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MEDIATION AS AN ALTERNATIVE FORM OF DISPUTE RESOLUTION: COMPARATIVE-LEGAL ANALYSIS

Oksana MELENKO[1]

Abstract:

The article under studies surveys the system of methods of alternative dispute resolution (ADR). It presents the definition of such structural concepts of ADR as negotiations, mediation, judicial conciliation, and arbitration. Particular emphasis is laid on the peculiarities of applying the ADR institutions in Ukraine and European countries, as well as on their advantages and disadvantages.

To carry out a comparative-legal analysis of the alternative forms of dispute resolution, there has been developed a special system of indicators. The latter aims to assess the effectiveness of the ADR institutions.These indicators are: availability of the procedure; possibility to enter and leave the ADR process; public or private nature of the procedure; conciliatory and competitive nature of the procedure; conducting the procedure out of court or in court; presence of an intermediary in the ADR procedure; taking final decision on the dispute directly by the parties or a third party; freedom to choose a mediator in the dispute; substantiating the decision on the dispute on formal or informal norms, rules, standards; opportunity to go to court in case the decision is impossible to enforce; recognition of the dispute as the one being resolved; intermediary's fee; cost and time saving.

Relying on the comparative-legal analysis of the alternative forms of dispute resolution, it has been determined that most of the comparative advantages belong to the institution of mediation. However, there are a number of shortcomings that hinder the effective functioning of the institution of mediation. Among them are insufficient requirements for the mediator's competencies and lack of mechanisms for fulfilling the terms of the mediation agreement.

Taking into account the existing drawbacks that hinder the effective development of the institution of mediation, the article offers a number of institutional innovations.They include: legislative establishment of the norm on the procedure of executing the mediation contract; enhancing the qualification requirements for the mediator (mandatory higher legal education); adoption of the law on mediation; consequently, introduction of amendments to material and procedural legislation regarding mediation procedure by means of remote (distance) regulation of legal disputes and actions that accompany this process with the use of special technical facilities

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(videoconferencing, electronic digital signature, electronic document management, electronic payments, etc.).

In addition, the article singles out the main peculiarity of the institution of mediation, which favorably distinguishes it from other ADR institutions - humanism (human-centrism). Unlike mediation, other ADR institutions (negotiations, judicial conciliation, arbitration) are marked with a factual and mostly competitive procedure. Mediation, due to its being rather human than factual oriented, as well as because of its being focused rather on conciliation than on competition, has a wider range of opportunities to better meet the requirements of the parties to the dispute. The main asset of mediation is its high potential to unite the parties, to continue their business and social communication after the resolution of the dispute. The latter integration potential favorably distinguishes mediation from all other forms of alternative dispute resolution and, at the same time, indicates positive external effect (externalia), which lies in uniting society.

Key words:

Negotiations; judicial conciliation; mediation; arbitration; alternative dispute resolution (ADR).

1. Introduction

As we know, trial is a traditional, universal way to protect the rights, freedoms and legitimate interests of natural and juridical persons. However, despite a number of advantages (regulation of judicial activity exclusively by law, clear regulation of the procedure for identifying and verifying all circumstances and facts, binding decision on the parties of the dispute and other natural and juridical persons, the independence of the body), a trial has significant shortcomings (duration of the procedure, publicity of the case, significant financial costs, non-termination of the dispute after the court decision, insufficient qualification of the judge or low trust in him, etc.).What is more, the legality of a court decision often does not correspond to its fairness because the party with more evidence is always right.

It is typical of a modern democratic society, with its inherent development of civic institutions, to promote the mechanisms of dispute resolution. More and more disputes are now being resolved in an alternative, out-of-court procedure. For example, in recent years, the vast majority of cases in the EU (80%) have been resolved through alternative dispute resolution institutions.

The flexibility of the alternative forms of resolving legal disputes, as well as the variability of tools that allow to "mitigate the strictness" of a legal norm and to enhance its possibilities attract the participants of civil proceedings today.

Nevertheless, along with the development of the alternative forms of resolving legal disputes, there arises necessity to compare their advantages and disadvantages. It is also important to find the ways to improve or eliminate them through the elaboration of appropriate institutional innovations in this area.

