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e-Paper

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The MEDIATION

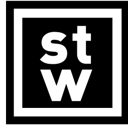
Trade magazine for Conflict Resolution – Leadership – Communication

Mediation from the Perspective of Ukraine and European Union

Korian Mediation: What Are the Issues and What Are the Prospects?

Family Mediation in the Time of War

Establishing Trustworthy ODR Systems to Enhance Consumer Confidence in E-Commerce



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International Mediation and Negotiation Skills Will Foster Amicable Conflict Resolution on All Levels

Welcome Readers!

It is indeed a pleasure to begin the year by sharing the second global English language edition of *The Mediation*. This publication brings a dynamic and diverse range of articles and inputs from professionals around the world, focussing on mediation developments, legislation, trends and experiences.

Russia's invasion of Ukraine in February of last year continues to elicit deep sadness and global outcry. With gratitude to our Ukrainian colleagues, we proudly share a series of articles providing nuanced insights into mediation in the country.

French colleagues relate their personal experiences of war and conflict in an inspiring piece highlighting the role mediation can play in restoring dignity to parties and contributing to peace in the world. From Poland, we receive a compelling entry on mindfulness in mediation. Practical and accessible exercises make the possibility of integrating the concept into any mediation both real and achievable.

Authors in Italy and the UK contribute their thoughts on mediation legislation and the uptake of mediation services in their respective countries and across the EU, exploring some of the challenges and triumphs in the field. Digitisation of mediation in the United States and the use of 'AI' technology invites readers to imagine the future of mediation.

In 2020, the EU funded InMediate Project began with the aim of establishing a European International Mediator professional profile through the development of an international training curriculum. Designed and delivered by partners in Germany, Italy and Poland, the project comes to a close in the spring. On March 2, 2023, the InMediate conference will take place, sharing learnings and outcomes from the programme and offering a terrific line up of presentations on a range of mediation topics. Also the developed curriculum will be presented to the public as an open source document. Furthermore experiences in international mediation and negotiation will be shared. Please join us in registering for this free event!

Thank you for your interest and we hope you enjoy your reading! Feedback and engagement with this work is both welcomed and encouraged as we continue to strengthen and enhance collaboration across our global mediation community.

With best wishes for a happy, healthy and peaceful New Year ahead!

Yours,

Allison Malkin Jonathan Barth

Subscribe or buy our German language magazine *Die Mediation* on our App.

"In a world of continous rapid changes, struggle for power and scarcity of resources around the globe, the ability to mediate internationally is needed more than ever."

Editor-in-chief Allison Malkin

Editor-in-chief Jonathan Barth

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Korian Mediation: What are the Issues and What are the Prospects?

Following the commitments made by the Korian group concerning the implementation of its Social and Environmental Responsibility policy, Claude Czech, honorary magistrate, was appointed Independent Mediator for Korian France. Former president of the tribunal de grande instance of Avesnes-sur-Helpe and vice-president of the Regional Institute of Mediation of Occitanie (IRMOC), he explains to us how he hopes to be able to restore dialogue between families, residents, the nursing staff and management in accommodation establishments for dependent elderly people (EHPAD) managed by Korian.

Interview with Claude Czech, the Korian France Mediator, conducted by Tine Roth November 2022

Tine Roth: Mr. Czech, can you tell us how your appointment at Korian came about?

Claude Czech: My appointment at Korian is the result of a recent process and also the fruit of a life story. Contacted beforehand by Thomas Prétot, Director of Mediation at Korian, I was appointed in June 2021 as an independent Mediator of Korian in France for a period of three years by a college made up equally of representatives of the company and consumer protection associations after the assent of its Stakeholder Council.

I received a mediation degree from Paul Valéry University in Montpellier in 2017, and arrived at mediation through conciliation, which I usually practiced in my functions as a magistrate. Since 2001, I ordered mediations in family matters. Today, the office of the judge comprises three missions which are to settle the dispute by a judgment, to attempt the conciliation of the parties or, to have recourse to mediation. In 2018, I organized the Assises of the European Grouping of Judges for Mediation (Gemme) in Bordeaux on the theme "Developing a culture of mediation". It is based on this experience and that of having been a guardianship judge, that I was sensitive to Korian's wish to introduce mediation in nursing homes in order to provide a reasoned and appeased response to the tensions arising between families and professionals who work there.

Mr. Czech, you say "introduce mediation to Korian". Why do you think this method of amicable conflict resolution is not more widespread in the business world?

Indeed, France seems to be a country of conflict and not of compromise. This is, in my opinion, the main reason why mediation as an alternative method of conflict resolution is slow to become part of the French landscape. I conducted a survey on the factors of resistance to mediation for my dissertation, entitled "Societal resistances to mediation". It turns out that despite a legal framework which is favorable to mediation, reluctance persists and is essentially cultural. The legal framework for mediation is very important here because it must reassure litigants. However, the law of February 8, 1995 and its decree of application nevertheless established a framework preserving the rights of the parties. They list the principles of both judicial and conventional mediation, namely the impartiality, independence, competence and diligence of the mediator, and provide all useful guarantees.

However, if the process seems to be stagnating in the judicial world, it is experiencing real growth in the spheres of civil, social, economic and administrative life. Since the order of August 20, 2015 relating to the out-of-court settlement of consumer disputes – which is the transposition of the European directive of May 21, 2013 – mediation also benefits from an additional space allowing disputes to be resolved between professionals and consumers, during the execution of a contract selling or providing services.

Work is a place where different or even divergent points of view necessarily coexist – in our case, that of dependent elderly people, families, caregivers and financial matters. How do you restore dialogue in the event of a disagreement?

Absolutely. The challenge is to be able to listen to the families, the residents, but also to the professionals working in these establishments. Families need to be reassured. The elderly need attention and to be listened to, sometimes with the difficulties that this implies in terms of availability or capacity. The working conditions of the staff are to be taken into account. What constrained choices does he face when he is understaffed? The lack of staff, "irregular covers", and training, are crucial in terms of operation and organization of work in nursing homes and clinics. Like other sectors, these structures are experiencing

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recruitment difficulties. But there are also people with a long-time work commitment.

I believe in the virtues of listening, of speaking up and taking being concern with understanding the "connection" of two humanities. These elements, like recognition, act like a balm. I perceived these difficulties before committing to the Korian group, but I was sensitive to the five elements of expressing the concern for "vulnerability": the company's employees are required to respect an ethical charter; upon entry, the resident undergoes a positive evaluation of his dependency, leading to an individualized follow-up; his care is carried out according to the humanist approach of "positive care"; establishments are subject to internal audits; the creation of a mediation unit, which provides a culture of dialogue.

That's where you come in. What are your plans for mediation at Korian ?

After drafting a mediation charter with Mr. Pretot, which can be seen on the website dedicated to mediation at Korian, I established a protocol for its implementation, breaking down our action into three areas. The first seeks to instil a culture of mediation in establishments through staff training, conferences and the posting of messages intended for residents, families and caregivers. The purpose of these posters will be to raise awareness and familiarize all the people present in these living spaces with the spirit of mediation, such as, "We stand together, you need us and we need you". This should contribute to the pacification of relations and boost trust. The second area seeks to reinforce curative mediation – consumption and conventional – by reducing the duration of disagreements and by working on better identifying the conflict. Saving time on the conflict avoids the installation of deleterious climates. The last area aims to introduce preventive mediation in nursing homes in order to identify all occurrences of potential tension during the services being carried out, and to avoid the deterioration of situations or the emergence of a conflict. An experiment in two pilot sites will be launched for this purpose. Let's wait and see.

Thank you very much for this interview and we are looking forward to hear from you soon.

Tine Roth

Tine Roth is a trainer in work analysis and a certified corporate mediator. She is mainly involved in the field of psychosocial risk prevention in medico-social establishments and nursing homes. She has a doctorate in work philosophy and she participated in a European research project on aging well between 2020 and 2022.

Claude Czech

Honorary magistrate and former trainer at the National School of Magistracy (ENM), Claude CZECH presided over the tribunal de grande instance of Avesnes-sur-Helpe (59) until 2014. He graduated as a Mediator from the Paul Valéry University of Montpellier in 2017 and is a member of the European Grouping of Magistrates for Mediation (Gemme), whose meeting he organized in 2018 in Bordeaux on the theme *Developing a culture of mediation*. He is also vice-president of the Regional Institute of Mediation of Occitanie (IRMOC) and therefore designed the program of the conference entitled *Mediation and situations of vulnerability*, which was held in Béziers in June 2022.

The Chance of Misunderstanding in Mediation

The moment that often leads to desperation in a dispute is a situation where the disputants do not understand one another. In fact, this is sometimes the moment when a quarrel starts. It is difficult to develop a common approach to find a solution when individuals do not understand their opponents. It is precisely this mutual lack of understanding that offers a mediator the opportunity to take the proverbial wheel and guide disputants through the conflict.

Antonia Voit

My name is Antonia Voit and I am a 23-year-old law student at the University of Vienna. I participated in the IBA – VIAC Consensual Dispute Resolution Competition (CDRC) Vienna in July 2022 and won second place as a mediator. During this mediation and negotiation competition, where I had the privilege to represent the University of Vienna, several moments occurred when the two parties involved failed to understand each other. I specifically remember one of these moments due to the complexity of the project.

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With one side already engrossed in the details and a busy conversation taking place on both sides, at first glance it seemed as if an agreement could be imminent. Yet to be honest, I did not understand what the parties were actually talking about and so I found myself in a dilemma.

Shall I raise a question to clarify what we are actually discussing, or allow the dialogue to continue uninterrupted, so as not to endanger a potential agreement? Without further ado, I trust my gut feeling and inquire openly and honestly, “What are we talking about when we speak about this project?”. For a short time, everyone is silent. Then one party explains once again what it is all about, while the other smiles and later says, “Thank you for clarifying that – I wasn’t quite sure myself what we were talking about”.

In the world of business, it is quite possible that agreements and projects are often completed without the parties involved knowing exactly what work they are agreeing to do. The example in the competition illustrated this well, highlighting that the disputing parties are often already so entrenched in their positions that they themselves are unable to shift their perspective and explore the opposite side. The task of mediation is namely to ensure that both sides understand each other and have space to express their views. In mediation it is important to constantly ask questions and if mediants are not able to do so, the mediator has to intervene and clarify the situation.

The Secret Language of Emotions in Mediation

Emotions are an important aspect of everyday life, and are a frequent topic in business mediations in particular. This arises not only because people are sitting face to face, where their emotions can be showcased, but they may be part of entire companies where the expression of emotions are not common. From the social point of view, emotions are undesirable in the corporate world. Instead, objectivity is required. However, a company could not exist without people and their emotional realities, which makes emotions an integral component of any company. For this reason, it is crucial to provide a stage where the emotions of those involved can be present.

Emotions can be used constructively, especially when it comes to finding a suitable solution. Behind emotion is usually an interest, and when this is properly illuminated, the essentials of the issue can be discussed. Therefore, an important realization is that emotions are very important in mediation and must be communicated.

In the mediation mentioned above, it was probably the case that the disputing party did not want to admit not knowing all of the complications of the project. After all, the company was active in the same field. Behind this proudly lies the interest to look

nation can also help to promote mutual understanding and provide explanations. Cultural differences may be opportunities to gain different insights and to benefit from each other. Mediation is a positive example of cross-cultural cohesion. The promotion of alternative dispute resolution is a step in the right direction, as it gives space to explore cultural differences without judgement.

This shows that the opportunity of mediation lies in the lack of understanding and in the diversity of the parties, because through the common definitions of words and goals, similarities can be discovered. Through acceptance and attempts to understand each other, almost any conflict can be resolved. The experience showed that if people can agree on simple matters, the way is paved for a joint solution.

good as a company and to maintain a reputation. This could be a shared interest between the two companies, from which common ground and numerous solutions could be derived.

From my experiences in the competition, I have learned to pick up on everything that is communicated on an emotional level. This may only come from a look or a gesture, as everyone is well aware that a lot of human communication is non-verbal. In mediation, there can be key moments to address just these small things. In the business world, where emotions are often hidden, this is especially useful to note. Sometimes a small eye roll is already a protest, a small hand movement indicates an outburst of emotion, and a facial expression betrays confusion. In such moments, it is worth pausing as a mediator and trying to verbalize what has been observed. However, caution is required, because not every personal perception corresponds to the reality of the disputants. Moreover, cultural differences must always be taken into account and interpreted in the right context.

Mediation in the Transcultural Context

This became particularly clear to me through an experience in the international competition. In the course of mediation, I often ask whether the parties have understood everything that was said. One party to the dispute shakes his head incessantly in response to this question. However, when I ask what is unclear, the answer is that there are no unanswered questions. At first, I am a bit confused, but then I realize that nodding does not mean “yes” in every country.

At the point where international differences are recognized and accepted, there is room for common comprehension. Considering the perspective and motivation of the other side is elementary for a mediation to be successful. The history of a

Mediation in the Future

The legal institution of mediation has already found representatives worldwide and has gained a presence in a large number of countries. In the future, mediation will offer even more opportunities to resolve conflicts and ensure that all involved parties benefit in the long-term. The first step towards making mediation accessible to everyone is state funding. There is also a need to educate the public, as many disputants quickly find themselves in the courtroom without knowing that there are faster, cheaper and more efficient ways to resolve the dispute. Mediation offers the chance to resolve a conflict in a sustainable way and to create a new way of living together. It is the most powerful tool available to resolve conflicts.

Antonia Voit

Antonia Voit is studying law at the University of Vienna. In her studies she focused on alternative dispute resolution. Her passion for mediation started at a young age as she successfully completed the peer mediation training during high school. After school she volunteered for a semester in a children’s home in South Africa. Antonia is currently working in a law firm as a legal assistant, where she specializes in civil law. In addition, she is completing practical training at the association Forum Wirtschaftsmediation in order to be able to register as a mediator later on. At the international competition the CDRC Vienna – The IBA-VIAC she won the second place as mediator as a team of the University of Vienna.

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The Biased Mediator

Mediators are 100 % impartial! They are not passive observers of a conflict, of course, but actively support all parties equally to express their views and needs and come to solutions that are in their best interest. Most definitions of mediation emphasize the role of the mediator as a neutral or impartial third party. Impartiality is a key principle of mediation.

Christian von Baumbach

But is this really true? Probably not, at least not 100 %. Biases are a natural and to some extend unavoidable part of human nature. Our biases help us to navigate through our daily lives without having to think too much about every action and encounter.

What about our professional lives? Can we leave our biases at the door when we enter the mediation room? Maybe to some extent, but probably not completely. To be honest, even in my professional role as mediator I am influenced by my biases. My biases are keeping me from being truly impartial. In most mediations I feel closer to one party than the other or feel that the arguments of one party are more reasonable than the other.

This can be a problem if this influences me in a way that I favor one party more than the other. As the mediator I am responsible for leading the process, and the process naturally has an impact on the outcome. I could, for example, lead the conversation in a way that helps party A at the expense of Party B. I could repeat or visualize some arguments in greater detail while neglecting others. Or the parties simply feel the greater sympathy towards one side. All of this would probably happen unconsciously and therefore would be difficult to avoid.

So, it is very important to be aware of our biases, train our perception and develop skills to stay as impartial as possible. How can we achieve this?

Seeing Through Cultural Lenses

Our perceptions and values are strongly influenced by our surroundings and our peer groups, especially at young age. Our family members, friends, classmates and others have an impact on how we perceive the world around us and how we judge others. This cultural background shapes our perception and influences our judgement. Most of the time we are not even aware of the cultural lenses that we look through. We believe that our view on the world is real, and therefore opposing, unexpected behavior must be somehow wrong or mischievous.

But we can train to view the world through different lenses, to look at the world from different angles. This is, of course, what mediators always pursue, but not all mediators take cultural biases into account. To do so we need to achieve knowledge about cultural dynamics and reflect on our own cultural background, as well as on other cultural aspects. We also need to develop an attitude of respect and interest towards people from other cultural backgrounds. Culture is complex and there is always something new to learn. It also helps to talk a lot to people from very different social and cultural backgrounds to understand how they perceive the world. Through these theoretical and practical experiences we gain intercultural competence that helps us to understand and deal with our biases (Bertelsmann Stiftung & Fondazione Cariplo, 2008).

One important aspect here is that culture is by no means limited to national culture. Modern cultural theories like the concepts of open culture and multicollectivity by Professor Bolten apply non-binary concepts to culture (Bolten, 2011). Professor Bolten points out that all humans belong not only to one culture, but instead to multiple collectives. Each collective has an influence on us and therefore on our own biases. These concepts may help us to understand our own diverse cultural background as well as that of others. It supports a view that is less black and white and more colorful.

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Together with my affiliates from PracticeForte Advisory in Singapore I currently develop a training module on intercultural competence (PracticeForte Pte Ltd, 2022).

Co-Mediation

Well aware of cultural biases, in Cross-border family mediation we often work in co-mediation with a team of mediators from different backgrounds that match the background of the parents. The German NGO MiKK has developed the so called 4B mediation model, in which co-mediator teams with the following characteristics are assigned to each case: 1. Bi-lingual: Parents may speak in their mother tongue as well as in the language of the relationship during the mediation. 2. Bi-cultural: The co-mediator team will reflect the culture of the parents. 3. Bi-professional: One mediator will be of a legal background and the other will be of a psychosocial (psychological or pedagogical) background. 4. Bi-gender: The co-mediator team will reflect the gender of the parents.

Each mediator will have biases and not each mediator can support each party equally, but together as a team they can help each other to understand and overcome their biases and support the parties equally. That is why each co-mediation is a wonderful learning experience for the mediators as well.

This mediation model is also effective to counter possible biases that the parties might have against the mediators. Someone from Germany might feel better with a German mediator in the room while someone from India might prefer a mediator from India, even if both mediators are effectively impartial to both parties.

Prejudice vs. Generalization

Not all assumptions are wrong. A helpful difference can be made between prejudices and generalizations. Prejudices are preconceived opinions that are not based on reason or actual experience. This is a negative and destructive form of bias. Generalizations on the other hand are realistic assumptions that are based on researched facts or personal experience. Generalizations can help us to understand a situation or people.

Reflecting on our own beliefs and understand which are based on facts and experiences and which are a result of prejudices can be very important.

Body and Mind

As biases are largely part of our subconscious it can be difficult to approach them on a logical, conscious level. However, they will manifest physically through our bodies, gestures and movements. Therefore mediators should pay attention to their body reactions, their posture, breath and gestures. All of this hints at the real thoughts including biases. For example, sometimes I notice that I subconsciously have a greater physical distance to one party or that I physically face more towards one side. This might hint at a subconscious bias. There are two ways to approach this: One is to reflect on this, maybe through supervision. The other is to deliberately correct my position in the room or my body posture. There is a close connection between body and mind and one effects the other. It can help to develop a better understanding for the connection between body and mind, for example through meditation, yoga practice or martial arts. Personally I have learned a lot from my Aikido practice over the years (von Baumbach, 2021).

Conclusion

Every mediator is influenced by his or her biases, often on a subconscious level, and this might impair our impartiality. To avoid that we need to be aware of our biases, train our perception and develop skills to stay as impartial as possible. Intercultural competence helps us to understand our own biases and treat others with respect. Co-mediation is a wonderful concept where two mediators with diverse backgrounds work together to overcome their own biases and acknowledge possible biases by the parties. Biases in form of generalization might actually be helpful as long as we stay cautious of prejudices. Lastly our body is a great indicator for our unconsciousness and helps us to understand and influence our own biases.

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We Have a Dream – Nous Avons un Rêve – Wir Haben einen Traum ...

Joëlle Dunoyer, editor in chief of the French Mediation magazine INTER-Médiés and Christel Schirmer, correspondent and permanent contributor, take us through some reflections and questions and maybe some responses on the outline of a world where brotherhood and solidarity would be the cement of society.

Joëlle Dunoyer and Christel Schirmer

"We must learn to live together as brothers, or we will all die together as fools"
(Martin Luther King)

Introduction

On August 28, 1963, Martin Luther King gave his speech, "I have a dream", which is now known throughout the world (Jeune Afrique, 2013). In recent years, and in view of what is happening in Europe and the world more broadly, we think often of this quote. We think that this dream is common to all human beings: to live comfortably and in peace. Like a stacked Russian doll, this dream includes so many others: the dream of freedom, prosperity, brotherhood and the dream of a better life for our children and grandchildren, etc.

Human beings are courageous and strong-willed, sometimes foolhardy: since the dawn of time, they have sought new horizons, in order to realise their dreams. However, unfortunately, sometimes they are pushed out of desperation to survive. When people abandon their homes or their families and countries because they have nothing left to lose, except their lives, we must stop for a second and ask ourselves why? When misery and violence reign, as simple as it may seem, they are simply seeking peace and justice.

Joëlle

My early childhood was marked by the Lebanese civil war, which my country faced for many years. When we look deeper, it may seem we found out that war was driven by a fear of each other.

There were Muslims, Catholics and Jews with a variety of beliefs ... a multicultural society living together in a land they all called home (Martin Luther King would've love it). Everybody, and I mean everybody(!) was looking upon life as a joyful, peaceful journey; living together despite their differences. What happened officially was a result of tensions amongst Lebanon's Christian and Muslim populations. That was the headline but in fact people didn't want this war.

It is my deeply held belief that if we interrogate any human being on this earth, his dream would be to live in peace and harmony. It may be an unattainable or difficult ideal to achieve, but this is everyone's belief. When Martin Luther King was talking about his dream, he was in fact talking about each and every one of our dreams. My neighbours wanted peace; my parents wanted peace for their children, as young teenagers, my soul mates dreamt of peace because war didn't let us live the life we wanted.

Maybe there are few who think that peace doesn't stand a chance and they may be blinded by their ego and love of power. Maybe those few think that only violence can bring results and solve problems. However, violence only brings more violence

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and war brings suffering and the circle goes round and round. Who can stop it?

