

Role of state in developing mediation – In EU and Ukraine (a comparative perspective)

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Abstract: Ukraine's status as a candidate country and the start of negotiations on accession to the European Union require a comparative analysis and harmonization of Ukrainian legislation with the legislation of other EU Member States and European legislation. One of the areas of comparative jurisprudence is the development of mediation as a legal institution, including the state policy of legislative regulation of the mediation institution. This development has attracted the attention and support of the EU and the Council of Europe, as European democratic standards require cooperation between the state and citizens or individuals. However, the need for a more cohesive and unified approach to mediation across the EU remains crucial, as highlighted by De Palo & Trevor (2012),¹ who argue that such harmonization would strengthen the effectiveness and accessibility of mediation services. The purpose of this article is, first, to compare the role of the state in the development of mediation in the EU and Ukraine. The state of research and literature on this topic in the EU and Ukraine is not sufficiently systematic, so a comparative analysis of this topic is relevant. In terms of methodology, the paper applies logical and linguistic methods. Still, some conclusions are based both on statistical data and on the observations of the participants, in particular, on their own mediation practice. Despite the more active role of the state in the development of mediation in the EU, this process cannot be called a 'success story'. To a certain extent, we can observe similarities between the EU and Ukraine regarding successes, challenges, and the state's role as one of the actors promoting the development of mediation.

Keywords: Mediation. EU law. Ukrainian law. The role of the state.

Summary: **1** Introduction – **2** Development of mediation in EU and Ukraine – **3** Role of state in development mediation in EU and Ukraine – Comparative conclusions – References

1 Introduction

The status of Ukraine's candidacy for European Union (EU) membership² underscores the imperative for a comparative examination between Ukrainian legislation

¹ De Palo, G., & Trevor, M. (2012). "EU Mediation Law and Practice: The Need for a Coherent Approach". *European Review of Private Law*, 20(5), pp. 1237-1262.

² On 17 June 2022, the European Commission issued its opinion on the application for EU membership and on 23 June, the European Council granted candidate status to Ukraine. On 14 December 2023, the European Council decided to open accession negotiations with Ukraine.

and that of other EU member states, thus engendering a significant discourse “novelty” and introducing a fresh academic context. One focal area of comparative legal analysis pertains to the advancement of mediation, including the influence of governmental intervention on its evolution. Harmonisation in civil litigation across EU countries has been increasingly discussed, as Albors-Llorens (2012)³ highlights the necessity of a cohesive approach to ensure consistency and accessibility in dispute resolution mechanisms.

Mediation has previously garnered *attention and endorsement from the Council of Europe (CoE)*,⁴ an integral institution of European integration to which Ukraine has been affiliated since the 1990s.⁵ Nevertheless, the progress of mediation across different legal domains varies among signatory states, with some exhibiting robust mediation cultures and comprehensive legislative frameworks or procedural protocols. Hopt & Steffek (2013)⁶ provide a comparative perspective on how mediation principles and legislation differ among EU Member States, illustrating the challenges in creating a unified mediation framework across diverse legal systems. While the *CoE recommendations and resolutions*⁷ hold a soft law status, they are applicable across all member states, aligning with European democratic standards that advocate for state collaboration with citizens.

The primary *objective of this article* is twofold: firstly, to juxtapose the current state of mediation development in EU member states and Ukraine, and secondly, to assess the extent of achievements and challenges, as well as adherence to Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters of 21 May 2008 (hereinafter – Directive 2008/52/EU)⁸ and Recommendations of the CoE and CEPEJ Guidelines.⁹ Despite variations in the depth of research and literature on this subject between the EU and Ukraine, a comparative analysis of mediation regulations represents

³ Albors-Llorens, A. (2012). “Mediation and Its Impact on Civil Litigation in Europe: Is There a Need for Further Harmonization?” *Cambridge Yearbook of European Legal Studies*, 14, pp. 187-209.

⁴ See recommendation of 5 September 2001, R(2001) 9 On Alternatives To Litigation Between Administrative Authorities And Private Parties [<https://rm.coe.int/16805e2b59>].

⁵ Ukraine – since 1995.

⁶ Hopt, K. J., & Steffek, F. (2013). “Mediation: Principles and Regulation in Comparative Perspective”. *European Review of Private Law*, 21(1), pp. 87-120.

⁷ Restricting only to normative regulations of a *lex generalis* nature, these are recommendations: R (81) 7, referring to (78) 8; R (86) 12 and the resolution no. 1 (2000). A for *lex specialis* nature see recommendations other than R (2001) 9 no.: R (87) 18 Concerning The Simplification Of Criminal Justice; R (99) 19 Concerning Mediation In Penal Matters; R (98) 1 On Family Mediation; R (2002) 10 On Mediation In Civil Matters. See also: *European Code of Conduct for Mediators* – http://ec.europa.eu/civiljustice/adr/adr_ec_en.htm.

