# Mediation Gap Analysis Report

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## Abbreviations:

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| ADR | Alternative Dispute Resolution |
| CPC | Civil Procedural Code |
| CAJ | Code of Administrative Justice |
| CCI | Chamber of Commerce and Industry of Ukraine |
| HEIs | Higher Education Institutions |
| ICAC | International Commercial Arbitration Court |
| FLA | Free legal aid |
| UMAC | Maritime Arbitration Commission |

# INTRODUCTION

Mediation has existed in Ukraine for over 20 years, but to date it has not become widespread and has not become part of the dispute settlement culture. Over the past five years, the situation has greatly improved, as the state was aware of the need to develop this area in the context of ensuring its commitments to ensure access to justice, increase investment attractiveness of Ukraine, and help relieve social tensions in society. To some extent, the rather high legislative activity helped to improve the situation. Since 2010, more than 10 draft laws on mediation have been registered in the Verkhovna Rada of Ukraine.

On 19 May 2020, the draft Law on Mediation No. 3504 – developed by the Ministry of Justice in cooperation with mediators' community – was registered in the Parliament and was approved by the Parliament in the first reading on 15 July 2020. This Draft Law sets the legal framework and the procedure for conducting mediation in Ukraine.

Within the framework of EU Pravo Justice Project a group of national and international experts reviewed the Draft law and conducted the current gap analysis of the legislative framework to see what else in the legislation and institutional set-up needs to be changed, which preparatory measures need to be put in place for the new legislation to come in force and be fully implemented. Such comprehensive analysis is of crucial importance for the new mediation system to be properly introduced.

The expert group consisted of four national experts from Ukraine:

- Luisa Ramanadze, lawyer, mediator
- Alina Sergeyeva, lawyer, mediator
- Svetlana Sergeyeva, lawyer, mediator
- Volodymyr Rodchenko, professor, lawyer

and two international experts,

- Remco van Rhee, professor of European Legal History and Comparative Civil Procedure, Maastricht (NL) and
- Bert Maan, former court president and former judge court of Appeal Amsterdam (NL).

Structurally, the gap analysis consists of three main sections:

1. Exclusive Summary and findings of the main issues of Gap Analysis, - prepared by Bert Maan;
2. Gap Analysis, that provides analysis of such main areas as a) National legislation; b) Interaction with the court and other stakeholders; c) Information policy; d) Mediator status, - prepared by team of national experts;
3. International observations, that provides an international perspective on mediation in Ukraine, - prepared by Remco van Rhee;

All the findings of the analysis are summarised in the tables (Gaps in the current state, List of issues to be addressed/recommendation, Proposals of the Draft nr 3504, Strategic goals for 5 years, Risks and challenges and finally Events (2020-2025) that go as as annex to current analysis.

# EXCUSIVE SUMMARY AND FINDINGS

## A. Role and place of mediation.

First and foremost, it is essential to determine the place of mediation in the societal area. In each society, large or small, sooner or later conflicts and disputes will arise. It is in the interest of well-being of society that one way or another, a solution for such conflicts will be found. It often happens that one of the parties just resigns to one self, or start protesting or negotiating, sometimes es even start litigation. A relatively new option in this area is mediation.

Mediation can be defined as it is done in the present draft law (article 1 § 1 under 4) mediation *is a voluntary, extra-judicial, confidential, structured procedure during which the parties, through the mediator (s), seek to resolve a conflict (dispute) through negotiation*.

A broader definition can be:
*A dynamic, structured, interactive process in which framework an impartial third person (mediator) assists disputing parties in resolving conflicts by using focused and specialised communication and negotiation techniques; in such a process parties are encouraged to actively participate in the process, which concentrates on the needs, rights and interests of parties.*

Another useful definition is the following:
*Mediation is a voluntary and confidential form of alternative dispute resolution based on an agreement between two or more parties and is aimed at resolving disputes between two or more parties with concrete effects. A third party, the independent and impartial mediator, assists the parties to negotiate a settlement. The mediator's role is to guide the parties toward their own resolution. Through joint sessions and separate caucuses with parties, the mediator helps both sides define the issues clearly, understand each other's position and move closer to resolution.*

Anyway, for the purpose of this analysis it must be emphasised that in case of conflicts in society, a way to resolve it can be done through friendly settlement in which framework mediation is a tool to reach such a settlement.

Each country, each society has its own history and culture, which reflects on the way how to resolve conflicts. Societies, for instance, in North-West Europe are characterised by a culture to try to solve conflicts amicably, while in for instance the USA, litigation is usually the choice to be made. In Central and Eastern Europe one can observe a tendency to hold the State of Government responsible for solving conflicts or complicated issues. In that perspective mediation in the Ukrainian context is possibly a rather new element, as it takes as its fundamental starting point that parties themselves are responsible for resolving conflicts.

As a consequence, mediation is an activity initiated by parties to resolve existing conflicts through a third person, a mediator. The mediator is neutral, does not make decisions, but only facilitates the parties in settling the conflict themselves. This requires a framework in which such mechanisms of conflict resolution are possible.

Often, a reason to choose mediation – instead of litigation – is found in the high workload of courts and/or the length of litigation proceedings. These are certainly valid reasons, but they disregard a much more important value: parties take their fate in their own hands and play an active role in determining the final solutions. This way, they accept “ownership” of the reached agreements.

Moreover, it appears that mediation is a tool which allows for a continued relationship, like in family disputes (relations between parents and children, for instance) but also in conflicts between neighbours and enterprises in the same areas.

In the second place, there is an urgent need to inform the general public as well as the entrepreneurial society about the existence mediation, its advantages and way to apply it. This implies that a comprehensive information system needs to be developed and implemented. It should include what mediation is, and which solutions it might bring. Secondly it should indicate where to obtain the necessary information about the applicable rules, the costs, where to find a mediator. Such generally available information might make all conflicting parties to rethink their options and steps to take, including mediation as one of the options.

In case Ukrainian authorities decide to focus on countrywide introduction and strengthening of the option for mediation, a comprehensive information policy must be in place. The assistance of professional communication organisations will be indispensable.

### B. Institutionalisation.

At present, there isn't a general organisation (Council) in Ukraine that teaches and provides education to become a mediator, organises exams, issues certificates and/or develops common ethical standards, applicable to all mediators, future and present.

In view of experiences with creating centralised organisations in Ukraine, in the field of mediation it will be proper to examine which solution for the time being will be fit.

Currently, there are more than 30 private organisations. Moreover, there are many public organisations actively working to develop and implement mediation in Ukraine. Currently, a fairly comfortable coexistence of different organisations.

Mediators now voluntarily choose an association either by field / area of activity, or by territory, or join an organisation where they have received basic mediator training and the necessary know how. Indeed, sometimes quite a few are members of several organisations at the same time.

In the actual situation it is not clear which of these organisations – or any other existing or new organisation - should be entrusted with the performance of a special self-governing functions. It will be preferable to continue the path already followed and see how matters crystallise out and result in the years to come in one or more larger organisations, which have the full support of the members, as it were in a sort of bottom up approach.

Such a policy might prevent contra-productive tensions and enable to share experiences, potentially leading to common views on the way to organise and ensure the quality of mediation in the country as a whole.

As a step towards increased communication and coordinating one might consider the establishment of a council as a communication platform and as an advisory organisation). It could include representatives of all interested organisations in this field.

### C. Legislation.

Indeed, even without legislation someone can act as a mediator, there is no rule against that. However, when it becomes an institution in the system of dispute resolution, there is a need for legislation, not only regarding quality and training., but also for reasons of confidentiality, essential for the process of mediation, in which participants must be certain that the information that they share with the mediator, is confidential.

This is increasingly the case when one considers mandatory information sessions concerning mediation, as will be described below. It is most certainly necessary when mediation is or becomes mandatory. In such situations it would be preferable when the applicable mediation law would contain at least minimum quality standards.

As already referred to, the law on mediation is pending and it may be expected that it will become definitive. Experts have studied this law and many comments and proposals for completion and improvement could be made, but even if it enters into force as it reads now, it will be useful in many aspects and practice will show where amendments and additions are needed.

One aspect may already be emphasised here: according to the legislative principle that special laws are preceding general laws, the situation is that where the Mediation law gives other or different rules that the present procedural codes, the mediation law prevails and is open for application even without amending the procedural laws. As a consequence, according to article 20 judges are allowed to suggest parties mediation. Nevertheless, it does no harm to amend such Codes accordingly to exclude all misunderstanding. The said article also gives direction to courts to ensure obtaining enforceable documents.

### D. Being a mediator

It is important in the first place to make a distinction between someone who performs a profession like a judge, prosecutor, attorney, and someone who is a mediator.

In principle anyone can play the role of mediator – if he has the necessary qualifications – irrespective of the profession that he fulfils. Someone can be an attorney, but he can also be a mediator. If conditions allow, a judge or prosecutor for instance could be a mediator, or rather, play the role as a mediator. But that has nothing to do with his profession. These roles have to clearly distinguished.

If someone performs the role of the mediator, it must be perfectly clear that he is doing that and nothing else. At that moment he is not a judge, not an attorney, not an enforcement officer nor a prosecutor, he is just a mediator. As a consequence, if he takes this role, is disqualifies him to handle the case in any other capacity.

This distinction determines the way mediation relates to the different professional duties. If parties in a procedure wish to solve their conflict through mediation, while it is pending before court, the judges refer the case to a mediator, only to be resumed when mediation did not result in a friendly settlement. In criminal case, the prosecutor could allow a mediator to mediate between victim and suspect, and the result may be determining to dismiss conditionally or unconditionally and/or which sanction to demand before court. In family and social disputes, the mediator can play his role in finding solutions for the problems, and the solution is delivered to the officer in charge, who can on that basis move forward with the family.

This does not mean that the said professions – all mentioned in Chapter 2 – don't need to know about mediation. On the contrary, they do, there is an urgent need for them to be aware of the notion of mediation and the solutions that it can bring. In the framework of their initial training and permanent education knowledge about mediation should be offered.

The consequences of entering into a mediation process requires in any case some basic provisions concerning the confidentially of his position and a regulation of the confidentiality in the whole process of mediation. The present draft law contains promising provisions in this respect.

### E. Finding a mediator

Not always and everywhere a mediator will be present. This is indeed an issue, which cannot be solved on very short notice. On the other hand, it is a bit of a "chicken-or-egg" story. There are not sufficient mediators because

there is no sufficient demand (caused by relatively ignorance). So, one should approach this from both sides simultaneously: promotion of the instrument and at the same time promote people to obtain qualification for mediator.

In any case, the proposed institution should have a public website where mediators can be found, preferable with mentioning their specialty, or published by categories ( like family, social, criminal, civil/commercial, administrative etc.).

Interestingly the Free Legal Aid system (FLA) accepts mediation as a remunerated form of legal aid and support with its own list of mediators. This is an important instrument to disseminate the use of mediation broadly.

In many countries professionals (often attorneys and notaries, but also bailiffs, psychologists and medical doctors) in their publications and on their professional stationery mention themselves as mediators (like "Jones and Peterson, Notaries and Mediators").

### F. Mediation and the legal and judicial environment.

For the success of mediation the attitude of judges and courts is essential and decisive.

Courts and judges are daily confronted with many disputes and they will be aware of the fact that it is almost always preferable that parties solve their problems by themselves, with the help of the court or without it.

As the overall goal of law and judicial institutes is to restore peace in society, they will know that a friendly settlement is the preferred option, which sometimes leads to the conclusion that mediation is a better solution than any judgment, in whichever aspect.

Of course, this has consequences for the judicial workload: every avoided hearing, every avoided judgment, it saves time and work. But that is not the most important factor: parties take responsibility for their own conflict, as well as the solution, which will have a much more lasting effect than any judgement would have. Moreover, there are disputes of which everyone knows that a judgment on one aspect, will immediately lead to more claims and procedures, as "everything is connected to everything". When judges show parties to be prepared to be helpful, by suggesting mediation – which they should be allowed to do, even without specific legal provision – it would even increase the confidence in the court. It would even be better if the court could facilitate this willingness of parties, by keeping in the registry a list of mediators in the area or in specialised areas, which could be made available to parties en one could even facilitate to establish the first contact between parties and the intended mediator. An option that goes a bit further is to allow the use of premises in the courthouse where mediation session can be held; an even further going option would be that the court employs mediators itself. However, in general it will be preferable that mediation occurs at a neutral location.

In any case, a judge cannot transform himself to a mediator as at that moment he will be working with standards that are not in accordance with principles of a fair hearing: in mediation it is standard procedure for instance that the mediator speaks with parties separately, what judges cannot do.

Nevertheless, paying attention in training and continuous education of judges, one should put mediation on the programme because it is necessary that professionals like judge know the system and have a clear view of this instrument available for parties to find solutions for their disputes. This is to a certain extent applicable to qualified court staff as well, as they might come in a position to inform the public about mediation and plays a role in smoothening the way from the court to the mediation process. The intention is not that participants to such training become mediators themselves. It suffices that they have an insight of the mechanism and how it will be applied.

Moreover, when the judges and the courts show that they not only know about mediation but accept and even promote it as one of the useful instruments for conflict resolution, it will be very helpful to give mediation the place that is needed.

One more or less technical point needs attention here. In a civil or commercial case a statement of claim is submitted, a mediation process has been put in place and appeared successful: parties reach an agreement. The question in then: what happens with the pending case. It seems that it is not feasible for the claimant to change his claim in such a way that is becomes equal to the reached agreement, because this would mean that the claim could not submitted for a second time. Leaving all kinds of practical issues aside, the following remark is to be made. A civil/commercial claim is not a criminal procedure. In criminal procedures one can only once prosecute – ne bis in idem - , but for civil claims that can be different. The only impediment for such a claim is that when the defendant proves that the same matter already has been decided in a final judgment between the same parties, a new claim cannot be submitted and will be declared inadmissible.

So, answering the question what do with the procedure after an agreement, the option could be: rephrasing or changing the claim according to the agreement and against this claim of course here is no objection anymore, or declaring the litigation terminated and issuing an enforceable document containing the reached agreement.

To a certain extent, this also goes for prosecutors, in regular criminal cases as well as in the more specialised juvenile area. Frequently victims of crimes and misdemeanours are more interested in compensation of damages, apologies, talks/interviews with the suspect, than in criminal convictions. This can already become clear at the stage before law enforcement. In such situations the prosecutor ( or head of police) may inquire about such options and start such proceedings, of course in case that the event itself justifies such approach. The prosecutor could arrange a mediator for talks between victim and perpetrator, and if the result is sufficient, may decide not to prosecute, conditionally or unconditionally; or the result may be that based on the agreement a lower sentence is proposed before court, of course disclosing the mediation and its result before court. When the case is still on the level of the law enforcement agencies, the head of police may decide not to forward the case-file to the prosecutor, in which situation consultation of the competent prosecutor has added value.

Also here goes, the prosecutor himself is not the mediator, an outsider fulfils this function. The prosecutor – or the defence counsel - initiates and promotes such a step.

Attorneys also play a significant role in this area, but somewhat different from the judges and prosecutors, because they can be mediators themselves, but only under certain conditions. In any case, the attorney is supposed to be aware of the whole range of dispute resolution options (litigation, arbitration, settlement and mediation) and he has the obligation to advise his client the most suitable one. For that reason they need to have the basic knowledge of this instrument and how it works; often they are together with their clients involved in the whole mediation process. As a consequence, during their initial training and permanent education attention must be paid to mediation.

One can observe that attorneys often regard mediation as a threat and a competitor. In advanced situations it appears not to be the case as in their law firms one frequently takes mediators in and even more frequently attorneys follow the education for mediator and show themselves to the public not only as attorneys, but also as mediators. This way it becomes a benefit instead of a threat.

The role of public notaries includes that sometimes they are faced with parties having serious disputes. It can concern inheritance, but also all kinds of other disputes or potential conflicts. The role of the notary could be to indicate to the clients that mediation under circumstances can be a suitable option, often preventing conflicts or escalation. Knowledge of mediation is necessary. Like attorneys, they could decide to follow the training to become mediator. In some countries, where notaries have a public function but within a more or less private

enterprise (France, Netherlands) he can function as a mediator, more or less comparable with the situation of attorneys. Of course, this depends on whether their legal status permits such a combination.

In Chapter 2 the different professions and organisation where mediation is in place are described, but one group deserves special attention. It concerns the Centres for Families, Children and Youth. It is very positive and important that in this area mediation is available and used. However, also here, one must be vigilant as to defining the different roles. The main issue is that when someone acts as a mediator, he is only doing that and nothing else. Confidence in a mediator and in mediation in general is endangered when the different roles are not sufficiently separated and clear. When in such a Centre a conflict exists between the social worker and the family or pupil where mediation could lead to a solution, the social worker in question should refer the case to someone else acting as a mediator; when the problems is solved through mediation, he will have the case back and he will resume his mentoring and coaching.

A few words concerning the options for the administrative disputes may be useful in this context. The most pressing issues seem the question if mediation in such cases is an option at all and the problem for the public offices and agencies that they should remain within the legal framework.

Not always mediation is possible in administrative cases. For instance, if a request is submitted asking for an administrative measure which is not based on the law, there is not much to mediate. If a building permit is requested for an industrial factory in a residential area, indeed, there is not very much to discuss.

But in many other cases, that may be different: the building permit is refused because the building was one meter too high, then it can be mediated to adjust the blueprints and reduce the building design, so that it fits in the legal framework. Or there is in social security a dispute about the percentage of invalidity, for instance 40% against 50 %, one can argue that an agreement will be reached at a level of for instance 45%. In other words, in many regulations of public nature, authorities have a certain margin of appreciation, in which mediation is feasible.

This approach supposes that the public body is allowed to withdraw its decisions, which appears not to be the case in Ukraine, so one has to see if other options exists, and it seems to be the case. In case of a successful mediation parties agree on the goal to be reached. In such a situation the usual approach could be followed: parties request the court to annul the decision and to order authorities to take a new decision. Subsequently the new decision will be issued in accordance with the agreement and this new decisions follows exactly the same line of events, including the right for third interested parties to object against this new decision. This way also the required transparency is ensured.

Experience in daily practice shows that in case of lesser crimes and offences, a peaceful solution between victim and perpetrator is widely accepted and contributes better to restore peace in society than just prosecution or sanctions. Mechanisms should be in place to realise what is mostly called “restorative justice”. It shows that victims will be better able to cope with what has happened to them. This is not only helpful after crimes have been committed but also in developing measures to support the perpetrator in reintegration in society also after having served the unconditional part of his sentence. Mediation can contribute to finding solutions for all kinds of disputes and signifies another tool for probation officers to find made-to-measure solutions.

A problematic area concerns enforcement, in which both public and private enforcement officers are working This plays a role in civil and commercial disputes, and also at the stage of enforcement, mediation can be of service. For instance, the debtor is not able to pay the debt, his house is seized and must be auctioned but the expected auction proceeds is far below the real value and still not sufficient for paying the debt in question. In such a situations mediation can be helpful for instance by finding third parties prepared to give a loan maybe against some securities or mortgage.

Presently, the usual application of the relevant legislation does not or not sufficiently allow public enforces to step outside the prescribed rules and are not in a position to communicate with debtors (en/or creditors) in such a way that mediation and settlement can have their place, for instance by allowing stay of execution for longer or shorter duration. Nor will public enforces have the option to use communicative skills, usual with mediation and settlement, in order to find proper and lasting solutions is the conflict of interest between debtor and creditor.

This is different for private enforcers. They are more flexible in their work, still staying within the legal framework. They can use their interpersonal skills and capacities to find made-to-measure solutions, acceptable to all concerned. Therefor there is a clear difference between the two types of enforcers.

There should not be such a difference: both should be able to propose mediation to find practical solutions and the law should provide for such options.

### G.Budget and finances, incentives.

As the saying is “Only the sun rises for free”, finances are involved in this matter. In this respect it is interesting that the recent draft law on mediation has a provision that each registered mediator has to do at least one mediation a year free of charge.