Unfortunately, many legislative gaps hinder the development of mediation. They include low qualification requirements for the mediator, the absence of an effective mechanism for fulfilling the contractual terms of mediation, and insufficient use of technical and technological achievements of modern civilization (electronic document management technologies, video conferencing, electronic digital signatures, electronic payments, etc.) in the field of alternative dispute resolution.

The relevance of the issue under investigation is also stipulated by the fact that today the world (under conditions of fighting against the COVID 19 virus) has to try new forms of social practices and interactions. In the field of alternative forms of resolving legal disputes, this necessitates the selection of those forms that can best be integrated into a society with a long-term quarantine.

2. Methodoligical background

In today's jurisprudence, the issue of applying the alternative forms of dispute resolution is very important. Numerous works by Ukrainian and foreign scholars are dedicated to the problems of negotiations, judicial conciliation, mediation and arbitration. Particularly significant contribution to the issue has been made by I. Baliuk, I. Bieri, A. Bitsai, N. Bondarenko-Zelinska, S. Dombrovskyi, T. Garby, M. Zayika, O. Zdrok, P. Kayser, O. Karmaza, Yu. Krysiuk, N. Mazaraki, J. Mirimanoff, J.-C. Magendie, I. Pobirchenko, D. Prytyka, O. Spektor, M. Franc, R. Hanik-Pospolitak, and others (Bitsai, 2018; Krysiuk, 2016; Karmaza, 2020; Hanik-Pospolitak & Pospolitak, 2019).

Most ADR researchers have directed their works to the fields of conceptual relations and foreign experience, or just identified problems within a particular institution of alternative dispute resolution. There is some disagreement between scholars on the composition of the system of alternative dispute resolution, and subsequently its content. Thus, some scientists claim that the system consists of negotiations, mediation, judicial conciliation and arbitration, others - only mediation, negotiations and arbitration, and still others - only judicial conciliation and mediation.

There are almost no methods for conducting a comparative-legal analysis of ADR.

In the course of the research under studies, both philosophical and legal methods of scientific cognition have been used. Among them are:

- dialectic and monographic-deductive methods, which have been applied in determining the genesis and analyzing the essence of the categories "negotiations", "court conciliation", "mediation", and "private arbitration";
- formally-legal, system and logical methods, applied when elaborating the ADR indicators (the system of parameters). The above methods allow describing a certain way of dispute regulation;
- comparative-legal method, used in analyzing common and distinctive features in the system of alternative dispute regulation, as well as in comparing the legislative areas of mediation and court conciliation in Ukraine and European states;
- the method of synthesis and analysis, critical-legal method, used in the course of identifying the shortcomings and advantages of a certain way of alternative dispute regulation.

3. Main paragraph.

The process of legislative institutionalization of alternative dispute resolution has not ended in Ukraine so far. In particular, there are still no legislative provisions on the rules of procedure of judicial conciliation, including the institutions of a judicial conciliator, professional negotiators, mediation. All this necessitates the study of foreign experience in the application of alternative dispute resolution, the analysis of merits and drawbacks in each of them, the elaboration of effective provisions for their further application in the legislative process of Ukraine.

In addition, since the world is experiencing the impact of a global biological threat from COVID-19, it is essential to give preference to those ways of coordination and interaction of people that can be done at the greatest distance possible. In this aspect, it is also important to review the existing forms of resolving disputes regarding their effective use during pandemics.

Before analyzing ADR common and distinctive features, it would be reasonable to define such notions as negotiations, judicial conciliation, mediation and arbitration (Bondarenko-Zelinska, 2020).

According to American researchers of negotiation process J. Dang and M. Huhns, negotiation is a process by which autonomous entities communicate and reach a compromise to reach an agreement on issues of mutual interest, while making the most of their individual capabilities (Dang & Huhns, 2006, p. 42).

In other words, negotiation is a resolution of a legal dispute by the dispute parties themselves, without involving qualified assistance.