⁸ <http://data.europa.eu/eli/dir/2008/52/oj>.

⁹ Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters – CEPEJ(2007)13E (12/2007), Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters – CEPEJ(2007)14E (12/2007), Guidelines for a better implementation of the existing Recommendation on alternatives to litigation between administrative authorities and private parties – CEPEJ(2007)15E (12/2007).

an innovative approach. Methodologically, the study draws upon literature, online resources, and legislative enactments, employing logical and linguistic analysis, supplemented by participant observations and the author's mediation practice. However, the primary methodological framework employed is the comparative method, facilitating a nuanced understanding through a cross-jurisdictional lens.

2 Development of mediation in EU and Ukraine

2.1 EU Countries

The XX-XXI centuries represent a period in which many countries began resolving conflicts through the mediation process, particularly evident in the European Union. It is worth noting that the mediation procedure has specific characteristics, prompting the need to explore international experience in this matter. Let's define these features.

Firstly, mediation distinguishes itself with universality. Examining international practices reveals a universally applicable model observed today. Mediators, irrespective of continent or cultural nuances, share a common universal "mediation" language, facilitating the free exchange of experiences. This unique communication language necessitates preservation and development through increased intensity of international interactions.

Secondly, the universality of the mediation development process is noteworthy. According to most researchers studying mediation issues, the universality of its procedure was introduced in the United States and subsequently spread across different continents. It is essential to emphasize that each European country has undergone its own path of mediation development, facing intricate processes regarding its integration into societal consciousness, legal system, and judicial proceedings.¹⁰

¹⁰ E.g.: T. Kyselova, G. Eromenko, Медіація в Україні: Щодо Необхідності Нормативно-Правового Регулювання (The Need to Regulate Mediation in Ukraine), *Interdisciplinary Humanities Studies: Studia Jurisprudentia*, 2015/2, [available at SSRN: <https://ssrn.com/abstract=2671775>]; S. Fursa, *Mediation in Ukraine: urgent issues of theory and practice and necessity of legislative regulation* [in:] C. Esplugues, L. Marquis (eds.), *New Developments in Civil and Commercial Mediation*, New York 2015, p. 737–754; T. Kyselova, *Institutional preconditions for mediation reform in Ukraine*, *Social'no-ekonomični Problemy i Deržava*, 2016/15(2), p. 78-84; N. Mazaraki, *Mediation in Ukraine: problems of theory and practice*, *Foreign Trade, Economics, Finance, Law*, 2016/84(1), p. 92–100 [retrieved from <http://journals.knute.edu.ua/foreign-trade/article/view/533>]; T. Tsuvina, *National Mechanisms of the Enforcement of Agreements Resulting from Mediation: EU Experience and Ukrainian Perspectives*, *Problems of Legality* 2022/158, p. 110–123 [<https://doi.org/10.21564/2414-990X.158.264998>]; O. Mozhaikina, *Legal regulation of mediators' professional training in Ukraine and Slovakia*, *Foreign Trade, Economics, Finance, Law*, 2022/124(5), p. 30–39 [[https://doi.org/10.31617/3.2022\(124\)03](https://doi.org/10.31617/3.2022(124)03)].

The role of the state in the development of mediation can be manifested through legislative regulation, the model of introduction and regulation of mediators' activities – which are significant components of this development.

Legal Framework

Any statutes, or procedural rules that might exist in each Member State are examined to demonstrate how firmly embedded mediation is in each jurisdiction. The analysis examines whether the regulation is uniform across the EU.

It is now more than 15 years since the European Union adopted Directive 2008/52, which is an important step in the development of legislation aimed at regulating mediation in civil and commercial matters. The Mediation Directive marked the end of a long journey by the European Parliament to formally recognise alternative dispute resolution ("ADR") in all EU Member States. But it also signalled the opening of a new direction –the path to mediation as a viable form of dispute resolution in the Member States. As Hopt and Steffek (2013)¹¹ highlight, despite the Directive's goal of harmonisation, significant diversity exists in the way mediation has been regulated across different EU nation.

The first decisive steps towards the adoption of the Mediation Directive were taken in 1999, when EU political leaders gathered in Tampere, Finland, and formally decided that EU member states should establish "alternative, non-judicial procedures" for dispute resolution as part of the promotion of "better access to justice in Europe". According to De Palo and Trevor (2012),¹² the Directive emerged from an overarching EU policy promoting Alternative Dispute Resolution (ADR) to enhance access to justice. In other words, ADR is useful and should be promoted through legislation.

