

Opinion Article

MEDIATION IN POST-WAR RESTORATION IN UKRAINE

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Summary: – 1. Introduction. – 2. The Status Quo. – 2.1 *The legal framework for promoting settlement in civil and commercial disputes.* – 2.2 *The community of mediators.* – 3. Changing Roles. – 3.1 *Courts actively providing information about mediation.* – 3.2 *Mediators cooperating closely with courts.* – 5. Concluding Remarks.

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ABSTRACT

Background: *This article addresses the challenges of developing mediation in Ukraine, the lack of effective coordination between courts and mediators, and issues of low awareness in Ukrainian society about mediation. It is argued that Ukrainian courts and mediation in Ukraine are going concurrent ways so that mediation is not integrated into or reinforcing the court-based litigation system. Meanwhile, the national mediation community must mature through the organization of high-quality interaction with the judicial system. Moreover, the war and post-war period will cause a new workload of civil and commercial disputes that are generally suitable for mediation, especially when the disputants residing in different regions after fleeing from war. This article is aimed at finding sustainable and fast solutions for raising*

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awareness of mediation in Ukrainian society and effective coordination between courts and mediators based on the progress already achieved.

Methodology: This article used doctrinal legal research to evaluate the options of cooperation between courts and mediation, empirical analysis to examine judicial system performance and the mediation community status quo, analyse options for closer cooperation of courts and mediators, and find sustainable solutions for promoting mediation.

Results and Conclusions: Courts and the mediation community must work together to break the general reliance on traditional litigation; courts should actively promote mediation through sustainable means, and the mediation community should improve the quality control of mediation services, develop a complaint-handling procedure, and further progress with online platforms for choosing a mediator.

1 INTRODUCTION

The resolution of civil and commercial disputes in Ukraine remains centred on courts, despite the gradual amendments to the legal framework that promote settlement and the presence of a mature national mediation community. Moreover, the war-related problems of the national judicial system have emphasised the long-lasting one – the undeveloped system of cooperation between courts and mediation.

The community of mediators in Ukraine, which has been on the rise since before the war, seems to have dispersed while fleeing from war, although efforts have been made to maintain the ties and abilities to provide mediation services. Even so, the eternal problems of mediation in Ukraine – especially the lack of demand due to low levels of awareness in Ukrainian society – have remained, constraining the potential of mediation in providing access to justice as a viable alternative or supplement to judicial dispute resolution.

Due to the above-mentioned circumstances, this paper proposes implementing a concerted action of the judicial system and community of mediators to better address the needs of Ukrainian citizens in settling civil and commercial disputes. The paper argues that the positive developments in mediation in Ukraine within the last five years, some of them caused by the Covid-19 pandemic, could be amplified to meet the challenges of the war and post-war periods.

2 THE STATUS QUO

2.1 The legal framework for promoting settlement in civil and commercial disputes

Settlement is undoubtedly the primary way in which civil disputes are concluded worldwide, even if its frequency varies widely from jurisdiction to jurisdiction.¹ Ukrainian legislation expressly provides for certain alternative dispute resolution methods in civil and commercial disputes in the Civil Procedural Code of Ukraine (CPC), Commercial Procedural Code of Ukraine, Laws of Ukraine 'On Mediation',² 'On Arbitration Courts',³ 'On Enforcement Proceeding',⁴ etc.

1 T Allen, *Mediation law and civil practice* (Bloomsbury Professional 2019) 1.

2 Law of Ukraine 'On Mediation' No 18675-IX of 16 November 2021, *Vidomosti of the Verkhovna Rada* 7/51 <<https://zakon.rada.gov.ua/laws/show/1875-20#Text>> accessed 22 August 2022.

3 Law of Ukraine 'On Arbitration Courts' No 1701-IV of 11 May 2004, *Vidomosti of the Verkhovna Rada* 35/412 <<https://zakon.rada.gov.ua/laws/show/1701-15#Text>> accessed 22 August 2022.

4 Law of Ukraine 'On Enforcement Proceeding' No 1404-VIII of 1 June 2016., *Vidomosti of the Verkhovna Rada* 30/542 <<https://zakon.rada.gov.ua/laws/show/1404-19#Text>> accessed 22 August 2022.

However, the principle of legal centralism and inextricable linkage of the administration of justice and courts have remained the dominant approaches for understanding the concept of justice in Ukraine.⁵ The post-Soviet rules on mandatory pre-trial attempts for commercial disputes⁶ were abandoned due to the Judgement of Constitutional Court of Ukraine No. 15-пн/2002 dated 9 July 2002, because ‘prescribing by a law a mandatory pre-trial settlement procedure limits exercising the right to judicial protection.’⁷ The main paradigm shift took place in 2016 with the amendments to Art. 124 of the Constitution of Ukraine, when the judicial jurisdiction was complemented with the possibility of mandatory pre-trial settlement procedures.⁸

Regarding civil and commercial disputes, the CPC and the Commercial Procedural Code include a number of provisions incentivising settlement:

- 1) during the consideration of the case on the merits, the court facilitates the reconciliation of the parties⁹
- 2) the parties may reconcile, in particular by means of mediation, at any stage of proceedings; the result of the reconciliation may be formalised by a settlement agreement¹⁰
- 3) some incentives for reconciliation exist in the form of the possibility of returning 50% of the court fee and 60% of the court fee if the settlement has been reached by mediation¹¹
- 4) the court announces a break in the preparatory session if the parties have agreed to settle the dispute out of court through mediation¹²
- 5) the court must suspend the proceedings in the case if both parties have filed the relevant request to engage in a mediation procedure¹³
- 6) the clause on the apportionment of court costs provides that the court considers the actions of the party regarding the pre-trial settlement of the dispute and the peaceful settlement of the dispute during the case proceedings, the stage of the case proceedings at which such actions were taken.¹⁴

However, this clause is rarely used due to the absence of algorithms and practice.