Central to negotiations is both the process, which is preceded by several stages, and the result reached by the parties. The result of negotiations, according

to modern representatives of the Harvard School of Law (J. Kutcher-Gerschenfeld, Baker K., Berente N., Berkman P., etc.), can be asymmetric, when one party, due to different circumstances (inability to negotiate, weak emotional component, insufficient level of training or evidence base, etc.) achieves a relatively greater benefit. The result may also be referred to as integrative (whereby each party achieves its maximum goal) or compromise (when none of the parties achieve what they have expected to, but their losses are more or less equal) (Kutcher-Gershenfeld, 2020, p. 505).

It is obvious that the success of negotiations will depend on the quality of the parties to the dispute as negotiators, as well as on the variety of their communication techniques and methods. Accordingly, the outcome of the negotiations will not rest on the objective factors and circumstances, but on the subjective characteristics and personal abilities of the negotiators. Achieving maximum benefits is possible for negotiators only provided all parties to the dispute possess a high negotiating power, which is unlikely for everyday practice.

Apart from that, it is important that the weakest point of negotiations is the dishonesty of one, two or all of its participants. Moreover, the post-negotiation process suggests many risks for the negotiators (non-fulfillment of agreements, reassessment of agreements and desire to revise the terms of the contract, imbalance of benefits and losses for the parties, etc.).

The lack of mechanisms on preventing dishonesty in negotiations, in other words, opportunistic (dishonest) behavior, prevents participants of civil proceedings from using this very institution to resolve a dispute. Nonetheless, in Ukraine, the institution of negotiations, as a form of dispute resolution, has recently acquired great popularity.

Unlike negotiations, where the parties frequently take the absence of victory as a defeat, and victory is mostly achieved at any cost, the result of mediation is a consensus.

As a matter of fact, most EU laws "On Mediation" (Austria, 2003, Belgium, 2005, Croatia, 2011, Cyprus, 2012, Denmark, 2011, Sweden, 2011, Latvia, 2014, Portugal , 2013, Malta, 2014, Hungary, 2002, Finland, 2005, Slovakia, 2004, Romania, 2006, etc.) contain similar definitions of the term under studies. For instance, Article 2 of the Act "On Mediation" (2004) of Bulgaria states that mediation is a voluntary and confidential procedure for out-of-court dispute resolution, through which an uninterested mediator assists the parties in resolving the dispute (International Mediation Institute, n.d.). In Romania, Article 1 of the Law "On Mediation and Organization of the Mediation Profession" (2006) claims that mediation is a form of peacefully resolving conflicts / disputes, with the support of a third party, who specializes as a mediator and is neutral, impartial and confidential, in case of the free consent of the parties involved (International Mediation Institute, n.d.). In Germany, Article 1 of the Act "On Mediation" (2012) defines mediation as a confidential

and structured process, in which the parties seek to reach a peaceful and autonomous resolution of their conflict with the help of one or more mediators (International Mediation Institute, n.d.). In the Republic of Cyprus, Article 1 of the Law "On Mediation" (2012) ensures that mediation is a structured process, whereby two or more parties to the dispute seek to reach an agreement on a voluntary basis to resolve the dispute with the assistance of a mediator (International Mediation Institute, n.d.).

The draft Law of Ukraine "On Mediation" (May 19, 2020) suggests that the mediation procedure is a way to resolve a legal dispute with the mandatory involvement of an intermediary (mediator) on the basis of voluntary consent of the parties, with the aim of achieving a mutually acceptable solution (The Verkhovna Rada of Ukraine, 2020).

On the whole, most legislative acts on mediation in the EU take into consideration the requirements set out in the Directive 2008/52 / EC of the European Parliament and the Council of the EU "On certain aspects of mediation in civil and commercial matters" (OJL 136/3 of 21.05.2008) (European Parliament, 2008). Article 3 of the above Directive describes mediation as a structured process, in which two or more parties seek, independently and on a voluntary basis, to reach an agreement on the resolution of a dispute through an intermediary. This process can be initiated by the parties, proposed or envisaged by a court or the legislation of an EU Member State. It also provides for mediation by a judge, who is not responsible for any legal proceedings in this dispute. However, the mediation process excludes attempts by the court or by the judge to rule on the dispute.