Directive 2008/52/EU was envisioned as such an approach, with a primary focus on broad areas encompassing civil and commercial matters. However, its significance extends beyond these realms, proving relevant in family matters, particularly those pertaining to matrimonial issues and parental responsibilities. It is essential to recognize that this Directive isn't the initial European document addressing alternative dispute resolution. Instead, it builds upon the Council's May 2000 Conclusions on alternative methods of settling disputes under civil and commercial law. This earlier document emphasizes the necessity of establishing fundamental principles in the realm of alternative dispute resolution to facilitate

¹¹ Hopt, K. J., & Steffek, F. (2013). "Mediation: Principles and Regulation in Comparative Perspective". *European Review of Private Law*, 21(1), pp. 87–120.

¹² De Palo, G., & Trevor, M. (2012). "EU Mediation Law and Practice: The Need for a Coherent Approach". *European Review of Private Law*, 20(5), pp. 1237-1262.

the development and operation of extrajudicial procedures for settling civil and commercial disputes and enhancing access to justice.

The Mediation Directive set out minimum regulatory standards for Member States to transpose mediation legislation into their national legal systems. Thus, Member States had the freedom of choice to implement this regulatory framework as they chose, including the possibility of adopting stricter standards. The purpose of the Mediation Directive, as stated in Article 1, is to “promote access to alternative dispute resolution and to facilitate the amicable resolution of disputes by promoting the use of mediation and ensuring a “balanced relationship”.

One of the steps taken by the state to strengthen the development of mediation is the introduction of a special law on mediation.

Analysing these best practices and national legislation in the field of mediation, it should be noted that mediation practices in the *27 EU members*, vary. They can be split into 3 groups. *The first group* of countries has a special law on mediation (Austria,¹³ Bulgaria,¹⁴ Croatia,¹⁵ Cyprus,¹⁶ Czech Republic,¹⁷ Germany,¹⁸ Hungary,¹⁹ Ireland,²⁰ Lithuania,²¹ Malta,²² Portugal,²³ Romania,²⁴ Slovakia,²⁵ Slovenia,²⁶ Spain²⁷). *The second group* of countries where mediation is regulated in civil procedure codes (Luxembourg,²⁸ Poland²⁹), judicial mediation (France³⁰), judicial mediation (Estonia³¹), statute on court-annexed mediation (Finland), other

¹³ https://www.viac.eu/images/law/Austrian_Mediation_Act.pdf.

¹⁴ Mediation Act promulgated on 17.12.2004. Since then, the law has undergone 6 amendments - the latest on 2.02.2023, which will come into force on 1.07.2024 <https://www.justice.govt.bg/home/normdoc/2135496713>.

¹⁵ <https://hgk.hr/documents/mediation-act586b9f6251f81.pdf>.

¹⁶ [https://www.mjpo.gov.cy/mjpo/mjpo.nsf/all/1DB25AD29B67BB94C2258614005BEBB8/\\$file/The%20Certain%20Aspects%20of%20Mediation%20in%20Civil%20Matters%20Law%20of%202012%20\(Law%20159\(I\)%202012\).pdf?openelement](https://www.mjpo.gov.cy/mjpo/mjpo.nsf/all/1DB25AD29B67BB94C2258614005BEBB8/$file/The%20Certain%20Aspects%20of%20Mediation%20in%20Civil%20Matters%20Law%20of%202012%20(Law%20159(I)%202012).pdf?openelement).

¹⁷ https://www.cak.cz/assets/zakon-o-mediaci_aj.pdf.

¹⁸ https://www.gesetze-im-internet.de/englisch_mediationsg/englisch_mediationsg.html.

¹⁹ <https://njt.hu/jogszabaly/2002-55-00-00>.

²⁰ <https://www.irishstatutebook.ie/eli/2017/act/27/enacted/en/html>.

²¹ <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/a1214b42d40911eb9787d6479a2b2829?jfwid=13yl78zgim>.

²² <https://legislation.mt/eli/cap/474/eng/>.

²³ https://www.arbitrare.pt/media/4261/law-on-mediation_no-29-2013-19-april.pdf.

²⁴ <https://www.cmediere.ro/legislatie/7/>.

²⁵ <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2004/420/20120101.html>.

²⁶ <http://www.sloarbitration.eu/Portals/0/Zakonodaja/Mediation%20in%20Civil%20and%20Commercial%20Matters%20Act.pdf>.

²⁷ https://www.mjjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Act_on_mediacion_in_civil_and_commercial_matters_%28Ley_5_2012_de_mediacion_en_asuntos_civiles_y_mer.PDF.

²⁸ https://legilux.public.lu/eli/etat/leg/code/procedure_civile/20231101.

²⁹ Provisions regarding mediation are contained in articles 183.1 - 183.15 of the Code, while articles 184-186 regulate court settlements. <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19640430296/U/D19640296Lj.pdf>.

³⁰ https://allowb.org/acts_pdfs/CPC.pdf.