Secondly, the Free Legal Aid system in Ukraine offers to the people with lesser financial abilities, a mediator free of charge. He, however, needs to receive some sort of compensation or fee for his work. Presently they perform these duties as volunteers, but if one wishes to take this work seriously, some sort of remuneration is required. Alas, the feeling in present days societies is, that when something is for free, it is worth (almost) nothing and is not to be taken seriously. The same will go for mediation, offered in the framework of the said Centres for Families, Children and Youth.

In the third place the draft Law on Mediation offers in case of successful mediation a reduction of the court fees. As to the fees, apart from those who can enjoy the benefits of the Free Legal Aid systems, clients of mediators have to be prepared to pay a reasonable fee, which might – at first glance - be an obstacle for resorting to mediation. This means that there is a need to explain to parties that the costs will be lower than the benefit being: having your fate in your own hands/you can influence the outcome yourself, a longer lasting solution, better relations in the family, less fees for attorneys, no appeals and cassations, shorter timeframe.

This is a matter of general communication by a central body as proposed, but also attorneys, prosecutors and other involved persons might talk with interested parties/clients to allow them to take a balanced decision. As sometimes is said: “ the costs precede the gains!”

Probably for a relatively new instrument like mediation, it will be good that incentives are in place to make parties reflect on alternative options than just litigation. One if these incentives can be found in the pieces of draft-legislation where in case of a successful mediation, parties will benefit from reduction of the court fees.

However, of the total costs of litigation the court fees are a relatively low pArticle Unlike the situation in other countries, in Ukraine mediation does not have significant financial attractiveness compared to court proceedings, which are not as costly and costly for the parties as in other countries. The value system is traditionally dominated by paternalistic principles, which does not contribute to the demand for mediation services compared to court proceedings.

Among the key drivers of widespread mediation implementation are:

- formation and popularisation of mediation as a separate new profession: "mediation is fashionable"
- expanding the range of mediation agents and ambassadors - excessive centralisation and regulation will harm the process

- stimulating other bottom-up initiatives
- introduction of a number of stimulating norms in the judicial system

Thinking about additional incentives, the first one might be – maybe only during a limited period of time in the starting period of mediation – that mediation in cases pending before courts will for the first few hours or meetings free of charge, in which situations the government should compensate the mediators.
Another incentive might be that the courts make arrangements such a way that the reached agreement can be declared enforceable within the existing legal framework.

### H. International aspects.

As is referred to in more details, Ukraine is in the process of ratification the U.N. Convention on Mediation (Singapore Convention) of 20 December 2018. Although this Convention effectively only regulated enforcement of agreements as a result of mediation, it indicates that Ukraine adheres to the principle of mediation and commits itself to appointing a competent authority to take decisions on granting relief of agreements (or refuse it).

The European perspective is important as well, as there are the Recommendation No. R(98)1 on family mediation, Recommendation No. R(99)19 on mediation in penal matters, Recommendation Rec(2001)9 on alternatives to litigation between administrative authorities and private parties and Recommendation (2002) 10 in civil matters. Other activities are carried out by the Council of Europe, in particular the CEPEJ publications like guidelines on mediation 2007.

# II GAP ANALYSIS

## A. Analysis of Natinal Legislation

Exploring the current state of mediation in Ukraine should be started with a review to the state of regulation in this area.

Today there is no legal regulation for mediation institution in Ukraine, except for the sphere of social services, where the State Standard for Social Mediation Service, approved by the Order of the Ministry of Social Policy of Ukraine dated 17.08.2016 № 892 (as amended from 07.08.2017) is in force. At the same time, the notion “mediation” is mentioned in a number of legal acts, such as: Commercial Procedure Code of Ukraine, Civil Procedure Code of Ukraine, Code of Administrative Justice of Ukraine as of 03.10.2017 №2147-VIII; Law of Ukraine "On Free Legal Aid" dated 02.06.2011 № 3460-VI; Law of Ukraine "On Social Services" dd. January 17, 2019 № 2671-VIII; Law of Ukraine "On Concession" dated 03.10.2019 № 155-IX; Law of Ukraine “On Public-Private partnership” of July 1, 2010 № 2404-VI; Decree of the President of Ukraine "On the Concept of Improving the Judiciary for the Establishment of a Fair Court in Ukraine in accordance with European Standards" dd. May 10, 2006 № 361/2006; Decree of the President of Ukraine "On the concept of Juvenile Justice in Ukraine" dated 24.05.2011 № 597/2011; Decree of the President of Ukraine "On the Strategy for Reforming the Court Organisation, Judiciary and Related Legal Institutions for 2015-2020" dated 20.05.2015 № 276/2015, etc.

The last significant amendments to procedure laws - the new edition of the Commercial Procedure Code of Ukraine, Civil Procedure Code of Ukraine (CPC) and Code of Administrative Justice (CAJ) introduced in 2017 bear a number of progressive standards designed to promote reconciliation of the parties. This is certainly

important, but it does not directly affect people's being in the know about mediation and, consequently, its broadering. Given that the analyzed norms are similar, some experts' recommendations are unified.

The mediation legislative regulation issues are on the table for many years. Despite the mediation could be implemented without a law, the adoption of a special law may facilitate public access and become a driver for its promotion. Various stakeholders, who believe in the effectiveness of mediation, constantly emphasize that they need a legal basis to interact with mediators and offer mediation as is. The Cabinet of Ministers of Ukraine has included the development, passing to the Verkhovna Rada of Ukraine and support of the draft law on mediation (Order of 04.12.2019 № 1413-p) in 2020 plan. In furtherance of the mentioned Order, on May 19, 2020, the Cabinet of Ministries of Ukraine has introduced a draft law No. 3504, adopted by the Verkhovna Rada of Ukraine on 15/04/202 in the first reading as a basis.

Foreign countries have different approaches to the regulation of the institution of mediation. Some states keep to regulatory concept, while the others follow a more lenient approach, introducing regulation at the level of best practices, soft legal provisions ect.

The adoption of the law on mediation will definately have a positive effect on the development of mediation in Ukraine. It is important that the adopted law is of framework nature and had not led to excessive regulation of mediation. At the same time, not only an adoption of subject-matter law, but also a comprehensive approach to relevant amending of national legislation is crutial.

The experts had scrutinized the draft Law of Ukraine "On Mediation" (registered № 3504 dated 19.05.2020), submitted by the Cabinet of Ministers of Ukraine. The draft law has been developed by the task force focused on preparing offers on the ratification of the United Nation Convention on transboundary agreements reached as a result of mediation, set up by the Order of Ministry of Justice of Ukraine # 2487/07 dd. 06.27.2019. The above mentioned draft law sets a general legal framework for introducation of mediation in Ukraine and its adoption will solve many issues outlined in this Gap-analysis. The experts also provided some additional concerns to the draft law, which may be taken into account during its preparation for the second reading. See more in the table (annex1).

Given current European trends, as well as Article 124 of the Constitution of Ukraine providing such a possibility, it is proposed to prioritize dispute categories for which a mandatory information session on mediation preceding the trial may be introduced in future. In this matter, it is important to act rationally, in order not to set up obstacles in the way of court proceedings, and focus on the availability of a sufficient number of mediators to ensure access to mediation throughout Ukraine. Only after the above introducing a mandatory information session on certain categories of cases is possible, expanding the list step by step. It is recommended to start with family disputes.

### 1.Civil law

Identified Gaps

Civil relations are the most favorable to practice mediation due to their dispositiveness and diversity. The problem is that vast majority of people are not informed about such a conciliation procedure as mediation at all, so they usually go directly to the court. In this regard, one shall agree with the conclusion of the Commission on the Efficiency of Justice that judges play a crucial role in shaping the culture of amicable settle of disputes and should be empowered to recommend alternatives to litigation, including mediation.

At present, mediation in Ukraine exists beyond the court process. The court is niether empowered to inform the parties about the mediation as a way of resolving disputes, nor shall recommend such a procedure. By agreement, the parties may participate in the mediation procedure together with court proceedings - in this case,

mediation meetings (sessions) take place between court hearings. The court does not have the procedural possibility to suspend proceedings and give the parties time to reconcile (dispite for divorce cases, where the judge may appoint a period of reconciliation for up to 6 months, suspending the proceedings - part 7 of article 240 of the CPC of Ukraine). The parties may enter into an amicable agreement at any stage of the proceedings (part 7 of article 49 of the CPC of Ukraine). However, an amicable agreement is not the only way to formalize agreements between the parties to mediation in case of ongoing court proceedings. Such agreements may also be procedurally executed as: a statement on leaving the suit without consideration, a statement on waiver of the claim or a statement on acknowledge the claim. Article 142 of the CPC of Ukraine provides that in case of concluding an amicable agreement before the resolution of the court of first instance, the plaintiff's waiver of the claim, acknowledge of the claim by the defendant before start hearing the case on the merits or at the stage of review of the decision at appeal or cassation, the court shall decide on the return to the plaintiff (complainant, applicant) from the state budget 50 percent of the court fee paid when filing a lawsuit (appeal or cassation appeal).

Part 5 of article 211 of the CPC of Ukraine establishes that during the consideration of the case on the merits the court shall contribute to the reconciliation of the parties. This provision means ample opportunities for empowering judges to inform the parties about the way of resolving a dispute through mediation, thus it will be a precise way to promote reconciliation. At the same time, there are risks that judges not aware of mediation procedure will not be able to provide comprehensive guiding for parties on its essence and features; mediators are not available in all settlements of the country (most mediators are located in large cities).

<u>The following issues need to be addressed:</u>

1 . The court does not have the procedural option to suspend the proceedings in order to give the parties time to reconcile / go through mediation (except for divorce disputes).
2. The court does not have the power to inform the parties to civil proceedings about the possibility of resolving the dispute through mediation.
3. There is no procedural option for the court to leave the claim without consideration at the request of the plaintiff at the stage of consideration of the case on the merits.

<u>Recommendations</u>

1. Incentives for the parties to settle the dispute amicably through mediation shall be introduced.
2. The parties to civil proceedings shall be informed of the possibility of settling the dispute through mediation at any stage of proceedings, including the execution of the court ruling. The decisive role here shall belong to the judges, who should be given the appropriate powers, in particular, to clarify during the preliminary case hearing the parties' will to conduct out-of-court settlement of the dispute through mediation with the opportunity to adjourn the preparatory hearing (in order to grant sufficient period of time to engage a mediator and define his/her role).
3. If the case is pending and the parties wish to try settling the dispute amicably, they should have enough time to reconcile. So providing a basis for the suspension proceedings in the CPC of Ukraine is required; a joint application of the parties to give them time to reconcile (usually it takes 2-3 months) shall serve for this purpose.
4. Provide the option to leave the suit without consideration at the plaintiff's request at any stage of the proceedings, not only before the trial on the merits (article 257 of the CPC of Ukraine). In such a case returning court fees seems unreasonable.
5. Some categories of civil cases brought to court shall be identified as priority for mediation, so information session on mediation shall be set as obligatory for them.
6. Such categories of disputes as: land, inheritance, labor and consumer disputes, intellectual property disputes, etc. need for additional study and analysis to develop individual proposals taking into account industry specifics.

*The draft Law of Ukraine "On Mediation" offers:*
*1. to encourage the parties to reconcile through mediation using the bonus of returning 60% of the court fee (amendments to part 1 of article 142 of the CPC of Ukraine and part 3 of article 7 of the Law of Ukraine "On Court Fees").*
*2. to assign the court to find out during a preliminary hearing if the parties wish to conduct out-of-court settlement of the dispute through mediation (amendments to paragraph 2, part 2 of article 197 of the CPC of Ukraine) and explain to the parties their right to go into out-of-court settlement through mediation at any stage of court proceedings (part 1 of article 20 of the Draft Law).*
*3. to provide the parties with time to decide on future mediation by making a break in preliminary hearing (amendments to part 5 of article 198 of the CPC of Ukraine) and / or suspend the proceedings for mediation process, but not for more than 30 days from the date of the court ruling (amendments to part 1 of article 252 and part 1 of article 253 of the CPC of Ukraine).*
*4. to establish that: mediation may take place before filing a lawsuit, during the court proceedings or when executing the judgment (part 3. of Article 2 of the Draft Law); the participation of a party in mediation cannot be considered as admission of liability of such a party, acknoeledgment of a suit or waiver of claims (part 3 of article 4 of the Draft Law); the joint decision of the parties to settle the dispute through mediation based on the results of mediation may be approved by the court in the manner prescribed by law (part 2 of article 20 of the Draft Law).*

Expected Outcome

Information on mediation is available to people, they can take advantage of procedural options to participate in the mediation procedure, draw up the results of agreements and return part of the court fee. The analysis of the mediation efficiency by categories of cases is ongoing and certain categories of cases are recommended for a mandatory information session on mediation. Some categories of civil disputes have been put high on the mediation agenda, which shall contribute to relieving the judicial system. Pilot programs for the integration of mediation into civil proceedings have been launched.

## 2. Family law

Identified Gaps

Currently, the field of family mediation is the most popular in Ukraine, as family conflicts is one of the most spread type of disputes. The field of family relations is very diverse - from marriage to adoption. And the mediation will allow ones to resolve family conflicts effectively. There is vast volunteer projects experience with the Children's Services and Centers for Social Services for Families, Children and Youth in different regions of Ukraine. The results of such projects shows that using the mediation conflicts among the relatives i.e. divorce issues, conflicts over the rights and responsibilities of parents and children, adoption, guardianship and custody, may be resolved. At the legislative level the need to promote reconciliation between the parties is considered only in the context of divorce. We are talking about Article 111 of the Family Code of Ukraine, providing that the court takes measures to reconcile the spouses if it does not contradict the moral principles of society and Article 240 CPC of Ukraine, according to which the judge may appoint a period for conciliation of a couple up to 6 months.

Special attention needs to be paid to the State Standard of Social Mediation Services, approved by the Order of the Ministry of Social Policy of Ukraine dated 17.08.2016 № 892 (as amended on 07.08.2017) and the Law of Ukraine "On Social Services" dated 17.01.2019 № 2671-VIII, mentioned above. According to these regulations, intermediacy (mediation) is a basic social service provided by the authorities to recipients of social services. On the one hand, this State Standard is the only legal act governing the provision of mediation services, on the other hand, it needs significant refinement:

- misusing of the terms " intermediacy" and "mediation", which are close in meaning to denote two different stages of one service;
- a mediation service can be provided as a second step only after the intermediacy, i.e. a person interested in receiving mediation services may access it after intermediacy stage is completed only;
- there is terminological confusion about names of contracts to be entered into when providing mediation services;
- the standard is quite complicated in terms of document flow, its requirements are almost impractical for organization process of the service;

*The following issues need to be addressed:*
1. Lack of knowledge / information about the mediation procedure among staff of child protective services, as well as staff of the social services bodies makes it impossible for parties to the conflict to be confided into the procedure.
2. Child protective services are not empowered to recommend to the parties in conflict to turn to mediation and assign to mediation.
3. Improving the legislation on provision of social mediation services.

Recommendations

1. Child protective services should be empowered to promote the amicable way to settle family conflicts and to recommend mediation to persons who have applied to such authorities to protect their family rights and interests. Appropriate amendments to the Family Code of Ukraine shall me made respectively.
2. Child protective services staff, as well as employees of the social services system (including social service centers for families, children and youth) must be sufficiently qualified in mediation to be able to inform the parties.
3. The state standard of social mediation services should be improved .
4. The mediation service should be separated from the intermediacy service and become a self-sufficient basic social service.

Expected Outcome

Amendments are introduced to the legislation on the provision of social mediation services. The number of mediators who provide social mediation services is sufficient to ensure access to such services throughout Ukraine. Effective cooperation between mediators and social services authorized bodies is launched. Mediation is accessable due to the effective organization of the provision of social mediation services.

## 3. Labor law

Identified Gaps

As the Draft Law of Ukraine "On Mediation" stipulates amendments to the Labor Code of Ukraine, the experts also studied the field of labor relations.

Experience has proven that the number of individual labor disputes brought to court is significant. Disputes arising from employment relationships rank third in the number of cases submitted to the Civil Court of Cassation.

The Labor Code of Ukraine contains provisions on the labor disputes commission, which is a mandatory primary body for consideration labor disputes arising at enterprises, institutions, organizations, except for certain categories of disputes. The way of their organization, the procedure, terms of consideration and decision-making proces, terms of appeal and execution order of the commission's resolution are governed in details. However, in fact, these commissions do not function, so the parties to labor disputes go directly to court.

The law stipulates that labor disputes may be resolved through negotiations, with the assistance of Labor Dispute Commissions or by court. In practice, the parties are hardly able to reach an agreement on their own; it ultimately leads to an excessive number of cases, many of which could be settled amicably through mediation.

*The following issues need to be addressed:*
1. Labor legislation does not contain the option to turn to mediation to resolve individual labor disputes.
2. The legislation does not provide for the option to turn to the mediation procedure for the settlement of collective labor disputes.
3. The parties to labor disputes are not informed about the mediation procedure and its essence.

Recommendations

1. To enter into the Labor Code of Ukraine the option and mechanism to use the mediation procedure in order to resolve a labor dispute.
2. do develop a mediation clause sample for the employment contracts.
3. to provide that entering into mediation procedure affects the period for filing a law suit.
4. to provide for integration of the mediation procedure into the settlement of collective labor disputes options stipulated by the Law of Ukraine "On the resolving procedure fort he collective labor disputes (conflicts)".

> *The draft Law of Ukraine "On Mediation" offers:*
> *to provide that upon agreement of the employee and the owner or his authorized body, mediation may be applied to resolve a labor dispute (amendments to article 221 of the Labor Code of Ukraine).*

Expected Outcome

The legislation provides favorable conditions for the settlement of labor disputes through mediation. Mediation is widely spread when resolving individual and collective labor disputes.

## 4. Commercial law

Identified Gaps

Ukrainian and world experience prove the efficiency of mediation in commercial relations. In this area, mediation is used not only to resolve disputes already arisen, but also as an effective way to prevent disputes in future (partner mediation). The range of issues about which business entities can apply to the mediation procedure is almost unlimited. The undoubted advantage of mediation for such entities is the confidentiality of the procedure, celerity, reasonable price and ability to keep relations in future. However, mediation is still not widespread among businesses in Ukraine due to weak awareness of it. As noted above, judges, who may be empowered to inform litigants, are important in this regard.

In the context of mediation, the commercial process does not differ from the civil process described above. Mediation exists beyond the court process. The court is not empowered to inform the parties of the option to settle the dispute through mediation and may not suspend the proceedings in order to give reconciliation time period to the parties. At the same time, during the consideration of the case on the merits, the court must promote the reconciliation of the parties (part 5 of article 196 of the Commercial Procedural Code of Ukraine).

A good basis to reach an agreements between the parties following the mediation process is that the parties may enter into an amicable agreement at any stage of the proceedings (part 2 of article 192 of the Commercial

Procedural Code of Ukraine). At that, if court proceedings are ongoing, the parties may draw up their arrangements in the form of a statement to leave the claim without consideration, a statement of waiver the claim or a statement of acknowledgement the claim. According to Article 130 of Commercial Procedural Code of Ukraine in the case the amicable agreement is made before the resolution of the court of first instance, the plaintiff's waiver the claim, acknowledgement the claim by the defendant before the hearings on the merits, or at the stage of appeal or cassation, the court in relevant ruling or resolution resolves on the refund to the plaintiff (complainant, applicant) 50 percent of the court fee from the state budget paid by him when filing a lawsuit (relevant appeal or cassation appeal).

*The following issues need to be addressed:*
1. The court does not have the procedural option to provide the parties with sufficient time for conciliation by suspending the proceedings.
2. The court does not have the power to inform the parties to the commercial process about the opportunity to resolve the dispute through mediation.
3. There is no procedural possibility for the court to leave the claim without consideration at the request of the plaintiff at the stage of consideration the case on the merits.

Recommendations

1. It is necessary to provide tools to encourage the parties to resolve the dispute through mediation.
2. Judges shall be empowered to inform the parties to the commercial proceedings of the opportunity to settle the dispute through mediation at any stage of the proceedings, including the execution stage, in particular to clarify during the preliminary hearing the parties' will to settle the dispute out of court through mediation by announcing a break in the preliminary hearing.
3. To provide the court with a procedural option to suspend the court proceedings to provides the parties to the dispute for up to three months a period for reconciliation.
4. to give the court the power to leave the claim without consideration at any stage of the proceedings at the request of the plaintiff (article 226 of the Commercial Procedural Code of Ukraine). In such a case returning court fees seems unreasonable.
5. to pay special attention to introducing mediation into bankruptcy proceedings.

