

Mediation in Ukraine: Urgent Issues of Theory and Practice and Necessity of Legislative Regulation

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Abstract The institution of mediation is well known in Ukraine, however, actually it is not regulated by the law and a lot of people are still unaware of such process. As noted by some authors, today mediation as such exists only on “public basis”, and actually is not regulated by law.

In Ukraine there is the necessity to formulate the definition of “mediation” and embody its principles, all responsibilities and results, special aspects of the process of mediation and mediation agreement as well, functions, rights and duties of the mediator as well as assign the functions of mediator not only to specially trained persons-mediators, but the notaries and lawyers. As there is the number of institutions in Ukraine that are applied in jurisdictional processes and in its essence it is nothing more than the mediation, although they are named differently. It is important to describe the possibility for the settlement of the dispute by making the settlement agreement as well as introduce the implementation of the mediation in notarial practice and law enforcement process.

The main question in Ukraine is the regulation of mediation at the national level and developing of the framework of cross-border mediation in future. As in Ukraine there is only three draft bills “On mediation” and the draft Law “On Amendments to Certain Legislative Acts of Ukraine on the use of mediation” and it is recommended to use some other international and national laws.

The process of mediation has proven its success and significance in the world practice and has the potential to take a worthy place in Ukraine as one of the alternative methods of law enforcement and protection of human rights.

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1 The Basis for Mediation in Ukraine

The institution of mediation is well known in Ukraine, however, as noted by some authors, today mediation as such exists only on “public basis”, and actually is not regulated by law.¹ While analyzing the legal systems of other countries, it is worthwhile noting that the process of mediation has proven its success and significance in the world practice and has the potential to take a worthy place in Ukraine as one of the alternative methods of law enforcement and protection of human rights.

In order to enforce the obligations taken by Ukraine as a member of the United Nations and the Council of Europe on implementation of mediation and the necessity of its legislative regulation, these issues for a long time have been a subject of discussion in Ukraine, but the specific Law of Ukraine “On mediation”, which would define its general and basic principles has not been adopted yet. Three draft bills “On mediation” under registration No. 7481 dated December 17, 2010; registration No. 8137 dated February 21, 2011; registration No. 10302 dated April 5, 2012 and the draft Law “On Amendments to Certain Legislative Acts of Ukraine on the use of mediation” under registration No. 10301 dated April 5, 2012 were registered in the Supreme Council of Ukraine.

The adoption of the Law of Ukraine “On mediation”, in our opinion, would be a significant step towards the development of conciliative (non-judicial) procedures in our country. But for that purpose, it should be promoted in different ways today. In practice, most of the conflicts that reached a blind alley could be solved out, if the parties timely involved the independent specialist-mediator who would be able to assist the parties to resolve the conflict situations through negotiations. Currently, the majority of Ukrainian citizens who are parties to the conflicts are unaware of the mediation and its benefits over the judicial procedure for dispute resolution.

So at this stage, it is better for Ukrainian legal community to arrange various joint activities aimed at the gradual introduction of mediation in domestic practice. Particular attention should be also paid to the level of training of mediators who actually will create the “image” of mediation procedure in Ukraine and impact on dynamics of its development in our country.²

Being a chair of Notarial and Execution Process and Advocacy Department of Taras Shevchenko National University of Kyiv (Ukraine) for notaries, lawyers, enforcement agents (court enforcement agents) specialization, the author raises questions about the necessity of introducing the mediation in these jurisdictional processes, that is, the mediation could be implemented in notarial practice as well as

¹Ohrenchuk A. The experts of SIC on mediation, the practice of its implementation: problems and perspectives // http://www.prostopravo.com.ua/klub_yuristov/yuridicheskiy_rynok/stati/eksperty_sng_o_mediatsii_praktike_ee_primeneniya_problemah_i_perspektivah

²Saenko M. The experts of SIC on mediation, the practice of its implementation: problems and perspectives // http://www.prostopravo.com.ua/klub_yuristov/yuridicheskiy_rynok/stati/eksperty_sng_o_mediatsii_praktike_ee_primeneniya_problemah_i_perspektivah

practice of law enforcement process. Therefore, these professionals have to possess the knowledge and skills to carry out such conciliation.

In order to give the mediation a new impulse in development, certain conditions should be provided: first of all, new special law should be adopted and amendments to the procedural regulations acts (codes) should be introduced.

Since the mediation in Ukraine is regarded as the procedural mechanism, scientists attribute it to the public fields of law, as its procedure is regulated by the state and is compulsory for the subjects of its implementation. Therefore, in this context, we can say that it has a public form, but the content of mediation concerns private – the legal issues of subject in civil relations.