³¹ <https://www.riigiteataja.ee/akt/13240243>.

laws (Belgium,³² Greece,³³ Denmark,³⁴ Italy³⁵). *The third group* of countries where mediation is practised but not regulated by law is - the Netherlands.

While the EU Mediation Directive aims to establish consistency in key areas like confidentiality, enforceability of settlement agreements, and mediation's effect on limitation periods, some EU nations lack local regulations on these matters. Furthermore, even in countries that have incorporated the Directive's provisions, varying legislative approaches exist, leading to differences in addressing these issues.

As Coben and Thompson (2006)³⁶ illustrate, regulatory approaches to confidentiality in mediation can create paradoxes. For example, while confidentiality aims to promote open dialogue, excessive regulation can limit a mediator's flexibility and discretion. This tension can, at times, affect the enforceability of mediated agreements, which varies widely among EU countries, thus affecting the efficiency and appeal of mediation. Regarding the confidentiality of mediation proceedings: While Bulgarian, Belgian, Greek, and Slovenian law impose confidentiality obligations on all participants involved in mediation, some countries, like Germany (according to the current draft of the Mediation Act), only mandate confidentiality for the mediator and their staff, not the parties or other participants. In Spain, the Netherlands, the Czech Republic, and currently in Germany, there are no specific legal provisions regarding confidentiality, leaving it to be addressed contractually through confidentiality agreements between the parties and the mediator. Given these disparities, it is strongly recommended that a confidentiality clause be included in the contract signed by the mediator and the parties before commencing any cross-border mediation to ensure the confidentiality of the proceedings.

Regarding the enforceability of mediation agreements, two primary approaches have been adopted: some countries require the mediation agreement to be concluded in the form of a notarial deed with explicit consent to enforceability (Czech Republic, Slovenia, Netherlands, Bulgaria), while others achieve enforceability through court approval, treating the agreement as a judicial settlement (Belgium, Germany, Italy, Slovenia, Netherlands, Bulgaria). In certain countries (Bulgaria, Slovenia, Netherlands), both methods are available.

Regarding the impact of mediation on statutes of limitation: In Germany, Belgium, Bulgaria, and Slovenia, the limitation period for a claim undergoing

³² https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1967101002&table_name=loi.

³³ <https://www.taxheaven.gr/law/4640/2019>.

³⁴ <https://www.uv.es/medarb/observatorio/leyes-mediacion/europa-resto/denmark-administration-of-justice-act-chapter-27.pdf>.

³⁵ <https://www.101mediatori.it/Public/OpenArticleAttachment/1160?attachmentId=245>, <https://www.gazzettaufficiale.it/eli/id/2023/10/31/23G00163/sg>.

³⁶ Coben, J. R., & Thompson, P. N. (2006). "Disputing Irony: A Systematic Look at Litigation About Mediation". *Harvard Negotiation Law Review*, 11, pp. 43-80.

mediation halts during the mediation process. Moreover, in Slovenia, any deadline for initiating legal action related to a mediated claim, as stipulated by special regulations, cannot elapse sooner than 15 days after mediation concludes. Conversely, in other countries like Spain, the Netherlands, and the Czech Republic, existing legislation does not entail the suspension of limitation periods.

Mediation Schemes

The focus of this section is an investigation of schemes that have been implemented in each Member State. Regarding the requirement of mediation prior to initiating court proceedings.³⁷

In Italy, legislation mandates mediation in specific dispute areas, including tenancy, land rights, property partition, inheritance, leases, loans, rental companies, vehicle and boat accidents, medical malpractice, defamation, contracts, insurance, and banking. Failure to engage in mediation before litigation results in the court dismissing the case.

In Germany, Article 15a of the Introductory Law to the Code of Civil Procedure³⁸ grants German states the authority to mandate pre-litigation conciliation for small claims (up to EUR 750), neighbour disputes, and libel suits. Several German states have enacted mandatory alternative dispute resolution (ADR) schemes.

Under Article 16, Paragraph 2 of the Slovenian Mediation Act, courts will dismiss an action if mandatory mediation proceedings are stipulated by law before filing the action.

In various jurisdictions, including Belgium and Slovenia, if contract parties agree to mediate disputes, courts will uphold this agreement. Failure to pursue mediation prior to litigation may result in the court staying the case (Belgium) or dismissing it (Slovenia, Germany).

Furthermore, in countries such as Italy, Slovenia, and Belgium, parties unreasonably refusing mediation may incur judicial costs, irrespective of the case outcome.

These instances underscore substantial disparities in mediation's legal framework and ramifications across EU member states, underscoring the need for careful consideration in cross-border mediation scenarios.