In 2017, the mechanism of settling disputes with the participation of a judge was introduced in the procedural codes, though in the last five years, it has not managed to

5 V Komarov, T Tsuvina, ‘International standard of access to justice and subject of civil procedural law’ (2021) 28(3) *Journal of the National Academy of Legal Sciences of Ukraine* 197-208.

6 T Kyselova, ‘Pretenzia Dispute Resolution in Ukraine: Formal and Informal Transformation’ (2015) 40(1) *Review of Central and East European Law* 57-95 doi:10.1163/15730352-40012000. See also Yu Prytyka, I Izarova, S Kravtsov, ‘Towards Effective Dispute Resolution: A Long Way of Mediation Development in Ukraine’ (2020) 29(1) *ALS* 389-399; I Izarova, Yu Prytyka, T Tsuvina, B Karnaukh, ‘Case Management in Ukrainian Civil Justice: First Steps Ahead’ (2022) 1 *Cuestiones Políticas* 927-938 doi:10.46398/cuestpol.4072.56.

7 Case No 15-пн/2002 [2002] The Constitutional Court of Ukraine <<https://zakon.rada.gov.ua/laws/show/v015p710-02?lang=en#Text>> accessed 22 August 2022.

8 Constitution of Ukraine of 28 June 1996 <<https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text>> accessed 22 August 2022.

9 Art 211(5) of CPC, Art 196(7) of the Commercial Procedural Code of Ukraine.

10 Art 49 of CPC, Art 46 of the Commercial Procedural Code of Ukraine.

11 Art 142(1,2) of CPC, Art 142(1,2) of the Commercial Procedural Code of Ukraine. There are no official statistics on amounts of repaid court fees.

12 Art 198 of CPC, Art 183 of the Commercial Procedural Code of Ukraine.

13 Art 251 of CPC, Art 227 of the Commercial Procedural Code of Ukraine.

14 Art 141 of CPC, Art 129 of the Commercial Procedural Code of Ukraine.

positively influence the administration of justice due to infrequent usage. The reasons for this lie in deficiencies of procedural frameworks and the cautious attitudes of judges towards new mechanisms,¹⁵ though minor amendments to the procedural codes may enhance the popularity of settling disputes with the participation of a judge.¹⁶ For example, in 2021, there were 66 attempts to trigger the mechanism in civil proceedings (0.01% of opened proceedings and only 12 out of 66 were successful) and 30 attempts in commercial proceedings (0.04% of opened proceedings, though 15 out of 30 were successful).¹⁷

According to the opinion of commercial and civil jurisdiction judges, the low popularity of the mechanism is caused by several factors – the imperfection of legal regulation (the procedure can be used to change the judge); the lack of necessary training for the majority of judges; low awareness of the parties to the dispute and their representatives regarding the essence of the procedure, as well as the low inclination of the population and business entities towards reconciliation, low bargaining power and, in general, a lack of a culture of resolve disputes and conflicts through reconciliation and reaching agreements.¹⁸

Obviously, Ukraine has not succeeded in effectively fitting alternative (out-of-court) and pre-trial settlement of disputes into the organisation of the functioning of the judiciary and the administration of justice. The National Strategy for the Development of the Justice System and Constitutional Judiciary for 2021-2023¹⁹ acknowledges that, recognising the introduction and development of the institution of mediation as a component of enhancing access to justice. The draft document 'Ukraine Recovery Plan'²⁰ also contains a provision on 'encouraging the use of out-of-court methods of dispute settlement, for certain categories of cases, establishing a mandatory pre-trial dispute settlement procedure using mediation and other practices'. Such a purposive approach is one more confirmation that the Ukrainian system of justice has a new, 'settlement-driven and mediation-centered paradigm'.

So, it may be concluded that within two last decades, Ukraine has travelled the path from the point where 'mandatory pre-trial settlement procedure creates obstacles in access to justice' to the point where the 'absence of effective mechanisms of alternative (out-of-court) dispute resolution and pre-trial settlement procedures are among the downsides of the system of justice' and 'mandatory pre-trial mediation is needed for certain categories of disputes'.

International experiences prove that within a certain jurisdiction, the sustainable development of mediation as an alternative way of resolving disputes rests on the 'three

15 'Settlement of disputes with the participation of a judge: "What?" and "How?"' (Legal Newspaper Online 2020) <<https://yur-gazeta.com/publications/practice/sudova-praktika/vregulyuvannya-sporiv-za-uchastyu-suddi-shcho-i-yak.html>> accessed 22 August 2022.

16 L. Romanadze 'Dispute resolution with the participation of a judge and other procedural novelties: impact on the development of mediation' <<http://mediation.ua/wp-content/uploads/2017/05/Stattya-pro-Mediatsiyu-v-proektah-protseksiv-2.pdf>> accessed 22 August 2022.

17 2021 Data Reporting (State Court Administration 2022) <https://court.gov.ua/inshe/sudova_statystyka/zvitnist_21> accessed 22 August 2022.