*The draft Law of Ukraine "On Mediation" proposes:*
*1. To offer incentives the parties for conciliation through mediation due to the possibility of refunding 60% of the court fee (amendments to part 1 and part 2 of article 130 of the Commercial Procedural Code of Ukraine and part 3 of article 7 of the Law of Ukraine „On the court fee").*
*2. To clarify within the preliminary hearing the will of the parties to conduct out-of-court settlement of the dispute through mediation (amendments to paragraph 2 of part 2 of article 182 of the Commercial Procedural Code of of Ukraine) and explain to the parties their right to go to out-of-court settlement of the conflict (dispute) through mediation at any stage of court proceedings (part 1 of article 20 of the Draft Law).*
*3. To give the parties time to make a decision on participation in mediation and time for mediation by announcing a break in the preliminary hearings (amendments to part 5 of article 183 of the Commercial Procedural Code of Ukraine) and / or suspend the proceedings, but not more than for 30 days following the day of the court ruling (amendments to part 1 of article 228 and part 1 of article 229 of the Commercial Procedural Code of Ukraine).*
*4. to establish that: mediation may take place before filing a lawsuit, during the court proceedings or when executing the judgment (part 3. of Article 2 of the Draft Law); the participation of a party in mediation cannot be considered as admission of liability of such a party, acknoeledgment of a suit or waiver of claims (part 3 of article 4 of the Draft Law); the joint decision of the parties to settle the dispute through mediation based on the results of mediation may be approved by the court in the manner prescribed by law (part 2 of article 20 of the Draft Law).*

Expected Outcome

Information on mediation is available to people, they can take advantage of procedural options to participate in the mediation procedure, draw up the results of agreements and return part of the court fee. Mediation is widely spread as a remedy in commercial disputes.

## 5. Implementation of the Singapore Convention on Mediation

Identified Gaps

On August 7, 2019 the Minister of Justice of Ukraine signed on behalf of Ukraine the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation). As the need to develop and adopt the Draft Law of Ukraine "On Mediation" is due, inter alia, to the need to ratify and implement the Singapore Convention on Mediation, the experts analyzed the main existing gaps in this context.

A working group was established by the Ministry of Justice of Ukraine (Order of the Ministry of Justice of Ukraine № 2487/7 dd. June 27, 2019) to develop proposals for ratification the Convention, implementation its provisions into the national legislation of Ukraine and the Law of Ukraine "On Mediation". The Singapore Convention on Mediation is essential because it recognizes the importance of mediation for international trade and strengthens its role in resolving international commercial disputes. This act aims to introduce an international mechanism for the enforcement of mediation agreements for the settlement of commercial disputes, similar to that provided for arbitral awards by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 .

The Singapore Convention on Mediation applies only to agreements resulting from mediation concluded in writing by the parties for the purpose of settling a commercial dispute, which were international at the time of conclusion. However, it does not apply to agreements concluded for the settlement of disputes concerning transactions in which one of the parties acts for personal, family or domestic purposes, as well as agreements related to family, inheritance or employment law.

The Convention sets out certain requirements for the agreement and a list of documents / confirmations to be provided to the competent authority. Considerable attention is paid to the grounds for refusing to satisfy the requirement to ensure the implementation of the dispute settlement agreement based on the results of mediation. In general, the Convention is of a framework nature, leaving the regulation of the specifics of the procedure to the discretion of the parties to the Convention.

The signing and ratification of the Singapore Mediation Convention imposes obligations on Ukraine to ensure compliance with its terms. In particular, it is necessary to regulate the scope of mediation, the procedure for its conduct, the status of mediators. The competent authority must also be identified.

*The following issues need to be addressed:*
1. Lack of national standards applicable to mediation and mediator, based on which the competent authorities of the state members of Singapore Convention on Mediation can find out whether there was a serious violation by the mediator during mediation.
2. Ratification of the Singapore Convention on Mediation, which should be accompanied by the designation of the competent authority to which they should apply in order to ensure the implementation of agreements on the settlement of disputes based on the results of mediation, by making appropriate changes in legislation.

Recommendations

1. Adopt a framework law on mediation in order to introduce certain standards on the scope of mediation, procedure and mediator.
2. Designate a competent authority for the purpose of implementing the Singapore Convention on Mediation and a mechanism to ensure the implementation of mediation dispute settlement agreements. There are several options in this regard, but the most acceptable are the court or notary.
3. Ratify the Singapore Convention on Mediation with appropriate amendments to the legislation to empower the competent authority and the regulation of the enforcement procedure for the agreements on the settlement of disputes based on the results of mediation.

Expected Outcome
The Singapore Convention on Mediation is ratified and the legislation is amended. A framework law on mediation is adopted, introducing standards on the scope of mediation, procedures and mediators. The competent body is identified and a procedure has been put in place to ensure the implementation of the dispute settlement agreement based on the results of mediation.

## 6. Administrative law

Identified Gaps

In the European area, the proliferation of mediation in resolving administrative disputes / conflicts is considered depending on Recommendation (2001) 9 of the Committee of Ministers of the Council of Europe on alternatives to litigation between administrative authorities and parties of 05.09.2001, which states that "The widespread use of alternative means of resolving administrative disputes will make it possible to address these issues and bring administrative bodies closer to the public."

Today, the CAJ of Ukraine is the most favorable for conciliation, as the court provides for the possibility of suspending the proceedings at the request of both parties to give them time for conciliation (articles 190, 236 CAJ of Ukraine) and the court clarifies the desire of the parties to resolve the dispute by conciliation at preliminary hearings (article 180 of the CAJ of Ukraine). In addition, paragraph 5 of part 1 of Article 240 CAJ of Ukraine provides for the possibility of leaving the claim without consideration at the request of the plaintiff at any stage of the proceedings, and not only before the trial on the merits (in a way different from civil and commercial proceedings).

Similar to the Civil Procedural Code of Ukraine and the Commercial Procedural Code of Ukraine, Article 194 CAJ of Ukraine sets out that during consideration the case on the merits the court promotes reconciliation of the parties, and according to part 5 of Article 47 CAJ, the parties can reach conciliation at any stage of the trial. In open court proceedings, agreements based on the results of mediation could be made as a statement for conciliation, a statement of leaving the claim without consideration, a statement of the plaintiff's waiver the claim or a statement of the defendant to acknowledge the claim. According to Article 142 CAJ of Ukraine in case of conciliation, the plaintiff's waiver the claim, acknowledgement the claim by the defendant before the hearings on the merits, or at the stage of appeal or cassation, the court in relevant ruling or resolution resolves on the refund to the plaintiff (complainant, applicant) 50 percent of the court fee from the state budget paid by him when filing a lawsuit (relevant appeal or cassation appeal).

It is believed that disputes that need to be resolved through administrative proceedings are non-mediatable, those that cannot be resolved through a mediation procedure. This is due to the peculiarity of the subjective composition of legal relations. In particular, one of the parties is always the authority. The CAJ of Ukraine for the first time introduces a generalized concept (term) "subject of power", the decision, actions or omissions of which

can be appealed in court. According to part 1 of article 3 of the CAJ of Ukraine, such entities include public authorities, local governments, their officials, other entities that perform government management functions on the legislation basis. In case of an administrative dispute, it is the subjects of power who should be more interested in the mediation procedure, because when resolving a dispute through mediation, the agreements reached are usually more in line with the real situation, which not only contributes to the implementation of decisions, but also the process of execution itself follows a natural, voluntary path. While bringing the dispute to the judicial proceedings should be the last resort to protect the violated rights and interests of citizens.

The contradiction is that despite all the favorable procedural rules, today reconciliation in the administrative process is rare. This is due to the peculiarity of the composition of the parties - one of which is the authority. According to Article 19 of the Constitution of Ukraine, these entities must act only on the basis, within the limits and in the manner prescribed by the Constitution and laws of Ukraine, and part 1 of Article 190 CAJ of Ukraine contains the requirement that the terms of conciliation may not contradict the law or go beyond the competence of the authority. It is obvious that this conflict of procedural law significantly complicates any conciliation procedures, including mediation. In practice, the authority's acts outside the scope of powers under legal provisions and its job descriptions is regarded as an excess of its powers and, sometimes, in the opinion of law enforcement agencies, indicates a corruption.

In addition, the administrative body has no right to revoke its own resolution or decision, this right is granted only to the court. Example, the right of the tax authority to revoke its own decision is limited and granted to the supervisory authority of higher level during the administrative appeal

Dependence of revoke of the relevant decision on detecting non-compliance with legislation acts hinders mediation procedure. The list of other grounds for extrajudicial revoke of decisions of the tax authority is not provided by the legislation of Ukraine. Even if the parties agree on revoke, there is no mechanism for implementing such an agreement. If the agreements are formalized by an amicable agreement and approved by a court decision, it will not be executed. Great hopes are placed on the draft Law of Ukraine "On Administrative Procedure", which has already been submitted for consideration to the Verkhovna Rada of Ukraine.

*The following issues need to be addressed:*

1. The court is not empowered to inform the parties to the administrative process about the option to resolve the dispute through mediation.
2. Authorities are not endowed with sufficient discretion to determine the terms of reconciliation through mediation with individuals and / or legal entities.
3. There are no clear criteria to determine the terms of conciliation that ensure the protection of authority (its official / representative) from allegations of corruption in case of reconciliation.
4. The legislation does not provide for the possibility and procedure for the authority's participation in the mediation procedure as a party in order to resolve conflicts with citizens / legal entities amicably.

<u>Recommendations</u>

1. Bring the legislation of Ukraine in line with the provisions of European law on the development of conciliation alternative out-of-court procedures. Provide a legal opportunity for the authorities to go to the mediation procedure and negotiate without violating Article 19 of the Constitution of Ukraine.
2. Introduce incentives for the parties to reconcile through mediation.
3. Give the court the power to explain to the parties their right to settle the dispute through mediation.
4. Provide for the possibility and develop a mechanism for resolving disputes through mediation with the participation of authorities out of court. In this sense, it is expedient to adopt a single law that would regulate the decision-making procedure of the subjects of power.

5. The authority must have sufficient discretion to resolve the issue of amicable settlement of the dispute out of court and to determine the terms of conciliation, as well as the issue of not appealing court decisions when it is hopeless, while being protected from unfounded accusations.
6. To develop and implement a transparent and reasonable mechanism for determining the feasibility of appealing by the authority of court decisions if a lawsuit is lost.
7. Develop and implement pilot projects on mediation in customs and tax disputes (fiscal mediation) with further scaling to the entire territory of Ukraine.

8. Establish a working group with representatives of the Ministry of Justice of Ukraine, the State Fiscal Service of Ukraine, courts of administrative jurisdiction, and experts in the field of mediation to comprehensively analyze and develop these recommendations, pilot projects and information materials on mediation.
9. Legislatively set out the phased of introduction of mediation in fiscal disputes. Choose categories of disputes or cases where mediation is possible. As an example, at the stage of administrative appeal (provisions of Art. 56 of the Tax Code of Ukraine), where the taxpayer has the right to participate in the consideration of objections to the act of tax audit or in the consideration of the complaint. This is a pre-trial stage where it is possible to discuss interests and implement mediation at the first stage.

10. In the future, the issue of presumed consent of an authority's representative to participate in mediation, if an individual or legal entity declares such a desire, shall be considered.

*The Draft Law of Ukraine "On Mediation" proposes:*
*1. To clarify by the court in the preliminary hearing the desire of the parties to conduct out-of-court settlement of the dispute through mediation (amendments to paragraph 2 part 2 of article 180 CAJ of Ukraine) and explain to the parties the right to conduct out-of-court settlement of a conflict (dispute) through mediation at any stage of court proceedings (article 20 of the Draft Law).*
*2. To give the parties time to make a decision on participation in mediation and time for mediation by announcing a break in the preliminary hearings (amendments to part 6 of article 181 of the CAJ of Ukraine and / or suspend the proceedings, but not more than for 30 days following the day of the court ruling (amendments to paragraph 4 of part 1 of article 236 CAJ of Ukraine).*
*3. to establish that: mediation may take place before filing a lawsuit, during the court proceedings or when executing the judgment (part 3. of Article 2 of the Draft Law); the participation of a party in mediation cannot be considered as admission of liability of such a party, acknoeledgment of a suit or waiver of claims (part 3 of article 4 of the Draft Law); the joint decision of the parties to settle the dispute through mediation based on the results of mediation may be approved by the court in the manner prescribed by law (part 2 of article 20 of the Draft Law).*

Expected Outcome

The scope of discretionary powers of state bodies to determine the terms of conciliation has been established. Authorities, individuals and legal entities have access to information on mediation and can use procedural opportunities to participate in the mediation procedure, formalize the results of agreements and return part of the court fee. Certain categories of cases are recommended for a mandatory information session on mediation. Pilot projects for the integration of mediation into administrative proceedings have been launched, Clear criteria and a mechanism for introducing fiscal mediation have been developed.

## 7. Criminal law

Identified Gaps

Recommendation of the Committee of Ministers of the Council of Europe № R (99) 19 of 15.09.1999 to member states on mediation in criminal matters notes that, due to its flexibility and involvement of the parties, mediation

provides a comprehensive solution to problems arising from crime. It is determined that mediation in criminal cases can exist both as an alternative to traditional criminal proceedings and as a supplement to such proceedings and the application of punishment, mediation can also reduce the number of sentences to imprisonment and, ultimately, reduce the cost of the prison system. Also, the above-mentioned Recommendation and, later, Recommendation CM / Rec (2018) 8 of the Committee of Ministers to member states on restorative justice in criminal matters contain a provision that restorative justice can be applied at any stage of the criminal process. More importantly, CM / Rec (2018) 8 encourages Council of Europe member states to develop and administer restorative justice within their criminal justice systems and promotes standards of restorative justice in the context of criminal proceedings, and seeks to protect the rights of participants and maximize efficiency of the process by meeting the needs of participants.

According to part 4 of Article 56 of the Criminal Procedural Code of Ukraine (CPC of Ukraine), the victim has the right at all stages of criminal proceedings to reconcile with the suspect, accused and enter into a conciliation agreement. Conclusion of a reconciliation agreement between the victim and the suspect or accused is allowed for criminal offences of small or medium gravity; in criminal proceedings in the form of private prosecution.

In cases provided for by the Criminal Code, conciliation is the basis for ceasing criminal proceedings.

In particular, in the event of refusal of the victim (or his representative) from prosecution in criminal proceedings in the form of private prosecution (except for criminal proceedings on a criminal offense related to family abuse). According to Article 45 of the Criminal Code of Ukraine a person who first committed a criminal offense or negligent not serious crime, except for corruption criminal offenses, is exempt from criminal liability, if after committing a criminal offense sincerely repented of his/her deed, actively contributed to solving a criminal offense and fully reimbursed or eliminated the damage caused.

According to Article 46 of the Criminal Code of Ukraine, a person who for the first time committed a minor or negligent crime of medium gravity, except for corruption crimes, is released from criminal liability if he reconciled with the victim and compensated for the damage or repaired the damage.

Currently, the exemption from criminal liability of a minor accused who took part in the recovery program in the criminal justice system of Ukraine, can also be done on the basis of Art. 48 (Exemption from criminal liability due to changes in the situation) and Art. 97 (Exemption from criminal liability with the use of coercive measures of an educational nature). Reconciliation with the victim may also be grounds for exemption from serving a criminal sentence.

In other cases, sincere repentance, voluntary compensation for damage or remediation of the damage caused are recognized as mitigating circumstances. A conciliation agreement is a form of formal arrangement between the victim and the suspect or accused.

An important role is played by investigators and prosecutors, who are not only obliged to inform the suspect and the victim about their right to reconciliation, but also to explain the mechanism of its implementation and not to interfere with the conclusion of a conciliation agreement. (part 7 of article 469 of the CPC of Ukraine).

Special attention is paid to the introduction of mediation in the field of juvenile justice.
Order of the Cabinet of Ministers of Ukraine № 1027-p of 18/12/2018 approved the National Strategy for Reforming justice system as to children for the period up to 2023.

On January 21, 2019, the Ministry of Justice of Ukraine and the Prosecutor General's Office adopted the Order “On the implementation of the pilot project” Recovery Program for minors suspected of commiting a crime” № 172/5/10 (as amended), which approved the procedure for implementing the pilot project “ Recovery Program for minors suspected of commiting a crime”.

Implementation of the project was launched on the basis of the system of free legal aid from March 2019 in Donetsk, Odesa, Lviv, Luhansk, Mykolaiv and Kharkiv regions. Successfully implemented project became the basis for its scaling to the entire territory of Ukraine since April 2020. Minors suspected of committing non-serious crimes and have not previously been prosecuted were involved into the project by their consent. Agreement on compensation for damage concluded by the parties within the pilot project is different from agreement on the reconciliation of the victim and the suspect or the accused, which is the basis forcourt of verdict in the case (Article 475 of the CPC of Ukraine). The agreement on compensation for the damage caused is a civil agreement.

From May 2019 to October 31, 2020, a pilot project "Implementation of Restorative Justice in Ukraine" in partnership with the Supreme Court operates in Ukraine. It aims to strengthen the capacity of Ukrainian communities to administer restorative justice in the fight against crime, conflict resolution and the promotion of redress by establishing mechanisms for the application of restorative justice programs in criminal proceedings .

*The following issues need to be addressed:*
1. The law does not directly mention the mediator as a person through whom the victim and the suspect or accused can reach an agreement on a conciliation agreement.
2. There is no direct mention in the legislation of mediation as a way to achieve reconciliation between the victim and the suspect or accused .
3. The legislation does not provide for the possibility to use the restorative justice program for participants in criminal proceedings and mechanisms for access to it.
4. There is no mechanism in the legislation to involve minors in the mediation procedure within executing friendly justice.

<u>Recommendations</u>

1. To envisage in the legislation the use of the mediation procedure as a means of reconciliation, which contributes to the correction of disturbed public relations.
2. To amend the legislation in order to consolidate restorative justice in criminal proceedings.
3. To explore the possibility of implementing resocialization programs within the framework of recovery programs justice.
4. To develop and implement mechanisms for resocialization of juvenile offenders who reconciled with their victims.
5. To develop an instrument for preventing repetition of a crime by a minor who has undergone the procedure of restorative justice and reconciled with the victim.
6. To evelop and implement a mechanism for the participation of a person sentenced to imprisonment in a restorative justice program and, in the case of reconciliation with the victim, take this fact into account when deciding on shortening the terms of serving a sentence or early release.
7. To make changes to the Criminal Procedural Code of Ukraine (part 1 of article 469 of the CPC of Ukraine) by adding a mediator to the circle of persons through whom the victim and suspect or accused can reach an agreement on a conciliation agreement.
8 . To add a mediator to the list of persons who cannot be questioned as a witness in criminal proceedings. This is about information that became known to them and / or received by them during the mediation.
9. To establish that participation in the mediation procedure cannot be considered a guilty plea.
10. To establish an effective mechanism of interaction between representatives of criminal justice structures and mediators.
11. To develop a basic course on restorative justice for judges, prosecutors, investigators and implement it in training programs for representatives of the criminal justice system of Ukraine.
12. To scrutinize the opportunity for expanding the list of crimes where the conclusion of an agreement on reconciliation between the victim and the suspect or the accused is allowed.

13. To investigate the possibility of suspension of pre-trial investigation (in particular, in the form of legal inquiry) for the period of participation of the suspect and the victim in mediation.