The main question in Ukraine is the necessity for regulation of mediation at the national level, that is, as internal; but the possibility of developing of a framework of cross-border mediation in future is not excluded.

1.1 The Notion of Mediation

There is no consensus on the concept of “mediation” among Ukrainian scientists. Nowadays it is only formulated by the scientists at theoretical level.

In Ukraine, the term “mediation” is fixed in the draft Law of Ukraine “On mediation”. According to the preamble of the Law, the mediation is considered as a non-judicial procedure that is used in order to resolve conflicts and disputes quickly and effectively. But this notion is simplistic, since it does not specify the entity involved in resolving such conflicts and disputes.

The author believes that the definition of “mediation” proposed in Wikipedia is noteworthy. Thus, “the mediation – is a type of alternative dispute resolution, method of resolving conflicts with the involvement of arbitrator (mediator) who helps the parties of the conflict to organize the communication process and analyze the conflict situation so that they could choose the option solution that would satisfy the interests and needs of all parties to the conflict”.

In theory, the conciliation procedures are understood as the processes (set of activities) to achieve mutually acceptable and mutually beneficial results of the settlement or other legal uncertainties among the parties through direct negotiations involving the conciliator (mediator).³

However, depending on the field of jurisdiction, where the mediation may occur, the concept of it could be stated in different ways, taking into account the specifics of this field of jurisdiction.

Speaking about the mediation in commercial disputes, the conciliation means the conduct of negotiations between the parties with the participation of the mediator about the possibility of reconciliation, and the conditions of this reconciliation in

³Rozhkova M. A. Settlement agreement: implementation in commercial rotation. M. Statut, 2005. p. 148.

commercial (economic) disputes arising from civil relations with the purpose of developing of mutually acceptable settlement between litigants and its subsequent implementation (Article 1 of the Commercial Procedural Code of the Russian Federation).

In the case of conciliation in criminal proceedings, the scientists determine it as the compromise. The compromise as a way of resolving conflicts in criminal procedure is achieved through voluntary mutual concessions of the parties, in order to achieve personally desired result. The use of compromise method in resolving conflicts sometimes occur in the pre-trial proceedings as well as at the trial stage of criminal proceedings.⁴

1.2 The Existing Legal Basis for Mediation in Ukraine

There is no special law that regulates the mediation in Ukraine but it is recommended to use in Ukraine several international and national law acts:

1. United Nations Convention “On jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children” (the date of signing – 19.10.1996, date of ratification in Ukraine – 14.09.2006, entered into force in Ukraine – 01.02.2008),⁵
2. Law of Ukraine “On free legal assistance” dated 02.06.2011,⁶
3. Decree of the President of Ukraine “Concept on the Development of Criminal Justice for Minors” (№ 597 /2011 dated May 24, 2011).⁷
4. Criminal Procedure Code of Ukraine (hereinafter – CPC) dated 13.04.2012.⁸

The current legislation of Ukraine provides the possibility for the settlement of the dispute through peaceful means, in particularly by making the settlement agreement in civil proceedings (Art. 175 of the Civil Procedure Code of Ukraine),⁹ commercial proceedings (paragraph 3 of Art. 78 of Commercial Procedure Code

⁴Paryzkyi I. V. The concept and essence of compromises in criminal procedure // Business, economy and law. 2010. № 8. p. 174–177.

⁵United Nations Convention “On jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children” (the date of signing – 19.10.1996, date of ratification by Ukraine – 14.09.2006, entered into force in Ukraine – 01.02.2008) www.rada.gov.ua

⁶Law of Ukraine “On free legal assistance” dated 02.06.2011 www.rada.gov.ua

⁷Decree of the President of Ukraine “Concept on the Development of Criminal Justice for Minors” (№ 597 /2011 dated May 24, 2011) www.rada.gov.ua

⁸Criminal Procedure Code of Ukraine www.rada.gov.ua

⁹Civil Procedure Code of Ukraine www.rada.gov.ua

of Ukraine),¹⁰ the Laws of Ukraine “On International Commercial arbitration”,¹¹ “On restoring debtor solvency or declaring a debtor bankrupt”,¹² “On arbitration courts”¹³ and “On procedure for the settlement of collective labor disputes”.¹⁴

The Chapter VI of CPC of Ukraine envisages criminal proceedings on the basis of agreements on reconciliation between the victim and the suspect or the defendant which in theory is called “restorative justice”.

According to the Art. 468 of CPC of Ukraine the following agreement can be concluded in criminal proceedings:

1. the settlement between the victim and the suspect or the defendant;
2. the agreement between the prosecutor and the suspect or the defendant about the admission of guilt.