18 Draft Report 'Mediation in civil and Commercial Cases' (EU-funded Project 'Pravo-Justice' 2021) <<https://www.pravojustice.eu/storage/app/uploads/public/615/5ac/7a6/6155ac7a6e5a3765926585.pdf>> accessed 22 August 2022.

19 Decree of the President of Ukraine No 231/2021 'On Strategy for the Development of the Justice System and Constitutional Judiciary for 2021-2023' <<https://www.president.gov.ua/documents/2312021-39137>> accessed 22 August 2022.

20 Ukraine Recovery Plan (Cabinet of Ministers of Ukraine 2022) <<https://www.kmu.gov.ua/storage/app/sites/1/recoveryrada/eng/justice-eng.pdf>> accessed 22 August 2022.

pillars': (1) infrastructure, (2) the availability of mediation services for all segments of the population, and (3) a significant degree of public awareness of the possibilities of dispute resolution in the order of mediation.²¹

These components are available in Ukraine, but, at the same time, they are at the initial stages of their development, and it is the low awareness of the population about mediation that limits the development of the infrastructure of mediation services due to the lack of stable demand. In turn, ensuring the availability of mediation services for all segments of the population is possible only under the conditions of a developed mediation infrastructure, as well as effective legislative regulation.

Moreover, one might expect that the workload of inheritance and family cases would drastically increase among Ukrainians as inevitable consequences of human losses and migration. These kinds of disputes – among heirs, divorcing spouses over their children and property, disputes regarding children taken abroad under a simplified procedure in order to ensure their safety, disputes over debts, labour disputes, business relocation and corporate issues disputes – are most suitable for mediation, and this underlines the necessity of establishing the cooperation of courts and mediators in order to direct the flows of disputing parties to a venue where they may find a viable option for effective dispute resolution.

This leads to the presumption that the community of mediators in Ukraine being on the rise could reduce the court's workload on the condition of effective and systematic communication between the court system and mediators, especially via the active engagement of courts in raising awareness of the society about the opportunities that mediation provides.

The courts and their websites remain the centre of gravity for parties to a dispute – that is why there is a need to consider the risks and opportunities of the enhanced role of courts promoting mediation, based on the legislation favouring settlement and using the available means.

2.2 The community of mediators

The question is whether the status quo of the Ukrainian community of mediators is capable of mediating a large number of disputes, meeting quality and ethical standards, and using videoconferencing. Just before the Russian invasion, the Ukrainian community of mediators was on the rise:

- 1) There have been nearly 30 years of development, resulting in structured and developed mediation centres and mediation training centres all over Ukraine. In 2018, N. Mazaraki emphasised that mediation in Ukraine already constituted a social and legal institute²² with its own organisational structure and ethical rules and that there was a continuous increase in the number of mediators and mediation spheres. A consistent community of mediators has made an effective contribution to national law-making processes and developing its own self-regulation.

21 See European Commission for the Efficiency of Justice (CEPEJ) Mediation Development Toolkit CEPEJ(2018)7REV <<https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52>> accessed 22 August 2022; V Nekošius, V Vėbraitė, I Izarova, Y Prytyka, 'Legal, Social and Cultural Prerequisites for the Development of ADR Forms in Lithuania and Ukraine' (2020) 116 *Teisė* 8-23.

22 N Mazaraki, 'Mediation in Ukraine as a Social and Legal Institute' (2018) 3 *Law Review of Kyiv University of Law* 169. See also the Mediation Gap Analysis Report (EU-funded Project 'Pravo-Justice' 2021) <<https://www.pravojustice.eu/storage/app/uploads/public/5f7/435/116/5f743511604ec221015187.pdf>> accessed 22 August 2022.

- 2) There is also the long-awaited Law of Ukraine 'On Mediation',²³ which was adopted in November 2021. The concept and text of the law have been praised by the Ukrainian community of mediators and international experts for providing the minimum regulations and needed flexibility and by academics for adherence to international mediation standards and its well-balanced approach towards meeting the interests of all stakeholders.²⁴ The absence of a legal framework for mediation in Ukraine used to be considered the key obstacle to the development of mediation and to building trust in this dispute resolution method in Ukrainian society.
- 3) Lastly, there is the Code of Professional Ethics of the Mediator,²⁵ created by the Ukrainian community of mediators and representing different mediators' organisations. The document had been thoroughly discussed and developed with the aim of setting reference points for ethics and quality standards for mediators and mediation parties.

The general principles of training for basic mediator skills²⁶ were developed by the community of mediators (representing the greater part of mediation training centres) to set high standards for mediator training. The Ukrainian mediation centres engaged in training family mediators developed the principles of training basic family mediator skills²⁷ based on national and international experiences in family mediation.

The list of Ukrainian mediators' achievements included here is certainly not the full one, though the points allow us to show that mediation in Ukraine does exist, advances its self-regulation with concerted actions, and is capable of taking some of the workload of the judicial system. It is also worth mentioning that the Russian invasion has hampered a number of important initiatives for the further development of mediation in Ukraine: a) the implementation of the Law of Ukraine 'On mediation' (approving the state standard for the provision of social service of mediation, amending the Tax Code of Ukraine to enable the taxation of mediators as self-employed persons, the inclusion of the mediator's profession in the National Classification of Professions to set up a qualification framework for the mediator's profession etc., and amendments to the Criminal Procedural Code concerning the impossibility of interrogating mediators); b) the further development of the mediation community (for example, establishing the body for processing questions of professional ethics, etc.); c) the ratification of United Nations Convention on International Settlement Agreements Resulting from Mediation, signed by Ukraine in August 2019.

