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REPORT ON DRAFT REGULATORY FRAMEWORK FOR MEDIATION IN UKRAINE

Contract No. AID-121-C-11-00002

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September, 2015

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Chapter 1

DESCRIPTION OF TASKS AND MAIN TERMS TO BE USED

Following the Scope of Work (SOW), this Report contains:

- a comparative analysis of the regulatory framework for mediation in several EU member states;
- the review of draft laws on mediation .No. 2480 and No. 2480-1 submitted to the parliamentary procedure in Ukraine;
- the recommendations to establish a regulatory framework for court-related and out-of-court mediation in a form of comments to relevant articles and proposed model articles or paragraphs and
- ADR policy recommendations and action plan on their implementation.

The findings of facts in this Report are based upon:

- Draft Laws on mediation, which were submitted by the beneficiary
- Information gathered during consultation process with beneficiary;

The conclusions and recommendations are based upon:

- Comparison of fact findings with model rules, guidelines, desk books and similar papers, related to design and implementation of regulatory framework for court-related and out of court ADR;
- Best practice examples of regulatory approaches from EU and Council of Europe (CoE) Member States and from USA;
- Recent research papers on court-annexed mediation schemes,
- Experts' individual evaluation and opinion as regards necessity and feasibility of proposed improvements.

For the purposes of this report:

Alternative dispute resolution covers an agglomeration of dispute resolution procedures, different from adjudication, provided by courts.

Mediation means any proceedings by which the parties attempt to reach through a neutral third person (mediator) the amicable settlement of a dispute arising out of or in relation to contractual or other legal relationship.

Court-annexed mediation means mediation program or scheme, authorized and used within a court system, controlled by the court in which cases are referred to mediation only by the court.

Court-connected mediation means program or scheme, linked to the court system but not being part of it in which cases are either referred by the courts or from out of the courts.

Court-related mediation means program or scheme which is either court-annexed or court-connected.

Accreditation means a process of formal and public recognition and verification that an individual, or organization or program meets defined criteria or professional standards.

Certification (also referred as recognition, licensing, credentialing, registration) means that accrediting body is responsible for the validation of an assessment process, for verifying the ongoing compliance with the criteria and standards set through monitoring and review, and for providing processes for the removal of accreditation, where criteria or standards are no longer met.

INTRODUCTION AND OVERVIEW

Having reviewed much commentary on the shortcomings of the civil justice system in many European countries, the Report has focused on the challenge of providing a dispute resolution service that is:

- **affordable** - for all citizens, regardless of their means;
- **accessible** - without undue restraint;
- **intelligible** - to the non-lawyer, so that citizens can feel comfortable in representing themselves and will be at no disadvantage in doing so;
- **appropriate** - in a way that the dispute resolution process matches to a dispute;
- **speedy** - so that the period of uncertainty of an unresolved problem is minimized;
- **consistent** - providing some degree of predictability;
- **trustworthy** - a forum in whose honesty and reliability users can have confidence;
- **focused** - so that neutrals are called upon to resolve disputes that genuinely require their experience and knowledge;
- **avoidable** - with alternative services in place, so that involving a judge is a last resort;
- **proportionate** - which means that the costs of pursuing a claim are sensible by reference to the amount at issue.

In this report I strongly advocate for the introduction of comprehensive alternative dispute resolution policy as an important part of access to justice reform in Ukraine as well as I call for radical change in the way, courts handle civil cases in order to educate and encourage litigants to consider mediation. Mediation hasn't gained yet appropriate attention and acceptance neither by policy makers nor by professional and general public. To overcome this problem, my main recommendation is directed at government and parliament of Ukraine as a “legislative engines for justice reforms” and at courts as a “laboratory for reforms”. I present in my findings that mediation, as significant part of

ADR movement in Ukraine, clearly demonstrates its potential. I argue that to improve access to justice by ensuring balanced relationship between mediation and litigation, dispute system design should rely on the concept of early dispute avoidance and resolution (EDR). Proposed regulatory approach is aimed at establishing three mediation referral tracks (starting within pilot projects) at courts: voluntary, quasi- mandatory with opt-out and, if feasible, compulsory. This may be seen as disruptive for some judges and lawyers but two major benefits would flow from this approach: significant reduction of judicial waiting time and backlogs on one side, and savings of time, money and increased satisfaction of litigants with a “justice with human face” on another side. Regulatory recommendations are drafted on the assumption that courts are rather service than place that is why I suggest increasing the capacity of court systems also through specific public-private partnership between courts and private institutional ADR providers.

Ukraine has a great potential for comprehensive and coherent dispute system design. Certain adaptations and improvements of existing court-related mediation programs or adoption of new ones are needed in order to make mediation presumptive dispute resolution option for litigants.

An aggressive goal for efficiency and integrity of court-annexed mediation program shall be established. For example, in a first year of implementation of pilot court-annexed mediation programs, at least 5% of inflow in civil cases should be referred to mediation, 50 % of referred cases should settle in mediation and 80% of disputants should be satisfied with the mediation process, outcome and mediator’s performance.

A pre-condition for a success is, that judges and lawyers accept changes as to the way, how to handle disputes, as their own and not as being imposed on them. The main task of chief judges and leaders of the bar is therefore to introduce participatory case management, encourage discussion among judges and lawyers and prevent excessive skepticism and reluctance at implementation of reforms. Implementation of recommended changes of court-annexed mediation program should be based on assumption, that the success or failure of changes depend less on the reasons for or against these changes and more on how they were introduced and managed (see more in A. Zalar: Management of change in the judiciary; Case study of court-annexed mediation at Ljubljana District Court; Five challenges for European courts: The experiences of German and Slovenian courts; Slovenian Association of Judges and Supreme Court of the Republic of Slovenia,2004,Ljubljana).

Courts’ endeavors to promote the use of mediation shall not stand alone. Key judicial policy players should publicly endorse development of mediation programs, encourage disputants to consider mediation seriously, promote savings of time and money of disputants and of courts as well as other benefits of mediation, provide appropriate funding to mediation schemes and contribute to consistent regulatory framework. Ongoing information exchange and enhanced institutional cooperation

regarding dispute system design are of key importance for implementation of recommendations from this Report.

As regards the need for the development and use of mediation in private sector by having recourse to market-based solutions, key players should support initiatives, aimed at ensuring quality of mediator’s performance through self-regulatory instruments, developed and adopted by non-governmental association of mediators. It is recommended that mediation profession itself speaks with one voice and ensures public trust and confidence in this new profession.

To conclude, we could all agree that a future is an unfinished business but after evaluating current state of regulatory play regarding mediation in Ukraine I believe that the future of dispute resolution there could belong to mediation.

Chapter 2

GOALS AND BENEFITS OF MEDIATION

Benefits of mediation could be described as individual, private sector and institutional benefits. *(Alternative Dispute Resolution Center Manual; A Guide for practitioners on Establishing and managing ADR Centers; The World Bank Group 2011, Washington)*

Type of benefit	Benefit
Individual benefit	<ul style="list-style-type: none"> • Cheaper redress • Resolution of dispute more quickly than mainstream court processes • In recommendation- and facilitation- based processes, retention of decision making with the parties rather than referral to a third party • In recommendation – and facilitation- based processes, a reduction of the need to enforce proceedings to ensure that parties will comply with an agreement, since the parties enter into their agreements consensually.
Private sector	<ul style="list-style-type: none"> • Enhance private sector development by creating a better business environment • Lower direct and indirect costs of enforcing contracts and resolving disputes • Lower transactional costs so that resources are not diverted

	<p>from the business</p> <ul style="list-style-type: none"> • Reinforce negotiation-based methods of doing business, depending on the process.
Institutional benefit	<ul style="list-style-type: none"> • Enhance good public sector governance by reducing the backlog of disputes before the courts and improving the efficiency of the court system • Provide better access to justice through a greater choice of dispute resolution methods • In particular jurisdictions, improve the reputation of the court system in providing effective resolution of disputes.

ASSESSMENT OF NEEDS AND DEVELOPMENT OF GOALS

This part of the Report firstly outlines some basic policy approaches as regards assessment of needs and development of goals, referring to the most advanced ADR policy document of California's courts (*Superior Court of San Mateo County/Family Law ADR Program/mrandspreuss@sanmateocourt.org/650-599-1070*).

NEEDS

Program planners suggest that courts or others planning a court-related ADR program attempt to identify the needs or problems which they would like to address prior to designing an ADR program.

This process can be broken down into three steps:

- Isolate the problems or conditions which program planners would like to address;
- Identify the specific sources or causes of these problems or conditions;
- Tailor program components so they are responsive to the identified needs and objectives.

Courts in general have approached the needs assessment process in a variety of ways. For example, in some jurisdictions, the court appears to have collapsed the first two steps and identified the following variables in establishing its ADR program: diminishing judicial resources; the demands of fast track; court administrators' recognition of the value of ADR; and the high cost of litigation. In others, the development of the settlement program stemmed directly from a belief that the bench and the bar needed to do something about the backlog of cases in the court.

GOALS

It is important to develop clear goals for a court-related ADR program prior to its implementation. Program goals and their prioritization can dramatically affect: (1) how the program is designed and (2) what criteria are used to monitor and evaluate its success. Additionally, clarity about program goals can help to ensure that cases are referred to an appropriate ADR process.

a. Goal Development/Prioritization

Commentators suggest program planners consider several issues in developing program goals:

- **Relationship Between Program Goals and the Needs/Problems Program is Intended to Address:** The National Standards for Court-Connected Mediation Programs in USA recommend that program goals relate directly to the courts' identified needs;
- **Individualized Selection of Goals:** Even though, as discussed above, courts should look to existing programs for models and ideas, it is most important that those planning a court-related ADR program examine the individual needs of the court for which the program is being planned when establishing the goals for that program. This means taking into account available resources, existing problems, existing ways of approaching those problems, etc.;
- **Goal Prioritization:** It is important that goals are prioritized. There can be considerable tension between and among ADR program goals. For example, an ADR program that provides greater public access to dispute resolution processes will not necessarily reduce the court's costs or caseloads. For this reason, it has been suggested that, even if all program goals appear consistent, courts should clarify and prioritize goals for any ADR programs they design and adopt. Furthermore, goal prioritization can assist program planners in clearly identifying the direction of a particular ADR program. Finally, the National Standards for Court-Connected Mediation Programs suggest that the prioritization of goals can be a crucial element in evaluating program effectiveness.

b. Goal Options

There are many different goal options for court-related ADR programs. However, these goals generally fall into two categories: goals relating to the interests of litigants and goals relating to the interests of courts. Ideally, these two types of goals will be congruent.

(1) Court-Oriented Goals

Court-oriented goals include:

- to increase the court's ability to resolve cases within given resources;
- to assist in decreasing backlog;

- to provide dispute resolution processes that are most appropriate for resolving specific types of disputes; and
- to encourage earlier and better case analysis and preparation by litigants.

Traditionally, the goal of reducing backlog has been viewed as a primary advantage of court related ADR. A central goal of the ADR/early settlement program implemented was to reduce the court's caseload or backlog.

(2) User-Oriented Goals

User-oriented goals are those directed to improving services delivered to users of the courts. Some of the most commonly cited user-oriented goals include:

- to provide disputing parties with a lower-cost, semi-formal, quasi-adjudicatory alternative to full blown trial;
- to reduce party alienation from the dispute resolution process;
- to help forge better relations between parties;
- to improve communication between parties and their lawyers;
- to bring the parties together before they have made a major economic and emotional investment in the case;
- to improve case analysis, reduce discovery costs and produce better focused discovery and motion practice plans; and
- to enhance the parties' capacity to protect their privacy interests.

(3) Hybrid

Some goals do not fall easily into one or other of these categories, but rather appear to have advantages for both the court and the parties. For example:

- to shorten the time to disposition;
- to improve communication between parties and the court;
- to reduce the expense of resolving disputes;
- to encourage earlier settlement; and
- to encourage the future voluntary use of ADR through education and familiarization with the processes.

Chapter 3

KEY REGULATORY ISSUES, TRENDS AND PRACTICES REGARDING MEDIATION

KEY ISSUES CHECK LIST FOR POLICY MAKERS WHEN CONSIDERING MEDIATION

This check list was adopted and published by the National Australian ADR Commission (hereinafter: NADRAC) in November 2006. It aims to provide guidance to government policy makers and drafters who are involved in developing or amending legislative provisions concerning ADR, so to assist in achieving appropriate standards and consistency in the legislative framework for ADR, especially in relation to the rights and obligations of the parties.

The check list is adapted by expert to the needs of the civil law country in order to be useful for policy makers in Ukraine.

1. IS THERE A NEED FOR LEGISLATION?	
RELEVANT CONSIDERATIONS	POSSIBLE APPROACH
<p>ARGUMENTS AGAINST LEGISLATION</p> <p>Is legislation necessary or are other mechanisms likely to be more effective?</p>	<p>NO LEGISLATION</p> <p>If not enacting new legislation, policy-makers could rely on the use of ADR mechanisms in the case law, contractual arrangements between the parties and codes of practice or other self-regulatory mechanisms applying to ADR practitioners.</p>
<p>ARGUMENTS SUPPORTING LEGISLATION</p> <ul style="list-style-type: none"> • When introducing ADR for the first time, there may be a need for some element of compulsion or legislative control • Government policy is to encourage ADR to foster a more conciliatory approach to dispute resolution. It can also be important that parties have a choice to use an effective ADR process. This may necessitate legislative change. 	<p>LEGISLATION</p> <ul style="list-style-type: none"> • ADR mechanisms could be introduced through the principal Act, regulations or rules of court. • Another legislative approach might be to deem that ADR clauses are part of private contracts.

2. WHAT TYPE OF ADR IS MOST APPROPRIATE?

RELEVANT CONSIDERATIONS	POSSIBLE APPROACH
<ul style="list-style-type: none"> • Consider the nature of the ADR processes - facilitative, advisory, determinative or, in some cases, a combination of these • Examples of facilitative processes are mediation, facilitation and facilitated negotiation. Advisory processes include expert appraisal, case appraisal, case presentation, mini-trial and early neutral evaluation. Determinative processes include arbitration, expert determination and private judging. • Various ADR processes may also be described according to their objectives, the specific strategies used or the type of dispute. For example, transformative mediation, evaluative mediation or co-mediation. 	<ul style="list-style-type: none"> • Leaving arbitration aside, mediation and conciliation are the most common processes referred to in legislation, followed by negotiation and conferencing. Adjudication, case appraisal and neutral evaluation are also occasionally referred to. • ADR definitions should not be provided in legislation except in limited situations. Policy-makers may wish to consider distinguishing between the types of ADR processes to be used rather than setting out prescriptive definitions. • ADR may be used for different categories of dispute, for example family dispute resolution, community mediation, victim-offender mediation, equal opportunity conciliation, workers' compensation conciliation, tenancy conciliation or commercial arbitration. Multi-party mediation may involve several parties or groups of parties.

3. HOW SHOULD DISPUTES BE REFERRED TO ADR?

RELEVANT CONSIDERATIONS	POSSIBLE APPROACH
<ul style="list-style-type: none">• The state should encourage its agencies to resolve disputes at the lowest appropriate level and to proactively avoid unnecessary escalation of conflict.• Except where judgment has been reserved in a judicial process, parties can attempt an ADR process at any stage in their dispute.• If legislation is to provide for referral to ADR, the nature and extent of any referral criteria or negative criteria, as well as whether to include these in legislation or regulations, needs to be decided.• It is important where legislation compulsorily refers parties to ADR that appropriate professional standards are maintained and enforced.	<ul style="list-style-type: none">• In some countries' courts and tribunals have a power to refer a matter to ADR. In some circumstances, this can be done without the consent of the parties (compulsory referral). The referring body will generally have a discretion to refer the dispute to ADR.• Legislation or court rules may require disputing parties to access community-based ADR before commencing proceedings. Grievance and complaints procedures governed by law may also require that an ADR attempt has been made.• Legislation should only require a dispute to be referred to ADR without the consent of the parties where an assessment of suitability for referral has been made. However, any assessment criteria do not need to be contained in legislation. It may be more useful for legislation to specify negative criteria, for example when not to refer a dispute.

4. SHOULD PARTICIPATION COMPULSORY FOR THE PARTIES N?

RELEVANT CONSIDERATIONS	POSSIBLE APPROACH
<p data-bbox="219 273 755 346">SHOULD PARTICIPATION IN ADR BE MADE COMPULSORY?</p> <p data-bbox="219 367 755 661">When a dispute is removed from the adversarial procedures of the courts and exposed to procedures designed to promote compromise, this provides an opportunity for participation in a process from which cooperation and consent might come.</p>	<p data-bbox="787 273 1307 304">COMPULSORY</p> <ul data-bbox="820 367 1307 1228" style="list-style-type: none"><li data-bbox="820 367 1307 451">• Parties may be referred to ADR with or without their consent.<li data-bbox="820 525 1307 661">• The referrer may have the discretion to refer matters to ADR or may be compelled to refer matters to ADR.<li data-bbox="820 735 1307 976">• Parties engaged in ADR are required to participate in good faith by a variety of laws and rules. The consequences of not participating in good faith vary.<li data-bbox="820 1050 1307 1228">• Contractual agreements containing ADR clauses are common in commercial and employment agreements.

5. SHOULD PARTICIPATION IN ADR BE VOLUNTARY?	
RELEVANT CONSIDERATIONS	POSSIBLE APPROACH
<p>SHOULD PARTICIPATION IN ADR BE VOLUNTARY?</p> <ul style="list-style-type: none"> • Generally, settlement during ADR is more likely to occur if the parties participate voluntarily in ADR rather than being compelled to do so. • Compulsory participation may also be inappropriate in certain types of disputes, for example where there is a history of violence. • Where participation is compulsory, ADR may be used as a case management tool by courts and tribunals, rather than as a mechanism for considered and deliberative ADR. 	<p>VOLUNTARY</p> <ul style="list-style-type: none"> • Parties may agree to attempt to resolve their dispute through ADR at any stage before or during legal proceedings. • Parties may agree to participate in ADR through a private contractual agreement. • Where legislation allows a court/tribunal to refer parties to ADR, the obligation to participate in ADR can be voluntary for the parties. • Wherever a dispute is referred to ADR, the advantages of compulsory participation can only be realized if there is careful assessment of whether the dispute is suitable for ADR and if there are appropriate exceptions for unsuitable cases. Compulsory participation and referral is only appropriate where professional practitioner standards are maintained and enforced.

6. WHAT ARE THE DUTIES AND STANDARDS EXPECTED OF ADR PRACTITIONERS? HOW IS THE ADR PRACTITIONER SELECTED?

RELEVANT CONSIDERATIONS	POSSIBLE APPROACH
<ul style="list-style-type: none"> • There is no national, single organization that accredits mediators and other ADR practitioners, but efforts are being made to develop common national standards for mediator accreditation. • Important issues to consider are: <ol style="list-style-type: none"> 1) whether the duties and standards of ADR practitioners should be a legislative requirement or left to 'good practice', 2) how the ADR practitioner should be selected, and 3) whether the ADR practitioner should face sanctions if there is a complaint against him or her. • Issues to consider when setting out the duties and standards of ADR practitioners include: how the practitioner is to be selected, the role of the practitioner, impartiality, conflicts of interest, competence, confidentiality, the quality of the process, the termination of the ADR process, recording settlement, publicity, advertising and fees. 	<ul style="list-style-type: none"> • Legislation and regulations can specify the level of training and education required in order to conduct mediation and other forms of ADR. • Codes of conduct and professional rules can also provide guidance about the duties of ADR practitioners, so consideration needs to be given to whether or not legislative guidance is needed. • The National Mediation Accreditation System and the National Mediation Standard aim to achieve a national uniform system of mediator accreditation.

7. SHOULD LEGISLATION PROVIDE IMMUNITY FROM SUIT TO ADR PRACTITIONERS?

RELEVANT CONSIDERATIONS	POSSIBLE APPROACH
<ul style="list-style-type: none"> • The main issues for policy-makers to consider are whether immunity should be provided and, if so, the extent of immunity and how to ensure parties receive appropriate standards of ADR. • The arguments for and against immunity relate to the need to provide some protection to ADR practitioners and at the same time ensure an acceptable degree of accountability for ADR practice. • Any immunity from suit for negligence or other civil wrong must be strongly justified as a matter of public policy. There is almost no profession which is granted the privilege of immunity from civil liability. • Traditionally, the general policy supporting immunity for ADR practitioners has been that the performance of their functions and duties, and the quality of ADR outcomes, might be threatened if there is a risk of legal action. 	<ul style="list-style-type: none"> • There is no general immunity from legal action for ADR practitioners. However, immunity can be provided by the practitioner's individual contract for service (if it is consistent with other legal principles about fair contracts) or by statute in particular areas of ADR work. • Statutory protection for ADR practitioners can either be provided as an absolute immunity (similar to that afforded to judges) for work done in relation to ADR associated with that legislation, or as a qualified immunity limited to acts done in good faith. • Where a court refers a matter to an ADR process, and the ADR is part of a continuum of case management strategies which aim to resolve litigation between the parties, safeguards should exist to protect the ADR practitioner from suit because of the proximity of ADR to judicial processes. In these circumstances, ADR is seen as an extension of court processes. • However, it is very difficult to justify the immunity of ADR practitioners wherever the ADR is community based rather than part of a court's case management process.

8. CONFIDENTIALITY AND DISCLOSURE OF COMMUNICATIONS MADE DURING ADR PROCESSES?

RELEVANT CONSIDERATIONS	POSSIBLE APPROACH
<ul style="list-style-type: none"> • It is widely expected that communications made during ADR will be kept confidential. The key issue to consider is whether legislation should impose these confidentiality obligations and what sanctions should apply for breaches of any confidentiality requirements. This is affected by a consideration of whether any common law or contractual obligations are sufficient. • The policy reasons for confidentiality obligations are based on maintaining public confidence in ADR processes and enabling open and honest communication within the process to produce a workable outcome. The arguments for restricting those confidentiality obligations are based on the need for some judicial or public control over the private resolution of disputes and the need for third parties who may be affected by the outcomes of an ADR process to have access to information to assert their rights. 	<ul style="list-style-type: none"> • In some countries legislation generally does not prevent the parties from disclosing communications made during ADR. • The duty of confidentiality on the part of the ADR practitioner is primarily an ethical obligation and generally is best dealt with by reference to professional standards and codes of conduct, rather than legislation. Although there is an obligation on participating parties to keep matters discussed during an ADR process confidential, that obligation should not be imposed by legislation.

9. IS THERE A NEED FOR LEGISLATION?

RELEVANT CONSIDERATIONS	POSSIBLE APPROACH
<ul style="list-style-type: none">• Legislation sometimes provides that evidence of anything said or done, or any admission made during an ADR process (including meetings with counsellors), is not admissible in court. This is done to facilitate frank discussions and meaningful negotiations, so that parties can negotiate more freely in an ADR session and express their differences openly without fearing that their words and actions will be used against them at a later date.• On the other hand, there may be compelling reasons for admitting some matters into evidence, for example where that evidence could help protect a child, vulnerable person or the public.• The key question for policy-makers is whether the circumstances justify including inadmissibility provisions in ADR legislation and if so, whether specific exceptions need to be added.	<ul style="list-style-type: none">• Most legislation dealing with ADR provides that evidence of communications made during an ADR session is inadmissible in later proceedings. A court is usually not permitted to see documents related to the ADR process without the parties' consent if they could not otherwise be obtained from other sources. This rule is designed to encourage the settlement of disputes.• Some legislation containing inadmissibility provisions also specifies the circumstances under which there are exceptions to that admissibility. It is important that inadmissibility provisions are not unfairly used to prevent enforcement of agreements reached through an ADR process.• Disclosures made during an ADR process should not generally be admitted into evidence in subsequent court proceedings. Protecting the communications made in an ADR session provides greater certainty about the status of those communications and avoids secondary litigation.

10. HOW SHOULD AGREEMENTS REACHED AT ADR BECOME ENFORCEABLE?

RELEVANT CONSIDERATIONS	POSSIBLE APPROACH
<ul style="list-style-type: none"> • The issue facing policy-makers in relation to the enforcement of ADR agreements is a question of balancing competing needs. • Settlement negotiations and other ADR processes need to be encouraged and their confidentiality protected through inadmissibility rules. This priority needs to be balanced against the need to encourage finality of disputes and to allow ADR agreements to be submitted as evidence of an agreement reached. • The main difficulty in relation to the enforcement of ADR agreements occurs where one party wishes to rely on the agreement and the other party wishes to withdraw from it. In such cases, one party will usually claim that the agreement was not final, but an interim document created during ADR. Such interim documents would usually be inadmissible, and therefore not enforceable. • The intended enforcement of ADR outcomes needs to be clearly stated in the agreement as uncertainty may undermine efforts to later enforce the agreement. 	<ul style="list-style-type: none"> • Where a court/tribunal has referred a matter to ADR, legislation may authorize that body to accept an agreement reached through an ADR process as evidence of settlement and make orders accordingly. • ADR processes should, where possible, assist parties to avoid litigation. For this reason, it is important that agreements reached at mediation and other ADR processes should be able to be enforced, subject to other statutory protections in relation to misleading and deceptive conduct and the protection available in cases of unfair contracts. • Where a court or tribunal has the legislative power to refer a matter to an ADR process, it should be able to make any orders within its power relating to any settlement agreement reached. Any agreements that go beyond the court or tribunal's power should be enforced through the law of contract.

WHAT GOVERNMENTAL POLICIES MAY SUPPORT THE GROWTH OF MEDIATION?

It would be interesting to explore, what makes politicians supportive to mediation. Are they convinced that mediation is superior instrument for conflict resolution? Do they subscribe it only because it is a fashionable, innovative step in a field full of tradition? Do they hope it will serve their own interests? What can governments do (more) in order to promote mediation?

REGULATORY FRAMEWORK FOR MEDIATION

With regard to different ways in which governments can promote mediation, it is important to note that governments of two leading European countries with well-developed mediation policy, England and Wales and Netherlands, do not favor regulatory approach. On the other side, the majority of new European democracies or countries in transition first passed statutory mediation law and only subsequently tried to practice mediation.

WHAT IS EXISTING REGULATION OF MEDIATION?

Mediation regulatory framework exists in various forms like:

General statutory legislation on mediation and mediators (e.g. Law on Mediation);

Court procedural laws (e.g. article 309 a of Slovenian ZPP, article 15a of Germany's EGZPO and article 278 of Germany's ZPO);

Judicial case law, emerging from disputes involving agreements to mediate, mediation clauses, settlements (see judgment in case *Halsey v. Milton Keynes General NHS Trust* (2004) EWCA Civ 576 (UK))¹;

Regulation of mediator's fees;

Professional Codes (Professional code for German lawyers BORA, European Code of Conduct for Mediators);

Court rules or programs (Backlog Reduction Court Annexed Mediation Program at Ljubljana District Court, Slovenia);

Private providers rules of mediation (UNCITRAL Rules of Commercial Conciliation, American Arbitration Association Rules of Mediation, ICC Rules of Conciliation);

Model laws (UNCITRAL Model Law on International Commercial Conciliation);

Policy papers (Green paper of the European Commission on alternative dispute resolution in civil and commercial law)²;

¹ Lord Philips: Why mediation works and the role of mediation in civil court system in the UK: Mediation Conference Warsaw, 14th June 2006.

² Commission of the European Communities, COM (2002)196, Brussels

Recommendations (Council of Europe recommendations on mediation in civil and in family matters)³.

The ability of courts in common law countries to adopt and change their court rules is in stark contrast to the legislative monopoly over the court rules in most (but not all) civil law countries.⁴ This feature has enabled common law courts to integrate mediation into the litigation process while a strict regulatory control over court rules in civil law countries put the brakes on change and experimentation until the legislator sees fit to allow and encourage mediation.

WHAT ARE ADVANTAGES AND DISADVANTAGES OF LEGISLATION ON MEDIATION?

Despite rapid mediation development in terms of market driven developments or as policy initiatives from governments and courts, European countries kept widely diffusing views as to exactly how to further stimulate the use of mediation. This concerned especially the possibility of legislation at the national and European (supranational) level of the mediation process as such and of the role, training, accreditation and accountability of mediators. Some cautious against any legislative initiative on this issue considering that it could threaten some of the distinguishing features of mediation like flexibility and scope for private autonomy. Where private mediation grows one does not need extensive regulation because the law should not be an obstacle for the efficient market developments. Another concern is that when mediation becomes legislated, attorneys would take over the process, not mediators. Some legal scholars believe that the more highly regulated mediation industry, the more likely mediation objectives will compete rather than complement one another and the greater the proliferation of schemes promoting efficiency and access to justice as their primary objective instead of self-determination of the parties.⁵ It also seems that especially funding shortages in some countries frustrate attempts to establish regulatory framework that would encourage mediation.

Concerning the advantages of regulatory framework for mediation many argue that the law might have an educational effect on neutrals, judges, lawyers and community at large and consequently could increase public trust and confidence in the use of mediation. Regulatory framework also ensures minimum quality standards for performance and could represent an incentive for public funding of mediation schemes. As regards the rules of mediation process, the law could resolve the situation where disputants can not agree about the way how mediation should be implemented and what law

³ Family Mediation (Recommendation No. R (98)1 and explanatory memorandum), Mediation in Civil Matters (Recommendation Rec (2002)10 and explanatory memorandum).

⁴ When district courts in Slovenia introduced court annexed mediation, there was no existing law on mediation, however courts interpreted the general provision of article 307 of the Civil Procedural Act, which prescribes the duty of the court throughout the procedure to assist the disputants to reach an amicable settlement, as a legal ground for offering court annexed mediation. Courts therefore adopted the rules of mediation in a form of backlog reduction program with binding effect for the parties and their lawyers.

⁵ See N. Alexander: Global trends in Mediation: Ridding the Third Wave, page 2.

should be applied. Many believe that mediation law could always provide enough flexibility when regulation is conditional, namely, when the law contains a term "unless the parties agree otherwise".

PILOT SCHEMES

What conclusions could be drawn from the advantages and disadvantages of regulatory framework for mediation? Council of Europe member states are free to decide, according to their national legal tradition and practice, whether mediation should be regulated by legislative measures or not. However, if one evaluates the mediation development in countries which started to promote the use of mediation without previous regulation (Netherlands, Slovenia, England and Wales) and compare it with difficulties in countries, which passed the laws on mediation before any mediation has occurred in practice, it seems that there is a risk of overregulated mediation in its infancy stage. In all three above mentioned European countries mediation gained momentum through experiments, pilot court-annexed schemes, designed by courts themselves. Mediation rules and practice could be adjusted to the needs of the users and legal community at large within learning organization. Through pilot projects the attitude and response of the disputants could be tested, without guaranteeing any success of the outcome of such an experiment. It is much easier for the parliaments as well to follow the pilot project implementation reports and regulate this field since the parliaments, in principle, are not interested only in adopting the laws, but also in real implementation of such laws. Best examples of court annexed (pilot) mediation schemes are:

- Ljubljana District Court Annexed Mediation Programs in civil, family and commercial cases, awarded with the special recognition of the Council of Europe and European Commission in a year 2005 (the European Prize — Crystal Scale of Justice);
- Courts in England and Wales designed variety of court annexed mediation models from completely voluntary (London 1996-1999), selective court direction (Commercial Court ADR orders Guildford scheme), voluntary program with background pressure (London 2001-2005, Birmingham), court referred model (Court of Appeal scheme, Exeter) to quasi compulsion court annexed mediation scheme (ARM London 2004-2005, Exeter);
- Trondheim District Court initiated court mediation of civil disputes in 1998 and reached settlement rate of 92 % in a year 2006 (Trondheim District Court Annual Report, 2006, Norway);
- The Netherlands Court — Annexed Mediation Schemes (effective nation-wide from 1st of April 2005).

WHAT COULD BE REGULATED?

The overriding goal of regulation in the field of mediation could be:

- To encourage the use of mediation;
- To regulate the process;
- To regulate the mediation profession.

During international mediation expert meeting in Hague on 29th and 30th June 2006, sponsored by Dutch government, one of the conclusions of the workshops on whether (statutory) regulation in the field of mediation is a good incentive, was that regulation can encourage the use but the mediation process and profession should not be regulated.⁶ "As had been similarly exploited in the panel discussion, the participants in the workshop showed that the regulations on mediation and the reasons to opt for regulation differ a lot of country to country. Some countries like Spain, Malta and Finland have legislation on mediation for specific sectors, for example in family law. Some (Poland, Finland, Belgium, Slovenia) have legislation on court annexed mediation whereas other like the UK encourage the mediation through provisions in their civil procedure rules. Most eastern European countries have recently developed a specific Law on Mediation. It was stressed that cultural aspects should be taken into account in order to make a comparison between the choices of the different countries for regulation or against it".

LEGAL INCENTIVES FOR MEDIATION DEMAND

There are two kinds of general policy incentives for mediation demand:

- Duty of disputants to consider mediation;
- Duty of courts to pay attention to mediation;

Lawyers should, where applicable, have an obligation to consider mediation even before going to court and give relevant information and advice to their clients.⁷ This could be achieved either by statutory provision or through professional code of national bar association or lawyers association.

Mediation information session may foster the trust of attorneys and their clients in the mediation especially where mediation is considerable or even complete novelty and may ensure informed consent, provided by the parties.

Judges as gatekeepers of mediation should have the power to arrange information session on mediation, and, where applicable, have the obligation to invite the parties to the dispute to go to mediation. Judges should therefore assume the role of seducers by assisting disputants to evaluate the

⁶ Report on facts and figures of Ljubljana District Court Annexed Mediation Programs is attached to this paper.

⁷ CEPEI: Draft Guidelines for implementation of the existing recommendation concerning family and civil mediation; interim report — CEPE3 GT-MED (2007)1 prov1.

risks of the case and to opt for mediation. Selective pressure mechanisms or sometimes even smart sanctions will be needed in order to make the case management powers of judges to require the parties to attend information session on mediation, enforceable. Statutory legislation might include sanctions like imposition of costs, award of attorney's fees or under egregious circumstances, dismissal of the case. Selection of appropriate sanctions should be left to the judge's discretion. However, some suggest that sanctions would result in judicial inefficiency, as valuable court time could be consumed by litigating the sanction's issues.

As regards existing national regulation of Council of Europe member states on duty to consider mediation, two different approaches could be identified. Slovenian model provides the example of bottom up policy approach in terms of regulatory development while the opposite approach is top down policy approach of the government in England and Wales.

DUTY TO CONSIDER MEDIATION; THE SLOVENIAN MODEL

Until year 2000 there was no tradition of mediation in Slovenia. Providers of these services on the open market barely existed.⁸ There was no explicit regulatory framework, providing a legal basis for mediation. Mediation was therefore not regulated either by the law or by implementing regulations.

Lack of initiative from the private sector to develop and use participative dispute resolution procedures was the reason for the initiative in this regard being temporary assumed by the state courts. District courts as courts of first instance launched court-annexed mediation schemes. Courts interpreted general provision of article 307 of the Civil Procedural Act which prescribes the duty of the court to assist parties to settle at all times during trial, as a sufficient procedural legal basis for offering voluntary mediation.⁹ As a substantive law basis for setting up court annexed mediation program courts interpreted article 62 of the Court Act and article 171 of the Court Rules as an implementing regulation.¹⁰ Both cited provisions prescribe the duty of the court to adopt a program to reduce case backlogs when statistics shows a backlog at the court over the last twelve months. A program is formally adopted by the president of the court. Court annexed mediation was therefore introduced as a special program to reduce the excessive case backlogs at respective district courts. Basic principles, rules and ethical standards of mediation were prescribed by this program.

