil procedure was reflected in the selected countries' legal legislation and practice. The Austrian, Lithuanian, and Ukrainian legal frameworks of court-connected settlement-oriented procedures were compared to acknowledge the existing variety and specifics of national approaches towards consensuality in the civil procedure in different jurisdictions.

Results and Conclusions: The ideas of a more socially oriented and consensual civil procedure are implemented in the civil procedure of Austria, Lithuania, and Ukraine through the introduction of settlement-oriented methods of dispute resolution, such as court conciliation and court mediation. Despite the wide common understanding of these amicable procedures, essential differences in the theoretical understanding of the concept and its implementation in the analysed jurisdiction were identified. This research assists dispute resolution practitioners and researchers interested in better understanding the implementation of court-connected settlement-oriented procedures in different jurisdictions.

1 INTRODUCTION

Amicable dispute resolution has become a trend in civil procedure in the last two decades. The classical understanding of competition-based dispute resolution in courts is changing rapidly toward a modern approach, including settlement-oriented options for the disputants. In most countries, the modernisation of civil procedure brought into practice the legal framework of such settlement procedures as in-court conciliation, in-court and court-connected mediation, and amicable conciliation processes. Thus, 'all over the world, "court-connected" programs and their mediation and conciliation elements differ'.¹ This leads to the need for a deeper look into the national legal framework and practice of selected countries to acknowledge the existing variety and specifics of national approaches towards consensuality in the civil procedure in different jurisdictions.

This research focuses on court-connected settlement procedures applied in civil process, where the implementation of principles involving mutual cooperation and consensuality is paramount. This small-scale study aims to disclose the peculiarities and specifics of implementing the social civil process ideas regarding court assistance in consensual settlement. The selected countries for examination are Austria, Lithuania, and Ukraine. The study seeks to unravel how settlement-oriented court-connected procedures operate in these countries, exploring their peculiarities, similarities, and differences.

The deliberate choice to focus on Austria, Lithuania, and Ukraine is influenced by the significant impact of famous Austrian lawyer F. Klein, the father of the concept of the social civil procedure. His ideas not only served as a base for the Austrian civil procedure but also influenced the legal doctrine and legislation of other European countries considerably. Lithuania, in particular, exemplifies this influence through its modern civil procedure. By grounding its modern Code of Civil Procedure in the ideas of F. Klein's doctrine on Social Civil procedure, the Lithuanian legislator sought to reassess the role of the court in the process, to give it not solely the role of a completely passive arbiter, but rather the role of a certain defender of public interests.² The Lithuanian Code of Civil Procedure aimed to achieve a reasonable combination of securing the interests of society and the state on the one hand and the interests of private individuals on the other.³ So, the Austrian school of social civil procedure had a significant impact on Lithuanian civil procedure.

Nevertheless, current changes in Lithuanian civil procedure law concerning the wider promotion of court mediation and applications of mediation as a mandatory pre-litigation procedure in family disputes show that this country is active in further development of socially oriented civil procedure and applies measures that go beyond the experience and practice of its predecessors.

- 1 Tetiana Tsvina, Sascha Ferz, Agnė Tvaronavičienė and Paula Riener, 'The Implementation of Consensual Tenet in Modern Civil Procedure: A European Approach of Court-Related Amicable Dispute Resolution Procedures' (2023) 6(1) Access to Justice in Eastern Europe 221, doi:10.33327/AJEE-18-6.1-a000124.
- 2 Virgilijus Valančius, 'Lietuvos civilinio proceso kodeksas: pirmųjų metų patirtis' (2005) 69(61) Jurisprudencija 55.
- 3 Vīgita Vėbraītė, 'Šalių sutaiikymas civiliniame procese' (DPhil thesis, Vilnius University 2009) 35.

The third country chosen for the comparison is Ukraine, a country rapidly advancing in the legal field, characterised by its ability to effectively adopt successful foreign practices and properly incorporate them into its national law, thereby creating prerequisites for the effective application of legal innovations. However, the ongoing Europeanisation process of this country also poses several challenges. The desire to enjoy a modern civil process often falters when faced with difficulties in implementing innovations. It is recognised that some socially useful initiatives focused on creating public welfare do not always receive support from the public and legal system entities. This applies to the settlement procedure with the participation of a judge, which is used not very often in practice. Such a comparison illustrates how the changes in civil procedure paradigm reflect the practice, focusing on the implementation of court conciliation and mediation concepts. It underscores the variety of possible directions of social civil process development, which grounds that every national system should constantly search, responsibly choose, and effectively implement the measures for assistance in settling.

2 THEORETICAL BACKGROUND CHANGES IN PERCEPTION OF ADR: THE SHIFT FROM THE ALTERNATIVE TO LITIGATION TOWARDS BECOMING AN INTEGRAL PART OF THE MODERN CIVIL PROCEDURE

Although alternative dispute resolution (further – ADR) is a well-known and globally used concept, recently its interpretation as an ‘alternative’ to litigation has been criticised in literature.⁴ Some scholars have proposed alternative terms such as ‘appropriate’,⁵ ‘amicable’⁶ or ‘additional’⁷ dispute resolution rather than ‘alternative’. In some sources, we can even find the proposition to replace ADR with EDR, i.e. ‘effective dispute resolution’.⁸ This pluralism of views reflects the diversity of dispute resolution areas, emphasising only one essential feature of a particular group of dispute resolution methods in the abovementioned terms. For example, ‘alternative’ underscores the distinctions between ADR and classical litigation,

-
- 4 Masood Ahmed, ‘Moving on from a Judicial Preference for Mediation to Embed Appropriate Dispute Resolution’ (2019) 70(3) Northern Ireland Legal Quarterly 331, doi:10.53386/nilq.v70i3.137; Laurence Boulle and Rachael Field, *Australian Dispute Resolution: Law and Practice* (LexisNexis Butterworths 2016) 36-7.
 - 5 Ahmed (n 4); Mariana Hernandez-Crespo Gonstea, ‘Remedy without Diagnosis: How to Optimize Results by Leveraging the Appropriate Dispute Resolution and Shared Decision-Making Process’ (2020) 88(6) Fordham Law Review 2165; Dorothy W Nelson, ‘Which Way to True Justice?: Appropriate Dispute Resolution (ADR) and Adversarial Legalism’ (2004) 83(1) Nebraska Law Review 167.
 - 6 Adriana Deac, ‘General Terms of the Amicable Settlement of Disputes Between Consumers and Traders’ (2015) 4(1) Perspectives of Business Law Journal 88; Sascha Ferz, ‘Amicable Dispute Resolution at Court: Conciliation Hearings, The Austrian and German Perspectives’ (2022) 8(1) International Comparative Jurisprudence 106, doi:10.13165/ijc.2022.06.008; Tsuvina and others (n 1) 221.
 - 7 John Doyle, ‘Diminished Responsibility? The Changing Role of the State’ (1997) 2(1) Flinders Journal of Law Reform 33; Mavis Maclean, ‘Family Mediation: Alternative or Additional Dispute Resolution?’ (2010) 32(2) The Journal of Social Welfare & Family Law 105, doi:10.1080/09649069.2010.506306.
 - 8 William L Ury, Jeanne M Brett and Stephen B Goldberg, ‘Designing an Effective Dispute Resolution System’ (1988) 4(4) Negotiation Journal 413, doi:10.1111/j.1571-9979.1988.tb00484.x.

'amicable' accentuates the conciliatory tenet of such procedures, and 'appropriate' highlights the procedures which best suit a particular type of case and parties, etc.

For many years, legal discourse on ADR was built around the dichotomy of ADR *versus* litigation. In such a paradigm, the court was typically introduced as a not-so-effective type of dispute resolution, i.e. more costly, timely, and burdened with formalities than ADR.⁹ This perspective embedded scepticism about ADR among lawyers educated in the adversarial system of civil litigation. Simultaneously, it could foster a false expectation of ADR as a panacea of dispute resolution area. Nevertheless, we do not follow this antagonistic view.

It seems that a more productive way of introducing a dispute resolution system is a procedural pluralism,¹⁰ which provokes us to interpret different ADR procedures, often considered 'in the shadow of the law', as equal forums for resolving disputes.¹¹ This approach suggests introducing different dispute resolution methods as parts of one dispute resolution system (DRS).¹² This means 'the use of the word 'alternative' as a description for DR has long been inaccurate.'¹³ Such a system was introduced in literature in different ways – as 'spectrum' or 'matrix'.¹⁴ In general, it covers negotiation, mediation, conciliation, arbitration, and litigation. However, such a spectrum can vary according to the national peculiarities of the DR in different countries.¹⁵

One of the key points is that in the procedural pluralism paradigm, courts also can be seen as multifunctional 'arenas in which various kinds of dispute [...] processing take place',¹⁶ (including negotiation, mediation, conciliation, etc.). It means the court is seen as a forum for other DR methods by integrating them into the litigation. Such interaction between classical litigation and other DR methods can be seen, for example, in practices of mandatory mediation, which is highly discussed now,¹⁷ when mediation becomes the prerequisite of the trial, as well as in the current practice of in-court or court-related

9 Adrian Zuckerman, 'Justice in Crisis: Comparative Dimensions of Civil Justice' in A Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (OUP 1999) 2, doi:10.1093/acprof:oso/9780198298335.003.0001.

10 Marc Galanter, 'Justice in Many Rooms: Courts, Private Ordering and Indigenous Law' (1981) 13(19) *Journal of Legal Pluralism* 1, doi:10.1080/07329113.1981.10756257.

11 *ibid* 2.

12 Boulle and Field (n 4) 33; Shauhin A Talesh, 'How Dispute Resolution System Design Matters: An Organizational Analysis of Dispute Resolution Structures and Consumer Lemon Laws' (2012) 46(3) *Law and Society Review* 463, doi:10.1111/j.1540-5893.2012.00503.x; Ury, Brett and Goldberg (n 8).

13 Boulle and Field (n 4) 38.

14 Boulle and Field (n 4) 40-2; Jean-Marie Kamatali, 'Transplanting an ADR-Centric Model of Dispute Resolution from the Anglo-American Legal System to the Civil Law System: Challenges, Limitations, and Proposals' (2022) 37(3) *Ohio State Journal on Dispute Resolution* 316.