However, this reconciliation agreements may be concluded in the proceedings concerning criminal offenses, crimes of little and average gravity and criminal proceedings in the form of private prosecution (paragraph 3. 469 of CPC of Ukraine).

For that matter, it is quite important to unify the approaches to understanding the institution of mediation at the international level, because there is a number of institutions in Ukraine that are applied in jurisdictional processes and in its essence it is nothing more than the mediation, although they are named differently, such as the settlement agreement and so on.

2 The Doctrinal Approaches to Understanding of Mediation

Being an expert in the area of procedural civil science, the author considers it necessary to formulate the official term of “mediation” in the legislation of Ukraine and assign the functions of mediator not only to specially trained persons-mediators for this purpose, but the notaries and lawyers as well. However, the Law “On mediation” and the procedural codes should provide exceptions to the general rule about persons who have no right to conduct the mediation procedure.

In this connection, we should pay attention to the provision of paragraph 1 of the Article 469 of the CPC of Ukraine that the settlement may be concluded on the initiative of the victim, suspect or defendant. The arrangements for conciliation agreement may be conducted by the victims themselves, suspect or defendant, defense counsel representative, or by any other person agreed by the parties to

¹⁰Commercial Procedure Code of Ukraine www.rada.gov.ua

¹¹Law of Ukraine “On International Commercial arbitration” www.rada.gov.ua

¹²Law of Ukraine “On restoring debtor solvency or declaring a debtor bankrupt” www.rada.gov.ua

¹³Law of Ukraine “On arbitration courts” www.rada.gov.ua

¹⁴Law of Ukraine “On procedure for the settlement of collective labor disputes” www.rada.gov.ua

the criminal proceedings apart from the investigator, prosecutor and judge. In other words, the agreement on settlement cannot be made according to the initiative of the investigator, prosecutor and judge, because the mediation is a paid intermediary activity. The court is able only to explain to the relevant parties their right to use the mediation procedures and their consequences, and that is the essence of the CPC of Ukraine. As to the defense counsel in criminal proceedings, there should be made additions to the article 19 of the Law of Ukraine “On advocacy and legal practice” to attribute “the performance of mediation function by the lawyers” to the lawyer type of activity. The only exception to general rule can be the agreement provided by point 2 of the paragraph 1 of the Article 468 of the CPC of Ukraine, which refers to the agreement between the prosecutor and suspect on recognition of guilt.

With regard to civil and commercial litigation, the settlement agreement between the parties is made on the initiative of the parties, the court only aware them of their right to enter into such settlement agreement under the Art. 31 of the CPC of Ukraine. The lawyers may assist the parties in formulation of that agreement, making the draft of their agreement. The court under the paragraph 5 of the Article 175 of the CPC of Ukraine has only the right to accept its terms and conditions if such settlement agreement is not contrary to the interests of the parties and the legislation, and explains the consequences of such agreement to the parties. It should be noted that the procedural regulations refer to the settlement agreement as the product of conciliation procedures, but the procedure is unnamed. Therefore, the way of conclusion of settlement agreement by the parties, discussion of its terms should be called the “mediation” and this concept should be fixed in Commercial and Civil Procedure Codes of Ukraine. In this connection the amendments should be made to the Art. 27 of the Civil Procedure Code of Ukraine, where among the rights and responsibilities of the persons involved in the case, specify their right at any stage of civil process to resolve the conflict through mediation procedure, and the paragraph 3 of the Art. 31 of the Civil Procedure Code of Ukraine shall be read as follows: “The parties may at any stage of civil proceedings achieve the amicable agreement on results of mediation”. In these types of proceedings the mediation can be held by the lawyers and mediators. The court simply explains to the parties their rights, that they can resolve a conflict through the mediation at the request by one of the parties; the court may adjourn the proceedings for a specified time for their decision about the conduction of mediation.

2.1 The Mediation in the Notarial Process

Regarding the notarial process, now there is the necessity to empower the notaries with mediation function in Ukraine.

As to the notaries, such proposal of the author is determined by those features of mediation, which should be attributed to its advantages over the judicial

methods of law enforcement and protection of human rights, namely: time-saving, cost reduction of dispute resolution process, ability to influence on the outcome, confidentiality of procedures, ability to maintain or restore business relations with partners, ability to prevent such conflicts in the future, guaranty of willful execution of the notarial act (if the mediation was successful) and simplifying the execution of a notarial act in a case it was not performed by one of the parties of the conflict with the help of notary's executive endorsement.

According to the Law of Ukraine "On Notaries" the notary is a person endowed by the state with the power to execute jurisdictional function by certifying indisputable rights and facts of legal significance to provide them with legal certainty, in other words, execution of function of "preventive justice" – prevention of the conflict. Today, the notary in Ukraine is a serious competitor to the court proceedings. Notaries, in fact, already carry out the mediation, but these actions have not yet received the official title "mediation".