The procedure of judicial conciliation is a type of judicial activity that takes place exclusively in court. It is conducted on the initiative of a judge and is possible only after the initiation of the case in court (Nosyreva & Filchenko, 2015). The main task of judicial conciliators is to achieve a peaceful resolution of the dispute on the terms and in accordance with the procedures provided by the Civil Procedural Code. To put it differently, conciliation agreement is concluded within any judiciary, but due to the the fact that the parties to the dispute are willing to conclude it, this agreement (by its nature) is an alternative to traditional judiciary (Cherniak, 2016).

It is essential that unlike mediation, the participation of a third party (judicial conciliator) in the mechanism of judicial conciliation is not mandatory, but rather optional or advisory. What is more, the legislation of many European countries (Belgium, Switzerland, France, Ukraine, etc.) provides for the possibility of a conciliation procedure by the judge himself. In particular, in Ukraine, there is no third party in the process of judicial conciliation, and the parties enter into a conciliation agreement on the initiative of a judge or on their own initiative. They notify the court about the agreement by making a joint written statement (Articles 206-208 of the Civil Procedural Code) (The

Verkhovna Rada of Ukraine, 2020). For example, according to the 2015 amendments to the Civil Procedural Code of France, Article 128 clearly stipulates that the parties to a dispute may agree either independently (on their own initiative) or on the initiative of a judge at any stage of civil proceedings (Legifrance, 2021). In compliance with the French Decree "On Judicial Conciliators", the chairperson of the appellate court (on submission of the magistrate) appoints the judicial conciliators for a 3-year term, provided they have sufficient experience in the legal field (Legifrance, 2020). The practice of judicial conciliation in the EU shows that the role of a judicial conciliator is usually taken over by an assistant judge, a retired judge, or a staff member of the court who are not directly involved in the proceedings (Magendie, 2020, p. 17).

The survey of scientific sources of European countries allows us to conclude that a conciliator, unlike a mediator, has more legal tools to encourage the parties to resolve a legal dispute, thereby restricting their certain freedoms. According to a French lawyer Pierre Kayser, a conciliator is a particularly active mediator (Kayser, 1996).

Article 203 of the Civil Procedural Law of Switzerland states that the conciliator has the right to request additional evidence (in addition to the provided one) from any of the parties. He / she also has the right to inspect the scene of event. Article 204 contains the norm, according to which the conciliator obliges the parties to appear in person to participate in the conciliation procedure, while the legal block on mediation (Articles 213-218 of this Code) suggests that only the parties are voluntarily responsible for the organization and conduct of the procedure of conciliation with the participation of an intermediary (The publication platform for federal law, 2008). Similarly, in compliance with Article 129.4 of the Civil Procedural Code of France, the competence of the conciliator (with the consent of the parties) includes inspection of the scene of event and interrogation of persons (Legifrance, 2021).

In contrast to mediation, the procedure of judicial conciliation takes place after the case has been passed to court (Zayika, 2016). In other words, passing a case to court is a necessary condition for the application of the procedure of judicial conciliation, whereas for the implementation of the procedure of mediation it makes no difference whether the parties went to court or not. On the contrary, the institution of mediation has the advantage that the dispute can be resolved in confidence, without going to court.

Besides, concluding a conciliation agreement as a result of the application of the judicial conciliation procedure precedes a binding court decision containing its terms. Only after the court approves of the conciliation agreement, it terminates the proceedings. In some cases, the court may reject the conciliation agreement and continue the proceedings. For instance, in Ukraine, according to Article 207 of the Civil Procedural Code, the grounds for rejecting the conciliation agreement are as follows:

- inadmissible actions of the legal representative, which are contrary to the interests of the party he protects;
- the terms of the conciliation agreement contradict the rights and interests of third parties, violate the law, or are unenforceable.

Arbitration is a form of alternative dispute resolution with the help of an intermediary (arbitrator), who is authorized to make a final decision binding on the parties (The Verkhovna Rada of Ukraine, 2004). The grounds for considering the case in arbitration court is an arbitration agreement submitted on a voluntary basis by the parties to the dispute (The Verkhovna Rada of Ukraine, 1994).