15 Boulle and Field (n 4) 41.

16 Galanter (n 10) 3.

17 Dorcas Quek Anderson, 'Mandatory Mediation: An Oxymoron - Examining the Feasibility of Implementing a Court-Mandated Mediation Program' (2010) 11(2) *Cardozo Journal of Conflict Resolution* 479; CH van Rhee, 'Mandatory Mediation before Litigation in Civil and Commercial Matters: A European Perspective' (2021) 4(4) *Access to Justice in Eastern Europe* 7, doi:10.33327/AJEE-18-4-4-a000082.

mediation. The more sophisticated view of courts as providers of complex DR systems was already introduced by F. Sander in his 'multi-door courthouse' concept years ago.¹⁸

As we can see, DR design is considered a set of measures to construct an effective DR system. In this context, the state becomes one of the stakeholders of such a system due to its vested interest in the efficacy of all justice sectors. This is supported by the increasing value of the consensual tenet in civil procedure seen in the civil procedural codes of many European countries and from the pan-European perspective.¹⁹ For example, ELI/UNIDROIT Model European Rules of Civil Procedure (ELI/UNIDROIT Rules) recognise the settlement principle as a prominent principle of modern civil procedure. According to this principle, parties, their lawyers, and judges are encouraged to cooperate in seeking the parties' consensual dispute resolution during a trial. This includes using amicable dispute resolution methods.²⁰

Current trends in emerging dispute resolution mechanisms underscore the growing importance of settlement-oriented procedures. For example, the Civil Resolution Tribunal (CRT) in British Columbia (Canada) in 2016 marked a pivotal development as the first online court for most small claims categories, including those up to CAD 5,000, personal injury disputes arising from road traffic accidents, and condominium disputes.²¹ The idea of this online court as a complex DR system is to provide dispute settlement at the earliest stage and only resort to a trial if it fails. This DR system consists of four blocks: 1) providing legal information on the dispute through the information platform 'Solution Explorer';²² 2) negotiations, when the parties use the online negotiation procedure to resolve the dispute by themselves; 3) facilitation, which is applied if the negotiations are unsuccessful and presupposes the active assistance of a third neutral party (usually a professional mediator); 4) court proceedings, as *ultima ratio* method.²³ Settlement-oriented procedures have also been integrated into innovative online dispute resolution systems recently introduced in Australia (New South Wales and Victoria)²⁴ and the United Kingdom.²⁵

18 Frank EA Sander, 'Varieties of Dispute Processing' (The Pound Conference: Perspectives on Justice in the Future: Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, St Paul, Minn, 7-9 April 1976) 111.

19 Tsuvina and others (n 1) 204-10.

20 European Law Institute (ELI) and International Institute for the Unification of Private Law (UNIDROIT), *ELI/UNIDROIT Model European Rules of Civil Procedure: From Transnational Principles to European Rules of Civil Procedure* (OUP 2021).

21 See: *Civil Resolution Tribunal* <<https://civilresolutionbc.ca>> accessed 20 June 2023.

22 *ibid*, 'Solution Explorer'.

23 Orna Rabinovich-Einy and Ethan Katsh, 'The New New Courts' (2017) 67(1) *American University Law Review* 190-1; Shannon Salter and Darin Thompson, 'Public-Centered Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal' (2016-2017) 3 *McGill Journal of Dispute Resolution* 113; Shannon Salter, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal' (2017) 34(1) *Windsor Yearbook of Access to Justice* 120-1, doi:10.22329/wyaj.v34i1.5008; Amy J Schmitz, 'Expanding Access to Remedies through E-Court Initiatives' (2019) 67(1) *Buffalo Law Review* 126-30; Vivi Tan, 'Online Dispute Resolution for Small Civil Claims in Victoria: A New Paradigm in Civil Justice' (2019) 24(1) *Deakin Law Review* 116-8, doi:10.21153/dlr2019vol24no1art873.

24 Tan (n 23) 122-8.

25 Online Dispute Resolution Advisory Group, *Online Dispute Resolution for Low Value Civil Claims* (Civil Justice Council 2015) 6-7.

In this context, it is especially important to recognise that these court practices contribute to shaping an image of a new court and justice in civil cases, affecting the understanding of the international standard of access to justice. DR design of such courts is built on the model 'dispute avoidance – dispute containment – dispute resolution': a) *dispute avoidance*, which corresponds to the first informational stage; b) *dispute containment*, which is the focus of the second, facilitative stage, during which the parties try to resolve the dispute through direct negotiations or consensual procedures involving a third neutral party, in particular, mediation, conciliation, etc.; c) *dispute resolution*, which takes place in an adversarial form of proceedings.²⁶ Of significance is that the accent of this system should be on the first two stages, which make sense from the perspective of conflict management.

Integrating different DR methods into formal justice indicates the hybridisation of formal and informal justice processes. It creates a new architecture of the civil DR system based on several fundamental provisions. Firstly, the consensual tenet of civil procedure should be at the heart of the civil procedure and the DR system. This approach allows for a dispute settlement at the earliest stages because negotiations, mediation, and other conciliation procedures are built into the DR system. Secondly, such a system is designed to be user-friendly, placing the disputing parties, their interests, and convenience at the centre of the DR system. Thirdly, DR systems in court are more effective for the state as they can save state resources by orienting the parties towards resolving disputes as early as possible. Fourthly, using such systems is also more effective for the involved parties. It is cost-effective, allowing parties the possibility to represent their interests independently in the early stages without a professional representative, thereby avoiding unnecessary expenditure of time and money on a timely litigation process. Crucially, this approach ensures equal access to justice for all in an attempt to ensure 'win-win' outcomes for the parties.

To sum up, many ADR methods recently became an integral part of modern civil procedure and cannot be titled as a contradiction for litigation anymore. Diverse legal frameworks and practices of different countries have already proved that hybridisation of the DR has great potential to build a more collaborative and disputants' interests-oriented process, which also serves as a means to manage the courts' workload and foster access to justice.

3 THE COURT-CONNECTED SETTLEMENT PROCEDURES, APPLIED IN AUSTRIA, LITHUANIA, AND UKRAINE

With some minor exceptions, Austrian, Lithuanian, and Ukrainian civil procedure legislation envisage the possibility of the parties ending court proceedings by reaching an agreement in most civil cases. How does the court support and foster settlements during the civil procedure in these three states? What types of court-connected settlement-oriented procedures are applied in these countries? These questions will be answered in the following based on an analysis of national legal regulations and practices in the selected countries.

26 *ibid* 17-8.

3.1. Court-Connected Settlement Procedures in Austria

3.1.1. Origins of the Settlement-Oriented Legal Regulation in Austrian Civil Justice

The history of civil procedure in Austria can be traced back to the ideas of F. Klein, known as ‘the intellectual father of the Austrian Code of Civil Procedure’ (Austrian CCP).²⁷ In 1890/91, Klein spearheaded a comprehensive reform with the publication of his series of essays titled ‘Pro Futuro’,²⁸ ultimately leading to a reform of the Austrian Code of Civil Procedure of 1895. This code remains the primary legal source for civil procedure today, replacing the relevant provisions of the General Court Rules of 1781.²⁹

Several theories in Austrian jurisprudential literature formulate the purpose and essence of civil litigation. Known theories are, for example, the liberalist litigation purpose theory,³⁰ the purely ideological litigation purpose theory of Marxism and National Socialism,³¹ the theory of the legal peace purpose,³² sociological litigation purpose theories³³ as well as the theory of F. Klein, which will be discussed in more detail below. In each case, the individual theories are to be viewed only in the light of ‘the historical background of the respective state, the specific applicable procedural law of the country, the litigation theorists themselves, and often only as a reaction to other litigation purpose theories.’³⁴

F. Klein's work assumed that civil proceedings, as an institute of public law, should not serve the interests of private individuals alone. Instead, they should be regarded as a burden on society as a whole – a social evil that impairs the economic cycle. They, therefore, must be eliminated as simply, quickly, and inexpensively as possible.³⁵ At the same time, the establishment of truth should in no way be neglected.³⁶ Accordingly, law enforcement is to be considered a community interest. To this end, judges strive to ensure the correctness and, above all, the comprehensibility of decisions. Moreover, they aim to terminate the proceedings economically and with minimal consequences to end the legal dispute.³⁷ In this

27 Walter H Rechberger und Daphne-Ariane Simotta, *Grundriss des österreichischen Zivilprozessrechts: Erkenntnisverfahren* (9 Aufl, MANZ Verlag 2017) 3.

28 Franz Klein, *Pro futuro: Betrachtungen über Probleme der Civilproceßreform in Oesterreich* (Deuticke 1891).

29 Peter G Mayr, ‘Das streitige Verfahren (Zivilprozessrecht)’ in H Barta (hrsg), *Zivilprozessrecht* (WUV Universitätsverlag 2004) 1081.

30 The civil process as an institution for the enforcement of individual interests. Hans Walter Fasching, *Lehrbuch des österreichischen Zivilprozessrechts: Lehr- und Handbuch für Studium und Praxis* (MANZ Verlag 1990) 35.

31 *ibid* 35-6. The purpose of civil proceedings is to implement the law for socialist legality or the people's community, thus putting individual protection aside.

32 *ibid* 36. The focus is on legal peace.

33 E.g. the civil process as a role play to reduce antagonisms and to legitimize decisions.

34 Fasching (n 30) 35-6.

35 Georg E Kodek und Peter G Mayr, *Zivilprozessrecht* (5 Aufl, Facultas 2021) 34; Mayr (n 29) 1081; Martin Trenker, *Einvernehmliche Parteidisposition im Zivilprozess: Parteiautonomie im streitigen Erkenntnisverfahren* (MANZ Verlag 2020) 64-5.

36 Oskar J Ballon, *Einführung in das österreichische Zivilprozessrecht: Streitiges Verfahren* (12 Aufl, Leykam Buchverlagsgesellschaft 2009) 20-1.

37 Kodek and Mayr (n 35) 46; Fasching (n 30) 36-8.

sense, the civil process represents a state welfare institution with the judge as the 'professional representative of the common interest.'³⁸ This approach by F. Klein led to the idea of social civil procedure.³⁹ According to this, civil proceedings should not only be understood as a means of enforcing individual interests but should rather ensure individuals' peaceful and orderly coexistence in a society.⁴⁰ Klein thus created the first process model, in which the protection of the individual and the community interest is balanced excellently.⁴¹

Today, the idea developed by F. Klein concerning social civil procedure is deeply anchored in Austrian jurisprudence. On the one hand, this was done by means of legislation through the drafting of corresponding norms.⁴² Examples of this are the obligation of completeness in party submissions, the power of judges to conduct proceedings, the short time limits, and the prohibition of novelty in appellate proceedings.⁴³ On the other hand, social civil procedure was also pursued through the interpretation of jurisdiction and the application of case law to actual individual cases.⁴⁴ Civil proceedings are thus also intended to resolve private conflicts to establish orderly coexistence and a functioning social system. If the causes of the conflicts behind the legal disputes are not eliminated, the following legal action is probably already on the way. The civil process should, therefore, also give the disputing parties the opportunity for rational dialogue to bring about an amicable settlement of the conflict if possible. To this end, the legislator forced several possibilities in the Austrian private law system.⁴⁵

According to H.W. Fasching, the purpose of civil procedure in the modern welfare state of the present can be classified as follows: civil proceedings must protect and guarantee the private legal order of the state legal community by establishing lasting legal peace through which the justified private legal claims of each individual are taken into account and realised as quickly and inexpensively as possible with the fully responsible participation of those affected. The formulation of such litigation purpose has implications for the CCP, and the degree to which it conforms to these determines how adept and effective it is. Consequences, according to Fasching's litigation purpose, are the institutional safeguarding of legal certainty and legal peace,⁴⁶ access to justice for everyone, ensuring uniform application of the law for similar cases, providing clear, quick, cheap, and

38 Ballon (n 36) 20-1; Mayr (n 29) 1081.

39 Ballon (n 36) 20-1.

40 Alexander Meisinger, *System der Konfliktbereinigung: Alternative, komplementäre und angemessene Streitbeilegung* (MANZ Verlag 2021) 1.