I believe what John Lennon used to sing, that if we can only "give peace a chance", the world would be a much better to live. There are those of us who live through war and face darkness, and those who do not face these hardships, yet are we not all human begins with the same hopes, desires and dreams?

Christel

Let us not close our eyes ... In 2018, one billion people on all continents were on the move due to political crises, famine and war, mostly within their own countries. 200 million took refuge in neighbouring countries, most of which are very poor and receive them as best they can. Rich countries, including many European countries, received many, many fewer. Forecasts for 2050 predict a doubling of these numbers, and not only as a result of global warming. This brings us back to our own history: over the centuries, have we Europeans not left by the thousands or millions to populate other lands and continents? Didn't we leave to take refuge elsewhere during religious wars, famines, ideological pursuits and other natural disasters? We are all migrants or the product of migration! This is something we have in common.

In Europe today, cultures, ideologies and ideas are mixing in quick succession. How can we find the lowest common denominator that allows each individual and community to feel recognised; where their needs are represented no matter where they live or where they come from? How can we reconcile the sometimes diametrically opposed values? What rules and limits should we set to ensure that the freedom that governs our countries is respected? What rights and duties can be demanded by all sides? In short, how can we live together in harmony when we do not exist in the same "world" mentally, and yet live together as neighbours?

Vera Birkenbihl said that each person is a Robinson Crusoe and that we all live on a desert island. Sometimes we can come together and when we share common values, opinions and interests, communication becomes increasingly possible. Sometimes our life experiences, opinions and beliefs are so far apart that we cannot communicate. In this case, we need to build bridges that allow us to reach each other – where we are. Accepting that "the other is other" and that they have the right to be other without being judged, devalued or, rejected – we see this respect ingrained in the training mediators receive, yet rarely as part of the training in everyday life.

Let us not delude ourselves: when we go to live elsewhere, we do not want to become and be like others, giving up what we believe, sacrificing our values, traditions, habits and ways of life. Rather, we want to enjoy what they have like peace, prosperity, happiness, etc., whilst remaining who we are. This is our right as human beings. It is difficult for us to conceive, or even imagine, that when we leave our countries and civilisations, we have to leave behind a part of ourselves, of our essential being.

Those who welcome us with the best will in the world, with empathy and fraternity, with benevolence and love for their fellow man, do not always imagine to what extent their lives will be impacted by our presence. Their "system" will be shaken and will never be the same and therefore resulting conflicts seem expected and perhaps inevitable.

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Therefore, as in mediation, it is important that everyone can express their position, state their needs and explain their point of view. It is essential that everyone is listened to and heard. It is critical to be able to say what separates us and then to look for and find together what we have in common, what connects us, what we can share and what can enrich us mutually. When we remain fixed on the points that differentiate and separate us, conflict can escalate to the point of no return: "together in ruin," Martin Luther King's phrase sums it up!

During my mediation training, our psycho-sociology teacher warned us: "If you are here, there is a reason. You will not come out of this training unscathed". She was right and there were reasons for my interest in mediation: I grew up in the 1960s in a Catholic village in Germany where we were in the minority 1 % of Protestants. We were almost considered heretics, "miscreants". Why was that? From the age of six, I didn't understand – why couldn't my cousins come to my birthday party? Half of my family lived in the Russian occupied zone, the GDR, and they were not allowed to travel to an imperialist country. Furthermore, I didn't understand why there was famine in Biafra (1967 to 1970) and the Vietnam war was taking place, whilst I was warm and safe … I always wanted to understand: how does it come to this? This is a question a mediator often asks.

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Joëlle

Like Martin Luther King, we have a dream and we know that we are not alone: We want to connect with people and participate in the creation of a better and more fraternal humanity. Isn't it a beautiful mission for mediators today, in Europe and elsewhere? Even if the future seems dark at present, remember that this is not the first time in human history people have felt this way; it is always dark for somebody somewhere! We remain optimistic.

To accomplish this mission of strengthening our humanity, we look to another great man, Mahatma Gandhi when he says, "Be the change you want to see in the world! If each and every one of us makes a step toward others with justice, understanding, humanity, empathy and so on, we take a giant step towards making a difference.

It was not by chance that I got into mediation and share much with you, Christel. I have a belief deep down that if every one of us can sow seeds of kindness, participate in acts of nonviolence around his neighborhood, in the family and amongst colleagues, faith in humanity and brotherhood can grow.

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The Battle for the Soul of Mediation

Kenneth Frank

Many years ago, I was practicing law with an emphasis on labor and worker's issues. Other areas of law, including minor criminal, bankruptcy, family and traffic violations came in the door alongside these cases, which resulted in my broad understanding of the adversarial system and the impact it has on clients and their advocates. Here were some of my observations:

1. No side left a contested hearing feeling very satisfied.
2. If one side was overly satisfied, the other side generally appealed.
3. Dissatisfaction extended to the attorneys in the case and occasionally to the judge.

I regularly appeared in front of a judge for pre-trial hearings in family cases. The judge would review the statement of issues not yet resolved and, upon finding something troublesome, would announce, "If you people cannot agree on (insert the issue here), I will enter an order nobody likes." It took me several years of practice before I realized the judge was merely stating the obvious. Who is in a better position to come up with a satisfactory resolution of the issues in the case – the judge who sees the case for a few hours or the parties who have lived it? Generally, if the announcement in court did not prompt the parties and attorneys to huddle and sort out the issues, the judge would enter an order nobody liked. The whole system left me questioning whether or not we were really affording our clients the best outcome in these cases?

When an opportunity to volunteer as a mediator came along in the late 1980's I jumped at it. I joined a group that paired a mental health professional with a legal professional to act as co-mediators. At that time, the only cases available for mediation were post decree modifications. Judges, who had already seen the case to a divorce decree, would refer parties who were seeking a change in the orders in the decree to mediators to see if we could come up with an acceptable modification. If we found a satisfactory modification of the prior order, we reduced it to writing, circled it back to the parties' legal counsel (if any were involved) inviting their review before filing it with the judge for final approval. In almost every situation, the court accepted the modification without further action, and made the modification an order of the court. Not only was this process more streamlined for the parties, but parties also left our mediation sessions satisfied!

As I began to digest these results, I spoke with fellow attorneys who were quick to dismiss the process because of its limited scope and lack of remuneration. Shortly after, I made a career move into academia, yet this experience in mediation stayed

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with me. Subsequently, I completed a graduate degree in conflict resolution. This degree program, housed in the social sciences, focused on the human beings in conflict rather than the legal system. This training informed my efforts in the classroom and as a mediation trainer. I also became a court approved neutral.

In the early years of delivering training, students arrived with almost no knowledge of the purpose and process of mediation. They certainly did not know that mediation held the potential to bring about lasting and meaningful reconciliation between parties in dispute. The year 2000 saw Brenau University enter a mediation team to participate in the first intercollegiate mediation tournament sponsored by a subgroup of the American Mock Trial Association. Rather than being in competition with other teams, the structure of the mediation tournament encouraged students from different colleges and universities to collaborate. Students established and built friendships with learners from other schools and as the tournament unfolded, the positive impact on the members of the team was immediately recognizable. Those of us involved in the organization of the tournament knew we were moving in the right direction. That subgroup ultimately became the International Academy for Dispute Resolution and over twenty years later, INADR remains very much involved in mediation education and tournaments at the undergraduate and law school levels around the world.

As more people became interested in mediation and recognition of mediation within the legal system took on a larger role, I remained interested in understanding how student's perceptions and grasp of mediation evolved. Worryingly, I began to hear negative anecdotes about mediation from students which included; the painful experience of attending mediation as part of a parent's divorce, one which left them feeling they would never again invest in this process. Or, the disappointed business owner who had found the mediation process to be generally lacking. As an early adopter, it was troubling to hear these stories about a process that had started out with so much promise.

With mere anecdotes and a lack of quantifiable data on mediation as a process, drawing conclusions was a struggle until, in 2016, a study entitled "What Works in District Court Day of Trial Mediation: Effectiveness of Various Mediation Strategies on Short- and Long-Term Outcomes" by the State Justice Institute, Maryland Judiciary and Salisbury University was published. https://mdcourts.gov/sites/default/files/import/courtoperations/pdfs/districtcourtstrategiesfullreport.pdf. This study covered four counties in the state of Maryland on Day of Trial ADR programs and collected data from 269 cases. That data included:

- Surveys of participants before and after ADR sessions
- Surveys of participants 3 and 6 months later
- Surveys of the ADR practitioners
- Behavioral coding of participants and ADR practitioners by trained observers
- Review of court records one year later

Finally, we had a study that informed practitioners about the impact mediators themselves have on the mediation process. The findings included: the impact of the use of caucus, whether or not ADR practitioners reflected emotions/interests and whether or not ADR practitioners elicited participant solutions. The study focused on the satisfaction of the participants as well as the observations of the mediators.

Findings with Regards to the Use of Caucus Discovered:

1. Short-term analysis found that the greater the percentage of time participants spent in caucus, the more likely the participants were to report that the ADR practitioner:

- controlled the outcome
- pressured them into solutions
- prevented issues from coming out

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2. A greater percentage of time in caucus was also negatively associated with participants reporting:
   - they were satisfied with the process and outcome,
   - the issues were resolved with a fair and implementable outcome

3. A greater percentage of time in caucus was positively associated with an increase in
   - a sense of powerlessness
   - the belief that conflict is negative

4. Long-term analysis discovered that the greater the percentage of time participants spent in caucus was associated with a decrease in:
   - participants' consideration of the other person
   - self-efficacy (the belief in one's ability to talk and make a difference)

5. The greater the percentage of time spent in in caucus was positively associated with the likelihood of returning to court in the 12 months after mediation for an enforcement action.

6. The percentage of time spent in caucus had no statistically significant impact (positive or negative) on reaching an agreement.

Findings as Regards ADR Practitioners Reflecting Participants' Emotions/Interests Discovered:

Reflecting back what the participants had themselves expressed, with a focus on their underlying emotions and interests, was positively associated with parties:

- apologizing and taking responsibility
- an increase in self-efficacy (the ability to talk and make a difference)
- an increase in the sense that the court cares

Findings as Regards ADR Practitioners Eliciting Participants' Solutions Included:

Asking the participants what solution they would suggest and checking to see if the solution would work for them was positively associated with participants:

- listening and understanding each other
- jointly controlling the outcome
- apologizing and taking responsibility

And negatively associated with:

- the ADR Practitioner controlling the outcome
- being pressured into solutions and;
- preventing issues from coming out

To summarize the results of the Maryland study, mediators need to minimize time spent in caucus, reflect participants' emotions and interests, and make sure that we elicit solutions from the participants' themselves, if our goal is to have participants who are satisfied with the mediation process. The benefits of happy parties are multifacted in that parties increase their self-efficacy, are more likely to reach a durable outcome and believe that the solutions are fair and implementable.

However, it is important to acknowledge that achieving such results may take time and require skills not all mediators possess. Some mediators resort to caucus at the first sign of emotional expression, exerting greater control over the process and

possibly pushing participants towards a settlement. If the goal of mediation is to achieve a settlement as quickly as possible, these kind of tactics do of course support that goal.

Following the release of the Maryland study, The American Bar Association (ABA) Dispute Resolution Section, prepared a "Report of the Task Force on Research on Mediator Techniques" in 2017.

The most significant findings from their review of studies which focused on mediator techniques, was that the ABA would encourage more research on how mediator techniques impact the mediation process and the satisfaction of participants within a mediation.

Some of the findings were in agreement with the Maryland study. Specifically, the ABA found:

- techniques that have the potential to increase the probability of settlement, improve party relations
- positive experiences of mediation included eliciting participants' suggestions and solutions, giving more attention to participants' emotions, relationships and sources of conflict and, using pre-mediation caucuses to establish rapport and trust

Other techniques, such as the use of caucus during mediation showed a mixed, although generally negative, result on participants' perceptions of the process and strength of relationships. The ABA did not answer the question of whether the goal of mediation should focus on participant satisfaction or efficient settlement. The report concludes with this comment from the Task Force that, "future steps are essential for the field of mediation to be able to develop a body of empirically derived knowledge about which mediator actions and approaches enhance mediation outcomes, and to use that knowledge to improve mediation practice." (p. 61)

To date, the ABA Task Force has not produced the volume of research required to deepen knowledge around how best to improve mediation practice. In the interim, a significant report from Galton, Love and Weiss was published entitled "The Decline of Dialogue: The Rise of Caucus-only Mediation and the Disappearance of the Joint Session." This article, published in 2021, laments the decline of meaningful, joint conference style sessions in mediation world-wide. It appears not to be the case that mediators have not been trained to work in joint sessions, as 95 % of mediators surveyed reported that indeed they had been trained on how to conduct a joint session. Interestingly, 65 % of these same mediators reported keeping participants in caucus always, usually or sometimes, while just over 29 % kept participants in joint session always, usually or sometimes. Mediators shared that the sources of their mediation cases were attorneys, and those referring attorneys did not want to participate in joint sessions.

Again, the goal of mediation comes into question? Is the goal of mediation to allow participants to discuss their differences and direct the outcome of their dispute through that discussion in a collaborative process? Or, is the goal to promote the most efficient settlement possible through a mediation process dictated by attorneys with differing interests to those of a trained mediator? I would suggest that taken to the extreme, shuttle negotiation with no meaningful joint session is not mediation – it is simply shuttle negotiation. The outcome of a process where the participants feel heard, understood and involved in the outcome, as shown by the Maryland study, is much more satisfying to the participants and likely to result in durable agreements. Galton, Love and Weiss end with the following observation: "Let's be sure that mediators remain leaders of understanding how to promote talk. Let's encourage the mediation field to continue to be expert in dialogue in a shrinking world which so desperately needs human interaction, collaboration and civil conversation."(p. 100)

In the battle for the soul of mediation, I hope that we can rekindle the promise of mediation rather than extinguish its bright flame.

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Italy, the Mediation Paradox?

More and more companies are facing abrupt changes. The perfect crisis management can prevent problems from getting out of hand in the first place, but this requires appropriate preparation and, above all, training for communicators and employees in customer contact.

Giovanni Matteucci

Introduction

Despite improvements, the judicial sector in Italy is inefficient: In 2009, pending civil judgements tallied almost 6,000,000 and reached almost 3,000,000 in 2021. In 2014, one could expect to wait 505 days for a court hearing and in 2020, the estimated wait time was 419 days. Wait times for appeal courts was 1,028 in 2014 and 891 days in 2020 (Ministero della Giustizia, 2022). In the early 2000s, the backlog in judicial civil cases increased continuously, reaching its peak at the end of 2009.

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In previous decades, laws ruled mediation into the Italian legal system. According to Law 580/1992, all Chambers of Commerce were required to set up Arbitration and Conciliation Chambers; however, very, very few proceedings were implemented. Legislative decree 5/2003 ruled voluntary mediation into corporate, banking, credit and financial matters, each being areas experiencing a high number of disputes. Nobody, more precisely, no lawyers, used the procedure, and when I asked why they answered: *"Because it was not compulsory"*!!! By the end of December, 2009, 5,826,440 civil litigation cases were pending in courts (two-thirds of which had a value of less than euro 3,000); the average number of days for a civil judgment in the 1st instance numbered 960, and in the court of appeal, 1,509 days (Ministero della Giustizia, 2010). The average number of days for commercial debt recovery was 1,210 and court costs consumed 30 % of the value of the dispute (World Bank et al., 2008).

In 2010, D.Lgs. (Legislative decree) 28/2010 and D.M. (Ministerial decree) 180/2010 introduced compulsory civil and commercial mediation into the contemporary Italian legal system. This resulted in furious opposition from lawyers who feared a significant in drop in revenues, and benign neglect by judges.

Mandatory mediation came in force in 2011, was revoked in October 2012 and reintroduced in September 2013.

Results in the period spanning 2011–2021 indicate; a decrease in civil court litigation (–4 % per year), because of the economic crisis; a strong increase in mediation proceedings (+17 % per year) and; a strong increase in mediated settlement agreements (+13 % per year) (Ministero della Giustizia).

According to the European Parliament, *"Italy … uses mediation at a rate six times higher than the rest of Europe"* (The European Parliament, 2018). Ten years later, in 2021, there were 2,731,349 new proceedings filed in civil courts; 166,511 civil mediation proceedings and 22,812 mediated settlement agreements (Ministero della Giustizia). The ratio of settlement agreements to new mediation proceedings (success ratio) was 14 %. If all parties were present and decided to go on from the first information meeting, the success ratio grew to 46 %. This mediation paradox demands the question, why is it so difficult to "bring" the parties to mediation in Italy? (de Palo & Keller, 2012; European Parliament et al., 2018; Herbert et al., 2011). It is a matter of social and economic environment and above all, knowledge.

Mediation Belongs to the Italian Legal Culture

In 2010, when compulsory civil mediation was introduced in the Italian legal system, the main criticism was that mediation does not belong to Italian legal culture. History teaches the opposite.

The first written collection of laws in the Western world is attributed to Zaleuco of Locri Epizephyrii, who lived in the 7th century B.C. in Southern Italy, along the Ionian Sea, which was

then a colony of Greece: *"It is forbidden to undertake a judgment between two people, if conciliation has not been attempted beforehand"*. In other words, mandatory mediation.

Taking a leap of about two millennia, the Italian State was founded in 1861. In the first Civil Procedure Code (1865), the heading of the seven introductory articles was "Conciliation". According to a law issued in the same year, police officers must first of all reconcile conflicts among private citizens. In 1880, the Justices of Peace *("Giudici di Pace")* issued 70 % of all judgments delivered in Italy. According to Law no. 261/1892, the judge *"in order to reach a conciliation, could call for the single party in a private hearing"* (an *ante litteram* caucus).

At the beginning of the twentieth century, the Italian bankruptcy law (n.197/1903) also provided for negotiation agreements on the settlements of the debtor crisis, under the control of the judge, who, in small claims, could also act as a mediator *("amichevole compositore")*.

During the Fascist period (1922–1943), the totalitarian regime disliked the resolution of conflict by private citizens and decreed they must be managed by a state body, judges and through sentencing. Mediation in Italy gradually lost its importance from about the 1930s and was no longer taught in universities for over seventy years. Mediation was, and still is, part of the Italian legal tradition, but it was forgotten. However, the "roots" of the economic and social context must be taken into account.

Giovanni Giolitti, one of the most important figures in Italian political history, was elected Prime Minister many times in the first decade of the twentieth century and once said: *"In Italy, a country of very low wages ...; the overall tax burden has become so high as to sometimes constitute a real confiscation of property; ...*

justice ... is slow, very expensive, and does not provide sufficient guarantees" (Giolitti, 1899).

Giuseppe Prezzolini, a journalist and author, wrote in his book *Codice della Vita Italiana* (Code of the Italian Life): *"It is not true ... that there is no justice in Italy. Instead, it is true that one should not ask the judge for justice, but rather the influential deputy, minister, journalist, lawyer, etc. You can find it: the address is wrong"* (Prezzolini, 1921).

Piero Calamandrei, one of Italy's leading jurists of the twentieth century, wrote in a book titled *Troppi avvocati* (Too many lawyers), published by La Voce: *"In Italy today the number of legal professionals surpasses by far the existing social needs; this pathological elephantiasis affecting the Bar entails, as its natural consequence, unemployment and economic hardship for the vast majority of professionals ... In truth, these two hundred lawyers who have been the immutable foundation of our Chamber for fifty years, whenever they have been faced with the problems of judicial reform by some bolder minister, they have allowed themselves to be guided not by national politics, but parochial politics or even class politics"* (Calamandrei, 1921).

In Italy there has never been the *bourgeoisie* nor the industrial revolution, only the self-proclaimed "Fascist revolution", which was nothing more than the maintenance of the *status-quo-ante*. Italy is a traditional country. Italians are not accustomed to radical changes.

2020 Mediation Big-Bang and Consequences

In 2020 more than 200,000 disputes were expected to be transferred from the courts to mediation (one million in five years). There was a mediation explosion or, to be precise, the *expecta-*

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tion of a mediation explosion. Due to the economic crisis, many professionals, the majority lawyers, rushed to attend courses on mediation, which lasted only 50 hours, while at least 200 hours would have been necessary. There was also a "rush" to offer training courses, and criticism about the quality of many of them. As a consequence, in 2012 there were 968 mediation providers *(Organismi di mediazione)*, – while no one knows the exact number – approximately 40,000 mediators (mainly lawyers) and 60,810 procedures in 2011. There were more mediators than mediations.

Two years later in 2012, according to the head of the Italian Ministry of justice's legislative office: *"When this adventure began, the fear was that we would not have enough coverage on the ground. In the wake of this, we dictated rules that are now applied to a different reality; this can create problems for the system"* (Macciocchi, 2012, p. 26).

Between 2014 and 2016, the Ministry of Justice carried out investigations: *"The inspections carried out – amounting to 125 – led to the cancellation or suspension of almost half of the mediation providers"* (Ministero della Giustizia, 2017, p. 151). Therefore, the huge increase in pending civil litigation cases in courts, the excessive time length of judgments and many attempted reforms of the civil process were ineffective. In 2010, compulsory civil mediation was introduced without prior adequate training. As already quoted, in 2021 there were: 2,731,349 new proceedings filed in civil courts; 166,511 civil mediation proceedings and; 22,812 mediated settlement agreements, almost the highest number ever reached.

But, in 2021 the ratio of settlement agreements to new mediation proceedings (success ratio) was 14% and settlement agreements to new proceedings filed in civil courts was 0.9%. Far too little. If all parties were present and decided to go on from the first information meeting, the success ratio grew to 46 per cent.

A mediation paradox or, the consequence of a decision taken with great urgency in 2010, in a difficult economic situation, in a social context unaccustomed to sudden changes, with fierce opposition or benign neglect by lawyers and judges and a lack of effective communication to the public. Above all, a lack of adequate training contributed to the absence of sufficient knowledge.