The procedure of arbitration rests on such principles as independence and impartiality of arbitrators, equality, and the competitive nature of the parties. The competitive principle significantly distinguishes arbitration from other forms of alternative dispute resolution.

Unlike mediation, where the intermediary (mediator) directs all his efforts to conciliating the parties to the dispute, the arbitration process is a combination of regulation procedures that aim to set up a system of evidence rules.

In other words, the arbitration procedure is marked with the same principle as the court, whereby the grounds for deciding the case may be a system of evidence (the case is won by the party to the dispute that has a stronger evidence base).

Consequently, a common definition for alternative forms of dispute resolution (other than formal justice) is the following.

Alternative forms of dispute resolution are the systems of procedures and rules, within which the parties to the dispute reach conciliation on a voluntary basis. This definition (in contrast to the existing ones, which indicate the "extrajudicial nature" (Karmaza, 2020) and the possibility of "concluding a mutually acceptable agreement" (Bondarenko-Zelinska, 2020)) allows to include the institutions of judicial conciliation and arbitration in the ADR. After all, the final decisions that are made under the procedure of conciliation or arbitration agreement are judicial in their nature. In addition, the arbitration decisions are directive and do not result from agreement between the parties.

The differentiation between "formal justice" and ADR should be made according to the principles governing the latter.

Unlike the traditional judicial system, the ADR institutions are guided by the following principles, common to them all:

- voluntariness;
- confidentiality;
- neutrality and impartiality of a third party (if applicable);
- cooperation;

- equality of the parties;
- mutual respect;
- acceptance;

In turn, each of the ADR institutions, except for general principles, also has separate, special ones.

Taking into account the generalization of all procedures and principles, on which alternative forms of dispute resolution are based, we have developed certain methods of comparative-legal analysis of ADR. They provide broad opportunities for ADR analysis, identify comparative advantages of each ADR institute, as well as point at their drawbacks.

The above methods are related to the system of indicators, which evaluates the capabilities of each ADR institution (table 1).

Table 1. Comparative system of the ADR indicators

Typical indicators	**Negotiations**	**Judicial conciliation**	**Mediation**	**Arbitration**
Free entrance to the ADR procedure	+	+	+	+
Free exit from the ADR procedure	+	+	+	-
Venue of the procedure out of court (public, private)	+	-	+	-
Private nature of the procedure	+	-	+	-
Conciliatory nature of the procedure	-	+	+	-
Mandatory participation of a third party along with the parties to the dispute	n/p	-	+	+
Mandatory participation of a third party along with the parties to the dispute (intermediary) aimed at assisting the parties in resolving the dispute without a court decision	n/p	-	+	-
The intermediary is freely selected by the parties to the dispute	n/p	-	+	+

The intermediary is not authorized to make a binding decision for the parties	n/p	-	+	-
The final decision on the case is based on formal and informal norms and rules	+	-	+	-
The final decision on the case is made exclusively by the two parties, without participation of a third party (judge, conciliator, mediator, arbitrator)	+	-	+	-
The case did not go to court	+	-	+	-
The agreement concluded by the parties (conciliation, mediation, arbitration) is the final act of dispute resolution	n/p	-	+	-
The intermediary gets a fee from the parties to the dispute	n/p	-	+	+
The intermediary is required to have legal education	-	+	-	+
Mandatory execution of the final decision	-	+	-	+
Low time consuming expenses on the dispute resolution procedure	+	-	+	-

(+) - yes, (-) – no, (n/p) – not provided for

Source: Developed by the author.

In general, as shown by the comparative-legal analysis of the ADR indicator system, the institution of mediation has the greatest advantages. There are only two weak points in the mediation procedure - the lack of guarantees for the fulfillment of the terms of the mediation agreement and the lack of mediators' legal education, the latter having a non-binding nature.

Most European countries have set a legislative requirement for a mediator - to have a higher education and a certain amount of credits in a mediation course, but it is not specified that this should be a higher legal education.