41 Rechberger and Simotta (n 27) 9-10.

42 Meisinger (n 40) 1.

43 Ballon (n 36) 21.

44 Meisinger (n 40) 1.

45 Kodek and Mayr (n 35) 34-5.

46 Code of Civil Procedure of Austria 'Zivilprozessordnung – ZPO' (as amended of 2023, current version) art 501 para 1 <<https://ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001699>> accessed 20 June 2023.

understandable procedures, and the responsible participation of parties by guaranteeing the right to be heard and protecting individual privacy.⁴⁷

3.1.2. Court Conciliation

In the case of Austria, the possibility of amicable dispute resolution is not directly enshrined in law but is, nevertheless, provided for as one of the leading principles of civil procedure. The procedural principles are guidelines from which the Austrian CCP proceeds in structuring the proceedings. Only rarely are they explicitly mentioned in the law. One of these procedural principles pursues promoting an amicable dispute resolution. An appropriate example of this principle can be found in the provisions on court settlement (Art. 204 Austrian CCP) regarding suitable institutions for out-of-court conflict resolution, in particular, mediation.⁴⁸ Thus, in civil cases, where settlement is possible, judges may encourage parties to a dispute to settle in several ways. Article 204 of the Austrian CCP proclaims that:

1. At the oral hearing, the court may, in any situation of the case, on the application or of its own motion, attempt an amicable settlement of the legal dispute or bring about a compromise on individual points in dispute. In this context, reference shall also be made, if this appears expedient, to institutions that are suitable for the amicable settlement of conflicts. If a settlement is reached, its content shall be recorded in the minutes of the hearing upon request.
2. For the purpose of attempting or recording a settlement, the parties may, if they agree, be referred to a commissioned or requested judge....⁴⁹

On the one hand, this legal provision implies classical court conciliation, which is an integral part of the civil procedure and may be applied in all cases and committed by the trial judge. Accordingly, the trial judge may bring an amicable dispute settlement in the form of a judicial settlement. This settlement is considered a procedural contract and must be drawn up in the form of a court record.⁵⁰ The record may be prepared by the trial judge, a requested judge or a bailiff.⁵¹ On the other hand, this legal article also leads to the understanding that the Austrian court may encourage the parties to a civil dispute to seek amicable solutions outside the court as part of conciliation efforts (e.g., the judge refers the parties to specific institutions dealing with the settlement of conflicts, such as state-recognized conciliation boards, counselling services or mediators).

47 Fasching (n 30) 36-8.

48 Kodek and Mayr (n 35) 64, 65, 73.

49 Code of Civil Procedure of Austria (n 46) art 204.

50 Jürgen Schmidt, 'Bestehende und neue Formen der Konfliktlösung' in A Deixler-Hübner und M Schauer (hrsg), *Alternative Formen der Konfliktbereinigung: ADR, Richtlinie, Schlichtungswesen, Mediation & Einigungsverfahren* (MANZ Verlag 2016) 183-4.

51 Klaus Gossi, 'Gerichtlicher Vergleich' (*Lexis 360*, September 2023) <https://360.lexisnexis.at/d/lexisbriefings/gerichtlicher_vergleich/h_80001_2338982765791970208_a909951de> accessed 18 April 2023.

Furthermore, Article 204 of the Austrian CCP also serves as the legal basis for the court-connected settlement procedure envisaged by the Austrian project⁵² around the so-called 'conciliation judges' acting in 'conciliation hearings'.⁵³ For almost a decade now, judges trained as mediators, or judges who have completed additional training in conflict resolution and settlement (a modular program of 100 hours, including a theory and a practical part), have been working in Austrian courts. Their role is to facilitate settlements in conflict disputes pending in court, primarily in civil, family, or tenancy law cases.⁵⁴ With the parties' consent, the trial judge can refer conflictual cases, in which mediating appears more practical than judging, to a specially trained colleague judge.

Within an average of half a day, or two sessions of approximately two hours each, this judge assists the parties in working out an amicable solution using the methods of conflict management.⁵⁵ Conciliation judges have no decision-making authority and solely assist parties in resolving the conflict, fostering a court proceeding conducted amicably and in a future-oriented manner.⁵⁶ The essential point is that, in cases where the conflict has little to do with the subject matter of the legal dispute, the court proceeding is the wrong choice. In contrast, in the conciliation hearing, akin to mediation, the parties are guided to recognise each other's needs behind the conflict to shift away from their often rigid positions and standpoints and move towards a common goal. The conciliation judge does not give legal information or advice, and unlike court proceedings, a conciliation hearing is never conducted from the judge's table. The parties should be able to meet each other at eye level.⁵⁷

A conciliation hearing will be successful if and as long as the parties are constructively interested in and work to solve the problem. Therefore, it can be terminated at any time by the parties, and the conciliation judge.⁵⁸ If no progress is observed in the conciliation hearing, it must consequently be terminated.⁵⁹ At the end of the conciliation process, an agreement can be reached regarding further proceedings before the conciliation judge, and this agreement will be informally documented for the parties, again similarly to mediation, often through a flipchart protocol.⁶⁰ In cases where no agreement or only a partial settlement is reached, the court proceedings continue seamlessly. If the parties require more time to

52 'Gerichtliche Einigungsverfahren' (*Österreichischer Verein für Co-Mediation*, 20 November 2017) <<https://co-mediation.or.at/gerichtliche-einigungsverfahren/>> accessed 26 June 2023.

53 Angelika Eisenreich-Graf und Ulrike Rill, 'Das Einigungsverfahren: die gerichtliche Streitbeilegung als Chance für die Zukunft' (2019) 4 RZ Österreichische Richterzeitung 55; Martin Moritz, 'Mediation und Vergleich im verwaltungsgerichtlichen Verfahren: Widerspruch oder Chance?' (2021) 11 RZ Österreichische Richterzeitung 245.

54 Eisenreich-Graf and Rill (n 53); Meisinger (n 40) 103-6.

55 Eisenreich-Graf and Rill (n 53); Meisinger (no 40) 104-5; Konstanze Thau, 'Gerichtsinternes Einigungsverfahren: ein Jahresrückblick Pilotprojekt zu einer alternativen Streitbeilegung' (2016) 3 Interdisziplinäre Zeitschrift für Familienrecht 140.

56 Moritz (n 53).

57 Ferz (n 6).

58 Eisenreich-Graf and Rill (n 53).

59 Ferz (n 6).

60 *ibid.*

deal with the conflict on their own, they can be referred to mediators outside the court or other experts at their discretion.⁶¹

As far as the costs for the conciliation proceedings are concerned, these are already covered by the court fees (legal costs), thus eliminating any additional costs for the parties.⁶² As already mentioned, an entry is also made in the schedule of responsibility for conciliation proceedings, but, at present, there is no case-related discharge for the conciliation judges when they are used. The only purpose of the record is to provide transparency for all parties involved.⁶³

Another unique example of the procedural principle of promoting an amicable dispute resolution in the Austrian CCP is the attempt at reconciliation provided for in matrimonial proceedings (Art. 460 para. 7 Austrian CCP).⁶⁴ In cases of marital disputes, judges are granted a more active and settlement-oriented role. The Austrian CCP states in Art. 460 para. 7 that 'In proceedings for divorce, the court shall, at the beginning of the oral proceedings, first try to reconcile the spouses (attempt at reconciliation) and work towards reconciliation at every stage of the proceedings, as far as possible'.⁶⁵ Such kind of court conciliation is possible not only in the first instance court but also in appeal proceedings.

The civil process is also intended to help resolve private conflicts to avoid further litigation. Therefore, the opportunity for dialogue and rational discourse should also be given at an early stage of the legal process. Thus, the Austrian legislator has provided for oral proceedings between the parties and an attempt at settlement in the preparatory hearing (Art. 258 para. 1 clause 4).⁶⁶ Art. 258 para. 1 clause 4 of the Austrian CCP proclaims, 'The preparatory hearing as part of the oral proceedings shall serve the following purposes: [...] 4. The making of an attempt at a settlement and, in the event of its failure, the discussion of the further progress of the proceedings and the announcement of the programme of the proceedings [...]'. Accordingly, attempting a settlement is one of the purposes of the preparatory hearings.⁶⁷ This brings the Austrian example close to Lithuania, where court conciliation is also established in a laconic way. Also, similar to Lithuania, if the case is settled at the first oral hearing, the flat fees are reduced according to note 4b of tariff post 1 of the Austrian Court Fees Act. Interestingly, in Austria, this also applies if the case is settled at the beginning of the second hearing as a consequence of mediation initiated at the latest during the first oral hearing. Proof of the mediation must be provided in writing.⁶⁸

61 Eisenreich-Graf and Rill (n 53).

62 *ibid*; Schmidt (n 50) 201; Thau (n 55).

63 Ferz (n 6).

64 Kodek and Mayr (n 35) 73.

65 Code of Civil Procedure of Austria (n 46) art 460 para 7.

66 Kodek and Mayr (n 35) 34-5.

67 Code of Civil Procedure of Austria (n 46) art 258 para 1 subpara 4.

68 Court Fees Act of Austria 'Gerichtsgebührengesetz – GGG' (as amended of 2023, current version) <<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002667&FassungVom=2023-07-17>> accessed 20 June 2023.

At this point, statistical data on court conciliation in Austria should also be discussed. However, due to the empirical scarcity of the Austrian judiciary, it is not possible to draw on current data comprehensively. Nevertheless, a performance report of the Austrian Federal Ministry from 2014 provides figures on the termination of civil court proceedings conducted that year. Thematically interesting is the distribution between the termination of proceedings by judgement and the termination of proceedings by settlement at that time. In a nationwide comparison, the number of proceedings before the local and regional courts that ended with a settlement was one-third lower than the number of proceedings that ended with a judgement in 2014. However, looking only at proceedings before the regional courts, including labour and social law proceedings, even 20% more proceedings ended with a settlement than by judgement. Thus, as the practice in 2014 has already shown, the court settlement is a non-negligible instrument for conflict resolution within the Austrian courts.⁶⁹ Concerning the conciliation judge procedures applicable in the project status, there are also no official statistics that can be referred to at this point. However, based on the personal statements of the judges involved, it can be assumed that the case numbers are rather low.

To sum up, the Austrian model of court conciliation corresponds to all the criteria set up for classical court conciliation. The Austrian court conciliation procedure is oriented towards a settlement. It may be conducted by the judge, who has been appointed as the trial judge, or by the requested judge in agreement with the parties. In the event of an unsuccessful assisted dialogue, the trial judge proceeds with the trial. Judges are not specifically trained as conciliators; but some passed training to develop their qualifications.

3.2. Court-Connected Settlement Procedures in Lithuania

3.2.1. Origins of the Settlement-Oriented Legal Regulation in Lithuanian Civil Justice

After the restoration of its independence in 1990, the Republic of Lithuania faced a clear need to renew the legal system and, most importantly, legislation. The previous Code of the Civil Procedure was inherited from the Soviet occupation period and did not correspond to new political and economic realities.⁷⁰ It was decided to prepare a completely new Code of Civil Procedure of the Republic of Lithuania (Lithuanian CCP)⁷¹ as only such a granted a consistent transition to a modern civil procedure typical for progressive democratic states. This included choosing the concept of social civil procedure, which was grounded by the ideas of F. Klein, and following the example of the Austrian CCP as a classical outcome of this concept.⁷² In line with all other important conceptual changes, the new Lithuanian CCP introduced measures fostering amicable settlements into the legal system.