The main legal characteristics of court annexed mediation in Slovenia as prescribed with the programs of the courts was the following:

- Mediation was a voluntary process for the plaintiff and for the defendant;

⁸ Permanent Arbitration at the Slovenian Chamber of Commerce has been offering mediation to disputants, however not as a separate ADR procedure, but as a process within arbitration (arb-med). Parties to the dispute have rarely taken up such option.

⁹ Civil Procedure Act, Official Gazette no. 26/99 as amended.

¹⁰ Court Act, Official Gazette no. 19/94 as amended; Court Rules, Official Gazette no. 17/95 as amended.

- The court suggested the parties to attempt mediation with a standard letter of invitation and attached brochure which describes the procedure and its advantages;
- Invitation to mediation occurred at an early stage of litigation procedure after lawsuit and defense paper have been exchanged; a judge could also refer a case to mediation at any subsequent time during litigation if the parties request so;
- Mediators (judges, retired judges, practicing lawyers, family therapists, social workers in family mediation) were trained, monitored and accredited by the court;
- Mediation operated within the court, was staffed and funded by the court;
- Court provided mediation free of charge for the parties;
- In case of settlement the parties choose the form of the agreement (contract or binding and enforceable court settlement order) and, were entitled to 50 % reduction of filing fees.

In the year 2002 Civil Procedure Act was supplemented regarding alternative dispute resolution. This statutory law authorized the court to suspend the procedure at the request of the both parties in order to attempt (any) alternative dispute resolution process.¹¹ Slovenian experience shows that it is not always necessary to establish mediation system by statutory law. Legal action, taken by public authorities, based on ad hoc amendments to the existing legislation, may be premature. The society in a country without mediation tradition has first to understand and recognize the advantage of mediation, adjust the perceptions and aspirations about the mediation before any firm regulative framework allows for mediation is adopted.

On the other hand, lack of legislation might bring with it certain risk. The principle of the confidentiality as a fundamental principle of mediation is particularly relevant with regard to the judicial procedure. It is linked with the standard of inadmissible evidence and it is so important that it should be included in the procedural rules. One can tackle this by having parties, who agree with mediation, to sign a declaration on protection of the principle of confidentiality and on respect for the rules on inadmissible evidence. But there remains a question as to how the court will take into account the principle of confidentiality in the event of a dispute over an infringement of this principle or of the rules on admissible evidence.

Another risk exists with regard the accountability of mediators. While for example the court can prescribe the basic ethical principles, that mediators are bound by, it cannot give mediators the immunity it provides to judges. Furthermore when public resources are used in mediation system, certain statutory authority is almost inevitable. This speaks in favor of minimum rules, necessary to guarantee process integrity. Slovenia has got these rules with Mediation in Civil and Commercial Matters Act (see more below).

¹¹ Article 305b of the Civil Procedure Act, Official Gazette no. 110/2002.

DUTY TO CONSIDER MEDIATION; THE ENGLISH MODEL

In England and Wales interest in mediation for civil and family disputes has increased steadily since the early 1990's. Major reforms in English civil procedure took place in 1999 following the publication of Lord Woolf's Access to Justice Report in 1996. This report was watershed in the development of mediation for non-family civil disputes. It was not proposed that ADR should be compulsory either as an alternative or as a preliminary to litigation, but Lord Woolf felt that the courts should play an important part in providing information about the availability of ADR and encouraging its use in appropriate cases.¹²

This encouragement is underpinned by the court's power to "punish" unreasonable behaviour in litigation by denying parties their legal costs or other financial penalties:

"The court will encourage the use of ADR at case management conferences and pre-trial reviews, and will take into account whether the parties have unreasonably refused to try ADR or behaved unreasonably in the course of ADR".

Under new civil procedure rules, implemented in April 1999, the courts have substantial case management powers, including the power to order parties to attempt mediation or another form of ADR and to interrupt ("stay") proceedings for this to occur. Judicial case management includes encouraging the parties to use an alternative dispute resolution procedure if court considers that appropriate, and facilitating the use of such procedure. Failure to cooperate with a judge's suggestion regarding ADR can result in cost penalties being imposed on the recalcitrant party.¹³

The emphases on ADR in court rules has been strengthened by the publication of 6 pre-action protocols, each of which encourage attempts at settlements, including consideration of ADR, before beginning court proceedings. The most recent update of the civil procedure rules includes the requirement that parties to any dispute should follow a reasonable pre-action procedure intended to avoid litigation, before making any application to court. This should include negotiations with a view to settling the claim and cost penalties can be applied to those who do not comply.¹⁴

¹² *The Hon. Lord Woolf, Interim report to the Lord Chancellor on the Civil Justice System in England and Wales*, June 1995, Lord Chancellor's department, Chapter 18, Para. 4, p. 136.

¹³ Factors to be taken into account when deciding cost issues include »the efforts made, if any before and during the proceedings in order to try and resolve the disputes« (Parts 1 and 44 Civil Procedure Rules).

¹⁴ Hazel Genn: *Contemporary experience of mediation in England and Wales*; European Commission for the Efficiency of Justice: *Mediation*, CEPEJ (2003)25 (d1), Strasbourg, 3rd October 2003.

REGULATORY ISSUES OF MEDIATION PROCESS

Besides access to mediation the statutory law might, unless defined by court rules or contractual agreements, regulate at least the following basic issues:

- Definition of mediation;
- Voluntary or compulsory nature of mediation;
- Confidentiality;
- Admissibility of evidence;
- Limitation periods;
- Mediation clause;
- Enforcement of mediated settlements.

DEFINITION OF MEDIATION

Mediation refers to a process, in which an impartial third party facilitates a negotiation between two or more disputing parties. Conciliation can be similar in many ways to mediation yet it differs in one important respect. Conciliation refers to a mediation like process in which the impartial third party, the conciliator, is able to provide the parties with legal information and (or) suggests solutions to the parties.

Conciliators can be much more directive and interventionist than interest based mediators. The following definition of mediation shall apply:

Mediation shall mean any process, however named or referred to, where two or more parties to a dispute are assisted by a third party to reach an agreement on the settlement of the dispute, and regardless of whether the process is initiated by the parties, suggested or ordered by a court or prescribed by the national law.

It shall not include attempts made by the judge to settle a dispute within the course of judicial proceedings concerning that dispute.

Occasionally, the external mediators are judges, other than those handling the case (Norway, Finland, Slovenia and Belgium). This variation in particular seems to indicate a growing awareness of the restrictions inherent in judges sitting on a case, acting as settlement directors simultaneously. Indeed, these judges are not allowed to resort to caucus, and time constraints will usually prevent them from digging deeper, tabling underlying interests for an all-encompassing dispute resolution agenda.¹⁵

¹⁵ A. de Roo and R. Jagtenberg: Comparative European research on court — encouraged mediation, Conference paper, Hague 2006, p. 3-4

VOLUNTARY V. COMPULSORY MEDIATION

Council of Europe recommendations on mediation in family and civil matters as well as EU Directive consider mediation as, in principle, voluntary process. In most Central and East European countries mediation is in fact voluntary, mainly due to its early developmental stage. Mandatory court related mediation is not widespread. On Malta family mediation was compulsory due to specific social interest because Maltese law did not allow a divorce of a married couple but just separate living. Mandatory schemes in Norway or in Germany under article 15a of German EGZPO in small claims and neighborhood disputes are underway. The so called "get your mediation ticket punched first" approach in order to make the courts a place of last, rather than first resort is exceptional in Europe. Courts have not yet developed multi-door concept. A complete menu of dispute resolution processes would be needed before the law would compel disputants to opt for any alternative dispute resolution process.

The research, conducted by Hazel Genn, has shown that if the country makes mediation mandatory, parties will of course use it. Especially, if they face a penalty when they bring a case to trial without having tried mediation first. So the first effect of compulsory mediation is that it gets a higher uptake than voluntary mediation. There is a second effect however. That is a declining success rate. Apparently, if parties are forced to engage in mediation, that does not in itself provide them with the right mind-set to work towards negotiated and mutually satisfactory settlements. The question then becomes — what is the right mixture on a scale that runs from an invitational approach, via seduction to full coercion.¹⁶

De Roo and Jagtenberg have found out that referral schemes in a number of European countries revealed that, next to voluntary schemes, mandatory referral exists, and, perhaps more importantly, that various shades of grey can be identified between the white of complete voluntaries and the black of absolute compulsion.

They have found that six (sub) variations of referral can be distinguished:

1. The parties themselves propose the idea for mediation as an option;
- 2a. The judge proposes the idea in a non — committal fashion;
- 2b. The judge (or mediator) proposes the idea, but accompanied of some professional explanation (often tailored to the parties);
- 3a. The judge initiates the referral; the parties can refuse without a sanction being imposed;
- 3b. The judge initiates, but a sanction may be imposed upon refusal;
4. Access to court is denied, as long as mediation has not first being attempted.

¹⁶ H. Genn: I would love to see a country make mediation compulsory — An interview, The state of affairs of mediation in Europe, What can governments do more?; Conflicthuntering, The Hague 29th and 30th June 2006

Only in the case of variation 1 there is full voluntary (self) referral, while only in variation 4 there is complete mandatory referral. Variation 2 is more widespread. It is clear that variation 2b is less voluntary than variation 2a. Here parties shall have to come forward with well-founded arguments, if they do not intend to consider the professional overview (usually supplied by the judge) of the possibilities that mediation may offer in the dispute at hand.¹⁷

Legal debates on the issue of voluntary versus compulsory mediation point to signs that voluntary court related mediation is attempting a comeback as a much more powerful tool than mandatory mediation to change disputing cultures. Alexander, Gottwald and Trenzcek discuss the bold experiment in Germany's Lower Saxony to change the disputing culture through a comprehensive voluntary court related mediation scheme.¹⁸

Conversely Ross argues that after unsuccessful attempts to change the disputing culture, mandatory mediation may, in fact, be the key to increasing awareness and changing the dispute management culture in Scotland.¹⁹

The question remains whether we could expect that mandatory mediation schemes will grow in Europe. The answer could be conditionally affirmative. But there is a danger that the tendency to mandate mediation directly (for example, through court referrals) and indirectly (for example, through legal aid) could lead to a scenario where litigation becomes an option only for the haves, that is repeat players and the affluent, and not for the have-nots. It is also important to note that the more compel participation in mediation is the more appropriate is regulation of this field. Last but not least, mandatory mediation model requires public funding of such schemes, in particular, if they are court-annexed.

CONFIDENTIALITY

"Member States should provide for legal guarantees of confidentiality in mediation"²⁰ Confidentiality is implied feature of mediation but unsettled area of the law. In countries where principle of confidentiality is not being statutory protected, further development of application of this principle depends on judicial case law. If judges don't know much about mediation particularities there would be a danger of harmful effect of mediation case law.

Principle of confidentiality is generally defined as follows: Unless otherwise agreed by the parties, all information relating to the mediation proceedings shall be kept confidential, except where disclosure

¹⁷ A. de Roo, R. Jagtenberg: Comparative European research on courts encouraged mediation; Conference paper, see page 13.

¹⁸ N. Alexander, W. Gottwald and T. Trenzcek, "Mediation in Germany: The Long and Winding road", part 2a VIII.

¹⁹ N. Alexander, Global trends in mediation: Riding the Third Wave, see page 2.

²⁰ CEPEJ, Working Group on mediation: Interim Report, p.19, see page 7.

is required by the law or for the purposes of implementation or enforcement of a settlement agreement.

Confidentiality is intended to protect mediation communications from disclosure in court and in extra judicial proceedings. It applies not only to oral and written communications but also to the demeanor or body language. Confidentiality is a binding principle for all participants in mediation, including mediator.

Duty of confidentiality may arise:

- From the agreement to enter into process between the parties and mediation provider;
- From the code of mediation practice;
- From the statutory law;
- From the court rules.

In order to provide confidentiality in practice the rules may arrange with the parties that, unless specifically asked not to do so, mediators will assume that they are authorized to disclose what has been discussed. Exceptions of confidentiality apply in case of action between the mediator and the parties for damages, arising out of mediation, mediator's testimony, when disclosure is required by the law, when it is necessary to avoid criminal charges or when confidentiality is subject to public policy based exception (child abuse, public safety or public health). Terms of confidentiality are matters of fact to be established in each individual situation. If there is no specific rule in the law or in the contract between the parties on when confidentiality shall not apply, then only the test of proportionality shall apply, that is whether the public interest justifies and overrides the disclosure notwithstanding what would otherwise be a duty of confidence.

ADMISSIBILITY OF EVIDENCES IN JUDICIAL PROCEEDINGS

In order to ensure the rule of inadmissibility of evidences, two goals shall be pursued:

- An obligation of the parties not to rely on certain type of evidence;
- An obligation of the courts to treat such evidence as inadmissible.

A party to the mediation, the mediator and any third person, including those involved in the administration of the mediation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:

- a) An invitation by a party to engage in mediation proceedings or the fact that a party was willing to participate in such proceedings;
- b) Views expressed or suggestions made by a party in the mediation in respect of a possible settlement of the dispute;
- c) Statements or admittance made by a party in the course of the mediation proceedings;

- d) Proposals made by the mediator;
- e) The fact that a party had indicated its willingness to accept a proposal for a settlement made by the mediator;
- f) A document prepared solely for the purposes of the mediation proceedings.²¹

LIMITATION PERIODS

Recourse to mediation is likely to affect access to justice in so far as such recourse does not end the limitation periods. At the end of the mediation in the event of the failure of the procedure, the action of the parties could then be extinguished or the limitation period open to them might be unjustifiably reduced.

Certain EU member states have stipulated in their legislation that the recourse to certain approved ADR bodies entails the suspension of the limitation period relating to the request made according to ADR procedure. In order to promote mediation, it may therefore be necessary to amend the civil procedure rules with regard to limitation periods, whereby the period could be interrupted, when mediation procedure begins and subsequently resume when the procedure ends, without a settlement having been reached.

Article 8 par. 1 of the EU Mediation Directive provides that Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation prescription periods during the mediation process.: The running of any period of prescription or limitation regarding the claim that is the subject matter of the mediation could be suspended as of when, after the dispute has arisen:

- a. The parties agree to use mediation;
- b. The use of mediation is ordered by a court, or
- c. An obligation to use mediation arises under the national law of a member state.

When the mediation has ended without a settlement agreement, the period resumes running from the time the mediation ended without settlement agreement, counting from the date when one of both of the parties or the mediator declares that the mediation is terminated or effectively withdraws from it. The period shall, in any event, extent for at least one month from the date when it resumes running, except when it concerns a period within which an action must be brought to prevent that a provisional or similar measure ceases to have effect or is revoked.

²¹ See article 10 of the UNCITRAL Model Law on International Commercial Conciliation: <http://www.uncitral.org/fr/index.htm>;

THE MEDIATION CLAUSE

The Council of Europe Recommendation No. (2002)10 on Mediation in civil matters invites the states to consider the extent to which agreement to submit a dispute to mediation may restrict the party's rights. This is the question of the so-called mediation clause. In arbitration law there is an arbitration clause which exclude access to the court if the parties agree that any dispute shall be attempted to be solved through arbitration. Such a clause in an agreement might also refer to mediation but the Council of Europe Recommendation indicates that such regulation is possible only if the national law prescribes so and that it becomes relevant especially in commercial disputes but not really in other types of civil disputes. From the aspect of lightening the burden of court commercial disputes, the mediation act might in this way promote the use of a mediation clause in agreements between commercial entities.

ENFORCEMENT OF MEDIATED SETTLEMENTS

Council of Europe Recommendation number R (98-1) on family mediation provides that states should facilitate the approval of mediated agreements by a judicial authority or other competent authority where parties request it, and provide mechanisms for enforcement of such approved agreements, according to national law.

Article 15 of the Model Law on the International Commercial Conciliation adopted by the UNCTITRAL on 35th session in New York on 28 June 2002 provides: If the parties reach and sign an agreement settling a dispute, that settlement agreement is binding and enforceable.

The question of the enforceability of agreements reached in mediation is dealt with differently in Council of Europe member states. In some states, it is for the court to approve these agreements while in others such agreements receive their enforceability from a body which is not a court (for example: an act by a Notary). There are also countries which introduced different enforceability regime for mediated settlement, depending on whether such a settlement was facilitated by a registered or non-registered mediator.

Some states have no special provisions on the enforceability of such settlements, with the result that they would be enforceable as any contract between the parties. In some national legislation, parties who have settled a dispute are empowered to appoint an arbitrator specifically to issue an award based on the agreement of the parties. Other legal systems provide for enforcement in a summary fashion if the parties and their attorneys sign the settlement agreement and it contained a statement that the parties may seek summary enforcement of the agreement.²²

²² See more on this issue in Guide to enactment and use of the UNCITRAL Model Law on International Commercial Conciliation

SELF-REGULATORY FRAMEWORK

Mediation is a flexible procedure therefore the basic principle of this process is the autonomy of the parties. This could become excessively restricted in so far as the law tries to regulate in great detail all open issues of procedural situations. Over standardization is the greatest hazard of any normative arrangement of process of mediation. The law should regulate only the basic principles of mediation such as the autonomy of the parties or their contractual freedom, the voluntary nature of mediation, principle of confidentiality, impartiality and integrity of the process and enforcement of settlement agreements. Other questions that are connected with the professional ethics of the mediator must in particular be left to self-regulation by means of a code of ethics of mediators, based on the model of the document submitted by the European Commission.²³

Empirical research about the attitude of the policy makers towards quality standards for mediation and mediators in Belgium, UK, Germany, Norway, Sweden, Denmark, France, Spain, Italy, Switzerland and Austria indicates that safeguarding of quality standards is a primary responsibility of the mediation providers themselves — hence self-regulation.²⁴ It is also indicated though, that self-regulation would have to be complemented by a supervisory task for the government. The multitude of organizations and disciplines involved in mediation services today hamper as yet as speedy conclusion on the quality standards discussion. Mediation profession in common law countries feels extremely reluctant towards any attempt to regulate the mediation profession by statutory law. Nevertheless, in Austria, for example, the government decided, upon the request of mediation profession, to regulate the accreditation and establishment of criteria for qualification of mediators.

The recommendation of the Council of Europe REC(2002)10 on mediation in civil matters provides that states should consider taking measures to promote the adoption of appropriate standards for the selection, responsibilities, training and qualification of mediators, including mediators dealing with international issues, in particular in case of compulsory mediation. In many European countries association of mediators has been established and assumed the responsibility for quality control in mediation (Slovakia, Slovenia, Bosnia and Herzegovina, The Former Yugoslav Republic of Macedonia, Montenegro and others). It is necessary for each state to strike a balance between minimum quality standards and maximum process flexibility. Mediation providers also seek to divert mediators from liability for breaches of contract, negligence or other tortuous conduct. Those mediators, who use contract terms with the effect of minimum risk of claims, are likely to face lower premium at professional indemnity insurance. However, if contractual or statutory immunity for

²³ European Code of conduct for Mediators regulates competence and appointment of mediators, independence and impartiality, the mediation agreement, process, settlement fees and confidentiality.

²⁴ De Roo and R. Jagtenberg: Comparative European Research on Court Encouraged Mediation.

mediator's liability exists, then it is necessary to provide consistency in training and accreditation of mediators.

One of the best practice examples in Europe of institutional mediation quality provider is Mediator's Federation Netherlands, former Netherlands Mediation Institute (hereinafter NMI). It operates within a strictly independent position and provides an independent quality framework in the shape of accreditation and registration of mediators as well as rules of conduct for mediators, a complaint procedure and independent disciplinary rules. It also provided quality assurance system for mediation and mediators through accreditation and independent personal certification in conformity with the uniform European standard EN45013, which was upgraded in a year 2010 into International Mediation Institute (IMI) Qualifying Assessment (QAP). MFN among others provides:

- A uniform infrastructure for mediation (mediation rules, models and agreements);
- A transparent and dynamic quality system for mediation and mediators;
- Advancement of mediation training facilities;
- Accreditation of mediation training institutes;
- Accreditation registration and certification of mediators;
- A complaints procedure;
- Independent disciplinary rules for mediators;
- Contacts with organizations, companies and public bodies;
- Development and dissemination of documentation and information;
- Independent selections from the NMI register of mediators to parties;
- Development and management of a web site on mediation for the public;
- Access to the public MFN and IMI register of mediators;
- Maintaining national and international contacts relating to mediation.

To ensure a reliable and transparent structure for mediation in Netherlands at a national level, MFN provides, among other things:

- The mediation rules;
- The complaints procedure;
- Rules of conduct for registered mediators;
- A model mediation clause;
- A model mediation agreement;

- Independent information and documentation on mediation;
- Independent disciplinary rules for registered mediators;
- A protocol for the assessment and recognition training institute;
- Protection and licensing of the title mediator and certified mediator;
- A public register of mediators listing the accredited mediators.

The purpose of the Quality Assurance Program, developed by IMI, is to provide a transparent, objectionable, dynamic, testable and independent system for mediation and mediator quality assurance nation wide.²⁵

Another example of self-regulation policy is Civil Mediation Council in England and Wales. It was established in order to protect end users of mediation services without having any mandate to impose quality criteria for mediators. Civil Mediation Council serves as single forum for many mediation organizations and is responsible for accreditation of organizations, not individual mediators. It was established in a year 2006 and it is composed of many mediation providers representatives and of the representatives of Ministry for the Constitutional Affairs.

CHAPTER 4

Regulatory framework for mediation in selected EU Member States

Introduction

In this chapter it is presented a summary of regulatory approaches to key mediation issues regarding mediation process, mediation profession and relationship between mediation and court proceedings in the following EU countries: Slovenia, Finland, Austria, Netherlands, Bulgaria, United Kingdom and Croatia.

After due and in-depth comparison of the mediation regulatory framework in all EU Member States, it became clear that it is worth to present systems of those countries which have a different legal tradition and which are in different stage of mediation development. The following criteria was taken into account:

- to present policy approaches in civil and common law jurisdictions;
- to compare approaches in old and young democracies;
- to identify approaches in Central and in Eastern Europe;

²⁵ Mediation in the Netherlands: Netherlands Mediation Institute NMI, January 2005.

- to select countries with extensive and with limited regulatory approach;
- to identify countries with judicial, court-annexed and court-connected mediation models;
- to point out differences in regulating mediation profession;
- to identify best practice policy approaches as regards incentives and smart sanctions for mediation demand and refusal.

SLOVENIA

General goal of Alternative Dispute Resolution Act in Judicial Matters²⁶ and of Mediation Act²⁷ is to encourage the use of mediation. ADR Act in Judicial Matters does so by imposing obligation on all courts of first and second instance to offer mediation in civil, commercial, family and labor disputes. By imposing obligatory design of court-annexed mediation programs legislator facilitated a wider access to Alternative Dispute Resolution. Moreover, mediation and adjudication are put on equal footing. A balanced relationship between mediation and litigation is therefore ensured in a way, that mediation is, for the parties, in principle still voluntary but courts and judges have to consider in every case, whether it is not eligible for mediation. Besides main goals (wider access to ADR, equality between mediation and adjudication and harmonization with EU policy) Mediation Act states some clear benefits from implementation of alternative dispute resolutions. Financial benefits, which impact both courts and parties, are substantial. In certain types of disputes parties are for example offered mediation free of charge (labor, family disputes). As for time spent in court, providing alternative procedures reduces case loads which again helps courts with their financial plan as well gives a better public perception of court efficiency.

EXISTING REGULATION / LEGISLATION ON MEDIATION

Slovenia has a specific statute dealing with mediation called The Mediation in Civil and Commercial Matters Act ('the Mediation Act'). The Mediation Act was adopted in 2008. The Act was developing at the same time as EU Mediation Directive and is therefore harmonized with it. Besides, the proposal of the Act was highly influenced by UNCITRAL Model law on International Commercial Conciliation and the previous experiences. Even before the adoption of the Mediation Act Slovenian courts were offering voluntary mediation based on interpretation of general provision of article 307 of the Civil Procedural Act (CPA). This provision prescribes the duty of the court to assist parties to settle at all times during trial. Therefore mediation has been practically in use since 2001, primarily

²⁶ The Act on Alternative Dispute Resolution in Judicial Matters (Zakon o alternativnem reševanju sodnih sporov)

²⁷ Mediation in Civil and Commercial Matters Act (Zakon o mediaciji v civilnih in gospodarskih zadevah)

taking the form of court-annexed mediation.²⁸ In 2009 the Act on Alternative Dispute Resolution in Judicial Matters ('the Judicial ADR Act') was also adopted. This act is important in connection with implementation of the EU Mediation Directive. This Act contains specific provisions on the mediation offered by court – it imposes an obligation on all courts of first instance and courts of appeal to offer mediation to parties in civil, commercial, family, and labor disputes (in some of these disputes mediation can be offered to parties free of cost). In addition to all the Judicial ADR Act was the basis for the issuance of Rules on mediators in the programs of the courts and Rules on awards and the reimbursement of travel expenses of mediators, acting in the programs of the courts.

REGULATORY TRENDS FOR BALANCED RELATIONSHIP BETWEEN LITIGATION / MEDIATION

Slovenia has got an ADR Act in Judicial Matters which imposes obligation on all courts of first and second instance to design either court-annexed or court-connected mediation programs.

Judges have also a duty to consider the eligibility of each particular dispute for mediation. Several thousands of court disputes are settled in court-annexed mediation each year.

REGISTRATION OF MEDIATORS

Out- of- court mediation is a matter of a free market since anybody could serve as a mediator, irrespective of his/her title or profession.

Court-annexed mediators are required to be registered in the list of the courts. Article 8 paragraph 1 of the ADR Act in Judicial matters provides that registered mediator must have capacity to enter into a contract, not have been convicted for deliberate criminal offence, have at least a first level of post-secondary education, and have undergone mediation training according to the programme determined by the minister of justice. Minimum training requirement is 40 hours of practical training.

INFORMATION SESSIONS

²⁸ *EU Mediation Law and Practice* (2012), prof. Giuseppe De Palo and prof. Mary B. Trevor, Oxford University Press, ISBN: 978-0-19-966098-8, 318 p.

Mediation can only be performed if parties agree to it. Their will can be expressed through the proposal to try to solve their dispute in mediation or with the approval of mediation, which was decided by the judge, after the information session has been held (by judge himself or his assistant).

VOLUNTARY / COMPULSORY NATURE OF MEDIATION

Slovenia does not have a complete compulsory form of mediation. However, the legal framework leaves enough space for that kind of interpretation. Slovenian legal theory already expressed a favourable opinion on mandatory preliminary ADR²⁹. Article 19 of the Act on Alternative Dispute Resolution in Judicial Matters imposes the following: *‘‘When it is suitable, given the circumstances of the case, and on the basis of consultation with the parties who participate in the informative hearing, the court may decide to suspend the proceedings for no longer than three months and refer the parties to mediation provided by the court in the framework of the program from Article 4 of this Act’’*. This cannot be explained as an obligation to conclude an agreement. Even the name of this Article clearly says *compulsory referral to mediation*. The obligation thus refers only on the judge’s act of the referral and parties’ cooperation. Parties are given a chance to argue judge’s decision. In case any party appeals, the court must repeal its decision.

Slovenian laws impose some other mandatory characteristics. A settlement hearing in which the judge informs parties of their possibility to try ARD is one of them. Judge is not obliged to perform so only if he deems this kind of approach would be inappropriate for a particular case. Another such example is the duty of a state, when involved in dispute, to first try mediation. If the State’s Attorney’s Office think mediation would not be an appropriate option for solving a certain dispute, then the question must be forwarded to the Government of Republic of Slovenia.

CONFIDENTIALITY

Confidentiality under Slovenian legislation meets Directive requirements. Mediator can disclose everything he received from one party to another unless the information was given as confidential. Other than that information gained in the process of mediation cannot be disclosed with third person unless disclosure is required by law, unless parties agree on disclosure or it is necessary for the enforcement of a dispute settlement agreement.³⁰

²⁹ Zakon o alternativnem reševanju sodnih sporov s komentarjem, B. Jovin Hrastnik, str. 93

³⁰ Mediation Act Articles 10, 11 and 12.

ADMISSIBILITY OF EVIDENCE

Admissibility of Evidence in Other Proceedings is outlined in Article 12 of the Mediation Act. The article sets out six inadmissible sorts of evidence³¹. Those kinds of evidence can only be disclosed or used exceptionally in special proceedings.

LIMITATION AND PRESCRIPTION PERIODS

Under the Mediation Act mediation has a different impact on limitation and prescription periods. Prescription periods refer to a deadline for bringing an action to court. This kind of periods may not expire during mediation. If the mediation attempt fails, the party has at least 15 days to bring an action or start arbitration proceedings. On the other hand, statutory limitation period stops running during mediation. If then mediation ends without an agreement, the limitation period continues to run from the moment the mediation ends.³²

ENFORCEMENT OF MEDIATED SETTLEMENTS

The Mediation Agreement can be enforceable if parties decide that way. They may as well choose not to enforce it. However if they wish otherwise the agreement has to take the form of a directly enforceable notary deed, a court settlement, or an arbitral award based on the settlement.⁴⁸ It may also be enforceable as a court settlement if an action has not been formally initiated in the court yet. With respect to court settlements, the agreement can also be recorded right after the termination of mediation proceedings.

INCENTIVES AND SANCTIONS

If parties unreasonably decline the use of mediation they might be sanctioned in the sense of bearing the costs of the judicial proceedings irrespective of the outcome of the dispute.³³ This is also called a smart sanction because in practice it rather comes out stimulus. As the Consultative Council of European Judges (CCJE) expressed in opinion in paragraph 149 of the Opinion no.6 (2004)³⁴: *“The CCJE discussed the role of the judge in mediation decisions considering first of all that recourse to mediation, in civil and administrative proceedings, may be chosen on the parties' initiative or,*

³¹ An invitation by a party to engage in mediation or willingness to participate, (2) views expressed or suggestions made by a party in respect of a possible settlement, (3) statements or admissions of the party, (4) proposals made by the mediator, (5) party's willingness to accept the mediator's proposal, (6) documents drawn up solely for mediation's purposes.

³² Mediation Act Article 17⁴⁸

Mediation Act Article 14

³³ *EU Mediation Law and Practice* (2012), prof. Giuseppe De Palo and prof. Mary B. Trevor, Oxford University Press, p. 319

³⁴ <http://www.vss.justice.bg/en/evro/ccje/Opinion%206.pdf>

alternatively, the judge may be allowed to recommend that the parties appear before a mediator, with their refusal to do so sometimes being relevant to costs.”

Therefore Slovenian courts can decide, upon request of the other party, to order the party that submitted a clearly unreasonable objection to the mediation referral to reimburse the other party for all or part of the expenses of the process. In deciding whether the objection to the mediation referral was clearly unreasonable, Article 19/VI of the Act on ADR in Judicial Matters imposes some of the circumstances which shall be taken into account.

IDENTIFICATION OF GOOD PRACTICES

Slovenian mediation project of District Courts of Ljubljana was recognized as an example of good practice in the competition for the Crystal Scales of Justice, organized by the Council of Europe and the European Commission in 2005. From then on this practice expanded, other district and local courts adopted it. In 2008 only 800 cases were resolved in mediation but in the following years the number of mediated settlements in court cases increased significantly. The adopted regulation accelerated use of mediation. Today more than 4300 cases per year are solved through mediation.

FINLAND

Main objectives of the new legislation regarding mediation are set to follow international developments in alternative dispute resolution by the recommendations of the Council of Europe and the European Union. Given the ever-growing complexity of dispute resolution, courts should offer a wider palette of alternative procedures available to its clients, with objectives to lower the threshold of seeking judicial redress. Mediation supports flexible relationship between parties and mediators, compliance and enforcement, no win or lose dichotomy and overall a simpler, cheaper and faster procedure than going to court. Reaching these stated advantages that mediation has over regular adjudication and judgment are all explicit goals and benefits of Mediation in Finland, which are set to improve its judicial procedures and trust in the courts in general.

EXISTING REGULATION / LEGISLATION ON MEDIATION

Finland has a long tradition on mediation. Specific areas such as labor disputes and criminal matters have long been under the influence of solving disputes with the help of mediation. Court-annexed mediation was formally first introduced in 2006 with the Act on court-annexed mediation (1015/2005) and amended provisions in the CJP on Settlement Certification in court (amendment Act 664/2005). According to the Mediation Act, court-annexed mediation is a procedure voluntary to the parties and managed by the judge, aiming at a situation where parties themselves find a satisfactory resolution of

their conflict. Mediation itself, as a form of alternative procedure to reached settlements in civil proceedings, which proved to be beneficial since 1993, quickly needed a new legislative framework. The mediation Act on Court Mediation enforced in 2011 and Act of Confirming settlements in Courts (394/2011) implemented the Directive into Finland's justice system and legislation. Even though the Directive applies only to cross-border disputes, Finland ensured provisions of the mediation Act cover cross-border and domestic disputes alike, minding that these same provisions do not apply in settlements reached abroad with no cross-border ties.

REGULATORY TRENDS FOR BALANCED RELATIONSHIP BETWEEN MEDIATION / LITIGATION

Ensuring balance between mediation and legislation Finland offers two procedures to settle disputes in civil proceedings: the promotion of settlement in a civil procedure and court-annexed mediation. Legislation dictates a judge is required to investigate the prospects of settling a civil case during its preparation. Judges may also propose settlement.

INFORMATION SESSIONS

Mediation can be suggested by courts own initiative depending on if the proceedings are already pending. Otherwise parties can file application for mediation before or during legal proceedings. Parties do not have a duty to consider mediation prior to litigation. According to the Bar Association Code of Conduct clients counsel is however required to consider if the dispute can be resolved by the use of any ADR procedure, due to counsel's duty to facilitate the best possible solution. According to the Mediation Act the commencement of court-annexed mediation requires the consent of all parties. However the courts decide on the commencement of mediation (if the matter is amenable to mediation).

VOLUNTARY/COMPULSORY NATURE OF MEDIATION

Court-annexed mediation in Finland is a voluntary process under the management of the judge. Mediation cases become pending in court either by a request for mediation or by way of a specific mediation application. The request can also be made later during preparatory stage in court proceedings. However, the court is the one to decide if mediation is to be undertaken. Mediation can solve disputes in all types of civil cases, although it cannot be used in all situations. Mediation can be declined for example when the parties are not equal, because one of the parties is incapable of pursuing his/hers own interests in an appropriate matter.

The process itself can also be informal because there are not procedural provisions in the legislation for that matter. Court-annexed mediation in Finland is by its nature evaluative and a facilitative effort.

CONFIDENTIALITY

Since the Mediation Act was enforced, court-annexed mediation proceedings are presumptively public unlike out-of-court mediation, which is as a rule, confidential. Though the provisions were in first criticized, those in favor of public proceedings pointed out “*the facilitative mediation is not the administration for justice, but rather, assisted mediation*”³⁵.

Specific provisions establishing the presumption of public mediation proceedings are imposed in Section 12 of the Mediation Act. However, according to that same section, documents and openness of mediation are subject to the provisions of the Act on Publicity of Court Proceedings in General Courts (370/2007, “the Publicity Act”). Therefore, according to the Publicity Act “*all court proceedings and documents are public in general, unless specifically classified or ordered confidential.*”³⁶ Confidentiality of mediation proceedings can however be achieved, if the parties request the court that mediation is confidential. Unlike the proceedings (confidential if requested), all consultations between the mediator and one party are not open to public according to the Section 12 of the Mediation Act.