It should be mentioned that the Ukrainian community of mediators has experience cooperating with courts to enhance access to mediation through numerous pilot projects (predominantly financed by foreign donor organisations), judges and judicial staff training, etc.²⁸ Likewise, Ukrainian mediators have had extensive experience cooperating with

23 Law of Ukraine 'On Mediation' (n 3).

24 T Tsvina, T Vakhonieva, 'Law of Ukraine "On Mediation": Main Achievements and Further Steps of Developing Mediation in Ukraine' 2022 1(13) Access to Justice in Eastern Europe 142-153 doi:10.33327/AJEE-18-5.1-n000104.

25 The Code of Professional Ethics of Mediator (non-governmental organization 'National Association of Mediators of Ukraine', 19 February 2022) <<http://namu.com.ua/ua/info/mediators/nseyenf-yekhyny-pyeekakhsua/>> accessed 22 August 2022.

26 The general principles of training basic mediator skills (non-governmental organization 'National Association of Mediators of Ukraine', 2 September 2019) <<http://namu.com.ua/ua/info/mediators/sfrsvrk-iafaey-ravarrya-baisvyp-ravnap-pyeekakhsua/>> accessed 22 August 2022.

27 The principles of training basic family mediator skills (non-governmental organization the Association of Family Mediators, 3 June 2020) <<http://afmu.org.ua/for-mediators/zasady-navchannya-osnovam-simeynoyi-mediatcii/>> accessed 22 August 2022.

28 Mediation Gap Analysis Report (n 23).

centres for free legal aid and state social services providing mediation for socioeconomically challenged parties.

In substantiating the capability of national mediators to reduce the workload of civil and commercial disputes, we should also mention that mediation is not as extensively connected with certain premises as courts are. Moreover, Ukrainian mediators have had a good experience mediating online and training online. The Covid-19 pandemic has forced mediators to use videoconferencing and thus to elaborate certain quality standards that led to the adoption of recommendations for mediators regarding the preparation and conduct of online mediation.²⁹

After the Russian invasion, the Ukrainian community of mediators has been dispersed, fleeing from the war along with millions of other Ukrainians. Both the mediators and their prospective clients left their permanent places of life and work, losing jobs and opportunities to solve disputes.

A dedicated platform seemed a viable solution, and the website www.mediation-help.com³⁰ was developed and launched to provide information and support to Ukrainians, who, while being abroad, fall into various conflict situations, as well as to support Ukrainian mediators, whose experience and skills may be useful in the settlement of conflicts and disputes, and to promote greater interaction between mediators and expand the network of mediators.

It may be concluded that the Ukrainian community of mediators has all the preconditions and capacity to effectively collaborate with courts, providing online and offline mediation services, taking some of the courts' workload, and helping Ukrainians resolve their disputes and maintain relationships.

3 CHANGING ROLES

3.1 Courts actively providing information about mediation

As discussed above, courts and mediation in Ukraine are going concurrent ways, so mediation is not integrated and does not reinforce the court-based litigation system as much as it does in matured jurisdictions (USA, EU member countries, UK, Canada, etc.).³¹

Over the past 50 years, there has been significant growth in and use of alternative forms of dispute resolution throughout Europe, resulting in a patchwork quilt of ADR provision,³² with mediation usually taking the central place. The USA's experience provides extensive frameworks for the integration of mediation and courts.³³ Moreover, the increased use of mediation and other alternative dispute resolution methods in civil and commercial disputes over the last decades has predefined a progressive change in the role of the courts.

29 The Recommendations for mediators regarding the preparation and conduct of online mediation (the non-governmental organization 'National Association of Mediators of Ukraine', 10 November 2021) <<http://namu.com.ua/ua/info/mediators/uyenspyereashchkl-ses-sroamr-pyeeekashchkl/>> accessed 22 August 2022.

30 This website was created and maintained with the financial support of the European Union within the Project 'CONSENT' implemented by the PU 'Ukrainian Academy of Mediation'.

31 Allen T (n 1) 71-94; H Brown et al, ADR Principles and Practice (Sweet & Maxwell 2018) 67-91.

32 The Relationship between Formal and Informal Justice: the Courts and Alternative Dispute Resolution Report of the European Law Institute and of the European Network of Councils for the Judiciary (2018) <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ADR_Statement.pdf> accessed 22 August 2022.

33 H Brown et al (n 32) 72-72.

In order to rationalise the scheme of integration for courts and mediation in war and post-war periods, there is a need to formulate this patchwork into a system and analyse practices through the prism of efficacy and sustainability.

The most comprehensive model is a multi-door courthouse model, wherein a courthouse, as a dispute resolution centre, offers multiple options, enabling the quick resolution of legal disputes.³⁴ This model is obviously not widespread, though it should be described here, as its introduction by Franck Sander³⁵ in the 1970s predetermined a shift in cooperation between courts and ADR not only in the USA but throughout different jurisdictions. Within the multi-door courthouse model, this or that dispute would be directed to the 'doors' of trial, arbitration, mediation, negotiation, or other dispute resolution methods, considering such rational criteria as the nature of the dispute, the relationship between the parties to the dispute, the value of the dispute, and the expectations of the parties regarding the cost and speed of dispute resolution. It should be noted that Frank Sander's idea has mostly been implemented in a narrower format of court-attached mediation programs offering mediation and case evaluation due to political, practical, and economic reasons, the last of these determined by the budget funds allocated for such programs.³⁶ Under circumstances of deficiency of resources in the Ukrainian system of justice, a multi-door courthouse is virtually impossible, so the main focus should be placed on mediation for the reasons presented above.