69 Schmidt (n 50) 176-8.

70 Vytautas Nekrošius, 'Naujasis civilinio proceso kodeksas ir bendrojo proceso pirmosios instancijos teisme reformos pagrindiniai bruožai' (2002) 44 Teisė 102.

71 Code of Civil Procedure of the Republic of Lithuania No IX-743 'Civilinio proceso kodeksas' of 28 February 2002 <<https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.162435/asr>> accessed 20 June 2023.

72 Nekrošius (n 70) 102.

Dramatical political changes and a sudden transition to a democratic regime in a few years dramatically raised the courts' workload. According to R. Simaitis, this fated the growing importance of restoring legal (formal) and social (material) peace between the parties. Undoubtedly, it led to the change of the role of the judge, adding additional functions and fostering the social value of peace.⁷³ Such transformation was quite the opposite of the previous Lithuanian Soviet Socialist Republic Code of Civil Procedure, where the court had no rights or powers to encourage parties to settle. The 'authoritarian' model of directive dispute resolution was predominant, all powers vested in the hands of judges, and there was no space for 'cooperative' procedures and active involvement of the parties.⁷⁴ Hence, the concept of the social civil procedure brought into the Lithuanian legal system a clear understanding of the need for a more active judiciary, including a set of measures oriented towards fostering more amicable resolution of disputes.

Progressive ideas of academicians about more socially oriented processes were reflected in the text of the new Lithuanian CCP. In general, the Lithuanian CCP aims *inter alia* on restoring judicial peace between the parties to a dispute (Art. 2 Lithuanian CCP). In Lithuanian legal science, judicial peace differs from social peace. Judicial peace refers to the final court decision, which is no longer an object of appeal. Meanwhile, social peace means reconciliation in the restoration of relationships by mutually agreed and accepted conditions. V. Vėbraitė explains that such wording of the aim of the Lithuanian CCP does not mean that the restoration of social peace is not important. Articles of Lithuanian CCP prove that civil procedure in Lithuania is oriented towards reconciliation of the parties, and determining the truth and passing a court judgement is necessary only when there are no further possibilities of reconciling the parties.⁷⁵ Reimbursement of the 75 percent of court fees in case of reaching a settlement may be mentioned. This legal rule in doctrine is qualified as the preventive aim of the civil procedure, encouraging them to settle rather than proceed with litigation.⁷⁶

Knowing the origins of the Lithuanian CCP it is natural to find several legal norms oriented toward settlements. The court is granted an active role in those cases when settlement agreements are likely to be reached. Judges were even obliged to take measures for settlements.⁷⁷ In line with economic incentives to settle (reimbursement of the bigger part of court fees), currently, Lithuanian CCP envisages two court-connected settlement procedures, which are accessible for all parties to the civil disputes free of charge: court-connected conciliation and court-connected mediation.

73 Rimantas Simaitis, 'Teisminis sutaikymas' (2004) 52 Teisė 92.

74 *ibid* 93.

75 Vīgita Vėbraitė, 'Šalių sutaikymas kaip civilinio proceso tikslas ir jo galimybės Lietuvoje' (2008) 69 Teisė 109.

76 Nekrošius (n 70) 108.

77 Simaitis (n 73) 93.

3.2.2. Court Conciliation

As mentioned above, the Lithuanian CCP, which entered into force on 1 January 2003, brought a new attitude towards settlements in the civil process. For the first time in Lithuania, this law introduced the court conciliation. This novelty, after a few years, inspired even further attempts to promote settlements in civil cases through court-connected mediation (see sub-chapter 4.2.2.).

As in Austria, Lithuanian judges are encouraged to take conciliation measures in all civil cases. In family matters, the court has a duty to be more active and undertake measures to reconcile the parties and protect the rights and interests of the children (Art. 376 para. 2 Lithuanian CCP). In Lithuania, as in Ukraine, the conciliatory activities of the judges are, in fact, concentrated in the preparatory stage of the process. Even organising the preparatory hearing is related to the chance to settle. If the judge does not believe that settlement is possible and there are no other preconditions for organising preparatory hearing, he or she can even skip this stage of the process: 'The court shall hold a preparatory hearing if it considers that a settlement can be reached in the case, or if the law obliges the court to take steps to reconcile the parties, or if this will lead to a better and more thorough preparation for the trial' (Art.228 para. 1 Lithuanian CCP).

It must be emphasised that during the Covid pandemic preparatory hearings normally were absent. After the pandemic, this situation remained the same. It seems that it is quite easier for the parties and courts to prepare for the hearing by document exchange. Judges already mentioned that the absence of a preparatory hearing is not useful for settlements in court conciliation or in recommending court-connected mediation.⁷⁸ The lack of a real in-person meeting is one of the obstacles to judges being more active in conciliation or recommending court mediation.

Lithuanian CCP states, 'The court shall take steps to reconcile the parties' (Art. 213 para. 1 Lithuanian CCP). This is the only procedural rule regarding the court conciliation process. Court conciliation usually takes place in the court hall; there is no standard structure of this process as it depends on the conciliation judge (same person as a trial judge) and what practice they apply. In academia, there were attempts to suggest certain structure for the court-connected conciliation,⁷⁹ it was never embodied neither in legislation nor in any other recommendatory methodological materials for the conciliators. If the judge's attempts to reconcile parties prove ineffective, the court hearing continues as normal.

The Lithuanian model of court conciliation provides the conciliator role for a judge appointed to examine the case. There are no qualification requirements to take this role, as it is presumed that all judges can reconcile parties in civil cases. Naturally, the results of court conciliations differ very much. Those judges who gain knowledge and developed skills in conflict resolution achieve far more compared with those who implement the duty to

78 Vygantė Milašiuūtė ir kita, *Privalomosios mediacijos šeimos ginčuose teisinio reguliavimo poveikio ex post vertinimas*, 2023 (STRATA 2023) 1 priedas.

79 Simaitis (n 73) 99.

reconcile only by a formal question for the parties: is there any possibility of settling? This presumption is mostly based on the results of private communication with the judges, as no research in this field has been done recently. In 2004, it was announced that about 80 percent of settlements in court were reached by private negotiation processes, and only 20 percent with the help of judges' conciliators.⁸⁰ But no relevant data is available to prove the growing number of successful court-connected conciliation numbers.

3.2.3. Court Mediation

Despite the fact that today, in Lithuania measuring in numbers, out-of-court mediation prevails, for the first time in the Lithuanian legal system, this amicable dispute resolution was introduced in 2005 through a court-connected mediation pilot project. This pilot project was inspired by the good practice of the province of Quebec in Canada⁸¹. It was implemented inside the court system by several enthusiastic judges and academicians on the grounds of the decree of the Judicial Council.⁸² Such inspiration may be grounded by the disclosed benefits of the settlements and the need for more active assistance for the parties in their negotiations. In a few years, this initiative exceeded the limit of the pilot project, and court-connected mediation is available in all Lithuanian courts both in civil (from 2011) and administrative (from 2019) disputes and has already become an integral part of the civil and administrative procedure.

According to I. Saudargaitė, court-connected mediation 'was introduced into the Lithuanian legal system by applying a mixed approach (a different approach as compared to the one adopted in most countries of civil tradition): it was implemented by attempting to apply it from court-to-court (so-called "pragmatic approach") jointly with the adoption of the legal regulation of this ADR procedure (so-called "legislative approach")'.⁸³ This has fated extremely close relations between court-connected mediation and courts. Even today, such an approach results in the specific position of the judges in the national list of mediators. Judges are enrolled in this list according to different rules to compare with other mediators.⁸⁴

The parties may initiate court-connected mediation, and the judge can recommend parties to a dispute to mediate. At the beginning of the application court-connected mediation in Lithuania was completely voluntary. In 2019, judges were also granted the discretion to refer parties to a dispute to mandatory court-connected mediation (Art. 231¹ para. 1 Lithuanian CCP).

80 *ibid* 105.

81 Natalija Kaminskienė, 'Teisminė mediacija Lietuvoje. Quo vadis?' (2010) 9(1) *Socialinis darbas* 58.

82 Resolution of the Council of the Judiciary of the Republic of Lithuania No 13P-348 'On the Trial Project of Judicial Mediation' of 20 May 2005 <<https://www.teismai.lt/data/public/uploads/2005/05/20050520-348.doc>> accessed 20 June 2023.

83 Ieva Saudargaitė, 'Judicial mediation in civil disputes in Lithuania' (DPhil thesis, Mykolo Romerio universitetas 2015) 210.

84 Law of the Republic of Lithuania No X-1702 'On Mediation' of 15 July <<https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/a1214b42d40911eb9787d6479a2b2829?jfwid=13yl78zgm>> accessed 20 June 2023. According to Art 6 para 4 of Law on Mediation, judges, who have gained no less than 3 year working experience, are not required to pass mediator's qualification exam and for them enough to have 16 hours initial mediation training (regular requirement – 40 hours).

Today, the general principle is that court mediation is voluntary. Still, in cases where judges see the clear perspective of settlement, they might use their discretion to order parties to mediate mandatory.

Judges or private mediators serve as mediators in civil cases. Both should be enrolled on the Lithuanian list of mediators.⁸⁵ Statistics show that judge mediators mediate the bigger part of court mediation processes, and only in rare situations are private mediators invited to help.⁸⁶ Judges (if he or she is a mediator) can mediate even in the cases where they are commissioned. Also, the judge can refer parties who are willing to mediate to another judge mediator. In case there is no judge available or willing to mediate, the judge who is examining the case can request a private mediator appointment with the State Guaranteed Legal Aid Service (Art. 231¹ para 2 of Lithuanian CCP). After getting such a request, this institution appoints one of the private mediators, who are listed in the Lithuanian list of mediators and are in contractual relations with an appointing body. The court order to start the court mediation procedure postpones the proceedings and sets a precise time for the next hearing. Court mediation should be finished by that date, but this time limit may be extended upon the mediator's request (Art. 231¹ para. 3 Lithuanian CCP). After the appointment, the mediator continues the process following the general concept and structure of mediation. During the court mediation period, 'the appointed mediator shall have access to the civil file, or, at the mediator's request, the civil file shall be handed over to him or her for signature' (Art. 231¹ para. 3 Lithuanian CCP).

The process of the mediation, from the appointment of the mediator to the termination of it, is not regulated in detail. The procedural part of court mediation is mostly regulated by the Rules of Court Mediation.⁸⁷ Mediators must secure implementation of basic mediation principles (voluntariness, confidentiality, mutual respect, neutrality and impartiality of the mediator, cooperation, professionalism of the mediator and honesty (clause 6) and may arrange the process as they see is suitable, including decisions in regard of the forms of mediation. They can have common sessions, caucuses, organise distance mediation, etc. (clause 20). The court mediation process may be terminated: 1) after the signing of a settlement agreement; 2) when any party to the dispute withdraws from the process; 3) after the end of the term established in the court order; 4) after the mediator terminates the court mediation process (if it is clear that settlement cannot be reached, of the settlement will be unenforceable or illegal, etc. (clause 27).