*The draft Law of Ukraine "On Mediation" proposes:*
*1. To establish that mediators may not be questioned as witnesses about information that became known to them and / or received by them during mediation (amendments to part 2 of article 65 of the CPC of Ukraine).*
*2. To determine that agreements on a reconciliation agreement between the victim and the suspect or accused may be reached with the help of a mediator (mediators) (amendments to part 1 of article 469 of the CPC of Ukraine)*
*3. To provide that the participation of a party in mediation cannot be considered as an admission of guilt by such a party (part 3, article 4 of the Draft Law ).*

Expected Outcome

Mediation reconciliation is widely used in criminal proceedings. Criminal justice bodies facilitate the use of mediation. A regulatory framework for the practical application of restorative justice (including mediation between victims and offenders (suspects, accused or convicted ) in criminal proceedings is formed. Effective mechanism of interaction between the criminal justice agencies and mediators is turned on.

## B. Interaction with the Court and Other Stakeholders

The success of mediation largely depends on the correct understanding and perception of mediation by stakeholders and representatives of the parties. Whether the parties will use mediation depends on the quality of information on the possibilities of out-of-court dispute resolution, the nature of the procedure and the role of the mediator. However, the experience of foreign countries, as well as national realities, show a low level of awareness of the legal community about mediation, which is also a significant barrier to its development in our country. This is due to lack of awareness of the mediation procedure, inability to offer mediation, perception of mediators as competitors rather than allies, lack of understanding of their role in the mediation procedure, the benefits of using its disclosure and the possibility of combining with the main profession.

Therefore, it is important to analyze the existing challenges and develop relevant recommendations for the integration and interaction of the mediation institution with stakeholders for its effective development and accessibility.

### 1.Court

Identified Gaps

If mediation was originally seen as an alternative to litigation, modern world trends now provides it as an integral component of the justice system, which has a positive impact on the judiciary - reducing the workload, reducing court time, increasing of the credibility of the judiciary and increasing trust, satisfaction of ordinary citizens with the work of the court. It is the court that plays a crucial role in spreading mediation and shaping a culture of amicable settlement of disputes.

Currently in Ukraine mediation is implemented as an out-of-court procedure only. At the same time, there are no mechanisms of interaction between the court and mediation. In recent years, various pilot projects have been implemented in Ukraine to ensure the availability of mediation in court: some of them were aimed at training mediators from among judges, some at attracting external mediators. Today there is a positive experience of one of the pilot projects in courts of different jurisdictions in Odessa, on the basis of which mediation offices have

been launched, where volunteers provide a mediation procedure on a free basis. This experience is an example of effective mediation interaction with the court.
Exploring the current trends of strengthening the interaction of mediation and justice, it should be noted that the parallel development of two models of mediation may exist: in-court (mediation is carried out by external mediatiors in special rooms or mediation centers located on court builings) and judicial (a judge or another person of court staff is a mediator).

Since 2017, a new conciliation procedure has been introduced in the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine and the CAJ of Ukraine - a dispute settlement procedure with the participation of a judge, which is a novelty for the legislation of Ukraine. It consists in the fact that prior to the commencement of the case on the merits by mutual agreement of the parties the dispute may be settled with the assistance of the judge in whose proceedings the case is pending.

Some (including judges and attorneys) mistakenly consider the dispute resolution procedure with the participation of a judge as judicial mediation. In fact, a dispute settlement procedure involving a judge is a type of conciliation procedure in which judges will benefit from the mediator's skills, but in essence it is not mediation.

Despite all the progressiveness and potential usefulness of a dispute resolution procedure involving a judge, there are several contentious issues in its settlement, namely, the reluctance of all judges in Ukraine to engage in this procedure and the possibility of abuse by the parties to replace the Judge-Rapporteur. First of all, the provisions on the settlement of the dispute by the judge-rapporteur in whose proceedings the case is pending review. It is more expedient to transfer the case to a specially trained judge. The dispute settlement procedure should be conducted by judges who wish to engage in conciliation and have undergone special training. If the dispute is not settled within the prescribed period, the case will be returned to the judge in whose proceedings it was before referral to such a procedure.

*The following issues need to be addressed:*
1. There is no interaction between mediation and the court (except for project pilots).
2. The optimal model for Ukraine's integration of mediation into the judiciary has not been determined.
3. There is a misconception of the institution of dispute resolution with the participation of a judge and its identification with mediation. The settlement of this institution contains controversial provisions that need to be improved.
4. Judges do not have enough information about mediation to inform the parties.

<u>Recommendations</u>

1 . We propose to take as a basis the model of in-court mediation, by introducing a system of mediation centers and rooms.
2. To develop in-court mediation Ruling for future introduction mediation rooms and centers for testing within pilot project and its subsequent scaling. Various models of engaging mediators to the rooms/centers and offering mediation to the parties shall be tested.
3. Improve the legal regulation of the dispute resolution procedure with the participation of a judge.
4. The National School of Judges of Ukraine together with experts in the field of mediation to develop and implement training programs for judges and candidates for the position of judge (on the essence of mediation, determining the mediability of disputes, etc.).
5. Include mediation issues in the program of the qualifying examination of candidates for the position of a judge. Thus, already at the beginning of their professional activity, judges will be aware of mediation.
6. Establish a working group with the participation of representatives of the State Judicial Administration of Ukraine, the High Qualifications Commission of Ukraine, the High Council of Justice, the National School of Judges of Ukraine, judges and experts in mediation for comprehensive analysis and elaboration of these recommendations, development of mechanisms for their implementation. etc.

Expected Outcome

During the approbation of the pilot project of the adjudication mediation model through the system of mediation centers and rooms, positive results were obtained, which became the basis for the development of a mechanism for extension to courts in all regions of Ukraine and relevant legislative changes.

Every judge understands the essence and nature of mediation, can pre-determine the mediability of the dispute and offers it to the parties. The parties have the opportunity to choose the method of settling their dispute on the basis of the court - in parallel with the adjudication mediation the procedure for settling the dispute with the participation of a judge is available .

## 2. Arbitration

Identified Gaps

The process of integrating mediation into international commercial arbitration and the introduction of a hybrid procedure is in line with global trends. The experience of most international commercial arbitration courts in the world suggests that combining arbitration with mediation within a single institution is more efficient, flexible and effective.

One of the links in the system of alternative dispute resolution operating in Ukraine is the two arbitration institutions established at the Chamber of Commerce and Industry of Ukraine (CCI).

The International Commercial Arbitration Court (ICAC) of the Ukrainian Chamber of Commerce and Industry has been operating in Ukraine since 1992. In its activities ICAC is guided by the Law of Ukraine "On International Commercial Arbitration" of 24.02.1994 , the Regulations on the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine, which is Annex 1 to this Law and the Rules of the International Commercial Arbitration Court at the Chamber of Commerce Chamber of Ukraine.

Since 1994, the Ukrainian Maritime Arbitration Commission (UMAC) has been operating at the Chamber of Commerce and Industry of Ukraine (considering disputes in the field of merchant shipping). UMAC in its activities is also guided by the Law of Ukraine "On International Commercial Arbitration", the Regulations on the Ukrainian Maritime Arbitration Commission at the Chamber of Commerce and Industry of Ukraine, the Rules of the Ukrainian Maritime Arbitration Commission at the CCI.

There are various hybrid out-of-court dispute resolution procedures in the world, an element of which is arbitration. Based on the analysis of different models used in reputable international commercial arbitrations, the experts concluded that the most acceptable for implementation in Ukraine are the following two types of interaction between arbitration and mediation:
1. “arb-med-arb” (arbitration-mediation-arbitration), when the procedure initiated in arbitration, in the presence of a mediation clause in the contract, is stopped and first transferred to the mediation procedure in arbitration, where there is a register of mediators or mediation center in arbitration. The solution obtained as a result of mediation may, at the request of the parties, be approved by the arbitrator and executed as a resolution of the arbitral tribunal. If the parties fail to settle the dispute through mediation, the case is returned to arbitration.
2. “med-arb” (mediation-arbitration), when any disputes arising directly or in connection with the contract must, before the arbitration proceedings, be referred to mediation in accordance with the Rules of Mediation. And

disputes between the parties that remain unresolved after the mediation procedure is submitted to arbitration in accordance with the Rules of Arbitration.

*The following issues need to be addressed:*
1. ICAC and UMAC do not provide for the possibility of resolving a dispute through mediation.
2. There are no mediation regulations (mediation rules), there is no functioning of the register of mediators or a separate mediation center at ICAC and UMAC, to which the dispute is referred for settlement.

Recommendations

1. To set out and develop the procedure for turning to mediation within arbitral proceedings.
2. To develop and approve the text of Mediation Rules for ICAC and UMAC. To enable mediation in arbitration proceedings, the existence of Arbitration and Mediation Regulations will establish a structured, institutional mechanism designed to ensure transparency, efficiency and fairness of the dispute resolution process.
3. To form a register of mediators at ICAC and UMAC.
4. To develop mediation clause samples for their potential including into contracts.

Expected Outcome

The parties have the opportunity to apply to the mediation procedure within the arbitration proceedings, as a result of which they have the opportunity to save time, save money (mediation fee for mediation is smaller than the arbitration fee). The probability to do to mediation within arbitral proceedings will contibute to this procedure in Ukraine.

### 3. Attorneys

Identified Gaps

Given the specifics of attorney, today attorneys can become one of the key stakeholders in the development of the institution of mediation. It is the attorneys who first turn to citizens and businesses in the event of a conflict, even before going to court. The extent to which an attorney can competently offer the client to settle his issues in pre-trial mediation, explain its essence and benefits, depends on how amicable settlement of conflicts in general will enter the legal culture of society as a whole. They can also provide qualified legal support to the client in the mediation procedure.

The rules of legal ethics require attorneys as possible to assist in pre-trial and extrajudicial orders for settlement of disputes between the client and others. (part 2, article 8).

It is also worth noting that the Ukrainian National Bar Association (UNBA) has a Committee on Mediation, the purpose of which is to promote the development of mediation in the legal community, spreading among attorneys the practice of peaceful settlement of disputes by extrajudicial methods.

There is currently no legal ban in Ukraine on combining the professions of attorney and mediator. The rules of legal ethics allow that a attorney may perform the function of a mediator provided that he / she took special training and adherence to internationally recognized ethical principles of mediation, as well as the basic principles of legal ethics. This issue needs further regulation, taking into account the ethical issues of combining these professions.

*The following issues need to be addressed:*
1. Many attorneys do not distinguish mediation from other types of negotiations; do not understand the nature and benefits of mediation, the role of the mediator and have fears that they will not be able to perform their functions as defenders during the mediation procedure, so they do not inform clients about it.
2. No valid regulation regarding the impossibility of a attorney to act as a mediator in cases where he/she provides legal assistance and, v.v., the attorney's role as a representative or defender in a conflict (dispute) in which he/she was a mediator. The above may result in competing interests.

Recommendations

1. To develop and implement a training program for attorneys on determining the mediability of disputes and informing clients about the possibility of resolving a dispute through out-of-court mediation.
2. To include questions on mediation in the examination tickets of the qualifying examination for acquiring the right to practice law in Ukraine. Thus, future attorneys will be aware of mediation and its place in the professional activity of a attorneys.
3. the issue of impossibility for an attorney to act as a mediator in cases in which he/she provides legal assistance and, v.v., for an attorney to act as a representative or defender in a conflict (dispute) in which he/she was a mediator and / or shall be determined by law to prevent conflict of interests.
4. To introduce a mechanism for settling disputes between attorneys on the basis of bar self-government bodies through mediation.

> *The Draft Law of Ukraine "On Mediation" proposes:*
> *1. To provide that defenders may be participants in mediation (article 1 of the Draft).*
> *2. to determine that the mediator may not be a representative or defender of any of the parties in the pre-trial investigation, court or arbitration proceedings in the conflict (dispute) in which he/she was a mediator (paragraph 3 of part 2 of article 6 of the Draft Law).*

Expected Outcome

Attorneys understand the value of the mediation procedure and can offer it to the client.
Attorneys who have taken special training will perform the function of a mediator, ensuring the rules on the impossibility of participating in the same case as a attorney and a mediator at the same time and in case of competing interests. The Unified Register of Advocates of Ukraine contains information on the possibility of a attorney act as a mediator and information on his/her basic training in mediation.

### 4. Free Legal Aid Coordination Center, Secondary Legal Aid Centers (FLA system)

Identified Gaps

On June 2, 2011, the Law of Ukraine "On Free Legal Aid" (hereinafter - the Law) was adopted. Article 7 of the Law stipulates that one of the types of primary legal aid is the provision of assistance in ensuring a person's access to secondary legal aid and mediation. Until recently, assistance in accessing mediation was hardly provided by the FLA system. Since 2019, thanks to the pilot project , a strong movement in this direction has begun. Currently, "mediation offices" have been opened on the basis of the FLA system, cooperation has been established with volunteer mediators who provide mediation services in family and inheritance disputes free of charge, a training program has been developed for further trainings on mediation. Also, the FLA system is involved in the implementation of the pilot project "Recovery Program for minors suspected of commiting a crime", which, in particular, provides for mediation services in criminal proceedings involving minors (see para „Criminal law").

Thanks to the extensive system of centers, the FLA system can become an effective channel for promoting and promoting mediation as a tool for resolving disputes. Legal assistance in providing access to mediation is a free primary legal aid to which all persons under the jurisdiction of Ukraine are entitled.

Today, mediators cooperating with the FLA System provide a free mediation service. The exception is made for mediation within the pilot project "Recovery Program for minors suspected of commiting a crime" on the basis of the system of providing free legal aid. In order to introduce restorative approaches in criminal proceedings on criminal offenses and non-serious crimes committed by minors, ensuring compensation for the damage caused, as well as ensuring the implementation of this pilot project, on June 03, 2020 The Cabinet of Ministers of Ukraine adopted Resolution No. 445 "Some issues of intermediacy (mediation) by lawyers included into the Register of attorneys providing free secondary legal aid". Thus, it was possible to involve centres for providing free secondary legal aid mediator from among lawyers included in the Register of attorneys who provide free secondary legal assistance, trained on the implementation of the Recovery Program for minors suspected of commiting a crime, to resolve the conflict between such minors and victims by concluding an agreement on the application of the said Program. Such mediators are involved on the basis of concluded contracts and instructions of the center for mediation. Also, the cost of services of such mediators was determined by amending the Procedure for the use of funds provided for in the state budget for payment of services and reimbursement of expenses of lawyers who provide free secondary legal aidapproved by Resolution of the Cabinet of Ministers of Ukraine dated March 4, 2013 № 130.

This is an excellent example of planning of the use of resources available in FLA for the implementation of the pilot project, but, of course, this option of attracting mediators cannot be permanent because mediators in this case can only be:
- lawyers already included into the Register of attorneys who provide free secondary legal aid;
- lawyers who have been trained on the implementation of the Recovery Program for minors suspected of committing a crime to resolve the conflict between such minors and victims;
- only in criminal proceedings involving minors as suspects.
Today in Ukraine mediators are not only lawyers, and the range of disputes where mediation can be applied on the basis of the FLA System is much wider than criminal proceedings involving minors.

The following issues need to be addressed:
1. It is not specified how aid should be provided in ensuring a person's access to mediation.
2. It is not defined what is a legal service to provide assistance in ensuring a person's access to mediation, who should provide this service and under what conditions.
3. Not all specialists of the FLA system have a correct idea of the mediation procedure and are able to offer this service to their clients.
4. There is no mechanism for attracting and paying for mediator services provided on the basis of the FLA system.

<u>Recommendations</u>

1. Legislation on free legal aid needs to be improved in the context of mediation.
2. To develop a mechanism for attracting mediators at public expense if mediation is to be provided to citizens free of charge.
3. To carry out systematic training of FLA staff on offering mediation to system clients.
4. To delevop a distance course on the issues of qualified mediation offerring for specialists of the FLA system, the completion of which will be a mandatory condition for employment in the front offices of the system. The online course will help speed up the training of the staff.

5. To establish a working group with the participation of representatives of the Coordination Center for Legal Aid, centers for secondary legal aid, the Ministry of Justice of Ukraine and experts in the field of mediation for

comprehensive analysis and elaboration of these recommendations, development of a plan and content of information activities on mediation issues, working out the mechanism of redirecting of FLA clients to social services to receive social mediation services.

Expected Outcome

The essence of the mediation access procedure and the place of the mediation service are determined. The experts engaged understand the essence of mediation and can competently offer mediation to clients. There is a mechanism for attracting external mediators and the procedure for paying for their services. The state budget provides funds to pay for mediation. The most vulnerable groups in society have access to mediation on a free basis.

## 5. Notary

Identified Gaps

Notary in Ukraine is a system of bodies and officials who are obliged to certify rights, as well as facts, in order to provide them with legal credibility in accordance with article 1 of the Law of Ukraine "On Notaries" 3425-XII , dated 13.02.2020. Today the notary is a multifunctional system.

The performance of notarial acts in Ukraine is entrusted to notaries who are state-authorized individuals conducting notarial activities in a state notary office, state notarial archive or independent professional notarial activity. In addition to notarial acts, notaries perform all functions in the field of state registration of rights to immovable property, perform actions in the field of business registration. In this case, Article 3 of the Law of Ukraine "On Notaries" contains restrictions that notaries may not perform other paid work, except for teaching, research and creative activities. Thus, today notaries cannot provide mediation services.

The role of notaries in promoting mediation is significant, as they are responsible for certifying agreements. When entering into agreement the parties may be reasonable offered to include mediation clause to it after qualified delating the option of resolving disputes through mediation. Best practices proves the effectiveness of notarization of agreements based on the results of mediation, as well as executing enforcement inscription by a notary on such agreements.

Some notaries, assuming the bonus of mediation skills in their professional activities, take mediation trainings on their own initiative. However, most notaries still do not understand the nature and features of the mediation procedure and, accordingly, can not competently inform clients about the possibility of resolving the conflict (disputes) through mediation.
Today, due to restrictions over the performance of other activities by notaries, as well as the lack of relevant knowledge of notaries, the notary system, unfortunately, does not contribute to the spread of mediation in Ukraine.

*The following issues need to be addressed:*
1. Most notaries do not have a clear understanding of what mediation is, how to identify mediable cases and how to offer it to clients.
2. Notaries do not have the right to provide mediation services due to the legal prohibition for notaries to perform other paid work, except for teaching, research and creative activities.
3. Defining the model of introduction a mediation in notarial activity and delimitation of activity notary and mediator functions.

Recommendations

1. To develop and implement a basic course for advanced training in mediation on the basis of Notary Chamber of Ukraine, which shall be undergone by all notaries.
2. To provide for awareness-building for notaries on the nature of mediation, determining the mediatability of disputes, offering mediation to clients, as well as on the certification of agreements on the results of mediation in all around Ukraine on ongoing basis.
3. Include mediation issues in the examination tasks of electronic anonymous testing during the qualifying examination for interns. Thus, even before the start, future notaries will be aware of mediation and its place in the professional activities of a notary.
4. Establish a working group with representatives of the Ministry of Justice of Ukraine, the Notary Chamber of Ukraine, the Institute of Law and Postgraduate Education of the Ministry of Justice of Ukraine, notaries and experts in the field of mediation for comprehensive analysis and development of these recommendations, plan and content of information activities..
5. Amend the special Law "On Notaries" and other regulations (in particular, the Procedure for notarial acts by notaries of Ukraine) to give notaries the right to provide mediation services, regulate the taxation of notaries and eliminate the possibility of conflict of interest.
To amend the Law “On Notary” and other regulations (in particular, the Procedure for notarial acts by notaries of Ukraine) in order to provide notaries the right to offer mediation as an independent service (if appropriate basic training is taken) or the possibility of mediation procedures within the provision of notarial services (for example, in the case of certification of the agreement, a notary who has undergone basic training in the field of mediation can help the parties to reach an understanding on all essential terms), regulation of tax issues and exclusion of the possibility of conflict of interest.
6. To investigate the possibility of entering enforcement inscriptions by a notary on agreements where agreements of the parties on the results of mediation are fixed, in case of non-fulfillment by the parties of such agreements/obligations provided by them and the possibility of using certain types of encumbrances in such contractual relations.

Expected Outcome

Notaries understand the value of mediation and can offer it to clients in a qualified manner. They can provide mediation services (as mediators) keeping to ethical standards of professional activity and eliminating the risk o of conflicts of interest. The Unified Register of Notaries contains information on notaries who can act as mediator. Notaries may certify agreements based on the results of mediation and make writs of execution on such agreements in case of non-fulfilment.