The design of developments in cooperation between the court and mediation throughout the jurisdictions differs to some extent, and this has led to a variety of terms, e.g., court-related, court-annexed, court-attached, or court-connected mediation. The term used is of minor importance – we would rather focus on the criteria that are important for rationalising the solution for Ukraine.

3.1.1. Who conducts mediation (a judge, a court official, an independent (private) mediator or a mediator working under a court-connected mediation program)?

Judges act as mediators in Germany, Australia, Finland, and a number of other countries.³⁷ Judicial mediation raises arguments both in favour (broader options for parties to settle without paying fees to a private mediator, stable respect for judges and their profession, inherent impartiality and confidentiality) and against such a mechanism (mediation is not a proper exercise of the judicial function, judges have different skills set and entirely different way of exercising personal authority).³⁸ The Ukrainian procedural framework provides for the settlement of disputes by a judge (addressed above), so the introduction of judicial mediation is not needed, and the judges who have had mediation training may exercise their skills and promote settlement within the existing procedure.

Some court officials in Ukraine have been trained in mediation, though obviously, for the reasons presented in part 2.1, additional functions of court officials could not be introduced as well.

34 M Malacka, 'Multi-Door Courthouse Established through the European Mediation Directive?' (2016) 16(1) ICLR 127-142, 135.

35 FEA Sander, 'Varieties of Dispute Processing', in AL Levin, RR Wheeler (eds), *The Pound Conference: Perspectives on Justice in the Future* (1979) 75-76.

36 TJ Stipanowich, 'The Multi-Door Contract and Other Possibilities' (1998) 13(2) *Ohio State Journal of Dispute Resolution* 303-304; G Kessler, LJ Finkelstein, 'The Evolution of a Multi-Door Courthouse' (1988) 37 *Catholic University Law Review* 582-584.

37 Allen T (n 2) 26.

38 H Brown et al (n 32) 73.

Mediators working in a court-connected mediation program are usually included in a register (a roster) of mediators established by the court based on certain requirements for training and qualification. There are different approaches to maintaining court-connected mediation programs, and the USA's experience is extensive and worth analysing here. The USA's national standards for court-connected mediation programs provide for the next levels of court responsibility for mediators:

The degree of a court's responsibility for mediators or mediation programs depends on whether a mediator or program is employed or operated by the court, receives referrals from the court, or is chosen by the parties themselves:

- a. The court is fully responsible for the mediators it employs and the programs it operates.
- b. The court has the same responsibility for monitoring the quality of mediators and/or mediation programs outside the court to which it refers cases as it has for its own programs.
- c. The court has no responsibility for the quality or operation of outside programs chosen by the parties without guidance from the court.³⁹

Bearing the responsibility for the quality of mediators and monitoring and evaluating the court-attached mediation program's performance is the fee a court pays for the advantages the program provides for the court (saving costs and court time) and for society (empowering people to settle their disputes maintaining control on the process and the outcome). Moreover, a court-connected mediation program fully operated by the court requires relevant resources, and currently, the Ukrainian system of justice obviously lacks additional funds.

The involvement of private mediators broadens the opportunities for parties to find a mediator, but raises questions of quality assurance of mediation services, support for socioeconomically challenged parties, maintaining mediator's ethics, etc. When parties can choose mediators whom they believe are best suited to handle their cases, particularly complex cases, they are likely to be more satisfied with the process. For voluntary mediation, quality assurance rests predominantly with the community of mediators. As mentioned above, the Ukrainian community of mediators is actively working to meet this challenge. In current Ukrainian conditions, a viable solution seems to be a roster of mediators formed by the mediators themselves, although this approach bears certain risks as regards quality assurance.

3.1.2. Who makes the decision to refer a dispute to mediation (a judge, a court official, parties to a dispute)?

The essence of this question lies in the differences between voluntary and mandatory mediation. However, only voluntary mediation will be discussed further for Ukraine because the aim of the paper is to rationalise the cooperation between courts and mediation in war and post-war periods, and mandatory mediation has not yet been prescribed by Ukrainian law.

When a judge or a court official recommends mediation or parties to a dispute make a decision to engage in mediation, they should consider the criteria for suitability of disputes for mediation. The clear and reasonable criteria for choosing the appropriate dispute resolution

³⁹ M Shaw, L R Singer, E A Povich, 'National Standards for Court-Connected Mediation Programs' (1993) 31 Family & Conciliation Courts Review 164 <<https://doi.org/10.1111/j.174-1617.1993.tb00293.x>> accessed 22 August 2022.

method should be made available to parties so they can make a proper decision and not waste time and aggravate the dispute by using an inappropriate procedure. The development of clear and well-founded criteria for the mediability of a dispute is the key to the effective establishment of mediation as an alternative method of dispute resolution and the formation of public trust in mediation through an understanding of its essence and nature.⁴⁰

The Ukrainian community of mediators⁴¹ and academics⁴² have elaborated different approaches to the mediability criteria that can be used to create information materials and self-test questionnaires that can be made available in courts and on court websites.