In case of the settlement, the judge, who performs in both capacities (as judge and mediator), may approve the agreement. If the judge is appointed only as a mediator, the parties must submit the settlement agreement to the judge, primarily commissioned to hear

85 'The List of Mediators of the Republic of Lithuania' (*Lietuvos elektroninių paslaugų portale*, 2003) <<https://e.teismas.lt/public/teismin%C4%97-mediacija/>> accessed 20 June 2023.

86 National Courts Administration, *Annual Report of Lithuanian Courts 2021* (Lietuvos teismai 2022) 2 <<https://www.teismai.lt/data/public/uploads/2022/03/teismai2022.pdf>> accessed 20 June 2023.

87 Resolution of the Council of the Judiciary of the Republic of Lithuania No 13P-125-(7.1.2) 'Rules on Court mediation' of 30 November 2018 <<https://www.e-tar.lt/portal/lt/legalAct/70208500f79411e880d0fe0db08fac89/asr>> accessed 20 June 2023.

the case. Court approval provides the settlement agreement with *res judicata* power, which is included in the court decision text. At the same time, it finishes court proceedings. The judge mediator cannot take part in the substantive proceedings. This means that if a judge was mediating the case, where he was primarily assigned as a judge, in case of not settling, he or she must be changed with another judge, who will step into the process and examine the case regularly.

Statistical data shows that court-connected mediation is still rarely used in practice. According to the data provided by the National Administration of Courts, the number of civil cases transferred to court-connected mediation in 2022 was 597, 5 percent more than recorded in 2021 (574 cases). 516 cases were mediated in courts in 2020, and 533 cases in 2019. In 2022, the success rate of mediation in civil cases in Lithuania reached 45 percent. In 2022, as in previous years, the largest number of civil cases referred to court-connected mediation were related to family matters, the law of obligations and cases arising from real estate legal relations. Relatively low numbers of court-connected mediation and the tendency to remain at the same level without any sufficient growth inspires discussion in the judiciary and beyond about the constant need to develop this institute.⁸⁸

3.2.4. Benefits for the Judges who Conciliate or Mediate

In Lithuania court conciliation is a duty of the judges in all courts and all judges are in fact conciliators. Remarkably, judges do not receive any additional salary for doing it. This scenario varies slightly for judges who function as court mediators. Those judges may serve as court mediators, albeit without a right to mediate in out-of-court processes, and their involvement is entirely voluntary. Those, who are willing to be court mediators, must be enrolled in the Lithuanian List of Mediators. In their case, it is required only to have not less than three years of working as a judge experience and take a 16-hours introductory course on mediation. In regard of additional payments, it should be stated that judge mediators are not getting any additional money for being court mediators. But they workload (number of cases) is reduced if they perform court mediations.⁸⁹

Lithuanian judge mediators express their dissatisfaction with such arrangements, emphasising that mediation demands more effort and time than handling ordinary cases.⁹⁰

88 National Court Administration, *Annual Report of Judicial Mediation Commission 2022* (Lietuvos teismai 2023) <<https://www.teismai.lt/data/public/uploads/2023/04/teismines-mediacijos-komisijos-2022-m.-veiklos-ataskaita.pdf>> accessed 20 June 2023.

89 Resolution of the Council of the Judiciary of the Republic of Lithuania No 13P-79-(7.1.2) 'On approval of the description of the procedure for calculating workload in the courts' of 29 May 2015 <<https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/276081500e1b11e5b0d3e1beb7dd5516/asr>> accessed 20 June 2023. According to the ruling the court mediation is granted coefficient of complexity 0,5. The most complicated cases in courts of 1st instance are granted 1,7 coefficient. These cases are related to insolvency procedure. In fact 0,5 coefficient shows, that Council of judges treat performance of court mediation as simple case. The lower coefficient 0,4 is granted only for cases in enforcement procedure and court order issuing cases.

90 Agnė Tvaronavičienė and others, 'Towards More Sustainable Dispute Resolution in Courts: Empirical Study on Challenges of the Court-Connected Mediation in Lithuania' (2021) 8(3) *Entrepreneurship and Sustainability Issues* 645, doi:10.9770/jesi.2021.8.3(40).

In addition, being a court mediator or good conciliator can positively impact one's career in the court system. According to judges, being a court mediator add some points in evaluation of the judge. This is reflected in legal regulation as well.⁹¹

To sum up, Lithuania's parties involved in a civil dispute have two court-connected options promoting settlement. In every civil case, the court must 1) offer the parties the possibility of agreeing on terms suitable for both parties and the conclusion of an amicable settlement and 2) notify the parties of the possibility of resolving the dispute through judicial mediation. The desired result of both these procedures is a settlement agreement, which, after court approval, gains *res judicata* effect. Court conciliation may be performed in all cases and is carried out by the judge, who is examining the case, during the preparatory hearing. Court mediation is more intensive interruption by the neutral third party. It can be done in all stages of civil procedure. As mediators here, in most cases, they serve trained judge-mediators or private mediators outside of the court system.

3.3. Court-Connected Settlement Procedures in Ukraine

3.3.1. Origins of the Settlement-Oriented Legal Regulation in Ukrainian Civil Justice

As historically different territories of modern Ukraine were parts of the Russian Empire and the Austro-Hungarian Empire, both the 1864 Russian Empire Statute of Civil Procedure and the 1895 Austrian Code of Civil Procedure were in force in different lands.⁹² Both codes were prominent examples of civil procedural codifications of the 19th century. However, later, during the Soviet period, all achievements in civil procedure area were abandoned, and the so-called 'principle of socialistic legality', according to which all state authorities and citizens were obliged to comply with the requirements of the legislation, which primarily served the interests of the state instead of human rights and freedoms, became prevailing over any considerations in civil procedure.⁹³ The abovementioned has factually cut off the Ukrainian civil procedure from the European tradition in the civil justice area for a long period.

91 Resolution of the Council of the Judiciary of the Republic of Lithuania No 13P-135-(7.1.2) 'On approval of the description of the procedure for evaluation of the activities of judges' of 13 October 2014 <<https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/c42840b0646e11e48710f0162bf7b9c5/asr>> accessed 20 June 2023. According to the ruling, the evaluation system is created and based on general evaluation and some additional activities of the judges, which gains him or her additional evaluation points. Mediation is one such activity in line with others, including many cases, which were ended by the settlement. Para. 10.5. of this ruling envisages the possibility of gaining up to 5 additional points for the performed court mediations (evaluating the number of mediated cases and their results). The same point may be gain for the settlement agreements number in investigated cases and other additional activities.

92 Iryna Izarova, 'Judicial Reform of 1864 on the Territory of the Ukrainian Provinces of the Russian Empire and Its Importance for the Development of Civil Proceedings in Ukraine' (2014) 2(4) Russian Law Journal 114, doi:10.52783/rlj.v2i4.250; VV Komarov, *Civil Procedural Legislation in the Dynamics of Development and Practice of the Supreme Court of Ukraine* (Pravo 2012) 13-4.

93 Komarov (n 92) 16-8.

Only after gaining independence in 1991 and ratifying the European Convention on Human Rights in 1997 did Ukraine prove its commitment to European legal values, reflected in the Civil Procedure Code of Ukraine in 2004.⁹⁴ However, at that time, neither legislators nor legal practitioners paid enough attention to the peaceful settlement of disputes in civil procedure. Later, with the donor community's support, the interest in this issue increased. It resulted in the introduction of several pilot projects within the justice sector aimed at the implementation of amicable dispute resolution procedures into civil procedure. The most relevant in this regard was the judicial mediation pilot project with the European Commission and the Council of Europe⁹⁵ and a project implementing the special procedure for settling a dispute with the participation of a judge supported by the Canadian National Judicial Institute.⁹⁶

The latter procedure was enshrined in the national civil procedural legislation in 2017 through the adoption of the new edition of the Civil Procedural Code, strengthening the consensual tenet in civil procedure as a part of Ukrainian reforms aimed at the adaptation to the legislation to the EU law.⁹⁷ The Civil Procedural Code of Ukraine (Ukrainian CPC) enshrines that the court *inter alia* shall: 'promote the settlement of a dispute by reaching an agreement between the parties' (Art. 12 para. 5 clause 2 Ukrainian CPC). In first-instance courts, the parties during the preparatory hearing are asked about their wish to settle the dispute using ADR methods, in particular, mediation, arbitration, or settlement of the dispute with the participation of a judge (Art. 197 para. 2 clause 2 Ukrainian CPC). Mediation and arbitration, in this case, are purely out-of-court processes, which can be chosen by the parties voluntarily and carried on outside the court. If parties decide to mediate, the court suspends proceedings (Art. 251 para. 1 clause 4-1 Ukrainian CPC), and parties can go to a mediator outside the court.⁹⁸ If parties decide to refer their case to

-
- 94 Code of Civil Procedure of Ukraine No 1618-IV of 18 March 2004 <<https://zakon.rada.gov.ua/laws/show/1618-15#Text>> accessed 20 June 2023.
- 95 Grants 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.
- 96 Project 'Education of Judges for Economic Growth' with the support of the Canadian National Judicial Institute. About projects see more detail: T Tsuvina and 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) 24-5; Tetiana Tsuvina and Tetiana Vakhoniva, 'Law of Ukraine "On Mediation": Main Achievements and Further Steps of Developing Mediation in Ukraine' (2022) 5(1) Access to Justice in Eastern Europe 142, doi:10.33327/AJEE-18-5.1-%20n000104.
- 97 Iryna Izarova, 'Civil Procedure Reform During the Period of Ukraine's Independence: New Goals and Principles' in Yu Prytyka and I Izarova (eds), *Access to Justice in Conditions of Sustainable Development: to the 30th Anniversary of Ukraine's Independence* (Dakor 2021) 32.
- 98 About Ukrainian model of mediation and its integration into the court proceedings see: Oleksandr Drozdov, Oleh Rozhnov and Valeriy Mamnitskiy, 'Mediation and Court in Ukraine: Perspectives on Interaction and Mutual Understanding' (2021) 4(3) Access to Justice in Eastern Europe 181, doi:10.33327/AJEE-18-4.3-n000082; Vytautas Nekrošius, Vigita Vėbraitė, Iryna Izarova and Yurii Prytyka, 'Legal, Social and Cultural Prerequisites for the Development of ADR Forms in Lithuania and Ukraine' (2020) 116 Teise 8, doi:10.15388/teise.2020.116.1; Yurii Prytyka, Iryna Izarova, Serhii Kravtsov, 'Towards Effective Dispute Resolution: A Long Way of Mediation Development in Ukraine' (2020) 29(1) Asia Life Sciences 389; Tsuvina and Vakhoniva (n 96); Tsuvina and Serhieieva (n 96), etc.

arbitration, their written arbitration agreement is considered as a ground to close the proceeding (Art. 255 para. 1 clause 8 Ukrainian CPC). The court connected the settlement option – settlement of a dispute with the participation of a judge. This method is regulated in a more detailed way, and Ukrainian scientific literature is often characterised as a type of court conciliation.⁹⁹

3.3.2. Settlement of a Dispute with the Participation of a Judge

The Ukrainian model of court conciliation is unique in several aspects. In most countries, despite proclaiming to have settlement-friendly civil procedures, laws pay little attention to the court conciliation process. For example, in Lithuania, it is merely stated that the court shall take steps to reconcile the parties (Art. 231 para. 1 Lithuanian CCP). In contrast, the Ukrainian CPC dedicates a separate chapter to the settlement of a dispute with the participation of a judge. The uniqueness of the Ukrainian court conciliation model lies, firstly, in the clear notion that this procedure is distinct from the court hearing and can only proceed with the agreement of the disputing parties.