Thus, according to the Law of Ukraine "On Notaries", while certifying the contract the notaries have to explain to the parties the nature of this contract; warn about the consequences of notarial acts, so that the ignorance of the law could not be used to their detriment; provide with the legal advice in order to select the best alternative of protection of indisputable right out of court; contribute in reclaiming the needed for notarial acts document; establish true intentions of each party of the contract, and the absence of the parties' objections to each of the terms of the contract by the same understanding of the meaning, the terms of the contract and its legal implications for each party. In this case, while certifying the contract, the notaries should take into account the principle of notarial secret and avoid the possibility of interference of third parties.

Today Ukraine stands on the way of joining the International Union of Notaries,¹⁵ therefore, the notaries have to provide the legal assistance to individuals and perform the above mentioned powers through mediation procedure, which should take place at the stage of preparation for notarial proceeding.

In particular, in Ukraine there are cases of execution the mediation procedures by the notary for certification of alimony agreements or mixed alimony contracts with elements of education and determination of place of residence of the child,¹⁶ in particular, the notaries while communicating with parents of minors, under aged children should explain them the benefits of notary certification of contracts before the court procedure for recovery of alimony, coordinate the amount of alimony payment, as well as provide other assistance concerning the maintenance of the child, the place of residence, explain the procedure for execution of the contract on

¹⁵Shtuniuk A. Why do our notaries need International Union? // Judicial bulletin of Ukraine // 2013. № 29 (942). p.12.

¹⁶Fursa S.Y., Dragnievich L.Y., Fursa Y. I. Family relations in notarial process. Reference book for notaries. – K.: "Publishing House" In Jure", 2003. – 352 p.

the basis of executive notary act in case if one of the party fails to comply with the terms of such agreement on the voluntary basis. Saving time and money while certifying this agreement are the benefits of this procedure. If the parties could not come to the conclusion, the notary explains them their right to appeal to the court to resolve the issue of alimony.

The procedure of mediation is often used by the notaries of Ukraine in cases where a person wishes to determine the property share in case of his or her death by certifying the contract.

In Ukraine these contracts include the inheritance agreement, contract of life maintenance (care), annuity agreement. But these agreements should be distinguished according to their nature, because they lead to different legal consequences, that is when parties of the contract apply to the notary with the intent to sign a contract about the post-mortuary disposition or the will, the notary have to explain to them the nature and the consequences of this contract or offer the alternative way of certifying donation agreement in case of death or attestation of the will.

The notary procedure has to include not only explanation of rights and obligations of individuals, warning about consequences from execution of notarial acts, so that the lack of judicial information could not lead to the harm of the parties, but identify the real goal, which the person wants to achieve as the result of agreement. For this purpose the notary have to explain the alternative way of disposition of the property or clarify the terms of contract due to the law protection of the right of individuals in order to avoid violation of law.

2.2 The Mediation in Enforcement Proceedings

As to the procedure of enforcement of court decisions, under the Law of Ukraine “On Enforcement Proceedings” and the Article 372 of the Civil Procedure Code the parties on the stage of enforcement of court decision are able to reach the settlement agreement. With the help of mediation a number of problems associated with a large amount of enforcement proceedings, deadlines of enforcement, complexity and the inability to enforce certain decisions could be resolved at the stage of execution. The mediation helps to take into account the interests of both the debtor and creditor, the parties themselves can decide the question of voluntary execution of court decision by the mutual concessions, indicate the property which may be levied primarily. This settlement agreement can be regarded as a form of the mediation agreement, which terminates the mediation procedure in enforcement process. The mediation in enforcement proceedings can occur at the stage of voluntary execution (Article 25 of the Law of Ukraine “On Enforcement Proceedings”) and during compulsory enforcement of the judgment. But first of all, the legislative changes must be made to this law regarding to the possibility of participation of mediator in the enforcement proceedings or execution of mediation functions by the lawyer of the parties in the enforcement process.

3 The Mediation Agreement (the Agreement to Submit Disputed to Mediation)

In the draft Law of Ukraine “On mediation” there is a rule that provides the content and form of the mediation agreement.

Thus, the mediation is based on the agreement that could be entered by the parties to the conflict (dispute) with one or more mediators and organizations providing mediation. The mediation agreement has to be done in writing form, signed by all the parties to the conflict (dispute) and the mediator (mediators) or organization that provides mediation. This agreement has to comply with all the general principles of civil legislation of Ukraine concerning the content of contracts.