Implementation of the Directive³⁷ regarding mediator’s duties on confidentiality (Article 7) was also enforced in Section 13 of the Mediation Act. Mediators and assistants may not reveal what they have learned regarding the mediated matter. Exceptions can be made, if the party benefiting from the confidentiality consents to disclosure or in other cases when disclosure is provided by law.

Mediators duties of confidentiality are further protected in newly imposed provisions, Chapter 17, section 23 of the Finnish Code of Judicial Procedure (4/1734). These provisions ensure confidentiality regarding admission of evidence in judicial proceedings where mediators and assistants “may not testify about knowledge gained in the course of mediated matter.”³⁸ However, exceptions such as public interest, interest of a child or to prevent violations of a person’s mental or bodily integrity, can justify by law, mediator’s admission of evidence against parties.

³⁵ *Eu Mediation Law and Practice (2012)*, prof. Guiseppe de Palo and prof. Mary B. Travel, Oxford university press, p. 100

³⁶ *Eu Mediation Law and Practice (2012)*, prof. Guiseppe de Palo and prof. Mary B. Travel, Oxford university press, p. 100

³⁷ *EU Directive 2008/52/EC*

³⁸ *Eu Mediation Law and Practice (2012)*, prof. Guiseppe de Palo and prof. Mary B. Travel, Oxford university press, p. 101

ADMISSIBILITY OF EVIDENCE

Evidence and knowledge gained in the process of mediation are under strict provisions of confidentiality. Due to the implementation of the Directive, similar provisions on admissibility of evidence were enforced in Section 13 of the Mediation Act. To sum up, mediators and assistants may not reveal, nor to the public or in further civil proceedings, what have they learned regarding the mediated matter. Exceptions can be made, if the party benefiting from the confidentiality consents to disclosure or in other cases when disclosure is provided by law. Provisions in the Mediation Act (Section 16) also impose a special privilege by which a party may not refer to the representations made by the other party in interest of reaching settlement.

Moreover, mediators duties of confidentiality in matters of admission of evidence are further protected in Chapter 17, section 23 of the Finnish Code of Judicial Procedure (4/1734). These provisions ensure confidentiality regarding admission of evidence in judicial proceedings.

Mediators and assistants “may not testify about knowledge gained in the course of mediated matter.”³⁹

However, exceptions such as public interest, interest of a child or to prevent violations of a person’s mental or bodily integrity, can justify by law, mediators admission of evidence against parties.

LIMITATION AND PRESCRIPTION PERIODS

The Directive’s Article 8 imposes requirements for member states to ensure mediation parties the right that participation in mediation suspends the limitation period. “*Parties choosing mediation must not be subsequently barred from perusing their claim through litigation due to the expiration of limitation periods during the mediation.*”⁴⁰

The suspension starts from when the mediation becomes pending. The relevant point for that in court-annexed mediation is when the court agrees upon the commencement of mediation. The suspension lasts as long as the mediation proceedings continue. When the proceedings are concluded, so is the limitation period.

ENFORCEMENT OF MEDIATED SETTLEMENTS

There are three possible outcomes in court-annexed mediation. First, mediation can end with a certified settlement or by parties notifying the mediator that they have reach settlement in some other matter. Secondly, a party can notify the mediator that he/she no longer wishes mediation in the case. Finally, the mediator can decide (after having heard the parties) that continuation of mediation is no

³⁹ *Eu Mediation Law and Practice (2012)*, prof. Guiseppe de Palo and prof. Mary B. Travel, Oxford university press, p. 101

⁴⁰ *Eu Mediation Law and Practice (2012)*, prof. Guiseppe de Palo and prof. Mary B. Travel, Oxford university press, p. 104

longer justified. However, if the case is also pending in adjudicative matter, mediation failure consequently leads to resuming of the civil proceedings, which can be ended by judgment, certified settlement or case being struck from the docket.

In practice, enforcement of mediation settlements is not something parties usually agree to do, since they both have entered into mediation proceedings willingly, conducted the negotiations voluntarily and in same matter reached a fair settlements.

In line with Article 6 of the Directive, Mediation Act predicts that all settlements in court-annexed mediation can be certified if the parties request the court to do so. Moreover, the Mediation Act⁴¹ states that such settlements can gain enforceability only if the mediator undertook certain mediation training provided by MoJ. When the court confirms a settlement, the decision is then enforceable on the basis of the Finnish Enforcement Code (2007/705). The confirmation of a settlement agreement has an immediate effect on any pending judicial proceedings, however there are certain limitations on whether the confirmation of settlement agreements is even possible. According to the Mediation Act, Section 8 courts cannot confirm the settlement if it is against the law, clearly unfair or breaches the rights of a third party.

INCENTIVES/SANCTIONS

One of the key incentives for mediation in Finland is that judges are performing mediations at courts and that disputants may refer their disputes to judicial mediation no matter wither the case is registered at court or not.

Sanctions: a party who unreasonably refuses to mediate can face serious cost sanctions at the end of a trial, subject to the court's discretion.

The parties bear their own costs arising from court-annexed mediation. A party cannot in proceedings concerning the matter of mediation, claim the opposing party for costs arisen from mediation.

Nevertheless, mediation in Finland is not costly since judges-mediators perform mediation on a pro-bono basis and don't charge mediation fees.

IDENTIFICATION OF GOOD PRACTICES

In Finnish court-annexed mediation approximately 68% of cases end up with a settlement. Since 2011 court-annexed mediation has evolved rapidly. Voluntary nature of mediation proved to be efficient enough for the brilliant results in disputes of all civil matters. Cost efficiency has proven to be one of the most important benefits for parties and courts. Parties for example do not need to pay mediator's

⁴¹ The Mediation Act, s 18(3)

fees, because the process is public service. Mediation has become a broader process than just a judicial procedure. Even unconventional methods such as Peer mediation in Finnish schools, Workplace mediation and Family mediators proved that mediation itself (not only as imposed by the Mediation Act) is an efficient problem-solving technique. To conclude, the case of Finnish court-annexed mediation should play as a role model to all seeking knowledge about its benefits.

AUSTRIA

Austria regulated Mediation as a European pioneer in the field of alternative dispute resolution however pointing out that it plays its role besides and not in place of the judicial process of reaching settlement. Among its general goals to reduce court caseloads and restore trust in the judicial system, Austrian mediation is in terms of legislation focused on introducing predictable legal framework , on alternative dispute resolution provisions that regulate procedure, accreditation/certification, etc. Following the European Union Mediation Directive Austrian legislation predicts costs and time efficiency for both, parties and courts. Moreover, agreements achieved by mediation are more likely to be complied by the parties because of their flexibility.

EXISTING REGULATION / LEGISLATION ON MEDIATION

Provisions on certain aspects of mediation in family law (divorces, children custody) existed in Austria since the year 1999, although there was no specific Act on mediation until 2004, when the Mediation Act⁴² (federal law on civil mediation) was enforced by the Austrian government. Consisting of 9 sections, provisions define mediation as a voluntary process, regulate training requirements for future mediators and other conditions as well as procedures for accreditation/registration of mediators. Because of high standards of the Mediation Act, the Directive⁴³ was implemented by a separate Act on Certain Aspects of Cross-border Mediation in Civil and Commercial matters in EU. The EU Mediation Act came into effect in May of 2011. Moreover, Austrian government also imposed some provisions concerning mediation (court referral for settlement, informing about ADR) in the Code of Civil Procedure (CCP).

⁴² Austrian Federal Law Gazette (BGBl) I Nr 23/2003

⁴³ EU Directive 2008/52/EC

REGULATORY TRENDS ENSURING BALANCED RELATIONSHIP BETWEEN MEDIATION / LITIGATION

Although Austria is by its legislation on ADR procedures a pro-mediation country it does not in fact have a formal court-annexed mediation scheme. In practice, there are however some specific types of civil disputes where legislation imposes mediation, such as civil claim against neighbour for obstruction of light or air by trees or plants and some labour law situations. These situations are in practice very rare.

INFORMATION SESSIONS

The court may (and in family and estate must) assist parties with dispute settlements at any time during the proceedings and when appropriate, may inform the parties about institutions, which are qualified for ADR. *“The court may also invite the parties to attend an information session on the use of mediation if such use of mediation is held and are easily accessible.”*⁴⁴

VOLUNTARY/COMPULSORY MEDIATION

Mediation in Austria is based on voluntariness of the parties involved in a dispute. To consider the use of mediation courts and parties are free to make their own decision on how to resolve a dispute. Parties can start an ADR process at any time of the proceedings if the other party consents to alternative dispute resolution. Yet in some special cases mediation is compulsory before parties can institute legal proceedings. Such limitation is imposed in matters of neighbour and labour disputes, where parties have to consult a conciliation committee or registered mediator before a claimant can file legal action.

⁴⁴ Eu Mediation Law and Practice (2012), prof. Giuseppe de Palo and prof. Mary B. Travel, Oxford university press, p. 12

REGISTRATION OF MEDIATORS

Austria introduced registered and non-registered mediators. Under Mediation Act, mediation which is not performed by a registered mediator, is neither subject to confidentiality nor to procedural exceptions regarding inadmissibility of evidence. List of registered mediators is run by the Federal Ministry of Justice. The applicant must be at least 28 years old, professionally qualified and trustworthy and must obtain liability insurance. Professional qualifications are determined by the Federal Ministry of Justice Regulation. The training must be provided by the accredited training institution, approved by the Federal Minister of Justice. Training requirements are extremely extensive since a registered mediator must complete between 200 and 300 hours course units of theory and between 100 and 200 course units of practical education.

CONFIDENTIALITY

Provisions of the Mediation act on confidentiality meet the requirements of the Directive. Strict legislation on accreditation and certification of mediators is also referred on general duties of confidentiality. The mediator is obligated to keep all information and facts confided by each party a secret. Infringement of this duty renders the mediator liable to prosecution although these provisions apply only on registered mediators as enforced by the Mediation Act. Mediation performed by unregistered mediators is neither subject to confidentiality nor the procedural exceptions from duty of giving evidence. Moreover, confidentiality provisions not in any way obligate parties, although they can agree upon confidentiality by contract.

ADMISSIBILITY OF EVIDENCE

The general duty on confidentiality refers also to admission of evidence. According to Article 320(4) of the CPP,⁴⁵ testimony of registered mediators is inadmissible as for criminal cases, mediators also have a right to refuse to give evidence.⁴⁶

LIMITATION AND PRESCRIPTION PERIODS

*“The commencement and the proper continuation of mediation proceedings suspend the expiration of limitation period, but they do not suspend procedural time limits.”*⁴⁷ Parties may also agree in writing that the suspension of the limitation period also concerns other claims not affected by the mediation. Moreover claims, which are subject to family law, are entirely covered by provisions of suspension, even without a written agreement, unless the parties expressly deviate from that rule.

⁴⁵ Code of Civil Procedure

⁴⁶ Code of Civil Procedure, Art 157(1)(3)

⁴⁷ Eu Mediation Law and Practice (2012), prof. Giuseppe de Palo and prof. Mary B. Travel, Oxford university press, p. 13/14

MEDIATION CLAUSE AND MEDIATION AGREEMENT

There is no definition on mediation clauses or agreements in any Austrian Code, therefore general rules and principles of civil and procedural law are applied. Mediation clauses can be included in the civil agreement of the parties in a form of the contract or as a freestanding agreement. No specific form-requirements are needed. In addition the content of the mediation clause/contract is under private autonomy of the parties and in most cases includes; the scope of mediation, appointment of the mediator, conditions of the mediation procedure, parties to the mediation, etc. Breaching the clause/contract is breach of contract, however under Austrian law, mediation clauses/contracts are not enforceable even if one party does not agree to resolve the dispute by mediation.

Most importantly there is a need to differentiate between mediation contract/clause and the mediation agreement. Mediation agreement refers to the relationship between parties and the mediator. The mediation agreement has both, the nature of a civil contract for services and contract of work. As a consequence the mediator has a right to claim an appropriate remuneration and owes an accomplishment of services by objective standards of his profession.

ENFORCEMENT OF MEDIATED SETTLEMENTS

Before the implementation of the Directive, parties had no possibility of reaching enforceability of settlements gained from mediation. The only option was if the agreement was made enforceable by a notarial deed. Nowadays parties may submit the content of mediation agreement before any regional court, which will be approved as long as the content does not violate the law. The judicial settlement is then enforceable at law. If the settlement is not submitted for enforceability, any party can at any time, even after a successful mediation, file a civil action before the court concerning the same issue.

INCENTIVES AND SANCTIONS

No direct financial incentives or sanctions connected with mediation are available.

IDENTIFICATION OF GOOD PRACTICES

In conclusion, although Austria has few court-annexed mediation experiences, it has developed efficient practices in matters of neighbour and labour disputes. Family disputes resolved by mediation have long been proven as successful.

In addition, government-funded mediation is as according to statistics very successful, reaching high numbers of mediated cases (2,504 mediations). It includes mediation about custody rights, visitation rights, alimony disputes and separation of property after divorce.

THE NETHERLANDS

Netherlands legislation on Mediation and ADR in general is focused on four long-term goals and benefits. Most importantly the goal is to give legal status to settling disputes and doing so in the qualitatively best and most efficient way. Parties should be given a multiform access to alternative dispute resolutions, and a broader responsibility for settling disputes. Benefiting from multiform alternative procedures, court also experience reduction of caseloads.

EXISTING REGULATION / LEGISLATION ON MEDIATION

Netherlands doesn't favour regulatory approach with respect to mediation. In 2012 the House of Representatives adopted Bill No. 32,320 – a new law that implements EU Mediation Directive in a very limited and compromised way. It is limited only on crossborder mediations (the Netherlands had a proposal – Bill No. 32,555 which was broader but raised to many concerns and finally led to withdrawal).

According to European Parliament's Directorate-General for International Policies' study The Minister of Security and Justice has recently announced supplementary legislation regulating, which proposes quality standards and a national register for mediators. In addition, a private member's bill on mediation has been announced. A lot still needs to be done to regulate not only cross-border but domestic mediation in the Netherlands.

Another relevant source for mediation is Civil Procedure Code (Adaptation of the Book 3 of the Civil Code and the Code of Civil Procedure to the EU-Directive on Certain Aspects of Mediation/Mediation in Civil and Commercial Matters). Until another regulation framework is adopted – Civil Procedure Code is the main one regulating court-annexed mediation. For that kind of mediation the Netherlands rather use expression *court referral mediation*.

REGULATORY TREND FOR BALANCED RELATIONSHIP BETWEEN LITIGATION / MEDIATION

Types of cases that can be mediated are dismissals, divorce and guardianship, rent disputes, conflicts with the government, neighbor disputes, commercial disputes, referrals by legal aid insurers, trade unions, dispute committees, government bodies, rents commissions, ombudsman, community mediation and the business market.

INFORMATION SESSIONS

Mediation in the Netherlands is not mandatory. A judge can either make an oral or written referral. He can suggest an oral referral to mediation anytime during court hearings. There is no special

information session. If the referral is written judge sends a special brochure and a 'self-assessment' to the parties so it is easier to decide whether they should mediate or not. For all the information about mediation an officer is also available. Mediation officer can then even assist the parties in choosing the mediator and setting a date for first meeting.

VOLUNTARY / COMPULSORY NATURE OF MEDIATION

The Netherlands' mediation is voluntary by its nature. According to the legislation which implemented the EU Mediation Directive a judge can recommend to the parties that they make use of a mediator. This can be achieved in two ways: (i) the court can suggest mediation in a letter to the litigants or (ii) the court can suggest mediation during court hearings.

CONFIDENTIALITY

The Dutch implemented Directive's provisions on confidentiality by modifying their Civil Procedure Code. According to the Civil Code Adaption confidentiality has to be agreed first, to be able to make use of the right of non-disclosure. However the participants are obliged to give evidence if parties agree, or this information is necessary to imperative reasons related to the public order.

ADMISSIBILITY OF EVIDENCE

When the confidentiality between the parties is specially agreed the mediators and parties involved in the mediation can decide to make use of a non-disclosure agreement, which protects the parties and the mediator from the obligation to give evidence or information related to mediation process.

LIMITATION AND PRESCRIPTION PERIODS

The limitation of an action is interrupted by mediation. The limitation period begins to run again the day after mediation was terminated. Mediation is terminated when either of the parties or the mediator notifies another party in writing that the mediation is terminated or if none of the parties took actions for more than six months during mediation. After mediation is over a new limitation period is set for three years.

ENFORCEMENT OF MEDIATED SETTLEMENTS

If parties want their mediated solution to become enforceable they have to request the court to mark the settlement in a court report as such or to deliver a judgment or order on that matter. Confirmation document has to be countersign by both parties (or their official representatives)⁴⁸.

⁴⁸ *EU Mediation Law and Practice* (2012), prof. Giuseppe De Palo and prof. Mary B. Trevor, Oxford University Press, p. 361

INCENTIVES AND SANCTIONS

Since the Netherlands is putting the emphasis on voluntary of mediation there are no requirements to consider or participate in mediation process nor sanctions associated with participation. They do have some incentives though – for court-annexed mediation, the judiciary covers certain costs. Between 2005 and 2009 they even had a temporary financial stimulus to offset some of the costs for cases referred from a court to mediation. It was available for parties who were not eligible to receive legal aid. In practice, this arrangement meant that parties received the first 2.5 hours of mediation for free. Today they only provide legal aid. Depending on the duration of the mediation and the income levels of the parties, a small financial contribution (50-100€) may still be required.

IDENTIFICATION OF GOOD PRACTICE

Before 2000 mediation was known only to a small group of legal professionals and citizens. Not that many cases were mediated and in addition mediation's image was a negative one – as a soft conflict resolution. However situation has drastically changed later when Platform ADR took and realized some promotional ideas. The Platform ADR suggested developing strategy to inform citizens about the added value of mediation, they implemented legal aid for those who could not afford mediation, trainings for legal practitioners, manuals for court officials, judges and lawyers, a registration process was developed for mediators interested in participating in court-annexed mediations. According to Mediation Monitor 2005-2008 report the number of referrals to mediator has increased from 830 (2005) to 3,708 cases in 2008⁴⁹. Research on the court-annexed mediation schemes in Netherlands shows that out of 1000 disputes referred to mediation 61% were settled. However the average duration of a judicial procedure that involves a referral to mediation is longer than a judicial procedure without referral.

What makes the Dutch practice a good one is their way of informing people of usefulness of mediation. Here two main actors are active: judiciary and the Dutch Mediation Institute (NMI). According to the study of Dutch Scientific Research Institute of the Ministry of Security and Justice in years 2005-2008 the most important information resource is a judge or an officer of a 'judicial information desk'. In 2005 they launched a nation-wide court-annexed mediation program, which required from all courts to design their mediation schemes and legal information desks. Today website visitors can find a lot of information about the process, costs, possibility of receiving legal aid. There are even some specific brochures about mediation including examples of practice and a self-assessment questionnaire so the reader can determine if mediation is suitable for the dispute

⁴⁹ *EU Mediation Law and Practice* (2012), prof. Giuseppe De Palo and prof. Mary B. Trevor, Oxford University Press, p. 369

concerned. In 2011 a general information campaign was launched by means of radio commercials and poster campaign.

BULGARIA

Bulgaria's laws do not mention any special goals or benefits of mediation. However one of the current goals of Bulgaria's mediation program is to foster the awareness of legal professionals and general public about the use of mediation, which makes it obvious that mediation has some benefits and is better from litigations. As can be seen from the website of Ruskov & colleagues law office , mediation saves time, is cheaper and preserves the relationship between parties. Another benefit is also the possibility of the parties to determine their own interests, priorities and therefore influence the outcome of proceeding. The process is confidential and therefore enabling parties to cooperate and solve dispute without unnecessary publicity.

EXISTING REGULATION / LEGISLATION ON MEDIATION

Bulgaria adopted Mediation Act in 2004 and renewed Civil Procedure Code ('the Code) in 2008. They also set minimum standards for mediation training and requirements for certification of mediators and training instructions in Ordinance no. 2 (2007). Later amendments to the Mediation Act implemented the EU Directive. Implementation was focused mainly on ensuring higher protection for parties (confidentiality, statutes of limitation, mediators' impartiality and neutrality, enforcement of the settlement).

REGULATORY TRENDS FOR BALANCED RELATIONSHIP BETWEEN LITIGATION / MEDIATION

In Bulgaria mediated subjects are family disputes (including divorce proceedings), civil disputes and commercial disputes. Until recently court-annexed mediation is used only in two biggest courts – Sofia City court and Sofia Regional court.

INFORMATION SESSIONS

Although the EU Mediation Directive was completely adopted, information sessions are not a part of Bulgarian legislation. Judges may invite parties to use mediation but are not having a special meeting with them to inform them about the process of mediation. Some courts decided to add that kind of provision to their own rules.

VOLUNTARY / COMPULSORY NATURE OF MEDIATION

While preparing the revisions to Mediation Act, the idea of making mediation mandatory was brought up. Bulgaria retained voluntary mediation. There is only one kind of proceedings where the court shall

be obligated to redirect parties to mediation or another procedure of voluntary resolution of the dispute. Divorce proceedings – first hearing for examination of the case. However parties still need to approve mediation. If they do so, divorce case will be stayed. If they don't they need to request a resumption within six months. If they refuse to do so, case is dismissed.

CONFIDENTIALITY

Bulgarian legislation guaranteed mediation confidentiality protections even before the Directive's implementation. After the implementation protection is higher and exceptions are defined. All discussions, events, facts, documents developed during the process of mediation and in connection with it are confidential. Same goes for information related to activity as a mediator⁵⁰. Furthermore Paragraph 2 of Article 7 of the Mediation Act provides admissibility of evidence gained from mediator's interrogation in case consent of the confiding party was not given. In the following Paragraph 3 exceptions are listed. First one for the purposes of criminal procedure in relation to protection of public interest, second for best protection of children or integrity of other person and third if disclosure is necessary in order to implement or enforce that agreement.

ADMISSIBILITY OF EVIDENCE

Parties and their lawyers are not prevented from using information obtained in mediation in subsequent court proceedings. For doing so one cannot be sanctioned. They can sign an agreement that contains a confidentiality clause though. In that case breach may result in liability for damages.

LIMITATION AND PRESCRIPTION PERIODS

Limitation period doesn't run during the mediation. Bulgarian legislative has individualized rules determining the beginning of mediation while the termination of mediation is provided in general – six months from the beginning of the procedure. In future it is expected that legislation will be amended with more specific rules determining the final date of mediation more explicitly. Thus there will be no doubt around the date on which the limitation period recommences.

ENFORCEMENT OF MEDIATED SETTLEMENTS

In the Article 18 of the Mediation Act enforceability is enacted. The court should approve the agreement, once acknowledged by the parties, if it doesn't contradict the law or the principles of morality. According to paragraph 1 of the same Article the approved agreement will have the full legal force (will become *res iudicata*). As such it will be final, it cannot be subject to appeal and the

⁵⁰ Bulgarian Mediation Act, Article 7; Ordinance, Article 33.

same dispute between these parties cannot be referred to the court in the future. As an addition to that, parties can also notarize their agreement.

Once the settlement agreement is reached, the court can dismissed a case on a parties' request, or on the plaintiff's withdrawal or waiver of its claim. However if the agreement only covers part of the dispute, court proceeds with the unsettled part.

There are some open questions related to enforceability of the agreement such as should the parties appear in person when confirming the agreement, what is the right legal procedure to approve the mediated agreement on courts, what fees should be collected for the approval, etc.

INCENTIVES AND SANCTIONS

Bulgarian has an interesting incentive for the parties to reach a settlement agreement. Under the Code, Article 78(9) half of filing fees deposited shall be refunded to the plaintiff if the settlement agreement is achieved. However there are no sanctions provided for not mediating.

REGISTRATION OF MEDIATORS

Bulgaria's minister of justice accredits mediators by entering them into Uniform Register of Mediators. To be qualified, an applicant must be a legally capable person who has successfully passed mediation training of at least 60 hours, out of which 30 hours should be practical (Article 8 of Mediation Act and implementing Ordinance), has not been convicted for crime and has not been deprived of the right to exercise a profession or an activity.

Judges and prosecutors are not allowed to perform a role of a mediator, other public officials could serve as mediators only on a pro-bono basis

IDENTIFICATION OF GOOD PRACTICES

Bulgaria has a very efficient and stable legal framework, which is promising for further mediation development. The statistics are currently available for Court Settlement Centre at Sofia Regional Court. They show that use of mediation is increasing each year, cases are being referred to mediation in about 2/3 of working days, the mediations are held every other day and usually the settlement was achieved after only two sessions.

The main and most active character in mediation is Sofia Regional Court, which started a Court Settlement Program (in a Court Settlement Centre) in 2010. Centre operates pro bono and is full of volunteers and judges, trained to mediate. The program is focusing on providing information, consultations, and trainings for legal professional, institutional strengthening of the Court Settlement Centre (by establishing effective rules and procedures for its administration, increasing the professional capacity of the coordinators and developing a strategy for its sustainability). The success

of the Centre attracted many additional institutional, financial and professional support (even from America⁵¹).

Another privilege Bulgaria has are strong and positive image of judges. They are highly respected and people trust them. To foster awareness of people about the use of this process, mediators are cooperating with different NGO's, Universities and Institute of Justice and MoJ.

UNITED KINGDOM

To ensure compliance with the EU Mediation Directive legislative changes had to be made, to encourage parties to use ADR procedures. The main goal for the government was to ensure disputes progress to a hearing only when absolutely necessary. Reaching this goal meant educating the justice system as well as the general public about mediation and other ADR procedures.

Moreover, it is crucial for legislators to fully integrate mediation into the United Kingdom justice system, so that it can become a part of the court process.

Enabling courts to deal with cases justly and actively with the help of the parties, mediation gives an opportunity to benefit from reduced court caseloads and saved costs. By choosing a faster and much cheaper alternative procedure, parties can solve disputes in a way, which is more flexible and most importantly, less daunting.

EXISTING REGULATION / LEGISLATION ON MEDIATION

Through history England and Wales did not have any legislation on mediation. Legislation frame developed through judicial decisions and individual cases, later on new Civil Procedure Rules (CPR) were introduced, together with Alternative Dispute Resolutions. The objective was to solve disputes more justly, but the practice showed ADR was not offered and used as often as predicted. In 2011 MoJ released a consultation on reforming civil justice in England and Wales (*Solving disputes in the County Courts: creating a simpler, quicker and more proportionate system*). The consultation was about bringing mediation before any litigation and had three proposals. Of those only the second was adopted – *to require cases below the small claims limit (currently £5,000 but about to be increased, initially to £10,000) to be referred automatically to mediation*. The government suggested that mediation will '*for the first time...be seen as part of the actual court process*'.

The EU Mediation Directive was implemented differently into legislation of England and Wales, Scotland and Northern Ireland, but only concerning cross-border disputes.

Relevant laws are therefore Civil Procedure Rules with amendments from 2011.

⁵¹ EU Mediation Law and Practice (2012), prof. Giuseppe De Palo and prof. Mary B. Trevor, Oxford University Press, p. 44

REGULATORY TRENDS FOR BALANCED RELATIONSHIP BETWEEN LITIGATION / MEDIATION

Court-annexed mediation is currently being used in England and Wales for small claims disputes, of up to £5,000 in value (the number is being increased to £10,000 or even £15,000). This form of mediation is therefore available in a number of first instance courts and courts of appeal for business, family, civil, commercial and criminal justice and cross-border matters.

Small claims claimants are referred to a mediation service before they proceed with their court claim.

⁵² However this is not a form of mandatory mediation. This only means a mediator is contacted to find out if mediation is really suitable for the case. Judges should encourage parties to use ADR and to mediate. In addition courts may provide short information handouts and mediation suitability questionnaires to the parties about the mediation process.

Courts are often not referring parties to mediate because of misunderstanding the connection between party's right to access to the court under European Convention on Human Rights and compelling a party to mediate. Even if a court refer a party to mediation that does not mean party needs to make a settlement or even mediate. The process itself is still voluntary.

Although mediation was found cheaper, quicker, and more effective than litigation, for both the parties and court service, it has not been used very frequently.

INFORMATION SESSIONS

When the court deems it appropriate, parties are encouraged to use ADR. In practice courts are reluctant to go further and compel an unwilling party to mediate. Judges have two options, either to invite the parties to an information session on mediation or invite them directly to use mediation as a process of settling their dispute. There are no requirements for consideration or preparation in mediation proceedings.

VOLUNTARY / COMPULSORY NATURE OF MEDIATION

A mandatory element could come out of the contract between parties though. Commitment to mediate, a bare agreement to agree, to agree to negotiate, or to settle a dispute in good faith is generally unenforceable. However UK has a common law system and an important case *Cable + Wireless PLC v IBM UK Ltd* to rely on. Court has recognized the agreement to engage in an ADR process as being breached by one of the parties for not doing so. In such cases, with clear and strong grounds, courts may stay or adjourn proceedings.

⁵² [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET\(2014\)493042_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf), p. 67

CONFIDENTIALITY AND ADMISSIBILITY OF EVIDENCE

Matters on confidentiality in United Kingdom's mediation procedures meet the requirements of the Directive. Confidentiality is as stated by courts a key concept of mediation. Precise rules differ depending on whether a case is cross-border or purely domestic. In domestic cases an exception to confidentiality applies where judges can admit evidence from the mediator if they believe it is in the interest of justice (serious misconduct such as duress or fraud). However mediators are in general not compelled to give evidence and knowledge gained in the mediation proceedings. Cross-border mediations on civil and commercial cases are subject to greater protection at disclosing protected information. The test is not if the evidence/information is "in interest of justice", but rather if the evidence is necessary for overriding reasons of public policy, in accordance with Article 7⁵³.

LIMITATION AND PRESCRIPTION PERIODS

For cross-border disputes in England and Wales, relevant statutes were amended to ensure that the limitation period is suspended during mediation. If a limitation period would otherwise expire after mediation starts, the expiration will be postponed until eight weeks after the mediation has ended.

ENFORCEMENT OF MEDIATED SETTLEMENTS

The EU Mediation Directive provisions on enforceability have been implemented to the legislation of England and Wales but only in limited form. The enforceability is guaranteed only for cross-border disputes and is not given by law itself. When a court seeks an evidence of enforceability an application called a mediation settlement enforcement order (MSEO) has to be provided. It is an order, made by a court on which a settlement agreement is attached.

To be able to release that kind of an order, each party has to provide the court explicit consent to the application. However if the consent of one party is not given the settlement agreement is not unenforceable (the other party has to take certain actions in order to get the consent or approval of it). MSEO cannot be issued if the content is unlawful or the Member State where the request is made does not provide enforceability.

The MoJ already proposed similar provisions for domestic civil and commercial disputes.

INCENTIVES AND SANCTIONS

Incentives: there are no direct mediation incentives except legal requirements described above.

⁵³ The cross-Border Mediation (EU Directive) Regulations 2011, SI 2011/1133, reg 10(b)

Sanctions: a party who unreasonably refuses to mediate can face serious cost sanctions at the end of a trial, subject to the court's discretion. Courts have developed guidelines indication factors a court should taking into account in making its determination. In the leading case "Halsey" the Court of Appeal stated that these factors include:

- the nature of the dispute,
- the merits of the case,
- whether other settlement methods have been attempted,
- whether the cost of mediation would be disproportionately high,
- delay to trial if mediation is undertaken,
- whether mediation had a reasonable prospect of success.

IDENTIFICATION OF GOOD PRACTICES

In 2012 a study⁵⁴ showed that 8,000 commercial and civil cases are mediated annually, at a collective case value of £7.5 billion. More than 90% were settled on the day of mediation or shortly after. British litigations are expensive compared to other European countries'. Therefore the saved amount is bigger (around £2 billion a year). In 2010 over 75% of all civil and commercial cases were settled before trial. If mediation would be used even more widely, Home Secretary, Kenneth Clark, said another 87,000 cases could potentially be resolved earlier. UK's practice is the best when comparing to the countries with high cost of going to court. To achieve time and cost savings no bigger than 19-24% success rate is needed⁵⁵.

REGISTRATION OF MEDIATORS

There is no requirement for a mediator to be legally qualified. The mediation profession tends to be heavily populated by solicitors and barristers.

There is also no requirement for a mediator to be a member of a panel accredited by the Civil Mediation Council which provides an accreditation scheme for mediation providers which is considered to be a mark of quality assurance. As of 11. January 2012 , to gain accreditation, a mediation provider must:

- have a panel of at least six trained civil or commercial mediators;
- require successful completion by its mediators of an assessed training course;
- ensure that if a mediator is not professionally qualified in a discipline that includes law, he demonstrates a grasp of basic contract law before undertaking civil or commercial mediation.

⁵⁴ Mediation Audit conducted by the Centre for Effective Dispute Resolution (CEDR), available on www.cedr.com

⁵⁵ 'The Cost of Non ADR-Surveying and Showing the actual costs of Intra-Community Commercial Litigation', the ADR Center, for the European Parliament's Committee on Legal Affairs to explore and quantify the impact that litigation has on the time and costs to the 26 Member States' judicial systems, PE 453.180.

Precize training requirements include performance assessment and minimum 40 hours of training, including role play.

CROATIA

The purpose of Croatian Mediation Act in compliance to the Directive is mainly facilitating access to mediation as an appropriate dispute resolution process. Legislation must ensure maximum availability for mediation but also keep a strong balanced relationship with judicial proceedings. Most importantly, experiencing this alternative procedure's benefits in practice can only be achieved with encouragement of use of mediation, training of mediators, disclosing all the information on mediation, mediators and institutions for mediation making them available through all types of media.

As acknowledged in the Directive, courts and parties benefit from mediation on matters concerning; winner/loser outcome for parties, overall costs and time spent in court procedures, reduction of court caseload and thus more trust in justice system and its procedures.

EXISTING REGULATION / LEGISLATION ON MEDIATION

First Croatian Mediation Act was adopted in 2003 and amended in 2009 to implement the objectives of the Directive 2008/52/EC (the Mediation Directive). It was constructed on basis of 2002 UNCITRAL Model Law on Conciliation. However Croatians adopted a new 2011 Mediation Act, which achieved full implementation of the Directive.

Court-annexed mediation in Croatia is integrated into civil proceedings. This points to another relevant law called Code of Civil Procedure. In addition to abovementioned Obligation Act is relevant as well.

REGULATORY TRENDS FOR BALANCED RELATIONSHIP BETWEEN LITIGATION / MEDIATION

Croatian mediation is very similar to Slovenian one, as Slovenian regulation was the one they used as a main model regulatory framework. The mediation system is spread to all municipal, commercial, and county courts in the Republic of Croatia. It is considered to be a process, in which parties attempt to reach a settlement of their dispute with the assistance of one or more persons who have no authority to impose a binding solution. The last statement clearly excludes a judge, arbitrator, adjudicator or another third neutral person with an authority to resolve the dispute by her own decision. However the court-annexed mediation can be organized only at the court where action over the dispute is

pending and the mediator can only be a sitting judge of that court who conducts mediation in his official capacity as a judge⁵⁶.

According to the Croatian Mediation Act Article 1, mediation is used in civil, commercial, labor and other disputes about rights, which parties may freely dispose.

VOLUNTARY / COMPULSORY NATURE OF MEDIATION

This kind of process can always be proposed by a judge or attorney, as it can also be proposed from one party to another or in a form of joint proposal of both parties for amicable settlement. The commencement of mediation therefore depends on parties consent although The Mediation Act imposes a provision for starting mediation when for special sorts of disputes mediation is predicted as compulsory⁷³. However there is no such case, mediation is still considered voluntary and the Act doesn't provide any consequences or sanctions for parties who refuse a mediation referral⁵⁷.