It should be noted that this process is time-restricted (maximum 30 days, with no possibilities of extension) and may be carried on only before the commencement of the proceedings on merits. All civil case judges should be prepared to apply this procedure, as the conciliator is the judge who was primary assigned to trial a case. Also, such a process may be carried out only if no third parties with stated independent claims are involved (Art. 201 para. 2 Ukrainian CPC). This settlement procedure starts by issuing the court's ruling, which suspends the proceedings.

It should also be noted that parties to a dispute can utilise this settlement procedure with the participation of a judge only once, as the repeated settlement of the dispute with the participation of a judge is not allowed. Ukrainian legislation in the field of settlement procedure with the participation of a judge emphasises the possible forms of the meetings, permitting both joint and separate meetings. Joint meetings involve all parties, their representatives and judges, while separate meetings are organised with a judge and each party separately (Art. 203 Ukrainian CPC).

Judges who fulfil this settlement procedure must explain the purpose, procedure, parties' rights and obligations in the settlement process (Art. 203 Ukrainian CPC). While this legal norm allows us to predict that there is a certain standard procedure which judges must follow, there is no available data about any additional documents that may reveal the key aspects of this settlement procedure. The lack of procedural rules and the absence of specific judges' training in the conciliation field causes situations where every judge follows his model of conciliation.

99 A Kotsiuruba, 'Conciliation Procedures In Civil Proceedings In Ukraine' (2020) 2(113) *Bulletin of Taras Shevchenko National University of Kyiv Legal Studies* 28, doi:10.17721/1728-2195/2020/2.113-6; Tetiana Tsvina, 'Implementation of the Institute of Court Mediation as A Promising Direction of Reforming the Civil Procedural Legislation of Ukraine' (Ukraine on the Way to Europe: Reform of Civil Procedural Legislation: International scientific and practical conference, Kyiv, 07 July 2017) 195.

The Ukrainian CPC delineates the rights of judges in the settlement procedure. There is a clear distinction between what can be done by the judge during joint meetings and what can be done during separate meetings. During the joint meetings, the powers of the judge are limited to clarifying the grounds and subject matter of the claim, the grounds for objections, explaining the standard of proof in such cases, inviting parties to make proposals for peaceful settlement of disputes, and taking other actions aimed at peaceful settlement of the dispute by the parties. The judge may also suggest to the parties a possible peaceful dispute settlement (Art. 203 para. 4 Ukrainian CPC), emphasising the judge's role as a legal advisor. During closed meetings, judges are allowed to share even more of their knowledge by informing the party of case law in similar disputes and offering the parties and (or) their representatives possible ways of peaceful dispute settlement (Art. 203 para. 5 Ukrainian CPC).

This legal framework indicates that while the legislator expects the judge conciliator to play an active role, the focus is exclusively on sharing legal knowledge rather than using the conciliator's soft skills. The Ukrainian CPC explicitly prohibits judges from providing legal advice, recommendations, or assessment of evidence in the case (Art. 203 para. 6 Ukrainian CPC).

In summary, judges possess the right to share their legal knowledge and experience but are prohibited from offering legal advice. The practical implementation of this legal norm poses challenges, as distinguishing between providing information and delivering legal advice can be elusive. The Ukrainian settlement involving a judge procedure is confidential. No minutes are kept or voiced, nor are video records or photos taken during the process (Art. 203 paras. 7 and 9 Ukrainian CPC).

Termination of this settlement procedure can occur for four reasons 1) upon the submission of an application by a party to terminate the dispute settlement with the participation of a judge; 2) when the stipulated period for settling a dispute with a judge expires; 3) at the judge's initiative in case of delay in dispute settlement by any of the parties; 4) in case of concluding a settlement agreement by the parties and applying to the court with a statement of its approval or the claimant's application to the court to leave the claim without consideration, or in case the claimant refuses the claim or the defendant recognises the claim. Ukrainian legal regulation envisages the rule related to the case transferal to the other judge in case of an unsuccessful settlement procedure (Art. 204 paras. 1 and 4 Ukrainian CPC), highlighting the Ukrainian legislators' concern for the judge's impartiality.

As mentioned before, all judges working within the civil justice system are obliged to be prepared to assist parties in settlement procedures. Notably, considering the specific skills and knowledge required for this task, Ukrainian judges do not undergo any special education about soft conflict management skills and conciliation procedures. The National School of Judges has developed a two-day training on the settlement of a dispute with the participation of a judge. It has three modules ('Dispute settlement with the participation of a judge: historical excursion, international practice, difference from mediation. Principles and advantages of the procedure'; 'Psychological aspects of the dispute settlement with the

participation of a judge'; 'Procedure and conditions of the Dispute settlement with the participation of a judge in civil proceedings').¹⁰⁰ However, it is not obligatory for the judges to participate in such training.

A settlement procedure with the participation of a judge is seen as an option for the parties and requires additional time from the judge's side. All judges, however, are expected to provide such assistance to the parties regularly and are not encouraged to do it or promote it through additional payments, reduced workload or any other benefits.

Statistical data shows that this procedure is not very popular in practice. In particular, in 2019, there were 50 rulings on conducting this procedure and 102 rulings on its closure (taking into account settlement procedures started in 2018, including 12 cases which were reconciled and 32 cases transferred to another judge for further consideration); in 2020, there were 77 rulings on conducting of this procedure and 78 rulings on its closure (including 22 cases which were reconciled, and 55 cases, which were transferred to another judge for further consideration); in 2021, there were 66 rulings on conducting of this procedure and 66 rulings on its closure (including 12 cases which were reconciled, and 47 cases transferred to another judge for further consideration) were issued; in 2022, 22 rulings on conducting of this procedure and 28 rulings on its closure (including 3 cases which were reconciled, and 22 cases transferred to another judge for further consideration) were issued. The relatively low number of procedures prompts discussion about new approaches in this regard. One of the options can be introducing judicial mediation or providing special education for judges in conflict management skills to enhance the effectiveness of the existing amicable dispute resolution procedure.

In summary, parties involved in civil disputes in Ukraine can enter into specific settlement procedure with the participation of a judge, blending elements of both court conciliation and court mediation methods. This procedure can be viewed as an example of a court-amicable conciliation process. Notably, it differs from the classical court conciliation as the judge conciliator in Ukraine lacks the authority to continue the trial in the capacity of a judge if the conciliation procedure proves unsuccessful. Moreover, this settlement procedure is confidential, with the conciliator acting impartially and independently, aligning it with court mediation.

However, this process is distinctive due to the judge's qualifications. All Ukrainian judges in civil cases can attempt to reconcile their parties to a dispute, and no specific training is mandatory for them. While the settlement procedure is regulated in detail, there is a notable lack of clarity regarding the procedural steps and the overall structure that judges should adhere to. Furthermore, there are no clear boundaries for judges when sharing their legal knowledge and experience with the parties in a dispute.

100 'Settlement of a Dispute with the Participation of a Judge in Civil Proceedings' (*National School of Judges*, 23 June 2020) <<http://www.nsj.gov.ua/ua/news/vreguluvannya-sporiv-za-uchastu-suddi-v-tsilnilnomu-sudochinstvi-/>> accessed 20 June 2023.

In Ukraine, mediation is possible during the court proceedings, but it should be carried out outside the court by private mediators. Judges are not allowed to provide out-of-court mediation services.

3.4. Comparison of the Court-Connected Settlement-Oriented Procedures in Austria, Lithuania, and Ukraine

After analysing the individual court-based and settlement-oriented models employed in Austria, Lithuania, and Ukraine, it is evident that distinct models are used in all three countries.

It should be mentioned that the promotion of amicable settlement is not listed as one of the goals of the civil procedure in any of the three countries. Nevertheless, in all three countries, judges are, in one way or another, encouraged to undertake measures to reconcile the parties or at least make attempts to do it. In Ukraine, judges have such a duty, while in Lithuania, it is the duty of the judge to reconcile parties only in family cases. In other civil cases, attempts to reconcile are at the discretion of a judge. In Austria, this idea flows from the approach that a court trial is an *ultima ratio*, and Austrian judges, similar to those in Lithuania, are obliged to try to reconcile the parties in matrimonial matters.

Despite these differences, all three countries implement court-connected settlement procedures, which, although varying, share some similarities. For example, in all the countries analysed, court-connected settlement procedures are made available for disputants at no additional costs.

In Austria, in addition to the standard procedure, a new approach to supporting parties' amicable negotiations is being tested through the conciliation hearing. Disputants in civil cases can take advantage of the traditional judge-assisted judicial settlement negotiation, which each judge conducts during the trial. The judge encourages the parties to reconsider their position and potentially reach a settlement, which can be documented by the judge immediately. In addition, the parties may be encouraged to explore a second procedural avenue - the conciliation hearing, but by another judge not authorised to make decisions. In this process, a type of conciliation with elements of mediation aimed at interests takes place. The main difference between these two models is undoubtedly reflected in the division of functions between the judges. In the first case, the judge with authority to make decisions conducts the conciliation attempt personally, while in the second procedure, a separate judge, not involved in the actual court proceedings, conducts the mediative conciliation, resembling judicial mediation more than the first, the classic model of judicial conciliation.

In the case of Lithuania, the courts offer the disputing parties classical conciliation, akin to the Austrian model. This ADR method is available in all cases and performed by the same trial judge. While in Austria and Lithuania, judges are encouraged to attempt to reconcile parties in all civil cases, in family disputes, as mentioned earlier, they are even obliged to do it and must be more active in conciliation.

Austrian courts do not provide court mediation; instead, the parties to a dispute may be referred to out-of-court mediation services. The same rule regarding mediation is followed by Ukraine. In comparison, in Lithuania, parties to a dispute may mediate on a voluntary and sometimes even mandatory basis. Court mediation is most often performed by a trained judge mediator. Such court mediation procedures are confidential, and the judge-mediators act here as impartial and neutral. In case of unsuccessful court mediation, the judge-mediators are not allowed to continue their activities in the capacity of the trial judge in this case, and another judge must be appointed. Generally, this mediation model is closely connected with the court. Still, if no judge-mediator is available and willing to mediate, the commissioned judge may refer the case to the State Guaranteed Legal Aid Service to appoint an out-of-court mediator.

In the case of Ukraine, parties to a dispute have the option to choose the settlement procedure with the participation of the judge. The Ukrainian model has elements of both court conciliation and court mediation. It might be presented as an example of an amicable conciliation process. The main peculiarity is that all civil case judges may serve in their cases as judge-conciliators and do not need any specific qualification to do it. Thus, if such a procedure fails, the judge-conciliator cannot continue to hear a case as a trial judge. A new judge must be appointed. It is clear that this model is also close to the court mediation concept.

A settlement procedure in Ukraine may be applied until the start of the trial on the merits. Court conciliation formally may be applied only during the preparatory stage of the civil procedure in Lithuania. Still, in the case of court mediation, the Lithuanian legal regulation is very flexible. It allows the court to enter mediation and postpone the case trial in all stages of the civil procedure. In Austria, both forms of court conciliation are admissible at any stage of civil proceedings.