There is no doubt that only higher legal education is able to direct the dispute resolution procedure within the legal norms that protect the rights, freedoms and legitimate interests of any person, as well as to take such a final decision that can be implemented in this society without breaking the law. Besides, it is extremely important for the parties to the dispute to understand the alternative losses that can be incurred by seeking help in court. Only on evaluating the full range of services a mediator can provide, their cost (time consumption, alternative expenses on enforcing a binding court decision) and consequences, the clients will feel interested in complying with and fulfilling the terms of the mediation agreement. Such an analysis of the disadvantages and advantages can be carried out only by a mediator with higher legal education. In this case, the parties to the mediation procedure will be satisfied with the outcome, and the dispute will be resolved at all levels, including the issue of the effectiveness of another, alternative dispute resolution scenario.

The data of Table 1 prove that although negotiations (as a component of ADR) have a number of advantages (free entry and exit from the procedure, speed of dispute resolution, private nature, secrecy of negotiations only between its parties, low costs, use of formal and informal institutions as evidence, out-of-court resolution of the dispute, devising a joint decision on dispute resolution without the involvement of a third party), a lot of useful options are simply not envisaged and not institutionalized by them, as well as need further improvement, even through the introduction of appropriate institutional changes.

One of the shortcomings of negotiations is, in contrast to other ADR forms, the lack of its parties' sufficient knowledge and competencies in jurisprudence and the negotiation process. Even if the parties to the negotiations involve contractual representatives, the latters' knowledge of negotiations and dispute management is rather limited. This problem may be solved by introducing into legal circulation of such an institution as a "professional negotiator", who would be entitled with certain rights and liabilities.

Very often, due to the lack of regulated procedures and mechanisms for their compliance with formal and informal institutions (the parties rely on), negotiators face the problem of opportunistic (dishonest) behavior. Subsequently, the process of dispute resolution through the institution of negotiations frequently comes to a dead lock. It is obvious that the introduction of a third impartial party into this process could significantly eliminate opportunism.

The competitive nature of the procedure is also inherent to negotiations. Therefore, each party aims to win at any price, whereas the inability to achieve the goal is regarded as a "failure" in negotiations. As a result, the negotiation process may be delayed for several rounds without ensuring a mutually acceptable solution.

The institution of judicial conciliation, as shown by the comparative-legal analysis, has several advantages (the parties' to the dispute having higher legal education, free entry-exit from the procedure, conciliatory nature of the procedure, ensuring the execution of the final decision) and many disadvantages. First of all, it it is important to emphasize that the effectiveness of this institution is impacted by the fact that the conciliation procedure is ensured not by a judge, but by a judicial conciliator. Experience shows that it is incredibly difficult for a judge to conduct conciliation proceedings. Effective implementation of the conciliation procedure with the participation of a judge requires him to constantly improve the skills of the negotiation process, to develop necessary human features and qualities, to have narrow specialization in conciliation of the parties.

Unlike judges, judicial conciliators have every opportunity to enhance their specialization in this area; they are capable of immersing themselves in the circumstances of the dispute and carrying out all the necessary negotiation procedures, using a variety of communication techniques and previously developed abilities (empathy, active listening and support technique, etc.).

A considerable drawback of judicial reconciliation is considered the fact that if the parties to the dispute do not dare to reach a conciliation agreement on their own initiative, and the judge for any reason does not assist them in negotiations (even in case of the participation of a conciliator), the dispute is impossible to resolve in a non-traditional (alternative) way.

It is interesting that in Ukraine, the institution of a judicial conciliator is currently absent. Consequently, a judge remains the main initiator of resolving the dispute by concluding a conciliatory agreement. For instance, Articles 201-205 of the Civil Procedural Code of Ukraine contain the rules of the conciliation procedure, which is ensured by a judge in the form of a joint or closed meeting at a preparatory hearing on the case. However, no clear regulations of this procedure are officially prescribed so far.

