

Legal, Social and Cultural Prerequisites for the Development of ADR Forms in Lithuania and Ukraine

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Alternative Dispute Resolution (ADR) mechanisms include several procedures that allow parties to resolve their disputes out of court in a private forum, with the assistance of a qualified neutral intermediary of their choice. Arbitration and mediation are one of the most popular institutes of alternative dispute resolution. This article analyzes the legal, social, and cultural prerequisites for the development of the institutes of arbitration and mediation in Lithuania and Ukraine.

Keywords: arbitration, mediation, Alternative Dispute Resolution (ADR).

Teisinės, socialinės ir kultūrinės sąlygos AGS formų plėtrai Lietuvoje ir Ukrainoje

Alternatyvaus ginčų sprendimo (AGS) mechanizmas apima kelias skirtingas procedūras, kurios leidžia šalims išspręsti savo ginčą ne teismo sprendimo pagalba, kai joms padeda kvalifikuotas nešališkas asmuo. Arbitražas ir mediacija yra populiariausi alternatyvūs ginčų sprendimo būdai. Šiame straipsnyje* analizuojamos teisinės, socialinės ir kultūrinės sąlygos būtent arbitražo ir mediacijos plėtrai Lietuvoje ir Ukrainoje.

Pagrindiniai žodžiai: arbitražas, mediacija, alternatyvūs ginčų sprendimo būdai (AGS).

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Introduction

Notwithstanding legal traditions, in almost all countries exist some forms of alternative dispute resolution. It is usually an alternative to litigation, and it is available as a mean to resolve conflicts between the parties to the dispute with varying levels of access to legal advice. Arbitration and mediation are one of the most popular institutes of alternative dispute resolution.

Lithuania and Ukraine are no exceptions, as arbitration and mediation procedures can be applied in these countries. As Lithuania and Ukraine share a common, long-lasting history, the aim of this article is to analyze the legal, social, and cultural prerequisites for the development of arbitration and mediation in Lithuania and Ukraine. The authors of the publication identify these tasks: (1) to examine whether arbitration and mediation already have traditions in Lithuania and Ukraine; (2) to determine if there are any similarities to the evolution of arbitration and mediation in these two countries.

So far arbitration as well as mediation have been only discussed in Lithuania and Ukraine on the national level, and there has never been an article where these two ADR institutes have been analyzed comparing the situations in Lithuania and Ukraine. Most publications in Lithuania (for instance, articles in the journal *Arbitražas. Teorija ir praktika*, Žukauskaitė, 2019) as well as scientific articles in Ukraine (for instance, Kyseliova, 2011; Kroitor, Mamnitskiy, 2019) discuss arbitration or mediation from practical legal perspective and do not discuss social or cultural conditions for applying these methods of dispute resolution.

To fulfil the tasks of the article, theological, historical, comparative research methods are used. Also, the topic is analyzed using the sociological method, as a brief survey has been done.

1. Development of ADR in Lithuania

1.1. Arbitration in Lithuania

The history of arbitration goes back to the Middle Ages in Lithuania. The process, which was similar to arbitration and was conducted as a process betting in the Grand Duchy of Lithuania, dates back to 1519 as one of the ways to resolve the dispute used by Sigismund I (Korowicki, 1826, p. 82). Article 85 of the Third Statute of the Grand Duchy of Lithuania recognizes the arbitration (*sqd kompromisarski*) as the method to resolve disputes equivalent to other means of dispute resolution and the courts themselves are attributed to the special courts. In this case we can only welcome the fact that the development of arbitration began several centuries earlier in the territory of the Grand Duchy of Lithuania than in the Kingdom of Poland, which recognized this form at a relatively late stage, in 1776 (Korowicki, 1826, p. 81). It must be noted that the regulation of the arbitration issues was already quite advanced at the time. This way of dispute resolution could have only been employed on the basis of the agreement concluded between the parties. Each of the parties would appoint an arbiter each and one super-arbiter would be appointed by the mutual agreement between the parties to the dispute. The adopted award could not have been appealed against, but it could have been contested before the Basic Court on the grounds referred to in the Statute which, in their essence, resembled the grounds for non-recognition of the awards stipulated in the New York Convention of 1958 (Korowicki, 1826, p. 80). A substantially similar regulation was provided for in Articles 1367 to 1400 of the Law on Civil Proceedings of the Russian Empire of 1864 as well (Tyutryumov, 1925, p. 429–435). This regulation was in force in the territory of Lithuania until the Soviet occupation of Lithuania that took place in 1940. During the Soviet times, Annex No. 1 to the CCP of 1964 had already established the rules of the arbitration tribunal but

they were basically referring to the ad hoc arbitration tribunal, let alone the considerable impact of the State court on the proceedings.