## 6. Bancruptcy trustees

Identified Gaps

On October 21, 2019, the Code of Ukraine on Bankruptcy Procedures (CUBP), comprehensive document that provides the conditions and procedure for restoring the solvency of a debtor - a legal entity or declaring it bankrupt in order to satisfy creditors' claims, as well as restoring solvency of an individual has enacted.

The issue of bankruptcy of legal entities is also regulated by the Commercial Code of Ukraine, the Commercial Procedure Code of Ukraine and other laws and by-laws of Ukraine.

The global sense of the functioning of the bankruptcy institution around the world is the solution of problems related to solvency in such a way that the creditor does not suffer a total loss of his funds, and the debtor has an opportunity to save the business and solve all financial problems legally.

Unfortunately, in the current Code of Bankruptcy Procedures, unlike the previous law, there are no provisions regarding the amicable agreement. But from the analysis of the CUBP it is seen that at certain stages on certain issues it is possible to reach an agreement between the parties (for example, regarding the repaid claims of creditors). Mediation as a way to achieve mutual understanding that would be appropriate during the financial rehabilitation of the debtor before the initiation of bankruptcy proceedings (regarding the terms of the financial rehabilitation plan, the candidacy of the financial rehabilitation manager and the need for his appointment, as well as determining the scope of his powers), and judicial procedure of financial rehabilitation (amending the rehabilitation plan and approval of its creditors' meetings in order to prevent the debtor from declaring bankrupt and extending the period of the financial rehabilitation procedure), and in other court procedures applied to the debtor.

Innovation of the Code is the procedure for restoring the solvency of an individual, according to which any individual who is not a business entity may put himself into bankruptcy proceedings.

In the bankruptcy procedure of an individual there are two stages: restructuring of debts and declaring a debtor bankrupt and introducing a procedure for repaying debts. Mediation can be a good and effective tool as one of the forms for elaboration of mutually acceptable decisions on debt restructuring or the procedure for repayment of debts of an individual (good faith debtor).

Taking into account that the insolvency receiver has the powers established by law to achieve the purpose of the Code of Bankruptcy Procedures, taking into account that in accordance with Part 2 of Art. 10 of the Code of Bankruptcy Procedures, the insolvency receiver from the moment of the decision (resolution) on his appointment as a reorganization manager or liquidator until the termination of his powers is equated with the official of the debtor company, the insolvency receiver can not perform functions of mediator in proceedings where they are directly insolvency officers. The role of the insolvency receiver in such proceedings should be to inform the parties about their ability to use mediation to resolve existing or potential disputes that may arise at certain stages of bankruptcy proceedings.

Absence of direct prohibition for insolvency officers to be engaged in other activities indicates the possibility of performing mediator function (subject to special training) in proceedings where insolvency receivers are not directly insolvency receivers, and there is no conflict of interests.

<u>The following issues need to be addressed:</u>

1. Most insolvency receivers are not aware of the mediation procedure, its essence and benefits for the parties.

2. The law does not provide for the powers of insolvency receivers to inform the parties about the possibility of applying to mediation at certain stages of bankruptcy proceedings.

3.The Code of Ukraine on Bankruptcy Procedures establishes the deadlines for the procedures of disposal of the debtor's property and restructuring of debtor's debts and, accordingly, the impossibility of extending such terms by the commercial court is in direct connection with the effectiveness of mediation in certain judicial procedures.

4. Absence of provisions on amicable agreement in cases of restoration of solvency and declaring bankruptcy in the Code of Bankruptcy Procedures of Ukraine.

<u>Recomendations:</u>

1. To include provisions regarding amicable agreement in the Code of Ukraine on Bankruptcy Procedures.

2. To amend the Code of Ukraine on Bankruptcy Procedures in order to grant the power to the insolvency receiver to inform the parties to the procedure for restoring solvency of the debtor - legal entity or declaring it

bankrupt, as well as restoring the solvency of an individual about the possibility of applying to mediation procedures.

3. To carry out information events on mediation issues for insolvency receivers in the regions of Ukraine on a regular basis.

4. Include mediation issues into the examination tickets of the qualifying exam for acquiring the right to act as an insolvency receiver.

5. To establish a working group with the participation of representatives of the Ministry of Justice of Ukraine, the National Association of insolvency receiver of Ukraine, judges and experts in the field of mediation for a comprehensive analysis and elaboration of the mentioned recommendations, research on the possible impact of participation of the parties in mediation procedural terms (extension of deadlines), development of the plan and content of information measures, as well as development of appropriate amendments to the legislation.

Expected Outcome

Insolvency receivers are aware of the mediation procedure, understand at what stages of bankruptcy procedure it is useful. Insolvency receivers inform the parties to bankruptcy cases about the possibility of mediation. The mediation procedure is in demand. The legislation on prolongation of procedural terms established by law in case of turning parties to mediation is improved.

## 7. Authorities and persons who enforce decisions

Identified Gaps

The final stage of the proceedings is the enforcement of the decision as an integral part of respect for the human right to a fair trial within a reasonable time, enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms in article 6 .

According to the Law of Ukraine "On Enforcement Proceedings" (Article 1) enforcement proceedings are the final stage of court proceedings and enforcement of court resolutions and resolutions of other bodies. Enforcement of decisions is assigned to the bodies of the state executive service (state executors) and to private executors (in cases provided by law).

Part 2 of Article 19 of the above-mentioned law gives the parties to the enforcement proceedings the right to enter into an amicable agreement in course of execution of the resolution, which shall be approved by the court that issued writ of enforcement. This rule is a good "basis" for applying mediation procedure at the stage of enforcement proceedings upon joint request of the recoverer and the debtor.

It should be noted that the percent of successful enforcement of court resolutions is quite low in Ukraine. In such a situation, it is reasonable for the parties to the enforcement proceedings to consider the option of amicable settlement of the dispute in the process of execution of the resolution, in particular regarding the use of mediation as an alternative method of dispute settlement. It should also be noted that the practice of some European countries shows that enforcement proceedings aimed not only at enforcing the resolution, but also at reconciling the debtor and the recoverer, are more effective.
Mediation should become one of the tools used in enforcement proceedings.
Bun one shall understand that this is possible if the execution of a court decision is inevitable. The debtor must understand that execution is effective and inevitable.

The experience of some private performers who have undergone a basic mediator training course proves that mastering this area is useful for the executor. The knowledge and skills of the mediator enable the executor to communicate more effectively with the parties to the enforcement proceedings, as well as to promote their reconciliation and, accordingly, to ensure the enforcement of decisions taking into account the reached agreements. A private executor is an independent professional in contrast to a state executor, who is a civil servant, which expands the possibilities of his performance a mediation function.

However, Art. 18 of the Law of Ukraine "On Bodies and Persons Enforcing Enforcement of Judgments and Decisions of Other Bodies" contains a provision that a private executor cannot be engaged in other paid (except for teaching, scientific and creative activities, activities of the insolvency receiver, instructor and judicial practice in sports and work in the bodies of the Association of Private Executors of Ukraine) or business activities.

*The following issues need to be addressed:*

1. The executors do not have the authority to facilitate the conciliation of the parties to the enforcement proceedings, in particular by informing them about the possibility of conciliation at the stage of execution of the decision.
2. The legislation does not provide for the possibility of suspending enforcement proceedings if the parties wish to resolve the dispute amicably.
3. The legislation does not provide for the possibility for a private executor to act as a mediator .

Recommendations

1. Amend the Law of Ukraine "On Enforcement Proceedings" and other legal acts in order to introduce the possibility of suspending enforcement proceedings by the executor following the joint statement of the parties to to give them time for conciliation, including through mediation.
2. To empower the executors to facilitate the reconciliation of the parties during the enforcement proceedings, in particular by informing the parties about the possibility of conciliation through mediation.
3. To amend the special Law "On Enforcement Proceedings" and the Law of Ukraine "On Authorities and Persons Enforcing Judgments and Decisions of Other Authorities" and allow private executors to act as a mediator, except for proceedings where they act as executors and conflict of interest cases.
4. to conduct regional information activities Ukraine on mediation for executors on ongoing basis.
5. to develop and implement a basic training mediation program for executors.
6. establish a working group of experts with representatives of the Ministry of Justice of Ukraine, experts in the field of mediation for a comprehensive analysis and elaboration of these recommendations, development of a plan and content of information activities, as well as information materials on mediation.

Expected Outcome

Executors understand the nature and benefits of mediation. Executors, both private and state, become mediation providers, informing the recoverer and the debtor on the possibility of conciliation through mediation. It is possible to suspend enforcement proceedings for the period of the parties' participation in the mediation procedure. Turning the parties at the stage of enforcement proceedings to the mediation helps to increase the level of decisions successfully enforsed. Private executors implement the possibility of acting as mediator, helping to negotiate with the parties to enforcement proceedings in which he is not the executor.

The Unified Register of Private Executors of Ukraine contains searchable information on executors who can act as mediator.

## 8. Authorities carrying out social work with families, children and youth

Identified Gaps

According to the Law of Ukraine "On Social Work with Families, Children and Youth" of June 21, 2001 №2558-III social work with families, children and youth is a professional activity aimed at preventing, minimizing negative consequences and overcoming difficult life circumstances of families, children and youth, strengthening their ability to fulfil their own life potential. A special place among the authorized bodies that carry out such work is taken by the centers of social services and their specialized formations, as well as office of children's services.

Centers for social services provide social services to various categories of the people, while the activities of office of children's services are aimed at ensuring the protection of the rights, freedoms and legitimate interests of children.

There is freedom for mediation in both activities - social service centers provide mediation services to persons / families in difficult life circumstances, and children's services are involved in resolving disputes (between parents regarding place of residence of the child, the order of upbringing of the child by those parents who live separately, etc.). That is why the most of the volunteer mediation projects implemented in Ukraine cooperate with the Centers for Social Services for Families, Children and Youth and Office of Children's Services. As the experience of these projects proves, a correct understanding of the essence of mediation by the staff of these bodies and their activity is crucial for the effective promotion of mediation to the parties to the dispute. In this regard, volunteer projects usually begin with training and other information activities on mediation for staff of these bodies.

Unfortunately, only a limited number of employees of the social services system have an idea of the mediation procedure, despite the fact that the Law of Ukraine "On Social Services" of January 17, 2019 № 2671-VIII treats the mediation service as a basic social service. The number of employees of the social services bodies who have undergone basic training as a mediator is even smaller.

In addition, there is no mechanism for interaction between these bodies and mediators. As noted above (see Family Law), the State Standard for Social Mediation Services itself needs to be improved.

*The following issues need to be addressed:*
1. Staff of the state bodies engaged in social work with families, children and youth do not know about the mediation, do not understand the essence of the procedure and its order, so they do not offer it to people.
2. There is no mechanism for interaction between mediators and bodies providing social work with families, children and youth, in particular with children's services.
3. The need to improve the legislation on the provision of social mediation service.

Recommendations

1. to develop and implement a mandatory basic training course on mediation for staff of state bodies engaged in social work with families, children and youth.
2. to train staff of bodies engaged in social work with families, children and youth in order to train internal mediators of the system.
3. It is necessary to develop and implement a mechanism of interaction with mediators of state bodies engaged in social work with families, children and youth.

4. Offices of children's service sand the commissions they set up should be empowered to refer parties to mediation.
5. To form a working group of experts with the participation of representatives of the Ministry of Social Policy of Ukraine, local governments, experts in the field of mediation for comprehensive analysis and elaboration of these recommendations, development of a mechanism for interaction with mediators, development of proposals for improving legislation, developing information materials.

Expected Outcome

Mediation is available through a system oft he state bodies that carry out social work with families, children and youth, its staff is qualified to offer it to the parties to the conflict. Effective and convenient for the parties to the conflict interaction of these bodies with mediators has been established. Legislation on social mediation services, which can be provided independently (without prior intermediacy), has been improved. The provision of mediation services in the system of social services is provided by external and internal mediators of the system.

## 9. Prosecution

Identified Gaps

Mediation in criminal proceedings is a widespread practice as seen from a number of regulations, including Recommendation NR (99) 19 dated 15.09.1999 to the Committee of Ministers state-members of the Council who are interested in organizing mediation in criminal cases, Recommendation of the Committee of Ministers of the Council of Europe “On Restorative Justice in Criminal Matters” CM / Rec (2018) 8 of 03.10.2018. These acts give the prosecutor's office a leading place among the bodies inteded to implement restorative justice programs and play an important role in development mediation. Thus, the involvement of the prosecutor's office in the introduction of mediation in the field of criminal justice is important and necessary, especially for juvenile justice.

The Consultative Council of European Prosecutors states in paragraph 40 of Conclusion No. 2 on "Alternative Prosecution Measures" that mediation and conciliation in criminal matters can be successfully implemented, where appropriate, together with alternative prosecution measures. Particular attention is paid to mediation and other alternative measures in criminal proceedings against minors (paragraph 31 of Conclusion No. 5 "Prosecutor's Office and Juvenile Justice" (Yerevan Declaration)), which states that prosecutors should, within their competence, seek mediation too.

Order of the Ministry of Justice of Ukraine and the Prosecutor General's Office of Ukraine dated January 21, 2019 № 172/5/10 "On the implementation of the pilot project "Recovery program for minors suspected of committing a crime", registered by the Ministry of Justice of Ukraine on January 24, 2019 under № 87/33058 assigns the prosecutor responsible for informing the minor (his/her legal representative) and the victim (his/her legal representative) about the possibility of implementing the Program; explaining that the results of participation in the Program will be taken into account when deciding on the grounds for exemption from criminal liability or ceasing criminal proceedings as prescribed by law.

*The following issues need to be addressed:*
1. Most prosecutors and investigators do not know what mediation, restorative justice mean, their essence and the way they can be useful.
2. The prosecutor is not empowered to initiate a conciliation agreement between the victim and the accused (suspect).
3. The prosecutor has no authority to offer mediation.
4. There is no mechanism for referring criminal cases to mediation.

Recommendations

1. Develop a training program on restorative justice and mediation for prosecutors, what cases can be referred to mediation, and how to inform the victim about the possibility of mediation to reconcile with the accused (suspect).
2. To expand the scope of powers of the prosecutor by adding the possibility to initiate entering into a conciliation agreement, including with the help of a mediator, and to invite the parties to criminal proceedings to use mediation.
3. Develop and implement a mechanism for referring parties to criminal proceedings for mediation.
4. Establish a working group with the participation of representatives of the Office of the Prosecutor General, experts in the field of mediation for a comprehensive analysis and developing recommendations, development of a plan and content of information activities, as well as information materials on mediation.

Expected Outcome

Prosecutors understand the nature and value of mediation in criminal proceedings. The prosecutor offers the victims and suspects (accused) to use the mediation procedure in case of a procedural opportunity and refers them to mediation. Prosecutors facilitate sharing the information on mediation in criminal proceedings. The prosecutor's office pays special attention to mediation in offenses committed by minors.

## 10.Probation

Identified Gaps

On February 5, 2015, the Law of Ukraine “On Probation” (№ 160-VIII) was adopted to ensure the safety of society by correcting convicts, preventing them from committing repeated criminal offenses and providing the court with information characterizing the accused for making a decision on their responsibility. To ensure the implementation of the tasks of the State Penitentiary Service of Ukraine on probation and the direction and coordination of the activities of the authorized bodies on probation, the State Institution "Probation Center" (Probation Center) was established.

At present, Ukraine focuses on the experience of other countries in restitution justice, which shall not punish a person, but try to reconcile the accused and the victim with the participation of a mediator and / or to compensate the victim for material damage and pain and suffering. In developed countries, the integration of mediation into probation is effective. However, there are different models for the mechanism of interaction and the role of probation. In some countries, probation officers act directly as mediators, and in some countries they facilitate the organization and establishment of restorative justice programs that include mediation.

As noted above, pilot projects “Implementation of Restorative Justice in Ukraine” and “ Recovery Program for minors suspected of commiting a crime” are being actively implemented in Ukraine today. Unfortunately, the probation body is still on the sidelines of these processes, although the Probation Center certainly plans to integrate mediation and other restorative justice programs into its activities. Creating conditions for interaction between probation and mediation is important for convicted who are subject to supervision, social and educational measures by court decision and in accordance with the law, as well as for defendants for whom the probation body prepares a pre-trial report and may exist in various types of probation.

For example, information on reconciliation with the victim through mediation (determination of the term and method of compensation, elimination of other negative consequences, etc.) should be included together with other data characterizing the identity of the accused in the pre-trial report prepared by the probation body (pre-trial probation). In future, control over the execution of the reached agreements, including response to cases of embages the convicted from going through a sentence or covering damage, may also be made by the probation

body within the supervisory probation. If a person does end up in prison, one of the conditions for early release may also be the participation in mediation and reaching an agreement with the victim. This can be achieved when preparing for release, which is also carried out by the probation body (penitentiary probation).

*The following issues need to be addressed:*
1. There is no mechanism for integrating mediation and other restorative justice programs into the probation body activity.
2. The staff of the body and probation volunteers are not good at mediation and other restorative justice programs, and don't understand their essence and possibilities for application.
3. There is no mechanism for involving mediators in mediation within the probation.

Recommendations

1. It is necessary to develop a mechanism for integrating mediation and other restorative justice programs into the activities of the probation body.
2. To introduce pilot projects on the use of mediation in various types of probation in order to develop an effective mechanism and its further scaling up throughout Ukraine.
3. A basic training course on restorative justice for probation staff and probation volunteers shall be developed.
4. To form a working group with the participation of representatives of the State Institution "Probation Center", the State Penitentiary Service of Ukraine and experts in the field of mediation for comprehensive analysis and developing of recommendations, development of a plan and content of information activities and information materials on mediation.

Expected Outcome

Mediation is an integral component of probation, which is widely used in all its forms. The staff of probation bodies is competent in the procedure, understands its essence and advantages, can qualifiedly offer it to the subjects of probation. A mechanism for involving mediators in probation has been developed.

## C. Information Policy

Identified Gaps

As of today, the level of being in the know about mediation in Ukraine is fragmentary. The main sources of information are some public organizations that promote the development of mediation; organizations that provide mediation training, conduct or access to mediation procedures; trained persons. Significant contribution to the formation of the information image of mediation in society is provided by individual projects funded by international donors, but their impact is insufficient.
Another issue is lack of coordination of efforts to promote mediation between different stakeholders, which leads to some duplication of information activities in some areas, while others generally remain out of focus. Information content is distributed by-fits on a territorial basis - the main information flows are more concentrated in large cities of regional importance, while in the district centers there is an information vacuum on mediation.

Information policy in terms of organizing the processes of generation, sharing and storage of information about mediation is determined by the following target segments:

**Informing general public about the mediation**.

The general public, for whom information on mediation is an element of the system of knowledge about conciliation procedures, conflict-free communication and tolerant models of interaction between citizens and institutions, as well as the overall growth of life quality. This segment is characterized by ignorance and lack of the necessary number of quality information sources on the nature of mediation and the role of the mediator.

*The following issues need to be addressed:*
1. Low level of public awareness of the mediation as an alternative way of resolving disputes, the nature of the procedure, the basic principles of mediation and the role of the mediator.
2. Lack of quality information state policy on social promotion of the institution of mediation: social advertising of mediation as a tool for dispute resolution (including social services), quality information content. Separate reference should be made to online reference sources on mediation.

**Informing the parties to the dispute about the mediation**

Providing the parties to the conflict with useful and timely information about mediation as a possible effective way to resolve the existing dispute is very important. At the same time, such information should be of high quality and relevant.

*The following issues need to be addressed:*
1. The information must be of high quality and specific, accompanied by information materials and available to the parties to the dispute throughout Ukraine.
2. The parties to the dispute who seek protection of their rights and legitimate interests generally do not receive information about the possibility of settling the dispute amicably through mediation.
3. Lack of information on finding and contacting mediators.

**Informing about mediation as a mandatory element of training representatives of certain professions (stakeholders)**

Persons who are traditionally asked for help in resolving disputes (conflicts) must have knowledge of the mediation procedure and understand its features, and could competently inform the parties to the conflict (customers). Getting this knowledge should become an integral part of their training. Now, for this sector entities are generally not inherent perception of mediation as an effective dispute resolution institution.