During the procedure of conciliation, a judge may hear the parties' proposals on the dispute resolution. On the other hand, he/she may offer his own version of conciliation. At the same time, judiciary experts in Ukraine claim that it is currently impossible to carry out a high-quality conciliation procedure with the participation of a judge. The reason for this is the necessity to develop methodical guidelines on conciliation procedures in court, to enhance judges' respective competencies (improving communication techniques (active listening, empathy, questioning technique, communication technique), techniques of

negotiations and conflict resolution, moderation, etc.)), which requires a lot of time (Holovachov, 2020).

In Ukraine, arbitration as an alternative form of dispute resolution has not gained widespread popularity yet. It happens so because a huge range of disputes arising daily between natural and juridical persons fall out of its competence (Article 6 of the Law of Ukraine "On Arbitration Courts"). These are disputes over family relations, real estate, labor relations, consumer rights protection, etc.

Apart from that, the parties to the disputes in the field of foreign economic activity, after appealing to the arbitration court, lose the right to apply to the competent court on the same issue until the arbitration agreement is declared invalid or unenforceable (Article 8 of the Law Of Ukraine "On International Commercial Arbitration"). In this aspect, the weakness of the institution of arbitration lies in the fact that the parties lose the freedom to leave the arbitration procedure, and subsequently, the freedom to appeal to the judiciary in general.

Distrust of commercial arbitration in Ukraine is caused by a number of abuses, like active use of arbitration courts by associations of banking institutions (e.g. banks and credit unions), which made it impossible for a third party (consumer of banking services) to withdraw from arbitration and defend its interests in court of general jurisdiction. The principle of confidentiality was often ignored in commercial arbitration in Ukraine, which has been proved by numerous corruption cases in the field of real estate abuse.

In contrast to judicial conciliation and mediation, which always rely on the principle of cooperation (conciliation), arbitration is characterized by the principle of competitiveness. This means that the procedure of considering the case in the arbitration court is performed with regard to parties' attempts to prove the circumstances, on which they base their claims and objections. In its turn, the arbitration court makes a decision on the case, taking into account only the formal side of the circumstances, thereby neglecting the informal institutions (traditions, customs, religious and cultural norms and rules).

The greatest advantage of judicial conciliation and arbitration is the binding nature of the court decision. A court decision (including approval of a conciliation agreement) that is not voluntarily enforced is known to be enforceable, which provides the parties with clear guarantees. These guarantees cannot currently be provided by the institutions of negotiations and mediation.

Yet, any qualified assistance, received during the mediation process, will allow the parties to the dispute to assess the alternative benefits and losses they would have suffered if the case had been passed to court. Rather often, the lack of alternative forms of executing a court decision can cause more losses to the parties than benefits.

A commercial constituent of mediators and arbitrators' activities is a powerful incentive not only for effective resolution of legal disputes, but also for continuous improvement of their professional abilities and skills, development of tools and measures in this area.

The legislation on mediation in most European countries does not require a mediator to have a higher legal education, while a conciliator as a current or former court employee must have one a priori.

Moreover, the job of a court conciliator, as a rule, is not liable to taxation since it is financed from the state budget. On the contrary, a mediator works on a commercial basis, which creates additional motives and incentives to constantly improve the quality of his/her services. For example, in France, the activities of court conciliators, their salaries and operating costs are funded by the Ministry of Justice. (Legifrance, 2020).

4. Conclusions

The performed comparative-legal analysis of the alternative forms of dispute resolution (ADR) enables us to conclude the following:

1. All forms of alternative dispute resolution are mutually complementary and do not exclude each other.
2. Due to alternative dispute resolution, the parties have the opportunity to reach an agreement without a directive (mandatory) court decision, issued without the participation of the parties.
3. If the parties fail to reach an agreement through negotiation, they may apply another alternative dispute resolution mechanism, like mediation, judicial conciliation, or arbitration.
4. The most viable in the system of alternative forms of resolving legal disputes, in regard to the number of comparative advantages, is the institution of mediation.

The special principles of mediation, in addition to those inherent in all ADR institutions, are:

- following the integral concept of negotiations, which provides for mutual victory of all participants – "win-win";
- dispositiveness;
- full control over the process at all stages of the mediation procedure;
- free exit from the mediation procedure at any of its stages;
- peaceful (non-conflict) nature of dispute resolution;
- time management (saving time of the parties);
- flexibility and variebility of dispute resolution decisions;
- conducting a mediation procedure without unnecessary words and emotions (soft nature of the discussion);

- use of formal (legislative) and informal (rules, socially accepted norms) institutions as a basis for reconciliation and formulation of a mediation agreement.