MEDIATION CLAUSE

A contractual clause whereby the parties have agreed to refer future dispute to mediation is binding as contractual promise and enforceable as any civil contract. Article 18 of Mediation Act provides that if the parties have agreed not to initiate or continue judicial or arbitration proceeding during specific period of time or until fulfilment a specific condition, the court, arbitral tribunal or other authority, before which proceedings has been commenced, must reject, upon objection of the other party, any legal act, whereby such proceedings are commenced or continued. The advantage of such an approach is that the parties have an incentive to honor their agreement to mediate future disputes.

CONFIDENTIALITY AND ADMISSIBILITY OF EVIDENCE

The confidentiality is required for all the information gained during the process of mediation.

This information cannot be forwarded to a third person without parties' consent unless the revelation is based on law or if it is necessary for the implementation and enforcement of settlements. The same goes for all the statements and express of parties' willingness that were made in the process of mediation. No one can provide or use those matters as evidence in court, in the arbitration proceedings or any other process. If provided or used they would be considered inadmissible.

LIMITATION AND PRESCRIPTION PERIODS

When the mediation is in process limitation period is interrupted (until the completion of mediation and additional 15 days are over). If the mediation ends without the settlement, limitation period is

⁵⁶ Civil and Commercial Mediation in Europe, Cross-Border Mediation, C. Esplugues, Volume II (2014), p. 82 ⁷³ Croatian Mediation Act Article 6

⁵⁷ [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET\(2014\)493042_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf), p. 76

considered as not being interrupted. However limitation is considered interrupted if the party files a lawsuit⁵⁸ within 15 days after mediation is over.

ENFORCEMENT OF MEDIATED SETTLEMENTS

According to Croatian Law on Mediation the received settlement obligates the parties that made it, any obligations included in the settlement must be fulfilled (*pacta sunt servanda*). There is also a provision stating that all agreements made in mediation containing a so-called enforceability clause are enforceable at law. According to European Parliament's Directorate General for International Policies' study⁵⁹ several courts and financial institutions have complained about this provision. These bodies have also caused some difficulty in the enforceability of some mediation agreements. The Law on Mediation however leaves another option open - parties may after all compose the settlement in the form of a notarial deed, a court settlement or an arbitration award on agreed terms.

INCENTIVES AND SANCTIONS

No sanctions are predicted for parties not mediating or attorneys not informing the parties of their possibility to mediate.

IDENTIFICATION OF GOOD PRACTICES⁶⁰

After the first Law on Mediation was adopted, the Croatian Parliament adopted the Strategy of Development of Alternative Dispute Resolution. The strategy contained three different developmental phases during the period from 2006 until 2012. Year 2006 was the one in which courts and judges started promoting the use of mediation. It all started in the Commercial Court in Zagreb and continued to other courts. The effort of the courts was notable and resulted in adaptation of a new Law on Civil Procedure, which formally allowed the possibility for implementation of mediation in all courts. Since then progress has slowed a little, mediation did not really spread to other courts. Mediation is not taken up in Croatia in large scope despite robust public awareness campaigns.. In 2009 Croatia adopted new Strategy of Developing Mediation in Civil and Commercial Cases.

REGISTRATION OF MEDIATORS

⁵⁸ Or takes any other action before a court or other competent authority for the purpose of determining, securing or enforcing the claim.

⁵⁹ Available here: [http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2014/493042/IPOL-JURI_ET\(2014\)493042_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf)

⁶⁰ [http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2014/493042/IPOL-JURI_ET\(2014\)493042_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf)

The law does not set up any specific requirements that a person must meet in order to practice mediation. No previous training, experience or affiliation is required. Article 8 of Mediation Act requires only that a mediator must act with competence.

In 2009 the Ministry of justice established registration which allows trained mediators to become registered mediators. This registration, established by a Decree (OG No.59/2011) has no purpose beyond public recognition of received formal training. Croatian nationality or habitual residence is not a requirement for registration.

Nevertheless, in court-annexed mediation only sitting judges may act as mediators.

Chapter 5

Assessment of the draft regulatory framework for mediation in Ukraine

Introductory remarks

This part of the report contains the analysis of the regulatory framework for mediation in light of optimal implementation of the EU Mediation Directive and taking into account best regulatory practices.

It is drafted in a way that only those regulatory issues are addressed, which are considered as problematic, incomplete, inappropriate or incompatible with the Directive and/or other internationally recognized legal standards.

Instead of drafted amendments to the both draft laws, the assessment of each relevant legal issue is followed either by proposed wording of model article or paragraph or by proposed deletion of the applicable article. Such an approach was necessary due to the fact that two different draft Laws on mediation were submitted to the legislative process. Model articles could therefore serve to legislator as possible compromised solutions, to be considered and, if feasible, adopted.

Comparison of procedural aspects of both draft laws clearly leads to conclusion that key procedural issues in both draft laws should be significantly improved. The same model articles or paragraphs are suggested in the comments to both draft laws in order to assist legislator at searching for acceptable wording.

Obvious distinction between two regulatory approaches is in provisions, regulating mediation profession. What is weakness of one draft law, represents strength of another and the other way around. On one side, licensing and registration of mediators is justified, when they serve in public mediation schemes, for example in court-related mediation, however intervention of a state in private sector and free mediation market is not an example of desired or welcomed regulatory approach. Thus, a middle way between both approaches could be to introduce mandatory accreditation and registration of mediators, who perform their tasks in court-related mediation schemes and leaving voluntary registration for others, who wish to compete for business on an open market.

The assessment of the regulatory framework for court-related mediation is, for the sake of transparency and due to its complexity, provided in a comment to relevant articles of both draft Laws on mediation and followed by Model Act on Alternative Dispute Resolution in Judicial Matters. Nevertheless, the legislator may, instead of adopting a separate Act on Alternative Dispute Resolution in Judicial Matters, insert a separate chapter in the Law on mediation, which may regulate (at least) procedural aspects of relationship between mediation and judicial proceedings. Key weaknesses of both draft Laws on mediation with respect to interaction between mediation and court proceedings in civil, commercial, family, labor and administrative cases is in absence of any incentives for the parties to consider mediation, supported by smart (cost) sanctions and of duty of courts to encourage disputants to consider mediation. That is why proposed Model Alternative Dispute Resolution Act in Judicial Matters could serve as a bridge between differences in approaches to court-related mediation in both draft laws.

Draft law

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Law of Ukraine on mediation

Chapter i

General provisions

Article 1. Legal regulation of mediation

The legal regulation of mediation shall be based upon the constitution of Ukraine, and shall comprise this law and other laws and by-laws of Ukraine adopted pursuant to the law.

If the international treaties ratified by the Verkhovna rada of Ukraine provide standards and provisions other than those established by this law, provisions of the international treaties shall apply.

Comment

A new third paragraph is suggested in order to encourage the use of mediation in cross-border and international disputes. Parties may have greater trust and confidence to mediation, performed in Ukraine, if a reference to the UNCITRAL Model Law on International Commercial Conciliation would be made in this law. Should most of proposed model articles in this Report, which are based upon this Model Law, be incorporated, it is recommended to make a reference to the spirit of UNCITRAL's Model Law.

Such an approach provides uniformity in application of this Law on mediation also regarding the questions, which are not explicitly settled in the Law on mediation.

Model article

(Interpretation of this Law)

In the interpretation of the provisions of this Law regard is to be given to the need to promote uniformity in the application of the Model Law on International Commercial Conciliation and the observance of principles of fairness and good faith.

Article 2. Definitions

In this law, the below definitions shall have the following meaning:

Mediation – alternative (extrajudicial) dispute resolution method by which two or more dispute parties attempt, within a structured process, independently and on a voluntary basis to reach an agreement to resolve their dispute involving a mediator;

Mediator – a person who meets the requirements established by the law and the mediation clause (agreement on mediation), has the status of mediator pursuant to the law and has been selected for the conduct of mediation by the dispute parties;

Mediation parties – individuals, entities and/or groups of individuals wishing to settle their dispute by means of mediation procedures;

Mediation participants – a mediator (mediators), mediation parties, their representatives, legal representatives, interpreter, experts, and other persons as agreed with the mediation parties;

Organizations administering mediation – individuals and entities of all types of ownership and legal status, which provide organizational and technical support to the conduct of mediation;

Organizations providing training for mediators - individuals and entities of all types of ownership and legal status, including educational institutions, which conduct professional training for mediators and issue certificates pursuant to the law.

Comment

Definition of mediation may lead to wrong understanding and interpretation that referral to mediation could be only voluntary since disputants in mediation attempt to reach an agreement on the voluntary basis. Although within the EU is in general acceptable that referral may be compulsory if the law would prescribe so or if a judge would order the parties, to refer their dispute to mediation but any party may terminate his/her participation in mediation any time during the process and no settlement could be imposed on the parties, it is suggested to avoid any misunderstanding regarding mandatory-voluntary dichotomy. The law should increase the opportunities for further encouragement of use of mediation and to make litigation a last resort. Quasi-mandatory or complete mandatory mediation schemes could be tested through pilot projects therefore it is suggested to consider adopting the text, presented in a model article below.

As regards definition of a mediator, it should be taken into account that mediator may not be always appointed by the parties but, for instance, by appointing authority (e.g. court, mediation center). It is also important to allow the parties to appoint a mediator irrespective of his/her profession or title. The following model wording is suggested:

Model article (definitions)

(1) for the purposes of this act:

a) mediation means proceedings by which the parties attempt to reach through a neutral third person (mediator) the amicable settlement of a dispute arising out of or relating to a contractual or other legal relationship.

b) mediator means any third person who is approached to conduct mediation, irrespective of his or her title or profession and irrespective of the manner in which he or she has been appointed or approached to conduct mediation, and who accepts the request. A sole mediator or several mediators may participate in the proceedings.

Article 3. Scope of application of mediation

1. Mediation may be used in any type of disputes, including civil, commercial, and administrative, as well as in criminal proceedings and cases related to the administrative offence, except cases stipulated by the current laws of Ukraine.
2. This law shall apply to the mediation both in disputes between the residents of Ukraine and in disputes involving the residents of other countries, if mediation parties have agreed that the place of mediation is within Ukraine.

Comment

Paragraph 2 is problematic in so far as it stipulates that this law shall apply even in cross-border or international disputes if the place of mediation is within Ukraine. Such a provision will deter foreign disputants, in particular commercial ones, from opting for mediation in Ukraine since it is an established practice in international mediation that the parties in their mediation clauses or agreements select also applicable law of that mediation clause or agreement, applicable law for mediation procedure and applicable law for mediated settlement. For example, in international commercial mediation parties often agree to refer to UNCITRAL Conciliation Rules instead of any country's domestic mediation procedural rules. Such an approach should be encouraged by legislation and should be based upon main mediation principle, that is party's autonomy and flexibility of mediation process. Article 5 of the Slovenian Mediation in civil and commercial matters Act, for example, provides:

Article 5 (variation by agreement)

Except for application of the provisions of article 4, the third paragraph of article 8 and article 17 of this act, the parties may reach a different agreement upon issues regulated by this act or exclude the application of an individual provision of the act.

It is therefore suggested to supplement the wording of paragraph 2 as follows:

Model paragraph

“Unless otherwise agreed by the parties, this law shall apply to the mediation, both in disputes between the residents of Ukraine and in disputes involving the residents of other countries”

or an alternative wording:

“Except for application of the provisions of Article x,y,z... , the parties may reach a different agreement upon issues regulated by this Law or exclude the application of an individual provision of the Law.”

Since the law on mediation provides that mediation could be pursued exclusively on a voluntary basis and taking into account that EU Mediation Directive is without prejudice to national legislation making the use of mediation compulsory (article 5 par.2), it is advised to envisage possibility that the law prescribes mandatory pre-filling mediation for certain kind of disputes and that a court may order a mandatory referral to mediation upon the law or discretionary power of a judge.

The law should be also clear regarding mediation clauses in contracts and regarding mediation rules of institutional providers to which it should be given the same legal effect as it is given to mediation agreement.

The following new paragraph 3 should be adopted:

Model paragraph

»This act shall apply irrespective of the basis upon which the mediation is carried out, including agreement between the parties, reached before or after a dispute has arisen, a law, or order, direction or recommendation by a court, arbitral tribunal or competent governmental entity.

When reference is made in this act to the agreement between the parties to mediate, this also refers to written mediation clause in contract and to the rules of the institution which conducts mediation, under condition that the parties have agreed to apply these rules.«

Chapter ii

Mediation process

Article 4. Principles of mediation

The mediation shall be conducted by mutual agreement of the dispute parties based on the principles of voluntary participation, equality, proactiveness and self-determination of the mediation parties, independence, neutrality of a mediator and confidentiality of information regarding the mediation.

Comment

Following the approach, described above, namely, to leave open possibility that other law may introduce mandatory pre-filling- mediation and that courts could compel litigants to mediation, it is suggested to introduce a principle of voluntary cooperation instead of principle of voluntary participation. The parties could be therefore compelled to mediation process but would not be forced to reach a mutual agreement.

Article 5. Voluntary participation in mediation

1. Dispute parties shall participate in the mediation process on terms of mutual voluntary expression of will.
2. Parties shall be responsible for the mediation outcome and shall be entitled to arrange mediation in the manner they consider appropriate, as well as terminate it at any time and have recourse to court or arbitration tribunal to restore their rights. Any pressure on the dispute parties to conduct or terminate mediation is prohibited.
3. The principle of voluntary participation shall also apply to mediator and other mediation participants.
4. Participation of a person in the mediation process cannot be interpreted as confession of guilt by the person or recognition of the claims, or waiver of his/her claims, including situations within court proceedings.

Comment

Paragraph 1 may be modified in a way to allow mandatory referral to mediation:

Model paragraph:

“Unless otherwise prescribed by the law, a dispute shall be referred to mediation process on terms of mutual voluntary expression of will.» (see comments to article 3 and 4).

Article 6. Equality of mediation parties

1. Mediation parties shall have equal rights and duties. Discrimination of mediation parties on any basis is prohibited.
2. Mediator is to display equal attention and benevolence towards mediation parties.
3. Mediator must provide services of equal quality to mediation parties.

Comment

This article regulates rights and duties of the parties (paragraph 1) and duties of a mediator (in paragraphs 2 and 3). Since duties of mediators are regulated in article 16, it might be better to incorporate paragraphs 2 and 3 in the article 16.

Article 7. Proactiveness and self-determination of mediation parties

1. Mediation parties shall independently select a mediator or mediators.

2. Mediation parties shall independently determine the scope of issues discussed, options for resolving the dispute, content of their mediated agreement, terms and methods of its implementation, and other issues concerning the dispute and the mediation procedure.
3. Mediation parties shall be allowed to use advice by other mediation participants, but the final decision shall be made solely by mediation parties.

Comment

Paragraph 1 should be amended in a way that would allow parties to agree that a mediator could be appointed by an appointing authority. In addition, sometimes one party wishes to obtain consent of the opposing party for referral to mediation and leaves the other party to appoint a mediator as a gesture of a good will..

Model paragraph is the following:

»Unless otherwise agreed by mediation parties they shall independently select a mediator or mediators.«

Paragraph 3 is very important because it allows mediators to conduct also evaluative mediation, when appropriate. In general mediators perform facilitative style of mediation but in certain disputes it is helpful if they use evaluative techniques which may be considered as advisory in their nature.

Статья 8. Confidentiality of information regarding mediation

1. Information regarding mediation shall be confidential, unless mediation parties agree otherwise. The following types of information shall be confidential: information concerning invitation by one of the parties to refer to mediation procedure, commitment of the parties to participate in the mediation; views, proposals or acknowledgements made in the course of mediation process; willingness of a party to accept the settlement proposal by the other party, and any other information regarding preparation and conduct of mediation.
2. Mediator shall not be authorized to disclose information about mediation without the written consent of the mediation parties.
3. No mediation party shall be authorized to disclose the information about mediation without the written consent of the other party.
4. Mediation participants shall not be authorized to disclose information about mediation without written consent of the parties.

5. When mediator receives information related to the dispute or the mediation procedure from one of the parties, he/she may disclose this information to the other party. However, if a party communicates information to mediator under the stipulation that it is not to be disclosed to the other mediation party, this information shall not be disclosed to the other party.

6. The mediator cannot be compelled to give testimony in court or arbitration proceeding regarding circumstances which became known to him in connection with his/her duties of mediator, except in cases when it is required in order to protect the interests of children or to prevent harm to the physical or mental health of a person, or if the disclosure of the contents of the mediation agreement is necessary to enforce this agreement.

Comment

The law on mediation regulates confidentiality as a core principle of mediation. It addresses both aspects of confidentiality, that is, protection of information conveyed by one party to the mediator from disclosure to another party and protection of discussions of the parties in mediation from disclosure to outside world.

As to the mediator's duty not to disclose the information, conveyed by one party in a separate meeting with a mediator to another party, if subjected to specific condition to be kept confidential, the law on mediation takes an approach different from the one where a mediator is allowed to disclose information to another party only upon prior consent of the party which provides a mediator with such an information. The same approach could be found in the article 4 of the European Code of Conduct for mediators which has been heavily criticized by the practitioners as inconsistent and as a potential ground for satellite litigations due to misunderstood expectations and practices regarding caucusing. It is therefore suggested to keep a current rule, which is recommended also by the UNCITRAL Model law on international commercial conciliation in article 8 which provides for mediator's discretionary disclosure of information, received during caucusing unless parties' specific condition to keep information confidential.

As to the protection of discussions and information from disclosure to outside world, it is important that the law clearly demonstrates the strongest possible protection of confidentiality. The wording of paragraph 1 could be therefore strengthened in a way that all information originating from or relating to mediation shall be kept confidential.

Paragraph 6 regulates inadmissibility issue but in a not enough precise way. Core weaknesses of paragraph 6 of this article are the following:

-protection from disclosure is limited only to testimonies of the mediator and not of the parties and not of other participants in mediation;

-protection is limited only to the usage of testimonies as evidence in any other procedure (litigation, arbitration) and not outside of them;

-the law doesn't allow general public order exceptions regarding confidentiality rule (see paragraph 1 a and b of the article 7 of the EU Mediation Directive)

Article 10 of the UNCITRAL Model law should be a guiding provision for legislators when considering how to regulate this important issue which could make mediation as an effective dispute resolution process and which could at the same time prevent disputants to embark only on fishing expedition for information, aimed to be relied on in subsequent litigation.

The law should regulate two aspects of (in) admissibility: it should introduce an obligation upon the parties, mediator and any third person, not to rely on the type of evidence, specified by the law and it should introduce obligation of the courts and arbitral tribunals to treat such evidence as inadmissible.

Public policy exceptions to disclosure and (in)admissibility are also needed to be prescribed by the law. In order to point out the importance of inadmissibility issues it would be better to regulate them in a separate article.

The following new article is suggested:

Model article

(admissibility of evidence in other proceedings)

(1) the parties, mediators or third persons who participated in mediation shall not in arbitral, judicial or other similar proceedings rely on, introduce as evidence or give testimony regarding any of the following:

- a) an invitation by a party to engage in mediation proceedings or the fact that a party was willing to participate in mediation proceedings;**
- b) views expressed or suggestions made by a party in the mediation in respect of a possible settlement of the dispute;**
- c) statements or admissions made by parties in the course of mediation;**
- d) proposals made by the mediator;**
- e) the fact that a party had indicated its willingness to accept the mediator's proposal for amicable dispute settlement;**
- f) documents drawn up solely for purposes of the mediation proceedings.**

(2) the provision from the preceding paragraph shall apply irrespective of the form of the Information and evidence.

(3) information referred to in the preceding paragraph of this article may only be disclosed or used in proceedings before an arbitral tribunal, court or other competent government authority for the purpose of evidence under conditions and to the extent required by law, in particular on grounds of public policy (e.g. protection of the interests of children or prevention of interference with a person's physical or mental integrity) or insofar as necessary for the implementation or enforcement of an agreement on the settlement of a dispute; otherwise such information shall be treated as an inadmissible fact or evidence.

(4) the provisions referred to in the first, second and third paragraph of this article shall apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that was or is the subject of the mediation proceedings.

(5) with the exception of cases referred to in the first paragraph of this article, evidence that is otherwise admissible in arbitral, judicial or similar proceedings does not become Inadmissible as a consequence of having been used in the mediation proceedings.

It is therefore suggested to insert this new article, regulating inadmissability of evidence, to delete paragraph 6 of article 8 of the Law on mediation and to modify paragraph 1 of article 8 with a new wording of a first sentence of paragraph 1 as follows:

Model paragraph

»All information originating from mediation or relating to it is confidential unless otherwise agreed by the parties, or unless its disclosure is required by law or for the purpose of implementation or enforcement of mediated settlement.»

Article 9. Mediation clause

Parties shall be entitled to agree on incorporating written mediation clause into their agreement, under which they agree to refer to mediation all or certain disputes which may arise between them in connection with any particular legal relations, regardless of whether they have a contractual nature or not. Mediation clause in the agreement shall not prevent application to the court or arbitration tribunal.

Comment

The law on mediation procedure contains provision regarding mediation clauses in contracts but does not envisage possibility to conclude general mediation agreements as to referring future disputes, arising out of or relating to the contract or any civil relationship, to mediation.

This is an obvious weakness of the regulatory framework since not only mediation clauses but also general mediation agreements between companies represent one of the most effective

incentives for businesses to refer future disputes to mediation as part of their risk management policies.

Taking into account the voluntary nature of mediation, nothing prevents parties to a contract, to draft appropriate mediation clause. Nevertheless, it is of utmost importance that the law supports the validity and, in particular, enforceability of mediation clauses. The EU regulatory framework doesn't prevent member states to envisage possibility to allow application of mediation clauses in relation to all civil and commercial disputes, except in consumer disputes where agreements to mediate are allowed only after a dispute has arisen.

Mediation clauses should be considered as independent from the contract which embodied them and therefore separable. In particular in cross-border contracts it is wise to determine the applicable law which governs the mediation clause and which could not necessarily be the governing law of the main contract.

Mediation clauses are binding upon the parties. Nevertheless, their enforceability is rather weak when mediation clauses are drafted merely as boilerplate clauses. That is why some minimum substance of mediation clause could be recommended by institutional mediation providers, for example: to identify the parties, how and when mediation to be initiated, the scope of mediation and its duration, applicable procedural and substantive law, the venue, language and selection method of mediator.

Multi-step or escalation dispute resolution clauses are often practiced in cross-border or /and international contracts. Bilateral negotiations, followed by mediation and, if not completed until certain period of days, followed by arbitration may be further encouraged in commercial disputes by drafting model dispute resolution clauses for various industries. Best practice examples such as guidelines, checklists and model clauses of AAA, ICC, CEDR, ICDR, ECDR, JAMS and other institutional providers of adr could serve as a legal source for drafters of such clauses.

The following paragraph may be considered to be inserted:

Model article

(mediation clause or agreement regarding future disputes)

“The parties may agree in writing to refer their future disputes, arising out of or relating to their contractual or other legal relationship with regard to the claim, which may be freely disposed of and settled, to mediation.

The parties may determine applicable law governing the mediation clause or agreement.

Mediation clause or agreement from the first paragraph is binding upon the parties and enforceable irrespective of whether the main contract is considered as null or void.

Previous paragraphs do not apply for future consumer disputes.”

Last sentence of this article is problematic because of a way how it regulates the effect of mediation on litigation and arbitration.

The enforceability of mediation clauses and agreements could be further strengthened if the law would address the issue of relationship between mediation on one side and arbitration and litigation, on the other. Parties may wish to agree not to initiate judicial or arbitral proceeding until expiry of certain period of time or until a specified event has occurred therefore the law should support their willingness to refer their dispute to mediation first. Since the parties could agree so even after a dispute has arisen, it is suggested here that the law should regulate this issue in a separate article.

The law should also regulate the situation when mediation would be prescribed as a procedural pre-condition by the law.

Model article

(introduction of judicial or arbitral proceedings)

“Where the parties have agreed upon mediation and have expressly undertaken not to initiate, until the expiry of a certain period of time or until a specified event has occurred, arbitral or judicial proceedings with respect to an existing or future dispute, the arbitral tribunal or the court, must, upon an objection by the defendant, dismiss such action, unless the plaintiff demonstrates, that otherwise harmful and irreparable consequences would occur. The defendant must submit this objection in the defense plea at latest.

The court shall dismiss an action even if before bringing the action obligatory mediation proceedings are prescribed by the law.

Initiation of arbitral or judicial proceedings shall not of itself be regarded as a waiver of the agreement to mediate or as the termination of mediation proceedings.”

Article 10. Conducting mediation

- 1. Mediation may be conducted by a mediator independently or with the assistance of an organization administering mediation.**
- 2. Parties shall independently select a mediator or mediators to settle their dispute.**
- 3. Mediator shall independently select means and methods of mediation and agree on mediation procedure with mediation parties in compliance with applicable law, mediation regulations, and rules of business and professional ethics of mediators.**

4. Mediation shall commence on the day when the dispute parties refer their case to mediation procedure. If a party that invited another party to mediate does not receive an acceptance of the invitation within thirty days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the invitation is considered to be rejected.

5. Mediation shall be terminated:

1) by the conclusion of a mediation settlement agreement by the parties, on the date of signature of the agreement;

2) by a declaration of the party or parties addressed to the mediator to the effect that the mediation proceedings are terminated, on the date of the declaration;

3) by a declaration of the mediator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified or by a declaration of the mediator about impossibility to involve other parties to the dispute into mediation procedure where the dispute involves decisions about the rights of these parties, on the date of the declaration.

Comment

This article regulates several issues which are not all interconnected: appointment of a mediator, the way how mediation is conducted, commencement and termination of mediation. It is suggested to improve the transparency of the law and separately regulate those four issues in four articles.

As to the appointment of a mediator it is suggested to allow various options for disputants.

Model article

(appointment of mediators)

The parties shall reach an agreement on the appointment of mediator, unless a different procedure for the appointment has been agreed upon.

The parties may seek an assistance of a third person or institution or association of mediators in connection with the appointment of mediators, in particular:

-a party may request a person or institution or association of mediators to recommend suitable persons to act as mediators, or

-the parties may agree that the appointment of mediator be made directly by such a person or institution or association of mediators.

Commencement of mediation

The law should be improved by defining the commencement of mediation. Precise definition is needed in particular because of the effect of commencement of mediation on limitation and

prescription periods (see more on this issue below). The law on mediation should be therefore supplemented with a following new article:

Model article

(commencement of mediation)

“Where the parties have agreed in advance to resolve mutual disputes that might arise out of particular legal relationship through mediation or where mediation is prescribed by the law for the resolution of a particular type of dispute, mediation shall commence on the day on which a party receives a proposal for commencement of mediation from opposing party.

In cases which are not included in the preceding paragraph, mediation referring to a dispute which has already arisen, shall commence on the day, the parties to the dispute agree to pursue mediation. If one party proposes mediation to the other party, but does not receive an acceptance of the proposal from the other party within 30 days from the day on which the proposal was sent, it may treat this as a rejection of the proposal for mediation.”

Termination of mediation

From the same reason as stated above (to define the effect of mediation on running, suspension or interruption of limitation and prescription periods), it is of key importance to define the moment when mediation proceedings is considered as terminated. The law on mediation regulates termination of mediation but in a not enough precise way. The parties could have a different understanding as to when exactly mediation ends therefore the following new article is suggested to be inserted:

Model article

(termination of mediation)

“mediation proceedings shall be terminated:

-by the conclusion of a mediated settlement, on the date of the settlement:

-by the expiry of a time limit for the appointment of a mediator, if the parties do not agree on the appointment of a mediator within 30 days from commencement of mediation, on the date of expiry:

-by a written declaration of a mediator, after consultation with the parties, to the effect that further efforts at mediation are no longer justified, on the date of the declaration:

-by a written declaration of the parties addressed to the mediator, to the effect that the proceedings are terminated, on the date of declaration:

-by a written declaration of a party to the other party or parties and the mediator, to the effect that the mediation proceedings are terminated, on the date of declaration. If in the proceedings several parties participate who are willing to proceed with the mediation among themselves, the mediation shall be terminated only for the party that has submitted a declaration.”

As regards the way, a mediator may conduct the process, which is prescribed in paragraph 3, it is suggested the following model article

Model article

(Conduct of mediation)

“The parties may agree on the manner in which mediation is to be conducted. In doing so they may also rely on existing rules.

Failing an agreement on the manner in which mediation is to be conducted, the mediator shall conduct the proceedings she/he sees fit. In so doing he /she shall consider all the circumstances of the case, any wishes the parties may express and the need for a speedy and permanent settlement of the dispute.

In any case, in conducting the proceedings, the mediator must act independently and impartially and make every effort to treat the parties equally, taking into account all circumstances of the case.”

Article 11. Mediation agreements

1. Arrangements reached by the parties based on the mediation outcomes may be set out in writing in the agreement, which is a civil contract and shall be implemented pursuant to the laws of Ukraine. Mediation agreement must comply with all requirements for the civil contracts and should not contain provisions that contradict the laws of Ukraine, the interests of the state and society, and its moral foundations.

2. Mediation agreement based on the mediation outcomes shall be mandatory for the parties according to the terms specified in the agreement. In the event of a default caused by a party, the other party shall be entitled to apply to the court in accordance with the statutory procedure to protect the violated rights and interests.

3. If mediation was conducted within the court or arbitration proceedings, its outcomes shall be finalized as an amicable settlement or conciliation agreement.

Comment

It is unclear why the law excludes the possibility to enter an oral mediated settlement, for example, an oral apology in neighbor disputes is often enough for the parties to settle their dispute. That's why in Netherlands, Austria, Slovenia and Bulgaria parties are free to conclude a mediated settlement also in an unwritten form. On the other hand Hungary, Croatia, Portugal and Bosnia and Herzegovine put written mediated settlements on an equal footing with court's judgement, if signed by the parties and (registered) mediator because such settlements are binding and directly enforceable.

Nevertheless, obvious weakness of this article is that it limits the autonomy of the parties, who may wish, to check the legality of terms of agreement in a way to enter their agreement in a form of a notarial deed or consent arbitral award. It is important that mediated settlement could take a form of consent arbitral award, when during arbitration procedure parties agree to attempt mediation (mediation window), settle their dispute and ask arbitrators to issue consent arbitral award. This is in particular useful method in cross-border or international arbitration because parties in such a way ensure applicability of the New York Convention on recognition and enforcement of international arbitral awards.

The EU Mediation Directive in article 6 explicitly envisages the possibility to make content of mediated agreement enforceable by a court or other competent authority. In particular in court-related mediation schemes it is an established practice that judges approve the content of mediated agreement even when mediators were their peers.

On the other hand, any agreement that goes beyond court's power should be enforced through contractual law. There is no special legal remedy against mediated settlement. The form of that settlement in fact determines (limited) possibilities for appeal according to the general rules and principles of civil law. Although is enforceability of mediated settlement's an implied feature of every regulatory framework for mediation, it could be refused by courts if the content of such a settlement is contrary to domestic or private international law or if the obligation specified in the agreement is unenforceable by its nature.

Model article

(Enforcement of mediated settlement)

The parties may agree that the mediated settlement shall take a form of binding and enforceable:

- court settlement or
- conciliation agreement or
- consent arbitral award or
- notarial deed or

-written civil contract.

Mediated settlement from the previous paragraph must comply with all requirements for the civil contracts and should not contain provisions that contradict the laws of Ukraine or domestic or international public order.

Article 12. Mediation during civil, commercial or criminal court proceedings, or arbitration proceedings

1. The judge or arbitrator shall be entitled to direct the parties' attention to the possibility of conducting mediation whenever he/she considers it appropriate.
2. A court or arbitration tribunal before which an action is brought, shall be entitled at any time, if it considers it appropriate, and taking into account all the circumstances of the case, to recommend the parties to refer their case to mediation in order to settle their dispute.
3. The judge shall not recommend the parties to apply to a specific mediator in order to settle their dispute. The parties who agree to refer their case to mediation during the civil, commercial or criminal court proceedings or arbitration proceedings, shall be provided with an information on the available organizations or mediators who are able to provide such services and among which the parties can select a mediator to settle their dispute.
4. Upon the request of the parties, the court or arbitration tribunal shall suspend the proceedings for the time required to conduct mediation, but not longer than for 14 days.

Comment

This article is of key importance because it regulates interactions between litigation and mediation.

One of the key weaknesses of the Law on mediation is that it is silent as regards effect of mediation on limitation and prescription periods. The protection of the parties' right to refer their disputes to the courts has a direct effect on the limitation and prescription periods. The EU Mediation Directive compels the member states to ensure that parties who choose mediation in an attempt to settle a dispute are not consequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process (article 8 of the Mediation Directive). The Mediation Directive makes no reference to the effect on that periods therefore this effect could be prescribed either in a way that time elapsed so far disappears and the period should start anew once mediation is terminated or it entails suspension, which would imply that a time already elapsed remains and it is from the instant from which the period should resume once the mediation fails.

The EU Mediation Directive in article 8 provides that states shall ensure that parties shall not be prevented from initiating judicial proceedings by the expiry of limitation and prescription periods during mediation process. Since the Directive does not harmonize national legal rules on limitation and prescription periods, EU member states have taken different policy approaches. In most jurisdictions the limitation period is considered as being interrupted, while regarding prescription period regulatory regimes differ.

In Netherlands the agreement to mediate delays court's process.

Prescription periods can't be interrupted or suspended in Slovenia but can't neither expire (extension up to 15 days is allowed by the law).

In Spain prescription and limitation period is suspended from the beginning of mediation until its end.

The parties may agree to suspend time limits in Austria.

In England and Wales amended Prescription Act applies also for court-related mediation.

The weakness of regulating the impact of mediation on limitation and prescription periods is that it requires necessary disclosure of start and end of mediation in order to stop running limitation period. Clear definition of when mediation commences and terminates is therefore needed. This might disregard flexible and informal nature of mediation. On the other side, private agreements to extend limitation periods could be allowed. Nevertheless, advantages of regulating this issue prevail. Namely, courts should always be available to the parties despite engagement in mediation. Attractiveness of mediation is ensured when interruption or suspension of limitation and prescription periods is prescribed. Last but not least, unless prescribed otherwise, courts might treat commencement of mediation as interrupting limitation period which means they start running from day one.

It is suggested to take the following approach in a new article, which provides both, stimulation of defendants to opt for mediation and protection of plaintiff's right to pursue the claim in parallel or subsequent litigation at court:

Model article

(effect of mediation on limitation and prescription periods)

»The limitation period for a claim subject to mediation shall cease to run during mediation.

If mediation proceedings are terminated without settlement, the limitation period shall continue to run from the moment the mediation proceedings are terminated without a settlement. The time that expired prior to the initiation of mediation shall be included in the limitation period, laid down by law.

If a deadline for bringing an action is set by a special regulation in respect of a claim subject to mediation, the deadline shall not expire earlier than 15 days after the termination of mediation.«

One of the challenging objectives of the EU Mediation Directive is to facilitate access to alternative dispute resolution by ensuring a balanced relationship between mediation and judicial proceedings (par 1 article 2). A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available. This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system (article 5).