3.1.3. *In case of voluntary mediation, what is the role of a court?*

Courts may serve purely as information sources about mediation, displaying materials about mediation and mediators within their premises and on websites, or enclosing the relevant information about mediation and mediators in envelopes with litigation documents, etc. Court officials and judges may inform disputants about the mediation procedure. Courts may serve an informational and organisational role, providing office space for mediation rooms. One of the pilot projects in courts of different jurisdictions in Odesa, on the basis of which mediation offices have been launched, where volunteers provide a mediation procedure on a free basis, has worked very well. This experience is an example of effective mediation interaction with the court.⁴³

In Ukraine, there have been different pilot projects wherein courts have engaged in providing mediation services,⁴⁴ using 'judges as mediators' and 'referrals to an independent mediator'. Those projects have enjoyed relative success with personal support from judicial authorities and financial and organisational support from donor organisations, thus providing mediation free of charge for parties. It must be admitted that these projects were also based on highly motivated volunteer mediators who were providing mediation services on a *pro bono* basis. However, certain projects have enjoyed long-lasting effects, multiplying their goals. Nevertheless, it was extremely difficult to break the general reliance on the traditional court process, highlighting the need for stronger promotion of this alternative dispute resolution method.

A. Koo quotes a number of judgments to illustrate the active role of the UK courts in promoting ADR:

Recent cases have revealed that judges become more proactive and vigorous in exercising their case management power as the circumstances require. In addition to facilitating the appointment of neutrals, they may direct the parties to take all reasonable steps to resolve the dispute before preparing for a trial. They may ask the parties to explain what steps towards ADR have been taken, why such steps have failed, and why some other form of ADR has not been used. They

40 L. Romanadze, 'Criteria of mediability in the context of the dispute resolution system' (2020) 3(35) Subcarpathian Law Herald 8-13; N Mazaraki, 'On the essence of mediability of a dispute' (2018) 12 Entrepreneurship, Economy and Law 258-262.

41 'When mediation is possible' (Ukrainian Mediation Academy 2022) <<https://mediation.ua/>> accessed 22 August 2022; 'The family mediation deals with...' (Association of Family Mediators of Ukraine, 2022) <<http://afmu.org.ua/pro-simeynu-mediacyu/z-yakymy-putanniamy-patsiyue/>> accessed 22 August 2022.

42 L. Romanadze, N Krestovska et al (eds), *Mediation in professional activity of a lawyer* (Ecology 2019) 239-240.

43 Mediation Gap Analysis Report (n 23).

44 T Kyseliova 'Policy paper. Integration of Mediation into Ukrainian Court System' <<https://rm.coe.int/kyseliova-t-mediation-integration-ukr-new-31-07-2017/168075c3c5>> accessed 22 August 2022.

may also compel the parties to agree to submit some issues to the jurisdiction of ADR, even if certain matters remain the subject matter of litigation.⁴⁵

Any type of cooperation between courts and ADR requires strong support from the national judicial authority and every single national court.⁴⁶ The Council of Europe placed emphasis on the important role of courts in promoting mediation.⁴⁷ The European Commission for the Efficiency of Justice 'Mediation Development Toolkit' stresses that judges have an important role in the development of mediation. They should be able to give information, arrange information sessions on mediation and, where applicable, invite the parties to use mediation and/or refer cases to mediation. H. Brown et al. communicates the need for the 'wholehearted commitment of judges' when courts are adopting or recommending ADR.⁴⁸

The primary role of courts in promoting mediation is true in the Ukrainian reality as well. Regardless of the fact that the trust in courts remains quite low among Ukrainian citizens (recent polls have shown that only 10-15% of respondents expressed trust in the courts⁴⁹), the courts remain the centre of gravity for disputants, if for no other reason than because other options, like mediation, are almost unknown in society.⁵⁰

This is why the awareness campaign should be built primarily around the courts (not underestimating the importance of work with lawyers, academia, the general public, public servants, the work already done and that is underway by the community of mediators, donor organisations, the state court administration, etc.). The courts may promote mediation as well as other ADRs (negotiations, arbitral tribunals) in different forms, both online and offline, guided by principles of timeliness, objectivity, and neutrality.

The results of the project 'Increasing awareness of judges, defence attorneys and the public on mediation in order to improve access to justice and enhance effectiveness and efficiency of the judiciary' and connected social poll conducted in 2018 in Odesa have shown the efficiency of promoting mediation in courts and the need to provide extensive information on mediation on court websites and in court premises.⁵¹

The launch of any court-connected mediation scheme requires a large amount of preparatory work, and it has yet to be done in Ukraine. Under the current circumstances, the national judiciary needs swift solutions, and a viable option seems to be 'courts actively promoting mediation': providing information on mediation, mediation providers, and mediators,

45 A Koo, 'The role of the English courts in alternative dispute resolution' (2018) 38(4) *Legal Studies* 680 doi:10.1017/lst.2018.13.

46 Mediation Development Toolkit (n 22).

47 Council of Europe Committee of Ministers Recommendation Rec (2002)10 of the Committee of Ministers to member States on mediation in civil matters <<https://rm.coe.int/16805e1f76>> accessed 22 August 2022.