The latter principle of mediation has a high potential for reconciliation of the parties, as the indicators of institutional genesis are informal norms and rules (religious, ethical, cultural, socio-communicative, etc.), which over time and due to institutional competition, reject ineffective formal institutions and substitute them. Accordingly, due to the institutional inertia of formal institutions, the court, conciliator and arbitration rely on, there occurs an "institutional trap" (dominance of ineffective institutions), and only the institution of mediation can avoid it.

At the same time, we agree with a well-known Swiss mediator and judge Jean Mirimanoff, that the main difference between mediation and judicial conciliation or arbitration is that the former focuses on people, while the other two - on facts (Mirimanoff, n.d.).

Therefore, unlike mediation, other alternative forms of resolving a dispute pay less attention to the intentions and states of the parties (emotional, socio-cultural), both before the dispute and after its resolution.

A mediator aims to maintain good relations between the parties to the dispute in the future (in particular, in family, business, socio-cultural, labor relations), thus creating an exceptional value that other institutions of dispute resolution cannot ensure. This value lies in the social-integrative function of the institution of mediation, which results in a large-scale integration, not atomization, of society. Undoubtedly, the external positive effect (externalia) that society additionally receives as a result of the development of the institution of mediation is difficult to overestimate.

Thierry Garby, a French mediator-arbitrator, a current lecturer in negotiations at many European universities, and Honorary President of the Christian Iordanescu Mediation Center (Bucharest) is convinced that mediation is primarily aimed at resolving the conflict, whereas conciliation or arbitration focus on getting decision on the dispute, i.e. on mutual claims of the parties (Garby, 2004, p. 9).

To put it differently, a mediator goes deep into the causes of the dispute. The further development of relations between the parties after the dispute resolution is also of great importance for him/her. A judicial conciliator is not very thorough about the root causes of the dispute. He works with the facts, seeks to overcome the contradictions between the parties and is indifferent to further relations between the parties.

Isabelle Bieri, MD, MSc in Clinical Psychopathology and Clinical Psychology, Accredited Mediator, lecturer at the University of Friborg, notes that conciliation and arbitration are used where the law (formal institutions) may apply, while mediation is used in all other cases (Bieri, 2006, p. 5).

Thus, the obvious advantage of mediation in the system of alternative forms of resolving legal disputes is its humanistic orientation, emphasis on the person and his/her human traits (psychological, emotional, physical, social, cultural, religious, etc.).

In this regard, it is important to understand that legal institutions as "rules of the game" are a product of society and they, due to their inertia, do not always meet the urgent needs of a human. After all, institutions depend on people, scientific and technological changes, social innovations, shifts in consciousness and social behavior. Very often, the limited possibilities of legal institutions, which judges, conciliators or arbitrators rely on, can be overcome only through mediation.

Human-centrism in mediation presupposes the need to apply high requirements for a mediator, namely in terms of his competencies in such areas of knowledge as psychology, religious studies, sociology, ethics, philosophy, culturology, etc.

Nevertheless, in our opinion, it is hardly possible to provide quality mediation services without higher legal education. After all, only a person with a higher legal education can explain to the parties all benefits and losses they will suffer in case they file a lawsuit. Otherwise, the parties will be disappointed with the mediation process, believing that resolving the dispute in a traditional (judicial) way would have better met their needs.

Because of quarantine, mediation with the help of modern means of telecommunications is becoming the most attractive way to resolve disputes. It allows, in video conferencing regime, to conduct all stages of the mediation process (analysis of the problem of conflicting parties, fixation of the parties' aims, legal assessment of the dispute, as well as projection of the in-court and out-of-court options for decisions, discussion of the options for dispute resolution, conclusion of a mediation agreement).

The introduction of a special legislative procedure for the implementation of a mediation agreement would definitely make the institution of mediation much more effective.

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