In all three countries, the main assistant to the parties in settlement procedures is the judge. Still, in Austria, it may be the commissioned or referred judge. In Lithuania, in case of court conciliation, it is always the commissioned judge; in case of court mediation – the commissioned judge (if he or she has the status of court mediator), referred judge (most commonly) or out-of-court mediator. In Ukraine, in the case of the application of conciliation procedure with a judge, a commissioned judge takes the role of a conciliator. Thus, in the case the conciliation fails, this judge is not allowed to proceed with the trial and pass a judgement. The same rule is applied in Lithuania regarding court mediation. If the commissioned judge takes the role of a court mediator in case of a non-settlement, he or she cannot proceed with this case. Another judge has to be appointed.

Regarding the qualifications of the judges who act as conciliators or mediators in the court-connected settlement procedures, only Lithuanian judges' court mediators have to fulfil specific requirements. Judge mediators should be trained (16 hours of training) and enlisted in the Lithuanian list of mediators.

In Austria and Ukraine, such additional activities of the judges do not grant them any additional bonuses. In Lithuania, judges and mediators get minor work reductions and may gain additional points in their further careers in the court system.

4 CONCLUSIONS

This article is an organic extension of the research on the trends of strengthening the consensual approach in civil procedure in European countries, which was initiated in the previous publication of the authors.¹⁰¹ In democratic states, civil procedure is designed to protect and guarantee the legal order by establishing a lasting legal peace as quickly and inexpensively as possible, with the active and responsible participation of those affected. This grants access to justice for everyone and ensures clear, quick, cheap, and understandable procedures while guaranteeing the right to be heard for every party in dispute.

Notably, a lot of ADR methods have recently become an integral part of modern civil procedure, no longer viewed as contradictory to litigation. Diverse legal frameworks and practices of different countries have already proved that the hybridisation of dispute resolution has great potential to build a more collaborative and disputants' interests-oriented process, which also manages the courts' workload and fosters access to justice.

The analysis of civil procedure legislation in Austria, Lithuania, and Ukraine revealed a growing tendency towards strengthening consuality in civil proceedings, which is increasingly noticeable in the European region. These three countries are actively developing their civil procedure, deeply rooted in the ideas of famous Austrian legal theorist F. Klein, and are committed to implementing the concept of social civil procedure.

Austria's model of court conciliation fully corresponds to the concept of classical court conciliation and contributes to orienting the civil procedure towards a settlement without diminishing focus on the judicial decision-making task. The conciliation proceedings may be conducted either by the judge appointed as trial judge or by the requested judge in agreement with the parties. In the event of an unsuccessful assisted dialogue, the trial judge proceeds with the trial. Judges are not specifically trained as conciliators, but some have undergone training to enhance their qualifications.

The Lithuanian civil procedure presents disputants with two court-connected settlement options. In every civil case, the court offers the possibility to agree on terms suitable for both parties and the conclusion of an amicable settlement. It notifies them about the potential of resolving the dispute through judicial mediation. Court conciliation, conducted by the judge examining the case, is available for all cases and takes place during the preparatory hearing. On the other hand, court mediation is a more intensive interruption by the neutral third party and necessitates specific preparation and training.

The Ukrainian model offers disputing parties the possibility of entering into a specific settlement procedure with the participation of a judge. This procedure has elements of both court conciliation and court mediation. A judge conciliator conducts the process, and in the event of an unsuccessful conciliation, they do not have a right to proceed with the trial in their capacity as a judge. All Ukrainian judges handling civil cases can attempt to

101 Tsuvina and others (n 1).

reconcile their parties to a dispute, and no specific training is obligatory for them. Additionally, in Ukraine, mediation is possible during court proceedings and is carried out outside the court by private mediators.

It seems that the experience of Austria and Lithuania in introducing conciliation in civil procedure could be useful for Ukraine. First, there is a clear need for ongoing and specialised training for judges in effective communication skills and conciliation conducting. This would improve the efficiency of the Ukrainian settlement procedure with the participation of a judge and contribute to an improved culture of dispute resolution in general. At the same time, it is worth noting that this procedure can only be carried out in the court of first instance during the preparatory proceedings under Ukrainian law. In our opinion, this is not effective enough, taking into account that the judge has an obligation to facilitate the settlement of the dispute in every stage of the proceedings. Such a restriction does not contribute to the usage of the full potential of this procedure.

In addition, we observe a tendency to strengthen the conciliatory functions of a judge in Austria and Lithuania, primarily in family cases, recognising the special nature and importance of this category of cases for the applicant. This aspect should also be considered during the improvement of procedural legislation in Ukraine. At the same time, given that some judges in Ukraine have already been trained as mediators, a model similar to Lithuania could be adopted to grant such judges the authority to conduct mediation.

Of course, given the absence of an effective scheme of interaction between courts and the mediation community in Ukraine, there is currently an urgent need to create a viable model of court-connected mediation. Still, judicial mediation can also be useful in this regard. Special attention should also be paid to improving the procedural rules to provide the judges with effective instruments that can increase the consensual tenet in civil procedure. There are several important points in this regard relevant for all jurisdictions: a) judges should have the right to refer parties to a mandatory court-connected mediation; b) courts should have the Rules of court-connected and/or judicial mediation and registers of mediators involved in such mediation; c) settlement agreements resulting from conciliation and court-connected or judicial mediation should have a *res judicata* effect; d) there should be effective system of court fees reducing in case of dispute settlement via mediation or conciliation.

The comparison results show that Austria, Lithuania, and Ukraine have quite different court-based and settlement-oriented models. In all countries analysed, though, court-connected settlement procedures are made available to disputants at no additional costs and are supported by the judiciary, even if demand for these procedures tends to be low. However, the offered procedures differ in many aspects, including the role of judges, the qualifications required for conducting settlement-oriented procedures, the possibilities to involve out-of-court conciliators or mediators, the stage of the procedure, and the time at which it can be adopted. This leads us to conclude that despite the same purpose, settlement-oriented procedures must be selected and implemented under the state's existing system and dispute-resolution culture.

REFERENCES

1. Ahmed M, 'Moving on from a Judicial Preference for Mediation to Embed Appropriate Dispute Resolution' (2019) 70(3) Northern Ireland Legal Quarterly 331, doi:10.53386/nilq.v70i3.137.
2. Ballon OJ, *Einführung in das österreichische Zivilprozessrecht: Streitiges Verfahren* (12 Aufl, Leykam Buchverlagsgesellschaft 2009).
3. Boule L and Field R, *Australian Dispute Resolution: Law and Practice* (LexisNexis Butterworths 2016).
4. Deac A, 'General Terms of the Amicable Settlement of Disputes Between Consumers and Traders' (2015) 4(1) Perspectives of Business Law Journal 88.
5. Doyle J, 'Diminished Responsibility? The Changing Role of the State' (1997) 2(1) Flinders Journal of Law Reform 31.
6. Drozdov O, Rozhnov O and Mamnitskyi V, 'Mediation and Court in Ukraine: Perspectives on Interaction and Mutual Understanding' (2021) 4(3) Access to Justice in Eastern Europe 181, doi:10.33327/AJEE-18-4.3-n000082.
7. Eisenreich-Graf A und Rill U, 'Das Einigungsverfahren: die gerichtliche Streitbeilegung als Chance für die Zukunft' (2019) 4 RZ Österreichische Richterzeitung 55.
8. Fasching HW, *Lehrbuch des österreichischen Zivilprozessrechts: Lehr- und Handbuch für Studium und Praxis* (MANZ Verlag 1990).
9. Ferz S, 'Amicable Dispute Resolution at Court: Conciliation Hearings, The Austrian and German Perspectives' (2022) 8(1) International Comparative Jurisprudence 106, doi:10.13165/j.icj.2022.06.008.
10. Galanter M, 'Justice in Many Rooms: Courts, Private Ordering and Indigenous Law' (1981) 13(19) Journal of Legal Pluralism 1, doi:10.1080/07329113.1981.10756257.
11. Gonstea MHC, 'Remedy without Diagnosis: How to Optimize Results by Leveraging the Appropriate Dispute Resolution and Shared Decision-Making Process' (2020) 88(6) Fordham Law Review 2165.
12. Gossi K, 'Gerichtlicher Vergleich' (*Lexis 360*®, September 2023) <https://360.lexisnexis.at/d/lexisbriefings/gerichtlicher_vergleich/h_80001_2338982765791970208_a9099951de> accessed 18 April 2023.
13. Izarova I, 'Civil Procedure Reform During the Period of Ukraine's Independence: New Goals and Principles' in Yu Prytika and I Izarova (eds), *Access to Justice in Conditions of Sustainable Development: to the 30th Anniversary of Ukraine's Independence* (Dakor 2021) 32.
14. Izarova I, 'Judicial Reform of 1864 on the Territory of the Ukrainian Provinces of the Russian Empire and Its Importance for the Development of Civil Proceedings in Ukraine' (2014) 2(4) Russian Law Journal 114, doi:10.52783/rlj.v2i4.250.

15. Kamatali JM, 'Transplanting an ADR-Centric Model of Dispute Resolution from the Anglo-American Legal System to the Civil Law System: Challenges, Limitations, and Proposals' (2022) 37(3) Ohio State Journal on Dispute Resolution 293.
16. Kaminskienė N, 'Teisminė mediacija Lietuvoje. Quo vadis?' (2010) 9(1) Socialinis darbas 54.
17. Klein F, *Pro futuro: Betrachtungen über Probleme der Civilproceßreform in Oesterreich* (Deuticke 1891).
18. Kodek GE und Mayr PG, *Zivilprozessrecht* (5 Aufl, Facultas 2021).
19. Komarov VV, *Civil Procedural Legislation in the Dynamics of Development and Practice of the Supreme Court of Ukraine* (Pravo 2012).
20. Kotsiuruba A, 'Conciliation Procedures In Civil Proceedings In Ukraine' (2020) 2(113) Bulletin of Taras Shevchenko National University of Kyiv Legal Studies 28, doi:10.17721/1728-2195/2020/2.113-6.
21. Maclean M, 'Family Mediation: Alternative or Additional Dispute Resolution?' (2010) 32(2) The Journal of Social Welfare & Family Law 105, doi:10.1080/09649069.2010.506306.
22. Mayr PG, 'Das streitige Verfahren (Zivilprozessrecht)' in H Barta (hrsg), *Zivilprozessrecht* (WUV Universitätsverlag 2004) 1079.
23. Meisinger A, *System der Konfliktbereinigung: Alternative, komplementäre und angemessene Streitbeilegung* (MANZ Verlag 2021).
24. Milašiūtė V ir kita, *Privalomosios mediacijos šeimos ginčuose teisinio reguliavimo poveikio ex post vertinimas, 2023* (STRATA 2023).
25. Moritz M, 'Mediation und Vergleich im verwaltungsgerichtlichen Verfahren: Widerspruch oder Chance?' (2021) 11 RZ Österreichische Richterzeitung 245.
26. Nekrošius V, 'Naujasis civilinio proceso kodeksas ir bendrojo proceso pirmosios instancijos teisme reformos pagrindiniai bruožai' (2002) 44 Teisė 102.
27. Nekrošius V, Vėbraitė V, Izarova I and Prytyka Yu, 'Legal, Social and Cultural Prerequisites for the Development of ADR Forms in Lithuania and Ukraine' (2020) 116 Teise 8, doi:10.15388/teise.2020.116.1.
28. Nelson DW, 'Which Way to True Justice?: Appropriate Dispute Resolution (ADR) and Adversarial Legalism' (2004) 83(1) Nebraska Law Review 167.
29. Prytyka Yu, Izarova I, Kravtsov S, 'Towards Effective Dispute Resolution: A Long Way of Mediation Development in Ukraine' (2020) 29(1) Asia Life Sciences 389.
30. Quek AD, 'Mandatory Mediation: An Oxymoron - Examining the Feasibility of Implementing a Court-Mandated Mediation Program' (2010) 11(2) Cardozo Journal of Conflict Resolution 479.
31. Rabinovich-Einy O and Katsh E, 'The New New Courts' (2017) 67(1) American University Law Review 165.