The following strengths and weaknesses of proposed regulatory framework for court-related mediation could be stated:

As to the strengths of the regulatory framework for court –related mediation:

- **both, court-annexed and court –connected (outsourced) mediation models are allowed;**
- **courts have a power to invite litigants to consider mediation;**
- **litigants may, upon their consent, request mediation at any time of the judicial process**
- **the law provides a discretion of courts to order a stay of litigation procedure for certain period in order to allow parties, upon their consent, to refer their dispute to private mediation provider;**
- **duration of court-related mediation is indirectly defined through the rule that a judge may suspend litigation for maximum 14 days if the parties agree to refer their dispute to mediation;**
- **judges may refer cases to mediation upon consent of the parties in all disputes;**

There are several weaknesses concerning regulation of court-related mediation:

- **the law on mediation procedure is not fully compatible with internationally recognized standards, enshrined in the EU Mediation Directive or/and UNCITRAL Model law on international commercial conciliation (no provisions on effect of mediation on limitation and prescription periods);**
- **no dispute is prima facie considered as eligible for mediation (e.g. small claims, family disputes);**
- **mandatory mediation, ordered upon judge’s discretion, is not allowed;**

- courts are not required by law to design and implement mediation schemes;
- the law doesn't envisage that courts with mediation program should adopt local rules of mediation program;
- the law does not ensure funding of court-annexed mediation schemes; ;
- mediation information session is not explicitly envisaged;
- duty of lawyers to meet and confer regarding mediation is not prescribed;
- duration of court-related mediation is too short during suspended litigation
- neither common criteria on accreditation of mediators in court-related schemes exist nor there is any provision, aimed at providing sustainability of training for court-approved mediators and judges on mediation referrals;
- there are no financial incentives for mediation demand for lawyers and disputants (e.g.reimbursement of filling fee) .
- smart sanctions for non-attendance at mediation session are not defined;

Some (but not all) of described weaknesses could be avoided by a better mediation program design and stronger integration of mediation in case management, while others obviously need to be addressed by improved legislative rules.

As to the court-related mediation program design it seems that court-related mediation is to be practiced as court-connected model. In court-connected mediation scheme, the service is outsourced. Litigants are referred to private providers which must be members of association of mediators. The quality control over mediation service is weak and outside authority of judges. This in return causes lower level of trust of judges to mediation providers and lower referral rate since judges do not act as mediators in court-connected programs. Judge's referral to mediation is not recognized performance target in case of mediated settlement. In addition, litigants have to pay mediation service. The mediator's fee and other costs do not differ from market rate. If mediation is not terminated with settlement, it contributes to higher overall litigation costs. Besides that, mediation is not affordable to all. Indigenous litigants, who are not eligible for getting legal aid, could be left out from mediation doors.

Instead of court-connected mediation model court-annexed mediation could serve much better to the needs of litigants. Such a program should be authorized, administered and operated by the court. Court's premises are used for mediation sessions and litigants are provided with "a day in court". Court-annexed mediation program is partially or completely funded by the court, therefore mediation is either free of charge for litigants or they pay reduced mediator's fee. It enables court leaders with better integration of mediation into case management system and backlog reduction. Due to established monitoring and control of performance of mediators court-annexed mediation model ensures greater trust and confidence of judges, lawyers and

litigants to provided services, in particular if judges-mediators serve as neutrals in court sponsored programs.

Mediation is not about being better than litigation but it is about being addition to litigation. Court-related mediation provides disputants with two different kinds of promises: promise of opportunity and promise of process integrity. International best practice lessons learnt regarding court-related mediation is that addition of ADR (and in particular mediation) to pretrial process, as early as feasible, is the most effective way of administration of justice because it reduces the time to disposition and transaction costs on one side and increases perception of fairness on the other. Invitation to litigants by a judge to consider mediation option occurs too late in the litigation process that is on a preparatory hearing. In fact, the whole judicial referral system rests on assumption that judges should have an interest to discuss with litigants the option of mediation. This assumption is unrealistic no matter how backlogged a particular court is. Mediation information session, performed by a judge is time consuming. In addition, judges are more focused on settlement discussions, performed by themselves than on referrals to mediation. Career stimulations for judges in terms of number of cases, disposed of, concerning settlement reached during litigation, is greater than those, reached during mediation are. Despite long waiting times for scheduling the preparatory and/or first hearing in many courts probably exceeds several months, courts do not practice sending out notice to litigants about expected timing of the preparatory hearing and information on how this waiting time could be effectively used if mediation is to be attempted. Courts also do not practice automatic invitation to litigants to consider mediation immediately after case filling. Any court-related mediation program should be designed in a way that mediation is considered as presumed no matter that it is formally not mandatory. No changes in regulatory framework are needed for described change of case management practice.

Mediation brings the value to the parties even when it enables them knowing that a case cannot settle. That is why in many jurisdictions (e.g. UK, Slovenia, Norway, USA, Canada etc.) It is considered as appropriate for a judge to order the parties to participate in non-binding ADR process over a party's objection. Despite voluntary nature of mediation, regulatory framework does not prevent courts to introduce quasi-mandatory mediation with the right of litigants to opt-out. Such an approach could be introduced either automatically for certain categories of cases (e.g. small claims) or upon discretionary decision of a judge in individual cases. Nevertheless, courts would probably wish to have a clear mandate for adopting case management rules of the mediation program. Ideally, the law should envisage possibility that a judge may compel litigants to mediation, however, in such a case, courts must offer ADR services for free or very low costs. State should provide funding for court-related ADR programs as it

does provide it for other judicial processes. Only in such a way the concept of multi-door courthouse, envisaged by prof. F.sander in his address at the national Pound conference on the cases of popular dissatisfaction with administration of justice from the year 1976, could be implemented. Multi-door courthouse model is based upon the belief that courts should operate as centralized intake and conflict diagnostic centers, which provide litigants with an advice on most suitable dispute resolution proceedings, taking into account characteristics of a case and of the parties. An array of dispute resolution options should be available. Advisory (early neutral evaluation), facilitative (mediation, conciliation,) adjudicative (binding or non-binding arbitration) to the litigants who should make an informed choice of appropriate process, depending on assessment of costs, time, access, fairness, enforceability of outcome and duration of resolution. Litigants should be compelled to choose one item from a “dispute resolution menu” on which mediation represents almost “standard appetizer”.

Key components of court-related mediation program advice are therefore the followings:

- effective mechanisms to enforce parties’ and lawyer’s duty to consider mediation;
- provided financial incentives for litigants and lawyers for voluntary referral;
- screening and consultation of the court with the parties and their lawyers;
- early soft mandatory referral (automatic in selected categories of cases or upon judge’s discretion in individual cases);
- allowed opt-out to litigants from referral to mediation;
- ensured smart litigation cost sanctions for unreasonable opt-out from mediation

In order to ensure that court-related mediation and ADR in general become a movement and to prevent them keeping the status of uneven and fragile penetration in legal and political culture, it is of utmost importance that governments and legislators in Ukraine address sources of peril regarding further development of court-related ADR. They must provide courts with authority to design and implement ADR programs. They must provide funding for such programs without which they can not function. They must provide incentives to give real considerations concerning ADR by disputants and their lawyers in each civil case as well as smart sanctions for non-compliance and legal protection to parties and processes. Last but not least, regulatory framework, established by policy makers should ensure tight quality control mechanisms (see more on this in W.Brazil: Court ADR 25 years after Pound: Have we found a better way?;Berkely law scholarsip repository, 1-1-2002).

It is therefore suggested that authorities in Ukraine overcome the weaknesses of the regulatory framework for court-related mediation as described above in a way that they adopt an ADR Act in judicial matters and/or a separate chapter of civil procedural codes and insert the provisions, which are presented below in a Model ADR Act in Judicial Matters.

Model Alternative Dispute Resolution Act in Judicial Matters

I. General provisions

Article 1

(content and purpose of the act)

(1) This act shall regulate alternative dispute resolution procedures provided to the parties in the judicial matters (hereinafter referred to as: the parties) by the courts on the basis of this act.

(2) Procedures from the above-mentioned paragraph facilitate wider access of the parties to justice, provide an option to select the most appropriate dispute resolution procedure to the parties, enable fair, expedient and friendly settlements, provide time and cost savings to the parties and courts, and increase the scope of voluntary and mandatory participation of the parties in court-related alternative dispute resolution programs.

Article 2

(scope)

(1) This act shall be applied in disputes arising from economic, employment, family and other civil relationships with regard to claims that are at the parties' disposal and that the parties can agree upon, unless otherwise stipulated by a special act for an individual dispute.

(2) This act may also meaningfully apply to administrative, tax and other similar disputes..

Article 3

(definition of alternative dispute resolution)

According to this act, an alternative dispute resolution shall be a procedure which differs from litigation and in which one or more neutral third parties intervene in the dispute resolution as described in article 2 of this act using the procedures of mediation, binding or non-binding arbitration, early neutral evaluation, hybrid or other similar procedures.

Ii. Alternative dispute resolution programs

Article 4

(court obligations and entitlements)

(1) Courts of first and second instance shall make the use of alternative dispute resolution procedures possible by adopting and implementing the alternative dispute resolution program.

(2) In the framework of the program mentioned in the above paragraph, the courts shall be obliged to provide the option of mediation to the parties and may also provide other forms of alternative dispute resolution.

Article 5

(program implementation form and manner)

(1) The court may adopt and implement the alternative dispute resolution program as an activity organized directly in court (court- annexed program) or on the basis of a contract with a suitable out of court public or private provider of alternative dispute resolution(court-connected program).

(2) Furthermore, on the basis of a mutual written agreement, courts can also implement the alternative dispute resolution program as follows:

- an individual first instance court may implement the program for one or more additional first instance courts in the area of the same judicial district,**
- an individual second instance court may implement the program for one or more first instance courts in the judicial district of the second instance court.**

Article 6

(program content)

In the alternative dispute resolution program, the court primarily defines which kinds of procedures it provides, and determines, in greater detail, the binding principles, rules and forms for these procedures. If the court implements the program in the manner provided in article 5, paragraph 2 of this act, it shall note this in the program.

Article 7

(mediators in the mediation program)

(1) Mediation procedures within the mediation program, as described in article 4 of this act, can be carried out by mediators (hereinafter referred to as: the mediator) who are listed in the register (hereinafter referred to as: the list) as mediators according to this act.

(2) In a court-annexed mediation program, the court that carries out the program also manages the list.

(3) In a court-connected mediation program, the alternative dispute resolution service provider who carries out the program on behalf of the court, and who is licensed by the alternative dispute resolution council to register mediators on the list, also manages the list.

(4) A mediator can mediate in court premises or in the premises of the alternative dispute resolution service provider who has put him or her on the list.

(5) A mediator could be also a judge who is not responsible for any judicial proceedings concerning the dispute in question.

Article 8

(addition and deletion from the list)

(1) Any person who meets the following criteria may be listed

- they have the capacity to enter a contract:**
- they have not been convicted, by final judgement, for a deliberate criminal offence for which they were prosecuted ex officio;**
- they have at least the first level of post-secondary education:**
- they have undergone mediation training according to the program determined by the minister of justice (hereinafter referred to as: the minister).**

(2) The minister may by a decree or regulations also put down additional criteria for addition to the list with regard to the type of disputes resolved by mediation.

(3) A mediator shall be deleted from the list:

- upon request by the mediator himself;
- if the mediator fails to meet the criteria from items one, two or five of paragraph one of this article;
- if the mediator breaches the law, the rules of the program (hereinafter referred to as: the rules), in the framework of which mediation is carried out, or if the mediator breaches the rules of mediation ethics;
- if the mediator conducts the mediation procedures irregularly or unprofessionally;
- if the mediator does not take part in compulsory forms of training, as determined by the minister; or
- if the mediator fails to carry out a minimum number of mediation procedures in a particular period of time, as determined by the minister.

(4) Any decision on a deletion from the list shall be reached by the court or alternative dispute resolution service provider that listed the mediator.

(5) In the decree or regulations, the minister shall also define the following:

- the conditions for issuing licenses to alternative dispute resolution service providers for listing mediators, and
- the method of supervising the work of mediators.

Article 9

(content and public accessibility of the list)

(1) The list shall include the following information:

- name of the mediator;
- date and place of birth;
- domicile or temporary residence;
- contact data: telephone number and e-mail;
- professional or academic title;
- occupation;
- employment data;
- the kinds of disputes for which the mediator provides mediation services;
- date of listing.

(2) For the purposes of providing effective mediation procedures according to this act, the list shall be publicly accessible for the following data:

- name of the mediator;
- professional or academic title;
- the kinds of disputes for which the mediator provides mediation services;
- date of listing.

(3) Data from the previous paragraph is submitted to the ministry of justice (hereinafter referred to as: the ministry) by the court or alternative dispute resolution service provider. Alternatively, the data may also be published on their websites. The court or the alternative dispute resolution service provider shall also submit information on the deletion of a mediator from the list to the ministry.

Article 10

(central mediator database)

(1) For the purpose of informing the public and providing effective mediation procedure services according to this act, the ministry shall keep a central database of listed mediators.

(2) The central mediator database shall be published on the ministry's website and shall include the following data:

- name of the mediator;
- professional or academic title;
- the kinds of disputes for which the mediator provides mediation services;
- name and address of the court or alternative dispute resolution service provider where the mediator is listed, and
- date of listing.

(3) After receiving data on the deletion of a mediator from the list, the ministry shall delete the mediator from the central mediator database.

(4) In the decree or regulations, the minister shall lay down detailed rules on maintaining the list and the central mediator database.

Article 11

(program management)

(1) The court offering the alternative dispute resolution program shall nominate a public servant who will manage, regulate, monitor and evaluate the performance of the program (hereinafter referred to as: the program manager). In a court-annexed program, the program manager shall also organize education and training activities, monitor the work of neutral third persons and designate a neutral third person in individual cases.

(2) The court offering an alternative dispute resolution program shall nominate a judge, within the annual work schedule of judges, who shall co-operate with the program manager in monitoring and evaluating the performance of the program, as well as the education and training activities of neutral third persons.

Article 12

(program funding)

The funds for the programs that are offered by the courts on the basis of article 4 of this act shall be provided to the courts by the competent authority.

Article 13

(program support)

(1) The ministry shall provide assistance in setting up and implementing the programs, assume responsibility for informing the public of the programs offered by the courts in accordance with article 4 of this act, and, in co-operation with the alternative dispute resolution council, provide appropriate advice and information on suitable good practices in setting up and implementing the programs and providing quality assurance..

(2) The courts shall submit any program they adopt on the basis of article 4 of this act to the ministry and to the high judicial and prosecutorial council.

(3) The judicial training centre in cooperation with the associations of mediators provides education and training for neutral third persons who participate in programs in alternative dispute resolution procedures offered by the courts in accordance with article 4 of this act.

Article 14

(alternative dispute resolution council)

(1) The alternative dispute resolution council (hereinafter referred to as: the council) shall be established for the purpose of providing consultancy services in relation with setting up and implementing programs according to article 4 of this act and providing quality assurance and further development of alternative dispute resolution.

(2) The council shall be comprised of at least ten members (hereinafter referred to as: members). The minister shall nominate members among experts in the areas of alternative dispute resolution or civil procedural law for a span of four years. The council shall be chaired by a chairperson (hereinafter referred to as: the chairperson) who shall be designated by the minister.

(3) In a document regarding the establishment of the council, the minister shall define the composition, tasks, methods of work, means, and reimbursement of costs for the chairperson and other council members, as well as other administrative and technical aspects required for the council's work.

III. Common procedural clauses

NOTE! THIS PART COULD BE ALTERNATIVELY INSERTED IN THE LAW ON MEDIATION

Article15

(referral to the alternative dispute resolution procedure by stipulation, motion or order)

(1) The court shall in each case no later than when serving the complaint to the defendant, provide and serve to all the parties in person the information of available alternative dispute resolution procedures and their comparative benefits, answers to frequently asked questions and various forms approved by the court.

(2) Small claims and other appropriate cases in which all the parties are represented by their lawyers and, which are determined by the court's alternative dispute resolution program, may automatically be assigned to the court's alternative dispute resolution program by the designated court office. Any party whose case has been assigned automatically to the alternative dispute resolution program may file with an assigned judge, within 8 days from the day the party

received a notice on automatic assignment, a reasoned motion for relief from automatic referral. Judge's decision on that motion is not subject to appeal.

(3) On the basis of a stipulation by all the parties who agree that an attempt at alternative dispute resolution should be made, by a motion of one party or on the judge's initiative, the court can suspend the court proceedings for no longer than three months and refer the parties to the alternative dispute resolution procedure.

Article 16

(duty to consider the alternative dispute resolution process)

(1) In cases automatically assigned to the alternative dispute resolution program, the lawyers who represent their clients in dispute in question must confer to attempt to agree on alternative dispute resolution process as soon as after case filing and no later than until deadline as set by the court.

(2) In cases automatically assigned to the alternative dispute resolution program, lawyers and their clients must sign, serve and file an alternative dispute resolution certification and shall provide a copy to the court, until the date specified by the court.

(3) Lawyer and client must certify that both have read the information booklet of the court on alternative dispute resolution program, discussed available dispute resolution options provided by the court and private providers, considered whether their case might benefit from any available alternative dispute resolution options and compared the costs of alternative dispute resolution processes with litigation costs.

Article 17

(stipulation to alternative dispute resolution process or notice for information telephone conference)

(1) In cases automatically assigned to the alternative dispute resolution program the lawyers must no later than on the date as specified by the court, file in addition to alternative dispute resolution certification, either a stipulation and proposed order selecting alternative dispute resolution process or a notice for a need for an alternative dispute resolution information phone conference on a form, established by the court.

(2)if any party has filed a need for an alternative dispute resolution phone conference, lawyers representing their clients are required to participate at joint phone conference at a time, designated by a court.

(3)All lawyers, representing their clients in particular case and internal or external dispute resolution expert, previously appointed or approved by the court, must participate at the alternative dispute resolution information phone conference.

Article 18

(informative alternative dispute resolution hearing)

(1) If the parties have not stipulated to a particular alternative dispute resolution process after alternative dispute resolution phone conference, the assigned judge shall discuss with the parties the selection of an alternative dispute resolution option at the preparatory hearing. If the parties do not agree to the alternative dispute resolution process and the judge deems it appropriate, she or he shall select one of the court alternative dispute resolution processes and issue an order referring the case to that process.

(2) The date and time of the informative hearing shall be determined by the court according to the rules of the civil procedural code.

(3) The invitation to the informative hearing shall be served to the parties in person.

(4) Minutes shall be kept in the informative hearing led by a judge or an law clerk.

(5) If, upon proper notice of invitation, the party fails to participate in the informative hearing and fails to produce justified personal reasons for absence or if there is a lack of generally accepted circumstances (e.g. earthquake, flood, etc.) that would justify the party's absence from the hearing, the absent party shall be obliged to reimburse the other party's expenses that arose from this hearing. In the notification for attending a hearing sent to the party, the court shall include information on the consequences of absence from a hearing. Unjustified absence of any party from a hearing does not prevent the assigned judge to issue an order of mandatory referral to selected alternative dispute resolution process.

Article19

(presence at hearings in alternative dispute resolution procedures)

(1) Natural persons as parties in a proceeding are obliged to participate in hearings and meetings in the framework of alternative dispute settlement procedures in person.

(2) Legal persons as parties in a proceeding shall make sure that a person authorized to enter into judicial or extra-judicial settlements is present or reachable during hearings and meetings.

(3) Notifications for hearings and meetings in the framework of alternative dispute resolution procedures according to this act shall be implemented in accordance with the rules of civil procedures.

(4) If a party who has been properly notified fails to attend the meeting or hearing in the alternative dispute resolution procedure and provides no justified personal reason for absence or if there is a lack of generally accepted circumstances (e.g. earthquake, flood, etc.) that would justify the party's absence from the meeting or hearing, the absent party shall reimburse costs arising from the meeting or hearing to the opposite party, and pay a three hour fee for the time used to prepare for the meeting or hearing to the one or more neutral third persons who prepared the meeting or hearing. The notification for attending a meeting or hearing sent to the party shall include information on the consequences of absence from a hearing.

(5) Persons authorized by the parties may be present in meetings and hearings in the framework of the alternative dispute resolution procedures.

Article 20

(fees for neutral third persons)

In the alternative dispute resolution procedure under the program from article 4 of this act, any neutral third person participating in the program shall be entitled to a fee and reimbursement of travel expenses in the amount set by the minister in the decree or regulations.

Iv. Special procedural provisions in the mediation program

Article 21

(mandatory mediation referral)

(1) When it is suitable, given the circumstances of the case, and on the basis of consultation with the parties at the preparatory hearing or in other appropriate way, the court may, any time during pending litigation, decide to suspend the litigation for no longer than three months and refer the parties to mediation provided by the court in the framework of the program from article 4 of this act.

(2) The decision on mandatory referral to mediation shall be explained and shall contain a warning on the consequences of a clearly unreasonable rejection of the mediation referral from paragraph 5 of this article. The decision shall be served to the parties in person.

(3) In eight days from the date the party was served the decision, the party may submit an appeal against the decision on mandatory mediation referral.

(4) Should the party submit an appeal from the previous paragraph, the court that has issued the decision on mandatory referral shall repeal this decision. Once the decision on the annulment of mandatory mediation referral is made, no appeal can be made against that decision.

(5) Regardless of the litigation outcome, the court may, upon request by the other party, order the party that has submitted a clearly unreasonable objection to the mediation referral, to reimburse the other party for all or part of the necessary spent litigation expenses that arose from the clearly unreasonable objection.

(6) In deciding whether the objection to the mediation referral was clearly unreasonable, the circumstances of each case shall be taken into account, especially the following:

- nature of the dispute,**
- the merits of the case,**
- whether or not the parties strived to settle the dispute in a friendly manner through negotiations or other settlement methods,**
- whether the costs that would arise from mediation would be disproportionately high,**
- the possibility that a three-month suspension of the procedure due to mediation could affect the result of the trial,**
- whether mediation would have had reasonable prospects of a successful dispute settlement.**

Article 22

(execution of the first mediation meeting)

If the court refers the parties to mediation in the framework of the court's program, the first mediation meeting shall take place no later than thirty days after the referral decision has been adopted.

Article 23

(disputes with the state entity or state bih)

(1) In all judicial disputes where this act is applied and where the state is a party, its' legal representative shall give consent for dispute settlement through mediation when such a decision is appropriate, given the circumstances of the case.

(2) If the legal representative from previous paragraph deems dispute settlement through mediation to be unsuitable, he/she shall submit an explanation and a proposal to the authorized government and ask for a decision.

(3) If, in a large number of disputes of the same kind, the legal representative deems dispute settlement through mediation to be unsuitable, he/she can submit a single proposal to the government asking for a decision on the application of mediation for all disputes of that kind. Should there be a possibility that disputes to which the proposal by the legal representative proposal relates will arise in the future, he/she may propose that the government simultaneously reach a decision on settling all expected future disputes of the same kind through mediation.

Article 24

(reimbursement of fees and travel expenses for the mediator by the court)

(1) In mediation procedures that are carried out in accordance with the program from article 4 of this act with regard to disputes in relations between parents and children and labor disputes due to termination of an employment contract, the court shall reimburse the mediator's fee and travel expenses.

(2) In mediation procedures that are carried out in accordance with the program from article 4 of this act with regard to any other dispute not mentioned in the previous paragraph, except commercial disputes, the court shall reimburse the mediator's fee for the first three hours of mediation, and travel expenses arising from the first three hours of mediation.

(3) In mediation procedures that are carried out in accordance with the program from article 4 of this act with regard to commercial disputes, the parties shall bear the fee and travel expenses of the mediator. The costs shall be shared equally, unless otherwise decided by the parties.

V. Transitional and final provisions

Article 26

(adoption and implementation of court programs)

(1) First instance courts shall adopt and implement the program of alternative dispute settlement from article 4 of this act no later than by the date this act enters into force.

(2) Second instance courts shall adopt and implement the program of alternative dispute settlement from article 4 of this act by no later than one year after the date this act enters into force.

Article 27

(applicable court programs)

If a court already offers a program of alternative dispute resolution at the time this act enters into force, it shall analyze the program and consolidate it with the provisions of this act no later than by the date this act enters into force.

Article 28

(deadline for publishing the decree or regulation)

The minister shall publish the decree or regulation for implementing provisions of this act no later than three months after this act enters into force.

Article 29

(date of entry into force and date of application of the act)

This act shall enter into force on the fifteenth day following the day of its publication in the official journal and shall begin to apply six months after entry in force.

Status of mediator

Article 13. Status of mediator

1. A mediator can be a person who has attained the age of twenty-five, has higher or vocational education and has passed the professional training in mediation, which is to comprise 90 academic hours of basic training, including at least 45 academic hours of practical skills training.

Additional requirements for acquiring the status of mediator may be established by the laws of Ukraine, organizations administering mediation, and mediators associations.

2. The following persons shall not be entitled to act as mediators:

- 1) a person who was recognized by the court partially incapacitated or incompetent;
- 2) a person who has a criminal record which has not been quashed or removed from the official records in accordance with the procedure established by law;
- 3) a person who was dismissed from the position of judge, prosecutor or investigator, from the public service or local government authorities, for breaching the oath or committing a corruption offense;
- 4) a person in regard to whom the decision has been taken to terminate the status of mediator, pursuant to article 22 of this law.

Comment

This article introduces mediation as a profession. Only those persons who meet the criteria, prescribed by the law, could serve in capacity of a mediator. Unlike to many EU member states where individuals are free to serve in a capacity of a mediator if the parties wish so, this article introduces restricted autonomy of the parties.

Mediation market in cross-border and international disputes will remain rather closed in Ukraine because foreign mediators might not fulfill criteria of 90 hours of training, taking into account that prevailing minimum training criteria in EU is 40 hours of training.

It is therefore suggested to open mediation market in a way that at least an approval process for training certificate, if obtained abroad, would be envisaged.

Article 14. Professional training for mediators

1. Professional training for mediators shall be conducted by individuals and entities the curricula of which have been certified by the mediators associations, and/or by the educational institutions which curricula have been certified in accordance with the law. The mediators associations performing certification of the mediation curricula, shall adopt and publicize the rules stipulating the requirements for the stated curricula.

2. Organizations conducting training for mediators are to provide basic professional training and continuous training aiming at conducting mediation in an effective, impartial and competent manner in regard to the parties.

3. The mediator's professional training shall be certified by a certificate including mediator's name and containing information on the name of the organization which provided the training; full name of the trainers; curriculum title and the amount (number of academic hours) of theoretical and practical courses.

Comment

This article introduces certification of training curriculums, which will be in hands of associations of mediators and educational institutions.

Article 15. Rights of mediator

1. A mediator shall be entitled to the following rights:

1) to obtain an information regarding the dispute, to which settlement he/she has been involved, from the dispute parties, public authorities, and officials in the scope required and sufficient to conduct mediation;

2) to independently select the mediation methodology, provided that it conforms with the legislation on mediation as well as with professional standards, business ethics and rules for mediators;

3) to withdraw from mediation due to ethical or personal reasons and in the event of a conflict of interest with the other mediation participants;

4) to provide paid or free of charge services;

5) to claim remuneration for his/her services and reimbursement of expenses incurred in mediation in the amount and form stipulated by the agreement on conducting mediation;

6) to perform his/her activities independently or in conjunction with other mediators, set up legal entities, mediators associations, work as an employed person and conduct entrepreneurial activity.

Comment

A mediator may, according to paragraph 6, conduct entrepreneurial activity and perform mediation service independently from institutional providers and therefore as a non-registered mediator. See more on rights and duties of non-registered mediators below.

Article 16. Duties of mediator

1. A mediator shall:

- 1) comply with the current legislation on mediation, professional standards and rules for mediators, confidentiality rules;
- 2) check the powers and authority of the representatives and/or legal representatives of the mediation parties;
- 3) notify mediation parties on the conflict of interest or any other circumstances ruling out his/her involvement in the mediation process;
- 4) informing the parties about mediation procedure and its legal consequences and providing explanation on the mediation procedure;
- 5) manage mediation process;
- 6) enable parties to verify whether the content of the mediation agreement complies to the law and ethical requirements.

Comment

See comment to article 6

Article 17. Independence of mediator

1. A mediator shall be independent of the mediation parties, public authorities, other legal entities and individuals.
2. The intervention of public authorities, any legal entities and individuals in the mediator's activity in the course of the mediation preparation and implementation shall be prohibited.
3. Attorneys and representatives and/ or legal representatives of the mediation parties cannot act as mediators. The person who provided or is providing the mediator services in a case (proceeding) cannot act as an attorney or representative of the mediation party in the same case (proceeding).

Comment

Paragraph 3 should be improved in a way that not only attorneys but also judges, when acting as mediators, should be prevented from dealing with cases in which they were engaged as mediators.

Such a provision would provide courts with court-annexed mediation schemes, to register as mediators also judges, if they comply with conditions from article 13 of the Law on mediation. Inclusion of judges-mediators into court-annexed mediation schemes is of key importance for maintaining trust and confidence of disputants and their lawyers to mediation (see Opinion No. 6 of the Consultative Council of European Judges (CCJE) at the Council of Europe).

Model paragraph or article:

»The provisions of this Law shall also apply to mediation conducted by a judge who is not competent for any of the court proceedings which refer to the dispute concerned. However, the Law shall not apply to cases where a court or a judge to whom a case has been referred, in the course of court proceedings referring to the dispute in question, attempts to facilitate the amicable settlement of a dispute, or where an arbitrator attempts to do so in arbitral proceedings referring to this dispute.«

Article 18. Neutrality of mediator

1. A mediator shall be a neutral (impartial) individual who helps the dispute parties to reach agreement, initiate and conduct negotiations. During the mediation process, a mediator shall seek to provide unbiased approach towards the parties and take into consideration all the circumstances of the case.
2. A mediator shall be entitled to provide advice to the mediation parties solely regarding the mediation procedure and formalization of its results.
3. A mediator shall not be entitled to resolve the dispute between the mediation parties. The mediator shall not be entitled to provide instructions and recommendations regarding the options for the dispute settlement, unless otherwise agreed in writing by the mediation parties, to evaluate the behavior and opinions of the mediation parties, except for clear violations of legal or ethical standards or the mediation procedure.
4. When a person is contacted with the request to act as a mediator, this person shall report on any circumstances that may cause reasonable doubt about his/. her neutrality and/or independence and/or impartiality. Since his/her appointment and throughout the mediation process, the mediator shall without delay inform the parties about such circumstances, if he/she has not informed them of such circumstances prior to the appointment as a mediator.

Comment

First sentence of paragraph 1 might be misunderstood because it describes a mediator's duty as a task to initiate and conduct (bilateral) negotiations. For the purposes of this law is sufficient to determine mediator's duty as his/her assistance to the parties to reach an amicable settlement.

Paragraph 3 deals with other possible intervention styles of a mediator, apart from facilitating one.

As regards possibility that a mediator acts as conciliator and provides the parties with his/her settlement recommendations or proposals, the law requires written agreement of the parties which doesn't seem necessary. The following model paragraph is proposed:

Model paragraph:

»The mediator may, at any stage of the mediation proceedings, make proposals for the settlement of a dispute. Such a settlement proposal shall not be binding upon the parties.«

As regards evaluative style of a mediation, paragraph 3 is too narrow because it allows it only in order to prevent violation of legal and ethical standards. This part of the text should be rather deleted.

Finally, the law is silent as regards the question whether a mediator may act in a same case as an arbitrator. Hybrid processes like med-arb or arb-med are often performed by the same person in order to reduce the costs of dispute resolution procedure. Nevertheless, many ethical issues may arise if the same person acts as a mediator and an arbitrator. The following model paragraph is therefore recommended:

Model paragraph:

»Unless otherwise agreed by the parties, the mediator shall not act as an arbitrator in respect of a dispute that was or is the subject of mediation, or in respect of another dispute that has arisen from the same legal relationship.«

Article 19. Registry of mediators

1. Mediators associations and organizations administering mediation and/or conducting training in mediation shall be entitled to maintain registries of mediators to enable the mediation service users to select a mediator for a specific case. The registry of mediators shall include the following information: full name, year of birth, education, professional training in mediation, organization that conducted the training, number of training hours, if available – specialization received, other information that would help the parties to select a mediator for the specific case.

2. Mediators associations and organizations administering mediation and/or conducting training in mediation can require additional special characteristics to include mediators into their mediators registry, that may be related to work experience in a certain field, special education, etc.

3. The users of mediation services shall be entitled to independently select a mediator for the specific case among the persons that are not included into the registry of mediators.

Comment

Registration of mediators is mandatory only if they are working within institutional provider or if they are members of association of mediators. The law is clear that users may select a non-registered mediator. Obvious purpose of provision on registry is to provide disputants with information on available mediators. Such an approach will set up two kinds of mediators. Registered and non-registered. Since there will be no control over non-registered mediators as to whether they fulfill conditions to perform a role of mediator from article 13, drafters of the law may consider possibility to impose a duty of non-registered mediators to certify in mediation agreement, signed by them and the parties, that they meet all the conditions to perform a role of a mediator from article 13.

Article 20. Mediator's remuneration

Mediation expenses shall comprise the mediator's (mediators') remuneration and expenses incurred in the mediation. The expenses shall be covered by the mediation parties in equal proportion, unless otherwise agreed by the parties under the agreement.

Comment

It is expected that most of mediators will perform their task within institutional providers. If so, it is a common practice that these providers set the remuneration scheme for mediators, reimbursement of expenses, filing fee, costs of administering mediation etc.

As regards court-related mediation schemes, the law may determine whether and to what extent the parties should pay the costs of mediation process. It is therefore suggested to adopt the following drafting approach:

Model article

“(Fees and costs of mediation)

Unless otherwise prescribed by the law or agreed in a written way by the parties and a mediator in a mediation agreement, the fee and compensation of mediator's costs shall be determined by the rules of the institution which administers mediation.”

Article 21. Mediators associations

Mediators, organizations administering mediation, and organizations conducting professional training in mediation shall be entitled to establish local, nationwide and international associations of mediators with the aim of protecting their rights and freedoms, meeting professional interests, raising public awareness on the role of mediation in harmonization of social and economic relations, and performing other functions.

Comment

Association of mediators shall be a voluntary, non-governmental organization as it is a case throughout Europe. Even an association may wish to establish a mediation scheme and perform a function of institutional provider therefore the law should be clear about this option.

Article 22. Liabilities of mediator

1. A mediator shall be liable for the infringement of the law on mediation, mediators' professional and ethical rules and breach of any contractual obligations in respect to mediation parties.
2. A mediation party who considers that the unlawful acts or omissions by the mediator has caused it material and/or moral damage, shall be entitled to file a complaint to the organization administering mediation or mediators association, or have a recourse to the court to protect its legitimate rights and interests. The court protects the rights and legitimate interests of the mediation parties following the procedure established by law.
3. Based on the outcomes of the consideration of the complaint submitted by the mediation party (parties), the organization administering mediation or mediators association may take a decision on exclusion of the mediator from the registry of mediators or the organization's membership, or termination of the mediator status. Such decision shall be publicized on the official website of the organization administering mediation or on the official website of the mediators association. Re-inclusion of the mediator into the registry of mediators or readmission to membership shall take place no earlier than three years after.

Comment

It should be pointed out here again that the Law on mediation differentiates between the status of registered and non-registered mediators. Paragraph 3 of this article will apply only for registered ones.