What Next?

The Covid-19 pandemic. Economic and social crisis. The European Next Generation (NGEU) programme granted financial aid to member countries. The Italian government implemented the NRRP (National Recovery and Resilience Plan, Ministero dell'Economia e delle Finanze), with the commitment, among others, *"to reduce the average length of civil proceedings by more than 40 per cent"* (Ministero dell'Economia e delle Finanze, p. 99) and the *"backlog of cases in the ordinary courts of first instance"*, reducing by 65 per cent the number of pending cases compared to 2019. All of this is set to be achieved by mid-2024.

On July 28, 2022, the Council of Ministers enacted two delegated decrees on civil trial reform (Governo italiano, 2022), which later fell under parliamentary scrutiny (Atti Parlamentari XVIII, Atto N. 407, 2022). Final approval will require the assent of Parliament by November 26, 2022. Special attention to ADRs (arbitration, assisted negotiation and mediation) is mentioned and we see the following points concerning mediation:

- increase in the matters covered by mandatory mediation;
- enhancement of court-appointed mediation (evaluation of the expertise of judges also on the basis of disputes settled by mediation and their training in mediation; for the two most interesting books in the last two years on mediation in Italy see Moriconi (2020) and Scuola Superiore della Magistratura (2022))
- involvement of the Public Administration;
- with party's agreement, a mediation technical expert report can be submitted to the court;
- greater effectiveness of mediation proceedings, through tax incentives and financial penalties, with adequate increase in available public funds (as promised!).

Also emphasised was the need to assess the competence of responsible training providers and establish key requirements, which suggests this is lacking in several cases. Yet to be

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enacted are the ministerial decrees relating to fees paid to mediation providers and to mediators, as well as changes in training. According to rumours, there would only be a change from 50 to 70 hours for the introductory mediation course, which is absolutely insufficient. In the civil proceeding reform, a new branch of the court is envisaged; the "Trial office" (Ufficio del processo), whose tasks will include analysing the "mediability" of the dispute and the likelihood of agreement following court-ordered mediation.

There are many interesting and relevant innovations, some of which will take years to become effective. However, the "mediation paradox" is likely to shrink.

Grosseto, 24.08.2022

Image Source: stock.adobe.com / Albachiaraa

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EU Cross-Border Commercial Mediation: Listening to Disputants

Anna Howard

"The fundamental problem about mediation is that it's a good idea and nobody uses it." (In-house counsel)

As part of Steinbeis Mediation's series of workshops for the EU InMediate Project, on June 27, 2022 I was delighted to deliver a workshop on the key findings of my book *EU Cross-Border Commercial Mediation: Listening to Disputants* (Wolters Kluwer 2021). During the workshop, I considered the conundrum captured in the quotation above: why, in spite of the frequently acknowledged qualities of mediation, does its usage appear to remain low? This article shares some of my research findings on the reasons why parties do not use mediation and what they need in order to increase their use of mediation.

Against the backdrop of recommendations to improve the EU Mediation Directive (2008/52/EC), I interviewed senior in-house counsel of multinational companies which operate across the EU to gain insights into their use, and lack of use, of EU cross-border commercial mediation. As users of dispute resolution processes, their insights are particularly valuable. Having the opportunity to listen to these users, through the qualitative research method of interviewing, enabled new and rich insights to emerge regarding their use of, and views on, mediation.

Reluctance to Use Mediation

Mediation is often promoted as a cheap and quick alternative to, and indeed avoidance of, litigation and arbitration. In other words, mediation is often promoted as the easier option. However, from listening to the in-house counsel interviewees who participated in my research, it became clear that the messaging does not resonate well with them. Viewing mediation through the disputants' perspective suggests that mediation is far from the easy option. Mediation actually asks a lot of its users.

The in-house counsel I spoke with identified three reasons why mediation asks a lot of them. Firstly, they explained that using mediation emphasises their "failure" to resolve the dispute through their own efforts. As one interviewee explained:

> *"The business sees going to mediation as an admission of failure. They haven't been able to deal with it commercially."*

These experienced commercial negotiators think that mediation reflects badly on them as it emphasises their failure to resolve the dispute in their own commercial negotiations. This issue of failure not only relates to entry into mediation but also to its conclusion. As another interviewee said:

> *"A lot of management saying if I go to mediation and then settle, I might get shot at for agreeing a bad deal. If I let it get ruled by court I can say that they got it all wrong. I'm kind of exculpated."*

There is a concern that they may fail in the sense that others, not present in the mediation, might view the outcome reached in the mediation as a "bad deal."

Secondly, another way in which mediation asks a lot of its users is that mediation asks them to take responsibility for the determination of the dispute. As one of the interviewees explained:

> *"Resolving by mediation rather than non-consensual methods requires a certain amount of accountability and let's say a certain management type ... You need to have management that – excuse my French – has balls. I take that risk because it is the best solution for the company."*

Interviewees also described mediation as "entrepreneurial", further suggesting the risk-taking and responsibility that mediation requires.

Thirdly, mediation asks its users to accept that engaging a third party to assist them in their negotiations could add value to their own unassisted negotiations. In-house counsel identified a pronounced scepticism about the value that mediation could add to their own negotiation efforts. In other words, they wonder why they should mediate if they have already negotiated. As an interviewee explained:

> *"More often the opponent is not willing to enter into a mediation. It's: we're so great at negotiating that we don't need a mediator ... I hear it and feel it all the time. It's irrational."*

These three intriguing insights show that mediation is not the easy option for disputants but rather asks a considerable amount of them. Understandably, the interviewees therefore sought reassurance about using mediation.

Reassurance to Use Mediation

The in-house counsel whom I interviewed sought reassurance about whether they could trust mediation as a dispute resolution process. Disputants explained that a lack of information

on mediation and its outcomes made it difficult to know "how well trusted" mediation is by its users:

> *"Lack of information on… the seniority and experience of mediators. Also, wider acceptance amongst peer group. We need more knowledge and awareness of current case outcomes. A big challenge is knowing how well trusted that route is."*

Regarding EU cross-border mediation in particular, interviewees also sought the reassurance of having a specialist mediation centre which could assist them in setting up their mediation, including the identification of good mediators. An interviewee noted that such assistance is available in other regions:

> *"There needs to be something like the IMI [International Mediation Institute] but with a more formalised role that they can go to. Like SIMC [Singapore International Mediation Centre] in Singapore. That does international mediation stuff. There is somewhere in Asia where you have a point of contact where everything can go through. You don't have that in Europe."*

Interviewees also sought reassurance on whether they could trust the mediation process to be confidential. Indeed, an interviewee explained that he wanted the mediation to be "watertight". The disputants' emphasis on the importance of confidentiality suggests that this is an area which would benefit from greater focus in the continued efforts to promote the use of mediation across Europe. However, given the interviewees' emphasis on the need for more information on mediation outcomes, there is a delicate balance to be struck between ensuring confidentiality and enhancing awareness.

Listening to Disputants

Through listening to disputants, important insights have emerged into their reluctance to use mediation and the reassurance they seek in order to engage more with mediation. These insights enable us to appreciate that mediation is not an easy option for disputants and, equipped with that awareness, to identify developments which could enhance disputants' willingness to use mediation.

In my mediation practice, I have shared the following wisdom from Epictetus: *"We have two ears and one mouth so that we can listen twice as much as we speak."* In the continued efforts to identify measures to promote the use of mediation, this ancient wisdom is an important reminder to continue to listen carefully to those choosing how to resolve their disputes.

*This Code: **20CBCM2023** (valid through April 30, 2023) will give 20 % discount on the book "EU Cross-Border Commercial Mediation") when purchased in the eStore https://law-store.wolterskluwer.com/s/product/changing-the-frame-framing-the-changes/01t0f00000J4qNRAAZ*

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Family Mediation in the Time of War

Tetiana Bilyk

This article is the result of analysis of the work of family mediators in Ukraine since the beginning of the full-scale invasion of Russian troops into our country, due to which over the past six months, according to UN Refugee Agency, more than 11 million people left Ukraine. This is the largest migration crisis since the World War II. Since February 24, 2022, nearly a third of Ukrainian citizens have fled around the world seeking for salvation from the war and a new home. We are talking about 11,1 million people who became refugees because of the war (Soroka, 2022).

This analysis was made based on monthly reports on the work of family mediators in volunteer project of NGO "League of Mediators of Ukraine" providing family mediation services to Ukrainian families affected by the war. This project brought together 50 family mediators from different cities, some of whom were forced to evacuate from war zones to the West of Ukraine or to other countries. For many years, NGO "League of Mediators of Ukraine" has been cooperating with social services on providing social services of family mediation to the population of the country willing to peacefully resolve family conflicts. With the outbreak of the war, NGO "League of Mediators of Ukraine" did not stop its work and continued to support Ukrainian families who found themselves in difficult life situations.

Military events in Ukraine are physically and emotionally dangerous for people's lives, and for the past 8 months have had a long-lasting traumatic effect on a large number of people. Ukrainians have lost their homes, peace, well-being and confidence in the future. The Ministry of Health of Ukraine estimates that about 15 million Ukrainians will need psychological support due to traumatic experience caused by the war, many of whom are already in dire need of it (Zhytniuk, 2022). The level of such traumatization is closely related to the feeling of one's own helplessness due to inability to act effectively in such a dangerous situation.

Stress and trauma had a particularly acute effect on family relationships. After the first shock, people faced issues which had never been raised or discussed in the family before, and these conflicts cannot wait, since they are closely related to a sense of one's own safety, cohesion between the family members, sharing responsibility for survival and saving children. Many families found themselves separated by distance, and many alienated emotionally because of overwhelming feelings caused

Fig. 1: The LiMU team 2018 – Development of family mediation in Ukraine Ensuring the best interests of children (Source: Ліга Медіаторів України).

by the horror experienced during occupation and evacuation, being in basements during shelling, deaths of family and friends, loss of home and job, illness, and other stress factors. Disruption of social cohesion, trust and level of people's trauma lead to a daily increase in family conflicts and breakdown of family relationships. War accelerated all processes, which in turn deepen the psychological trauma of family members.

All these factors have strongly influenced the necessity to use the integrative approaches in the work of family mediators considering traumatization of Ukrainian population, who at the same time, provide psychological support to the conflicting parties and help to restore social cohesion to work out a mutually acceptable solution and way out of the conflict situation. Working in co-mediation of 2 family mediators, one of them having psychological background, allows to perform more effective diagnosis and analysis of the conflict, including psychological state of the conflict parties. Considering high level of traumatization of the population of Ukraine, mediators need to be able to recognize people prone to emotional outbursts and have the skills for working with such states; be able to work with different aspects of trauma and understand the level of traumatization caused by experiences (awareness of the extended impact of trauma, recognition of signs and symptoms of trauma); and determine the most effective interventions in the conflict, taking into account all the factors.

Unprecedented crises require unprecedented solutions, and mediators found themselves in a situation of extreme necessity to work with emotional side of the conflict caused by stress and trauma of the parties before they have the opportunity to move on to discussing the core of the conflict. In these conflicts and crises, mediator's success and generally survival us as a nation is increasingly dependent on our ability to listen with empathy, help the parties return to non-violent communication, try to solve problems together, negotiate and reach settlement in the best interest of all family members. This process depends directly on the mediator's ability for self-reflection and capability to maintain neutral position while facing personal experiences, and also being under stress of the war, as the parties to the conflict.

On the one hand, being inside the events, Ukrainian family mediators, like no one else, understand psychological state of the conflicting parties, but on the other hand, this may seriously block empathy for those people who have a different view of the current events, or lead to intense physical and emotional exhaustion. In these working conditions, resistance and growing aggression as a defense mechanism against those who think differently is much more acute, which makes it impossible to build trust with the parties to the conflict and between them for mediating.

It is impossible to go through one's own traumatic experience plunging every day into people's suffering and sense of loss; therefore, a mediator needs additional resource for resilience. For this he needs to develop skills of self-reflection, being aware of his own coping strategies, reflect on their effectiveness and seek help from specialists (psychologists, supervisors), if necessary.

All these factors affecting the work of family mediators during the war have made it necessary to use new instruments for working in mediation – what we call now "Crisis Mediation". Because of the difficulties a mediator faces in such crisis mediations caused by vulnerability and sensitivity of the parties to the conflict, quick loss of control over anger, anxiety and high level of distrust, loss of focus and an observable decrease of cognitive abilities, it leads to a state of increased helplessness of the parties and inability to generate options for solutions. And given the fact that prioritization, decision-making

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and situational understanding take place in the frontal part of the brain which switches off under stress this makes mediator's work even more difficult. Therefore, in crisis mediation, more and more efforts directed to work with the parties' emotions to reduce activity of the limbic system, mental stimulation, and increase cognitive abilities, thus helping the parties to reduce feelings of helplessness, and to enable generation of short-term decisions to meet the "here and now" needs. In the conditions of active hostilities in the country, it makes no sense to work on looking for long-term decisions, it's difficult for people to agree on something for the future being in a situation of uncertainty about tomorrow.

Such high intensity of emotions in crisis mediation, considering global state of anxiety and fatigue of all participants in mediation due to the war crisis, as well as often mediating in limited conditions (blackouts, air sirens, lack of Internet traffic) requires additional skills and resources from mediators, which quickly leads to professional burnout of mediators.

An additional complexity and peculiarity of family conflicts in war time are situations involving children evacuated from the county. Unfortunately, cross-border mediation in our country even before the war was not widespread due to the fact that only in the last decade, Ukraine was forming its regulatory framework and began to implement legislative initiatives in such cases as international child abduction. However, during the war, this issue aggravated greatly, and number of such requests has increased significantly due to forced evacuation of a large number of children. UNICEF reports about nearly two-thirds of children in Ukraine internally displaced persons or have left Ukraine to escape the war.

Currently, mediators are taking all possible measures to encourage the parties in cross-border family conflicts involving interests of children to enter mediation process in order to find a negotiated way out of conflict. In disputes arising from separation or divorce, it is essential to reach an agreement between the parents to ensure the right of "the child to maintain personal relationship and direct contact with both parents on a regular basis", as it is proclaimed by the UN Convention on the Rights of the Child (CRC, 1989). Regular contact with the parent who does not live with the child is an important part of the emotional and psychological development of the child. In any case, this contact is even more important when the child is very young. Each parent makes his/her contribution to the child's up-bringing – the one that the other parent can not compensate for.

Since the beginning of the full-scale war in Ukraine, many women have taken their children without consent of the child's father, since under martial law, children are allowed to go abroad without notarized consent of the second parent (adoptive parent; Salalaiko, 2022), and they do not plan to return in the near future. As a result of such actions, many fathers have lost contact with their children because of their non-departure status (in order to implement the measures of the legal regime of martial law the departure from Ukraine of Ukrainian male citizens aged from 18 to 60 is restricted), and every day this gap causes greater parental alienation.

Cross-border mediation always faces a number of difficulties which do not occur in conflicts within the country: long distance between family members, interaction of different legal systems, and limited time, since there is always risk of loss of contact with a parent. In cross-border family conflicts, the legal context is particularly complex: it is necessary to consider interaction of two and more legal systems, and it is important that parents are well informed about the laws of the countries applicable to their conflict. Conflict parties, now most of them are the fathers of the children, should have access to justice to resolve their conflict situation with the child's mother, but to justice, there is no offence in the mother's actions during war, and taking the child without consent of the child's

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father is not considered illegal abduction to initiate a criminal proceeding and return the child to Ukraine. For the other parent who is deprived of contact with the child such situation is a shock and additional stress to experiencing war crisis. Relationship between parent and child is rudely and abruptly cut, and a parent often fears that the child is lost forever. As a result, arising anxiety, helplessness and despair are intensified when the parent does not know the exact whereabouts of the child. Even when the location is known, the parent may not find it possible to establish physical and emotional contact with the child after a long-term breakup in the relationship.

Fig. 2: Booth of UkrainianMediationLeague (LiMU) 2018 (Source: Tetiana Bilyk).

These factors make it very difficult to engage both parents in mediation process and help them realize that such breakup in parent-child relationship results in additional traumatization for the child. Being in the middle of intense parental conflict harms the child's psyche and brings risks of long-term psychological and behavioral problems for the child. While most parents love and care about their children, during intensive parental conflict, children become a weapon against the other parent. Unfortunately, parents do not realize how much it hurts their children. Cross-border family mediation puts the needs of the child first in dispute resolution. The mediator's objective in such disputes is to help parents to find such decisions that ensure well-being of the children in accordance with their rights under the UN Convention on the Rights of the Child.

However, mediator's attempts to mediate in cases where one of the parties is obviously not willing to participate, or for some other reason, the dispute cannot be settled in mediation, only lead to loss of his/her time and energy. If mediator manages to engage both parents in mediation, they have the opportunity not only settle the current family conflict, but also to eliminate the causes of aggression and hostility between the parents which, despite the end of their marital relationship, have not been closed. Obviously, such work with root causes of the conflict will require a lot of effort and more time from the parties for work, including special mediator's skills to work with relationship and develop new forms of constructive interaction in co-parenting. In addition, a specially trained family mediator, if both parents' consent, can conduct direct consultations with the child, and from our practice, such involvement is often very supportive for children, as well as helps parents move to a new level of understanding of their children's feelings, and find ways to resolve the conflict while minimizing its impact on children.

Unfortunately, not all family conflicts can be resolved peacefully. This is obvious, and some cases require court intervention. This may be due to the nature of the conflict, specific needs of the parties, or some special circumstances of the case. But it is important for parents to remember that such disputes are considered in court for years and enforcement of decisions conflicts concerning children is the most difficult period which only complicates already difficult conflict situation between parents resulting for the children to suffer the most.

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Mediation in Cross-Cultural Perspective

Olha Bershadska and Olesia Ivanenko

Due to business globalization and increasing migration, more and more mediators throughout the world will be dealing with disputes and negotiations involving people and organizations from different cultures. Moreover, interpersonal conflicts are much more likely in multicultural environment [7]. So, it is crucial for the mediator to be able to recognize culture differences because they affect the way how conflict manifests, operates and how it is resolved. This article offers recommendations for efficient cross-cultural mediation.

Regardless of the culture people belong to, they all experience **conflict**. It is a natural process, which we know as "a clash between individuals arising out of a difference in thought process, attitudes, understanding, interests, requirements and even sometimes perceptions". [5] However, in different cultures there are different expectations of how the conflict should be dealt with. For example, some people can believe that conflicts "clear the air", while others prefer avoiding conflict not to damage the relationship.

Besides, different cultures suppose different behaviors, communication styles and norms. These include eye contact, pauses length, speaking time, directness and indirectness, etc. All that can add misunderstanding to the disputes the mediator is dealing with. **So, what is important to know and pay attention to during mediation process?**

Recommendation 1

Always be ready to deal with cultural differences. "Cross-cultural communication" is not only about communication between people from different countries or ethnic groups. Any communication between any groups – or individuals belonging to these groups – each of which has their own values, beliefs, behaviors and norms is cross-cultural. Not only countries have unique cultures, but organizations and even departments or teams do, too. Which means, for example, that dispute between two people who belong to different organization in the same country or even to different departments at the same organization might require certain cross-cultural awareness.

Recommendation 2

Do your homework. It is quite natural to interpret others' behaviors, values, and beliefs from perspective of one's own culture. Such strategy often results in misunderstandings because same behavior might be the signal of different attitudes. For example, not talking much during the meeting may be interpreted by people from different cultures as unwillingness to participate in a conversation, or showing respect or even as the sign of fear or shyness. The solution is to research about the culture of the people you are going to work with.

There are many models and researches that can be helpful here. The authors tried to categorize cultures on different dimensions. Among the most known and frequently cited are:

- Geert Hofstede suggested the following dimensions: power distance, collectivism versus individualism, femininity versus masculinity and uncertainty avoidance, long-term versus short-term orientation. [6]
- Edward T. Hall classified groups as monochronic or polychronic, high or low context and past- or future-oriented. [5]
- Alfons Trompenaars categorized universalist versus particularist, individualist versus collectivist, specific versus diffuse, achievement versus ascription and neutral versus emotional or affective. [13]

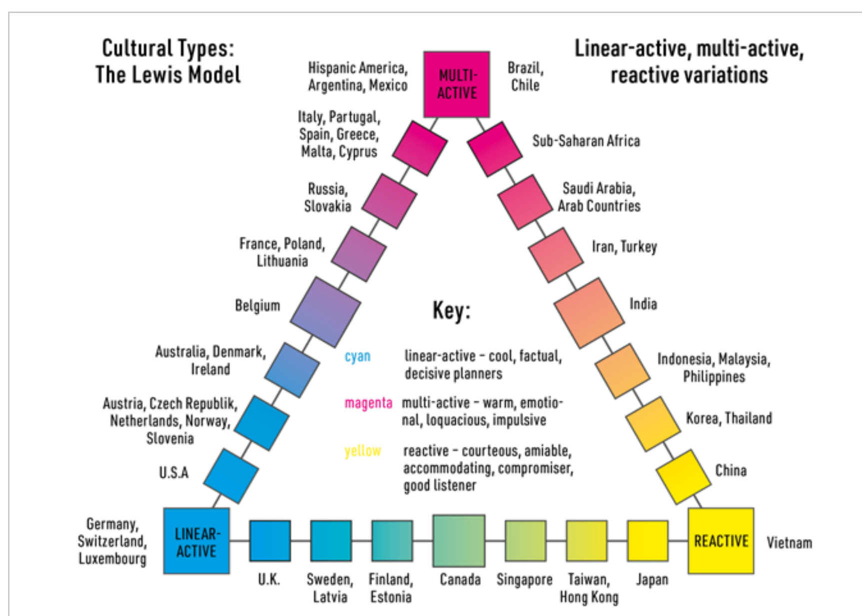


Fig. 1: Basic cultural categories defined (Source: endless creative / Holm Klix, following Lewis 2005: When Cultures Collide: Leading Across Cultures. 3rd revised edition. Page 42, Figure 3.9).