48 H Brown et al (n 32) 90.

49 Public trust barometer (USAID New Justice program 2021) <https://newjustice.org.ua/wp-content/uploads/2021/03/Public_Trust_Barometer_Report_1st_Stage_2020_UKR.pdf> accessed 22 August 2022; Ukraine's population survey regarding confidence to judicial and other branches of government, judicial independence and responsibilities, perceptions of corruption and readiness to notify about its manifestations (USAID New Justice program 2021) <https://newjustice.org.ua/wp-content/uploads/2021/06/2021_Survey_Population_Report_UKR.pdf> accessed 22 August 2022.

50 Challenges of mediation and dialogue in Ukraine: distrust in procedures and dysfunctional market (Centre for Peace Mediation 2016) <http://www.peacemediation.de/uploads/7/3/9/1/73911539/dp_challenges_dialogue_ukraine_ukrainian.pdf> accessed 22 August 2022; Mediation Gap Analysis Report (n 23).

51 The report of the project implemented by PU Ukrainian academy of mediation 'Increasing awareness of judges, defense attorneys and the public on mediation in order to improve access to justice and enhance effectiveness and efficiency of the judiciary' (USAID New justice, 2018) <https://drive.google.com/file/d/1YERg5sKAPH1124_JGm6bC2ZoUnmri3mI/view> accessed 22 August 2022.

retaining the right of access to court under Art. 6 of the European Convention on Human Rights after utilising mediation or other ADR methods.

The parties of a dispute should obtain enough information to have realistic expectations about the mediation, its procedure, its principles, and the rights and duties of the mediator(s), parties, their representatives, and possible participants. The European Commission for the Efficiency of Justice 'Mediation Development Toolkit' provides a list of important points about how mediation should be delivered to the parties to a dispute, including requirements such as: the voluntariness and equality of the parties, the confidentiality of the process, the non-admissibility of statements and evidence in court proceedings due diligence and impartiality of the mediator, the role of the mediator, the role of lawyers, the postponement of court proceedings, the mediator's fee, the agreement of the parties, and what should be done to get the mediation started.⁵² Disputing parties are to be provided with the information to enabling them to reach an informed decision as to the appropriate dispute resolution process for them to follow in light of their needs and expectations regarding speed, cost, process, and outcome.⁵³

The Ukrainian courts may inform disputants about mediation by:

- 1) displaying materials about mediation, mediators, and the mediability of disputes⁵⁴ within court premises and on official websites, enclosing in envelopes or electronically the relevant information about mediation with litigation documents (a decision about opening the procedure, a decision about suspension of the claim, a decision about dismissal the claim without consideration, court judgements etc.). The community of mediators has developed relevant materials and could provide the court administration with them.⁵⁵ This method would require minimum resources from courts and would allow the information to reach a wide range of disputants;
- 2) information for disputants provided by court officials. As mentioned above, certain court officials have been trained in mediation, as have participants in the relevant programs by the EU-funded Project 'Pravo-Justice', the USAID 'New Justice' program, etc.;
- 3) information for disputants provided by judges. As was mentioned above, civil procedural law and commercial procedural law provide for the duty of the court to promote settlement. The information from the judge may be perceived well by the disputants due to the credibility of the judges. There have been numerous projects regarding mediation awareness training for judges within the last decade, so at least some judges are able to provide such information.

This multi-faceted approach may allow the wider public to discover information about mediation and help to draw some disputants from courtrooms to mediation rooms, where they and the judicial system can benefit from the advantages of mediation.

52 Mediation Development Toolkit (n 22).

53 'The Relationship between Formal and Informal Justice: The Courts and Alternative Dispute Resolution' (n 33).

54 L Romanadze (n 41) 11-12.

55 Information on possibility of settlement in court (The EU-funded Project 'Pravo-Justice', 2021) <<https://www.pravojustice.eu/storage/app/uploads/public/603/758/4f1/6037584f1942d154434120.pdf>> accessed 22 August 2022; Quick reference card on securing access to mediation in a court (The EU-funded Project 'Pravo-Justice' 2021) <<https://www.pravojustice.eu/storage/app/uploads/public/603/75d/361/60375d3614c1f465648197.pdf>> accessed 22 August 2022.

3.2 Mediators cooperating closely with courts

The earlier part of the paper has substantiated that the Ukrainian community of mediators has completed an impressive amount of work on the development of self-regulation and ethics documents, setting up quality standards for mediation training and mediation services. Nevertheless, even more, work has yet to be done and completed. The Russian invasion and martial law have created certain challenges and set up new priorities: advancing online mediation, completing the framework for complaints procedures regarding a mediator or mediation provider in respect of the service they have provided, and quality assurance for mediation training programs and mediation services.

It is obvious that in war and immediate post-war periods, mediations will be held in a videoconferencing mode in the majority of cases, and disputants will predominantly seek and choose mediators online. The mediation providers and mediator associations normally maintain registries of mediators so that prospective clients can choose from and check a mediator's credentials. The Law of Ukraine 'On Mediation' obliges mediation organisations to maintain such registries. Thus, in Ukraine, there are a number of mediator registries. Until recently, the court and court staff, when informing court visitors about mediation, could only suggest that they use Google as a possible way to find a mediator. Because there were so many registries belonging to different organisations, an official could not give preference to any one organisation or recommend it as a resource for finding a mediator.