In addition, the mediation agreement should include:

- provisions about the adoption by the parties of the conflict (dispute) of the principles of mediation set out by this Law;
- definition of the place of mediation;
- specifying the period of mediation;
- the costs of payment for the procedures by the parties to the conflict (dispute), the size and mode of payment fee to the mediator (mediators) or organization that provides mediation.

The parties to the conflict (dispute) and the mediator (mediators) or organization that provides mediation are empowered to determine other conditions of mediation in the mediation agreement, which are not inconsistent with this Law, the other laws and regulations of Ukraine.

The mediation agreement has to be concluded in the number of copies in accordance with the number of conflict (dispute) parties – one for each party and each of mediators or organizations providing mediation.

The mediation agreement on conflict (dispute) takes effect on the day of its signing by the parties of the conflict (dispute) and the mediator (mediators) or organization that provides mediation. Aside from that, the duration of the mediation agreement should be mentioned.

The mediation agreement could be certified in any mode provided for by the current legislation of Ukraine.

In the Criminal Procedure Code of Ukraine there are two rules that govern the content of the conciliation agreement: Article 471 of the CPC and content of plea agreement (Article 472 CPC), which can be concluded during the trial or pre-trial investigation.

4 The Mediator in Ukraine

The draft law “On mediation” establishes requirements for the mediator. The mediator could be an individual who has passed special training in the relevant area in Ukraine or abroad and received the certificate or other document, which proves

the passing by him or her of the appropriate training. Moreover, the mediator could be an individual who at the time of formation of contract of the mediation turned twenty-one.

The parties and/or organizations that provide mediation may establish additional requirements for the mediators, including the age, education, experience and so on. But, in our view, a list of requirements for the mediator should be complemented by the requirement of legal education, because in the jurisdictional process the mediator is unable to provide knowledgeable assistance in resolving the conflicts without knowing national legislation and the rules of foreign and international law, because very often the participants of the dispute are foreign entities.

As to the mediator's special training in Ukraine or abroad, we should focus on the fact that education in Ukraine and abroad are fundamentally different. Therefore, the legislation of Ukraine should include the procedure for the recognition of documents that confirm completion of the training in the sphere of "mediation" and which were obtained outside of Ukraine (nostrification).¹⁷

The mediator could not be a person with the criminal record, who is not released from conviction in the manner prescribed by law, or incapacitated and disabled person under court decision.

The draft law "On mediation" refers to the Code of Ethics for Mediators, but nowadays this Code doesn't exist in Ukraine.

As to the organizations which carry out the training of mediators, it is necessary to define such authorities under the legislative level and identify the procedure for giving the licenses to legal entities who will give the training to the mediators and define supervisory authority over the conduct of training of mediators and their practices, determine the enterprises, organizations and institutions that will have the register of trained mediators. It is reasonable to develop a unified register of mediators, which will help to insure a unified record of mediators within the state.¹⁸ Subsequently, we should talk about the development of International Register, since the question of mediation should not be limited to Ukrainian borders.

The mediator has to be certified by any company, institution or organization which train the mediators in Ukraine or abroad under the program which comprises of not less than forty academic hours, including practical training.

The document, which confirms the passing of appropriate training, is the certificate or other document that includes:

- surname, name and patronymic of the person who has passed the training;
- name of the entity which conducted training;
- surname, name and patronymic of persons who conducted training;
- number of hours of training, including number of hours for practical training.

¹⁷Commentary and proposition of legal department of the Supreme Court of Ukraine to the draft laws of Ukraine "On mediation" and "On amendments to some of the legislative acts of Ukraine on implementation of mediation".

¹⁸Commentary and proposition of legal department of the Supreme Court of Ukraine to the draft laws of Ukraine "On mediation" and "On amendments to some of the legislative acts of Ukraine on implementation of mediation".

4.1 Fundamental Rights and Duties of the Mediator

During the mediation the mediator may:

- determine the procedure of mediation;
- verify the powers of the representatives of the parties of mediation;
- meet individually with each of the parties of mediation or at the same time with all of the parties of mediation under the conditions which ensure confidentiality;
- offer the parties of mediation to suspend mediation for additional preparatory actions or involvement of the necessary experts from one of the mediation parties;
- assist the parties of mediation in formulating the content of the results of the mediation agreement reached by the parties in accordance with the decision of the mediation;
- stop the mediation process;
- use the other rights provided by the mediator under laws of Ukraine, as well as the mediation agreement.

If the mediator has received from other party some information relating to the mediation, he/she shall be entitled to disclose such information to another party only with the prior consent of the party that provided the information.