- Ferdinand Tönnies distinguished Gemeinschaft versus Gesellschaft cultures. [12]
- Samuel Huntington studied the cultures thought the lence of civilizations – West European, Islam, Hindu, Orthodox, Japanese, Sinic and African. [7]

The model we use the most frequently in our work is Richard Lewis's model described in his book "When Cultures Collide" [8]. According to his model of cultural differences, it is possible to divide all the world´s cultures into three parts: linear-active, multi-active and reactive. Such classification is the result of analyzing the world's cultures based on behavior he observed in 135 countries in 20 of which he was employed. These three clearly distinctive cultural groups form a triangle that is known in the world as the Lewis model (Fig. 1).

Linear actives are those who plan, arrange, organize, do one thing at a time, follow action chains. They are more direct than diplomatic and do not fear confrontation. Their work and as well as personal life is based on logic rather than emotions. Linear actives feel comfortable with facts, fixed agenda. They are task oriented and usually separate social-private and professional life.

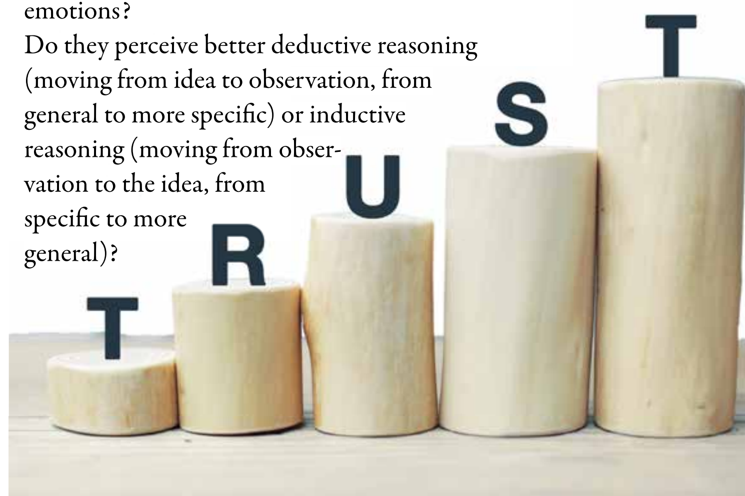
Multi-actives are multi-tasking, plan their priorities not according to a time schedule, but according to the relative importance (or emergency) of each appointment. People in these cultures are very talkative and impulsive, people-oriented and feel uncomfortable in silence. Multi-active people prefer to meet in person rather that write emails.

Reactives prioritize courtesy and respect. They usually listen quietly without expressing emotions. Reactive cultures do not interrupt a speaker. And are very conscious of hierarchy.

As you can see, there are no "pure" types. Each culture is a mixture of at least two with different proportion. Which is also true for other models mentioned above.

Whatever model you choose, to help you navigate across all that information, here is a list of questions is really useful to know in advance the answers to the following questions:

- Do people in this culture(s) see open confrontation as productive or threatening?
- Are they ready to speak directly and openly or most of the information is usually "between the lines"?
- Do they believe that expressing emotions is normal and expected or not?
- Do they believe that the result is more important than relationship or the opposite?
- Do they believe that certain rules apply equally to everyone or that different situations require different interpretation of the rule?
- Do they prefer to base their argumentation on evidence or emotions?
- Do they perceive better deductive reasoning (moving from idea to observation, from general to more specific) or inductive reasoning (moving from observation to the idea, from specific to more general)?



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- How far in the future are they ready to plan?
- Do they prefer written communication before and/after personal meeting? Or do they prefer spoken communication, ignore emails and rely on the information they receive in person?

The answers to these questions will help you synchronize communication styles, yours and the parties' and avoid additional misunderstanding. For example, if we look at the German and Ukrainian culture peculiarities, we can see the following:

	Germany	Ukraine
Attitude to written communication	Strong preference of written communications to precede or confirm discussions.	Strong preference of spoken communications which are considered as replacement for the written ones.
Purpose of the meeting	Meetings are intended to solve problems.	Meetings are intended to support relationships and ensure mutual understanding.
Long-term versus short-term orientation	Long-term planning is common	Short-term planning is common
Expressing emotions	Emotions should be managed	Emotions are encouraged and expected and are considered a sign of commitment and dedications.

Tab. 1: Differences in communication attitudes between Germans and Ukrainians (Source: Olha Bershadska and Olesia Ivanenko)

It explains while Ukranians can be overwhelmed when pushed for long-term commitment and insist on personal meetings, while German might be surprised by emotional expression and that written communication is not considered or responded properly.

Going back to recommendation 1, it is also important to make an effort studying the context and the various cultures to which the person belong:

- culture of country,
- culture of ethnic group,
- culture of professional group,
- particular organization's corporate culture.

The more you know, the better you will be prepared to deal with potential misunderstandings.

However, it is important to remember that it is only prior assumption and since we are dealing with individuals, recommendation #2 should not be used without the recommendation #3.

Recommendation 3

Beware of stereotyping. After we have researched on the cultures we need to deal with, it is important to remember that it is only prior conception which – however helpful – can lead to stereotyping, distorted expectations about other people's behavior, which are also often pejorative. Instead of relying on stereotypes, we should try to focus on prototypes: cultural averages on dimensions of behavior or values. There is a big difference between stereotypes and prototypes.

Image Source: stock.adobe.com/Nikki Zalewski

For example, looking at the cultural dimensions' models, we can assume that Germans tend to rely on rules and procedures more than, say, Ukrainians, who often approach the same situation differently depending on the context, the participants, and the decision maker. However, we should remember that there is still a great deal of variability within each culture and that some Ukrainians will be more willing to stick to procedures than some Germans.

So, it would be a mistake to expect a Ukrainian you have never met to be unwilling to follow the rules. But if it turns out that the person is challenging some procedures, you might better understand their behavior and change your approach based on the prototype (which in this case is "relations are more important that procedures"). Besides, awareness of the parties' cultural prototypes can help you anticipate how they might interpret each other's and your behavior. For example, instead of insisting on following the procedure, which can jeopardize the trust, you might want to spend more time more time to getting to know each other, build trust and only then explaining why the procedure is as it is and is better to follow.

Recommendation 4

Listen and observe. Only then interpret carefully and ask instead of assuming. Active listening is one of the key skills for a mediator. So, we will focus here not on how to listen but

on what to pay attention to. As we mentioned in the previous recommendation, the information you get from prior research on culture is only the frame but not the fact. Now, when we meet the real people our task is to observe the behavior and non-verbal response as well as listen to the arguments people give. Your task is actually to confirm or refute the answers to the questions listed in recommendation #3. The important skill is to focus on behavior as it is before we jump to interpretation. Quite often we do not realize how quick we are in making conclusions. For example, is a person keeps silent, instead of suggesting support if you think that they are uncomfortable or upsetting because you think that the person is not interested in conversation, try to ask questions to make sure that your interpretation of the behavior is correct. The behavior of people from another culture may seem strange to us, but any behavior makes sense simply because it is consistent with what a given person believes. So, to understand why people behave the way they do means to understand what values and beliefs are linked to this behavior.

Recommendation 5

Be careful with evaluation. Most individuals assume that their cultural beliefs are right or, at a minimum, better than another group's cultural beliefs. And that is natural. However, it is not possible to fairly make such a judgment without having been raised in the other's culture and understanding the reasons for the beliefs. In most cases, there is no right or wrong answer; the cultures are just different. Moreover, beliefs are so deeply rooted that trying to change them might just make the conflict worse. So, the mediator's strategy should be to help find the solution that would take into account the values of both parties.

Recommendation 6

Build trust through education. As we already mentioned above, conflict resolution process can be seen differently by different cultures. A person not experienced in mediation may not trust the mediator, especially if they come from a different culture [3]. If a party does not trust the mediator, they are unlikely to be open and honest with the mediator. So, as we can see, the mediator should not only speak the languages of both parties, but also understand the "hidden differences" and "read between the lines". The mediator can not only tell about the mediation process but also share their knowledge about culture differences with the parties which will help them find common language in future.

Conclusion

All in all, as you can see, all the recommendations promote facilitative mediation, which unlike evaluative mediation focuses on "the parties' interests and a reasonable result for both parties with little regard for who is legally right or wrong" [4]. So, if you are using facilitative approach to mediation, the next step in your professional development might be follow the recommendations and thus enhance your cross-cultural competence.

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Mediation as a Tool of Land Disputes Resolution in Ukraine

In Ukraine, there is a system of commercial courts, the jurisdiction of which extends to the resolution of disputes in the field of business including; the consideration of cases in disputes regarding the title to property or other real title to property (movable and immovable, including land) and; registration or accounting of titles to property, as well as cases in disputes regarding the pledged property, parties of which are legal entities and (or) private entrepreneurs.

Vitalii Urkevych

On November 16, 2021, the Parliament – Verkhovna Rada of Ukraine adopted Law No. 1875-IX "On Mediation" (hereinafter – the Law), which regulates a wide range of issues. The Law defines the legal principles and order of conducting mediation as an out-of-court conflict (dispute) settlement procedure, the principles of mediation, the status of a mediator, training requirements and other issues related to this procedure. Let's consider the prospects of using the mediation procedure in the out-of-court settlement of land disputes arising between business entities in Ukraine.

The Law defines mediation as a voluntary, confidential and structured out-of-court procedure, during which the parties with the help of a mediator(s), try to prevent the occurrence or settle a conflict (dispute) through negotiation. The legislator determined the application of the mediation Law extends to social relationships, with a view to preventing the occurrence of conflict in the future or to settle any disputes in existence, including economic ones arising between business entities. The peculiarity of mediation in Ukraine is that such a procedure can be carried out both before applying to court and during court proceedings, as well during the execution of a court decision. The result of the parties' agreement can be formalized by a settlement agreement.

It is noteworthy that the legislation of Ukraine strongly encourages the use of mediation, including in business disputes. Thus, the Law made appropriate changes to the Commercial Procedural Code of Ukraine, which regulates the judicial process of resolving economic disputes. Among such innovations, in particular we can mention; (a) the duty of the commercial court to suspend the procedure when both parties (plaintiff and defendant) request this in connection with mediation; (b) rreimbursement of 60 percent of the court fee paid for filing an appeal or cassation claim to the claimant (applicant) in the event of reaching an agreement, on the conclusion of a settlement agreement or, upon the plaintiff's refusal from the claim or recognition of the claim by the defendant as a result of mediation.

The commercial courts of Ukraine receive a large number of land disputes relating to various aspects of land relations including; conclusion of land lease agreements, extension of the term of use of land plots, collection of debts for land use, cancellation of decisions of state authorities and municipal bodies (regarding the use of state and municipal lands), state registration of property rights to land plots and, return of arbitrarily occupied land plots, etc. One of the modern problems of law enforcement in Ukraine is the excessive number of land

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disputes in courts. In particular, those connected with permanent reform of the field of land relations and the instability of land legislation, as well as the lack of transparent administrative procedures that would allow land disputes to be resolved not only in court. Land disputes in Ukraine are considered in economic, civil and administrative procedure, depending on the object and subject criteria, which unfortunately, leads to differences in judicial practice. It can be said that there exists the contradictory resolution of land disputes even at the level of cassation review. At the same time, the Supreme Court makes great efforts to ensure the unity and stability of judicial practice in general and, in the resolution of land disputes in particular.

In contrast to the direct legal prohibition of resolving land disputes in arbitration courts, the settlement of land disputes by means of the mediation procedure is not prohibited. Moreover, the advantage of mediation is that the parties do not have to include a mediation clause in the land lease agreement. The parties can turn to a mediator at any stage, either before applying to court or when the case is being heard by the court. The analysis of court practice shows that in a significant percentage of disputes there are no complex legal issues that require a court hearing, but that can rather be agreed through mediation procedures.

It is obvious that a portion of these could be resolved through mediation because a significant number of land disputes contain technical aspects (regarding cadastral numbers and areas of land plots, "imposition" of land plots one on another, crossing of the land plots' borders), in which pure legal issues are not particularly complicated. We believe that such disputes have significant mediability, that is, they can be settled by a voluntary, out-of-court procedure between parties of the dispute. Conducting mediation in such cases will encourage not only the resolution of technical issues related to land use, but also save the plaintiff the costs of filing a claim with the court, which, moreover, may be charged from the defendant based on the results of the dispute resolution.

The Law "On Mediation" adopted a year ago provides significant impetus for the development of mediation in general and, in particular in the resolution of land disputes. It is also worth noting that even before the adoption of the Law, a community of mediators had been formed in Ukraine. They unite in associations, educational services are provided for interested professionals, and mediation is studied as one of the alternative methods of dispute resolution at law schools. However, this is not enough. Extensive education regarding the functions and advantages of mediation is needed both within the legal community (judges, prosecutors, lawyers, etc.) and amongst citizens. It is concluded therefore, that mediation is an underutilized procedure for resolving land disputes in Ukraine, and has significant potential for settling disputes in the field of land relations. Mediation is a valuable approach to resolve land disputes without delving into the intricacies of national land legislation and court practice. Furthermore, the mediation process is efficient and relatively accessible from a cost perspective, conservative as compared to the resolution of land disputes in court. In cases where mediation is unsuccessful, the person still has the right to apply to the court, yet it seems that the vast majority of disputes would not have need to go to court after a mediation process.

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Mediation and Labour Disputes: The Experience of Ukraine

Mykhailo Shumylo

Introduction

Until recently, Ukrainian legislation contained only four alternative dispute resolution mechanisms: the International Commercial Arbitration Court, the Court of Arbitration, the National Mediation and Conciliation Service for resolving collective labour disputes and the Labour Dispute Committee responsible for the resolution of individual disputes.

The Law "On Mediation" in Ukraine was adopted on November 16, 2021 and marked a new development stage of alternative dispute resolution the country. Mediation has been discussed for years with approximately six draft laws having been proposed over the past ten years; however, the legislative process did not progress further than the first reading, which is only the first of three stages in the legislative process. This can be explained by a number of objective and subjective factors including the Soviet legacy that oppressed people's free will since the latter always precedes mediation; lack of confidence in alternative dispute resolution and lack of legal and social traditions of settling disputes outside the court of law. Together, these elements created obstacles to the implementation of mediation at the legislative level. However, in the course of time society becomes stronger, post-totalitarian traumas begin to heal and mediation appears and actively develops without recognition at the legislative level.

In Ukraine, a paradoxical situation has emerged where we have working mediators, an extensive system of associations, schools and training courses for mediators, yet their activity is not regulated. Figuratively speaking, there are two words in the Ukrainian language that describe the same thing: "a bazaar" and "a market". A "market" is a trading place regulated by clear rules such as the markets in the West, and a "bazaar" is the same trading place, though is not regulated by particular written rules, and its relations are based on traditions or self-regulated rules, which in turn reminds us of eastern markets. Thus, we can admit that mediation in Ukraine has gained the form of a bazaar and the purpose of the law was not to create an environment for establishing and developing mediation, but for regulating current relations that have appeared already and are functioning today. The adoption of the Law "On Mediation" a year ago was a big event for supporters of mediation as it signified a transition from "a bazaar" to "a market".

Mediation can become a crucial instrument for resolving labour disputes, which in turn will be equally beneficial for parties to the labour dispute and the judicial system, since mediation is capable of reducing the court workload.

Statistics

In order to better understand the current state of labour dispute resolution in Ukraine, it is necessary to reference court statistics. It is worth mentioning that there are no special labour courts in Ukraine and disputes in this area are considered by the courts of general jurisdiction.

In 2020, there were 19,617 labour disputes before courts of general jurisdiction, followed by 20,624 labour disputes in 2021. Among them, the following categories should be

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highlighted: reinstatement claims – 2,845 cases in 2020 and 3,540 cases in 2021; claims for unpaid salary – 10,565 cases in 2020 and 8,480 cases in 2021; and compensation for material damage caused to state enterprises and organizations by employees – 370 cases in 2020 and 355 cases in 2021. The total number of cases heard in the courts was 13,586 in 2020 and 13,342 in 2021, among which a final decision was made in 11,584 cases in 2020 and 10,955 cases in 2021. In general, courts of first instance upheld claims in 70.7 % of cases in 2020 and 64.9 % of cases in 2021.

The question of the length of the proceedings relating to labour disputes should be mentioned. The courts of first instance heard 1,148 labour cases in 2020 and 899 labour cases in 2021 (which is 8.4 % in 2020 and 6.7 % in 2021), exceeding the length of judicial proceedings required by the Civil Procedure Code.

As for statistics on judgments passed by appeal courts in 2020/21, the overall number of judgments made by lower courts that were reviewed by appeal courts in 2020 was 3,458, and this number increased to 3,843 in 2021. The number of overturned decisions amounts to 1,035 in 2020 and 1,010 in 2021. In general, appeal courts upheld 57 % of appeals in 2020 and 57.6 % of appeals in 2021; overturned 29.9 % of decisions in 2020 and 26.3 % of decisions in 2021; modified 12.7 % of decisions in 2020 and 15.2 % of decisions in 2021.

The third-largest category of cases received by the Civil Court of Cassation is "labour disputes" and this tendency is still visible today.

Throughout 2020, the Civil Court of Cassation issued judgments in 1,510 cases with labour-related issues. Within this category, the Court upheld 1,072 lower courts' decisions, which is 71 % of all labour cases; 398 decisions (26.4 %) were overturned.

In 2021, the Civil Court of Cassation handed down judgments in 1,051 cases involving labour issues. The Court upheld 701 lower courts' decisions. i. e. 66.7 % of all labour cases; 303 (28.8 %) decisions were overturned.

As of October 1, 2022, the Civil Court of Cassation issued judgments in 507 cases concerning labour issues. Within this category, the Court upheld 343 lower courts' decisions, that is 67.7 % of all labour cases; 140 decisions (27.6 %) were overturned.

Mediation in Individual Labour Disputes

The resolution of individual labour disputes plays an important role in protecting the system of human rights. It is necessary to mention that the right to work is enshrined by the Constitution of Ukraine and belongs to socially sensitive court cases.

Court statistics show that cases concerning the collection of unpaid salaries take first place and cases regarding reinstatement claims occupy second place. When discussing labour disputes, it is observed that a number of disputes are caused as a result of labour legislation that needs fundamental changing. This relates to the current Labour Code which was adopted all the way back in 1971. Soviet ideologists refer to that period as "developed socialism". Despite the fact that the Code was significantly amended along the way, with an additional package of laws adopted in the area of labour, its ideology remains socialist; programmed to regulate relations within the command economy and not the market one. It means that a lot of individual labour disputes are artificial and could be resolved with the help of mediation.

The current Labour Code still contains old provisions (Chapter XV) that govern activities of the Labour Dispute Committee, one of the bodies established within a company,

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organization, or institution that is responsible for the resolution of individual disputes between an employee and an employer. A person could not go to the court without first resorting to the Committee. The adoption of the Constitution of Ukraine in 1996, which states that everyone has the right to appeal directly to a court and the jurisdiction of the courts extends to all legal relations that arise in the State, has resulted in the dismantling of the Labour Dispute Committees.

It is worth mentioning that there is a lot of potential for mediation in the area of labour dispute resolution. Dismissed employees use the courtroom as a platform to express personal grievances and achieve moral satisfaction. This action makes sense for many employees, especially those who work at a company for many years, where their workplace becomes a second home. It is impossible however, to ignore the violation of laws by employers that abuse their power and analysis of particular labour disputes which were examined by the courts, indicate that there are not so many legal problems requiring resolution in such cases. Therefore, both employee and employer need the assistance of a mediator, who seeks to support reconciliation between parties rather than a judge who imposes decisions.

Mediation in Collective Labour Disputes

The first examples of reconciliation procedures in the labour area have appeared within the resolution of collective labour disputes. Speaking of the prospects for the development of mediation within the resolution of collective labour disputes, it is significant that Ukrainian legislation stipulates the non-judicial settlement of such disputes. The Decision of the Grand Chamber of the Supreme Court of October 1, 2019 (case no. 916/2721/18) confirms this general rule. The draft laws on mediation, which were submitted to the Parliament, prescribed that mediation procedures do not apply to the resolution of collective labour disputes and drew criticism. Such an approach by the authors of the draft law was explained by the fact that these relations are governed by the Law "On Resolution of Collective Labour Disputes (Conflicts)" (1998). This law establishes the legal and organizational basis to resolve collective labour disputes, and seeks to encourage cooperation between parties during the settlement of collective labour disputes.

A collective labour dispute can be resolved by 1) a conciliation commission made up of representatives of parties, the aim of which is to make a decision that would be satisfactory to all parties engaged in a collective labour dispute; 2) an arbitration body comprised of experts invited by the parties who are authorized to make a decision on a case. There is also the National Mediation and Conciliation Service, which was established by the President of Ukraine and has a specific role in resolving collective labour disputes. Its main objectives are to improve labour relations, prevent collective labour disputes and encourage decision-making within a reasonable timeframe. In fact, it can be argued that the monopoly of the National Mediation and Conciliation Service was established at the legislative level in the area of the resolution of collective labour disputes. This situation is inadequate for a democratic country that should promote alternative ways to protect rights, including mediation procedures. It is for this reason that the adopted law "On Mediation" does not contain any restrictions and this paves the way for the application of mediation within the resolution of collective labour disputes.