Article 5.2 of Directive 2008/52/EU provides Member States with the option, although not the obligation, to make mediation mandatory, provided that the right of access to justice is guaranteed. Thus, Member States that have so far refused

³⁷ For a comparative perspective, refer to an interesting study on multiparty mediation in Brazil, particularly involving the public sector. FERREIRA, Daniel B.; SEVERO, Luciana. Multiparty Mediation as Solution for Urban Conflicts: A Case Analysis from Brazil. *BRICS Law Journal*, v. 8, n. 3, p. 5-29, 2021. <https://doi.org/10.21684/2412-2343-2021-8-3-5-29>.

³⁸ https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html.

to introduce mandatory mediation to increase its use have the option of using other regulatory instruments, such as mandatory information sessions or financial incentives.

The concept of voluntary participation in the mediation process is enshrined in the Recommendation of the Committee of Ministers of the Council of Europe on Family Mediation of 21 January 1998 No (98)³⁹ (in particular, the provision “mediation should not be compulsory”), as well as in paragraph 10 of the preamble to Directive 2008/52/EU, which states: “This Directive shall apply to processes whereby two or more parties to an international dispute attempt to reach a settlement agreement on a voluntary basis by means of a mediator”.

Having analysed the Member States’ mediation legislation, it can be concluded that usually one of the first principles of mediation in the text of the law is voluntariness (voluntary participation of the parties in the mediation process). In particular, Article 4 of the Law of Moldova “On Mediation”, as well as Article 1731 of the Belgian Judicial Code, Article 5 of the Bulgarian Law “On Mediation”, Article 5 of the Law of Ukraine “On Mediation”.

Instead, some foreign laws do not have a separate provision containing a list of principles of the mediation process, but the concept of voluntariness emerges from the text of the law. For example, Article 17 of the Mediation Act of the Republic of Malta provides that the parties may voluntarily apply to the mediation process; Article 2 of the Romanian Law on Mediation and the Organisation of the Mediation Profession states that, unless otherwise provided by law, the parties may voluntarily apply to the mediation process. Articles 22, 23, 26 of the Lithuanian Law on Mediation in Civil Disputes stipulate that the parties to a dispute may continue mediation voluntarily at the expense of the parties to the dispute. According to Art. 2 of the Bulgarian Law on Mediation, the concept of mediation is mediation, which is a voluntary and confidential procedure for the out-of-court settlement of disputes.

In addition, the scientific and practical analysis of foreign legislation in the field of mediation shows that the mediation procedure may be initiated by a party to the dispute, provided for in a ruling or order of a court or other body that considers cases and makes decisions in arbitration, or carried out in accordance with the law (for example, Article 17 of the Mediation Act of the Republic of Malta). Pursuant to Article 3 of Directive 2008/52/EU, the mediation process may be initiated by the parties, or proposed by a recommendation or order of a court, or prescribed by the law of a Member State. In other words, foreign legislation provides for several grounds for starting the mediation process.

³⁹ <https://rm.coe.int/1680747b77>.

Regulation of Mediators

Mediation legislation and practices vary across Member States, reflecting distinct legal traditions and cultural attitudes toward ADR. Eidenmüller (2011)⁴⁰ discusses how regulatory competition among EU countries has influenced the development of mediation laws, with some jurisdictions adopting more stringent regulations to attract cross-border mediation cases. For instance, Italy mandates mediation in several specific areas, while countries like Germany give states the discretion to impose pre-litigation mediation requirements in certain cases.

The different training courses and accreditation requirements for mediators in each Member State are explained. Comparisons are drawn between the various schemes in each jurisdiction and particularly the number of hours of training required for accreditation.

So far, only a few countries have adopted legal requirements for the accreditation of mediators, mediation and mediation training organisations, and the required training (Belgium, Bulgaria, Italy). Although the Greek Mediation Law contains such requirements, the relevant implementing regulations have not yet been adopted.

We conclude that Member states should recognise and promote existing as well as new workable mediation schemes by financial and other forms of support. Where successful mediation programmes have been established, member states are encouraged to expand their availability by information, training and supervision.

2.2 Ukraine

The development of mediation in Ukraine can be divided into several stages that reflect different aspects of its evolution. The beginning of the history of this process is associated with the support of donor international organisations, which was accompanied by an active interest of people in the development and practice of mediation. The first stage, starting with the collapse of the Soviet Union and Ukraine's independence, was marked by the activity of international donor organisations and the development of public initiatives. The second stage, from the mid-1990s to the early 2000s, was characterised mainly by the support of mediation projects by international organisations, which contributed to the opening of the first mediation centres in Ukraine. The third stage, from the early 2000s until the adoption of the Law of Ukraine "On Mediation".⁴¹ The development of mediation in Ukraine can be divided into several stages that reflect different

⁴⁰ Eidenmueller, Horst G. M., Regulatory Competition in Contract Law and Dispute Resolution Available at SSRN: <https://ssrn.com/abstract=2201772> or <http://dx.doi.org/10.2139/ssrn.2201772>.