As a matter of fact, the development of the arbitration tradition continued after the restoration of independence in Lithuania (after 11 March 1990), and in particular after the ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 by the Seimas of the Republic of Lithuania on 17 January 1995 (it must be noted that the Republic of Lithuania has not ratified the European Convention on International Commercial Arbitration of 21 April 1964). Shortly after the ratification of this convention, which was undoubtedly most significant for the development of arbitration, the Seimas of the Republic of Lithuania adopted the Law on Commercial Arbitration of the Republic of Lithuania of 6 April 1996, the draft of which was based on the UNCITRAL Model Law of 1985. On 21 June 2012, the Seimas of the Republic of Lithuania adopted a new recast of the Law on Commercial Arbitration, which definitely contributed to Lithuania becoming even more favorable to the arbitral process of the resolution of commercial cases, and the legal regime existing in Lithuania was brought closer to the UNCITRAL Model Law, which was recognized as the official source of arbitration law by the intention of the legislature. Article 4(5) of the Law provides for that interpretation of this Law and its definitions shall be subsidiarily governed by the 1985 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, as last amended. The purpose of this rule is to establish the duty of the courts and arbitration tribunals to refer to the Model Law as well when applying and interpreting the Law. It must be noted that the Lithuanian legislature, by means of the same act, governed the activity of both national and international arbitration as it did not discern any specific peculiarities of procedural nature which would give rise to the need to regulate the matters of the international commercial arbitration by a separate law.

Therefore, from the perspective of the legal, social and cultural tradition, Lithuania has the arbitration tradition of almost five centuries with an exception of fifty years. It must nevertheless be recognized that after the Soviet period the revival of that tradition was arduous, as the formed mentality that all disputes were resolved by the State court was deeply rooted. It was not long after businesses consolidated and society perceived the significance of personal autonomy from the State that the arbitration established itself, first of all in the mind of the business community, as an important means of dispute resolution and a serious alternative to the State justice. The statistics of Vilnius Court of Commercial Arbitration (the "VCCA"), which undoubtedly is the main permanent arbitral institution in Lithuania, show that over 400 cases have been heard since its establishment in 2003, of which only few adopted awards were repealed (information can be found online here: www.arbitrazas.lt). Absolute independence of the arbitration from the influence of the State and politicians as well as the confidentiality of the proceedings are certainly the main reasons for which businesses increasingly opt for the arbitration procedure. Business really needs to have an opportunity to resolve the disputes without the attention of the public or media and it needs to be certain that the completion of the proceedings will not be affected by any external factors.

The case-law of the Supreme Court of Lithuania of the last several decades may be described as strongly pro-arbitral. Numerous rulings of the SCL refer to the "arbitration as a broadly accepted alternative way of resolving disputes equivalent to the dispute resolution at national courts. The basis of this alternative jurisdiction is the agreement concluded between the parties from the exercise of free will to refer the specific disputes to the arbitration tribunal whereby the parties not only grant the arbiters the right to resolve their dispute, decide upon the subject-matters of the dispute to be resolved at the arbitration tribunal as well as on the rules applicable to the awards but also refuse the right to refer to the courts of any State with regard to the resolution of the disputes referred to in the arbitration

agreement. Thus, the arbitral jurisdiction is based on the principles of party-disposition and binding force of agreements, it provides the parties with an opportunity to refer the dispute to the professionals selected by the parties. Where the State entrenches a feasibility for the parties to select an alternative way of dispute resolution by legal acts, the parties are given the legitimate expectations for relying on that way of dispute resolution, in particular implying that the awards adopted by the arbitration tribunals will be respected and enforced, thus the awards of the arbitration tribunals may be reviewed in exceptional cases only where the fundamental values are unambiguously breached, and the substance of arbitration, as an alternative way of dispute resolution, would be otherwise compromised” (Ruling of the Chamber of judges of the Supreme Court..., 2014).

This confidence in arbitration was not just an unsubstantiated gift from the courts to the arbitration. It entails the respect to individual autonomy and freedom of agreement in democratic society as well as the fact that the arbitral bodies earned this respect by its long and consistent work. The fact that the courts revoked merely several arbitral awards in all these years was and remains serious grounds for confiding in the arbitration in Lithuania.

The SCL, when analyzing the validity of arbitration agreement, has stated that “in case of doubt regarding the existence and validity of arbitration agreement, the doubts are interpreted in favor of the validity of arbitration agreement, i.e. the *in favor contractus* principle is applied. “Where the parties express the intention to settle the disputes at the arbitration tribunal, the court should exercise that will of the parties even though some aspects of the arbitration agreement are inaccurate as is the case in the case at issue. The parties’ will must be exercised where the arbitration agreement may be executed without favouring the rights of either party. Thus, firstly, the courts must interpret the arbitration agreement by applying the *in favor contractus* principle, and, secondly, when interpreting the arbitration agreement the priority must be given to the interpretation which would allow preserving the effectiveness of the arbitration agreement (principle of effective interpretation)” (Ruling of the chamber of judges of the Supreme Court..., 2013). The case-law of the courts has established the presumption of not only the validity of the agreement but also of the dispute arbitrability. The SCL has stated that “where the parties agree on the referral of the dispute to the arbitration tribunal, the presumption of arbitrability shall apply. It shall be considered that the dispute is capable of settlement by arbitration unless the presumption is rebutted” (Ruling of the chamber of judges of the Supreme Court..., 2015).

When it comes to arbitration as an alternative equivalent to the State jurisdiction, we cannot ignore the exception to the rule of the priority of justiciability, which was at first worded by the SCL and then entrenched in the CCP by the legislature. It goes back to the Soviet times when the civil procedure established the principle that in the presence of several claims of which at least one claim fell within the jurisdiction of the court, all of them were to be heard at the court (Article 24 of the CCP). So far only one exception to this rule has been made in favor of the arbitration. First of all, the SCL noted that “in the cases where part of the claims of the case is subject to the effective submission to arbitration and part of them is not and where such claims may be factually and legally bifurcated (they arise out of different transactions, between different persons, etc.), they shall be heard separately” (Ruling of the chamber of judges of the Supreme Court of Lithuania Civil Case Division of 2 April..., 2014). On 6 November 2016, Article 24 of the CCP was supplemented with paragraph 3, which led to the establishment of the respective rule at a legislative level.