Law "On Mediation" (Summary)

The Law "On Mediation", which was adopted on November 16, 2021, is a compromise when compared with previous draft laws. The law is characterized as a framework or act that legalizes mediation and gives legal weight to the practice. The law contains only 21 articles that define the terminology, principles, scope, procedural aspects of mediation, the mediation agreement and status of mediators; including their rights, obligations and training requirements. The law does not have all the answers but according to its provisions, it applies to a broad range of personal and professional relationships concerning itself with conflict prevention and the regulation of conflict (disputes), including civil, family, labour, commercial and administrative disputes etc. In other words, it enshrines the maximum possible scope of mediation practice. However, mediation in labour, civil, administrative and commercial areas can benefit from more detailed and specialised laws. In this regard, the law "On Mediation" is a kind of *lex generali*.

The law "On Mediation" introduced amendments to the Labour Code such as new article 222 which prescribes that a labour dispute between an employee and an employer, regardless of the type of employment contract, can be resolved by mediation according to the law "On Mediation," whilst considering particular features enshrined in the Code. A mediation agreement and a final settlement agreement resulting from mediation in labour disputes are concluded in written form.

The Problem of Implementation of Mediation in the Labour Area

Previously, it was stated that mediation is not a popular way to resolve disputes, including labour conflicts. In order to revitalize this process, the legislature adopted a few motivational norms. The Civil Procedure Code states that parties can reconcile with the help of mediation at any stage in the proceedings. The result of agreements between the parties can be enshrined in a settlement agreement. It is the financial aspect however, which garners the biggest motivation. In mediation cases where a settle-

ment agreement is reached, a claim is abandoned or, a claim is recognized by a defendant as a result of the mediation procedure, – 60 % of court fees that were paid for submitting a claim will be returned. The same rule applies to applications submitted to appeal courts and courts of cassation. In the author's opinion, such provisions will not encourage the utilisation of mediation.

The Conditional Imperative of Mediation in Labour Disputes

Mandatory mediation cannot serve as an alternative to judicial protection, nor can it serve as a compulsory pre-judicial procedure since this would contradict the main principle of mediation as a voluntary process. Furthermore, the Constitutional Court of Ukraine in its Decision No. 1–2/2002 of July 9, 2002 stated that a mandatory pre-trial settlement of disputes, which excludes filing a lawsuit in the relevant court, violates the right to a fair trial. The recourse to ADR can enhance the parties' legal protection, and it does not undermine the principle that only courts are empowered to dispense justice. In response to a need for strengthening legal protection, the government can incentivise parties to use alternative dispute resolution, and in this context, it is worth mentioning that the application of ADR is the right of a person who seeks legal protection, not an obligation. The author is not certain that large numbers of parties to a labour dispute will resort to mediators and not to the courts after the adoption of the law "On Mediation". There is a need to educate judges, lawyers and citizens about the law.

The Italian experience can be useful to reflect upon as Ukraine seeks to encourage the development and adoption of mediation. Since 2013, the requirement to have an initial mediation session in specific categories of cases in Italy has been mandated (Maiorana, 2019). In Ukraine, labour disputes could be among such cases. On March 4, 2010, the Italian government issued Legislative Decree n. 28, having regard, inter alia, to Directives 2008/52/EC of the European Parliament and 21/2008 of the Council concerning mediation in civil and commercial matters. Preparatory discussions clearly indicate that the objective of introducing "mandatory" mediation for a number of listed disputes was sought to secure an effective "deflationary" measure to deal with the enormous backlog of cases pending before the Italian courts, as well as to contribute to the promotion of a culture of alternative dispute resolution (Mastellone & Ristori, 2017).

It is necessary to mention the judgment of the European Courts of Justice (ECJ) in *Rosalba Alassini and Others v Telecom Italia SpA and Others* (C 317/08-C 320/08) of March 18, 2010. The ECJ ruled in *Alassini v Telecom Italia SpA* that a domestic provision requiring litigants in Italy to attend mandatory mediation before being able to enter legal proceedings did not contravene Article 47 of the EU Charter (18.03.2010). Taking into account Ukraine's aspiration to become a member of the European Union, this approach is aligned and can have a positive effect.

Conclusions

In labour disputes, there is a need to establish mediation as an alternative dispute resolution mechanism, which requires parties to have an initial mediation session before applying to the court. This will serve to promote mediation as an instrument aimed at resolving labour disputes. If the mediation session is unsuccessful, and parties do not want to resolve their dispute with the participation of a mediator, they can then apply to the court. Such an approach may pose a challenge for the mediation community however, as they may find themselves in the position of convincing parties that mediation is effective. On the other hand, a person who explores mediation as an alternative does not lose the right of access to justice. The establishment of the proposed model of mediation may yield a range of positive effects including: an inexpensive and quick way to resolve labour disputes, reduction of the court backlog, and promotion of mediation.

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Mediation and/or Litigation – In Search of Balance

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Introduction

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There are certain aspects of life to which legal rules are difficult to apply. It is hard to influence by means of law the long-established worldviews, customs, traditions and so on, respected among some social groups. This is largely relevant to the nature and specific characteristics of family relationships, particularly in disputes involving the residence of a child or/and ways of participation in their upbringing.

With a view to assisting families with their problems during dissolution, it is not always sufficient to rely on the array of pragmatic technicalities operated by the judicial procedure and rules of law, where relevant issues of practice and discrepancies in the application of law may not be considered. Courts often lack flexibility, versatility and the ability to offer a tailored, individualized approach as regards decision making in emotionally exhausting disputes. The aforementioned justifies the need for more comprehensive engagement of out-of-court settlements for family disputes, one of those being mediation.

Ukraine widely exercises various mechanisms in the resolution of family disputes; specifically, where parents reside in separate accommodation and cannot agree upon the primary residence of the child or, how best to support a child's upbringing. These include; dispute settlement by the guardianship and trusteeship body; involvement of the Service for Children Affairs (both are elements of the Ukrainian public service system authorized to administer the legal protection of children's rights and legitimate interests); and by court. A concerned person may initiate judicial proceedings directly or, in cases where decisions by the aforementioned governmental bodies are not complied with. Thus, such disputes are frequently laid before the court.

Issues of Judicial Settlement of Family Conflicts Regarding Children

Court procedures for family disputes may entail excessive red tape, overlooking the specific aspects of a family's situation. In difficult situations, lawsuits are primarily filed by persons unable to decide and agree upon key issues relating to a child's place of residence or upbringing; they may be helped by the guardianship and trusteeship body. Consequently, the court begins to deal with family conflict chiefly in its terminal stages, where situations are complicated by the emotional fatigue of a couple who, at one time, imagined themselves in long-lasting relationship. In such circumstances, a balanced resolution by the court in the best interests of a child, requires attention on the settlement of the "environmental" future of a child, rather than a decision relating to the infringed rights of one of the parents. In these cases, the demand for less traditional mechanisms of dispute resolution such as mediation emerge.

The purpose of judicial proceedings, secured by a number of procedural actions, is to decide a dispute of rights. However, a family dispute is not always a question of law, but rather of a crisis in relationships between family members. A family conflict, involving children, shall be resolved in their best interests, which must be prioritized over the rights of other parties. This point of view has been widely implemented around the globe and Ukraine is no exception.

Sadly, court proceedings are usually detrimental for children, as child-friendly procedural attitudes have scarcely been realized in practice. Judicial coercion, as it is conventionally used, might occasionally appear inappropriate or even excessive in

these cases, leading to party's rejection of court rulings, escalating emotional tensions and aggravating differences. The quest to win a dispute often provokes parties to make insinuations, or worse; attempt to orchestrate the alienation of one parent from the child; manipulate the child, neglect assessing the risks of this behaviour, which can inflict substantial damage to the child's mental and physical health.

The person tasked with implementing the court decision on how a parent, grandparent or, carer will participate in child's upbringing arranges how, when and where a relative will meet with the child. They consider dates and frequency of visits, location and specific timings as directed and specified by the court. This task can become herculean in effort if one of the parties lacks the willingness to uphold the ruling fully and in good faith. In such circumstances, its enforcement only bolsters animosity and begets further litigation in respect of the judgment's execution. In hearing similar cases, the European Court of Human Rights has repeatedly found Ukraine in violation of upholding the right to have one's private and family life respected, given Ukraine's systemic and structural flaws in executing enforcement proceedings in cases concerning guardianship over a child. Furthermore, legal machinery to foster voluntary respect for mutual agreements or to ensure the enforcement of decisions remains underdeveloped (*Gen & Kaluzhska v. Ukraine (applications № 41596/19, № 42767/19)*, 10.06.2021; *Shvets v. Ukraine (application № 12962/19)*, 23.07.2019; *Vyshnyakov v. Ukraine (application № 25612/12)*, 24.07.2018).

It is worth highlighting that the modern Ukrainian judiciary is overburdened with minor disputes, which should have never been brought before the court, but had the conflicting parties in these cases applied for professional assistance in a timely manner. Thus, the Ukrainian courts have had to resolve disputes where parents failed to agree upon the name of a newborn or leisure activities for a child (*The Supreme Court judgment in case № 264/3435/18*, 04.09.2020; *The Supreme Court judgment in case № 753/7395/20*, 29.06.2022). The aforementioned issues are exacerbated by such deep-rooted problems within the Ukrainian judiciary, such as a lack of popular confidence in courts, under-financing and limited human resources. In light of this, it is highly challenging to offer an individualized approach to families in dispute, paying due attention to the conflict, whilst under pressure to issue a ruling in best interests of children. Therefore, the employment of reconciliation procedures in family disputes regarding the primary residence of a child and schedule of a parent's participation in their upbringing is of the greatest necessity.

The Merits of Mediation

With the Law of Ukraine "On mediation" (hereinafter referred to as "the Law") having been adopted on November 16, 2021, Ukrainian legislation provides mediation as an option not only with a view to settling pre-existing disputes, but also for the avoidance of such conflicts in future. In the context of legal proceedings, mediation may be embraced separately, before or during the judicial procedure; and, at the stage of judgment execution, with the primacy of mediation secured by the duty of the court to suspend the case for not more than 90 days as of when the parties decide to employ mediation.

The issue of a child's residence and upbringing relies heavily upon constructing healthy and sound relationships between members of the dissolved family. In a mediated agreement, as opposed to a court decision, parties may negotiate well beyond the scope of a judicial procedure and settle grounds for peaceful coexistence. Therefore, a specially trained mediator is more competent than a judge in furthering co-parents' visions of

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peaceful and harmonious cooperation which concentrates first and foremost on the child's needs, rather than the division of property, stiffening a grudge or, satisfying other unnecessary or covert motives. The distinguishing feature of a mediated dispute in family cases is the decision-making process, which is conducted directly by the parties rather than by court, and which centers on their interests and the child's wishes.

With consideration for the principles of mediation, which include voluntariness, confidentiality and equality of parties' rights, the prospects of regulating the crisis or even preventing a family conflict appear much more promising when supported by a neutral, impartial mediator.

Since the full-scale Russian invasion of Ukraine commenced in late February 2022 (UNHCR, 2023), more than 10 million Ukrainians have crossed the state border, making the reality for many Ukrainian families very harsh indeed. The forced separation of families has resulted in family members living in different countries and this has no doubt contributed to increased family conflict. Real-time audio-visual mediating sessions may serve as an option to adjust family interactions and offer stability in these tense times. This new reality comes on the back of recent Covid-19 restrictions which removed much of the joy from our human interactions. Here we acknowledge the special role professional mediators can play by holding meetings online, helping to ease parents' tensions over a child, encouraging parents to focus on the child's needs and, reminding them of the primacy of their duty to provide welfare to their offspring. Data from the Unified State Register of Court Decisions reveals that as of October 2022, no Ukrainian court has suspended a case involving the residence of a child or, the ways a parent may participate in a child's upbringing, pursuant to the commencement of the mediation procedure. To some extent, the aforementioned indicates the settlement of such cases through mediation is far from being widely used (Informatsiini Sudovi Systemy, 2023).

Obviously, Russian aggression impedes the development of mediation in Ukraine, but it is not the only reason to consider. Another issue is that Ukrainian society is largely suspicious of most novelties. In addition, there is a lack of public awareness about the very existence of the possibility to have family conflicts facilitated by a professional intermediary – the mediator. More extensive use of mediation may be promoted through educational efforts within social networks, mass media, schools and hospitals, etc. The wider public would then be equipped with the knowledge of how the out-of-court settlement of disputes by mutual agreement works in principle. The authors of the present paper believe Ukraine should consider advancing the openness and accessibility of mediation by prescribing reasonable fee structures, especially for those whose finances may otherwise render mediation unaffordable.

Judges also have a great contribution to make towards the development of mediation. By exercising legal procedure during preliminary hearings, they can not only inquire after the parties' desire to settle a dispute through out-of-court mediation, but also to provide the necessary details regarding such a procedure and the principles of its function.

Further possible steps for the encouragement of mediation include making the meeting with a mediator mandatory under the law. Such meetings would precede judicial hearings and be a mandatory stage in cases involving the residence of a child or, ways a parent may participate in child's upbringing. The meeting could also be useful during the dissolution of a marriage if the parties indicate an existing dispute concerning children, prior to the commencement of the judicial procedure. Evidently, such involvement by a mediator, as contrasted with a judge, would not be substantially delayed or inappropriate.

In the event of a party failing to appear at the meeting with a mediator, the party shall be subject to a certain penalty. The latter shall also be applied to a party sabotaging the mediation or regarding it simply as a formality before a hearing in court. Judicial expenses shall not be fully compensated to the party who won the case but refused to partake in mediation procedures during the preliminary hearing. Such events shall be recorded in the ruling assigning the case to be heard, where the court would indicate which party dismissed the proposal of mediation.

In our estimation, a substantial reason for the unpopularity of out-of-court methods of dispute settlement is the lack of sufficient guarantees for family disputes to be resolved through mediation. The Law, specified therein, binds parties to fulfil

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their obligations under the mediation agreement in a timely manner. However, the Law omits a definition of legal status of such an agreement, nor does it provide legal machinery ensuring its fulfilment. Nevertheless, the Council of Europe's Committee of Ministers has repeatedly recommended the States Parties to promote validation of mediation agreements by court or other body so authorized, if the parties so prefer, and by thus doing so establish legal mechanisms to ensure the implementation of such agreements in compliance with their domestic legislation (Council of Europe, 2023).

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Conclusions

The Judiciary is often unable to strike a balance between all elements requiring consideration before issuing a decision in the best interests of a child. Therefore, parties to family conflict shall be encouraged to engage in constructive dialogue for the purpose of voluntary dispute resolution regarding the residence of a child or ways of participation in their upbringing.

With the fullness of time, the soft power of mediation in such disputes will contribute to harmonious and healthy childhoods for many generations, whilst fostering sound relationships between family members. Indeed, mediation holds the promise of promoting respect for children's interests, values of the family and the establishment of healthy environments within a family. The substantial merits of mediation are its voluntariness, flexibility and versatility to meet the interests of different families. The process of mediation ensures confidentiality, relieves emotional pressure at certain stages and motivates all parties concerned to generate solutions for the crises in question, keeping the best interests of children at the forefront of their minds.

Alternative out-of-court methods of resolving family disputes involving children may be accepted by society only when education of, and accessibility to mediation is increased. The mandatory meeting with a mediator, if signed into law, would help divorcing couples or parties to the conflict involving the residence of a child or/and ways of participation in its upbringing, settle situations. A professional mediator serves to avoid the external enforcement of a decision by a court. Meanwhile, fixing the amount of judicial expenses and their subsequent compensation in correlation with the parties' desire to compromise in mediation, for the sake of children, would be a good financial incentive to embrace mediation. The legal machinery to ensure the fulfilment of obligations by the parties, under the mediation agreement, shall thereto also be introduced.

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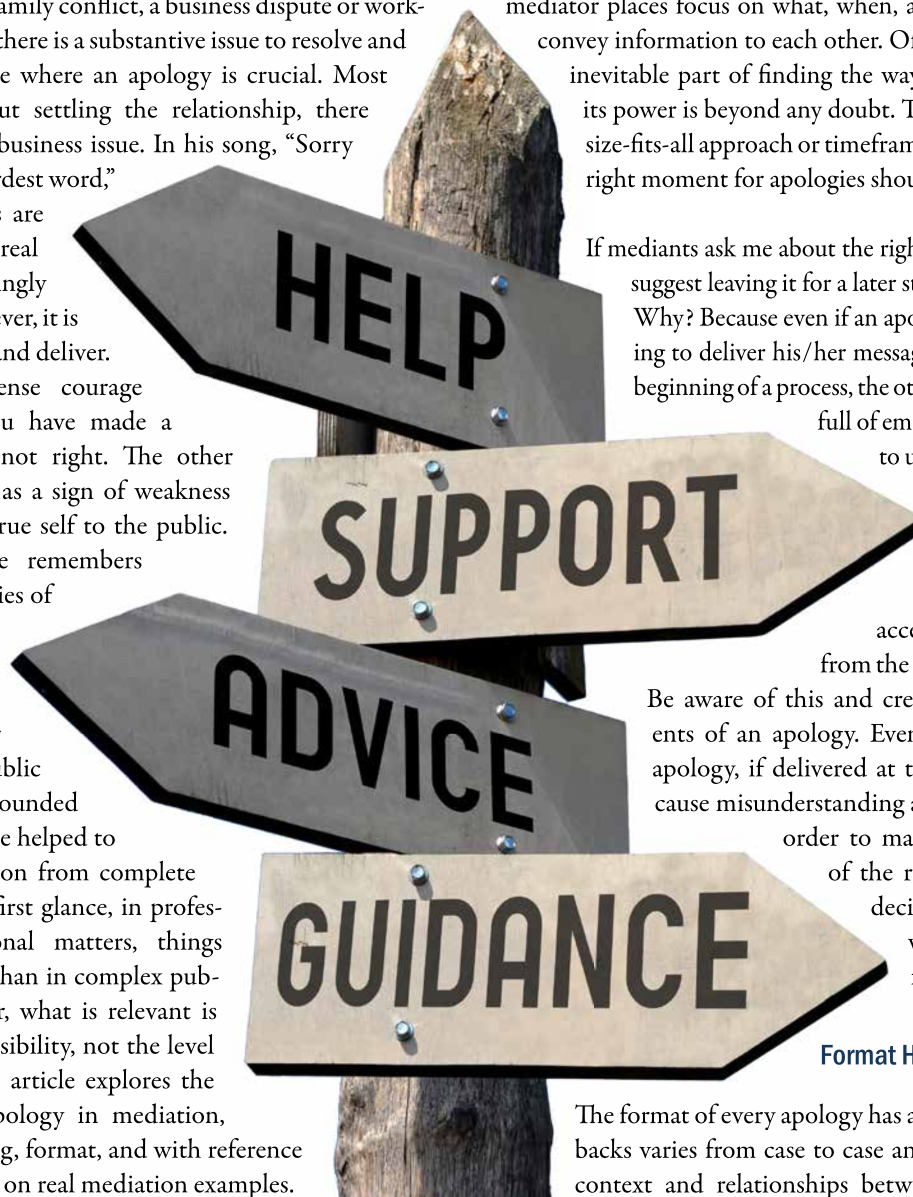
Authentic Apology in Mediation: Courage to Deliver and Willingness to Accept

Is "apology" a word or an action? One may apologize many times without effect, and other times, a single offering of, "I apologize," is enough to completely change a situation. How do apologies work when parties are in conflict and why do they sometimes make no sense?

Fidana Alieva

"An apology is only as good as the actions that follow it." (Wallace, 2013)

Any conflict or dispute involves a situation where one or both parties feel aggrieved by the other. In such circumstances, no matter the arena; family conflict, a business dispute or workplace controversy, there is a substantive issue to resolve and a relationship issue where an apology is crucial. Most commonly, without settling the relationship, there is no way to fix a business issue. In his song, "Sorry seems to be the hardest word," Elton John's lyrics are truly applicable to real life. It is a seemingly simple word; however, it is not easy to frame and deliver. It requires immense courage to admit that you have made a mistake or were not right. The other party may take it as a sign of weakness and expose your true self to the public. Undoubtedly, one remembers the biggest apologies of world leaders, including Bill Clinton, Boris Yeltsin, Tony Blair and many other public persons. Some sounded awkward, and some helped to save their reputation from complete deterioration. At first glance, in professional and personal matters, things seem to be easier than in complex public issues; however, what is relevant is the level of responsibility, not the level of simplicity. This article explores the peculiarities of apology in mediation, including its timing, format, and with reference to scenarios, based on real mediation examples.



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Timing Matters

As mediators, typically, we do not advise, but what we can do is share our experience, giving in the least, food for thought and at most, encouragement for someone to apologize appropriately. Bearing responsibility for process management, a mediator places focus on what, when, and how participants convey information to each other. Often, an apology is an inevitable part of finding the way out of conflict and its power is beyond any doubt. There is no ideal, one-size-fits-all approach or timeframe for an apology. The right moment for apologies should come naturally.

If mediants ask me about the right time to apologize, I suggest leaving it for a later stage in the mediation. Why? Because even if an apologizing party is willing to deliver his/her message immediately at the beginning of a process, the other party often arrives full of emotion and is not ready to understand and accept an apology.

Another point to highlight is that accepting an apology from the other side takes time. Be aware of this and create space for recipients of an apology. Even the most heartfelt apology, if delivered at the wrong time, may cause misunderstanding and further upset. In order to make it smooth, think of the right time first, then decide on the format, which are described further hereunder.

Format Helps

The format of every apology has advantages and drawbacks varies from case to case and depends upon the context and relationships between the parties. An

apology may not always follow the mediation format. For example, parties in an online mediation may yet decide to apologize in person. Let's consider the most commonly used formats for apologies.