*The following issues need to be addressed:*
1. The correct public image of mediation can not be formed simultaneously with the acquiring of professional status.
2. Training programs do not contain information about mediation and its features sufficient for further informing the parties to the conflict about it.
3. A single standard of basic knowledge about mediation has not been formed on the basis of training programs for judges, attorneys, notaries, etc.

**Informing about mediation through Higher education**

It is important to have a systematic and comprehensive approach for spreading the mediation for the gradual formation of amicable settlement of disputes culture in Ukrainian society. The experience of conducting informational activities on mediation proves that students and recent graduates from institutions of tertiary education easily and with interest perceive information about mediation, which they use in their future activities. Therefore, such training should become an integral part of obtaining higher education in certain specialties. Only in some institutions of tertiary education mediation is taught as an optional discipline and / or launched master's programs in mediation in pilot projects.

There is also a positive experience in the development of teaching materials for teaching the discipline "Mediation in the professional activity of attorneys." More than 10 institutions of tertiary education (who train attorneys) from different regions of Ukraine joined the creation of the textbook and methodical recommendations for teachers. The materials are open to public, so all institutions are free to use them in their studies.

*The following issues need to be addressed:*
1. Information and educational activities on mediation in the institutions of tertiary education have not become widespread.
2. The branches of study for which the mediation course should become a compulsory discipline are not defined.
3. There is no unified content of training courses on mediation by qualifications.
4. Information policy regarding this segment is not formed as a whole.

Recommendations

1. Ensure informing the general public and entrepreneurs about the institution of mediation with special attention to certain categories (youth and adolescents, families, vulnerable groups of society, etc.). Development quality information content and launching social advertising.
2. Provide information on mediation on the Internet in order to create a unified information and reference portal for the promotion of mediation, and ensure access to online mediation.
3. Create an interactive online map using the judiciary web portal, which will allow to solve two tasks - serving as a convenient service for finding a mediator, as well as help to determine in which regions there are no or not enough mediators and training is needed accordingly.
4. Ensure that representatives of certain professions (judges, attorneys, notaries, social workers, etc.) gain the knowledge about mediation and its features, sufficient to inform the parties to the conflict about it.
5. Create conditions for informing about the persons to whom they turn for help in resolving disputes / conflicts ( development of an algorithm for finding and contacting mediators, information materials, etc.).
6. Spreading information and training activities on mediation in institutions of tertiary education.
7. To set out the qualifications where the mediation course should become a compulsory discipline within the higher education.
8. To develop unified content of training courses on mediation by qualifications.

> *The draft Law of Ukraine "On Mediation" proposes:*
> *1. Introduce the need to maintain and publish registers of mediators, associations of mediators and organizations providing mediation. The information in the register, which shall be open and accessible, should contain information about the mediator. At the same time, State bodies and local self-government bodies have the right to maintain and publish registers of mediators whom they involve or whose services they use (article 13 of the Draft Law).*
> *2. Stipulate the powers of the court, arbitration court, international commercial arbitration to explain to the parties their right to out-of-court settlement of the conflict (dispute) through mediation at any stage (part 1 of article 20 of the Draft Law).*
> *3. to amend Article 13 of the Law of Ukraine "On social work with families, children and youth" in order to give the offices of social work with families, children and youth the right to propose dispute resolution through mediation.*

Expected Outcome

The general public and entrepreneurs are informed about mediation with special attention to certain categories. For this purpose, high-quality information content is developed and social advertising has been launched. A portal for informing on mediation in the Internet has been developed and is working.

Courses on mediation and its features for representatives of certain professions are developed and implemented. Content to inform about mediation persons addressed for resolving disputes / conflicts (development of an algorithm for finding and contacting mediators, information materials, etc.) is created.

Institutions of tertiary education promote information on mediation. The qualifications where the mediation course should become a compulsory discipline within the higher education have been identified and the unified content of mediation training courses is developed.

## D. Status of Mediator

Identified Gaps

***Conditions for acquiring status***

Currently in Ukraine the issue of the legal status of a mediator is not settled, and, accordingly, it is not defined who is considered tob e a mediator. There are no requirements for training, acquisition of the status of a mediator, the scope of his rights and liabilities, the proceedings order and responsibilities. At the same time, there are many mediators who provide mediation services in various fields. One of the key issues in this regard is also the need to legalize the activities of mediators, as the relevant classifiers do not contain either the profession of "mediator" or this type of activity. Classifier of professions DK 003: 2010 provides only a few positions related to conflict solution, namely a specialist in conflict resolution and mediation in the socio-political sphere, a specialist in resolving collective labor disputes (conflicts) and a specialist in conflict resolution (domestic sphere)).

The need to determine the status of a mediator is also due to the need to build public confidence in the mediator and in the mediation procedure in general. Legal certainty in this matter will contribute to a clear understanding of the mediator's role and the principles of his activity.

*The following issues need to be addressed:*

1. Mediation is not formed as an autonomous professional sphere.
2. There are no conditions for acquiring the status and conduction mediation activity.

***Regulation of activity***

An active and powerful community of mediators making joint efforts to develop the sphere has been formed in Ukraine. To a greater extent, this applies to various public associations, which, inter alia, develop open documents for accession to implement common standards for mediation training and service delivery. Currently, a code of ethics for mediators has been developed, as well as principles for teaching basic mediator skills, and principles for teaching the basics of family mediation are being developed. It is important that mediators take care of the quality of education and services. An example is the development of basic principles for teaching basic mediator skills, in which the recommended duration of the training course has been increased to 90 hours (previously 40 hours of training was considered sufficient). A significant number of training centers and trainers voluntarily joined these principles and keep to them. Ukraine is a worthy example of self-regulation by the mediation community.

An important element of the mediator's activity is compliance to professional ethics rules, as well as efficient mechanism to ensure their implementation. As of today, Ukrainian mediators may choose: to comply with the provisions of the European Code of Conduct for Mediators, to develop their own standards within organizations, to join the standards of other organizations. However, the problem is that despite the variety of options, there are no mechanisms to ensure that mediators comply with ethical standards.

It is extremely important to take into account that in case of adoption the draft Law"On Mediation" in the wording proposed by the Cabinet of Ministers of Ukraine, a situation that in Ukraine not all the practicing mediators meet the requirements of Articles 9, 10 of this Draft Law, namely, have undergone basic training in mediation for at least 90 hours, may arise. After all, during 20 years, most of training centers have been training mediators in 48-hour training programs.

*The following issues need to be addressed:*
1. There is no regulation for the mediator's activity.
2. Issues of keeping registers of mediators are not set out.
3. The issue of ethical norms is uncertain and there is no mechanism to ensure their implementation.

Recommendations

1. Enter the definition of mediator, provide for the profession of "mediator" in the Classifier of Professions and introduce the appropriate type of activity in the Classifier of Economic Activities.
2. To regulate the conditions for acquiring the status and activity of a mediator: his rights and liabitilies, the procedure for maintaining registers, requirements for qualification in certain areas, responsibilities and taxation. In this regard, framework regulation should be a priority.
3. It is suggested that each person, organization providing training and / or providing mediation services develop their own ethical standards or join others with mandatory notification of clients about these standards. A mechanism should also be developed to respond to violations of ethical norms.
4. During the preparation of the draft Law of Ukraine "On Mediation" for the second reading, it is necessary to provide for a transitional provision on standardization of the mediator status, who, at the time of entry into force of the law, will not have 90-hour basic training. It is also advisable to remove from this project the requirement to have higher education for a mediator - such a requirement raises the age limit for a mediator (although it is not defined in the project) and limits access to the profession of persons who already provide mediation services without higher education.
Most of the recommendations will be implemented in case of adoption of the Law of Ukraine "On Mediation" № 3504.

> *The draft Law of Ukraine "On Mediation" proposes:*
> *1. to provide a definition of the term "mediator" (article 1 of the Draft Law).*
> *2. To determine the basic requirements for the mediator, as well as the possibility of setting out additional requirements by the parties to the mediation, state bodies and local governments (article 9 of the Draft Law).*
> *3. to provide requirements for basic training in the field of mediation and determine the range of persons who can carry out such training (article 10 of the Draft Law).*
> *4. Set out the obligation to place information about mediators in the registers, which shall be kept and published by associations of mediators and organizations providing mediation (article 13 of the Draft Law).*
> *5. Define the principles of mediators' activity, their rights and responsibilities, as well as liability (articles 6, 7, 11, 12, 14 of the Draft Law).*

Expected Outcome

The Law of Ukraine "On Mediation" was adopted; it enters the definition of mediator, regulates the conditions for acquiring the status and activity of a mediator: his rights and responsibilities, the procedure for keeping registers, requirements for qualification in certain areas, liability and taxation. Recommendations on the status of mediators, who at the time of entry into force of the law will not have 90 hours of basic training, are taken into account. Amendments are made to the Classifier of Professions, which provided for the profession of "mediator"

and introduced the appropriate type of economic activity. Individuals providing training and / or mediation services have developed their own ethical standards and mechanisms to prosecute violations.

# III INTERNATIONAL OBSERVATIONS

The present chapter provides an international perspective on mediation in Ukraine. The topics discussed were raised by the national experts participating in the project that gave rise to the present Chapter. Its starting point is Draft Law #3504, submitted to Parliament on 19 May 2020 (original Draft Law hereafter). An alternative draft #3504-1 has been submitted to Parliament on 4 June 2020.

The Chapter takes into consideration that in Ukraine, an explicit legal basis is needed for most actions to be taken by judges and other officials. Without an express legal basis, judges and other officials are hesitant to act.

The original Draft Law applies to civil cases (including commercial, labor and family matters), administrative and criminal cases (Article 2(1)). This does not imply that mediation in these different areas of the law is identical in nature. It is obviously not. It only means that the original Draft Law provides general rules, which need to be complemented by specific statutes or rules dealing with civil, administrative or criminal mediation separately (see Article 2(2)).

## A. Status of the rules in the Draft Law: binding or regulatory?

The original Draft Mediation Law provides that the rules in the law are binding in the sense that they need to be applied whenever mediation is attempted (Article 4(2)), also in civil and commercial matters. This is different in most Western jurisdictions. There rules on mediation in civil and commercial matters are usually regulatory in nature (default rules). This means that they will be applied unless otherwise provided by the parties.[1] This is due to the fact that in liberal states, parties have complete freedom to solve their private law disputes in the way they prefer. In mediation in administrative and criminal matters, this is usually different since, as a general rule, in these areas of the law parties cannot dispose freely of their rights and obligations.

In modern criminal law, for example, the perpetrator and the victim can usually not come to the agreement that there will be no criminal prosecution. After all, the perpetrator has interfered with the interests of society at large and it is for this reason that the public prosecutor decides about prosecution. This may be different if there is a clear basis in the law, but even then this is questionable, for example for constitutional reasons. Obviously, under these circumstances, criminal mediation needs to be strictly regulated by way of mandatory rules.

The same is true, although maybe to a lesser or different extent, in administrative law. In administrative law, there are serious limitations as regards the results of mediation. Administrative authorities may, for example, not use a negotiated settlements to disregard their mandatory obligations. Again, this requires mandatory legal rules.

*Suggestion* Consider whether or not the statutory rules on mediation should also be binding in private law matters.

## B. Definition of mediation

A clear definition of mediation in a general statute on mediation is important. This is due to the fact that opting for mediation has various legal consequences. An example is where judges attempt to settle the case. They may do so with or without making use of mediation. If they opt for mediation, a direct consequence is that they disqualify themselves from hearing the case after mediation has failed. Since mediating judges have obtained

[1] Obviously, public order rules need to be observed under all circumstances.

all kinds of confidential information during mediation in a manner that is not necessarily adversarial, they cannot be considered unbiased anymore. The result is that new judges should be appointed to hear the case. Other types of ADR techniques, however, do not prevent judges to continue hearing the case. It is therefore important to be able to determine whether or not the judge has attempted mediation.

A clear definition is also important if the rules in the Draft Law are meant to be regulatory (i.e. not mandatory) in nature for civil and commercial cases (which does not seem to be the case at the moment, but which should be considered given the nature of the rights and obligations at stake in civil and commercial cases and given foreign practices). In such cases, a definition allows one to determine whether or not a specific ADR agreement deals with mediation, in which case the rules of the Draft Law are applicable as default rules (i.e. rules that apply if the parties have not agreed differently in their contract or mediation clause).

In the original Draft Law we find the following definition of mediation (Article 1(4)):

> *Mediation is a voluntary, extra-judicial, confidential, structured procedure during which the parties, through the mediator(s), seek to resolve a conflict (dispute) through negotiation.*

The defining elements in this definition are:

- Voluntary;
- Confidential;
- Structured;
- Conflict resolution;
- Through negotiation;
- By way of a mediator.

It appears that some important elements are missing when we compare this definition with the following more comprehensive definition (it should be noted that most of these elements may be found elsewhere in the original Draft Law (e.g. Article 7(3)); the point here, however, is that a comprehensive definition of mediation is so important that all of these elements should appear in one place at the beginning of the law):

> *Mediation is a voluntary and confidential form of alternative dispute resolution based on an agreement between two or more parties and is aimed at resolving disputes between two or more parties with concrete effects. A third party, the independent and impartial mediator, assists the parties to negotiate a settlement. The mediator's role is to guide the parties toward their own resolution. Through joint sessions and separate caucuses with parties, the mediator helps both sides define the issues clearly, understand each other's position and move closer to resolution.*

Here the defining elements are:

- Voluntary;
- Confidential;
- Based on an agreement between parties;
- Independent and impartial mediator;
- Mediator provides assistance to parties to negotiate their own settlement.

The most important additional element mentioned here is that mediation aims at the parties negotiating their own settlement. In other words, the third party who acts as a mediator has no powers to decide the matter at hand. This is a crucial element in any definition of mediation and it is suggested that this element may be emphasized in the Mediation law.

*Suggestion* Consider elaborating the definition of mediation in a first article of the Law on Mediation, emphasizing that the mediator only has a facilitative role.

### C. Types of mediation

Voluntary, semi-voluntary, compulsory

Different types of mediation can be distinguished. A common distinction is between (1) voluntary (internationally the most successful type of mediation), (2) semi-voluntary and (3) compulsory mediation.

(1) Voluntary mediation leaves it to the parties to decide whether or not they want to attempt mediation. There is no compulsion and there are no sanctions if parties decide not to attempt mediation. This means that mediation only takes place if both parties agree on mediation voluntarily.

(2) Semi-voluntary mediation differs from voluntary mediation due to the fact that there are sanctions if parties do not seriously attempt to reach a mediated settlement. Such sanctions may, for example, be costs sanctions to be applied by the court when the dispute is litigated there. In this case, attempting mediation is not a requirement for access to court, but there is still some compulsion to make use of it.

(3) In the case of compulsory mediation, litigation before a court of law is only possible after serious mediation attempts have not resulted in a mediated settlement. In this particular case, an attempt to reach a mediated settlement is a *conditio sine qua non* for filing an action in court.

The original Draft Mediation Law aims at voluntary mediation (Arts. 3 and 4(1)). In light of international experience, this is the correct approach. After all, international experience shows that voluntary mediation is usually very successful since the parties decide themselves and are very motivated to reach a mediated settlement. In the case of (semi-) compulsory mediation the success rate is often much lower since many of those involved lack the necessary motivation to settle their case: they are just involved in mediation because they want to avoid adverse consequences (e.g. costs sanctions) or they have to mediate in order to get access to court. Therefore, the fact that the original Draft Law opts for voluntary mediation is a positive aspect of this Draft.

*Suggestion* Follow the approach of the original draft law and opt for voluntary mediation.

Party-initiated and court referred/court-annexed

Another distinction is between (1) party-initiated mediation, and (2) court-referred or court-annexed mediation. Obviously, court-referred and court-annexed mediation are only possible when a court has been given notice of the case. This means that usually a lawsuit has been brought and that the judges have come to the conclusion that mediation might be beneficial in the particular case at hand. In that case they can refer the parties to mediation or recommend it to them. In case of a referral or recommendation, courts obviously have a certain responsibility as regards the quality of the mediator and the mediation procedure. This means that courts should, for example, inform the parties about qualified mediators and provide facilities for mediation.

Court-annexed mediation will only be successful if judges have a good understanding of mediation and if they cooperate. This means that judges should be made aware and gain an understanding of mediation. The following text is from a report on mediation in the Netherlands:

> "Vital for a court-annexed mediation project is the understanding and cooperation of judges. Several courts [in the Netherlands] were involved of which the judges were trained, not to become mediators, but to identify

> cases possibly suited for mediation. The judges' task was to inform the parties and their counsel, about mediation during the oral hearing in such cases which they identified as suitable for mediation. The project involved some 70 mediators who were selected according to criteria set by the Ministry of Justice together with NMI, the Dutch Mediation Institute."[2]

*Suggestion* The Draft Mediation Law does not contain rules on the role of the court in mediation. It may indeed be wise to include such a rule only in specific legislation, for example a rule that the judge has the duty to inform the parties about mediation in the early stages of litigation, or a rule that the judge will refer to mediation in suitable cases. Another rule may be that the court should only refer to certified mediators, i.e. the mediators that are included in the public register(s) discussed below.

Ordinary mediation and e-mediation

A last distinction that should be made is between ordinary mediation in the presence of the parties and a neutral mediator, and e-mediation.[3] E-mediation should be considered seriously and it should also be facilitated since it may solve various problems. Examples are the absence of qualified mediators in the particular area of the country where the parties reside or problems related to the Covid19 pandemic, but it may also be beneficial from a costs perspective. It may be beneficial for Ukraine to consider developing rules on e-mediation.

*Suggestion* The role and use of e-mediation should be explored in Ukraine.

Hybrids

Finally, there exist certain hybrids involving mediation, such as Med-arb. Med-arb takes place where the parties have agreed that after an unsuccessful mediation attempt, the mediator will change colours and become an arbitrator. The following text describes med-arb well:

> "In a med-arb process, parties first reach agreement on the terms of the process itself. Typically—and unlike in most mediations—they must agree in writing that the outcome of the process will be binding. Next, they attempt to negotiate a resolution to their dispute with the help of a mediator. As in a traditional mediation, the mediator may suggest caucusing with each party individually [convene with a party individually out of the presence of the other party] to discuss possible proposals in addition to bringing disputants together to air their views and brainstorm solutions. In med-arb, if the mediation ends in an impasse, or if issues remain unresolved, the process isn't over, parties can move on to arbitration. The mediator can assume the role of arbitrator (if he or she is qualified to do so) and render a binding decision quickly based on his or her judgments, either on the case as a whole or on the unresolved issues. Alternatively, an arbitrator can take over the case after consulting with the mediator."[4]

It should be emphasized that med-arb has not proven to be very successful in many parts of the world, especially not in areas where the concept of mediation is new or not so popular. There are various pitfalls:

> "When disputants are aware that their mediator could ultimately make a binding decision about the case, they may feel inhibited about sharing confidential information with him or her about their interests. If the mediation moves to arbitration, it could be difficult for the mediator-turned-arbitrator to "forget" that confidential information and focus exclusively on jointly shared information. Disputants might avoid this possibility by having different individuals serve as mediator and arbitrator, though this solution requires additional time and cost. In addition, disputants may feel pressured to reach an agreement to avoid

[2] https://www.bbkwmediation.nl/user/file/4_court_annexed_mediation__the_dutch_approach.pdf.
[3] https://www.vitero.de/en/fields-of-application/e-mediation.html.
[4] See https://www.pon.harvard.edu/daily/mediation/what-is-med-arb/.

arbitration and the possibility that the mediator-turned-arbitrator will reach a decision that pleases them less."[5]

*Suggestion* Experiments with med-arb may be interesting for Ukraine. The same is true for experiments with arb-med, where the arbitrator hears the parties and writes an award which he keeps secret and then attempts to reach a mediated settlement.[6] Successful models can be found in different jurisdictions such as the USA, Australia and Singapore.[7] The most important requirements for success are that those involved are aware of the possible benefits of med-arb and arb-med, that arbitration clauses provide for it and that it is actively promoted by arbitrators and arbitral institutions.