Finally, the dispute between Lithuania and GAZPROM, where the SCL recognized the award of the Arbitration Institute of Stockholm by which the Republic of Lithuania was obliged to withdraw all claims arising out of the agreements containing the clause of arbitration from the State courts was the crowning achievement that made the recognition of arbitration as a way of dispute resolution equivalent

to administering civil justice. Despite the award being clearly disadvantageous for Lithuania, it was recognized, and its enforcement was allowed. The SCL stated that “taking account of the contractual nature of the arbitration, as an alternative way of dispute resolution, and legal nature of the arbitrators’ power to act as well as the substance and effect of the measures imposed by the arbitration tribunal, the Chamber sitting in extended composition states that the measures imposed by the arbitral award whose recognition and enforcement has been requested are to be qualified as the State’s obligation to execute the agreement (arbitration agreement) in kind – to adhere to the selected means of dispute resolution and refrain from actions which could compromise the arbitration proceedings or the effectiveness of the arbitral award that could potentially be adopted in the future. In the presence of the arbitral clause, the possibility for the arbitration tribunal to take measures to protect the arbitral proceedings on its own (i.e. without waiting for the State court that the party brought its claim before, where the claim might potentially breach the arbitral clause, to resolve the question of accepting the claim) is compatible with a legal nature of arbitration” (Ruling of the chamber of judges of the Supreme Court..., 2015).

The overview of the development of arbitration as an alternative means of dispute resolution in Lithuania unambiguously suggests that in the recent three decades this alternative to administering civil justice has become an integral part of the Lithuanian business environment culturally, socially and legally.

1.2. Mediation in Lithuania

Contrary to arbitration, the concept of mediation has not been well-known in Lithuania for a very long time. Although Lithuanians are a quite litigious nation, not a lot of discussions and research could have been found on possibility to settle disputes peacefully for an exceedingly long time. During the independence of Lithuania between 1918–1940, it was understood that parties can settle the dispute before going to court or during the all stages of hearing of civil case in court; it was also possible for the notaries to confirm the reached agreement (Mačys, 1924, p. 272), but it was not discussed much how the parties to the dispute should reach the settlement.

The first steps toward promoting mediation in Lithuania came in the year 2005, as judicial mediation was introduced in some courts of first instance. The Council of the Judges passed that year a decision No. 13P-348 Concerning the Pilot Court Mediation. At first mediation was introduced only in the Second District Court of Vilnius City. Later other courts joined the project. This pilot project was organized according to the example of the Quebec Court of Appeal project of court-annexed mediation.

EU directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (2008) was quite a huge stimulus to promoting mediation and adopting a law on mediation in Lithuania. In year 2008, the Law on Conciliatory Mediation in Civil Disputes was adopted and it came into force on the 1st of January 2010. It can be noted that for the Parliament of Lithuania (Seimas), it took only several months to adopt a law after the EU directive came into force. Such short terms could mean that the legislator did not have any real intention to promote mediation in the country but just to implement a directive.

This law formally defined mediation (the conciliatory mediation of civil disputes) in Lithuania as a procedure of the resolution of civil disputes in which one or several mediators assist the parties to a civil dispute in reaching a conciliatory agreement. The legislation also included legal norms on mediation agreement, principles of mediation, the nomination of a mediator, and settlements reached during mediation. The law was applied to private and to judicial mediation procedures.

Regardless of the law, mediation has not become popular in Lithuania after the law came into force. Still only judicial mediation was better known for the lawyers and public than private procedure.

For example, according to the Statistics on activities of courts in Lithuania, in the year 2012, only 17 judicial mediation procedures took place in Lithuania. The situation started to change as more judges got interested in the procedure and began to actively promote possibilities of judicial mediation during court procedures. For instance, in the year 2017, there were already 387 judicial mediations. Also in the year 2017 possibilities were introduced for notaries (Law on Notaries, 2015) and bailiffs (Law on Bailiffs, 2017) to provide mediation services. That means that more legal professions received the chance to provide mediation as a mean to help parties in their disputes to reach amicable settlements and at the same time advertise mediation to the society.

On 1 January 2019, the recast Republic of Lithuania Law on Mediation in Civil Disputes (Law on Mediation, 2017) went into effect. The objective of this law was to promote and enhance the use of mediation in civil disputes, and to establish a unified mediation system. The law regulated requirements for the mediators and their responsibilities, disciplinary responsibility, types of mediation, and peculiarities of judicial mediation. Also, mandatory mediation was introduced.

One of the aims of the legislator was to introduce requirements for mediators and to ensure that mediation services would be provided professionally. According to the new law, mediation services can only be provided by people who have passed a special examination (with certain exceptions), who meet other legal requirements (impeccable reputation, university education, mediation training), and who are included on the Republic of Lithuania List of Mediators (the list can be found here: <https://vgtpt.lrv.lt/lt/advokatu-mediatoriu-ir-psichologu-sarasai>).