An apology in-writing is very hard to express because an accepting party may take it as just a formality. However, it is generally used in the business environment and is helpful if several rules are followed:

1. Acknowledge the fact that the situation happened and your responsibility in that
2. Use such expressions as "I regret", "I apologize" "I am very sorry" in the letter
3. Explain what made you understand the actual state of affairs
4. Offer some solutions, options and actions to rectify/ change the situation
5. Before sending a letter, make sure the addressee will receive and read it
6. Kindly ask for confirmation of receipt of your letter.
7. Request a personal meeting, if there is any possibility to continue this conversation in person it may serve to build a bridge between parties

An apology by phone is a better option in situations where a party wants to show empathy to the other party, in addition to his/her message of apology. The use of one's voice can be a powerful tool and its influence should not be underestimated. The suggested rules for a phone apology include the following:

1. First, think of what you are going to say
2. Ensure nobody interrupts you while you are speaking over the phone
3. Ask the party if she/he has time to speak
4. Be clear with the wording and pronunciation of your message

If there is any possibility to continue this conversation in person, ask for a personal meeting.

An in-person apology is the most challenging way to deliver regret and is preferred when one can use all the energy and power of expression of verbal and nonverbal communication. As a persuasive approach, it requires a lot of courage and skill to manage one's own emotions, look into the other party's eyes and avoid finding oneself at a loss for words. One must also prepare themselves for a negative reaction and consider making a second attempt should the first one fail. Rules to follow include:

1. Consultation with a mediator and your counsel regarding an appropriate moment to deliver an apology as part of the mediation process
2. Asking the other party to listen, or requesting support from the mediator, who may ask for the other party's attention
3. Follow rules 1–4 for drafting of a written apology

Since the beginning of the pandemic, the virtual format of mediation has become the more acceptable and, by *apologizing in a virtual space*, you can express sincerity through your voice and facial expressions. The apology will possibly be a little bit less emotional, given the distance between you and the other party, yet helpful if there is a sincere intention to apologize. A smooth internet connection and basic technical skills helps avoid repetition and misunderstanding.

An audio message may represent another way to deliver apologies, however, I suggest recording and listening to it first before sending it to the other side. In more formal arenas, I would not recommend the use of messenger, SMS-delivery etc., because it may lack the nuance needed to adequately acknowledge aspects of a relationship. In one of my cases, the party represented by a customer told me how angry he got when, after receiving unsatis-

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factory services and sending a complaint, they received a formal message of apology via messenger with apologies from the other party as represented by a service provider which felt completely robotic in nature. The complainant did not accept the apology in this case which worsened the situation.

Parties can benefit from discussing the format of an apology with a mediator in advance of delivery. This has the advantage of preparing the sender and the receiver, as well as considering the impact an apology may have or likely scenarios which may emerge in the moment.

Apology Scenarios

Who should deliver apologies in a business mediation setting? The assumption that it should be the top manager or a party personally involved in a dispute is not always justified. I mediated a two-month-long dispute where a newly appointed deputy represented the apologizing party. The former deputy involved in the conflict had, by that time, transferred to the company's new branch. The new deputy was aware of the issue and decided to deliver a personal apology despite their having not been involved in the conflict. Apologies conveyed by the new company representative at a later stage in the mediation, when parties had already resolved the financial aspects of the case, worked very well and the offended party fully accepted them.

Another scenario presents when one party aims to settle an issue and the other party expects an apology, sometimes even demanding one from the other side. In this situation, the demanding party may have a personal apology in mind. As a neutral facilitator, a mediator is is helpful in listening to both sides', supporting the design and format of an apology which fits the expectations and needs of all the parties involved. This may make an apology efficient.

Later stages of mediation may reveal deeper understanding of a conflict, which allows parties to choose the most viable scenarios in which to extend an apology.

Genuine business apology: key steps

It takes years to establish trust with a business partner or client and yet, it only takes a few minutes to ruin it. Re-establishing trusting relationships require a range of strategies, and one that works very well is the act of apologizing.

The way apologies are communicated depends on the personality of an apologizing party. Some people apologize using words while others prefer actions, it is an art to combine both. No matter which country you and the other party come from, there are common elements to a "bad apology". In some cultures, a long and complex apology matters and is worthwhile listening to and accepting. In others, a short, sincere apology is enough. The ethic of the wrong apology includes coercion, as well as the word "but" after the phrase, with regrets. This approach makes the other side think you are making excuses for your actions and are not going to change the situation. Sincerity is valued in every culture.

According to Bruce Edwards, mediator of construction disputes at JAMS and founder of the Edwards Mediation Academy, there are three types of apologies: an insincere apology, which refers to use of words like "I'm sorry" without expression of emotion, usually making the situation even worse; a partial apology, expressing concerns without taking responsibility and; a full apology, which is very hard to deliver. A full apology is followed by an action which confirms you are ready to change what has/has not been done or, demonstrating it is not about absolving yourself of guilt, but rather communicating your sincere wish to transform the situation for the sake of all people involved.

There is an assumption that apologizing is harmful to a business reputation yet imagine how detrimental ignoring the situation and being slow to apologize may be. The price can be so high.

Mediation offers a real chance to protect honour, dignity, and business reputation through the confidential and neutral nature of the process. In mediation, apologizing is understood as a constructive way out of relationship conflict, not as a

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#	Key steps for a mediator	Key steps for an apologizing party
1	Explore the situation to understand whether there is a willingness of one party to apologize.	Accept responsibility and decide whether to apologize or not.
2	Discuss with this party any previous attempts to apologize.	Inform the mediator about your willingness to apologize.
3	Inquire after the motivations for apologizing to consider the best approach.	Explain clearly the purpose of apologizing. Is it to change the situation, regain trust, get what you want or, another reason?
4	Help the apologizing party decide on a relevant time and strategy. Confirm the same with the accepting party.	Share any assumptions you have about the possible reaction of the other party with the mediator.
5	Determine who will deliver the apology and, if the party is represented by an entity, who this representative will be.	Choose a format that would be both potentially efficient and at the same time, comfortable for yourself and the other party.
6	Discuss with an apologizing party a potential scenario where the other party does not accept their apologies. How will they manage in this moment?	Spera optimum sed praepara ad pessimum (Latin for "Hope for the best, prepare for the worst"). Always be prepared for the worst scenario, keeping in mind that the other party may not accept your apologies.

Tab. 1: The key steps of the authentic apology (Source: Fidana Alieva)

method to decide who is right and who is wrong. Furthermore, the confidential nature of mediation ensures that in most cases, an apology stays between the sender and the receiver. Rarely, one party may ask for a public apology which may take more time and effort both for the sender and for the receiver. The value-add of mediation in this regard is noted in either case.

An apology is not a thing one can order for delivery through the post office or a third party. Mediators, upholding the principle of neutrality, are not authorized to convey a message of apology from one party to another. In reality, sometimes a person delivers an apology through actions rather than verbal communication. For example, a reputable person may never even say "I am sorry", but rather prevent the same situation that damaged the relationship with his business counterpart in past from recurring. Continued cooperation between the parties demonstrates an acceptance of the nonverbal apology. An authentic apology encourages the other person to reciprocate in some way and, as a result, both party's benefit.

A special apology service, www.prefectapology.com, offers strategies for businesses in the areas of apology. As a guideline for a perfect business apology, they suggest following eight elements: (1) giving a detailed account of the situation, (2) acknowledging the hurt or damage done, (3) taking full responsibility, (4) recognizing your personal or the company's role in the situation, (5) including a statement of regret, (6) asking for forgiveness, (7) promising that it won't happen again, and (8) providing a form of restitution if possible (Perfect Apology, 2014).

In a mediation context, a mediator never invites one party to apologize to the other. It should be the ultimate decision and sincere intention of a party. However, a mediator does help organize the setting, timing and space, supporting a party to hear and accept an apology. The key steps for a mediator and an apologizing party to achieve momentum in this area are highlighted in Table 1.

Conclusion

Human nature is unique and complex. We can spend years building friendly and long-term relationships, and we can destroy them in a minute with a simple word, sometimes intentionally, sometimes accidentally. When the relationship with the other party matters there is always a chance, if not to fully restore, to rebuild or develop a new level of trust on the back of a previous negative experience. When you realize that it is essential to apologize, and you are not sure how to convey your message, mediators can help to facilitate effective apologizing strategies in your particular situation. For business relationships, sometimes apologizing becomes a bridge between parties' intransigent positions, and the apology moment marks a crucial shift in moving the negotiation forward.

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Fidana Alieva

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Mediating by Telephone

The biggest difference in mediating by telephone rather than face to face or in-person is the mode of communication. As simplistic or even oxymoronic as that may seem, it is true and has numerous ramifications. To be a successful phone mediator you have identify and deal with the dynamics of telephonic conversation as opposed to face-to-face communication.

Frank C. Laney

Standard Telephone Calls versus Meetings around Conference Room Tables

When people come to your conference room, they come with a number of expectations. First, they usually dress in a professional manner, expecting similar dress from the others that are also there. They have taken considerable time to leave whatever else they were doing that day and drive or even fly to the location of the meeting. The very act of committing that level of time, energy and resources to merely attend the meeting means that they will commit similar time, energy and resources to preparing for the meeting. While I will acknowledge that we all have war stories of people who showed up completely unprepared, the exception proves the rule. The fact that they did so is so memorable and outside of the expected social norm that you remember the incident and even categorize it as a war story. I would also argue that in many cases the lack of preparation may well have been a deliberate negotiation tactic. In the rest of these examples, it was probably sheer laziness.

Second, they expect a similar level of energy and commitment from the other participants in the meeting. Think of how irritated and possibly angry, meeting participants get when they believe that others in attendance have not come prepared and "done their homework". Anger comes from the belief that the other has committed a social betrayal – violated a social expectation or, even disrespected you by wasting your time. When people come to your conference room, they expect you to be prepared and they expect everyone else to be prepared too.

Third, they expect an agenda or organized process to the meeting. They expect someone to be in charge and for that someone to have at least an outline or roadmap as to where the meeting is going and what it is set to accomplish. This is reflected in our standard mediation opening statements which discuss the process, roles, expectations and stages of the mediation. We are confirming and satisfying the parties' expectation that this meeting has a roadmap and a goal.

Fourth, they expect a successful outcome, or they at least have a realistic hope of a successful outcome. If they really thought that there was little to no chance of the meeting being productive, they would put their energy into getting out of the meeting, rather than getting ready for it.

When you call people on the phone, there exists a very different set of expectations. First, is that this will be a very short meeting comparatively speaking. While face to face meetings is usually scheduled in hour-long blocks of time, phone calls are recorded in tenths of hours. The expectation is that the call will be short (less than 5 minutes) or long (15 to 20 minutes). Unless previously notified and reserved, most people do not expect a phone call to reach, much less exceed, 30 minutes. Phone calls are what we fit in between the hour-long meetings in our day.

Second, "you called me, so what do you want?" There is less expectation of a meeting plan or agenda, but instead usually a point or two that is communicated or clarified. But, whatever the point of the call, it is your point and you do not (or cannot) expect me to do anything to be prepared. If you ask me anything I do not know on the top of my head, I will have to get back to you. This also means that to avoid any subject I do not wish to discuss, I must merely assert that you are asking about something that I do not have the information for at my fingertips and I will have to get back to you – which in fact I may or may not do.

Third, when you call people, you cannot generally expect them to bring the same level of energy to the conversation. It is your call and you need to energize them or they may remain passive and simply respond to your questions. Until you manage to engage them, do not rely on parties to be an energy source for you. Phone call recipients are not committed to the call the way meeting attendees usually are.

Fourth, the person who receives the call has no particular expectation as to the outcome except:

1. I hope you have a point to this call, otherwise it will be very short, and
2. If a successful outcome does not appear to be on the horizon, I will terminate your call.

The other participant has no psychological investment in the success of your call, and to the contrary, reserves the right to cut off the call if it is not meeting her time and interest.

The bottom line is that the telephone mediator must be aware of these psychological and social differences between modes of meeting/ communicating, and be ready to deal with them.

Getting ready to mediate by telephone

Bring Energy

The mediator must be ready to provide the energy to get the case rolling toward settlement. The parties are much less likely to show up with a, 'let's get this case settled', attitude than they often do at an in-person mediation. They will be polite, but much more passive, so you have to bring the energy. That does not mean being a cheerleader, but rather being ready to be persistent. Do not take their lack of engagement as a sign that the case cannot settle. Neither you nor they know if it will settle, as they have not really tried yet. They are present, but you need to get them into the game. I have been told many times that my persistence is what settled a case. I do not know if I am patient, stubborn, or both, but they are helpful attributes in mediating cases by phone.

Slow Down

As noted above, most people expect a phone call to be somewhat shorter than a face-to-face meeting. So, the expectation may be that if we are not headed toward a settlement in 15 to 20 minutes, then we need to stop the conference. Do not allow the participants to hustle you down that path. Take charge of the mediation and slow things down. If need be, explain that settlement, no matter what the forum, takes time. There are issues to discuss, information to process, decisions to be made, and all of those take time. The main thing is to not allow yourself to feel time pressured.

Realistically, there are time differences between to two methods. For me an average face to face civil mediation which is unsuccessful takes about two hours. My average unsuccessful phone mediation is an hour. I attribute that difference mainly to how the participants prepare. For an in-person mediation, the parties come ready to make a lengthy presentation about their case and then have follow-up discussions. All of this takes a couple of hours, then if you are making progress, the mediation lasts until the parties either settle or reach impasse after exhausting all their options. For my phone conferences, even with a letter from the court requesting that they come ready to discuss the case, make and respond to offers; the parties come ready to answer my questions, but without much in the way of a planned presentation. If there is a presentation, it runs 5 to 10 minutes, as opposed to say, 30 minutes. A discussion of the case and its present procedural posture, including private conferences to elicit offers and responses, usually runs an hour.

Thus, while a phone mediation may be shorter than an in-person one, do not let the social expectation that a phone call is a short conversation pressure you into not fully exploring the case and its settlement possibilities with the parties.

Make Sure the Parties Are Prepared

As with parties not bringing energy to the conference, they are not inclined to bring energy to the preparation. So, you may need to prepare more than usual. While I commonly walk into a mediation knowing little more than the general area of the law (property division, car wreck, employment discrimination), for a phone mediation I always review briefs or a memorandum to get a good grasp as to not only the area of the law, but also the claims, underlying facts and specific issues that have been or are likely to be argued to the court. The parties will get impatient spending a lot of time bringing the mediator up to speed. This impatience may be irrational, as they do not show similar impatience in a face-to-face setting, however, it is nonetheless real.

Your preparation also adds momentum to the notion set forth above – now that they are there, get them into the game. If you have not reviewed at least parts of the file and the parties give you only a sketchy summary, you will likely not have enough information to ask insightful, penetrating questions that get the parties engaged in the discussion. There may be significant issues that may aid or impede settlement about which you will never learn. Issues you are unaware of cannot be used to nudge the parties toward settlement.

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Once you are prepared, you can more realistically assist in making sure the parties are prepared. Have they completed sufficient discovery? Is there an issue to which documentation is vital (e. g., medical bills, disability rating, the contract in dispute)? If you do not have the documents, it is possible the other side does not either and without them, your mediation is going nowhere. Check in with the parties and make sure everyone gets what they need to have a fruitful discussion in your telephone mediation.

If in the mediation a party is lacking in information, impasse is not the only option. Send them home with work to do and set up another conference call.

Today Is Not the End of The World

With consideration for the energy that goes into preparing for and attending an in-person mediation, the attitude is frequently that if the case does not settle today, there is no point in continuing to try. Having invested this time and effort, many parties are reluctant to engage in serious settlement efforts again, having failed once. With telephone mediation, the opposite is true. As little effort or energy has gone into getting ready for and getting to the mediation, the parties are not upset by the idea of taking a break, allowing the lawyers and litigants to confer, then getting back together in a few days to pursue settlement discussions further. This is aided by the parties' frequent pessimistic attitude about even the possibility of settlement. They are so surprised and pleased that progress is being made toward settlement that they offer no resistance to the notion of a second session.

My experience is that once we have swapped an offer or two, settlement discussions usually break down as someone needs to go back to their client(s) to discuss the present offer and see if more authority is forthcoming. It is the rare exception that a case settles in the first conference. Most settlements are the product of numerous calls and conferences and you need to be ready for the reality that this telephone session may not be the only one. If settlement looks like a possibility, you need to prepare the parties for the idea of having multiple calls leading to a settlement.

Returning to preparation, if there is to be another telephone conference, the mediator must ensure everyone is ready for it. While the parties are on the phone, everyone should reference their calendars and select a date and time for the next conference. Agree who will participate, and if the mediator is setting up the conference, find out where the participants will be and the phone numbers at those locations. Review whatever agreements or proposals are on the table to make sure everyone is on the same page. Lastly, confirm any homework that either party has agreed to undertake, such as gathering and exchanging documents, providing backup calculations or verifying information.

Advantages to Phone Mediation

Advantages the experienced mediator can use center around its simplicity. Phone mediations do not take the same amount of time and energy to prepare for or the attendance that a face-to-face mediation does. Parties that are reluctant to invest multiple hours of preparing and scheduling a day to meet may be more willing therefore, to spend a few hours getting ready for an hour on the phone. If no progress is made in that hour, then not much is lost. However, experience teaches us that this smaller investment produces a surprising return. Where no one thought a case would settle, once discussions start, parties find they misperceived the other side's positions and goals. Phone mediations can also be more flexible. If you get into a face-to-face mediation, it is hard to put things on hold while another person comes to join you. But adding another participant to a phone call takes a matter of seconds. Thus, parties can be more conservative about who they bring to the conference, because additional people can always be added if it turns out their input is important.

Telephone mediation is a very different tool for the mediator in the digital age. With thought and care, it can be a very effective tool.

Frank C. Laney

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Mindfulness in Mediation and Negotiation

The mediator's eye should be guided by attention, calmness, empathy and compassion for the parties. The mediator should not judge, but rather be aware of the situation and what is experienced by various parties to the conflict that he works with. He should try to understand their behaviours, difficulties and intentions. The professional background of the mediator is not important, whether a psychologist, lawyer, or person with a totally different education. The capability to support parties as a mediator requires openness and curiosity. Pursuant to the Code of Civil Procedure, the Act of July 27, 2001, and the law on the common courts system, a mediator can be any person except for a judge, who has full capacity for acts in law, exercises all public rights, is at least 26 years of age, speaks the Polish language, has not been finally sentenced for intentional or unintentional fiscal offence, and who has the knowledge and skills necessary to conduct mediation.

Katarzyna Przyłuska-Ciszewska

A mediator does not acquire all the necessary competences in the 40-hour standard mediation training course. This is what motivates a mediator to frequently seek additional knowledge and understanding in their work: connecting their service for the benefit of others as well as establishing a sense of balance. There is a need to embrace the challenge of mastering the other so called soft skills, which unexpectedly often turn out to be the harder ones to manage! Mediation is not only a method but also a practice based on the development of trusting relationships. Regardless of whether we are mediators or negotiators, we find that skills from this field are helpful in various areas of our lives.

Mediation is an art of facilitating mutual understanding. Understanding the thoughts, beliefs and behaviours associated with human moods, physiological sensations, and events in our lives allows the mediator to guide the parties in conflict through a complex process of conversation. In facilitating a negotiation, clear lines must be drawn to prevent the skills in question from being mistaken for manipulation.

The mediator's challenge lies not only in attempting to reconcile conflicting parties, but also to remain vigilant, observing what is going on in any given moment. This means listening to what parties are saying without becoming prejudiced or shocked and, communicating at all times, a sense of understanding, acceptance, dignity, neutrality and trust. The mediator refrains from judgement.

What we as mediators think about the event or experience we are witnessing has a strong influence on our reactions in areas such as emotions, behaviours, and physiology. That is why we must be aware of our role in the mediation process and maintain a state of mindfulness and cognizance of the process, without making judgments, offering criticism, or issuing guidance.

Mindfulness activates the mediator's senses and allows them to notice the thoughts and emotions that accompany each experience. Mindfulness consists of accepting and watching with curiosity and openness, everything that is going on in a current moment. There can be few or a dozen instances during the day when we consciously redirect our attention to the present moment. We can then reflect that the most difficult mediation is one during which our mind is like a galloping horse.

Mindfulness of the Mediator

From the mediator's point of view, mindfulness is a very important and interesting concept. The mediator should remain mindful (focussed, open, flexible, making appropriate distinctions) while attentively preparing each case, conversation and meeting. The mediator displays patience and calmness, which in turn models positive communication to the parties. Acting mindfully, the mediator remains present and reflective, avoiding sudden reactions or displays of nervousness right up until and even during the signing of the settlement and conclusion of the process.

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What is important in the practice of mindfulness is to first of all work on attention itself – remaining focused, returning to what is important to each party and then moving on to subsequent issues of significance. In the course of training such attention, mediators can obviously make use of reflexive and contemplative practices, such as various forms of:

- meditation – beginning from breath awareness meditation
- body scan – becoming aware of body sensations
- mindfulness activities – including walking, performing particular movements
- mindful listening – how I listen and what I listen to

A mediator's independence and impartiality reflects their state of consciousness with respect to the conflict: understanding that this is not their conflict, but the conflict of the parties; that the parties needs and values should be heard, noticed, and satisfied in the process of reaching agreement. Mediators employ soft skills to recognize the current state of affairs between parties, without passing judgment and or involving themselves in the affairs of either side. As the starting point for professional mediation, the process then seeks to assist parties reach agreements acceptable to them with the support and knowledge of a neutral third party.

Mediators understand that a compromise often does not solve the dispute, and many a time may deepen frustration and tension, prolonging a lack of consent to the status which the party/parties have to endure in their life/lives (with the signed settlement document).