## D. Governance of mediators and mediation ('institutionalization')

Centralized or decentralized

Governance of mediators and mediation is qualified as "institutionalization" in the present report. Mediation and mediators may be governed in different manners. First, one may decide for a centralized governance, or for decentralization. The general approach in most modern jurisdictions is that only matters that need central initiatives should be addressed centrally (and indeed, there are very few matters that need to be organized at the central level). For the rest, a decentralized approach is to be preferred. Decentralization prevents the accumulation of power at the top, and may therefore be helpful against corruption and unacceptable behavior.

*Suggestion* Mediation should, as much as possible, be organized in a decentralized manner.

Self-governed, state-governed, hybrid

Apart from centralization and decentralization, a choice needs to be made between the following types of governance:

- self-governed;
- state-governed;
- hybrid.

In modern, liberal western societies, state-governance is a means of last resort in all walks of life. The leading idea is that state-governance results in inefficiency, a lack of quality and all kinds of other unwanted side-effects. Controlled self-governance is preferred in most jurisdictions, and therefore in actual practice often hybrid forms of governance exist. As much as possible is left to private initiative, but state-intervention is not categorically excluded, especially in order to avoid unwanted side-effects.

As regards mediation, international studies show that very little state intervention is needed. State-involvement is often limited to issues like quality control, setting age and other limits and to some financial requirements to be met by the mediator. This often boils down to the keeping one or several public registers of qualified and licensed mediators.

## E. Register(s) of mediators (quality)

A public register (or public registers) of mediators is (are) preferably accessible through the Internet. Only those mediators who meet the necessary requirements are included. The procedure for inclusion in the register(s)

[5] See https://www.pon.harvard.edu/daily/mediation/what-is-med-arb/.

[6] https://www.pon.harvard.edu/daily/mediation/what-is-med-arb/.

[7] See e.g. M. Leathes, Negotiation. Things Corporate Counsel Need to Know but Were Not Taught, Alphen aan den Rijn, 2017.

should be straightforward: those mediators who submit a diploma of an accredited training institution, and who prove their age, good behavior etc. by way of the necessary documentation, are automatically included in the register(s). Discretion in allowing entry in the register(s) should be avoided. Removal from the register(s) should only be effectuated for serious reasons.

Obviously, registers may be kept centrally, regionally or locally. Local registers are preferable if it is felt that the mediator should come from the same locality as the parties. However, given the facilitative role of the mediator, it is not easy to see why local mediators are needed. The personal background of the mediator is in many cases irrelevant, and therefore very often a centrally kept public register on the Internet suffices. Obviously, this central register needs to allow parties to identify where a particular mediator is located, but if they feel that the locality of the mediator is irrelevant, they should be able to select the mediator of their choice. Obviously, travel expenses may be a reason to choose a mediator who is located in the vicinity, but in case of e-mediation this is not a relevant issue. A central public register may also be a solution for those parts of Ukraine where qualified mediators are scarce. If, for reasons of costs, a central register cannot be kept, a central webpage referring to local registers of mediators should be made available.

In order to guarantee continuity and quality, one may consider some kind of oversight at the central level. A central register kept by the state, for example through MoJ, may be ideal, but at the moment no budget is available for this. Instead, one may consider the less expensive option of a central webpage (e.g. kept by MoJ) referring to the individual registers of local mediation organizations.

*Suggestion* Public registers of mediators may serve as a guarantee for quality. Ideally, a central register is kept by MoJ, but if this is not possible due to costs, at least a central webpage referring to local registers should be established by MoJ.

### F. Place of mediation and facilities

When mediation takes place in the presence of the parties and the mediator (not in the case of e-mediation), a physical locality is needed. In Ukraine, there are experiments with mediation inside court buildings. Outside the larger cities, this may be a good option since in those areas of Ukraine citizens naturally turn to the courts for a solution to their problems. In larger cities the situation may be different due to a lower degree of trust in the judiciary. In larger cities it may be beneficial to provide for neutral localities for mediation, away from the court building.

A neutral location could be made available by the mediator or by the state. Obviously, the location should allow the mediator to convene privately with the parties (*caucus*), so there should be possibilities for a party to withdraw. For the rest, the environment should be such that all those involved are stimulated to attempt to reach a settlement through mediation. Technical facilities may be limited to a laptop and maybe some recording device (e.g. a mobile telephone). Attention should be paid to cyber security.

*Suggestion* Facilities for mediation may be provided in the court building, especially outside the larger cities. However, in larger cities themselves, a locality away from the court building may be a better option.

### G. Who can be mediator?

In private law disputes, in most jurisdictions the parties agree on the mediator, and they may chose anyone they like. This seems to be different in the original Draft Mediation Law since there specific requirements are stipulated for all types of mediation, including mediation in private law matters.

The following types of mediators may be distinguished:

- Private mediators (i.e. mediators who do not act in any additional official capacity, such as psychologists)
- Official mediators (i.e. mediators who act in an additional official capacity)
    - Judge
    - Attorney
    - Notary
    - Enforcement officer
    - Others

The legislature may obviously decide that certain officials are excluded from offering mediation services (usually in the laws governing these officials). This is in the end a political choice, but some arguments for excluding certain officials may not be politically motivated.

If mediation is promoted in order to reduce the caseload of the courts, it seems logical to exclude judges from being mediators. Since Ukrainian courts are overburdened, judges could most likely better devote their time to deciding cases and reducing backlogs. Some judges may also lack the skills and mindset to act as a mediator. Judges normally take the lead in deciding matters in court. It may be difficult for some of them to change this role completely and facilitate parties to reach a settlement. It should be noted here that facilitating parties to reach a settlement by way of mediation is very different from judges encouraging parties to reach a settlement during court hearings without the assistance of a neutral third party; the latter is obviously *not* mediation.

Another problem with judges acting as mediators is that they may not continue hearing the case when mediation attempts have failed. This means that another judge has to study the case and this will result in a loss of the time and energy devoted to the case by the original judge who acted as an unsuccessful mediator. This may be another reason not to have judges act as mediators.

When (legal) professionals other than judges act as mediator, one should be aware of conflicts of interest. Possible conflicts of interest should be addressed by the legislature. In addition, it may be that the hourly tariff of some professionals is such that they may not be the first choice when mediation is concerned.

When setting requirements for the admission as a mediator, there is a need for transitory statutory provisions allowing those who currently act as mediators (these are usually very experienced mediators) to continue to do so even though they may not meet all formal requirements yet. This does not mean that such mediators should be exempted from fulfilling formal requirements, but that they should be allowed a period of grace (e.g. two years) to fulfill the necessary requirements without being prevented to act as a mediator.

*Suggestion* Given the heavy burden on the courts, mediation should be outsourced in Ukraine in the sense that judges concentrate on litigious cases. When officials such as notaries or enforcement officers serve as mediators, conflicts of interests should be addressed. There should be transitory statutory provisions in place in order to allow experienced mediators to continue handling mediation even though they do not meet new statutory requirements for mediators (these mediators should be granted a period of grace of two years; after those two years they should meet the statutory requirements).

### H. Timing of mediation, prescription, interruption of the hearing and enforcement

Mediation and other types of ADR may be attempted at any time (Article 2(3) of the original Draft Law). Unnecessary burdens on the state financed court system may be avoided by mediation taking place *before* the case reaches the court house. This means that the parties themselves or their lawyers should come to the conclusion that mediation is the best option for their case since there are no judges involved that may refer to mediation.

*Prescription* In case of mediation taking place before the case is brought to the notice of the court, specific rules are needed regarding prescription (statute of limitations). Prescription is automatically interrupted by bringing a case before a court of law, but this is not the case when disputes are subjected to mediation. A legal provision is needed that addresses the issue of prescription in case of mediation and other types of alternative dispute resolution *before* a court is involved.

Mediation after the case has reached the court-house is obviously less beneficial from the perspective of reducing the caseload of the courts. Nevertheless, a certain reduction of the caseload can still be achieved, especially when mediation is attempted in the early stages of litigation. A positive aspect of mediation after the case has entered the court is that judges may inform the parties about mediation or refer them to mediation, whereas they may also refer parties to information sessions. Although in most jurisdictions it is felt that informing the parties about mediation is part of the wider responsibility of the judge to encourage settlements, in Ukraine a legal basis seems to be needed to empower the judges to inform parties about mediation (Article 20(1) original Draft Law).

*Interruption* Another problem seems to be that in Ukraine one does not agree with most other jurisdictions in the Western world that the parties by agreement may decide to interrupt the case in order to try to settle their case. In most legal systems, litigation before a court of law automatically comes to a halt if settlement is attempted. In civil and commercial matters, this is due to the so-called principle of disposition (*Dispositionsmaxime* in German). This principle, that is widely observed in Western legal systems and that is strongly related to adversarial systems of civil procedure, implies that the parties are in charge of the progress of the case in court. In most legal systems, therefore, parties have the power to put proceedings on halt when they want to mediate or attempt other types of ADR. If indeed the above adversarial rules of procedure and the *Dispositionsmaxime* are not interpreted in Ukraine as elsewhere, specific rules are needed for the interruption of court hearings to attempt mediation.

*Enforcement* For a foreign observer, it is hard to see what role mediation can play during the enforcement stage. After all, in the enforcement stage the judgment creditor has been provided with clarity about his/her claims, and he or she will not be willing to renegotiate what has been decided univocally by the court in the judgment. Obviously, in some situations enforcement may prove to be difficult due to the fact that the judgment debtor does not have sufficient assets. In those cases it may be worthwhile to explore alternative possibilities for the judgment debtor to satisfy the judgment, for example by way of payments in instalments. However, this matter does not require mediation (there is no dispute to be settled). What is needed is providing information to the judgment debtor and creditor about the situation and about reasons to cooperate in finding a solution to the apparent problems. The judgment debtor should for example be informed that it is advisable to come to an alternative arrangement with the judgment creditor about satisfying the judgment. After all, the fact that currently the judgment debtor does not have sufficient assets to pay does not mean that he or she will escape liability in the future; future assets may also be subject to enforcement. Furthermore, the judgment creditor should be informed that enforcement is currently problematic due to a lack of assets, and that special arrangements are to be preferred to recover (part of) the debt in the future in an alternative manner.

In the Netherlands, the necessary information is provided by the enforcement officer, who should also have the necessary social skills. Such enforcement officers may not be widely available in Ukraine and, if that is the case, other means of providing judgment debtors and creditors with the necessary information (including incentives to cooperate) should be explored.

*Suggestion* Mediation before the case goes to court should be facilitated. This implies that mediation should bring the statute of limitations (prescription) to a halt. When the parties want to attempt mediation in a pending case, an interruption of the hearing should be uncomplicated. Mediation in the enforcement stage should only occur in exceptional situations.

## I. Promotion of mediation

Providing Information

Mediation is relatively unknown in Ukraine. It has appeared that legal professionals often lack the necessary knowledge of mediation. Mediation is also relatively unknown with the public at large. In order to change this situation, the following initiatives may be taken:

*Suggestion*

- Referral to information sessions about mediation when a case is brought to the attention of the court (i.e. providing information to individual litigants). Rules on information sessions and their content need to be developed.
- General information campaigns by way of the public media may also be effective in increasing knowledge of mediation (i.e. providing information to the public at large). The way this is organized should be left to professionals trained in launching information campaigns.
- The introduction of mediation in the law curriculum at university and in professional training courses. It is not necessary to teach mediation skills to all students, but it is necessary that students obtain some theoretical knowledge of mediation. This will allow them to suggest alternatives to court action to their future clients and it may increase their willingness to do so.

Incentives

International research has shown that globally mediation has not become popular due to its ideological advantages (e.g. keeping business relations in good shape and confidentiality). Even in Japan, business disputes are currently often litigated in courts of law and traditional mediation has become less popular.

What makes mediation popular are costs advantages, speed in obtaining a final solution and effective enforcement.

Costs advantages may be difficult to achieve in Ukraine due to the fact that litigation is relatively inexpensive. In actual fact, it is likely that costs advantages may only be realized in Ukraine if mediation is provided free of charge. This would pose serious constraints on the budget for the judiciary.

More promising is speed in obtaining a final solution by way of mediated settlements and easy enforcement of such mediated settlements. Here a Law on Mediation may play an important role, and especially where it concerns quality standards. One may consider an approach in which mediated settlements that have come into being while observing the rules of the Mediation Law should be rubber-stamped by the courts and consequently become enforceable with the speed of light. If this is combined with an efficient enforcement procedure, mediation may become very popular.

*Suggestion* Incentives for mediation are important and should be further explored.

## J. Costs of mediation

The costs of mediation may influence its popularity. Different from litigation before a court of law, which is in most jurisdictions mainly funded by the state, mediation is usually funded by the parties. If costs are prohibitive, mediation will lose its appeal. Since mediation helps to alleviate the burden on state courts and therefore reduces the expenses associated with these courts, funding of mediation by the state may be considered. Parties may be asked to pay a contribution, which should not amount to more than they would have to pay when bringing

their case before a court of law. Attention should be paid to the risk that mediation fails and that court action becomes necessary. In that case parties may incur higher costs due to the fact that they had to contribute to the expenses of mediation and now also have to pay court fees. Abolition of court fees after unsuccessful but serious attempts to mediate may be a solution for such a situation.

Having mediators provide part of their services free of charge may be an attractive alternative to paid mediation from the perspective of the state. It is, however, doubtful whether it is a good idea to have mediation partly financed by the mediators themselves. First, this may increase the costs of mediation in other cases, since mediators will have to compensate themselves for lost income due to the fact that they had to provide their services free of charge. Second, it may influence the performance of mediators since not being paid for one's efforts is usually not very motivating. Finally, it is hard to see why in a situation in which *judges* are not asked to provide their services free of charge, one could ask free services from *mediators*.

If one would like to impose a rule in which mediators have to provide a certain amount of services free of charge (Article 12(8) original Draft Mediation Law), one should make sure that only those mediators who generate a certain minimum amount of income through mediation have the duty to do so. In addition, one may consider to provide state funded legal aid for mediation in specific types of disputes. Legal aid is currently popular in family mediation, for example in the United Kingdom.

*Suggestion* In order to increase the popularity of mediation, legal aid should be provided by the state in certain areas of the law, e.g. in family matters.

### K. Rights of third parties

The original Draft Mediation law provides for rules on the rights of third parties (e.g. Arts. 1(9), 2(4)). This may be good for reasons of clarity. However, even if these rules would not be part of the Draft Law, this would not be problematic. It may be presumed that mediated settlements affecting the rights of third parties are <u>not</u> enforceable (at least, as far as these rights are concerned; if the rest of the mediated settlement is not related to third parties' rights, the remaining part of the settlement is enforceable).

*Suggestion* As regards the rights of third parties and mediation, a clear rule would be: When a mediated settlement contains provisions on the rights of third parties, the mediated settlement (or the relevant part of it) cannot be enforced.

### L. Mediation in specific areas of the law

<u>Commercial law</u>

Here the Singapore Convention is relevant, at least, where it concerns international mediation: The Convention states: This act aims to introduce an international mechanism for the enforcement of mediation agreements for the settlement of commercial disputes, similar to that provided for arbitral awards by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. The most important parts of the Singapore Convention are Articles 4 and 5. Article 4 provides what information has to be submitted to the competent authority in order to obtain permission to enforce an international mediated settlement, whereas Article 5 contains grounds for refusal to grant permission.

*Suggestion* Based on the Convention, Ukraine should identify a competent authority for receiving requests for the enforcement of mediated settlements in international commercial disputes. Obviously that authority should be familiar with especially Articles 4 and 5 of the Convention. And obviously parties to mediated settlements originating from Ukraine should be aware of the requirements of the Convention when they want their settlement to be enforced abroad.

Administrative law[8]

Apart from a general mediation law, specific rules on mediation are needed in legislation governing administrative law. The reasons for this are obvious.

First, many rights and obligations in the area of administrative law have a character that is different from the character of rights and obligations in private law (about which the parties can freely dispose). It is not directly obvious that these rights and obligations can be subject to a mediated settlement. Especially when mediation takes place after a decision has been taken by the administrative authority, mediation will only work if this authority is legally competent to amend its previous decision. This may be problematic since in many administrative law conflicts the legal position of third parties not involved in the proceedings may be at stake. A mediated settlement in individual cases may also be hard to achieve since in administrative law the authorities are often exercising discretionary powers. "When an administrative authority is negotiating the way it shall exercise [these] discretionary power[s], there is [often] more at stake than the single use of the competence in that particular instance." After all, "[a]ny administrative authority is obliged to act and decide systematically and consistently and treat equal cases equally. This will limit the possibilities of an administrative authority negotiating on the use of a discretionary power, as the use of the power in this one instance will have to be repeated when the same conditions are met in another case. Successful application of any method of ADR is only in order when an administrative authority is willing to change the way it uses this particular competence in any similar case that the future might bring and therefore is willing to change its policy for legitimate and objective reasons."[9]

As a consequence, the legislature has to decide which areas of administrative law can be subject to mediation, and it also has to provide specific rules on the person of the mediator (requirements such as status and education) and the specific rules to be followed in mediation. Inspiration may be drawn from countries such as the Netherlands, Austria, Germany and the United Kingdom, where mediation is being used on a regular basis to avoid administrative disputes (other countries, such as Belgium, are more hesitant in this respect).

Interesting for Ukraine is section 173 of the German *Verwaltungsgerichtsordnung* (VwGO). This provision provides that in relevanr cases the administrative courts have the possibility to propose to the parties to turn to mediation and to halt proceedings until mediation finishes (Article 278a VwGO).

Criminal law

Mediation in criminal law knows its own difficulties. In modern criminal law, for example, the perpetrator and the victim themselves can usually not come to the agreement that there will be no criminal prosecution. After all, the perpetrator has interfered with the interests of society at large and it is for this reason that the public prosecutor decides about prosecution. This may be different if there is a clear basis in the law for mediation in criminal matters, but even then this is questionable, for example for constitutional reasons.

*Suggestion* Obviously, under the above circumstances, criminal mediation needs to be strictly regulated by way of mandatory rules.

[8] See K.J. de Graaf, A.T. Marseille, H.D. Tolsma, Mediation in Administrative Proceedings, available at https://www.rug.nl/research/portal/files/14920995/ADR_in_European_Administrative_Law_De_Graaf_Marseille_Tolsma.pdf; Dejan Vučetić, Is Mediation Viable in Administrative Matters?, available at https://pdfs.semanticscholar.org/e3f7/6baa4b0441c4379ee0dd4ca52e40fc31d9c6.pdf.

[9] K.J. de Graaf, A.T. Marseille, H.D. Tolsma, Mediation in Administrative Proceedings, available at https://www.rug.nl/research/portal/files/14920995/ADR_in_European_Administrative_Law_De_Graaf_Marseille_Tolsma.pdf.

## ANNEX 1. Draft Law on Mediation #3504

DRAFT

Submitted by
the Cabinet of Ministers of Ukraine

D. SHMYGAL

___ _____ 2020

***LAW OF UKRAINE***
On Mediation

_____

This Law defines the legal basis and procedure for mediation in Ukraine.