One of the biggest aims of the recast law was to introduce mandatory mediation and also in such way try to promote possibilities of amicable settlement in Lithuania. By following the example of Italy and some other states, on the 1st of January 2020, Lithuania launched mandatory mediation as a prerequisite to contentious family legal proceedings in court. Under the new legislation, if one party applies for mediation, either the mediator or the State Guaranteed Legal Aid Service will send the other party a notice of initiation. If the consent of the other party to the dispute is not obtained within fifteen working days, that party is deemed not to have consented to the mediation. In such cases, the party to the dispute who initiated the mandatory mediation is entitled to apply to the court. If parties do not turn to mediation on their own initiative and at their own expense, mandatory mediation services will be paid for from the state budget and provided for up to four hours. The State Guaranteed Legal Aid Service assists in selecting and appointing mediators. Extending mandatory mediation into other fields of disputes is likely to be considered as well if its performance in family matters function well.

Private mediation, organized by arbitration institutions or just privately according to a mediation agreement, is still not popular in Lithuania and it is quite difficult to find the exact statistics on this practice. It can be mentioned that according to the law, private mediation must be also conducted by a mediator who is on the official list of mediators in Lithuania, or mediators who have licence to be mediators in other EU or in EFTA countries.

In Lithuania, it is possible to use modern technological means for mediation procedures. Until the pandemic of COVID-19, it was not popular to have such an online procedure, but it has changed as quarantine was declared in Lithuania on the 16th of March, 2020 (Resolution of the Government of Lithuania, 2020). Not all, but quite many mandatory mediation sessions have been taking place online since then, and some of them have been successful. It is anticipated that online mediation sessions will continue in the future.

Early studies of online mediation in the USA have found it to be an effective means of resolving disputes. It offers convenience, allowing parties to participate when they have the time. In addition,

e-talks can level the playing field between disputants who tend to naturally dominate discussions and those who are more reserved (Staff, 2020).

It can be agreed that “culture is an essential part of conflict and conflict resolution. Though cultures are powerful, they are often unconscious, influencing conflict and attempts to resolve conflict in perceptible ways” (Lebaron, 2003, p. 465). The abovementioned shows that mediation is still not well-known or popular in Lithuania. The reason for this could be that the society does not have a culture or deep-rooted traditions of peaceful settlement. Everyone understands that if you have a dispute, you should submit a claim and go the court. Also, it can be said that the advantages of mediation are not advertised enough. There is hope that the success of mandatory mediation in family disputes would help to promote mediation overall. It should be remembered that culture is an undergoing process and can be changed, but it takes time. It is particularly important that advantages of mediation and peaceful settlement could be felt by society.

It takes time to understand that the function of civil procedure is not just to grant a judicial relief, but also simply to be conflict resolution in a broad way. The correctness of a judgment is sometimes not the most important aim, but it is essential to resolve a conflict in such way that parties to the dispute could have proper relations in the future.

2. Development of ADR in Ukraine

2.1. Arbitration in Ukraine

“An arbitral tribunal is a fraternal court” says an ancient Ukrainian proverb (Collection of Ukrainian proverbs and sayings..., 2002, p. 54), which is a reflection of the historical wisdom of the people, and the history of arbitration in Ukraine is a clear evidence of this. It dates back to the times of the Kievan Rus and reflects the idea that during the rule of customary law the court of private individuals preceded the court of public power (Volkov, 1913, p. 65). It is rightly believed that it was then that the most common form of contractual settlement of disputes was through an arbitral tribunal, whose main task was not to strictly comply with the letter of the law, but to end hostility and discord (Mykhalsiy et al., 2007, p. 7), i.e. a conciliatory settlement of the dispute.

This approach to the administration of justice is quite principled and important for the Ukrainian society, which in general has an immanent peaceful way of resolve any conflicts. Therefore, the Ukrainian doctrine is of the opinion that the development of arbitration in Kievan Rus in the early stages of history took place independently, according to different from Western Europe algorithms, and in particular was not accepted from the outside as a novelty unfamiliar to our ancestors (Prytyka, 2006, p. 636).

An additional argument in favor of this idea is the fact that at the linguistic level in the languages of the East Slavic peoples there is an independent, not borrowed from other languages term *treteiskiy sud*, which corresponds to the Western analogue of *arbitration* (Prytyka, 2006, p. 638). This term comes from the word *tretiy* (“third”), and it is quite a literal and narrow understanding of the term *arbitral* (Zaozerskiy, 1899, p. 24).

Scholars differ in their opinions about the time of the origins of arbitration courts in the Kievan Rus, but the most reasonable position seems to link this point with the mentioning of arbitration in the charter of 1362.¹ At the same time, it is believed that this institution has been known since the 8th century; however, it did not gain prevalence in the field of trade at those times (Vynogradova, 1994, p. 6).

¹ It goes about the Charter of Grand Duke Dmitry Ivanovich Donsky with Prince Serpukhovsky Vladimir Andreevich the Brave from 1362, see more: Vitsyn (1856), p. 54.

The classification of the arbitration court at the times of Kievan Rus seems to be quite elaborate. It included such its forms as a court with the participation of a chief arbitrator or a “metropolitan court,” a court with the participation of several persons or a “hegumen court,” as well as the so-called court of “amicable order,” the decision in which was considered only as a point of view or an opinion, which was immediately communicated to the parties and immediately received the force of the final decision (Vynogradova, 1994, p. 8–9).