Article 23. Mediation services quality assurance

1. Organizations administering mediation and mediators associations shall develop voluntary codes of conduct (codes of ethics) and perform oversight of the mediators complying with these codes, as well as implement other efficient mechanisms for the mediation services quality assurance.
2. Organizations administering mediation shall verify the level of professional training of the mediators whom they involve into conducting mediations; maintain the registries of mediators and

provide access to them for the public; ensure compliance of the professional training for mediators with the specific circumstances of each case the mediator is to be involved in.

3. Organizations administering mediation shall place on their websites the registries of mediators, codes of mediators' ethics, rules for the mediation procedure, regulations on the disciplinary panels, information on the cost of mediation services and any other administrative fees, other information needed by the mediation parties to comprehend the nature of the mediation procedure and select a mediator for the specific case.

4. Rules for conducting mediation shall be developed by the organizations administering mediation and shall include the following provisions:

- 1) types of disputes which are settled under the rules;
- 2) procedure for selection of a mediator/mediators;
- 3) procedure for withdrawal of the mediator if any circumstances arise that may cause reasonable doubt about his/her neutrality or independence.
- 4) procedure for sharing expenses, related to the conduct of mediation, between the parties;
- 5) procedure for conducting mediation, rights and responsibilities of the parties, other conditions for conducting mediation.

Comment

It is understood from this article that organizations, administering mediation could be either private or public mediation providers. This is important because the law authorizes all of them to develop professional standards in a form of codes of conduct which may differ, criteria for registration of mediators (for example certain number of performed mediations in court-related mediation schemes) and different training requirements.

It is also very important that the law determines minimum public information on mediation, which has to be provided on websites of institutional providers and therefore ensures public and professional awareness on mediation.

Last but not least, it is of utmost importance that the law envisages adoption of mediation rules at each institutional provider. It is an established international practice that institutional providers have adopted their own mediation rules to which disputants could adhere either before or after a dispute has arisen. In addition, this requirement also empowers courts to design and adopt their own mediation case management rules in court-related mediation schemes (see more on this in comment to article 12).

1. Organizations administering mediation independently or through the mediators associations shall set up disciplinary panels and develop regulations on such panels.
2. The disciplinary panels shall be established on a permanent basis to examine the complaints filed by the mediation parties against acts or omissions of the mediators who are members to or included into the registries of the organizations or mediators associations.
3. In order to enable simple and efficient access, the information about the composition of the disciplinary panels, regulations on the disciplinary panel, contact information of the person in charge of accepting the complaints for consideration, shall be made publicly available and accessible on the official websites of the organizations administering mediation or mediators associations.
4. The complaints against acts or omissions of the mediators shall be considered within one month after their receipt by the responsible person. The mediation parties shall receive a written notice about the results of the complaint consideration.
5. Based on the complaint consideration outcomes, the mediator can be called to account pursuant to article 22 of this law.
6. The information on the number of complaints against acts or omissions of the mediators shall be publicized once a year by placing the information on the official websites of the organizations administering mediation or mediators associations.

Comment

Quality control mechanisms through complaint regime are envisaged as mandatory. Nevertheless, if an individual mediator is not performing his/her mediation tasks through institutional providers or is not a member of an association of mediators, a duty to establish a complaint mechanism doesn't apply which seems as a weakness of proposed article.

Final and transitional provisions

1. The law shall come in force on the day following the day of its official publication.
2. The verkhovna rada enacts:

The following legislative acts of Ukraine shall be amended:

2.1. Paragraph 2 of article 65 of the criminal procedure code of ukraine (bulletin of the verkhovna rada of ukraine, 2013, no.9-10, no.11-12, no.13, p. 88) following the clause 10 shall be supplemented with the new clause in the following edition:

- «11) mediators – regarding the circumstances that became known in connection to the performance of the mediators duties, except for cases established by current legislation;”.

2.2. Article 221 of the labor code of ukraine (bulletin of the verkhovna rada of the ukrainian ssr, 1971, appendix to no. 50, p. 375) following paragraph 3 shall be supplemented with the two new paragraphs in the following edition:

- «the parties to the labor dispute by voluntary agreement can initiate the mediation process and select a mediator to assist in the dispute resolution.

The labor disputes committee or court shall explain to the dispute parties their right to mediation and its consequences.”.

2.3. In the commercial procedure code of ukraine (bulletin of the verkhovna rada of ukraine, 1992, no. 6, p. 56):

- paragraph 1 of article 65 after clause 1 shall be supplemented with the new clause in the following edition:

«2) shall explain to the parties their right to mediation and its consequences;”;

- paragraph 2 of article 79 after clause 3 shall be supplemented with the new clause in the following edition:

«4) conducting mediation.».

2.4. In the civil procedure code of ukraine (bulletin of the verkhovna rada of ukraine, 2004, no. 40-41, 42, p. 492):

- paragraph 1 of article 51 after clause 4 shall be supplemented with a clause in the following edition:

«5) mediators – about the information obtained by them in the course of the mediation.»;

- paragraph 3 of article 130 following the words “the parties” and before the words “conclude a conciliation agreement” shall be supplemented with the following words:

«conduct mediation».

Paragraph 1 of article 201 after clause 7 shall be supplemented with the clause 8 in the following edition:

«8) conducting mediation».

2.5. In the code of administrative procedure of ukraine (bulletin of the verkhovna rada of ukraine, 2005, no. 35-36, 37, p. 446):

- paragraph 2 of article 65 after clause 5 shall be supplemented with the clause 6 in the following edition:

«5) mediators – regarding the circumstances that became known in connection to the performance of the mediators duties, except for cases established by current legislation;»;

- paragraph 3 of article 111 after the words “regarding the conciliation” shall be supplemented with a comma and the following words: “conducting mediation and its consequences.”;

- paragraph 3 of article 113 after the words “the conciliation” shall be supplemented with the following words: “and/or conducting mediation.”.

3. The cabinet of ministers of ukraine shall:

Within six months following the day this law comes into force:

- 1) amend the classification of types of economic activity by introducing the economic activity type “mediator”;
- 2) amend the national classifier of ukraine under category “classifier of professions” by introducing the profession “mediator”;
- 3) ensure bringing their regulatory legal acts in line with the law provisions by the ministries and other central executive authorities.

Comment

If any of suggested amendments and supplementations of the Law on mediation and provisions of the Model Alternative dispute resolution act in judicial matters is to be accepted, the relevant legislation as identified above shall be amended accordingly.

Chairman,

Verkhovna Rada of Ukraine

V.Groisman

Draft Law

Submitted by the Members of the
Parliament of Ukraine:

S.V.Kivalov

V.Y.Razvadovskiy

LAW OF UKRAINE

On Mediation

This Law sets out a legal framework for introduction and implementation of the procedure for dispute settlement through mutual agreement of the conflict parties involving the intermediary (mediator), establishes its principles and arrangements for conducting mediation, including the status of mediator.

Chapter I. GENERAL PROVISIONS

Article 1. Ukrainian laws on mediation

1. The laws of Ukraine on mediation comprise this Law and other legal acts.
2. If an international treaty ratified by Verkhovna Rada of Ukraine sets rules on mediation other than those provided by the laws of Ukraine, rules of the international treaty of Ukraine shall apply

Comment

A new third paragraph is suggested in order to encourage the use of mediation in cross-border and international disputes. Parties may have greater trust and confidence to mediation, performed in Ukraine, if a reference to the UNCITRAL Model Law on International Commercial Conciliation would be made in this law. Should most of proposed model articles in this Report, which are based upon this Model Law, be incorporated, it is recommended to make a reference to the spirit of UNCITRAL's Model Law.

Such an approach provides uniformity in application of this Law on mediation also regarding the questions, which are not explicitly settled in the Law on mediation.

Model article

(Interpretation of this Law)

In the interpretation of the provisions of this Law regard is to be given to the need to promote uniformity in the application of the Model Law on International Commercial Conciliation and the observance of principles of fairness and good faith.

Article 2. Definitions

1. In this Law, the key definitions shall have the following meaning:

mediation report – document drafted by the mediator about mediation outcomes;

dispute – disagreement between two or more persons regarding significantly important for them subjective rights and legal responsibilities, interests or values;

mediator – professionally trained neutral in negotiations between the parties to the conflict;

mediation agreement – written agreement between mediation parties on resolution of their dispute and / or eliminating damage caused by the dispute;

mediation clause – a clause of the civil, commercial, labor or marriage contract under which disputes arising from the contractual relations between the parties shall be subject to mediation;

mediation – extrajudicial procedure for dispute settlement through negotiations involving one or more intermediaries (mediators);

dispute parties (parties to the conflict) – individuals, entities and/or their groups who take divergent positions regarding their important subjective rights and legal responsibilities, interests or values;

mediation parties – the dispute parties who have concluded an agreement on conducting mediation;

agreement on conducting mediation – written agreement on conducting mediation between the dispute parties on one side and the mediator on the other side;

authorized mediator – mediator who has passed the required qualification and competency verification and has been included into the National Registry of Authorized Mediators according to the procedure established by the legislation;

mediation participants – mediator (mediators), mediation parties, their representatives and/ or legal representatives, interpreter and other persons as agreed with the dispute parties.

Comment

Mediation agreement in the international practice means agreement to mediate, concluded before or after a dispute has arisen. Instead of definition of mediation agreement as presented above, it is suggested to use the term mediated settlement or amicable settlement.

Definitions of two key terms are important in this article, namely mediation and mediator. Both definitions could be improved as follows:

Model article (definitions)

(1) For the purposes of this law:

a) mediation means proceedings by which the parties attempt to reach through a neutral third person (mediator) the amicable settlement of a dispute arising out of or relating to a contractual or other legal relationship.

b) mediator means any third person who is approached to conduct mediation, irrespective of his or her title or profession and irrespective of the manner in which he or she has been appointed or approached to conduct mediation, and who accepts the request. A sole mediator or several mediators may participate in the proceedings.

Article 3. Objectives of mediation in Ukraine

1. The mediation objectives include:

- 1) dispute settlement through achieving a mutually acceptable solution by the dispute parties;
- 2) eliminating damage caused by the dispute;
- 3) as full as possible satisfaction of the parties to the conflict;
- 4) reducing the conflict intensity by the parties and preventing the resumption of the dispute;
- 5) restoring law and order and harmony within the society.

Comment

Objectives of mediation could be stated in light of the EU Mediation Directive. It is important that the law clearly demonstrates one of the main goals of this law, that is a balanced relationship between mediation and litigation.

The following improved wording could be inserted:

Model article

(Objective of the law)

The objective of the Act is to facilitate access to alternative dispute resolution and to promote amicable dispute resolution by encouraging the use of mediation and providing a balance between mediation and court proceedings.

Article 4. Scope of application of the mediation

The mediation covers any disputes stipulated by this Law, including the civil, commercial, administrative, labor and family disputes, as well as administrative offence cases and criminal proceedings in cases provided by legislation.

Comment

It is suggested to encourage the use of mediation also in international and cross-border disputes in which the parties may agree to apply Ukrainian Law on mediation or any other law. Variation of (all or some of) legislative provisions by the mediation agreement would require supplement wording of this article by inserting a new paragraph, as for example follows:

Model article

“Unless otherwise agreed by the parties this law shall apply to the mediation, both in disputes between the residents of Ukraine and in disputes involving the residents of other countries.”

or an alternative wording:

“Except for application of the provisions of article x,y,z... , the parties may reach a different agreement upon issues regulated by this Act or exclude the application of an individual provision of the Act.”

Taking into account that EU Mediation Directive is without prejudice to national legislation making the use of mediation compulsory (article 5 par.2), it is advised to envisage possibility that the law prescribes mandatory pre-filling mediation for certain kind of disputes and that a court may order a mandatory referral to mediation upon the law or discretionary power of a judge.

The law should be also clear regarding mediation clauses in contracts and regarding mediation rules of institutional providers to which it should be given the same legal effect as it is given to mediation agreement.

The following new paragraph 3 should be adopted:

Model paragraph:

»This act shall apply irrespective of the basis upon which the mediation is carried out, including agreement between the parties, reached before or after a dispute has arisen, a law, or order, direction or recommendation by a court, arbitral tribunal or competent governmental entity. When reference is made in this act to the agreement between the parties to mediate, this also refers to written mediation clause in contract and to the rules of the institution which conducts mediation, under condition that the parties have agreed to apply these rules.«

Article 5. Principles of implementing mediation

1. The mediation shall be implemented by the agreement of the dispute parties based on the principles of voluntary participation, equality and proactiveness of the mediation parties, mediator's independence, neutrality and tolerance, confidentiality of information regarding the mediation.

Comment

Following the approach, described above, namely, to leave open possibility that other law may introduce mandatory pre-filling- mediation and that courts could compel litigants to mediation, it is suggested to introduce a principle of voluntary cooperation instead of principle of voluntary participation. The parties could be therefore compelled to mediation process but would not be forced to reach a mutual agreement.

Article 6. Voluntary participation in mediation

1. The dispute parties shall participate in mediation process based on their mutual voluntary expression of will.

2. The mediation parties have the right to withdraw from mediation at any stage.

3. Any pressure on the dispute parties to conduct or terminate the mediation shall be prohibited.

Comment

Paragraph 1 may be modified in a way to allow mandatory referral to mediation:

Model paragraph

(Voluntary cooperation)

“Unless otherwise prescribed by the law, a dispute shall be referred to mediation process on terms of mutual voluntary expression of will.« (see comments to article 3 and 4).

Article 7. Equality of the mediation parties

1. The mediation parties have equal rights and liabilities.
2. Discrimination of the mediation parties on any basis shall be prohibited.

Article 8. Proactiveness of the mediation parties

1. The mediation parties shall independently determine the scope of the issues discussed, options for resolving the dispute, content of the mediation agreement, terms and methods of its implementation.

2. The mediation parties may rely on the advice by other mediation participants, but the final decision shall be made solely by the mediation parties.

Comment

Paragraph 2 is very important because it allows mediators to conduct also evaluative mediation, when appropriate. In general mediators perform facilitative style of mediation but in certain disputes it is helpful if they use evaluative techniques which may be considered as advisory in their nature.

Article 9. Independence of the mediator

1. The mediator is independent of the mediation parties, public authorities, including legal entities, officials and individuals.

2. The mediator shall select his/her own means and methods of mediation, the admissibility of which is determined by the current legislation on mediation.

3. The intervention of public authorities, any legal entities, officials, and individuals in the mediator's activity in the course of the mediation preparation and implementation is prohibited.

4. Attorneys of the dispute parties, representatives and/ or legal representatives of the dispute parties cannot act as mediators.

5. The person who provided or is providing mediation services in a case (proceeding) cannot act as attorney or representative of the mediation party in the same case (proceeding).

Comment

Paragraph 4 should be improved in a way that not only attorneys but also judges, when acting as mediators, should be prevented from dealing with cases in which they were engaged as mediators.

Such a provision would provide courts with court-annexed mediation schemes, to register as mediators also judges, if they comply with conditions from article 13 of the Law on mediation. Inclusion of judges-mediators into court-annexed mediation schemes is of key importance for maintaining trust and confidence of disputants and their lawyers to mediation (see Opinion No. 6 of the Consultative Council of European Judges (CCJE) at the Council of Europe).

Model paragraph or article:

»The provisions of this Law shall also apply to mediation conducted by a judge who is not competent for any of the court proceedings which refer to the dispute concerned. However, the Law shall not apply to cases where a court or a judge to whom a case has been referred, in the course of court proceedings referring to the dispute in question, attempts to facilitate the amicable settlement of a dispute, or where an arbitrator attempts to do so in arbitral proceedings referring to this dispute.«

Article 10. Neutrality of mediator

1. Mediator shall be a neutral (impartial) individual who helps the dispute parties to reach an agreement, establish and conduct negotiations.
2. Mediator is entitled to provide advice to mediation parties solely regarding mediation procedure.
3. Mediator is not entitled to resolve the dispute between the dispute parties or provide instructions for its settlement.
4. Mediator must withdraw from mediation if there are circumstances affecting his/her neutrality.

Comment

First sentence of paragraph 1 might be misunderstood because it describes a mediator's duty as a task to initiate and conduct (bilateral) negotiations. For the purposes of this law is sufficient to determine mediator's duty as his/her assistance to the parties to reach an amicable settlement. Paragraph 3 deals with other possible intervention styles of a mediator, apart from facilitating one.

As regards possibility that a mediator acts as conciliator and provides the parties with his/her settlement recommendations or proposals, the law requires written agreement of the parties which doesn't seem necessary. The following model paragraph is proposed:

Model paragraph:

»The mediator may, at any stage of the mediation proceedings, make proposals for the settlement of a dispute. Such a settlement proposal shall not be binding upon the parties.«

The Law should clearly allow mediators to perform evaluative style of a mediation by assessing strengths and weaknesses of parties' positions.

Finally, the law is silent as regards the question whether a mediator may act in a same case as an arbitrator. Hybrid processes like med-arb or arb-med are often performed by the same person in order to reduce the costs of dispute resolution procedure. Nevertheless, many ethical issues may arise if the same person acts as a mediator and an arbitrator. The following model paragraph is therefore recommended:

Model paragraph:

»Unless otherwise agreed by the parties, the mediator shall not act as an arbitrator in respect of a dispute that was or is the subject of mediation, or in respect of another dispute that has arisen from the same legal relationship.«

Article 11. Tolerance of mediator

1. Mediator should display equal attention and benevolence towards the mediation parties.
2. Mediator must provide services of equal quality to the mediation parties.
3. Mediator is not entitled to evaluate behavior and opinions of the mediation parties, except in the case of clear violations of legal and / or ethical standards or of mediation procedure.

Comment

Paragraph 3 deals with other possible intervention styles of a mediator, apart from facilitating one.

As regards evaluative style of a mediation, paragraph 3 is too narrow because it allows it only in order to prevent violation of legal and ethical standards. This part of the text should be rather deleted.

Article 12. Confidentiality of information

1. Information regarding preparation and conduct of mediation shall be confidential, unless the mediation parties agree otherwise.

2. Mediator is not authorized to disclose information about mediation without the consent of the mediation parties.

3. A mediation party is not authorized to disclose the information on the mediation without the consent of the other mediation party.

Other mediation participants are not authorized to disclose the information on the mediation without the consent of the parties.

4. A person cannot serve as a witness in a case (proceeding) in which he/she was involved as a mediator.

5. The content of a mediation agreement shall not be included into the mediation report.

Comment

The law on mediation regulates confidentiality as a core principle of mediation. In separate articles it addresses both aspects of confidentiality, that is, protection of information conveyed by one party to the mediator from disclosure to another party and protection of discussions of the parties in mediation from disclosure to outside world.

As to the mediator's duty not to disclose the information, conveyed by one party in a separate meeting with a mediator to another party, if subjected to specific condition to be kept confidential, the law on mediation takes an approach different from the one where a mediator is allowed to disclose information to another party only upon prior consent of the party which provides a mediator with such an information. The same approach could be found in the article 4 of the European Code of Conduct for mediators which has been heavily criticized by the practitioners as inconsistent and as a potential ground for satellite litigations due to misunderstood expectations and practices regarding caucusing. It is therefore suggested to keep a current rule, which is recommended also by the UNCITRAL Model law on international commercial conciliation in article 8 which provides for mediator's discretionary disclosure of information, received during caucusing unless parties' specific condition to keep information confidential.

As to the protection of discussions and information from disclosure to outside world, it is important that the law clearly demonstrates the strongest possible protection of confidentiality. The wording of paragraph 1 could be therefore strengthened in a way that all information originating from or relating to mediation shall be kept confidential.

Paragraph 4 only partially regulates inadmissibility issue but in a not enough precise way. Core weaknesses of paragraph 6 of this article are the following:

-protection from disclosure is limited only to testimonies of the mediator and not of the parties and not of other participants in mediation;

-protection is limited only to the usage of testimonies as evidence in any other procedure (litigation, arbitration) and not outside of them;

-the law doesn't allow general public order exceptions regarding confidentiality rule (see paragraph 1 a and b of the article 7 of the EU Mediation Directive)

Article 10 of the UNCITRAL Model law should be a guiding provision for legislators when considering how to regulate this important issue which could make mediation as an effective dispute resolution process and which could at the same time prevent disputants to embark only on fishing expedition for information, aimed to be relied on in subsequent litigation.

The law should regulate two aspects of (in) admissibility: it should introduce an obligation upon the parties, mediator and any third person, not to rely on the type of evidence, specified by the law and it should introduce obligation of the courts and arbitral tribunals to treat such evidence as inadmissible.

Public policy exceptions to disclosure and (in)admissibility are also needed to be prescribed by the law. In order to point out the importance of inadmissibility issues it would be better to regulate them in a separate article.

The following new article is suggested:

Model article

(admissibility of evidence in other proceedings)

“(1) the parties, mediators or third persons who participated in mediation shall not in arbitral, judicial or other similar proceedings rely on, introduce as evidence or give testimony regarding any of the following:

- a) an invitation by a party to engage in mediation proceedings or the fact that a party was willing to participate in mediation proceedings;**
- b) views expressed or suggestions made by a party in the mediation in respect of a possible settlement of the dispute;**
- c) statements or admissions made by parties in the course of mediation;**
- d) proposals made by the mediator;**
- e) the fact that a party had indicated its willingness to accept the mediator's proposal for amicable dispute settlement;**
- f) documents drawn up solely for purposes of the mediation proceedings.**

(2) the provision from the preceding paragraph shall apply irrespective of the form of the Information and evidence.

(3) information referred to in the preceding paragraph of this article may only be disclosed or used in proceedings before an arbitral tribunal, court or other competent government

authority for the purpose of evidence under conditions and to the extent required by law, in particular on grounds of public policy (e.g. protection of the interests of children or prevention of interference with a person's physical or mental integrity) or insofar as necessary for the implementation or enforcement of an agreement on the settlement of a dispute; otherwise such information shall be treated as an inadmissible fact or evidence.

(4) the provisions referred to in the first, second and third paragraph of this article shall apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that was or is the subject of the mediation proceedings.

(5) with the exception of cases referred to in the first paragraph of this article, evidence that is otherwise admissible in arbitral, judicial or similar proceedings does not become Inadmissible as a consequence of having been used in the mediation proceedings.”

It is therefore suggested to insert this new article, regulating inadmissibility of evidence, to delete paragraph 4 of article 12 of the Law on mediation and to modify paragraph 1 of article 12 with a new wording of a first sentence of paragraph 1 as follows:

Model paragraph

(Confidentiality)

»All information originating from mediation or relating to it is confidential unless otherwise agreed by the parties, or unless its disclosure is required by law or for the purpose of implementation or enforcement of mediated settlement.”

Chapter II. STATUS OF MEDIATOR IN UKRAINE

Article 13. Conditions for acquiring the status of mediator

1. Mediator may be a natural person who has attained the age of eighteen years old and passed the professional training in mediation at the educational institution or agency based in Ukraine or abroad.

A person recognized by the court as partially incapacitated or incompetent cannot act a mediator.

2. Professional training of mediators is to include theoretical and practical courses of at least forty hours.

3. Mediator’s professional training shall be certified by a diploma, certificate or other document issued with the mediator’s name and containing information on the amount (number of hours) of the theoretical and practical courses.

4. The educational institutions and agencies responsible for training of mediators in Ukraine shall maintain the registry of the trained mediators.

5. Persons, who have not attained the age of eighteen, are allowed to conduct mediation free of charge for their peers. Professional training for them is not mandatory.

Comment

This article introduces mediation as a profession. Only those persons who meet the criteria, prescribed by the law, could serve in capacity of a mediator. Unlike to many EU member states where individuals are free to serve in a capacity of a mediator regardless their title or profession, if the parties wish so, this article introduces restricted autonomy of the parties.

Since the law introduces prevailing minimum training criteria in the EU of 40 hours of training it is likely to expect that this requirement will not present an obstacle for access to an open mediation market for foreign mediators. However, it is suggested that at least an approval process for training certificate, if obtained abroad, should be envisaged.

Article 14. Conditions and procedures for acquiring the status of authorized mediator

1. Authorized mediator may be a natural person who has attained the age of twenty five and has a complete higher education, has passed the professional training in mediation, was certified by the Mediators Council of Ukraine and included into the National Registry of Authorized Mediators, which shall be certified by the certificate.

2. A person who has a criminal record which has not been quashed and removed from the official records in accordance with the procedure established by law, cannot act a authorized mediator.

3. Authorized mediator shall be assigned a registration number. Authorized mediator is allowed to have a personal seal indicating his name and registration number.

4. Persons that are not included into the National Registry of Authorized Mediators are not authorized to call themselves authorized mediators.

Comment

The law prescribes two additional conditions for persons, called themselves authorized mediators: certification by Mediators Council of Ukraine and registration at National Registry of Authorized Mediators. Articles 13 and 14 therefore introduce mediation profession dichotomy as it is developed in many EU member states.

The law differentiates between the powers of authorized (registered) and non-authorized mediators since only authorized mediators may serve in court-related mediation proceedings.

Such an approach is important in order to provide quality control of public mediation schemes. Model conditions for registered (accredited) mediators in court-annexed and court-connected mediation schemes are presented in Model Alternative Dispute Resolution Act in Judicial Matters (see comments to article 31).

Article 15. Rights of mediator

1. Mediator shall be entitled to the following rights

1) to obtain an information regarding the dispute, which he/she mediates from the dispute parties, public authorities, and officials in the scope required and sufficient to conduct mediation;

2) to independently select mediation methodology, provided that it conforms with the legislation on mediation as well as professional standards and rules for mediators;

3) to withdraw from mediation due to ethical or personal reasons and in the event of a conflict of interest with the other mediation participants;

4) to provide paid or free of charge services;

5) to claim remuneration for his/her services and reimbursement of expenses incurred in mediation in the amount and form stipulated by the agreement on conducting mediation;

6) to perform his/her activities independently or in conjunction with other mediators, set up legal entities, mediators associations, work as an employed person and conduct entrepreneurial activity.

Comment

The title of this article should be supplemented in a way that it would determine rights of both categories, mediators and authorized mediators.

Article 16. Responsibilities of mediator

1. Mediator shall be responsible for the following

1) complying with the current legislation on mediation, professional standards and rules for mediators, confidentiality rules;

2) checking the powers and authority of the representatives and/or legal representatives of the mediation parties;

3) notifying the mediation parties on the conflict of interest or any other circumstances impeding his/her involvement in the mediation process;

4) informing the parties about the mediation arrangements and its legal consequences and providing explanation on the mediation procedure;

5) managing the mediation process;

- 6) ensuring compliance of the mediation agreement with the legal and ethical standards;
 - 7) withdrawing from mediation in the event of clearly illegal or unfair conduct by at least one mediation party, representative and/ or legal representative of the mediation party.
2. Authorized mediator must notify in writing the authority in charge of the case referred to mediation about the termination of the mediation.

Comment

The title of this article should be supplemented in a way that it would determine responsibilities of mediators and authorized mediators.

Article 17. Grounds and procedures for terminating the status of authorized mediator

1. The registration certificate of the authorized mediator may be reversed in the event of:
 - 1) petition submitted by the authorized mediator;
 - 2) conviction of the authorized mediator for committing a crime;
 - 3) authorized mediator's incapacitation by the court or recognizing him/her incompetent;
 - 4) regular or grave singular breach of the law requirements on mediation by the authorized mediator.
2. The termination of the authorized mediator's registration shall be carried out by the Mediators Council of Ukraine.
3. The information on the termination of the authorized mediator's registration shall be included into the National Registry of Authorized Mediators.

Article 18. Liabilities of mediator

1. The mediator shall be disciplinary liable for the infringement of the laws on mediation as well as of professional standards and rules as set by the Law.
2. The following disciplinary penalties may be applied to the mediator:
 - 1) admonition;
 - 2) excluding from the National Registry of Authorized Mediators.

Comment

This article obviously deals only with liabilities of authorized mediators therefore the title should be revised accordingly.

Article 19. Associations of mediators

1. Mediators are allowed to establish local, nationwide and international associations under the current statutory procedure.

Comment

This article should be inserted into the next chapter on self-governance

Chapter III. MEDIATORS SELF-GOVERNANCE.

Article 20. General principles of the mediators self-governance.

1. The mediators self-governance shall be based upon the elective principle, as well as on principles of transparency, compulsory performance by the mediators of the decisions made by the self-governance bodies, and accountability.

2. The main objectives of the mediators self-governance include:

- development and establishment of standards and rules for professional activity of mediators;
- performing oversight of compliance by the mediators with the requirements of standards and rules for professional mediators;

- taking decisions on granting and terminating the status of the authorized mediator;

- maintaining the National Registry of Authorized Mediators of Ukraine.

3. Organizational forms of the mediators self-government shall be the Congress of Ukrainian Mediators and the Mediators Council of Ukraine.

Comment

It is not clear whether rules on self-governance apply also for non-authorized mediators. Nevertheless, this chapter over-regulates mediation profession. One of key weaknesses of this chapter is that it imposes financial burden on mediators in order to maintain tasks of Congress and Council of Ukrainian Mediators despite the fact that the Council perform tasks in public interests, in particular as regards certification of authorized mediators and maintaining of National Registry of authorized mediators as well as performing tasks of disciplinary body. Should the legislator insist at this approach, public funding of required functions is to be provided by the Law on mediation and article 24 should be changed accordingly.

Article 21. Congress of Ukrainian Mediators

1. The supreme self-governance body of the mediators in Ukraine shall be the Congress of Ukrainian Mediators.

2. The quota, procedure for nomination and election of the delegates for the Congress of Ukrainian Mediators, as well as policy for the convention of the Congress of Ukrainian Mediators shall be developed by the Mediators Council of Ukraine and approved by the Congress of Ukrainian Mediators, except for the representation quota, procedure for nomination and election of the delegates for the Constituent Congress of Ukrainian Mediators, which is established under Transitional Provisions of the Law.

4. The Congress of Ukrainian Mediators shall be convened by the Mediators Council of Ukraine at least once every three years. The Congress of Ukrainian Mediators shall be convened within the 60-days term upon the initiative of the Mediators Council of Ukraine or upon the request by at least 100 mediators.

If the Mediators Council of Ukraine does not convene the Congress of Ukrainian Mediators within 60 days after submission of the proposal on convening the Congress, the mediators who signed the proposal shall take a decision on establishing the organizational bureau for the convention of the Congress of Ukrainian Mediators. The organizational bureau shall be entitled to convene and facilitate the conduct of the Congress of Ukrainian Mediators, as well as select the chairperson.

5. The Congress organizers shall place the announcement of the venue, date and time for commencement of the Congress of Ukrainian Mediators, including issues submitted for agenda, in the state official printed mass media not later than twenty days before the Congress commencement.

6. The Congress of Ukrainian Mediators shall be considered legally competent if attended by more than half of the elected delegates.

7. The Congress of Ukrainian Mediators shall:

- approve regulations on the procedure for convention and conduct of the Congress of Ukrainian Mediators;
- approve regulations on the Mediators Council of Ukraine;
- approve regulations on the Audit Committee of the Mediators of Ukraine;
- approve the Procedure for Qualification and Competency Verification to Acquire the Status of Authorized Mediator;
- approve the Procedure for Maintaining the National Registry of Authorized Mediators;
- approve the budget estimate for the Mediators Council of Ukraine and report on its execution;
- elect two thirds of membership of the Mediators Council of Ukraine and recall from office the elected members of the Mediators Council of Ukraine;
- elect the members for the Audit Committee of the Mediators of Ukraine;
- set up the official printed and/or electronic publication issued by the self-governance body of the mediators of Ukraine;

- establish the amount of fee for the qualification verification to acquire the status of authorized mediator;
- exercise other powers under this Law.

The Congress of Ukrainian Mediators may adopt a decision on introducing annual fees to be paid by the mediators to enable the mediators self-governance, also establish their amount, areas for their usage and liabilities for fees evasion.

8. The decisions of the Congress of Ukrainian Mediators shall be adopted by the majority of votes of the delegates participating in the Congress.

Article 22. The Mediators Council of Ukraine

1. In between the congresses of Ukrainian mediators, the function of the mediators self-governance body shall be performed by the Mediators Council of Ukraine which is a legal entity.

The status, authorities and rules of procedure of the Mediators Council of Ukraine are set out by the Law, other laws of Ukraine, and Regulation on the Mediators Council of Ukraine approved by the Congress of Ukrainian Mediators.

The Mediators Council of Ukraine shall be subordinated and accountable to the Congress of Ukrainian Mediators.

The Mediators Council of Ukraine shall be chaired by the Head.

2. The Mediators Council of Ukraine membership shall comprise 15 members. The Congress of Ukrainian Mediators shall elect two thirds of the membership of the Mediators Council of Ukraine.

The judicial self-governance bodies and the lawyers' self-governance bodies shall appoint two members each to the Mediators Council of Ukraine, whereas the Ministry of Justice shall appoint one member.

The member of the Mediators Council of Ukraine shall be appointed for three years with the right to be reappointed.

The session of the Mediators Council of Ukraine shall be deemed legally competent if attended by the majority of its members.

3. The Mediators Council of Ukraine shall:

- promote public awareness on the benefits of mediation, its implementation, training and advanced improvement of professional skills of the mediators;
- develop an agenda, facilitate convention and conduct of the Congress of Ukrainian Mediators;
- ensure implementation of the decisions issued by the Congress of Ukrainian Mediators;
- ensure maintenance of the National Registry of Authorized Mediators and provide excerpts from the Registry;

- conduct qualification and competency verification of the individuals applying for the status of authorized mediator;
- develop regulation on the procedure for convention and conduct of the Congress of Ukrainian Mediators;
- develop regulation on the Mediators Council of Ukraine;
- develop regulation on the Audit Committee of the Mediators of Ukraine;
- develop the Procedure for Qualification and Competency Verification to Acquire the Status of Authorized Mediator;
- develop the Procedure for Maintaining the National Registry of Authorized Mediators;
- develop the budget estimate for the Mediators Council of Ukraine and draft report on its execution;
- develop the procedure for annual fees payment by the mediators to enable the mediators self-governance, ensure the fees distribution and use if the Congress of Ukrainian Mediators adopted the respective decision;
 - consider complaints regarding acts or omissions performed by the mediators;
 - by its decision, impose disciplinary sanctions on the mediators who infringed the laws or professional rules and standards;
 - maintain operations of the official printed and/or electronic publication issued by the self-governance body of the mediators of Ukraine;
 - perform other functions pursuant to this Law and resolutions by the Congress of Ukrainian Mediators.

Article 23. Head of the Mediators Council of Ukraine

1. The Head of the Mediators Council of Ukraine shall be nominated through voting by the members of the Mediators Council of Ukraine elected by the Congress of Ukrainian Mediators.

The Head of the Mediators Council of Ukraine shall be elected for three years with the right to be reelected.

The mandate of the Head of the Mediators Council of Ukraine may be terminated ahead of schedule on one's own accord, upon the decision of at least two-thirds of the membership of the Mediators Council of Ukraine or following the resolution of the Congress of Ukrainian Mediators.

2. The Head of the Mediators Council of Ukraine shall:

- organize the activities of the Mediators Council of Ukraine and presides at the Council's sessions;
- appoint sessions of the Mediators Council of Ukraine;
- endorse the decisions of the Mediators Council of Ukraine;

- represent the Mediators Council of Ukraine in liaison with other bodies, agencies and individuals;
- execute other powers pursuant to this Law and Regulation on the Mediators Council of Ukraine.

Article 24. Financial provision for the mediators self-governance bodies

1. Maintenance of the mediators self-governance bodies may be carried out through:

- the qualification and competency verification fee meant for acquiring the status of authorized mediator;
- annual fees paid by the mediators to enable the mediators self-governance;
- voluntary contributions by the mediators and their associations;
- donations by individuals and legal entities;
- other sources not prohibited by law.