### Chapter I. GENERAL PROVISIONS

**Article 1. Definition of terms**

1. For the purposes of this Law, the terms shall be used in the following meanings:

1) mediation agreement is an agreement on the provision of mediation services to parties for the purpose of conflict (dispute) resolution, as concluded by the parties to the conflict (dispute) and a mediator (mediators), in the form which has been agreed among them, taking into account statutory requirements;

2) mediator is an independent, neutral, impartial individual who conducts mediation and is not entitled to decide on the merits of the conflict (dispute);

3) mediation agreement is an agreement between the parties on the method of resolving all or certain conflicts (disputes) that have arisen or may arise between the parties in connection with any specific legal relations, contractual or not, through mediation. The mediation agreement may be concluded in the form of a mediation clause in a contract or in the form of a separate written agreement;

4) mediation is a voluntary, extra-judicial, confidential, structured procedure during which the parties, through the mediator (s), seek to resolve a conflict (dispute) through negotiation;

5) association of mediators is a voluntary association of two or more mediators for the exercise and protection of their rights and freedoms, created in any organizational and legal form, including public associations, or self-regulatory organizations which exercise professional self-governance, or partnerships set up under the laws of Ukraine by persons having the status of mediator'

6) organization providing mediation is an association of mediators, economic entities, institutions, and organizations whose activity includes the provision of mediation services and which have approved rules of mediation and maintain a register of mediators;

7) rules of mediation are the procedure and method of mediation, as well as the rights and obligations of participants to the mediation as defined in the mediation agreement or approved by an organization providing mediation;

8) parties to the mediation are individuals, legal entities or groups of people who have contacted a mediator (mediators) or an organization providing mediation in order to settle a conflict (dispute) between them through mediation;

9) agreement on the settlement of a conflict (dispute) based on the results of the mediation ( hereinafter - agreement on the results of the mediation) is an agreement that captures the results of the agreement between the parties to the mediation in a form which has been agreed between them, while taking into account statutory requirements; in which the parties may go beyond the matter of the conflict (dispute), provided that such an agreement would not violate legitimate rights or interests of third parties;

10) participants to mediation are parties to the mediation, mediator (mediators), persons who, by agreement of the parties to the mediation, are involved in the mediation process, including legal representatives, lawyers, interpreters/translators, experts, and other persons.

**Article 2. Scope of mediation**

1. Mediation can be applied in any conflicts (disputes) that arise in civil, family, labor, economic, administrative relations, as well as in criminal proceedings when concluding a settlement agreement between a victim and a suspect, or accused. and in other areas of public relations.

2. Legislation may provide for specificities of the use of mediation in certain categories of conflicts (disputes).

3. Mediation may be conducted both prior to going before court, arbitral tribunal, international commercial arbitration, or during judicial or arbitral review, or during the execution of a judgment, arbitral award, or award of an international commercial arbitration.

4. Mediation shall not apply to disputes (conflicts) if such disputes (conflicts) affect or may affect the rights and legitimate interests of third parties who do not participate in mediation, and in other cases provided for by law.

5. Mediation is used in resolving family disputes (conflicts) if such disputes (conflicts) affect or may affect the rights and legitimate interests of the child, in particular as a third party, in accordance with the law and taking into account the best interests of the child.

**Article 3. Principles of mediation**

1. Mediation shall be conducted with the mutual consent of the parties to the mediation, with consideration of the principles of voluntariness, confidentiality, independence and neutrality of mediator, impartiality of the mediator, self-determination and equality of rights of the parties to the mediation.

**Article 4. Voluntary nature of mediation**

1. Participation in mediation is a voluntary will of the parties to the mediation.

2. Parties have the right to engage in mediation within the scope of requirements established in respect of mediation under this Law, the rules of mediation, and the mediation agreement, as well as to terminate mediation at any time.

3. A party's participation in mediation shall not be considered as a plea of guilty, a recognition of claims, or a waiver of such claims.

**Article 5. Confidentiality**

1. A mediator and other participants to mediation shall abide by the principle of confidentiality, unless other is provided by law, and also when the parties to the mediation have agreed different thing in writing.

The principle of confidentiality does not apply where disclosure is necessary to prevent harm to physical or mental health of a person or to prevent a criminal offense.

2. All information regarding mediation is confidential, in particular, about the proposal and willingness of the parties to a conflict (dispute) to engage in mediation, the facts and circumstances that became known during the mediation, the opinions and suggestions of the parties to the mediation regarding the settlement of the conflict (dispute), content of the agreement based on the results of the mediation.

3. Neither party to mediation, nor mediator, nor other participants to the mediation, nor organization providing mediation shall have the right to disclose information regarding mediation without the written consent of the parties to the mediation.

If a mediator receives information concerning the mediation from one of the parties, de/she may disclose such information to another party only with the consent of the party that provided such information.

4. The persons referred to in paragraph 3 of this Article shall be liable for the disclosure of information concerning mediation without the written consent of the parties to the mediation, as envisaged in law or the mediation agreement.

**Article 6. Independence and neutrality of a mediator**

1. During the mediation, a mediator as a neutral third party shall be independent of the parties to the mediation, state authorities, local self-governance bodies, officials and employees thereof, other natural and legal persons.

2. A mediator may not:

1) combine the function of mediator with the function of another participant to the mediation process within the same conflict (dispute);

2) give to the parties to the mediation consultations and recommendations regarding the conflict (dispute), unless the parties have agreed otherwise;

3) represent or defend any party at the stage of pre-trial investigation, court, arbitral, or international arbitral processes in a conflict (dispute) where de/she acted as mediator.

3. State authorities, local self-governance bodies, officials and employees thereof, any other natural or legal persons are strictly prohibited from interference in activities of a mediator during the preparation and conduct of mediation.

**Article 7. Impartiality of a mediator**

1. A mediator should be an impartial person who helps the parties to a conflict (dispute) to communicate, to reach understanding, and to negotiate.

2. A mediator may advise the parties to the mediation on the procedure and conduct of mediation, and record its results.

3. The mediator shall not resolve the conflict (dispute) between the parties to the mediation or to induce the parties to make a settlement decision on the merits of the conflict (dispute).

**Article 8. Self-determination and equality of rights of the parties to the mediation**

1. Parties to the mediation shall independently select a mediator(s) or an organization providing mediation.

2. Parties to the mediation independently determine the list of issues to be discussed, options for the conflict (dispute) settlement, the content of an agreement based on the results of mediation, terms and instruments of its implementation, other issues regarding the conflict (dispute), and mediation. Other participants to the mediation may provide advice and guidance to the parties to the mediation, but the final decision shall be made exclusively by the mediation parties.

3. If a party to mediation is a minor or a person whose civil capacity is limited, he/she shall make decisions in compliance with statutory requirements while taking into account the extent of their capacity.

4. Mediation shall ground on the principle of equality of parties. The parties to the mediation shall be treated equally, and each of them shall have be given equal opportunity to express their position. The mediator's commitments shall be the same in respect of all parties to the mediation.

## Chapter II. STATUS OF MEDIATOR

**Article 9. Requirements to a mediator**

1. A mediator may be a natural person who has a university degree and has completed basic training in the field of mediation in Ukraine or abroad.

2. A mediator may not be a person with criminal history on record or unspent conviciotns, if recognized by court as partially incapacitated or incapacitated.

3. Parties to mediation, public authorities and local self-governance bodies may impose additional requirements on the mediators they employ or contract, including those related to age, education, work experience.

4. Associations of mediators and organizations providing mediation may impose additional requirements on mediators they include in their registries.

**Article 10. Training in the field of mediators**

1. Basic training in the field of mediation shall be at least 90 hours of mediator training, including 45 hours of practical training, and shall include theoretical knowledge of the principles, procedures, and methods of mediation, legal regulation of mediation, ethics of mediators, negotiation, conflict (disputes) settlement, as well as practical skills for application of the above.

2. Training in the field of mediation shall be carried out by educational institutions, as well as by organizations providing mediation, economic entities regardless of the type and ownership, which have the right to provide services in the field of mediation or to organize their provision. in accordance with law.

3. Training in the field of mediation, alongside basic training, may include additional specialized mediator training under training programs developed by the entities referred to in paragraph 2 of this Article.

4. After completing the training and confirming the acquired competences, a document shall be issued stating:

1) last name, first name, patronymic (if any) of a person who underwent training;

2) name of the entity that provided such training;

3) number of training hours, including practical training.

A document confirming the completion of the training may be accompanied by a description of the training program and competences acquired by the mediator, as well as other information on the results of the training.

5. Entities that provide training in the field of mediation shall keep and publish the registers of their graduates, indicating information that is envisaged in paragraph four of this Article.

**Article 11. Rights of a mediator**

1. A mediator has the right to:

1) independently decide on the methodology of mediation, provided it is compliant with the requirement of the legislation on mediation, rules of mediation, and ethics of mediator;

2) receive information from the parties to a conflict (dispute) about such conflict (dispute) to the extent which is necessary and sufficient for mediation;

3) conduct their activities for a fee or free of charge, individually or jointly with other mediators, create an association of mediators;

4) the reimbursement of expenses incurred for the preparation and conduct of mediation, as well as the remuneration whose amount and form shall be stipulated by the mediation agreement and/or the rules of mediation;

5) refuse mediation for ethical or personal reasons;

6) collect and disseminate depersonalized information on the number, duration, and effectiveness of the mediations conducted by them;

7) enjoy other rights envisaged in law, mediation agreement, or rules of mediation.

**Article 12. Obligations of a mediator**

1. A mediator is obliged to:

1) fulfill their duties under this Law, observe the principles of mediation, rules of mediation, and ethics of mediators;

2) abstain from disclosure of information obtained by him in the framework of mediation;

3) inform the parties to the mediation, before the beginning and during the mediation, of circumstances that may give rise to reasonable doubts as to their independence and impartiality;

4) terminate the mediation in case of conflict between personal interests of the mediator and their duties, which may affect their impartiality and neutrality during mediation, as well as in the case of other circumstances that make it impossible to participate or require the mediation process to be abandoned by them;

5) inform the parties and other participants to the mediation about their rights and obligations, principles and rules of mediation, possibility to seek advice from respective specialists (experts), consequences of signing of the mediation agreement, and/or agreement based on the results of mediation in writing or oral, professional experience and competences of the mediator;

6) govern the mediation ;

7) constantly improve their professionalism;

8) no less than once per year to provide free of charge mediation services, in which one of the parties is a person under the jurisdiction of Ukraine, if his/her average monthly income does not exceed two subsistence minimum, calculated and approved in accordance with the law for persons who belong to the main social and demographic groups of the population, or a person with a disability who receives a pension or assistance provided in lieu of a pension, in an amount not exceeding two subsistence minimums for disabled persons, in case such persons apply to a mediator;

9) fulfill other duties stipulated by the legislation.

**Article 13. Registers of mediators**

1. Information on mediators shall be entered in the registers of mediators, whose maintenance and publication shall be ensured by associations of mediators and organizations providing mediation.

Public authorities and local self-governance bodies may keep and publish the registers of mediators they employ or contract.

2. The registers of mediators shall contain the following information:

1) last name, first name and patronymic (if any) of the mediator;

2) education;

3) number of hours of basic and specialized training in the field of mediation, indicating the name of the entity that provided such training;

4) specialization of the mediator (if any);

5) information on professional development (if any);

6) information on provision of free of charge mediation services for persons specified in paragraph 8 of the first part of Article 12 of this Law (if any);

7) other information provided by this Law

3. Information entered in the registers of mediators shall be open and accessible.

**Article 14. Responsibility of a mediator**

1. A mediator shall be held liable for violation of this Law in the manner provided by law.

2. A mediator may also be liable under the statutes and/or provisions of association of mediators where he/she is a member.

## Chapter III. CONDUCT OF MEDIATION

**Article 15. Procedure of mediation**

1. Mediation shall be conducted under the guidance of a mediator (mediators) in compliance with this Law, the mediation agreement, rules of mediation, and ethics of mediators.

2. Mediation shall begin with the conclusion of a mediation agreement by the parties to the mediation.

In the absence of a written mediation agreement, it shall be considered that mediation begins when parties have taken the necessary steps to begin mediation.

3. Mediation shall cease:

1) when the parties to the mediation sign a agreement on the results of mediation;

2) when the mediation period and / or the mediation agreement expires;

3) if at least one of the parties to the mediation or the mediator(s) refuse from mediation;

4) if a party to the mediation is recognized as incapacitated;

5) in case of death of a natural person who is a party to the mediation or liquidation of a legal entity which is a party to the mediation;

6) in cases that make mediation impossible;

7) in other cases, in accordance with the rules of mediation.

4. In the cases provided for by this Law, a mediation agreement, mediation rules or at the request of a party (parties) to the mediation, a document confirming the conduct and/or termination of mediation in compliance with the principle of confidentiality of mediation may be issued.

**Article 16. Rights of parties to the mediation**

1. Parties to the mediation have the right to:

1) select a mediator(s) and/or an organization providing mediation by mutual consent;

2) decide on the terms of a mediation agreement;

3) involve other participants in the mediation by mutual consent;

4) refuse services of one mediator and choose another mediator;

5) at any time refuse to participate in the mediation;

6) in case of the failure to implement or improper implementation of a agreement on the results of the mediation, apply to court, arbitration court, international commercial arbitration in accordance with the procedure established by law;

7) perform other actions provided by law.

**Article 17. Obligations of parties to the mediation**

1. Parties to the mediation are obliged to:

1) comply with this Law, the mediation agreement, and the rules of mediation;

2) implement the agreement on the results of the mediation in the manner and terms established by such agreement;

3) fulfill other duties stipulated by law.

**Article 18. Mediation agreement**

1. A mediation agreement shall be signed between parties to a conflict (dispute) and a mediator (mediators).

2. A mediation agreement shall specify:

1) date and place of signature of the agreement;

2) information on the mediator(s), the parties to the mediation, and the organization providing mediation (if any);

3) terms and place of mediation;

4) language of mediation;

5) subject of conflict (dispute);

6) rights and obligations of participants to the mediation;

7) rules of mediation;

8) terms and procedure for payment of remuneration of the mediator(s) and reimbursement of the costs of organizing and conducting the mediation;

9) conditions pf confidentiality of mediation and consequences of their breach by participants to the mediation;

10) liability of the mediator(s) and parties to the mediation for violation of terms of the mediation agreement;

11) the procedure and grounds for termination of the mediation;

12) other conditions as determined by the mediator(s) and parties to the mediation.

**Article 19. Agreement on the results of the mediation**

1. Agreement on the results of the mediation shall suggest a common solution of parties to the mediation on the settlement of a conflict (dispute) and shall be binding on such parties.

2. Agreement on the results of the mediation, if concluded by the parties to the mediation in writing, shall contain information on:

1) date and place of signature of the agreement;

2) parties to mediation and representatives thereof;

3) mediator(s), mediation agreement, or mediation rules;

4) obligations, methods, and terms of their fulfillment, as well as the consequences of the failure to fulfill or improper fulfillment, as agreed by the parties to the mediation;

5) other terms as decided by the parties to the mediation.

Agreement based on the results of the mediation, if concluded by the parties to the mediation in writing, may be signed by the mediator(s).

3. Agreement on the results of the mediation should not contain provisions that are contrary to the laws of Ukraine, the interest of the State or public interest, or moral principles of the society.

**Article 20. Mediation during court or (international) arbitral proceedings**

1. A court, arbitral tribunal, international commercial arbitration shall explain to the parties in a case that they have the right to seek mediation for the out-of-court dispute settlement at any stage of court or (international) arbitral proceedings.

2. A joint decision of the parties to the mediation on the settlement of a conflict (dispute) based on the results of the mediation may be approved by a court, arbitral tribunal, international commercial arbitration in accordance with the procedure established by law.

## Chapter IV. FINAL AND TRANSITIONAL PROVISIONS

This Law shall enter into force three months after its publication.

2. Amend the following legislative acts of Ukraine:

1) Article 221 of the Labor Code of Ukraine (Bulletin of the Verkhovna Rada of the USSR, 1971, annex to No. 50, Article 375) shall be supplemented with the following content:

"Mediation may be conducted with the consent of an employee and an owner or a body authorized by him to settle a labor dispute.";

2) in the Criminal Procedure Code of Ukraine (Bulletin of the Verkhovna Rada of Ukraine, 2013, No. 9-13, article 88;):

part two of Article 65 to be supplemented with paragraph $8^1$ which goes as follows:

"$8_1$) mediators – information that they became aware of and/or received during mediation;";

sentence two of part one of Article 469 after the words "with the help of" to be supplemented with the words "mediator(s)";

3) in the Commercial Procedure Code of Ukraine (Bulletin of the Verkhovna Rada of Ukraine, 2017, No. 48, Article 436):

in Article 130:

the first part after the words "when filing a lawsuit" to add with the words and figures ", and in the case where such decisions were made by the parties as a result of mediation - 60 percent of the court fee paid when filing a lawsuit";

the second part after the words "cassation appeal" shall be added with the words and figures "and in case such decisions were made by the parties as a result of mediation - 60 percent of the court fee paid upon filing the relevant appeal or cassation appeal";

paragraph 2 of part two of Article 182 after the words "peaceful settlement" to be supplemented with the words "to hold out-of-court dispute settlement by way of mediation,";

part 5 of Article 183 to be supplemented with paragraph 5 which goes as follows:

"5) if the parties have decided to settle the dispute out of court through mediation;";

in part three of Article 195, the words and numbers "and paragraph 1" shall be replaced with the words and numbers "and paragraphs 1, $4^1$";

part one of Article 228 to be supplemented with paragraph $4^1$ which goes as follows:

"$4^1$) requests from both parties to suspend the proceedings in connection with the mediation;";

part 1 of Article 229 to be supplemented with paragraph $8^1$ which goes as follows:

"$8^1$) paragraph $4^1$ of part one of Article 228 of this Code – for the period of mediation, but not more than thirty days from the date of the court order;";

4) in the Civil Procedure Code of Ukraine (Verkhovna Rada of Ukraine, 2017, No. 48, Article 436):

in Article 142:

the first part after the words "when filing a lawsuit" to add with the words and figures ", and in the case where such decisions were made by the parties as a result of mediation - 60 percent of the court fee paid when filing a lawsuit";

the second part after the words “cassation appeal” shall be added with the words and figures “and in case such decisions were made by the parties as a result of mediation - 60 percent of the court fee paid upon filing the relevant appeal or cassation appeal”;

paragraph 2 of part two of Article 197 after the words “peaceful settlement,” to be supplemented with the words “to conduct an out-of-court settlement of a dispute through mediation,";

part five of Article 198 to be supplemented with paragraph 5 which goes as follows:

“5) if the parties have decided to settle the dispute out of court through mediation;”;

part three of Article 210, the words and numbers “and paragraphs 1-3 ” shall be replaced with the words and numbers “and paragraphs 1-3, $6^1$ of part one of Article 252”;

part one of Article 252 to be supplemented with paragraph $6^1$ which goes as follows:

"$6^1$) requests from both parties to suspend the proceedings in connection with the mediation;";

part one of Article 253 to be supplemented with paragraph $10^1$ which goes as follows:

"$10^1$) paragraph $6^1$ of part one of Article 252 of this Code – for the period of mediation, but not more than thirty days from the date of the court order;";

5) in the Code of Administrative Proceedings of Ukraine (Bulletin of the Verkhovna Rada of Ukraine, 2017, No. 48, Article 436):

paragraph 2 of part two of Article 180 after the words “by way of reconciliation,” to be supplemented with the words “to conduct an out-of-court settlement of a dispute through mediation,";

part six of Article 181 to be supplemented with paragraph 5 which goes as follows:

“5) if the parties have decided to settle the dispute out of court through mediation;”;

paragraph 4 of part three of Article 236 after the words “stated in the motion” to be supplemented with the words “, or requests from both parties to suspend the proceedings in connection with the mediation – for the period of mediation, but not more than thirty days from the date of the court order;” ;

6) in the Law of Ukraine “On Social Work with Families, Children and Youth” (Bulletin of Verkhovna Rada of Ukraine, 2009, № 23, p. 284):

the first part of Article 13 shall be supplemented with the following paragraph:

"Offer dispute resolution through mediation";

Article 21 after the words “laws of Ukraine” shall be supplemented with the words “, in particular with the use of mediation”;

7) in Article 7 of the Law of Ukraine “On Judicial Fees” (Bulletin of Verkhovna Rada of Ukraine, 2012, № 14, Article 87; 2017, № 48, Article 436):

the third part after the words "when filing a lawsuit" to add the words and figures ", and if such decisions were made by the parties as a result of mediation - 60 percent of the court fee paid when filing a lawsuit";

the fourth part after the words “cassation appeal” shall be supplemented with words and figures “and in case such decisions were made by the parties as a result of mediation - 60 percent of the court fee paid upon filing the relevant appeal or cassation appeal”.

3. The Cabinet of Ministers of Ukraine shall, within three months from the day this Law enters into force:

bring its regulations in compliance with this Law;

make sure that ministries and other central executive authorities bring their regulations in compliance with this Law.

**Chairman of the Verkhovna**
**Rada of Ukraine**