The mediator has no right to give the parties legal advice, expert opinions or other advice on the subject of conflict (dispute) or possible outcomes of conflict resolution (dispute) in which he/she is directly involved as the mediator.

The mediator has no right without the consent of the parties to make any public statements on the merits of the conflict (dispute). We believe that this provision of the draft law restricts the right of mediator to reach agreement between the parties and the implementation of the functions of mediator in the conflict (dispute), because if the function of mediator will be provided by the lawyer, notary, namely they have to provide legal advice to the parties and explain the best ways of protecting their rights and the consequences that may occur as a result of the settlement agreement between the parties.

The mediator has no right to impose the decision to the parties of mediation, that is, he/she has no right to enforce the person, the decision has to be free without coercion.

As to the duties of mediator, he/she has to act within the laws of Ukraine, norms of professional ethics of mediators and the mediation agreement. During the mediation he or she has to:

- provide clarification on the mediation procedure to the parties of mediation;
- inform the parties of mediation about the conflict of interest in accordance with this Law;
- use efforts provided by the legislation of Ukraine to achieve the settlement of the conflict (dispute) by the parties during the mediation;
- do not delay the mediation without good excuse;
- refrain from giving the parties of mediation any promises or guarantees of specific results of mediation.

5 The Process of Mediation in Ukraine

The principles of mediation in Ukraine are the principle of voluntariness, self-determination, equality of the parties, privacy, independence and impartiality of the mediator, the principle of language in which the mediation will be executed.

1. The principle of voluntariness of mediation lies in the fact that no one can be enforced to resolve the conflict (dispute) by the mediation. The parties of the conflict (dispute) participate in the mediation by mutual agreement and may refuse from its implementation at any time before the conclusion of the agreement and find another way to resolve the conflict (dispute). The participation in mediation cannot be considered as the admission of guilt by the person or the charges against his or her claims, as well as the rejection of their claims.
2. The principle of self-determination of parties of mediation means that the parties are free to find common solutions to resolve the conflict (dispute) and independently determine its possible solutions.
3. The principle of equality of mediation parties means that the parties have equal rights during the mediation. It is prohibited to give any party of mediation privileges or restrictions based on race, color, political, religious or other beliefs, sex, ethnic or social origin, property, residence, language and other characteristics.
4. The principle of confidentiality of mediation means that during the mediation all information relating to specified procedures have to be remained confidential, except on occasions prescribed by law of Ukraine, as well as occasions where the parties have agreed in writing otherwise.

The mediator shall not disclose the information relating to mediation that became known during the mediation, without the prior written consent of all parties to mediation.

If the parties haven't agreed in writing otherwise, in any other procedures for resolving conflict (dispute), including litigation and arbitration, parties of mediation, organizations providing mediation and their employees are not entitled to refer to the information about:

- proposition of the parties to apply to the mediation procedure;
 - consent of the party to participate in the mediation procedure;
 - considerations or suggestions of the parties on possible ways to resolve the conflict (dispute);
 - statements made by the parties during the mediation;
 - proposition of the mediators;
 - acceptance of proposition by one of the parties to regulate the conflict (dispute);
 - other information relating to mediation.
5. The principle of independence and impartiality of the mediator means that he or she is independent in the work and acts in the manner prescribed by the legislation of Ukraine.

The mediator has no right to participate in the mediation of conflicts (disputes) in which he/she has a personal interest, including personal or financial interest in resolving such conflicts (disputes), or if he/she is related by family or business relationship with one or more parties of the mediation, or if he/she considered the conflict (dispute) as an official of the competent authority or its representative or advisor at least to one of the parties of mediation, or if there are other circumstances which can cast the doubt on the impartiality of the mediator. If there is at least one of the following circumstances, the mediator has to inform the parties of the conflict, and if such circumstances become known during the mediation – immediately after their detection.

The mediator who realizes conflict (dispute) mediation cannot be the representative or advisor one of the parties during consideration of the same conflict (dispute) by the competent authority.

In our opinion, the mediator cannot be a person who is or was in the service or in other depending on one of the party of mediation.

6. The principle of language used for mediation.

The parties of mediation in the mediation agreement are able to determine the language or languages for the mediation. If the mediation agreement does not contain the reference to the language that will be used in the mediation, then it should be conducted in the Ukrainian language.

All the contracts, agreements, statements and other documents prepared in the process of mediation or its results should be conducted in the language or languages chosen by the parties of mediation.

If the mediation provisions and/or mediation agreement contains no reference to the language in which mediation is carried out, then all the contracts, agreements, statements and other documents prepared in the process of mediation should be conducted in Ukrainian language.

5.1 Appointment and Replacement of Mediator

The parties of mediation have to choose one or more mediators by mutual consent on the independent basis.