⁴¹ <https://zakon.rada.gov.ua/laws/show/1875-IX#Text>.

aspects of its evolution. The beginning of the history of this process is associated with the support of donor international organisations, which was accompanied by an active interest of people in the development and practice of mediation. The first stage, starting with the collapse of the Soviet Union and Ukraine's independence, was marked by the activity of international donor organisations and the development of public initiatives. The second stage, from the mid-1990s to the early 2000s, was characterised mainly by the support of mediation projects by international organisations, which contributed to the opening of the first mediation centres in Ukraine. The third stage, from the early 2000s until the adoption of the Law of Ukraine "On Mediation" in 2021, was characterised by growing interest in mediation by international and national organisations, as well as the activation of the public and public associations in this area. This process was accompanied by pilot projects with the courts, and one of the conclusions was the need for legislative regulation of mediation, as referring citizens to alternative methods of conflict resolution without an appropriate legal framework was impossible outside of pilot projects. The lack of legal status of a mediator also hindered the development of this profession in Ukraine. In 2019, Ukraine joined the 46 countries that signed the United Nations Convention on International Agreements to Settle Disputes through Mediation in Singapore (the Singapore Convention).⁴² This event stimulated legislative activity, and Draft Law No. 3665 was actively supported by both the mediation community and the Ministry of Justice of Ukraine. On 16 November 2021, the Law on Mediation was adopted by the Parliament.

Legal framework

The adopted Law of Ukraine "On Mediation" took into account modern foreign standards of legislative regulation of mediation and international practices,⁴³ such as Directive 2008/52/EC, the Council of Europe Recommendations on Mediation for Different Categories of Cases,⁴⁴ developed by the European Commission on the

⁴² United States Convention on International Settlement Agreements Resulting from Mediation: https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf.

⁴³ Handbook for mediation Lawmaking, adopted at the 32nd plenary meeting of the CEPEJ Strasbourg, 13 and 14 June 2019. <https://rm.coe.int/cepej-2019-9-en-handbook/1680951928>.

⁴⁴ Recommendation Rec (2002)10 of the Committee of Ministers to member States on mediation in civil matters, adopted by the Committee of Ministers on 18 September 2002 at the 808th meeting of the Ministers' Deputies. <https://rm.coe.int/16805e1f76/>; Recommendation No R (98)1 on family mediation, adopted by the Committee of Ministers on 21 January 1998 at the 616th meeting of the Ministers' Deputies. <https://rm.coe.int/1680747b77/>; Recommendation Rec (2001) 9 of the Committee of Ministers to Member States on Alternatives to Litigation between Administrative Authorities and Private Parties adopted by the Committee of Ministers on 5 September 2001 at the 762nd meeting of the Ministers' Deputies. <https://rm.coe.int/16805e2b59/>; Recommendation No R (99) 19 of the Committee of Ministers to Member States on Mediation in Penal Matters, adopted by the Committee of Ministers on 15 September 1999 at the 679th meeting of the Ministers' Deputies. <https://rm.coe.int/1680706970>.

Efficiency of Justice,⁴⁵ and the UNCITRAL Model Law “On International Commercial Mediation and International Mediation Settlement Agreements”.⁴⁶

Ukraine provides for a classical model of facilitated mediation.⁴⁷ Законом “Про медіацію” визначені принципи медіації: добровільність, конфіденційність, нейтральність, незалежність та неупередженість медіатора, самовизначення та рівності прав сторін медіації.⁴⁸ The Law on Mediation defines the principles of mediation: voluntariness, confidentiality, neutrality, independence and impartiality of the mediator, self-determination and equal rights of the parties to the mediation. The scope of the Law on Mediation is quite broad. It applies to relations related to mediation in order to prevent conflicts (disputes) in the future or to resolve any conflicts (disputes), including civil, family, labour, economic, administrative, as well as in cases of administrative offences and criminal proceedings with the aim of reconciling the victim with the suspect (accused).⁴⁹

The Law “On Mediation” (Article 1(1)(9)) defines a mediation agreement as an agreement that records the result of the agreement of the parties to mediation in an oral or written form agreed between them, taking into account the requirements of the law, and also establishes the right of the parties to mediation to apply to a court, arbitration court, international commercial arbitration in accordance with the procedure established by law in case of non-performance or improper performance of the mediation agreement (Article 18(1)(6)). The right of the parties to civil proceedings to reconcile, in particular through mediation, allows the results of the parties’ agreement as a result of mediation to be approved as settlement agreements (agreements on reconciliation in administrative proceedings; Article 49(7) of the Civil Procedure Code of Ukraine, Article 46(7) of the Commercial Procedure Code of Ukraine, Article 47(5) of the Code of Administrative Procedure of Ukraine), which are an enforcement document and may be enforced (Article 208 of the Civil Procedure Code of Ukraine, Article 193 of the Commercial Procedure Code of Ukraine, Article 191 of the Code of Administrative Procedure of Ukraine).⁵⁰

⁴⁵ CEPEJ Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters. <https://rm.coe.int/16807475b6>; CEPEJ Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters <https://rm.coe.int/1680747759>.