2. The amount of the qualification and competency verification fee meant for acquiring the status of authorized mediator as well as the amount of the annual fee paid by mediators for enabling the self-governance shall be determined with regard to the need for covering the maintenance costs of the mediators self-government bodies.

Chapter IV. RIGHTS AND RESPONSIBILITIES OF THE MEDIATION PARTIES

Article 25. Rights of the mediation parties

1. Mediation parties shall have the right to:

- 1) select the mediator (mediators) by mutual agreement;
- 2) reject the mediator;
- 3) withdraw from mediation at any stage;
- 4) participate in mediation in person or through representatives whose authorities shall be based on the power of attorney issued as prescribed by the law;
- 5) benefit from the assistance of interpreter, expert, legal or other advisor;
- 6) in the event of failure to enforce or improper enforcement of the mediation agreement to take legal action in accordance with law.

Article 26. Responsibilities of the mediation parties

1. The mediation parties shall have the following responsibilities:

- 1) comply with all applicable laws and agreement on conducting mediation;

2) implement the mediation agreement in the manner and within the timeframe specified in this agreement.

Chapter V. THE MEDIATION PROCEDURE

Article 27. Initiating mediation

1. The initiative in conducting mediation shall rest with the dispute parties or the authority which instituted the relevant proceeding. The dispute parties are free in accepting or rejecting the offer to mediate.

2. Concluding of the agreement on conducting mediation by the dispute parties shall constitute grounds for suspension of the proceeding for the time of mediation according to the legislation.

Comment

The law on mediation procedure contains no provision regarding mediation clauses in contracts neither envisages possibility to conclude general mediation agreements as to referring future disputes, arising out of or relating to the contract or any civil relationship, to mediation.

This is an obvious weakness of the regulatory framework since both, mediation clauses and general mediation agreements between companies represent one of the most effective incentives for businesses to refer future disputes to mediation as part of their risk management policies.

Taking into account the voluntary nature of mediation, nothing prevents parties to a contract, to draft appropriate mediation clause. Nevertheless, it is of utmost importance that the law supports the validity and, in particular, enforceability of mediation clauses and agreements. The EU regulatory framework doesn't prevent member states to envisage possibility to allow application of mediation clauses in relation to all civil and commercial disputes, except in consumer disputes where agreements to mediate are allowed only after a dispute has arisen.

Mediation clauses should be considered as independent from the contract which embodied them and therefore separable. In particular in cross-border contracts it is wise to determine the applicable law which governs the mediation clause and which could not necessarily be the governing law of the main contract.

Mediation clauses are binding upon the parties. Nevertheless, their enforceability is rather weak when mediation clauses are drafted merely as boilerplate clauses. That is why some minimum substance of mediation clause could be recommended by institutional mediation providers, for example: to identify the parties, how and when mediation to be initiated, the scope of mediation

and its duration, applicable procedural and substantive law, the venue, language and selection method of mediator.

Multi-step or escalation dispute resolution clauses are often practiced in cross-border or /and international contracts. Bilateral negotiations, followed by mediation and, if not completed until certain period of days, followed by arbitration may be further encouraged in commercial disputes by drafting model dispute resolution clauses for various industries. Best practice examples such as guidelines, checklists and model clauses of AAA, ICC, CEDR, ICDR, ECDR, JAMS and other institutional providers of adr could serve as a legal source for drafters of such clauses.

The following paragraph may be considered to be inserted:

Model article

(mediation clause or agreement regarding future disputes)

“The parties may agree in writing to refer their future disputes, arising out of or relating to their contractual or other legal relationship with regard to the claim, which may be freely disposed of and settled, to mediation.

The parties may determine applicable law governing the mediation clause or agreement.

Mediation clause or agreement from the first paragraph is binding upon the parties and enforceable irrespective of whether the main contract is considered as null or void.

Previous paragraphs do not apply for future consumer disputes.”

The enforceability of mediation clauses and agreements could be further strengthened if the law would address the issue of relationship between mediation on one side and arbitration and litigation, on the other. Parties may wish to agree not to initiate judicial or arbitral proceeding until expiry of certain period of time or until a specified event has occurred therefore the law should support their willingness to refer their dispute to mediation first. Since the parties could agree so even after a dispute has arisen, it is suggested here that the law should regulate this issue in a separate article.

The law should also regulate the situation when mediation would be prescribed as a procedural pre-condition by the law.

Model article

(introduction of judicial or arbitral proceedings)

“Where the parties have agreed upon mediation and have expressly undertaken not to initiate, until the expiry of a certain period of time or until a specified event has occurred, arbitral or judicial proceedings with respect to an existing or future dispute, the arbitral tribunal or the

court, must, upon an objection by the defendant, dismiss such action, unless the plaintiff demonstrates, that otherwise harmful and irreparable consequences would occur. The defendant must submit this objection in the defense plea at latest.

The court shall dismiss an action even if before bringing the action obligatory mediation proceedings are prescribed by the law.

Initiation of arbitral or judicial proceedings shall not of itself be regarded as a waiver of the agreement to mediate or as the termination of mediation proceedings.”

Article 28. Agreement on conducting mediation

1. The agreement on conducting mediation shall be concluded in writing between the mediator (mediators) and the dispute parties.

2. The agreement on conducting mediation shall stipulate the following:

1) mediator (mediators), dispute parties, their representatives and/or legal representatives (if any);

2) procedure for, amount and form of the remuneration to be provided to the mediator (mediators) for his/her (their) services and reimbursement of expenses for the preparation and conduct of mediation;

3) mediation language and language of the mediation agreement;

4) involvement of interpreter and other persons (if needed);

5) date and place of mediation.

Comment

Among mandatory items to be described in a mediation agreement (agreement to conduct mediation) should be also a brief description of a disputed issues.

Article 29. Conducting mediation.

1. Mediation shall be conducted under the guidance of the mediator in a manner agreed upon by the parties, in compliance with applicable legislation on mediation.

2. Mediation shall be terminated upon:

1) signing of the mediation agreement by the mediation parties;

2) drafting of the mediation report by the mediator if the mediation agreement has not been concluded;

3) withdrawal from mediation by the parties or the mediator;

- 4) expiration of the period established under the agreement on conducting mediation;
- 5) the death of a party who is a natural person, or liquidation of a party that is a legal entity.

3. The mediation agreement or the mediation report shall be attached to the case files by the authority which initiated the mediation, as required by law.

Comment

This article regulates several issues which are not all interconnected: the way how mediation is conducted, commencement and termination of mediation. On the other hand this Chapter omits regulation on appointment of mediators. It is suggested to improve the transparency of the law and separately regulate those issues in four articles.

As to the appointment of a mediator it is suggested to allow various options for disputants.

Model article

(appointment of mediators)

The parties shall reach an agreement on the appointment of mediator, unless a different procedure for the appointment has been agreed upon.

The parties may seek an assistance of a third person or institution or association of mediators in connection with the appointment of mediators, in particular:

-a party may request a person or institution or association of mediators to recommend suitable persons to act as mediators, or

-the parties may agree that the appointment of mediator be made directly by such a person or institution or association of mediators.

Commencement of mediation

The law should be improved by defining the commencement of mediation. Precise definition is needed in particular because of the effect of commencement of mediation on limitation and prescription periods (see more on this issue below). The law on mediation should be therefore supplemented with a following new article:

Model article

(commencement of mediation)

“Where the parties have agreed in advance to resolve mutual disputes that might arise out of particular legal relationship through mediation or where mediation is prescribed by the law for the resolution of a particular type of dispute, mediation shall commence on the day on which a party receives a proposal for commencement of mediation from opposing party.

In cases which are not included in the preceding paragraph, mediation referring to a dispute which has already arisen, shall commence on the day, the parties to the dispute agree to pursue mediation. If one party proposes mediation to the other party, but does not receive an acceptance of the proposal from the other party within 30 days from the day on which the proposal was sent, it may treat this as a rejection of the proposal for mediation.”

Termination of mediation

From the same reason as stated above (to define the effect of mediation on running, suspension or interruption of limitation and prescription periods), it is of key importance to define the moment when mediation proceedings is considered as terminated. The law on mediation regulates termination of mediation but in a not enough precise way. The parties could have a different understanding as to when exactly mediation ends therefore the following new article is suggested to be inserted:

Model article

(termination of mediation)

“Mediation proceedings shall be terminated:

-by the conclusion of a mediated settlement, on the date of the settlement:

-by the expiry of a time limit for the appointment of a mediator, if the parties do not agree on the appointment of a mediator within 30 days from commencement of mediation, on the date of expiry:

-by a written declaration of a mediator, after consultation with the parties, to the effect that further efforts at mediation are no longer justified, on the date of the declaration:

-by a written declaration of the parties addressed to the mediator, to the effect that the proceedings are terminated, on the date of declaration:

-by a written declaration of a party to the other party or parties and the mediator, to the effect that the mediation proceedings are terminated, on the date of declaration. If in the proceedings several parties participate who are willing to proceed with the mediation among themselves, the mediation shall be terminated only for the party that has submitted a declaration.”

As regards the way, a mediator may conduct the process, which is prescribed in paragraph 1, it is suggested the following model article

Model article

(Conduct of mediation)

The parties may agree on the manner in which mediation is to be conducted. In doing so they may also rely on existing rules.

Failing an agreement on the manner in which mediation is to be conducted, the mediator shall conduct the proceedings she/he sees fit. In so doing he /she shall consider all the circumstances of the case, any wishes the parties may express and the need for a speedy and permanent settlement of the dispute.

In any case, in conducting the proceedings, the mediator must act independently and impartially and make every effort to treat the parties equally, taking into account all circumstances of the case.

Article 30. The mediation agreement

1. The mediation agreement may be concluded based on the mediation outcomes.
2. The mediation agreement shall be concluded in writing, signed by the parties, mediator, representatives and/or legal representatives of the parties (if any).
3. The mediation agreement shall include joint decision of the parties on the dispute resolution and / or obligation regarding the form and procedure for eliminating damage caused by the dispute.
4. The mediation agreement should not contain provisions that lead to a breach of legal or ethical standards.
5. The mediation agreement shall be subject to mandatory execution in terms specified under the agreement.
6. In the event of a default caused by a party, the other party shall be entitled to apply to the court as required by legislation.

Comment

It is unclear why the law excludes the possibility to enter an oral mediated settlement, for example, an oral apology in neighbor disputes is often enough for the parties to settle their dispute. That's why in Netherlands, Austria, Slovenia and Bulgaria parties are free to conclude a mediated settlement also in an unwritten form. On the other hand Hungary, Croatia, Portugal and Bosnia and Herzegovine put written mediated settlements on an equal footing with court's judgement, if signed by the parties and (registered) mediator because such settlements are binding and directly enforceable.

Nevertheless, obvious weakness of this article is that it limits the autonomy of the parties, who may wish, to check the legality of terms of agreement in a way to enter their agreement in a form of a notarial deed or consent arbitral award. It is important that mediated settlement could take a form of consent arbitral award, when during arbitration procedure parties agree to attempt mediation (mediation window), settle their dispute and ask arbitrators to issue consent arbitral award. This is in particular useful method in cross-border or international arbitration because parties in such a way ensure applicability of the New York Convention on recognition and enforcement of international arbitral awards.

The EU Mediation Directive in article 6 explicitly envisages the possibility to make content of mediated agreement enforceable by a court or other competent authority. In particular in court-related mediation schemes it is an established practice that judges approve the content of mediated agreement even when mediators were their peers.

On the other hand, any agreement that goes beyond court's power should be enforced through contractual law. There is no special legal remedy against mediated settlement. The form of that settlement in fact determines (limited) possibilities for appeal according to the general rules and principles of civil law. Although is enforceability of mediated settlement's an implied feature of every regulatory framework for mediation, it could be refused by courts if the content of such a settlement is contrary to domestic or private international law or if the obligation specified in the agreement is unenforceable by its nature.

Model article

(Enforcement of mediated settlement)

The parties may agree that the mediated settlement shall take a form of binding and enforceable:

- court settlement or**
- conciliation agreement or**
- consent arbitral award or**
- notarial deed or**
- written civil contract.**

Mediated settlement from the previous paragraph must comply with all requirements for the civil contracts and should not contain provisions that contradict the laws of Ukraine or domestic or international public order.

Chapter VI. PARTICULAR ASPECTS OF MEDIATION IN CERTAIN TYPES OF DISPUTES

Article 31. Mediation during litigation

1. The mediation may be conducted in the event of a conflict (dispute) before the initiation of a law-suit and during the court proceedings.
2. The mediation initiated by the court shall be conducted exclusively by the authorized mediator.
3. The mediation agreement concluded during the court proceeding may be approved by the court in accordance with the statutory procedure.

Comment

This article is of key importance because it regulates interactions between litigation and mediation.

One of the key weaknesses of the Law on mediation is that it is silent as regards effect of mediation on limitation and prescription periods. The protection of the parties' right to refer their disputes to the courts has a direct effect on the limitation and prescription periods. The EU Mediation Directive compels the member states to ensure that parties who choose mediation in an attempt to settle a dispute are not consequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process (article 8 of the Mediation Directive). The Mediation Directive makes no reference to the effect on that periods therefore this effect could be prescribed either in a way that time elapsed so far disappears and the period should start anew once mediation is terminated or it entails suspension, which would imply that a time already elapsed remains and it is from the instant from which the period should resume once the mediation fails.

The EU Mediation Directive in article 8 provides that states shall ensure that parties shall not be prevented from initiating judicial proceedings by the expiry of limitation and prescription periods during mediation process. Since the Directive does not harmonize national legal rules on limitation and prescription periods, EU member states have taken different policy approaches. In most jurisdictions the limitation period is considered as being interrupted, while regarding prescription period regulatory regimes differ.

In Netherlands the agreement to mediate delays court's process.

Prescription periods can't be interrupted or suspended in Slovenia but can't neither expire (extension up to 15 days is allowed by the law).

In Spain prescription and limitation period is suspended from the beginning of mediation until its end.

The parties may agree to suspend time limits in Austria.

In England and Wales amended Prescription Act applies also for court-related mediation.

The weakness of regulating the impact of mediation on limitation and prescription periods is that it requires necessary disclosure of start and end of mediation in order to stop running limitation period. Clear definition of when mediation commences and terminates is therefore needed. This might disregard flexible and informal nature of mediation. On the other side, private agreements to extend limitation periods could be allowed. Nevertheless, advantages of regulating this issue prevail. Namely, courts should always be available to the parties despite engagement in mediation. Attractiveness of mediation is ensured when interruption or suspension of limitation and prescription periods is prescribed. Last but not least, unless prescribed otherwise, courts might treat commencement of mediation as interrupting limitation period which means they start running from day one.

It is suggested to take the following approach in a new article, which provides both, stimulation of defendants to opt for mediation and protection of plaintiff's right to pursue the claim in parallel or subsequent litigation at court:

Model article

(effect of mediation on limitation and prescription periods)

»The limitation period for a claim subject to mediation shall cease to run during mediation.

If mediation proceedings are terminated without settlement, the limitation period shall continue to run from the moment the mediation proceedings are terminated without a settlement. The time that expired prior to the initiation of mediation shall be included in the limitation period, laid down by law.

If a deadline for bringing an action is set by a special regulation in respect of a claim subject to mediation, the deadline shall not expire earlier than 15 days after the termination of mediation.«

One of the challenging objectives of the EU Mediation Directive is to facilitate access to alternative dispute resolution by ensuring a balanced relationship between mediation and judicial proceedings (par 1 article 2). A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available. This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system (article 5).

The following strengths and weaknesses of proposed regulatory framework for court-related mediation could be stated:

As to the strengths of the regulatory framework for court –related mediation:

- **both, court-annexed and court –connected (outsourced) mediation models are allowed;**
- **courts have a power to invite litigants to consider mediation;**
- **litigants may, upon their consent, request mediation at any time of the judicial process**
- **the law provides a discretion of courts to order a stay of litigation procedure for certain period in order to allow parties, upon their consent, to refer their dispute to private mediation provider;**
- **duration of court-related mediation is indirectly defined through the rule that a judge may suspend litigation for certain period if the parties agree to refer their dispute to mediation;**
- **judges may refer cases to mediation upon consent of the parties in all disputes and in family disputes without it;**
- **family disputes are prima facie considered as eligible for mediation (**

There are several weaknesses concerning regulation of court-related mediation:

- **the law on mediation procedure is not fully compatible with internationally recognized standards, enshrined in the EU Mediation Directive or/and UNCITRAL Model law on international commercial conciliation (no provisions on effect of mediation on limitation and prescription periods);**
- **mandatory mediation, ordered upon judge’s discretion, is not allowed;**
- **courts are not required by law to design and implement mediation schemes;**
- **the law doesn’t envisage that courts with mediation program should adopt local rules of mediation program;**
- **the law does not ensure funding of court-annexed mediation schemes; ;**
- **mediation information session is not explicitly envisaged;**
- **duty of lawyers to meet and confer regarding mediation is not prescribed;**
- **duration of court-related mediation is too short during suspended litigation**
- **neither common criteria on accreditation of mediators in court-related schemes exist nor there is any provision, aimed at providing sustainability of training for court-approved mediators and judges on mediation referrals;**
- **there are no financial incentives for mediation demand for lawyers and disputants (e.g.reimbursement of filing fee) .**
- **smart sanctions for non-attendance at mediation session are not defined;**

Some (but not all) of described weaknesses could be avoided by a better mediation program design and stronger integration of mediation in case management, while others obviously need to be addressed by improved legislative rules.

As to the court-related mediation program design it seems that court-related mediation is to be practiced as court-connected model. In court-connected mediation scheme, the service is outsourced. Litigants are referred to private providers which must be members of association of mediators. The quality control over mediation service is weak and outside authority of judges. This in return causes lower level of trust of judges to mediation providers and lower referral rate since judges do not act as mediators in court-connected programs. Judge's referral to mediation is not recognized performance target in case of mediated settlement. In addition, litigants have to pay mediation service. The mediator's fee and other costs do not differ from market rate. If mediation is not terminated with settlement, it contributes to higher overall litigation costs. Besides that, mediation is not affordable to all. Indigenous litigants, who are not eligible for getting legal aid, could be left out from mediation doors.

Instead of court-connected mediation model court-annexed mediation could serve much better to the needs of litigants. Such a program should be authorized, administered and operated by the court. Court's premises are used for mediation sessions and litigants are provided with "a day in court". Court-annexed mediation program is partially or completely funded by the court, therefore mediation is either free of charge for litigants or they pay reduced mediator's fee. It enables court leaders with better integration of mediation into case management system and backlog reduction. Due to established monitoring and control of performance of mediators court-annexed mediation model ensures greater trust and confidence of judges, lawyers and litigants to provided services, in particular if judges-mediators serve as neutrals in court sponsored programs.

Mediation is not about being better than litigation but it is about being addition to litigation. Court-related mediation provides disputants with two different kinds of promises: promise of opportunity and promise of process integrity. International best practice lessons learnt regarding court-related mediation is that addition of ADR (and in particular mediation) to pretrial process, as early as feasible, is the most effective way of administration of justice because it reduces the time to disposition and transaction costs on one side and increases perception of fairness on the other. Invitation to litigants by a judge to consider mediation option occurs too late in the litigation process that is on a preparatory hearing. In fact, the whole judicial referral system rests on assumption that judges should have an interest to discuss with litigants the option of mediation. This assumption is unrealistic no matter how backlogged a particular court is. Mediation information session, performed by a judge is time consuming. In addition, judges

are more focused on settlement discussions, performed by themselves than on referrals to mediation. Career stimulations for judges in terms of number of cases, disposed of, concerning settlement reached during litigation, is greater than those, reached during mediation are. Despite long waiting times for scheduling the preparatory and/or first hearing in many courts probably exceeds several months, courts do not practice sending out notice to litigants about expected timing of the preparatory hearing and information on how this waiting time could be effectively used if mediation is to be attempted. Courts also do not practice automatic invitation to litigants to consider mediation immediately after case filing. Any court-related mediation program should be designed in a way that mediation is considered as presumed no matter that it is formally not mandatory.

Mediation brings the value to the parties even when it enables them knowing that a case cannot settle. That is why in many jurisdictions (e.g. UK, Slovenia, Norway, USA, Canada etc.) It is considered as appropriate for a judge to order the parties to participate in non-binding ADR process over a party's objection. Despite voluntary nature of mediation, regulatory framework does not prevent courts to introduce quasi-mandatory mediation with the right of litigants to opt-out. Such an approach could be introduced either automatically for certain categories of cases (e.g. small claims) or upon discretionary decision of a judge in individual cases. Nevertheless, courts would probably wish to have a clear mandate for adopting case management rules of the mediation program. Ideally, the law should envisage possibility that a judge may compel litigants to mediation, however, in such a case, courts must offer ADR services for free or very low costs. State should provide funding for court-related ADR programs as it does provide it for other judicial processes. Only in such a way the concept of multi-door courthouse, envisaged by prof. F. Sander in his address at the national Pound conference on the cases of popular dissatisfaction with administration of justice from the year 1976, could be implemented. Multi-door courthouse model is based upon the belief that courts should operate as centralized intake and conflict diagnostic centers, which provide litigants with an advice on most suitable dispute resolution proceedings, taking into account characteristics of a case and of the parties. An array of dispute resolution options should be available. Advisory (early neutral evaluation), facilitative (mediation, conciliation,) adjudicative (binding or non-binding arbitration) to the litigants who should make an informed choice of appropriate process, depending on assessment of costs, time, access, fairness, enforceability of outcome and duration of resolution. Litigants should be compelled to choose one item from a "dispute resolution menu" on which mediation represents almost "standard appetizer".

Key components of court-related mediation program advice are therefore the followings:

-effective mechanisms to enforce parties' and lawyer's duty to consider mediation;

- provided financial incentives for litigants and lawyers for voluntary referral;
- screening and consultation of the court with the parties and their lawyers;
- early soft mandatory referral (automatic in selected categories of cases or upon judge's discretion in individual cases);
- allowed opt-out to litigants from referral to mediation;
- ensured smart litigation cost sanctions for unreasonable opt-out from mediation

In order to ensure that court-related mediation and ADR in general become a movement and to prevent them keeping the status of uneven and fragile penetration in legal and political culture, it is of utmost importance that governments and legislators in Ukraine address sources of peril regarding further development of court-related ADR. They must provide courts with authority to design and implement ADR programs. They must provide funding for such programs without which they can not function. They must provide incentives to give real considerations concerning ADR by disputants and their lawyers in each civil case as well as smart sanctions for non-compliance and legal protection to parties and processes. Last but not least, regulatory framework, established by policy makers should ensure tight quality control mechanisms (see more on this in W.Brazil: Court ADR 25 years after Pound: Have we found a better way?; Berkely law scholarsip repository, 1-1-2002).

It is therefore suggested that authorities in Ukraine overcome the weaknesses of the regulatory framework for court-related mediation as described above in a way that they adopt an ADR Act in Judicial Matters and/or a separate chapter of civil procedural codes and insert the provisions, which are presented below in a Model ADR Act in Judicial Matters.

Model Alternative Dispute Resolution Act in Judicial Matters

I. General provisions

Article 1

(content and purpose of the act)

(1) This act shall regulate alternative dispute resolution procedures provided to the parties in the judicial matters (hereinafter referred to as: the parties) by the courts on the basis of this act.

(2) Procedures from the above-mentioned paragraph facilitate wider access of the parties to justice, provide an option to select the most appropriate dispute resolution procedure to the parties, enable fair, expedient and friendly settlements, provide time and cost savings to the

parties and courts, and increase the scope of voluntary and mandatory participation of the parties in court-related alternative dispute resolution programs.

Article 2

(scope)

(1) This act shall be applied in disputes arising from economic, employment, family and other civil relationships with regard to claims that are at the parties' disposal and that the parties can agree upon, unless otherwise stipulated by a special act for an individual dispute.

(2) This act may also meaningfully apply to administrative, tax and other similar disputes..

Article 3

(definition of alternative dispute resolution)

According to this act, an alternative dispute resolution shall be a procedure which differs from litigation and in which one or more neutral third parties intervene in the dispute resolution as described in article 2 of this act using the procedures of mediation, binding or non-binding arbitration, early neutral evaluation, hybrid or other similar procedures.

Ii. Alternative dispute resolution programs

Article 4

(court obligations and entitlements)

(1) Courts of first and second instance shall make the use of alternative dispute resolution procedures possible by adopting and implementing the alternative dispute resolution program.

(2) In the framework of the program mentioned in the above paragraph, the courts shall be obliged to provide the option of mediation to the parties and may also provide other forms of alternative dispute resolution.

Article 5

(program implementation form and manner)

(1) The court may adopt and implement the alternative dispute resolution program as an activity organized directly in court (court- annexed program) or on the basis of a contract with a suitable out of court public or private provider of alternative dispute resolution(court-connected program).

(2) Furthermore, on the basis of a mutual written agreement, courts can also implement the alternative dispute resolution program as follows:

- an individual first instance court may implement the program for one or more additional first instance courts in the area of the same judicial district,**
- an individual second instance court may implement the program for one or more first instance courts in the judicial district of the second instance court.**

Article 6

(program content)

In the alternative dispute resolution program, the court primarily defines which kinds of procedures it provides, and determines, in greater detail, the binding principles, rules and forms for these procedures. If the court implements the program in the manner provided in article 5, paragraph 2 of this act, it shall note this in the program.

Article 7

(mediators in the mediation program)

(1) Mediation procedures within the mediation program, as described in article 4 of this act, can be carried out by mediators (hereinafter referred to as: the mediator) who are listed in the register (hereinafter referred to as: the list) as mediators according to this act.

(2) In a court-annexed mediation program, the court that carries out the program also manages the list.

(3) In a court-connected mediation program, the alternative dispute resolution service provider who carries out the program on behalf of the court, and who is licensed by the alternative dispute resolution council to register mediators on the list, also manages the list.

(4) A mediator can mediate in court premises or in the premises of the alternative dispute resolution service provider who has put him or her on the list.

(5) A mediator could be also a judge who is not responsible for any judicial proceedings concerning the dispute in question.

Article 8

(addition and deletion from the list)

(1) Any person who meets the following criteria may be listed

- they have the capacity to enter a contract:**
- they have not been convicted, by final judgement, for a deliberate criminal offence for which they were prosecuted ex officio;**
- they have at least the first level of post-secondary education:**
- they have undergone mediation training according to the program determined by the minister of justice (hereinafter referred to as: the minister).**

(2) The minister may by a decree or regulations also put down additional criteria for addition to the list with regard to the type of disputes resolved by mediation.

(3) A mediator shall be deleted from the list:

- upon request by the mediator himself;**
- if the mediator fails to meet the criteria from items one, two or five of paragraph one of this article;**
- if the mediator breaches the law, the rules of the program (hereinafter referred to as: the rules), in the framework of which mediation is carried out, or if the mediator breaches the rules of mediation ethics;**
- if the mediator conducts the mediation procedures irregularly or unprofessionally;**
- if the mediator does not take part in compulsory forms of training, as determined by the minister; or**
- if the mediator fails to carry out a minimum number of mediation procedures in a particular period of time, as determined by the minister.**

(4) Any decision on a deletion from the list shall be reached by the court or alternative dispute resolution service provider that listed the mediator.

(5) In the decree or regulations, the minister shall also define the following:

- the conditions for issuing licenses to alternative dispute resolution service providers for listing mediators, and**
- the method of supervising the work of mediators.**

Article 9

(content and public accessibility of the list)

(1) The list shall include the following information:

- name of the mediator;**
- date and place of birth;**
- domicile or temporary residence;**
- contact data: telephone number and e-mail;**
- professional or academic title;**
- occupation;**
- employment data;**
- the kinds of disputes for which the mediator provides mediation services;**
- date of listing.**

(2) For the purposes of providing effective mediation procedures according to this act, the list shall be publicly accessible for the following data:

- name of the mediator;**
- professional or academic title;**
- the kinds of disputes for which the mediator provides mediation services;**
- date of listing.**

(3) Data from the previous paragraph is submitted to the ministry of justice (hereinafter referred to as: the ministry) by the court or alternative dispute resolution service provider. Alternatively, the data may also be published on their websites. The court or the alternative dispute resolution service provider shall also submit information on the deletion of a mediator from the list to the ministry.

Article10

(central mediator database)

(1) For the purpose of informing the public and providing effective mediation procedure services according to this act, the ministry shall keep a central database of listed mediators.

(2) The central mediator database shall be published on the ministry's website and shall include the following data:

- name of the mediator;**
- professional or academic title;**
- the kinds of disputes for which the mediator provides mediation services;**
- name and address of the court or alternative dispute resolution service provider where the mediator is listed, and**
- date of listing.**

(3) After receiving data on the deletion of a mediator from the list, the ministry shall delete the mediator from the central mediator database.

(4) In the decree or regulations, the minister shall lay down detailed rules on maintaining the list and the central mediator database.

Article 11

(program management)

(1) The court offering the alternative dispute resolution program shall nominate a public servant who will manage, regulate, monitor and evaluate the performance of the program (hereinafter referred to as: the program manager). In a court-annexed program, the program manager shall also organize education and training activities, monitor the work of neutral third persons and designate a neutral third person in individual cases.

(2) The court offering an alternative dispute resolution program shall nominate a judge, within the annual work schedule of judges, who shall co-operate with the program manager in monitoring and evaluating the performance of the program, as well as the education and training activities of neutral third persons.

Article 12

(program funding)

The funds for the programs that are offered by the courts on the basis of article 4 of this act shall be provided to the courts by the competent authority.

Article 13

(program support)

(1) The ministry shall provide assistance in setting up and implementing the programs, assume responsibility for informing the public of the programs offered by the courts in accordance with article 4 of this act, and, in co-operation with the alternative dispute resolution council, provide appropriate advice and information on suitable good practices in setting up and implementing the programs and providing quality assurance..

(2) The courts shall submit any program they adopt on the basis of article 4 of this act to the ministry and to the high judicial and prosecutorial council.

(3) The judicial training centre in cooperation with the associations of mediators provides education and training for neutral third persons who participate in programs in alternative dispute resolution procedures offered by the courts in accordance with article 4 of this act.

Article 14

(alternative dispute resolution council)

(1) The alternative dispute resolution council (hereinafter referred to as: the council) shall be established for the purpose of providing consultancy services in relation with setting up and implementing programs according to article 4 of this act and providing quality assurance and further development of alternative dispute resolution.

(2) The council shall be comprised of at least ten members (hereinafter referred to as: members). The minister shall nominate members among experts in the areas of alternative dispute resolution or civil procedural law for a span of four years. The council shall be chaired by a chairperson (hereinafter referred to as: the chairperson) who shall be designated by the minister.

(3) In a document regarding the establishment of the council, the minister shall define the composition, tasks, methods of work, means, and reimbursement of costs for the chairperson and other council members, as well as other administrative and technical aspects required for the council's work.

III. Common procedural clauses

NOTE! THIS PART COULD BE ALTERNATIVELY INSERTED IN THE LAW ON MEDIATION

Article 15

(referral to the alternative dispute resolution procedure by stipulation, motion or order)

(1) The court shall in each case no later than when serving the complaint to the defendant, provide and serve to all the parties in person the information of available alternative dispute resolution procedures and their comparative benefits, answers to frequently asked questions and various forms approved by the court.

(2) Small claims and other appropriate cases in which all the parties are represented by their lawyers and, which are determined by the court's alternative dispute resolution program, may automatically be assigned to the court's alternative dispute resolution program by the designated court office. Any party whose case has been assigned automatically to the alternative dispute resolution program may file with an assigned judge, within 8 days from the day the party received a notice on automatic assignment, a reasoned motion for relief from automatic referral. Judge's decision on that motion is not subject to appeal.

(3) On the basis of a stipulation by all the parties who agree that an attempt at alternative dispute resolution should be made, by a motion of one party or on the judge's initiative, the court can suspend the court proceedings for no longer than three months and refer the parties to the alternative dispute resolution procedure.

Article 16

(duty to consider the alternative dispute resolution process)

(1) In cases automatically assigned to the alternative dispute resolution program, the lawyers who represent their clients in dispute in question must confer to attempt to agree on alternative

dispute resolution process as soon as after case filing and no later than until deadline as set by the court.

(2)In cases automatically assigned to the alternative dispute resolution program, lawyers and their clients must sign, serve and file an alternative dispute resolution certification and shall provide a copy to the court, until the date specified by the court.

(3)Lawyer and client must certify that both have read the information booklet of the court on alternative dispute resolution program, discussed available dispute resolution options provided by the court and private providers, considered whether their case might benefit from any available alternative dispute resolution options and compared the costs of alternative dispute resolution processes with litigation costs.

Article 17

(stipulation to alternative dispute resolution process or notice for information telephone conference)

(1)In cases automatically assigned to the alternative dispute resolution program the lawyers must no later than on the date as specified by the court, file in addition to alternative dispute resolution certification, either a stipulation and proposed order selecting alternative dispute resolution process or a notice for a need for an alternative dispute resolution information phone conference on a form, established by the court.

(2)if any party has filed a need for an alternative dispute resolution phone conference, lawyers representing their clients are required to participate at joint phone conference at a time, designated by a court.

(3)All lawyers, representing their clients in particular case and internal or external dispute resolution expert, previously appointed or approved by the court, must participate at the alternative dispute resolution information phone conference.

Article 18

(informative alternative dispute resolution hearing)

(1) If the parties have not stipulated to a particular alternative dispute resolution process after alternative dispute resolution phone conference, the assigned judge shall discuss with the parties the selection of an alternative dispute resolution option at the preparatory hearing. If the parties do not agree to the alternative dispute resolution process and the judge deems it appropriate, she or he shall select one of the court alternative dispute resolution processes and issue an order referring the case to that process.

(2) The date and time of the informative hearing shall be determined by the court according to the rules of the civil procedural code.

(3) The invitation to the informative hearing shall be served to the parties in person.

(4) Minutes shall be kept in the informative hearing led by a judge or an law clerk.

(5) If, upon proper notice of invitation, the party fails to participate in the informative hearing and fails to produce justified personal reasons for absence or if there is a lack of generally accepted circumstances (e.g. earthquake, flood, etc.) that would justify the party's absence from the hearing, the absent party shall be obliged to reimburse the other party's expenses that arose from this hearing. In the notification for attending a hearing sent to the party, the court shall include information on the consequences of absence from a hearing. Unjustified absence of any party from a hearing does not prevent the assigned judge to issue an order of mandatory referral to selected alternative dispute resolution process.

Article19

(presence at hearings in alternative dispute resolution procedures)

(1) Natural persons as parties in a proceeding are obliged to participate in hearings and meetings in the framework of alternative dispute settlement procedures in person.

(2) Legal persons as parties in a proceeding shall make sure that a person authorized to enter into judicial or extra-judicial settlements is present or reachable during hearings and meetings.

(3) Notifications for hearings and meetings in the framework of alternative dispute resolution procedures according to this act shall be implemented in accordance with the rules of civil procedures.

(4) If a party who has been properly notified fails to attend the meeting or hearing in the alternative dispute resolution procedure and provides no justified personal reason for absence or if there is a lack of generally accepted circumstances (e.g. earthquake, flood, etc.) that would justify the party's absence from the meeting or hearing, the absent party shall reimburse costs arising from the meeting or hearing to the opposite party, and pay a three hour fee for the time used to prepare for the meeting or hearing to the one or more neutral third persons who prepared the meeting or hearing. The notification for attending a meeting or hearing sent to the party shall include information on the consequences of absence from a hearing.