If the mediation agreement was signed with the organization that provides mediation, the organization may recommend a candidate (candidates) for mediator or to assign him/her (them) in the case when the parties have made a corresponding appeal to the organization under contract in order to conduct the mediation. The confirmation of the candidate of mediator can take place in any way that the parties and organizations providing this mediation recognize as enough for such approval.

The parties have the right to replace the mediator, and if the mediation is conducted by several mediators – either one or all the mediators at any time of the mediation until the conclusion of the agreement on the results of mediation. In this case, the transactions between the parties and the mediator (mediators) are carried out in accordance with the terms of mediation.

5.2 Agreement of the Results of Mediation

The draft law No. 10301 indicates that according to the results of mediation the parties may enter into the agreement on results of mediation and/or perform any other activities which are not prohibited by the law, in accordance with the agreements.

However, if the mediation agreement is the ground to appeal to the court, in case of failure to execute or execution of its conditions by the mediator not in good faith, such agreement is the subject compulsory conclusion and certification (recognition, approval, certification) by the competent authority which has carried out the mediation. For example, if the mediation was conducted in notarial process for certification of transaction, the result of the mediation has to be transformed into the notarial act, which has to be certified by the notary. If in the court, the settlement agreement as the result of mediation procedure shall be recognized by the court and be certified by him.

If the mediation was conducted out of the court, notary, state executive service, the results of mediation agreement between the parties to the conflict (dispute) have to be concluded in writing form in accordance with the general principles of civil legislation of Ukraine and principles of mediation statement, indicating the statement of decision reached by the parties on extrajudicial settlement of the conflict (dispute) .

The agreement on results of mediation includes:

- date and place of conclusion of the results of mediation;
- name (for legal entities) or surname, name and patronymic if any (for individuals) of the parties of mediation, their location (for legal entities) or residence (for individuals), identification codes of business entity if any (for legal entities and individuals registered as entrepreneurs) or personal identification numbers if any (for individuals);
- subject of the conflict (dispute);
- statement of the decision reached by the parties on extrajudicial settlement of the conflict (dispute).

The mediation parties have the right to determine the provisions and other statements of the agreement of mediation.

The mediation agreement has to be concluded in multiple copies according to the number of parties to mediation – one for each side.

The agreement on results of mediation (conflict) comes into effect on the date of its signing by the parties, unless otherwise is provided by the agreement between them. This provision can occur only when the mediation is held by the mediator and the parties.

The agreement on results of mediation of the dispute shall be executed in multiple copies according to the number of parties to mediation – one for each

side and one copy to the competent authority handling the relevant dispute. The agreement on results of mediation of the dispute shall enter into force on the day after signing by the parties and approval by the competent authority which conducts these relevant proceedings concerning dispute, unless otherwise is prescribed by the current legislation of Ukraine.

The results of mediation agreement can be certified by any method provided by the current legislation of Ukraine, that is, if there is no special (compulsory) form of certifying the mediation agreement under the law of Ukraine, the following procedure may be decided by the parties, for example, the parties can certify that agreement in notary.

In one of the draft bills (No. 10301 dated April 5, 2012) there is a provision that if the parties want to conclude the mediation agreement in judicial proceedings in an attempt to settle their dispute, then the period of limitation is stopped for the period of mediation. In this context, we should agree with the opinion of the Supreme Court of Ukraine that this provision has to be revised, because the grounds for suspension of the limitation period are specified in the Article 263 of the Civil Code of Ukraine. A list of these grounds is not exhaustive and does not provide the mediation procedures. The draft law No.10301 does not provide changes to the Code. Thus, if the draft law No.10301 in the proposed version will be passed then the conflict of the law will arise. However, it should be noted that the provisions of the draft law No.10301 on the suspension of limitation period does not relate to the subject of the regulation of the draft law being analyzed.¹⁹

5.3 Refusal from Mediation

According to the draft law “On mediation” the parties are empowered to reject from it at any stage of the mediation. However, the draft law does not contain the grounds for such refusal, they, for example, should include improper performance by the mediator of its rights and obligations, lack of competence, disclosure of confidential information by the mediator without the agreement of the parties, the will of the parties of mediation. This failure leads to the termination of mediation and to legal consequences for the parties to mediation and to the mediator, arising out of the contract. In particular, for the parties it could be the payment for the mediator’s work that was done, for the mediator – compensation of the damages or the termination of certificate and so on.

¹⁹Commentary and proposition of legal department of the Supreme Court of Ukraine to the draft laws of Ukraine “On mediation” and “On amendments to some of the legislative acts of Ukraine on implementation of mediation”.