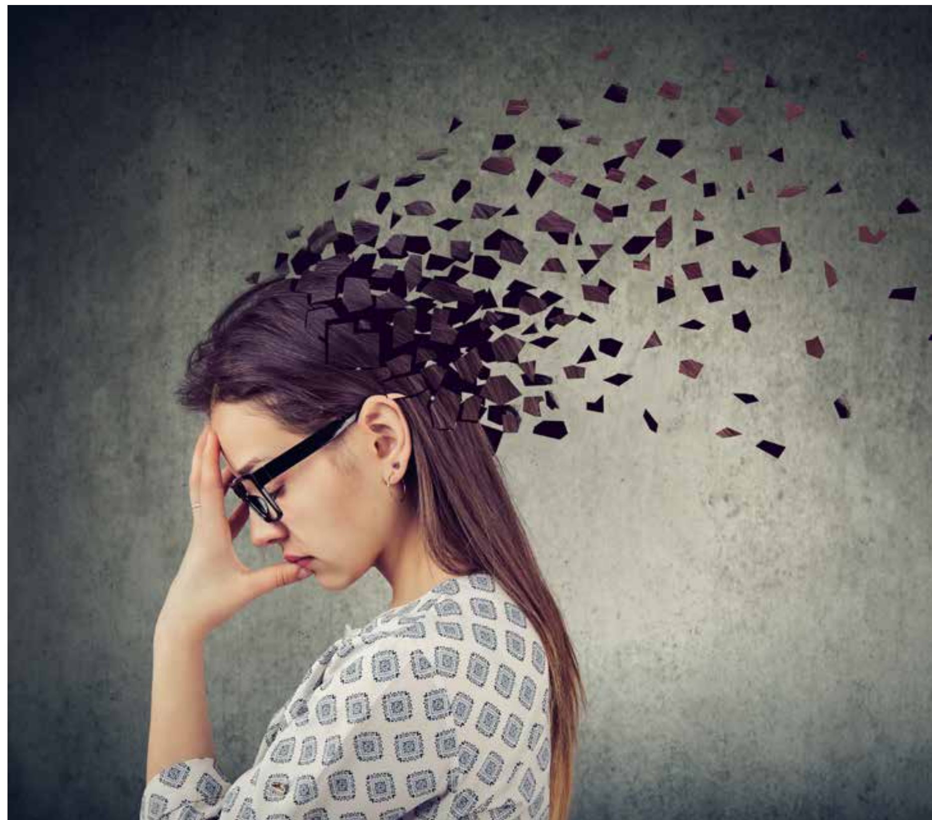
Mindful Process

In a mediation or negotiation process, each party comes to know and become aware of their needs and interests in order that they may present them to their counterparts and indicate potentially acceptable solutions. Through the mutual exchange of information, in which both parties are supported by an independent, impartial and neutral facilitator, the mediator, they work out jointly acceptable conditions of agreement at their own pace.

Each mediator's work should include reflexive practice in order to prevent the their taking the side of any party, or feeling the need to give a helping hand, rescue, or reconcile the parties at all costs. This can include regular mindfulness practice to prevent the mind from galloping like the horse referred to earlier. The exercises of remaining in the current moment without making judgments, concentrating on simple activities in a mindful and conscious manner and, observing the sensations of your own body are helpful. It is particularly useful to practice such skills before mediation, in order to muffle your own judgments and assumptions, and also directly after mediation, in order to calm your mind and prevent yourself from predicting the further course of action.

An example of reflexive practice for mediators: breath and body awareness

Allow yourself to take a few-minutes break from what you are currently doing. Find a quiet and peaceful spot where nobody will disturb you for five, maximum ten, minutes. Sit comfortably in a position which expresses a sense of dignity (not to worry if you do connect with this sense right way). With your back straight, rest your arms on your lap with your hands relaxed. Concentrate on your breathing – you do not need to change, lengthen or hold it. Feel the sensations in your body that accompany you in this moment. Notice where in your body you physically feel your breathing. Follow the breathing that you notice in particular parts of your body. Practice being present in the current moment, returning to the sensations in your body, being mindful of your breathing. If any thought appears, notice it and be aware that it is just a thought. Kindly return to your breathing. When your attention once again follows the thought, notice it calmly and kindly return to your breathing. Remain in this breathing experience for more or less five minutes. Then, thank yourself for these moments of mindfulness that you have given yourself. Open your eyes, get up, and attentively resume your activities. Notice how you are feeling now.



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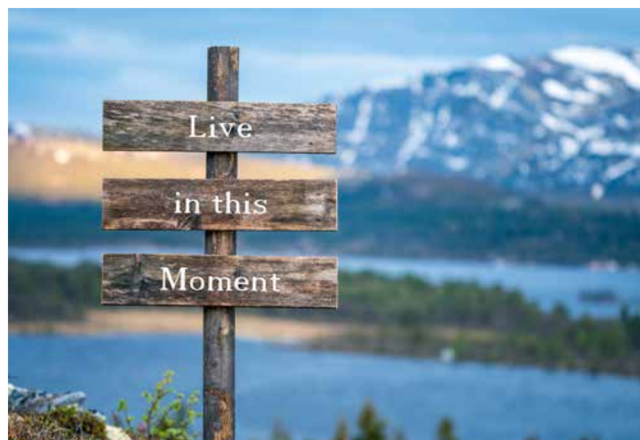
Exercise: Mindful Listening

For the purpose of this exercise, once again find a quiet and peaceful spot, where nobody will disturb you for at least a few minutes. Sit comfortably and freely, relax your shoulders and arm muscles, release any tension in your jaw, let your hands rest on your lap. Notice any sounds reaching you from the room in which you are sitting, observe them slowly, without making judgments. Then, notice any sounds coming from outside the room. This may include birds singing, the sound of a passing car, a person's voice. Listen to them as they reach your ears and do not involve yourself in any further considerations. Breathe calmly. When you notice that your attention follows a thought, make a note of it and calmly return to listening to the sounds around you. Gently finish the practice and resume what you have been doing.



A key role of the mediator is to help parties hear each other. In order to make this possible, they use the technique of active listening. During active listening, the mediator seeks to understand the point of view (intentions, needs) and the situation of the speaker, and encourages the speaker to answer open questions asked by the mediator. In this way, he tries to understand the speakers full experience, inclusive of their emotions and feelings. He becomes emphatic by putting himself in the other persons shoes, without being overly sympathetic, which risks compromising neutrality.

The work of the mediator consists of constantly checking whether he is receiving information passed on by the speaker in an accurate, authentic manner which avoids distortion, distraction, assumption or prejudice by the mediator himself. Supporting this effort, the mediator relies on the 80/20 rule (80 % listening, 20 % speaking). The mediator lays his foundation by first creating an atmosphere of calmness and a space of physical and emotional safety. This builds an environment that is favourable for the speakers, encouraging parties to share their thoughts, judgments, feelings, and sometimes even dreams and prospects.

A good mediator is somebody who is active, mindful, aware, gentle, and at the same time, firm at times and professional. While talking to the parties, he is involved in listening (mindfulness) to the same extent as in the acting itself (compassion). He leads the conversation from the point of view of cooperation rather than competition, testing, or making judgments. Asking questions becomes a way of explaining, clarifying, providing more details, providing an auxiliary tool, and often contains positive messages, including suggestions that are to encourage the speaker to be open, honest and courageous.

It is worthwhile to remember that mediation does not deprive the mediator of his own perspective, his personal judgments, thoughts, or values, but teaches him tolerance, patience, the feeling of dignity and openness to otherness and to diversity. The mediator does not react passively to a conflict, but always remains neutral towards the object of the dispute and the parties. As a result, both parties can be listened to, heard and understood simultaneously.

Becoming the One Who Supports

In my opinion, mindfulness is being fully aware of what is going on in the moment, without applying filters or judgment, and understanding the underlying processes at play in a given situation. Such mindfulness involves noticing, discovering, looking, as well as being involved in repeated observation, further verification and experiencing. In this process, one is not a judge but rather a curious scientist. The fact is, only the current moment that can be fully experienced. We can no longer change the past through our actions and the future cannot be fully planned either. The intention that accompanies us at the current moment shapes our thoughts, words and actions.

Learning and being aware of the recognition and understanding of relations between our thoughts, emotions, behaviours

What a Mediator Can Actually Do?

Suggest taking a break from the conversation. Instruct the client in confidence of a secure space that they can currently use for their own needs. This can be another mediation room. Make sure that the client is ready to accept help and jointly work with the mediator in order to neutralise strong emotions or experiences and sensations coming from the body. Ask the client to sit comfortably, relax the body, hands, jaw, release tension in the shoulders and legs. Sit in the chair keeping their back straight. Then, guide the client through a brief mindful breathing exercise. Ask them to breathe calmly and observe sensations in their body as they appear. You can tell the client to take turns to think about each sensation at a time, without passing judgment. It can be helpful to ask such questions as: How can you describe this sensation? Where in the body does it appear? Is it pleasant or not? How do the sensations change when you direct your attention to them? Are they becoming stronger or weaker?

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and physiological reactions that accompany everyday situations, as well as difficult life events, such as conflicts, disputes or court actions, facilitates clear thinking about our clients and ourselves as mediators. They also support the recognition and labelling of our patterns of thinking and behaviour, motivating us observe them without judgment. They allow us to act and cope with difficult emotions and situations in the course of a mediation, and also work consciously to develop our aims of professionalism and social responsibility.

Studying the sensations in the body, emotions and thoughts seems to be simple. However, during the mediation session, they are frequently accompanied by irritation, weakness, blockade, and not infrequently, they introduce the state of distraction and even irritation on the part of the mediator themselves. Noticing these states without identifying with them, accepting that they are as they are, and that they pass away, requires constant practice and commitment to simple mindfulness exercises. Mindfulness allows the mediator see their state from a distance and to select their attitude when it arises and this has a very positive influence on relationships with clients. This gives clients the feeling of safety in the spaces where they mediate, opens them to communicate without violence and, lays foundations for future agreement, despite a difference of opinion or values between the conflicting parties. What is more, it often helps to control the emotional states experienced by clients' during the course of mediation.

After doing the exercise, slowly resume conversation with the other party, if both parties are still interested in finding ways to reach an agreement. Thus, we learn that mindfulness is not only a technique, a result of meditation, but also an appropriate way of thinking and being.

Translation from the Polish language of an article published in Mindfulness magazine, Issue 4/2019, pages 35–38

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Multi-Tiered or Multi-Step Clauses for Dispute Resolution

Luca Dal Pubel and Andrea Marighetto

In today's global marketplace, international disputes can be complex and costly. Most companies cannot afford the time and expenses associated with traditional litigation and dealing with the challenges brought by different legal cultures. Recently, more alternative dispute resolution (ADR) procedures have become available to address these issues in commercial cross-border contexts. Incorporating multi-tiered dispute resolution clauses in international contracts has been common practice to resolve potential disputes. The idea behind such clauses is to provide several possible alternatives to dispute settlement within one dispute resolution procedure (Checkley & Alexander, 2018).

Multi-tiered, or multi-stage, clauses are dispute resolution provisions containing a step-by-step process for resolving disagreements, starting with a series of alternative dispute resolution (ADR) stages (negotiation, mediation) and ending with an arbitration. These "escalation" clauses are commonly adopted and included in international commercial contracts. They are also frequently found in international procurement or engineering contracts. Including multi-tiered clauses allows contract parties to resolve their disputes through a sequence of dispute resolution processes that do not harm the commercial relationship and save them time and money. The parties choose a specific approach to resolving a potential dispute. They agree to find a resolution in multiple phases; in each phase, there is an attempt to reach an agreement that must be completed before moving on to the next step (Pryles, 2021).

Legitimate reservations about multi-tier clauses may arise from the concern that one of the parties may exploit these contractual provisions to delay an unfavorable arbitration decision (ICDR, 2022). To overcome this issue, the parties may provide specific timelines within which each phase must be completed. These timelines must be adequate to allow the parties to complete the negotiation or mediation phases. Alternatively, the clause might be drafted to enable each party to resort to arbitration without necessarily going through the negotiation or mediation phase or having them proceed in parallel. Otherwise, if the parties commit themselves to the various steps as admissibility conditions, they must be ready to face all the stages of the resolution procedure provided in the clause. To avoid delays, contract parties should give precise timing for the transition from the negotiation to the subsequent dispute-resolution phases.

Examples of Multi-Tiered Dispute Resolution Clauses

There are various types of multi-tiered clauses. Generally, multi-tiered clauses are of two kinds: *Mediation-Arbitration* and *Arbitration-Mediation*, depending on whether the mediation phase takes place before or after the arbitration phase.

However, contract parties can combine different ADR procedures by commencing with, for example, a negotiation phase, followed in the absence of settlement by an arbitration phase *(Negotiation-Arbitration Clause)*. An example of this clause is provided by the International Center for Dispute Resolution (ICDR) (2022) Step-Clause Model:

> *In the event of any controversy or claim arising out of or relating to this contract, or a breach thereof, the parties hereto shall consult and negotiate with each other and, recognizing their mutual interests, attempt to reach a satisfactory solution. If they do not reach settlement within a period of 60 days, then, upon notice by any party to the other(s), any unresolved controversy or claim shall be settled by arbitration administered by the International Centre for Dispute Resolution in accordance with the provisions of its International Arbitration Rules. (p. 3)*

Other models of multi-tiered clauses involve the use of mediation before arbitration *(Mediation-Arbitration Clause)*. In this case, the parties agree to resolve the dispute with the help of a

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third neutral agreed-upon mediator. If the dispute cannot be settled through mediation, the parties agree to submit the dispute to a final and binding arbitration. JAMS (2018) offers a sample of this dispute resolution clause.

> *The parties agree that any and all disputes, claims or controversies arising out of or relating to this Agreement shall be submitted to JAMS, or its successor, for mediation, and if the matter is not resolved through mediation, then it shall be submitted to JAMS, or its successor, for final and binding arbitration. (p. 3)*

Given that the mediation phase could be interpreted as a precondition for recourse to arbitration, a deadline should be provided to allow parties to move from mediation and arbitration to avoid delays. Also, the mediator should not act as an arbitrator in subsequent arbitration since he might have been exposed to confidential information during the mediation.

Negotiation and mediation are sometimes included in international commercial contracts before resorting to arbitration. Parties often prefer first resolving the disagreements arising from their commercial relationship themselves. If direct negotiations are unsuccessful, the parties refer the resolution of their disputes to a mediator and, ultimately, to an arbitrator. In this case, the contract clause provides negotiation and mediation before arbitration *(Negotiation-Mediator-Arbitration Clause)*.

The ICDR (2022) multi-tiered clause for Negotiation-Mediation-Arbitration reads as follows:

> *In the event of any controversy or claim arising out of or relating to this contract, or the breach thereof, the parties hereto shall consult and negotiate with each other and, recognizing their mutual interests, attempt to reach a solution satisfactory to both parties. If they do not reach settlement within a period of 60 days, then either party may, by notice to the other party and the International Centre for Dispute Resolution, demand mediation under the Mediation Rules of the International Centre for Dispute Resolution. If settlement is not reached within 60 days after service of a written demand for mediation, any unresolved controversy or claim arising out of or relating to this contract shall be settled by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules. (p. 4)*

Multi-tiered clauses can be complex, as in the case of Mediation-Arbitration-Mediation *(Med-Arb-Med)* and Arbitration-Mediation-Arbitration *(Arb-Med-Arb)*. Through these clauses, the parties are contractually obliged to carry out the mediation and (or) arbitration procedure on a preliminary basis. If the clause provides that mediation is the preventive method, and if mediation does not achieve the desired result, the parties will proceed to arbitration. If the clause provides that arbitration is the preventive means of resolving the conflict, and the arbitration does not achieve the expected result, the parties will recourse to mediation.

Critical Issues in Drafting Multi-tiered Clauses

Although multi-tiered clauses are critical and practical, legal experts should be cautious when drafting them, as they constitute sources of obligation on the parties, especially in the case of voluntary mediation and imposition of a sentence by an arbitral tribunal.

Since these clauses provide for different stages, a lack of clarity can lead to uncertainty and a possible inapplicability of the clauses. The subsequent stage is assumed to occur only when the previous one has been respected. One party cannot pass to the next level if the other has not complied with the previous one. However, there may be different opinions and understandings when one is over and the other begins. A multi-tiered clause should be straightforward and clear about the sequence of the various steps.

Often these clauses are included at the last minute, with few explanations regarding the different phases. An unclear or ambiguous clause on the multiple steps and the compulsory pre-arbitration stages can lead to further disagreements and delays in dispute resolution.

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Another critical aspect to consider when drafting a multi-tiered clause is the wording used. Suppose the language of the multi-level clause indicates that the parties' true intent was to have a mandatory pre-arbitration mechanism. In that case, the courts will generally be inclined to enforce this stipulation. Such wording may be expressed in any appropriate language that indicates that submitting the dispute to the pre-arbitration mechanism is an obligation and not a mere right for the injured party. Using non-mandatory words such as "may" instead of compulsory ones like "shall" does not impose upon the parties an obligation to comply, and parties may directly commence arbitration proceedings (Kayali, 2010). Therefore, rather than pasting a sample of a multi-tiered clause into an agreement, one should adequately consider whether a multilevel procedure is in the interests of the parties. If so, contract parties should pay close attention to how they word the clauses to avoid or mitigate any problems. It may involve determining whether pre-arbitration phases are mandatory or not and defining the events that may lead to the failure of pre-arbitration steps and allowing them to be bypassed (Garrigues, 2018).

The more precise the mechanism stipulated by the parties with clear timelines, the more the courts and arbitral tribunals will be led to consider the multilevel clause leading to arbitration enforceable. Lastly, before incorporating a standard multi-tiered dispute resolution clause, it is worth considering whether a multi-stage process meets the needs and interests of the parties to avoid potential practical problems when the dispute arises.

Enforceability of Multi-Tiered Clauses

Critical problems occur regarding the enforceability of multi-tiered clauses when one of the parties does not comply with the procedure designed in the contract. A multi-tiered clause allows a party to agree to a means of ADR. Contract parties can decide that disputes may go to mediation and (or) arbitration rather than litigation. A multi-tiered clause can apply to all disputes under an agreement or only to certain types of disputes. If a party refuses to mediate and (or) arbitrate per the contract's terms, the counterparty may have to go to court to enforce the arbitration clause.

Consequently, one should analyze the entire contract to determine if the multi-tiered clause can be applied to the dispute and whether it is enforceable. Further, the multi-tiered clause can present surprises that the signatories may not have anticipated, such as a third party attempting to compel a signatory to mediation and (or) arbitration.

The scope of the analysis of a multi-tiered clause provision could be limited by the type of disputes it covers. Still, it could be extended to other provisions in the contract that may provide the parties with the option of litigation because of some preliminary measures. Another necessary provision that can impact the contract and its specific multi-tiered clause is the language within the contract. Also, mediation and (or) arbitration provision can exclude specific disputes. Parties that intend for a multi-tiered clause to reach all disputes between them must expressly state that in the provision.

In particular, court experience demonstrated that multi-tiered clauses need to present some elements to define how the conflict will be resolved and enforced. First of all, it is an essential requirement that the use of any ADR proceedings is expressed as a precondition to litigation in the ordinary jurisdiction. This precondition must include a provision to prohibit other proceedings, such as the ordinary jurisdiction, until the ADR process has been completed. Another necessary condition is that the dispute resolution must be sufficiently specific, making the agreement expressly followed step by step according to the enforceable procedure. The third requirement concerns the type of process, and the administrative center advocated resolving the dispute. Finally, a requirement that can be considered

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very sensitive, especially in certain jurisdictions, is incorporating a detailed description of the rules of the mediation process and (or) arbitration. It is also quite interesting to highlight that the contract principles of the agreement to attempt to negotiate a dispute are not directly part of the resolution proceeding, except when reference is made to the applicable material law. This demonstrates that the courts recognize the importance of respecting the parties' autonomy.

Conclusions

Multi-tiered clauses must be expressed and detailed in mandatory terms to be efficiently enforced. Legal experience, mainly in the United States (US) and the European Union (EU), reinforces the importance of using and promoting ADR procedures and multilevel clauses, particularly in supporting the parties' will during the negotiation and drafting of the agreements' terms to safeguard and defend the principle of party autonomy.

It is advisable to focus on the requirements that the jurisdiction of the applicable law indicates to regulate the ADR process because conditions can differ due to various applicable national laws.

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Digitalising Dispute Resolution

Imagine walking through the city centre one day to find large screens displaying your face, and your name, with a statement that you had been fined for the offence of walking in a busy street against a pedestrian red light. You were being named and shamed for the offence of jaywalking and, yet, imagine you had no knowledge of either the incident or the fine. Imagine the shame of it all if you were the well-known head of a major air conditioning company in the city. This is what happened in the Chinese city of Ningpo (Shen, 2018). How it happened provides much ammunition for those who challenge the role of Artificial Intelligence in the justice system.

Graham Ross

Traffic cameras in Ningbo, and other Chinese cities use Artificial Intelligence (AI) to identify, shame and punish people who the cameras identify as not complying with the pedestrian lights. What went wrong was that whilst the cameras and AI correctly identified the lady in question from her face, she was not jaywalking. In fact, she was not in the road or area at all. What the camera had spotted was this lady's face displayed in an advertisement on the side of a bus. It was human error in the design and coding of the system and its algorithms not to check that there was a body attached to the face, that it had three dimensions, was not tied in movement to a vehicle and generally, was not a real person.

Another example of AI in the justice system going wrong is in the COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) system used in the USA which assist courts in assessing the likelihood of someone coming before them for sentencing to prison, re-offending within two years of release. The higher the likelihood, the longer the sentence the court would impose. ProPublica conducted a study using the risk scores generated by COMPAS for 7,000 people who came up for sentencing for crimes of violence and checking records to see how many were charged with violent crimes over the following two years. Of these offenders who were predicted by COMPAS to commit further violent crimes in the following two years, and therefore who would have on such prediction, have been given longer sentences than might otherwise be the case, 4 out of 5 did not, in fact, commit any crime of violence in that period (Larson et al., 2016).

The problem with Artificial Intelligence generally is that it can very quickly produce a promise of what it can achieve but more often than not, the true value of that promise will not be achieved without considerable human effort to monitor and, where necessary, reinforce on a continuing basis the accuracy of the processes by which it is programmed.