⁴⁶ UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002). https://www.uncitral.org/pdf/english/commissionssessions/51stsession/Annex_II.pdf.

⁴⁷ Mayer, B. (2004). Facilitative Mediation. In J. Folberg, A. L. Milne, & P. Salem, *Divorce and Family Mediation: Models, Techniques, and Applications*. Guilford Pres.

⁴⁸ Article 4 of the Law ‘On mediation’.

⁴⁹ Part 1 of Article 3 of the Law ‘On mediation’.

⁵⁰ Tsuvina, T.A. (2022). National Mechanisms of the Enforcement of Agreements Resulting from Mediation: EU Experience and Ukrainian Perspectives. *Problems of legality*, 158, 110-123. <https://doi.org/10.21564/2414-990X.158.264998>.)

Mediation Schemes

The Law on Mediation defines the principle of voluntariness as one of the main provisions that none of the participants may be forced to participate in mediation, mediation is possible only if the parties voluntarily choose a mediator by their mutual consent, and the procedure may be terminated by one of the parties at its own initiative at any time. However, there is now a tendency to interpret the principle of voluntariness from voluntary entry into the mediation procedure to voluntary completion of the procedure.⁵¹

Certain alternative methods of dispute resolution are provided for in the Civil Procedure Code of Ukraine,⁵² the Commercial Procedure Code of Ukraine,⁵³ the Code of Administrative Procedure of Ukraine⁵⁴ and the Laws of Ukraine "On Arbitration Courts",⁵⁵ "On Enforcement Proceedings".⁵⁶

As part of the reform of procedural legislation in 2017, the institute of dispute resolution with the participation of a judge was introduced in civil, commercial and administrative proceedings,⁵⁷ but this procedure is not identical to judicial mediation, so judges cannot currently act as mediators.

It should be noted that according to the procedural law (Code of Civil Procedure, Code of Commercial Procedure, Code of Administrative Procedure of Ukraine), the parties may reconcile at any stage of the court proceedings and the court shall ascertain the parties' desire to enter into a settlement agreement, to conduct out-of-court settlement of the dispute through mediation, and in case of such agreement, the court shall adjourn.

Ukrainian law also grants notaries the right to conduct mediation, subject to completion of the training required by law.⁵⁸

Regulation of mediators

A mediator is a "specially trained neutral, independent, impartial person who conducts mediation".⁵⁹ The requirement for a person wishing to become a

⁵¹ T. Tsvina, T. Vakhonieva 'Law of Ukraine 'On Mediation': Main Achievements and Further Steps of Developing Mediation in Ukraine' 2022 1(13) Access to Justice in Eastern Europe Pp 142-153. DOI: https://doi.org/10.33327/AJEE-18-5-1_n000104.

⁵² <https://zakon.rada.gov.ua/laws/show/1618-15#Text>.

⁵³ <https://zakon.rada.gov.ua/laws/show/1798-12#Text>.

⁵⁴ <https://zakon.rada.gov.ua/laws/show/2747-15#Text>.

⁵⁵ Law of Ukraine 'On Arbitration Courts' No 1701-IV of 11 May 2004, Vidomosti of the Verkhovna Rada 35/412. <https://zakon.rada.gov.ua/laws/show/1701-15#Text>.

⁵⁶ Law of Ukraine 'On Enforcement Proceeding' No 1404-VIII of 1 June 2016, Vidomosti of the Verkhovna Rada 30/542. <https://zakon.rada.gov.ua/laws/show/1404-19#Text>.

⁵⁷ <https://zakon.rada.gov.ua/laws/show/2147-19#Text>.

⁵⁸ Anna Kalisz, Alina Serhieieva. The Development of Mediation in Poland and Ukraine: A Comparison and Prospects for Experience Exchange. *Studia Iuridica Lublinensia* vol. 32, 3, 2023. <https://journals.umcs.pl/sil/article/view/14996/pdf> <http://dx.doi.org/10.17951/sil.2023.32.3.89-109>.

⁵⁹ Part 2 of Art 8 of the Law 'On mediation'.

mediator is to complete a basic mediation course (at least 90 hours, including at least 45 hours of practical skills training)⁶⁰ in Ukraine or abroad. There is no age limit for mediators. Associations of mediators and entities providing mediation shall maintain registers of mediators in compliance with the law on the collection, storage, use and dissemination of confidential information about a person The Law on Mediation (Article 14).