The development of arbitration on the territory of Ukraine was further due to the fact that in different historical periods Ukrainian lands were a part of different states. Thus, on the Left Bank of Ukraine (Cossack Hetmanate), an extensive system of arbitration courts, which operated on the basis of or with the assistance of the Hetman and the General Military Chancellery (Vynogradova, 1994, p. 9–10), was created for hearing civil and criminal cases. On the territory of the Right Bank of Ukraine, which was part of the Grand Duchy of Lithuania, there were Lithuanian statutes, which also provided for the existence of arbitration, the decision of which had the force of an official state court. The right to appeal against the decision of the arbitration court and its enforcement was also provided (Vynogradova, 1994, p. 9).

An important role in the establishment of the institution of arbitration in Ukraine was played by the Conciliar Law “On Arbitration” of 1649 and other legislative acts adopted before the middle of the 19th century in the Russian Empire, as well as the Regulations on Arbitration of 1831. This provision governed the activity of so-called legal or compulsory arbitration courts, which dealt with essentially corporate disputes until 1864, when only voluntary arbitration courts remained in the Civil Procedure Statute (Vynogradova, 1994, p. 11).

During the Soviet period, the institution of arbitration was not in great demand among both participants of the planned economy and legislators. In the conditions of totalitarian ideology and the priority of state property, the existence of an effective alternative to the Soviet courts was in fact denied, so in general, this institution did not become widespread.

Historical aspects of the development of arbitration in Ukraine suggest that the society had positively perceived and supported the idea of an alternative to the state court for centuries, which can be considered a sufficient cultural and sociological prerequisite for the further development of various alternative ways of dispute resolution. During the long stay of the territory of Ukraine as part of other states, as well as within the Soviet period of development, the perception of state bodies, including the judiciary, as representations of power holding the Ukrainian lands by force, in particular in such aspects as language, religious views, as well as cultural traditions of Ukrainian society became common.

The restoration of Ukraine’s independence in 1991 provided an opportunity to form an effective branch of arbitration, which proved its importance during this period. Recent reforms of civil and commercial procedural law suggest that this effective mechanism inspires confidence among businesses.

According to statistics, over the past 5 years, ICAC has accepted 2,335 cases, and in 2019 – 243 international cases from more than 50 countries.² About 3–5% of the number of cases are challenged, which indicates that the level of trust in this institution is quite high.

The case law of the Ukrainian Supreme Court, over the past few years, can be described as pro-arbitration, in particular because the new procedural law declares a pro-arbitration policy on the use of alternative dispute resolution and provides international commercial arbitration in Ukraine, with many new tools to improve its effectiveness and promote its development (Review of the case law of the Civil Court of Cassation..., 2019).

² Statistics and case law of the International commercial arbitration court can be found online here: <https://icac.org.ua/statystyka-ta-praktyka/>.

First of all, it should be noted that the Ukrainian Supreme Court in its legal positions adheres to the principle of autonomy of the arbitration agreement from the main agreement, that is, considers the arbitration agreement and the main agreement as two separate agreements, and therefore the invalidity of the agreement cannot automatically mean the invalidity of the arbitration agreement. In particular, in its decision of March 27, 2019 in the case of Norbert Schaller Gesellschaft m.b.H (Austria) against PJSC “First Investment Bank,” the Court noted that the principle of autonomy of the arbitration agreement (separability) provides that the validity of the main agreement in principle does not affect the validity of the arbitration agreement included in it and that the main agreement and the arbitration agreement may be subject to different laws. Therefore, it is seen as a guarantee that the dispute will be considered in any case by arbitration and makes it impossible to apply to public courts. As the Court rightly points out in its decision, when concluding an arbitration clause, the parties usually provide for the submission of any disputes to arbitration, including disputes concerning the validity of the agreement itself (unless such disputes are expressly excluded from the scope of the arbitration clause). If the party could refuse arbitration and deny the competence of the arbitrators, referring to the invalidity of the agreement, such an opportunity would always be used by the unscrupulous party to disrupt the arbitration.

This position on the nature and significance of the arbitration agreement deserves support, provides a solid basis for increasing business confidence in such a tool for resolving disputes in a democratic state governed by the rule of law.

An important achievement of the pro-arbitration approach in Ukrainian procedural and arbitration law was the appearance of Article 22 of the Code of Civil Procedure, which explicitly provides that any inaccuracies in the text of the agreement concerning the referral of the dispute to arbitration, international commercial arbitration and (or) doubts about its validity and enforceability must be interpreted by the court in favor of its effectiveness, validity and enforceability.

The same approach is demonstrated by the case law of the Supreme Court, which in Case № 906/493/16 the Grand Chamber of the Supreme Court referred to paragraph 113 of the UNCITRAL Secretariat’s Guide of New York Convention of 1958, which states that courts may also apply an approach aimed at the assistance of arbitration, i.e. interpret vague or inconsistent wording of arbitration agreements in such a way as to support these agreements. The pre-emptive right should be given to the intention of the parties to settle the dispute in arbitration. Thus, the Court determined that “the court shall interpret minor errors and inaccuracies in the name of arbitration institutions provided for in the arbitration agreement, in favour of international commercial arbitration.”