(5) Persons authorized by the parties may be present in meetings and hearings in the framework of the alternative dispute resolution procedures.

Article 20

(fees for neutral third persons)

In the alternative dispute resolution procedure under the program from article 4 of this act, any neutral third person participating in the program shall be entitled to a fee and reimbursement of travel expenses in the amount set by the minister in the decree or regulations.

IV. Special procedural provisions in the mediation program

Article 21

(mandatory mediation referral)

(1) When it is suitable, given the circumstances of the case, and on the basis of consultation with the parties at the preparatory hearing or in other appropriate way, the court may, any time during pending litigation, decide to suspend the litigation for no longer than three months and refer the parties to mediation provided by the court in the framework of the program from article 4 of this act.

(2) The decision on mandatory referral to mediation shall be explained and shall contain a warning on the consequences of a clearly unreasonable rejection of the mediation referral from paragraph 5 of this article. The decision shall be served to the parties in person.

(3) In eight days from the date the party was served the decision, the party may submit an appeal against the decision on mandatory mediation referral.

(4) Should the party submit an appeal from the previous paragraph, the court that has issued the decision on mandatory referral shall repeal this decision. Once the decision on the annulment of mandatory mediation referral is made, no appeal can be made against that decision.

(5) Regardless of the litigation outcome, the court may, upon request by the other party, order the party that has submitted a clearly unreasonable objection to the mediation referral, to reimburse the other party for all or part of the necessary spent litigation expenses that arose from the clearly unreasonable objection.

(6) In deciding whether the objection to the mediation referral was clearly unreasonable, the circumstances of each case shall be taken into account, especially the following:

- nature of the dispute,**
- the merits of the case,**
- whether or not the parties strived to settle the dispute in a friendly manner through negotiations or other settlement methods,**
- whether the costs that would arise from mediation would be disproportionately high,**
- the possibility that a three-month suspension of the procedure due to mediation could affect the result of the trial,**
- whether mediation would have had reasonable prospects of a successful dispute settlement.**

Article22

(execution of the first mediation meeting)

If the court refers the parties to mediation in the framework of the court's program, the first mediation meeting shall take place no later than thirty days after the referral decision has been adopted.

Article23

(disputes with the state entity or state bih)

(1) In all judicial disputes where this act is applied and where the state is a party, its' legal representative shall give consent for dispute settlement through mediation when such a decision is appropriate, given the circumstances of the case.

(2) If the legal representative from previous paragraph deems dispute settlement through mediation to be unsuitable, he/she shall submit an explanation and a proposal to the authorized government and ask for a decision.

(3) If, in a large number of disputes of the same kind, the legal representative deems dispute settlement through mediation to be unsuitable, he/she can submit a single proposal to the government asking for a decision on the application of mediation for all disputes of that kind. Should there be a possibility that disputes to which the proposal by the legal representative proposal relates will arise in the future, he/she may propose that the government simultaneously reach a decision on settling all expected future disputes of the same kind through mediation.

Article 24

(reimbursement of fees and travel expenses for the mediator by the court)

(1) In mediation procedures that are carried out in accordance with the program from article 4 of this act with regard to disputes in relations between parents and children and labor disputes due to termination of an employment contract, the court shall reimburse the mediator's fee and travel expenses.

(2) In mediation procedures that are carried out in accordance with the program from article 4 of this act with regard to any other dispute not mentioned in the previous paragraph, except commercial disputes, the court shall reimburse the mediator's fee for the first three hours of mediation, and travel expenses arising from the first three hours of mediation.

(3) In mediation procedures that are carried out in accordance with the program from article 4 of this act with regard to commercial disputes, the parties shall bear the fee and travel expenses of the mediator. The costs shall be shared equally, unless otherwise decided by the parties.

V. Transitional and final provisions

Article 26

(adoption and implementation of court programs)

(1) First instance courts shall adopt and implement the program of alternative dispute settlement from article 4 of this act no later than by the date this act enters into force.

(2) Second instance courts shall adopt and implement the program of alternative dispute settlement from article 4 of this act by no later than one year after the date this act enters into force.

Article 27

(applicable court programs)

If a court already offers a program of alternative dispute resolution at the time this act enters into force, it shall analyze the program and consolidate it with the provisions of this act no later than by the date this act enters into force.

Article 28

(deadline for publishing the decree or regulation)

The minister shall publish the decree or regulation for implementing provisions of this act no later than three months after this act enters into force.

Article 29

(date of entry into force and date of application of the act)

This act shall enter into force on the fifteenth day following the day of its publication in the official journal and shall begin to apply six months after entry in force.

Article 32. Particular aspects of mediation in family disputes

- 1. The court of primary jurisdiction shall be obligated to initiate mediation in divorce cases, except where one of the spouses has committed a criminal offense against the other spouse or child.**

Comment

It is not clear whether the Law stipulates that courts must invite litigants to consider mediation or must refer family cases to mediation. In the latter case no opt out regime for litigants is envisaged by this law. It is uncertain whether such an approach could cause more negative than positive implications regarding acceptance of mediation by the parties as valuable dispute resolution option. Pilot court-annexed family mediation schemes should be launched first in order to test the outcome of mandatory referrals or quasi-mandatory referrals with a right of litigants to opt out before compelling litigants to mediation nationwide.

Article 33. Particular aspects of mediation in criminal proceedings

1. The mediation in criminal proceedings shall be conducted exclusively by the authorized mediator.

2. The investigator, prosecutor, judge or court shall provide the mediator with the required information sufficient for the mediation.

The mediator shall be warned about his/her duty not to disclose the information on pretrial investigation.

3. The mediation agreement in criminal proceedings shall be a conciliation agreement which particularities are determined by the Criminal Procedure Code of Ukraine.

4. The conclusion of the conciliation agreement between the complainant and the suspected offender or the defendant shall not be interpreted as confession of guilt of the suspected person charged with a crime or criminal offense.

5. The non-conclusion of the conciliation agreement between the complainant and the suspected offender or the defendant shall not entail legal consequences in the criminal proceeding.

Article 34. Particular aspects of mediation involving children

1. A child may become a mediation party provided that he/she has sufficient understanding of the mediation grounds, procedure, and consequences, and subject to mandatory participation by his/her legal representative.

Chapter VII. FINAL PROVISIONS

1. This Law shall come into force on January 1, 2016, except for:

1) Article 14 of the Law coming into force on the day of registration of the Mediators Council of Ukraine;

2) Paragraph 2 of Article 16, Article 18, Paragraph 2 of Article 31, Paragraph 1 of Article 33 under the Law, which come into force on the day of establishment of the National Registry of Authorized Mediators.

2. The following legislative acts of Ukraine shall be amended:

2.1. Article 221 of the Labor Code of Ukraine (Bulletin of the Verkhovna Rada of the Ukrainian SSR, 1971, Appendix to No.50, p. 375) following the Paragraph 3 shall be supplemented with three new paragraphs in the following edition:

«Parties to the labor dispute may institute mediation and select the mediator to assist in dispute settlement.

The commission on labor disputes or court by agreement between the parties may refer the labor dispute to mediation.

The mediation agreement between the labor dispute parties shall subject to mandatory performance».

2.2. In the Criminal Code of Ukraine (Bulletin of the Verkhovna Rada of Ukraine, 2001, No.25-26, p. 131):

1) Paragraph 1 of Article 46 following the words “or eliminated the damage caused” shall be supplemented with the following words “or if the individual has concluded a mediation agreement with the affected party and fulfilled its conditions”;

2) Paragraph 1 of Article 66 shall be supplemented with clause 10 in the following edition:
«10) concluding the mediation agreement with the affected party and fulfilling its conditions»;

3) in Paragraph 1 of Article 69-1 the words and numbers “clauses 1 and 2” shall be replaced with the words and numbers “clauses 1, 2 and 10”.

2.3. In the Civil Procedure Code of Ukraine (Bulletin of the Verkhovna Rada of Ukraine, 2004, No.40-41, 42 p. 492);

1) Paragraph 3 of Article 31 following the words “conciliation agreement” shall be supplemented with the words “or mediation agreement”;

2) Article 41 following the Paragraph 2 shall be supplemented with the new paragraphs in the following edition:

«3. The person who conducted mediation shall not be entitled to act as a representative of the mediation parties before the court”;

3) Paragraph 1 of Article 51 shall be supplemented with clause 5 in the following edition:

«5) mediators – about the information obtained by them in the course of the mediation»;

4) Paragraph 2 of Article 89 following the words “conciliation agreement” shall be supplemented with the words “or mediation agreement”;

5) Clause 2, Paragraph 2 of Article 122 following the words “or concluding the conciliation agreement” shall be supplemented with the words “or mediation agreement”;

6) In Article 130:

Paragraph 3 following the words “refer to arbitration” shall be supplemented with the words “or conduct mediation”;

Paragraph 4 shall be supplemented with the new paragraph in the following edition:

«4-1. If the parties wish to involve mediation, the court shall adjourn the proceeding in order to allow time for the parties to choose the mediator and conclude an agreement on conducting mediation. If the parties have concluded the agreement on conducting mediation, the court shall adopt a ruling to suspend the proceeding”;

7) shall be supplemented with Article 175-1 in the following edition:

«Article 175-1. Mediation Agreement

1. In order to settle the dispute, the parties shall be entitled to conclude the mediation agreement at any stage of the proceeding.

2. The mediation agreement shall be concluded by the parties based on the mediation results and shall apply to the rights and responsibilities of the parties, including the subject of the claim.

3. The parties shall inform the court on the conclusion of the mediation agreement by submitting a joint statement. If the mediation agreement or the notifications are enclosed into the written statement of the parties, the statement shall be attached to the case files.

4. In the event of conclusion of the mediation agreement by the parties, the court shall adopt the ruling to close the proceeding”;

8) Paragraph 1 of Article 201 shall be supplemented with clause 8 in the following edition:

«8) conclusion by the parties of an agreement on conducting mediation»;

9) Paragraph 1 of Article 205 shall be supplemented with clause 4-1 in the following edition:

«4-1) the parties have concluded the mediation agreement and it has been recognized by the court»;

10) Article 372 shall be edited in the following manner:

«Article 372. Conciliation agreement and mediation agreement in the process of enforcement

1. The conciliation agreement or mediation agreement concluded between the parties or waiver of enforcement stated by the plaintiff during execution of the court judgement shall be submitted in writing to the state enforcement officer who, not later than in three days, shall further refer it for recognition to the court located at the place of enforcement.

2. The court shall be entitled to verify the conciliation agreement or mediation agreement and not to recognize them, or not to accept the plaintiff's waiver of enforcement, if it is against the law or infringes the rights and freedoms of other persons.

3. Upon considering of the conciliation agreement or mediation agreement, or the plaintiff's waiver of enforcement, the court shall adopt a ruling pursuant to the provisions of the Code”.

2.4 In Commercial Procedure Code of Ukraine (Bulletin of the Verkhovna Rada of Ukraine, 1992, No. 6, 42 p. 57):

1) Article 28 following Paragraph 3 shall be supplemented with the new paragraph in the following edition:

«The individual who acted mediator in the proceeding shall not be entitled to act as a representative of the mediation parties be/fore the court”;

2) Paragraph 3 of Article 43-10 following the words “the conciliation agreement approved” shall be supplemented with the words “or mediation agreement”;

3) in Article 78:

Paragraph 1, following the words «conciliation agreement» shall be supplemented with the words «or mediation agreement»;

Paragraph 2, following the words «conciliation agreement» shall be supplemented with the words «or mediation agreement»;

Paragraph 3, the words «the conciliation agreement may» shall be replaced with the words «conciliation agreement or mediation agreement may»;

Paragraph 4, following the words «conciliation agreement» shall be supplemented with the words «or mediation agreement»;

4) Paragraph 2 of Article 79 shall be supplemented with clause 4 in the following edition:

«4) conclusion of agreement on conducting mediation between the parties»;

5) Clause 7, Paragraph 1 of Article 80, following the words “the parties concluded the conciliation agreement” shall be supplemented with the words “or the mediation agreement”;

6) Paragraph 1 of Article 106 shall be supplemented with clause 9-1 in the following edition:

«9-1) on approval of the mediation agreement»;

7) Paragraph 4 of Article 121 shall be edited in the following manner:

“The conciliation agreement or mediation agreement, concluded between the parties in the course of execution of the court judgement, shall be submitted for approval to the commercial court that adopted the respective decision. The commercial court shall adopt a ruling on approving the conciliation agreement or mediation agreement”.

2.5. In the Code of Administrative Procedure of Ukraine (Bulletin of the Verkhovna Rada of Ukraine, 2005, No.35-37 p. 446):

1) Paragraph 3 of Article 51 shall be edited in the following manner:

«3. The parties may reach reconciliation, inter alia, by concluding the mediation agreement at any stage of the administrative proceeding, which shall constitute grounds for closing the relevant administrative proceeding»;

2) Article 57 after Paragraph 2 shall be supplemented with the paragraph in the following edition:

«3. The person who conducted mediation shall not be entitled to act as a representative of the mediation parties before the court»;

3) Paragraph 2 of Article 65 shall be supplemented with clause 4-1 in the following edition:

«4-1) mediators – about the information obtained by them in the course of the mediation»;

4) Paragraph 1 of Article 113, following the words “on the basis of mutual concessions” shall be supplemented with the words “including through the conclusion of the mediation agreement”;

5) Article 262 shall be edited in the following manner:

«Article 262. Conciliation of parties in the process of enforcement

1. The conciliation agreement or mediation agreement concluded between the parties in the administrative proceeding shall be submitted in writing to the court which adopted the judgement in respect to the given case. The conciliation agreement or mediation agreement concluded between the parties of the enforcement proceeding, or statement by the plaintiff on waiving enforcement during execution of the court judgement, shall be submitted in writing to the state enforcement officer who, not later than in three days, shall further refer it to the court located at the place of enforcement. The conciliation agreement or mediation agreement shall refer solely to the rights, freedoms, interests and obligations of the parties and the subject of an administrative claim.

2. The court shall consider the conciliation agreement, mediation agreement or statement by the plaintiff on waiving enforcement within 10 days at the court session and notify the individuals participating in the case. Nonappearance of the individuals who were notified in a due manner shall not prevent the proceeding.

3. Based on the results of consideration of the conciliation agreement, mediation agreement, or statement by the plaintiff on waiving enforcement, the court may adopt the ruling on recognition of the conciliation agreement or mediation agreement between the case parties, the plaintiff and the debtor, or on accepting the plaintiff's waiver of enforcement and closing the enforcement proceedings.

4. The court shall not recognize the conciliation agreement or mediation agreement, or shall not accept the plaintiff's waiver of enforcement, if it is against the law or infringes the interests, rights and freedoms of other persons.

5. The court ruling based on the results of consideration of the conciliation agreement, mediation agreement, or statement by the plaintiff on waiving enforcement may be appealed against by following the standard procedure”.

2.6. In the Criminal Procedure Code of Ukraine (Bulletin of the Verkhovna Rada of Ukraine, 2013, No. 9-13 p. 88):

1) Paragraph 1 of Article 469 shall be edited in the following manner:

«Article 469. Initiating and concluding the agreement

1. The conciliation agreement may be concluded upon the initiative of the affected party, suspected offender or defendant person. The negotiations regarding the conciliation agreement may be conducted independently by the complainant and suspected offender or defendant person, defender and representative, or with the assistance of a mediator or other person approved by the parties of the criminal proceeding (except for the investigator, prosecutor or judge)”.

2) Paragraph 3 of Article 469 shall be edited in the following manner:

«3. The agreement on conciliation between the affected party and the suspected offender or the defendant may be concluded in the proceedings related to criminal offence and crime of any type”.

2.7. In the Law of Ukraine “On Enforcement Proceedings” (Bulletin of the Verkhovna Rada of Ukraine, 1999, No. 24, p. 207):

1) Paragraph 1 of Article 37 shall be supplemented with clause 19 in the following edition:

«18) conclusion of an agreement on conduction of mediation between the debtor and the plaintiff upon their joint written application”;

2) Paragraph 2 of Article 39, following paragraph 6 shall be supplemented with the new paragraph in the following edition:

«with clause 19 under Article 37 of the Law, - for the period of mediation»

3) Clause 2, Paragraph 1 of Article 49, following the words “conciliation agreement” all be supplemented with the words “or mediation agreement”.

3. The Cabinet of Ministers of Ukraine within three months following the day of publication of the Law shall:

bring their regulatory legal acts in line with the Law;

ensure review by the ministries and other central executive authorities of their regulatory legal acts contradicting the Law;

ensure inclusion of the profession “mediator” into the National Classifier of Ukraine under the category “Classifier of Professions”;

ensure inclusion of the economic activity “providing mediation services” into the National Classifier of Ukraine under the category “Classification of Types of Economic Activity”.

Chapter VIII. TRANSITIONAL PROVISIONS

1. The Constituent Congress of Ukrainian Mediators shall be conducted after the Law comes into force, yet not later than three months after the Law comes into force. With the view of arranging the conduct of the Constituent Congress of Ukrainian Mediators, the steering committee shall be established among the proactive mediators. Before conducting the Constituent Congress of Ukrainian Mediators, the steering committee shall hold its session dedicated to the conduct of the Constituent Congress of Ukrainian Mediators during which the chairperson of the steering committee and his/her deputy shall be nominated. The announcement of the venue, date and time for commencement of the Constituent Congress of Ukrainian Mediators, including issues submitted for discussion, shall be placed in the state official printed edition not later than twenty days before the Congress commencement. Any Ukrainian mediator who appeared on due date and in due time specified in the announcement and accredited him(her)self as the Congress participant, shall be entitled to participate in the activities of the Constituent Congress of Ukrainian Mediators. The Constituent Congress of Ukrainian Mediators shall be valid regardless of the number of registered participants and shall have capacity to adopt resolutions on all issues specified in Paragraph 7 of Article 21 of this Law. The resolutions by the Constituent Congress of Ukrainian Mediators shall be adopted by the majority of votes of the registered participants.

Chairman of the Verkhovna Rada of Ukraine

Chapter 6

ADR POLICY RECOMMENDATIONS

Taking into account findings from this Report, the following policy recommendations should be considered:

Ministry of Justice should consider to:

- Design an **ADR expert committee or council**, composed of domestic and, if feasible, international experts, which may, in due time, evolve into a permanent advisory body to the MoJ regarding ADR policy (ADR strategy and action plan, regulatory issues, monitoring the implementation of mediation schemes in public sector, including courts, ADR public awareness campaign, comparative policy research, best practices exchange etc.).

- Issue a **public ADR mission statement** of recognizing further development of ADR, in particular mediation, as a political priority (e.g. Where are we now? Where and how do we want to go? How we will achieve and measure the progress?).
- Provide a commitment that government is taking mediation seriously and practices what it preaches by issued **public mediation pledge** on behalf of the government to consider referral to mediation in every dispute where a State is a party to it (see Model Alternative Judicial Dispute Resolution Act).
- Invite key stakeholders from business sector (domestic and foreign companies, corporations, Chambers of Commerce, insurance companies, banks and other players) to sign and subscribe to a **Mediate First Pledge** by which they'd express their commitment to consider mediation in future or existing disputes (see ADR pledge at the web page of the MoJ of Slovenia and Department of Justice Report on the working group on mediation, 2010 Hong Kong).
- Develop an **ADR strategy and action plan, which shall include development of both, pre-filing and post-filing court-related mediation as well as out of court mediation**, aimed at defining goals (improved access to justice, decreased court backlogs, earlier and increased number of settlements, saved time and money of litigants, ensured higher compliance, provided most appropriate dispute resolution process for specific types of cases), performance areas (regulatory, self-regulatory, non-regulatory), target groups (judges, litigants, lawyers, businesses, general public, media, public sector bodies) measures/actions (including robust public awareness campaign), performance indicators, timing, SWOT analysis etc. (see National Mediation Strategy for Croatia 2006-2008; Europe Aid/123293/D/SER/HR).
- Revise and/or draft **amendments to court procedural codes** in order to regulate interactions and balanced relationship between litigation and mediation such as duty of litigants and lawyers to consider mediation after case filing, automatic assignment to mediation and assignment by stipulation of both parties, upon motion of one party or upon judge's initiative, duty of lawyers to meet and confer, ADR certification on discussed ADR options and compared assessment of litigation and mediation costs, notice of need for ADR telephone conference, mediation information session, motion for relief when parties are compelled to mediation, smart cost sanction for unreasonable refusal of mediation and other related case management issues (compare Civil Procedure Rules 2011 of England and Wales SI 2011/88; United States District Court Northern District of California ADR Local Rules, July 2, 2002; de Palo, Trevor: EU Mediation, Law and Practice, Appendix B, Oxford, 2012).

- Revise and/or draft amendments to existing draft **Law on mediation** or alternatively, draft a **new Mediation Act** in order to harmonize it with EU Directive on certain aspects of mediation in civil and commercial matters 2008/52/EC and guided by UNCITRAL Model Law on International Commercial Conciliation, 2002, having regard Recommendations of the Committee of Ministers of the Council of Europe to Member States on family mediation (1998), on mediation in civil matters (2002) and CEPEJ Guidelines (2007) on better use of abovementioned recommendations.
- Draft **Alternative Disputes Resolution Act in Judicial Matters** aimed at mandatory development of court-annexed, court-affiliated and/or court-connected mediation programs at all courts with jurisdiction in civil, commercial, labor and administrative matters, providing funding for mediation programs by court's budget, establishing sustainable training and accreditation system and registry of mediators in court-related programs and encouraging emergence of other types of court-related ADR (early neutral evaluation, binding and non-binding arbitration, hybrid processes) towards **multi-door courthouse model** (see above Model Alternative Dispute Resolution Act in Judicial Matters; see Summary of the US Alternative Dispute Resolution Act of 1998 in Guide to Judicial Management of Cases in ADR, Federal Judicial Center 2001)..
- Draft **Alternative Dispute Resolution Act in Consumer Disputes** and Initiate designing **pilot projects on consumer-related (high volume-low value) off and on-line alternative dispute resolution schemes**, having regard implementation of the European Union Regulation on ODR (Regulation (EU) 524/2013) and ADR Directive (Directive 2013/11/EU).
- Revise and/or draft provisions in **Legal Aid Act** which would provide access to both, out of court and court-related mediation for disputants with limited financial means. According to international recognized standards legal aid could be conditional and approved for litigation upon mandatory participation of the applicant for legal aid in mediation, if the other party provides its consent or if both are referred to mediation.

Courts in Ukraine should consider to:

- Designing **pilot court-annexed mediation program**, where feasible.
- Adopt the **rules of court-annexed mediation program** in which it could, inter alia, be described the court-oriented and user-oriented goals of mediation.
- Among user-oriented goals courts should **point out savings of time and money of litigants**, in particular, when dispute is referred to mediation early in the litigation process. In addition, higher compliance with mediated settlements when compared with judgments could be a defined goal.

- As regards court-oriented goals, in addition to wider access to justice and reduction of waiting time of litigants, it is suggested that **courts aim to encourage earlier settlements**. This is important because even among judges is often present a view that they could facilitate settlements anyway at the preparatory or settlement hearing. Taking into account that these hearings cannot be performed soon after case filing, earlier settlement as a goal could be used by court leaders as persuasive argument why courts should invite litigants, to consider mediation much earlier in the process as courts do now.
- It is also of utmost importance that courts adopt and promulgate Rules of court-annexed mediation program in order to define legal and administrative issues such as automatic invitation to consider mediation, early case assessment, time standards for court staff, parties and their lawyers, mediation certification regarding implemented duty of litigants and their lawyers to consider mediation, elements of referral order, opt-out requirements from mandatory referral, accreditation criteria for mediators, mediator assignment procedure, monitoring and evaluation, data collection and statistics, complaint procedure regarding mediator's performance etc. (see Program of alternative dispute resolution at the District Court of Ljubljana, Slovenia Su 46/2013 from 4.3.2013; see Court Dispute Resolution Program Design Guide; see Model Local ADR Rule of Judicial Council of the Ninth Circuit (1999); see National Standards for Court-Connected Programs in Judge's Deskbook on Court ADR, Harvard Law School (1993); see Guidelines for Ensuring Fair and Effective Court-Annexed ADR in Guide to Judicial Management of Cases in ADR, Federal Judicial Center 2001.

Most important issues from the perspective of timing and scope of referrals, to be dealt with by these Rules, are the following:

- In order to make mediation presumptive dispute resolution option for litigants, **courts should introduce automatic written invitation for litigants to consider mediation** in all civil cases.
- Written invitation to consider mediation, should be supplemented by **information brochure** (explaining how can mediation help in party's case), by the **checklist matrix of benefits, likely delivered by mediation, by frequently asked questions and provided answers, by self-test form for referral to mediation, consent form for selecting mediation** and should direct parties for additional queries to contact person at mediation administrative office at court.
- Courts should **deliver invitation to consider mediation at earliest convenience** (e.g. at case filing by a plaintiff and/or together with service of a complaint to a defendant) since early intervention of a court is crucial for promotion of time savings for litigants as mediation benefit.

- In invitation letter to consider mediation courts should inform the parties, that the case is registered with the court but because of heavy workload, **litigants can't expect scheduling of a preparatory hearing before certain period of months** (depending on average scheduling time) while this waiting time could be effectively used by referring dispute to mediation. Courts should underline that statutory deadline for completion of mediation prevents any delay of litigation if the case wouldn't settle.
- Rules of court-annexed mediation program should define, **what process may trigger mediation:** stipulation of both parties in all civil cases (voluntary referral to mediation), motion of one party followed by an order of a court or court order upon judges initiative (mandatory referral to mediation).
- Rules of court-annexed mediation program should promulgate the **period of the pilot regarding its duration to minimum 2 years.**
- Rules of court-annexed mediation program should, upon previously signed memorandum of understanding between courts and bar associations or upon legislative authorization, determine a **duty of lawyers and their clients to certify in writing, signed by lawyer and litigant** (on a mediation certification form filled at court), that they had read the mediation information brochure, discussed the option of mediation, provided by the court and considered, whether the case might benefit from mediation option.
- Rules of court-annexed mediation program should, upon previously signed memorandum of understanding between courts and bar associations or upon legislative authorization, determine a **duty of lawyers, representing plaintiff and defendant**, to discuss mediation option (either on a meeting or via telephone) This rule shouldn't apply for cases with unrepresented litigants;
- Rules of court-annexed mediation program should, upon previously signed memorandum of understanding between courts and bar associations or upon legislative authorization, determine a duty of lawyers, who haven't reached an agreement to mediation process during their meeting or telephone conference, to provide court with a **notice of need for mediation telephone conference** with liaison mediation judge or law clerk at court in order to explore obstacles for attempting mediation. Report on the fact that telephone conference with designated court officer took place, should be filed and signed by that officer. This rule shouldn't apply for cases with unrepresented litigants.
- Courts should consider introducing **mandatory mediation information sessions** as procedural events, integrated in preparatory sessions **in advance determined category of disputes**, in

which parties and their lawyers haven't reached an agreement neither in their direct interactions nor during telephone conference with mediation liaison officer.

- Courts should consider introducing soft **mandatory referrals to mediation in selected disputes upon discretionary decision of a judge**, either after screening of the eligibility of a case and of parties' ability to bargain and compromise at mediation information session or automatically after receiving the mediation telephone conference report and a motion of one party to issue an referral order (without scheduling mediation information session). Parties should retain their right to opt out from mediation upon good cause shown in their written motion, if lodged within 8 days from the day they received referral order.
- Courts should determine **projected number of referred cases to mediation per year for each referral track**, taking into account average monthly inflow of particular kind of cases.
- Courts should **adjust monitoring and evaluation system concerning the Pilot to new procedural events and separately for each referral track** (number of stipulations of both parties, number of motions of one party, number of orders upon judges initiative, number of mediation telephone conferences and information sessions, their impact on parties consents to mediate, duration and outcome of mediation sessions).
- Courts should, after setting up accreditation criteria and selection procedure for court approved mediators in the Rules of court-annexed mediation program, **invite trained and experienced mediators at the Associations of Mediators and institutional providers to apply for accreditation at courts** and therefore in short-term ensure capacity for dealing with considerably higher number of mediations.
- **Mediation liaison judge, serving at each court, should be appointed out of sitting judges** in order to increase court's advisory capacity.
- **Administrative staff at court mediation unit shall undergo training courses on mediation and referrals to mediation** in order to gradually take over the role of dispute resolution specialists and perform mediation telephone conferences with lawyers and litigants.
- Courts should **invite active and retired judges from all court instances to express their interest to attend initial mediation training course** and subsequently serve as mediators in a pilot programs.
- Courts should prepare **mediation awareness campaign** in order to communicate its' new policies with general public through press conferences, web site, mediation telephone hotline, mediation

milestone events, mediation week (see CEPEJ Guidelines for a better implementation of existing CoE recommendations concerning family and civil mediation).

- Courts should analyze and select old pending civil cases, representing court backlog (e.g. cases, older than 5 years) and announce **backlog reduction program through mediation**, aimed at providing savings of litigants' time, money, risk of protracted litigation, dignity, stress and relationship. Litigants in selected cases should be invited to consider mediation.

High Judicial Council should consider to:

- approve **collection and dissemination of judge's individual statistics** regarding number of referred cases to mediation, number of performed mediations (if a mediator is a judge or prosecutor), and number of mediated settlements. Monthly comparison among judges and prosecutors could serve as an incentive for increase in referrals.
- **Amend the Rules of Courts Performance** in order to authorize courts to adopt ADR programs by which they determine principles, rules and forms of court-related ADR processes, in particular mediation.
- **Allow and stimulate judges to attend mediation training courses and to perform function of mediator** in court-annexed mediation schemes taking into account Opinion No.6 of the Consultative Council of European Judges at CoE (CCJE).
- **recognize referrals to mediation after performed preparatory hearing as objective criteria for measuring performance** and inserting them into rules on performance evaluation of judges, referring to similar best practice approaches (e.g. in Netherlands and Slovenia) Different ponders could be used for referrals, resulting in mediated settlement and those, where mediation was completed without settlement. Nevertheless, the same ponder should be used for a settlement reached during trial and a settlement reached during mediation.
- upon consultation with courts and ministry of justice, **start planning yearly costs of court's mediation programs, including mediators' fees, and integrate them into regular judicial administration budget** to ensure program's sustainability.
- issue **public statement** aimed at promoting mediation, encouraging litigants and their lawyers to consider mediation as well as supporting judges at their efforts to refer cases to mediation and to mediate court disputes.
- together with the supreme court, **encourage courts in the country to consider designing court-annexed pilot mediation scheme.**

Bar Associations should consider to:

- support courts’ endeavors to engage litigants and their representatives into early discussions and exploration of mediation benefits by **signing memorandum of understanding with courts concerning mediation certificate and mediation telephone conference** and in such a way implement ethical principle of lawyers to advise their clients about ADR benefits.
- **publicly endorse court-annexed mediation programs.**
- **integrate mediation advocacy training into (mandatory) training of lawyers on ethical issues.**
- **establish mediation center at bar associations** and provide business opportunity to members of bar associations, who wish to practice as mediators as well as to the clients and their lawyers, who are willing to recourse to mediation prior to litigation. Mediation center at bar association could also serve as a platform for resolution of disputes between lawyers and their clients as it is a case in many jurisdictions in USA and Europe.
- explore opportunities for **financial incentives/rewards (increased fee, tax exemption)** for lawyers who represent client in mediation, taking into account best practice examples from Italy, Germany and Slovenia.

Chapter 7

ACTION PLAN FOR FURTHER POLITICAL AND OPERATIONAL SUPPORT TO THE DEVELOPMENT OF ADR IN UKRAINE

I. Recommendations on setting up two pilot court – annexed mediation programs at first instance courts			
Actions	Activities	Timeframe for implementation	Budget needed
Set up the	Formulation of project management functions and mechanisms	1 Month	

project	Local consultation and coordination		
	Mobilization of stakeholders & organization of the kick-off meeting		
	Definition of a precise work plan		
Assessment of current capacities	Review of capacities & organizational structure for mediation	1 Month	129.500 EUR
	Analyse the results of previous or similar projects		
	Draft and present the Inception Report		
	Launch the procedures for the implementation of the work plan		
Designing the program on court- annexed mediation	Ensured and improved operational requirements and sustainability of the court-annexed mediation program at two selected courts benchmarked against performance indicators (functions, organizational structure, physical structure, neutrals, stakeholders, monitoring, evaluation, data management, fees)	1 Month	
	Determination of standards for selection and accreditation of mediators, ethical standards for mediators and complaint mechanisms		
	Designing rules, principles and forms of the program		
Implementation of the program of court – annexed mediation at two selected	Implementation of court-annexed mediation program (referrals, case management and administration, reporting, data protection)	12 Months	

courts	Establishment of court's register of mediators		
	Assistance throughout the implementation of the program		
	On sight expert advice concerning management, administration, monitoring and evaluation of the program.		

II. Recommendation on public and private ADR capacity and quality building			
Actions	Activities	Timeframe for implementation	Budget needed
Drafted model ADR clauses and agreements	Drafted model ADR pre-dispute multi-tiered clauses and post-dispute ADR agreements, depending on the type of contract or dispute	1 Month	10.000 EUR
Analysis and improvement of institutional arbitrations	Analysis of the existing structure and operations of all institutional arbitrations and revision of rules of arbitrations	3 Months	40.000 EUR
	Organized 2 study visits to ADR centers in the EU Member States		
	Ensured and improved operational requirements and sustainability of arbitrations and benchmarked against performance indicators (functions, organizational structure, physical structure, neutrals, stakeholders, monitoring, evaluation, data management, fees)		
	Established cooperation and coordination between institutional arbitrations and courts (referrals, case management and administration, reporting, data protection)		

Established ADR centers/schemes for consumer claims	Ensured and improved operational requirements and sustainability of centers/schemes and benchmarked against performance indicators (functions, organizational structure, physical structure, neutrals, stakeholders, monitoring, evaluation, data management, fees)	12 Months	40.000 EUR
	Developed med-arb rules for consumer disputes resolution		
	Identified mechanisms for selection and accreditation of mediators and arbitrators (neutrals)		
Designed ODR scheme	Designed ODR scheme for domestic and cross-border consumer disputes	3 Months	25.000 EUR
Designed and performed train the trainers program	Revised existing mediation training curricula for the training of trainers	3 Months	90.000 EUR
	Conduct a Training Need Analysis		
	Design the training curricula for the training of trainers with specialized modules on commercial, family and civil cases		
	Developed and produced the training material for the training of trainers		
Performed training programs for lawyers and judges	Organized train the trainers programs	6 Months	
	Organized training programs (16 hours per 1 program) on mediation advocacy		
	Organized informative seminars (1 day per 1 seminar) for judges and prosecutors on referrals to ADR		

III. Recommendation

Public awareness campaign			
Actions	Activities	Timeframe	Budget needed
Developed communication strategy	Identified target groups and communication messages	2 Months	135.000 EUR
	Developed communication strategy		
	Action plan for implementation of communication strategy		
Key advertising approaches	Media campaign	2 Months	
	Printed information material		
	Visibility events		
Publish and disseminate a brief quarterly project newsletter	Define the format and channel for communication with target groups	12 Months	
	Prepare and disseminate information		
	Discuss mechanisms to ensure the long-term sustainability of the information flow		
Developed a national website on mediation	Developed structure of a national website on ADR	3 Months	
	Ensured the ownership and sustainable management of the website		

Aleš Zalar, former minister of justice of Slovenia