5.4 Termination of Mediation

The grounds for termination of mediation include:

- (a) conclusion by the parties of agreement on results of mediation – on the day of entry into force of the agreement;
- (b) statement of the mediator, that was made after the consultation with the parties that the further action in the conflict (dispute) will not lead to the agreement on results of mediation – on the day of submission of such application by the parties to the conflict (dispute);
- (c) application made by all the parties of mediation on its termination – on the day of submission of such application by the parties to the mediator.

These grounds for termination of mediation should be supplemented also by

- (d) death, announcement of individual party as dead, liquidation of legal entity. This reason is caused by the provisions of the Civil Code of Ukraine, the Commercial Code of Ukraine as the procedure of mediation has a contractual nature.

5.5 Implementation of the Agreement on Mediation Results

The results of mediation agreement are binding to the parties of mediation. If one of the parties breaks its obligations under the agreement on results of mediation, the other party may refer to the court with the claims against the party that violated its obligations under the agreement on results of mediation.

As to the timeframe of mediation, it should be determined by the parties in the agreement on mediation.

6 Responsibility of the Mediator and the Consequences Which Arise from the Mediation Agreement in Ukraine

According to the draft law “On mediation” the mediator is liable for the violation of this Law, other laws and the laws of Ukraine, norms of professional ethics of mediators and mediation agreement.

The damage caused to the parties as a result of unqualified services of the mediation shall be compensated by the mediator in accordance with the procedure established by the civil legislation of Ukraine, as well as by the contract for mediation.

Special liability of mediator for disclosure of information, which became known to him/her in the process of mediation (break of confidentiality), is not provided, but it should be regulated by the Law “On mediation”, the Code of Ethics of Mediator

and should lead to cancellation of his certificate if he systematically breaks the law and the principle of confidentiality and to be the ground for termination of mediator's activity.

Moreover, the question of responsibility for the violation of the principle of confidentiality (disclosure of information) should be provided in the contract (agreement) on mediation in terms of civil liability, if the person was harmed both materially and morally by the disclosure of such information.

The civil liability of mediator has to be insured in the manner prescribed by the current legislation of Ukraine.

7 The Success of Mediation Process

The number of disputes which were successfully resolved through mediation in Ukraine is very small compared with the number of cases resolved in the court.

There is no official information on the number of positively resolved disputes and the number of mediators in Ukraine.

But based on the information over the Internet, there are already positive results in resolving conflicts through the mediation in Ukraine. Thus, the law firm "Legal Alliance" was the first one who applied in Ukraine the mediation procedure in resolving the conflict between their two regular customers in pharmaceutical sphere. That conflict resolution through the procedure of mediation was the beginning of rendering by this law firm of such specific service and showed the tendency of applying mediation in Ukraine. Regarding to this, N. Lavrenova pointed out that "accompanying the interests of the majority of participants of pharmaceutical market, we risk appearing at the crossroads of interests of several of our very important client. And our main task is to separate their ways, to find a compromise that would suit both of the parties, to help them build a constructive dialogue. Taking into account national peculiarities of doing business and the lack of the legal mechanism to enforce into progress the settlement agreements in the case of failure to execute them voluntarily, the parties don't want to apply to the mediation procedure. Perhaps the legal regulation of the mediation will increase the confidence in this procedure and will be an effective tool for resolving disputes in Ukraine."²⁰

According to the information over the Internet the number of public institutions that provide the services of mediation increases.

Thus, in 2008 the Ukrainian Mediation Center was created in Kyiv-Mohyla Business School.

Besides, the Ukrainian Centre for Understanding, Odessa Mediation Group and others operate in Ukraine.

²⁰Lavrenova N. The experts of SIC on mediation, the practice of its implementation: problems and perspectives // http://www.prostopravo.com.ua/klub_yuristov/yuridicheskiy_rynok/stati/eksperty_sng_o_mediatsii_praktike_ee_primeneniya_problemah_i_perspektivah

These organizations are engaged in elaboration of knowledge in this field, training the mediators. Leading specialists from the public entities were involved in the development of the Draft Law “On Mediation” No. 8137 of 21.02.2011 that in the future will ensure the implementation of culture of alternative dispute resolution in Ukraine.

8 Costs of the Mediation

The cost of mediation procedure in Ukraine is not the same and depends on the conflict, the terms of its settlement, the specialization of the mediator and other criteria.

8.1 Legal Assistance and the Grounds on Which it is Available

As to the legal assistance, there is a law “On free legal assistance” in Ukraine. Besides, the issue of state legal assistance is regulated by the Article 12 of the Civil Procedure Code of Ukraine and by other procedural Codes of Ukraine.

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²¹Short list of the most influential scientific works on this topic.