Most mediation programs connected to foreign courts provide rosters of qualified mediators for the disputants whose cases have been referred to mediation or the disputants who engage in voluntary mediation. The rosters and registries enable the parties to make an informed choice of a mediator (considering such criteria as qualification, area of specialisation, languages spoken, fee rates, etc.) and play a role in ensuring the quality of mediation services.

The court-connected mediation programs in the USA's courts employ the following methods to screen the qualifications of mediators before including them on the roster: paper screening (mediators submit filled-out questionnaires, a curriculum vitae), individual interviews, involvement of outside organisations to certify mediators, mentoring programs, etc.⁵⁶

Every method of filling and managing a registry or roster has its own advantages and disadvantages,⁵⁷ and in the case of Ukraine, there is an obvious need to find a method that would effectively balance the efficient allocation of court resources, quality control, and equitable standards of mediators.

At the moment, the Ukrainian courts have very limited resources and a number of challenges, so it would be irrational to burden the judicial system further with the responsibility for screening mediators' qualifications. This is why the formation of a roster should be completed by mediators themselves based on the procedure agreed upon by Ukrainian mediator associations and organisations. The new website (www.mediators.com.ua) and others recently developed with the financial support of the EU present very promising solutions for disputants to find a suitable and qualified mediator. However, the presence of a mediator on a platform is certainly not an assurance of competence *per se* but rather an assurance that the information submitted by the mediator her/himself has been checked and meets the basic criteria of credibility. So, it may be presumed that these platforms serve a communicative function, providing enough information for disputants to choose a suitable

⁵⁶ M Shaw, L R Singer, E A Povich (n 40) 187.

⁵⁷ See D Noce, 'Communicating Quality Assurance: A Case Study of Mediator Profiles on a Court Roster' (2008) 84(3) North Dakota Law Review 770-771; P Maida, 'Rosters and Mediator Quality' (2001) 8 Dispute Resolution Magazine 17-21.

mediator. It should be noted that the Law of Ukraine 'On Mediation' sets only minimal requirements for mediators' qualifications: 'basic mediation training of 90 hours, including minimum 45 hours of practical training'.

Such platforms with an inter-organisational list of mediators allow courts to give parties better information concerning mediation and provide them with a specific information resource to find a mediator through different filters. The judicial system could provide links to these platforms on its official websites along with information about mediation.

The above-mentioned platforms, together with registries of Ukrainian mediator associations and organisations, obviously need to develop mechanisms for quality control and handling complaints. Indeed, the development of the complaints handling procedure is mandatory for Ukrainian mediator associations,⁵⁸ and the mediation community is working to build the relevant framework.

Another challenge for the Ukrainian mediation community is the development of mediation rules and standards that would complete the national mediation framework alongside the Law of Ukraine 'On Mediation' and the Code of Professional Ethics of Mediators. The mediation rules should be adopted by mediator associations to provide parties to mediation with clear parameters for the conduct of participants in the mediation procedure.

Mediations in videoconferencing mode require certain skills and relevant guidelines for mediators and parties on, for example, securing privacy and confidentiality. This would require relevant amendments to mediation training programs and the introduction of 'digital' professional development programs for mediators.

Last but not least seems to be the need to develop statistical and feedback systems to monitor and analyse the demand for mediation, the performance of mediators, the satisfaction of parties to mediation, and characteristics of completed and non-completed mediation to provide a basis for future development of mediation programs and mediation quality assurance mechanisms.

4 CONCLUDING REMARKS

This paper concludes with Winston Churchill's famous suggestion: '*Never let a good crisis go to waste*'. The Russian invasion has not put the administration of justice in Ukraine in crisis but rather emphasised the long-lasting problems of the undeveloped system of cooperation between the courts and mediation. The Ukrainian courts and mediation in Ukraine are going concurrent ways so that mediation is not integrated and does not reinforce the court-based litigation system. Meanwhile, the mediation community in Ukraine shows potential – even during the war, mediators have kept working to advance the normative framework and web resources for mediation.

The Ukrainian procedural laws are sufficiently favourable to settlement at any stage of court proceedings, including the enforcement, and there is a mature mediation community, ready to help parties settle their disputes. Moreover, one might expect that the workload of inheritance and family cases will drastically increase among Ukrainians as inevitable consequences of human losses and migration. These kinds of disputes – among heirs, divorcing spouses over their children and property, disputes regarding children taken abroad under a simplified procedure in order to ensure their safety, disputes over debts, labour disputes, business relocation and corporate issues disputes – are very suitable for mediation, and this underlines the necessity of establishing the cooperation of courts and

58 The Law of Ukraine 'On Mediation', Art. 13.4 (n 3).

mediators in order to direct the flows of disputing parties to a venue where they can find a viable option for effective dispute resolution.

The unsolved problem remains the low awareness in society about mediation and the correlated lack of trust in this dispute resolution method. This 'new wave of disputes' may be effectively dealt with only on the basis of timely and appropriate preparatory work.

This paper has substantiated that under the current circumstances, the courts should actively promote mediation by all reasonable and sustainable means, including official websites and court premises, enclosing information about mediation in litigation documents and informing the disputants about the advantages and limits of mediation. There is an obvious need to develop a unified communicative strategy for mediation with a focus on different target audiences.

These activities should be complemented with active work in the mediation community on quality assurance, the development of complaint-handling procedures, and the further advancement of online platforms for finding a mediator. The concerted action of the courts and the mediation community in developing their cooperation would create the necessary basis to effect statutory provisions on mandatory pre-trial dispute settlement in certain categories of disputes.

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