In another case (904/4384/17) delimiting the jurisdiction of state courts and international commercial arbitration, the Supreme Court determined that according to paragraph 7 of part 1 of Article 76 of the Law of Ukraine “On International Private Law” courts may accept and hear cases with a foreign element; however, this does not apply to cases where an arbitration agreement has been concluded between the parties to the dispute, and such agreement is valid, has not expired and in respect of it there is no stated impossibility to enforcement. This is due to the fact that the court to which the claim is referred concerning the issue subject to the arbitration agreement is obliged, if either party so requests, not later than the submission of its first application on the merits of the dispute, to terminate the proceedings and refer the parties to arbitration.

The current legislation of Ukraine (Articles 124 of the Constitution of Ukraine, Articles 7, 8 of the Law of Ukraine “On the Judiciary and the Status of Judges”, Part 1 of Article 16 of the Civil Code of Ukraine, Part 3 of Article 1 of the Commercial Procedure Code of Ukraine, in the wording valid at the time of case consideration, Articles 1, 7 of the Law of Ukraine “On International Commercial Arbitration,” part 2 of Article 12 of the Commercial Procedure Code of Ukraine) does not refute the

statutory obligation of the commercial court to terminate the proceedings if the dispute is not subject to commercial court. However, the exercise by the parties of the right to conclude an arbitration agreement on the transfer to the arbitration of disputes arising from their agreement or in connection with it, is not a waiver of the right to apply to the commercial court, as it is the choice of the parties to such an agreement of one of the ways of realization of the right to apply for protection of their rights (<http://www.reyestr.court.gov.ua/Review/73702604>).

It should also be added that in the ECtHR judgment, in the case of *Regent Company v. Ukraine* (application no. 773/03) of 3 April 2008, the Court equated the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce (ICAC) to a “tribunal established by law,” acting in accordance with the Law of Ukraine “On International Commercial Arbitration” and its internal Rules, similar to proceedings in civil or commercial courts and the law established the right to appeal its decisions to the Court of Appeal of Kyiv, which could review the ICAC decisions on the grounds established by law. The ICAC remained the only arbitral tribunal in Ukraine that could resolve “commercial disputes with a foreign element” under the Law, and according to the Law of Ukraine “On International Commercial Arbitration” and Article 3 of the Law of Ukraine “On Enforcement Proceedings” the ICAC decision is considered equivalent to a court decision subject to enforcement.³

Another positive step forward, which clearly confirms the pro-arbitration position of the Supreme Court, is its legal position on the inadmissibility of excessive formalism in the form and content of the application for revocation of the decision of international commercial arbitration, which violates the right of access to justice, stated in the decision in the case of *Ansercone Enterprise LP (United Kingdom of Great Britain and Northern Ireland) v. Fastiv Bakery Complex LLC (Ukraine)* of 18 December 2018. In that decision, the Court recognized as incorrect the decision of the first instance court, which found that the applicant had not complied fully with the obligations, as the copy of the agreement containing the arbitration clause had not been duly certified and lacked a legally binding signature. In fact, the copy provided did not contain such an inscription on each page of the agreement, but only on the last page – however, all pages were stitched and numbered. This was the basis for the Court’s finding of excessive formalism, which consisted in a too strict interpretation of the procedural rule by national law and deprived the applicants of the right to go to court.

2.2. Mediation in Ukraine

As well as in Lithuania, the concept of mediation in Ukraine has not been known since ancient times. However, since the 2000s, the possibility and necessity of using mediation as an alternative way to resolve a dispute (Kyseliova, 2011), as well as ways to legislatively regulate this institution, have been quite actively discussed in science. In particular, over the past decade, 5 draft laws have been submitted to the Verkhovna Rada of Ukraine, the last of which was prepared by the Working Group established to prepare a draft Law of Ukraine on mediation in July 2019. The main provisions of this project have already been analyzed in detail in other publications (Izarova, Prytyka, Kravtsov, 2020, p. 389–399), but some of them have been updated for the present study. It should be noted that the 2019 draft law was recalled during the last change of the Ukrainian government; however, interest in the mediation procedure among Ukrainian society, students and practitioners is growing, as evidenced by the data of a small survey conducted as part of this study.

Regarding the assessment and public perception of the mediation procedure, it should be noted that

³ See in the judgment of the European Court of Human Rights of 3 April 2008 in the case of *Regent Company v. Ukraine* (application no. 773/03).

on the territories which historically were a part of Ukraine, arbitration courts have long been active, as we have already mentioned in the previous part of our work. However, they cannot be considered an effective alternative to traditional courts, as state courts in Ukraine were established only during the period of the 18th–20th centuries,⁴ and their competence extended only to a part of the population and to commercial or trade relations. The extremely widespread serfdom in Ukraine was abolished only in the 1860s (Gurzhiy, 2009, p. 404), which actually freed huge masses of the population, among others, from the judicial power of the landowner. This happened about 4–5 generations ago, so a rather specific Soviet approach to defining the nature and role of justice in society, which prevailed in Ukraine for a little over 70 years, and which in fact is the only one that was familiar to such a wide range of people – still significantly influences the formation of the legal doctrine, as well as the cultural and social preconditions for the introduction of out-of-court dispute resolution in Ukraine.