32. Rechberger WH und Simotta DA, *Grundriss des österreichischen Zivilprozessrechts: Erkenntnisverfahren* (9 Aufl, MANZ Verlag 2017).
33. Rhee CH van, 'Mandatory Mediation before Litigation in Civil and Commercial Matters: A European Perspective' (2021) 4(4) *Access to Justice in Eastern Europe* 7, doi:10.33327/AJEE-18-4.4-a000082.
34. Salter Sh, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal' (2017) 34(1) *Windsor Yearbook of Access to Justice* 112, doi:10.22329/wyaj.v34i1.5008.
35. Salter Sh and Thompson D, 'Public-Centered Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal' (2016-2017) 3 *McGill Journal of Dispute Resolution* 113.
36. Sander FEA, 'Varieties of Dispute Processing' (The Pound Conference: Perspectives on Justice in the Future: Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, St Paul, Minn, 7-9 April 1976) 111.
37. Saudargaitė I, 'Judicial mediation in civil disputes in Lithuania' (DPhil thesis, Mykolo Romerio universitetas 2015).
38. Schmidt J, 'Bestehende und neue Formen der Konfliktlösung' in A Deixler-Hübner und M Schauer (hrsg), *Alternative Formen der Konfliktbereinigung: ADR, Richtlinie, Schlichtungswesen, Mediation & Einigungsverfahren* (MANZ Verlag 2016).
39. Schmitz AJ, 'Expanding Access to Remedies through E-Court Initiatives' (2019) 67(1) *Buffalo Law Review* 89.
40. Simaitis R, 'Teisminis sutaikymas' (2004) 52 *Teisė* 92.
41. Talesh SA, 'How Dispute Resolution System Design Matters: An Organizational Analysis of Dispute Resolution Structures and Consumer Lemon Laws' (2012) 46(3) *Law and Society Review* 463, doi:10.1111/j.1540-5893.2012.00503.x.
42. Tan V, 'Online Dispute Resolution for Small Civil Claims in Victoria: A New Paradigm in Civil Justice' (2019) 24(1) *Deakin Law Review* 101, doi:10.21153/dlr2019vol24no1art873.
43. Thau K, 'Gerichtsinernes Einigungsverfahren: ein Jahresrückblick Pilotprojekt zu einer alternativen Streitbeilegung' (2016) 3 *Interdisziplinäre Zeitschrift für Familienrecht* 140.
44. Trenker M, *Einvernehmliche Parteidisposition im Zivilprozess: Parteiautonomie im streitigen Erkenntnisverfahren* (MANZ Verlag 2020).
45. Tsuvina T and Serhieieva A, 'Comprehensive Analysis of the Current Situation, Barriers and Possibilities of Mediation Development: with Recommendations for the Promotion and Implementation of Mediation in Ukraine' (2019).
46. Tsuvina T and Vakhonieva T, 'Law of Ukraine "On Mediation": Main Achievements and Further Steps of Developing Mediation in Ukraine' (2022) 5(1) *Access to Justice in Eastern Europe* 142, doi:10.33327/AJEE-18-5.1-%20n000104.

47. Tsuvina T, 'Implementation of the Institute of Court Mediation as A Promising Direction of Reforming the Civil Procedural Legislation of Ukraine' (Ukraine on the Way to Europe: Reform of Civil Procedural Legislation: International scientific and practical conference, Kyiv, 07 July 2017) 195.
48. Tsuvina T, Ferz S, Tvaronavičienė A and Riener P, 'The Implementation of Consensual Tenet in Modern Civil Procedure: A European Approach of Court-Related Amicable Dispute Resolution Procedures' (2023) 6(1) Access to Justice in Eastern Europe 198, doi:10.33327/AJEE-18-6.1-a000124.
49. Tvaronavičienė A and others, 'Towards More Sustainable Dispute Resolution in Courts: Empirical Study on Challenges of the Court-Connected Mediation in Lithuania' (2021) 8(3) Entrepreneurship and Sustainability Issues 633, doi:10.9770/jesi.2021.8.3(40).
50. Ury WL, Brett JM and Goldberg SB, 'Designing an Effective Dispute Resolution System' (1988) 4(4) Negotiation Journal 413, doi:10.1111/j.1571-9979.1988.tb00484.x.
51. Valančius V, 'Lietuvos civilinio proceso kodeksas: pirmųjų metų patirtis' (2005) 69(61) Jurisprudencija 55.
52. Vėbraitė V, 'Šalių sutaukymas civiliniame procese' (DPhil thesis, Vilnius University 2009).
53. Vėbraitė V, 'Šalių sutaukymas kaip civilinio proceso tikslas ir jo galimybės Lietuvoje' (2008) 69 Teisė 106.
54. Zuckerman A, 'Justice in Crisis: Comparative Dimensions of Civil Justice' in A Zukerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (OUP 1999) 2, doi:10.1093/acprof:oso/9780198298335.003.0001.

AUTHORS INFORMATION

Tetiana Tsuvina

Dr. Sc. (Law), Head of the Department of Civil Procedure, Arbitration and International Private Law, Head of the Mediation and ADR Center at Yaroslav Mudryi National Law University, Kharkiv, Ukraine; Visiting Researcher at Karl Franzens-University, Graz, Austria.

t.a.tsuvina@nlu.edu.ua

<https://orcid.org/0000-0002-5351-1475>

Corresponding author, responsible for the concept creation, research methodology, writing and supervising. **Competing interests**: Although the author serves as one of the managing editors of AJEE, which may cause a potential conflict or the perception of bias, the final decisions for the publication of this note, including the choice of peer reviewers, were handled by the other managing editors and the editorial board members. **Disclaimer**: The author declares that her opinion and views expressed in this manuscript are free of any impact of any organizations. **Translation**: The text of the article was written by authors in English.

Sascha Ferz

Univ.-Prof. Mag. Dr., Professor for Alternative Dispute Resolution at the Institute of Legal Foundations and Head of the interdepartmental Centre for Social Competence at the Karl-Franzens-University, Graz, Austria.

sascha.ferz@uni-graz.at

<https://orcid.org/0000-0002-8450-4497>

Co-author, responsible for the conceptualization, writing and data collection.

Competing interests: No competing interests were announced. **Disclaimer:** The author declares that his opinion and views expressed in this manuscript are free of any impact of any organizations.

Agnė Tvaronavičienė

PhD (Law), Head of Mediation and Sustainable Conflict Resolution Laboratory, full time professor at Mykolas Romeris University, Vilnius, Lithuania.

a.tvaronavicienne@mruni.eu

<https://orcid.org/0000-0002-5489-5570>

Coauthor, responsible for the writing and data collection. **Competing interests:**

No competing interests were declared. **Disclaimer:** The author declares that his opinion and views expressed in this manuscript are free of any impact of any organizations.

Paula Riener

Mag., University Assistant at the Institute of Legal Foundations (Alternative Dispute Resolution) at the Karl-Franzens-University, Graz, Austria.

paula.riener@uni-graz.at

<https://orcid.org/0000-0002-0276-9476>

Coauthor, responsible for the writing and data collection. **Competing interests:**

No competing interests were declared. **Disclaimer:** The author declares that his opinion and views expressed in this manuscript are free of any impact of any organizations.

ADDITIONAL INFORMATION

Tetiana Tsvina's input for the research was supported by the European Federation of Academies of Sciences and Humanities (ALLEA) and by the Austrian Academy of Science within the project JESH-Ukraine. The theses explained here represent the ideas of the authors and do not necessarily reflect the views of the ALLEA or the Austrian Academy of Science.

Agnė Tvaronavičienė's input for this article was financed by the project "The Portrait of a Judge" – a multi-dimensional model of competencies to be measured during the procedures of selection, evaluation and promotion of judges". Project number: 2018-1-0662. Grant provider: 100 % EEA and Norway Grants Fund for Regional Cooperation.

ABOUT THIS ARTICLE

Cite this article

Tsuvina T, Ferz S, Tvaronavičienė A and Riener P, 'The Implementation of Consensual Tenet in Modern Civil Procedure: Comparative Analysis of Court-Connected Settlement Procedures Applied in Austria, Lithuania, and Ukraine' (2024) 1(22) Access to Justice in Eastern Europe. Published online 20 Dec 2023. <https://doi.org/10.33327/AJEE-18-7.1-a000109>

Submitted on 22 Aug 2023 / Revised 23 Nov 2023 / Approved 1 Dec 2023

Published ONLINE: 20 Dec 2023 / Last Published: 1 Feb 2024

DOI <https://doi.org/10.33327/AJEE-18-7.1-a000109>

Managing editor – Mag. Polina Siedova. **English Editor** – Jules Bold.

Summary: 1. Introduction. – 2. Theoretical Background. Changes in Perception of ADR: the Shift from the Alternative to Litigation towards Becoming an Integral Part of the Modern Civil Procedure. – 3. The Court-Connected Settlement Procedures, Applied in Austria, Lithuania, and Ukraine. – 3.1. *Court-Connected Settlement Procedures in Austria.* – 3.1.1. *Origins of the Settlement-Oriented Legal Regulation in Austrian Civil Justice.* – 3.1.2. *Court Conciliation.* – 3.2. *Court-Connected Settlement Procedures in Lithuania.* – 3.2.1. *Origins of the Settlement-Oriented Legal Regulation in Lithuanian Civil Justice.* – 3.2.2. *Court Conciliation.* – 3.2.3. *Court Mediation.* – 3.2.4. *Benefits for the Judges, who Conciliate or Mediate.* – 3.3. *Court-Connected Settlement Procedures in Ukraine.* – 3.3.1. *Origins of the Settlement-Oriented Legal Regulation in Ukrainian Civil Justice.* – 3.3.2. *Settlement of a Dispute with the Participation of a Judge.* – 3.4. *Comparison of the Court-Connected Settlement-Oriented Procedures in Austria, Lithuania, and Ukraine.* – 4. Conclusions.

Keywords: *settlement, civil procedure, mediation, conciliation, court conciliation, court mediation, alternative dispute resolution.*

RIGHTS AND PERMISSIONS

Copyright: © 2023 Tetiana Tsuvina, Sascha Ferz, Agnė Tvaronavičienė and Paula Riener. This is an open access article distributed under the terms of the Creative Commons Attribution License, (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.