3 Role of state in development mediation in EU and Ukraine – Comparative conclusions

An analysis of the development of mediation in the European Union shows significant progress in its integration into conflict resolution processes. Mediation has become a universal approach to dispute resolution in the EU Member States, thanks to a common language of mediation and the exchange of best practices.

The role of the state in the development of mediation is manifested in legal norms regulating the activities of mediators. Some countries have adopted specific legislation on mediation, while others have included provisions on mediation in existing legislation. The EU Mediation Directive, together with the Council of Europe Recommendations, provides a basic framework for the promotion of mediation and minimum regulatory standards.

National legislation and best practices vary across EU Member States, reflecting the range of approaches to mediation regulation. This requires harmonization and careful consideration of cross-border mediation cases, in particular with regard to confidentiality, the enforceability of mediation agreements and the impact on limitation periods.

Despite the progress made in introducing mediation as an alternative dispute resolution mechanism, challenges remain in harmonizing legal frameworks and ensuring consistency across jurisdictions. International cooperation and ongoing dialogue between EU Member States and other countries is essential for the further development of mediation practice and the improvement of access to justice.

In this context, the different mediation schemes applied in each EU Member State and their impact on the pre-trial process are analyzed. The differences in the regulation of mediation in different EU Member States underline the need for a careful approach to cross-border mediation. While Article 5.2 of the EU Mediation Directive gives Member States the flexibility to make mediation mandatory, ensuring access to justice for citizens remains a priority.

⁶⁰ Part 1 of Art 10 of the Law 'On mediation'.

The concept of voluntary participation in mediation is enshrined in European law, as evidenced by the different legal provisions in different Member States. This analysis of foreign legislation highlights the diversity of procedures for initiating mediation and the importance of compliance with the law in creating effective dispute resolution mechanisms.

The development of mediation in Ukraine reflects the experience of both U.S. and EU donor support and the grassroots development of mediation that has emerged from a growing civil society. At the same time, the legislative process in the EU has been driven by social innovation, while in Ukraine proper regulation of mediation has been postponed until 2021.

Ukraine, like EU countries, incorporates mediation into its legal system in a wide range of cases, from criminal disputes to family conflicts. However, the Russian invasion in 2022 complicated the implementation of the law on mediation, and pilot projects were suspended. Ukrainian mediation is not yet integrated into the judicial system, and there is no unified register of mediators, resulting in a lack of statistical data.

In addition to the war, Ukraine faces much greater challenges than EU countries, such as a short experience with legal mediation and the absence of a unified register of mediators. As with many other standards derived from the Copenhagen criteria and EU rules and legal principles, Ukraine will face a process of harmonization that will apply to mediation, among many other areas of life and law. Mediators continue to provide consultations, negotiations, training and education even in these difficult times.

Given the increasing number of disputes related to war damage, mediation can be an effective tool for resolving these conflicts, which highlights the need for cooperation between courts and mediators.

Resumo: O *status* da Ucrânia como país candidato e o início das negociações de adesão à União Europeia exigem uma análise comparativa e a harmonização da legislação ucraniana com a legislação dos outros Estados-Membros da UE e a legislação europeia. Uma das áreas do direito comparado é o desenvolvimento da mediação como uma instituição jurídica, incluindo a política estatal de regulamentação legislativa da mediação. Esse desenvolvimento atraiu a atenção e o apoio tanto da UE quanto do Conselho da Europa, uma vez que os padrões democráticos europeus exigem cooperação entre o estado e os cidadãos ou indivíduos. No entanto, a necessidade de uma abordagem mais coesa e unificada para a mediação em toda a UE continua a ser crucial, como destacado por De Palo & Trevor (2012), que argumentam que essa harmonização fortaleceria a eficácia e acessibilidade dos serviços de mediação. O objetivo deste artigo é, primeiramente, comparar o papel do estado no desenvolvimento da mediação na UE e na Ucrânia. O estado da pesquisa e da literatura sobre este tema na UE e na Ucrânia não é suficientemente sistemático, por isso uma análise comparativa deste tema é relevante. Em termos de metodologia, o artigo aplica métodos lógicos e linguísticos. Ainda assim, algumas conclusões são baseadas tanto em dados estatísticos quanto nas observações dos participantes, em particular, em sua própria prática de mediação. Apesar do papel mais ativo do estado no desenvolvimento da mediação na UE, esse processo não pode ser chamado de uma “história de sucesso”. Em certa

medida, podemos observar semelhanças entre a UE e a Ucrânia em relação aos sucessos, desafios e ao papel do estado como um dos atores que promovem o desenvolvimento da mediação.

Palavras-chave: Mediação. Direito da EU. Direito ucraniano. Papel do Estado.

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