It is reasonably believed that the legal system of Ukraine was formed under the influence of the Romano-Germanic legal tradition, which led to a widespread approach to resolving disputes as a struggle or rivalry, the result of which is limited to two options: one side always gets the desired result and the other side remains in the disadvantaged position (Polishchuk, 2019, p. 11). Indeed, on the example of the development of civil procedural legislation of Ukraine in the Soviet and post-Soviet period, we can trace the active phase of the introduction of the adversarial principle in civil proceedings, which manifested itself in numerous procedural instruments, rights and obligations of the parties (Kroitor, Mamnitskiy, 2019, p. 30–41) and inspired parties to struggle rather than to find a compromise. On the other hand, concerning conciliation of the parties, the law contained only a provision on such a right itself, without specifying the procedure, and did not contain at all any incentives to reconcile the means of influencing the conduct of the parties.

At the same time, during the reforms of procedural legislation, the CPC in the wording of 2017 was amended⁵ to reflect the relevant changes to the Constitution of Ukraine,⁶ which virtually negated the previous provisions of the 1996 Constitution, which extended the jurisdiction of state courts to all legal relations in the state⁷ and led to a catastrophic increase in the number of appeals to state courts. Approximately 4 million cases are heard annually in the courts of Ukraine, of which approximately 1 million 200 thousand are in civil proceedings.⁸

Not surprisingly, during the intensification of European integration processes in Ukraine, ideas began to be heard about borrowing the European experience of conciliatory alternative settlement of disputes, which relate to disputes of a private law nature between individuals. Today, there are no

⁴ In particular, the Supreme Court of Ukraine or the General Court was established on December 15 (2), 1917 by the Law of the Central Rada. This judicial body consisted of three departments: civil, criminal and administrative – and performed on the territory of Ukraine all the functions that still belong to the Governing Senate in judicial matters and in matters of supervision of judicial institutions and persons of the judiciary. For details, see: Prylutskiy (2019), p. 6–16.

⁵ Art. 16 of the CPC provides that the Parties take measures to pre-litigate a dispute by mutual agreement or in cases where such measures are mandatory by law.

⁶ Art. 55 of the Constitution of Ukraine guarantees the right of everyone to protect their rights and freedoms from violations and unlawful encroachments by any means not prohibited by law, and Art. 124 introduced the possibility of a mandatory pre-trial settlement of a dispute.

⁷ The Constitution of Ukraine of 1996 contained provisions on the principle of the rule of law (Article 8), but at the same time the provisions on the protection of human and civil rights and freedoms by the court (Article 55) and on the administration of justice were supposed to be performed exclusively by the courts (Article 124).

⁸ Overview of data on the implementation of justice in 2017 available at: https://court.gov.ua/userfiles/file/DSA/2018_DSA_NAKAZY/ogl_2017_copy.pdf. Overview of data on the implementation of justice in 2018 available at: https://court.gov.ua/userfiles/media/media/ogl_2018.pdf and Analytical tables on the state of justice in 2019: https://court.gov.ua/inshe/sudova_statystyka/analit_tabl_19.

provisions about such measures being mandatory by law that oblige the parties to pre-trial settlement of the dispute, but the abovementioned amendments to the Constitution have helped to create the necessary basis for this.

At the same time, even the latest draft law on mediation of 2019 does not provide for a mandatory procedure for settling disputes, but only a voluntary one. Disputes over the necessity of mediation are quite active, as proponents of the Soviet approach to the concept of justice and the principle of administration of justice only insist that any mandatory pre-trial proceedings restrict a person's right of access to justice.

Accordingly, in the 2019 Draft law on Mediation, mediation is viewed as a voluntary, extra-judicial, confidential structured procedure for resolving a conflict (dispute) through negotiation between its parties, conducted by a mediator (mediators).

Mediation can be used in any conflicts (disputes) arising, in particular, from civil, family, labor, economic, administrative legal relations, as well as in criminal proceedings when concluding agreements on reconciliation between the victim and the suspect, the accused and in other spheres of social relations. Mediation even extends to disputes with a foreign element, including international disputes arising from business relationships.

Principles of mediation according to the 2019 Draft law reflect the main European standards of mediation, in particular, the EU Directive on certain aspects of mediation in civil and commercial matters (Directive on Mediation) of 21 May 2008; Recommendation of the Committee of Ministers of the Council of Europe to Member States of 2 January 1998 on mediation in family matters, Recommendation of the Committee of Ministers of the Council of Europe of 18 September 2002 on mediation in civil matters; European Handbook of Mediation Law-making prepared by CEPEJ.

Therefore, it the proposed principles of mediation are the principles of voluntariness; confidentiality; independence and neutrality, impartiality of the mediator; self-determination and equality of rights of the parties of mediation.

Along with this, it should be noted that the activity of mediators in Ukraine is carried out without legislative regulation. As in Lithuania, it is very difficult to find specific data on their activities. We may even say about a separate area of professional activity which is the answer to market supply due to which a lot of organizations providing mediation services, such as the Ukrainian Mediation Center, the Mediation Center of Kyiv Chamber of Commerce and Industry, Lviv Mediation Center were created. But there are several associations of mediators in Ukraine, the most famous of which is the National Association of Mediators of Ukraine, which is a self-regulatory, non-profit public association of professionals working in the field of mediation.

At the same time, it should be noted that there is a certain demand for the legislative regulation of mediation in Ukraine, as evidenced by the survey.⁹

The survey conducted in the framework of this study was prepared in order to clarify the attitude of specific groups to the question of the need to implement mediation, its pathway, as well as criteria for its effectiveness in the future. The survey was conducted on June 1–15, 2020. The respondents, 200 persons in total, were divided into several groups – legal practitioners and law students (50%

⁹ The authors express their sincere gratitude to all who took an active part in organizing and conducting this survey, in particular Olena Shurny, Assistant of Department of Justice, Faculty of Law, Taras Shevchenko National University of Kyiv, Mykhailo Shumyl, Head of Legal Administration (IV) of the Department of Analytical and Legal Work Court, Kateryna Narovska, mediator, honorary member of the National Association of Mediators of Ukraine, as well as Mykola Selivon, chairman of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine.

each). In turn, among the practicing lawyers there were several groups – directly involved in dispute resolution (lawyers, judges, mediators and arbitrators – 25%), as well as persons indirectly influencing the resolution of disputes – researchers and teachers (25%). Among the persons involved in resolving disputes, the entities resolving the dispute (judges, arbitrators – 10%), as well as facilitating its resolution (mediators – 5%) and representing the interests of the parties (lawyers – 5%) can be singled out.

The vast majority of respondents believe that out-of-court dispute resolution is a worthy alternative to litigation, but in specific cases only (75%). Among the important advantages of alternative dispute resolution most respondents mentioned transparent and clear rules (half of those directly involved) and the fact that both parties to the dispute were satisfied with the outcome. This is especially important to assess the effectiveness of this procedure, reducing the risk of non-compliance with the decision reached by the parties. For example, in court, half of the respondents are absolutely convinced that only one of the parties is satisfied with the result. At the same time, the majority of respondents rated the court procedure as costly and exhausting (one third of the respondents). Most of the disputes considered out of court through mediation are marital and family disputes (50%), as well as those arising from contracts (30%). Interesting is the fact that almost half of the respondents believe that the out-of-court settlement procedure can help the parties to the dispute in resolving it, and the other half are convinced that it can help in some cases, but none answered negatively. It is also important that the majority of respondents are convinced that legislative regulation of out-of-court dispute resolution in Ukraine is necessary, in particular, in order to legalize this activity and establish rules of conduct. At the same time, about 10% of the respondents believe that legislative regulation is not needed, and the procedure can be agreed at the level of a self-regulatory organization. It should be added that almost all respondents agree that it is necessary to study the experience of other countries in the implementation and application of out-of-court settlement of disputes, in particular, of leading European countries (85%) and neighbouring countries (28.9%), but not of former Soviet countries (7%).

At the same time, it is necessary to focus on the level of trust in the courts and law enforcement system (77%), as well as the level of freedom and democracy in these countries (70%), as well as mental closeness, common social and cultural traditions (50%) and common sources of law and legislation (50%). Respondents associate their hopes about the introduction of out-of-court dispute resolution in Ukraine with the reduction of conflicts in society and the unloading of courts.

Analyzing the results of the survey, we can say that the part of Ukrainian society that is competent in law tends to think about the need for and effectiveness of out-of-court dispute resolution, which in specific cases is an alternative to costly litigation in state courts. This can be considered a sufficient precondition for the further development of alternative dispute resolution in Ukraine, by settling the relevant relations at the level of legislation mediation.

Conclusions

Arbitration has longer traditions both in Lithuania and Ukraine in comparison with mediation. Some allusions to the arbitration go back to the Middle Ages. During Soviet times, in both countries, understandably, such a method of alternative dispute resolution was not promoted.

Mediation does not have long-lasting traditions in Lithuania and Ukraine, and the first steps to stimulate this method of alternative dispute resolution were made only in the newly adopted law in Lithuania and a draft law on mediation in Ukraine. It is hoped that a new law on mediation in Ukraine could be adopted considering the experience of Lithuania.

Arbitration is also much more influenced in both countries by the existing international and national case law than mediation.

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Legal, Social and Cultural Prerequisites for the Development of ADR Forms in Lithuania and Ukraine

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S u m m a r y

This article analyzes the legal, social and cultural prerequisites for the development of the institutes of arbitration and mediation in Lithuania and Ukraine. The authors concluded that arbitration has longer traditions both in Lithuania and Ukraine in comparison with mediation. Some allusions to the arbitration go back even to the Middle Ages. During Soviet times, in both countries such a method of alternative dispute resolution was not promoted. Mediation does not have long-lasting traditions in Lithuania and Ukraine, and the first steps to stimulate this method of alternative dispute resolution were made only in the newly adopted laws on mediation.

Teisinės, socialinės ir kultūrinės sąlygos AGS formų plėtrai Lietuvoje ir Ukrainoje

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S a n t r a u k a

Straipsnyje analizuojamos teisinės, socialinės ir kultūrinės prielaidos arbitražo ir mediacijos institutų vystymuisi tiek Lietuvoje, tiek ir Ukrainoje. Autoriai nustatė, kad arbitražas turi kur kas ilgesnes tradicijas abiejose valstybėse nei mediacija. Tam tikrų arbitražo instituto elementų randama net viduramžiais. Sovietų Sąjungoje, suprantama, alternatyvūs ginčų sprendimo būdai nebuvo skatinami. Mediacija neturi ilgų tradicijų tiek Lietuvoje, tiek ir Ukrainoje ir pirmi žingsniai skatinti ši alternatyvų ginčų sprendimo būdą pradėti žengti tik priėmus mediacijos įstatymus.

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