I mention these stories to underline why there may be concern at the prospect of using AI in the justice system and, a good example of why it is important to have full transparency of the rules followed in algorithms.

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AI itself will have a bad reputation with dispute resolution professionals expressing offence, I am sure, at the fear that the machine can do their job better than they can. Might it take away some of their work? If a machine is going to make a decision in quicker time and with more reliability than a human can, then they may feel it right to be concerned as to how such a provision will affect their inflow of work.

Let's look at the acronym in another way. An important distinction can be made when applying the acronym "AI" to the mutual resolution of disputes rather than to automated decision making. I am referring here to digital tools that actively assist a human to be more successful in bringing about resolution. In such an area the traditional meaning of the acronym being 'Artificial Intelligence' is less relevant than 'Augmented Intelligence'. Artificial Intelligence gives the machine some degree of control over the outcome, whilst Augmented Intelligence does not. Instead, control and decision making reside with the human, while Augmented Intelligence assists to a degree, the work of the human to be more successful in her work.

There is a huge difference between these two versions of 'AI' that goes to the heart of what we want from technology in society. 'Artificial Intelligence' has the potential to significantly reduce the flow of work for which human dispute resolvers will be needed, whereas 'Augmented Intelligence' requires the human element in order properly to function. Augmented Intelligence uses machine learning technologies similar to Artificial Intelligence, but does it in partnership with the human mediator to support problem-solving, while Artificial Intelligence has the potential to bypass humans altogether.

Let me refer below to two examples which demonstrate the need for the human neutral facilitator to play the key role. Not only do they broaden the acronym AI but they also explain the important difference between Digitising and Digitalising justice. The former refers to technology that simply emulates, in a digital form, existing processes, whereas the latter term is more appropriate to describe technology that changes to a degree, and hopefully for the better, the underlying process itself. For example, mediating by web/video conferencing, such as Zoom, does not change the process, but simply and usefully enables that mediation process to take place at a distance. In her discussions the mediator will still use the same form of mediation process, whether facilitative, evaluative, interest based etc., that she usually follows. She will simply follow it online rather than in-person. In digitalisation, the technology enables the mediator to follow a process that varies in a way that could not be undertaken in-person.

Another form of misunderstanding is that ODR does not apply to any process undertaken in person. Both of the examples I will refer to can be operated usefully by mediators whilst working in person. A more accurate acronym would be TADR for Technology Assisted Resolution. For the reason that these tools, which is a better term than 'systems', require skilled mediators/negotiators to make them successful. They are not a threat to resolution professionals but rather give them an advantage in delivering resolution.

Each of the systems of Augmented Intelligence that I will refer to here can be applied equally to in-person mediation as well as distant mediation. One tool, called "ONE", provides the ability to submit secret offers not seen by the other party and the other, "Infinity", provides the facility to submit anonymous proposals, as well as aiding in the brainstorming of solutions in more complex disputes with multiple issues. In both cases, the usual 'negotiation dance' impacted by emotion is avoided completely while at the same time the focus of the parties is directed, to a greater degree, on what a final agreement would look like rather than on why they are in dispute in the first place.

Smartsettle ONE (iCan Systems Inc. & Smartsettle Resolutions Inc.)

Smartsettle ONE is a visual blind bidding tool. Its application lies in disputes in which, apart from one or two conditions that can be agreed at the outset, the only issue in dispute is a number. Of course, that number most commonly relates to a sum of money paid by one party to the other. It could, however, relate to the number of periodic payments or the number of days within which to deliver an item before its purchase is rescinded.

In Smartsettle ONE the parties make offers by moving a flag along a horizontal scale comprising a range of numbers. Two flags are provided, one green and one yellow. The position of the green flag is seen by the other party. But the position at any time of the yellow flag is not seen by the other party and is effectively a blind bid. These flags can be moved up or down any number of times through a series of rounds until a resolution is reached.

The augmentation of the mediator's intelligence by Smartsettle ONE is seen in a number of ways. Firstly, the process enables

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the secret bids to have a direct effect on bringing about a resolution that the mediator could not do without the system. A mediator may be given offers to put to the other party but if he isn't authorised to declare them in that way, then what he is told in private discussion cannot be used. He also has to be very careful, if not authorised to declare an offer, in how he may encourage a bid by the other party whilst not breaching the confidentiality of the first party. However well he handles this pressure, the parties may naturally be more cautious before declaring an offer in an in-person mediation that he/she does not want to be revealed, save as a settlement, out of fear that confidentiality may in some way be breached. If he is authorised to declare an offer to the other party then it is not secret. The fact that the settlement can be declared without either party knowing anything of the secret bids of the other party, and without having to consider an actual offer other than the open offers, applies a dynamic otherwise not available in more traditional mediations. The system has flexibility in that the mediator can choose, with the consent of the parties of course, to see the secret offers of each party to enable her to nudge the parties closer together without breaching the secrecy of the bids.

Importantly, it encourages the parties who are confident in the confidentiality of their offers, to make more effort to settle. Another element of confidence with Smartsettle ONE is the knowledge that if a secret offer, let's say by the paying party or the Respondent to the claim, does not bring about a settlement, that offer can be withdrawn to a lesser amount. This is beneficial in that it gives an opportunity for the Respondent to settle early when costs are low, without damaging his negotiating strategy if it is not accepted and has to be withdrawn. This is advantageous when the total liability with costs would likely be less than much later down the line when, despite a lower payment for the claim, there is a much higher cost burden that could damage his negotiating strategy if not accepted. This provides an extra dimension to the impact of the work of the mediator, hence for all these reasons, the technology can be said to augment the intelligence applied by the mediator.

The second factor is that when the rules of the algorithms identify a ZOPA (Zone of Potential Agreement), whether by an overlap of offers or where the gap can be closed by the secret instructions fed into the system by the parties, a calculation is undertaken to identify which party made more effort to settle. This party is then rewarded by a more favourable settlement figure to be declared by the system rather than just splitting the difference, overlap or gap. Splitting the difference would encourage parties to hold back and be more conservative in their secret bids, something that the designers of Smartsettle ONE wanted to avoid. The impact of this rule is to encourage moves to settle early. Once again, we see here the positive impact by the augmentation of the work of the mediator.

Another problem with a system that just splits the difference is that it would not be truly "blind" because the parties would be able to find out the last secret bid of the other party by simply doubling the difference between their last bid and the announced settlement figure. This may present a problem for

insurance companies, for example, that may not want claimant lawyers to be able to identify the final offers of the insurers in negotiations in a number of cases, identifying to some degree therefore, their negotiation strategies.

In 2019, Smartsettle ONE was used by the parties in a dispute over consultancy fees, who quickly learnt to use the system and resolve within an hour of use, a dispute that had not only been running through the courts for over three months and was heading to a full hearing before a judge, but had failed to settle under court mediation (Hilborne, 2019). Smartsettle has allowed the public, on no fee, to negotiate with Smartsettle ONE in roleplay scenarios against either a robot or a human.

Smartsettle Infinity (iCan Systems Inc. & Smartsettle Resolutions Inc.)

Smartsettle Infinity is a very powerful tool for multi-issue disputes which accommodates an unlimited number of parties. It does not seek to declare a settlement, but rather to brainstorm by offering suggestions of packages of proposals it considers more likely to be acceptable to all parties. No agreement is reached save only on proposals that have been accepted by all parties. Infinity develops its intelligence from a combination of what it learns from information fed into it by the mediator or, in direct inter-party resolution, by the parties themselves, as to the comparative preferences each party has in all of the different issues that are to be resolved within the dispute. This comes on top of what it learns dynamically from proposals put together by the parties themselves while operating the system. How important is it, for example, to the employer in an employment dismissal dispute, that a clause in the original employment contract barring out the employee from working with a competing business should be included in any settlement. It may be that the information Infinity has learnt from the mediator will lead it to the view that the employer is not at all concerned with where the employee works next but, on the other hand, they are most concerned with what compensation they will have to pay. As for the employee, if he knows that a competing business would like to offer him immediate work then it would be more valuable for him to agree a lower amount of compensation on the basis that he is free to join the other company immediately, thus reducing the period of time when he is out of work. With this information Infinity might put forward a proposal that included higher compensation and a cancellation of the non-compete clause.

In addition to the ability to put together proposals, the very fact that they are generated by the machine rather than the other party helps the party receiving the proposals to look at them more objectively. In addition, Infinity allows parties to submit their own proposals either with identification that they were put together by that party to demonstrate a desire to settle, or to require the machine to hide the fact that they were put together by that party, masquerading as if it was put together by the machine and thus removing bias when the receiving party considers the proposal. The machine further aids the parties by ascribing a value for each proposal they generate based on that party's underlying interests as fed into the system by the mediator/negotiator. This enables the parties to be able to comparatively assess the value of them reaching agreement on a particular proposal before disclosing it to the other party. At any time, a party can share a proposal with the other party and once a package has been agreed by both, a provisional agreement is declared. The power of Infinity is further demonstrated by the fact that once all the parties have indicated agreement to a particular package of proposals, it does not stop at that point but, as a result of what it has learnt will look for any value 'left on the table'; and, if it does, will offer to all parties a different package that is valued higher for each party than the one already provisionally agreed upon. If all parties indicate that they accept the improved package, then that package takes effect over the provisional one.

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At all times the mediator/negotiators remain fully in charge and no settlement is reached save one agreed to by both parties. The system is designed so that all of the issues to be agreed are on screen

at the same time. Furthermore, through colour coding the flags positioned on a horizontal scale, the system gives the mediator/negotiator a single overview of the various proposals in each of the packages and thus improves her ability to quickly guide the parties into resolution in a way that is more effective than through a narrow issue by issue lens. Additionally, it helps focus the party's attention on reaching agreement rather than spending time in mediation arguing over who did what and the history of what led to the dispute. Minds are focused not on who is right and who is wrong but on what can be agreed. The system does require a high quality of information fed into it as to the preferences of the parties and hence the importance of having it operated by a skilled mediator/negotiator. With such human skill, Infinity can help the mediator/negotiator to be more successful in bringing the parties to a mutual resolution.

To demonstrate the power of the system a live simulation of negotiations over a ceasefire in Ukraine, using Smartsettle Infinity, took place at University College Dublin during the 21st International Forum on Online Dispute Resolution in May 2022. A settlement was achieved! The detail of the negotiations can be viewed on the Smartsettle website (iCan Systems Inc. & Smartsettle Resolutions Inc., 2022).

Conclusion

Those mediators who celebrated the end of lockdown and a return to in-person mediation, thinking they had experienced all that ODR had to offer are mistaken. Those who fear that AI is a threat to their practices are mistaken. I have identified a distinction both between Artificial Intelligence and Augmented Intelligence', the former giving control of the decision making entirely over to the machine whereas the latter retains control and decision-making with the human whilst significantly assisting the human in their role in a way that could not be achieved without technology. I have also identified a distinction between 'digitisation' and 'digitalisation', the former allowing for improvements in communication but not changing in any material way the underlying skilled process that is mediation and negotiation, and the latter bringing about a beneficial change in the underlying process that could not otherwise be achieved. The two examples of such Augmented Intelligence powered systems being Smartsettle ONE and Smartsettle Infinity, also offer true digitalisation. The future for our modernised justice systems must look towards those beacons of Augmented Intelligence and Digitalisation ('AID') to show the way forward with what one might be tempted to call 'Real ODR'. Such developments will not only improve access to justice but help remove fears held by mediators that the technology is a threat to their practices, highlighting this technology as an opportunity they should begin to seize.

Graham Ross, November 2022

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Establishing Trustworthy ODR Systems to Enhance Consumer Confidence in E-Commerce

When problems arise online, the ability to access justice remedies can play a crucial role in helping increase consumer trust in e-commerce. Although various marketplaces facilitate commercial transactions between third parties online, consumers still find it hard to access justice and resolve disputes arising from B2C online transactions. The high costs, complexity, and length of offline procedures and the lack of trust in ADR remedies discourage some consumers from engaging in e-commerce transactions.

Luca dal Pubel

Many scholars and experts agree that ODR plays and can progressively play a vital role in improving access to justice. New, increasingly advanced forms of ODR technologies and systems based on algorithms have expanded the forms of redress available to consumers. Such systems, as shown by eBay's and Amazon's experiences, can handle large numbers of low-value e-commerce consumer disputes quickly and cost-effectively. Katsh and Rabinovich-Einy have argued that the combination of data collection, communication, and ODR software offers the opportunity to increase efficiency and fairness, which translates into an increase in access and justice (Katsh & Rabinovich-Einy, 2015). Expanding consumer access to justice has been claimed to improve consumer confidence in e-commerce. ODR seems to adapt well to the needs of consumers who operate online precisely for its characteristics of accessibility through the internet and the low cost and speed of its procedure. It can make justice more accessible to consumers involved in e-commerce disputes, which as a result, may help reinforce their trust in e-commerce transactions. ODR can also be a driving force for developing a global e-commerce economy.

As a means of access to justice and an instrument to enhance consumer trust, ODR must first become a source of confidence. As noted by Ebner and Zeleznikow (2015), technology must be constructed so that the public will trust it as an efficient and effective way of managing disputes. Also, consumers must trust that ODR service providers will respect their confidentiality, be impartial, and provide each side with equal rules and procedures (Rule & Friedberg, 2005).

Abedi et al. (2019) developed standards for measuring consumer trust in ODR and identified three crucial trust indicators: *knowledge*, *perception of fairness*, and *code of ethics*. The first element contributing to measuring trust is knowledge and information about ODR systems. Users must be informed about the process to trust it (Abedi et al., 2019). Another element identified in their research is the expectation of fairness. When using ODR mechanisms, individuals expect them to be fair. Fairness can be obtained through transparency about the process and neutrals, the confidentiality of personal data, accessibility of redress procedures, decision makers' integrity, honesty, and consistency of outcomes (Abedi et al., 2019). The third significant element for measuring trust in ODR systems is the presence of a code of ethics (Abedi et al., 2019). Such code should include an official certification to ensure neutrals and decision-makers impartiality and professional competence. According to the results of this qualitative study, the standards should help enhance trust and confidence in ODR.

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As affirmed by Schmitz (2016), online vendors and ODR providers should work with "policymakers to create regulations ensuring that ODR systems are designed, implemented, and monitored with attention to delivering justice" (p. 3) and promoting trust in e-commerce.

Therefore, ODR designers and providers should create and develop efficient and trustworthy mechanisms. To promote and guarantee ODR quality, the International Council for Online Dispute Resolution (ICODR) and the National

Center for Technology and Dispute Resolution (NCTDR) have recently developed and adopted ethical standards for the design and implementation of ODR systems (ICODR, 2022). The standards require that ODR platforms and processes must be:

- Accessible
- Accountable
- Competent
- Confidential
- Equal
- Fair and Impartial
- Legal
- Secure
- Transparent

These standards complement other significant ethical, legal, and technical principles for face-to-face dispute resolution. They provide an essential guide for developing fair, accessible, accountable, and secure ODR. However, this article wants to propose standards that reflect the existing literature and previous empirical investigations. If implemented, such criteria could help influence consumers' intentions and purchase behavior and generate trust in e-commerce. Therefore to help promote consumer confidence, ODR must be:

Accessible: Complaint procedures and options should be clearly explained to the consumer, and information should be available and clearly displayed online. Research shows that consumers expect complaint processes to be in place and accessible. Their presence generates trust in the vendor (Ong & Teh, 2016). In contrast, a lack of knowledge and understanding of procedures often leads to a lack of confidence (Zeleznikow & Bellucci, 2012).

Easy-to-Use: Complex procedures discourage consumers from shopping online (Ong & Teh, 2016). Complaint handling systems must consider the needs of different social groups and the skills needed to complain online.

Provide a Fair Process by Respecting due Process Standards: Research findings have highlighted how consumers expect equal opportunities to share information, be heard, and present their cases. (Dal Pubel, 2018, p. 145). Consumers should receive just treatment and have equal access to remedies despite their economic status or the price of their purchases (Schmitz, 2016).

Efficient and Responsive: Research shows that consumers understand that mistakes can occur when shopping online. Errors do not prevent consumers from engaging in online transactions. However, they do expect vendors to respond quickly and fix their problems. Responsiveness and problem-solving are what gain their trust in the vendor (Ong & Teh, 2016).

Transparent: Transparent and easy-to-follow redress policies generate trust in online vendors (Ong & Teh, 2016). Data show that transparency can avoid the perception of biases and makes consumers feel they are treated fairly and equally (Dal Pubel, 2018, p. 149).

Provide Consumers with Various Resolution Options: A three-tier system that includes negotiation, third-side facilitation/mediation, and a binding evaluation procedure. Restricting consumers to one form of redress reduces their access to justice (Katsh & Rabinovich-Einy, 2017).

Train Dispute Resolution Specialists: Results from research investigations show that consumers expect to deal with knowledgeable and trained representatives when contacting a vendor's customer service or help center (Dal Pubel, 2018, p. 152).

Provide Information Security (Preventing Outsiders from Accessing, Manipulating, Selling, or Destroying Parties' Information): Information entered into the ODR program should be protected using encryption features such as Transport Layer Security (TLS) protocol that allows client/server applications to communicate across a network to prevent data tampering, falsification, interception, and theft. Many consider security an antecedent of trust that can positively affect consumer trust (Azam et al., 2012). For others, information security is essential in improving confidence in ODR technology (Abedi et al., 2019).

Provide Data Security: Prevent outsiders from hacking the ODR system and accessing private information stored in the system related to the parties and the dispute. Research and literature show how security is one of the main concerns preventing consumers from purchasing online.

Ensure the Confidentiality of the Process: ODR mechanisms should guarantee the confidentiality of any communication and exchange of information between all the parties involved in the process. Studies have confirmed the importance of

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security measures to protect the confidentiality of information (Mundra et al., 2014; Sengupta et al., 2005). Like any other dispute resolution process, confidentiality is essential to protect personal information and build trust.

Provide Reliable Enforcement Mechanisms to Ensure Consumers Receive the Remedies Deemed Appropriate by the Process (Schmitz, 2016): The enforcement of ODR outcomes is crucial, especially in cross-border e-commerce disputes. The traditional court enforcement mechanisms are too complex and costly for low-value B2C disputes and therefore do not represent an appropriate option. Authors have argued for self-enforcement mechanisms to ensure ODR efficiencies, like chargebacks or the ICANN enforcement model. Different models have been proposed. The UNCITRAL Secretariat proposes an escrow-based model requiring a third-party account where money is stored until the dispute resolution. Similarly, Ortolani (2015) has suggested looking at the Bitcoin adjudication mechanism as an alternative model of self-enforcing mechanisms. Others have advised that blockchain technology can be used for the decentralized execution of programmable contracts, known as smart contracts (Koulu, 2016). They have claimed that smart contracts could provide a solution to enforcing ODR outcomes. Different models should be compared to provide valuable solutions to enforcing ODR outcomes.

Establishing trusted ODR systems can help build trust in e-commerce as it encourages consumers to purchase online, knowing that efficient and secure redress mechanisms are in place when things go wrong (Schmitz, 2018).

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Defining Mediation

Marcus Bauckmann

What is mediation? Who can solve the challenge of developing a general and universal definition of mediation?

A standard definition you read and hear nearly everywhere says that mediation is a conflict resolution process in which a neutral, external person conciliates between the parties and supports them to develop a joint solution.

Does this help us? From these words does everyone now know what mediation really is, the background of mediation or, how it differs from other dispute resolution processes?

Well, I dare to say NO!

Is mediation a skill, or is it more than a skill? Is it a competence, a feeling, an attitude, a tool or, a proceeding?

At the beginning of 2021, the German Mediation Foundation commissioned a representative survey on the awareness of mediation (infratest dimap & Deutsche Stiftung Mediation, 2021). 63 % of the respondents said they "know" mediation. However, when asked further, only 36 % (that is 57 % of the 63 % who said that they know mediation) could actually explain in more detail what mediation is.

In several countries, the mediation community is currently discussing aspects of the question of how to professionalize mediation and further develop education in the field. Therefore, the questions of whether mediation is a profession and or an education should also be asked.

Mediation cuts across several academic disciplines in a special way, including; psychology, sociology, law, economics, and communication to name just the core disciplines. None of these disciplines has a perfect definition of what mediation is as we understand the search for this to be complex and multifaceted. A truly all-encompassing definition can – if at all – only be provided by science.

So, is mediation also a science? Maybe. But what is "science"?

Wikipedia says, *"Science is a systematic endeavor that builds and organizes knowledge in the form of testable explanations and predictions (…)."* (Wikipedia, 2022). Science is divided into various areas: natural, legal, social, and formal sciences. Social science covers fields like psychology and economics and addresses all aspects of society and relationships between individuals within those societies. Societies and relationships among individuals within societies? Sounds like conflict may be involved here! And yes, mediation is about solving conflicts!

So, is a science that deals with mediation a social science? Well, yes and no, it is more than that! Solving conflicts is, in a strongly juridical time like ours, above all the task of the law and also of jurisprudence, and thus of the legal science. So, is a science that deals with mediation a legal science? Well, yes and no, it is all of that! As mediation cuts across several academic disciplines, so too does it cut across many of the sciences, which makes mediation a science by definition.

The science of mediation can help us in so many ways by highlighting; which tools are best for which conflict situations; how mediation can secure further acceptance and; how mediation can be further developed without regulating it as such.

Conclusion

In the end we can see that mediation is way more than just "one thing". For many of us in the mediation community of course it is "the thing". It is a skill, a competence, a tool, an attitude, a proceeding, a profession, an education and a science (and I'm not even using all the adjectives imaginable). It is much more than has yet been decided today and invites further research – how exciting!

Before people start saying that this is all nonsense, that mediation is a vocation, that nothing needs to be researched, you can stick with Max Planck who said, "Applying must be preceded by recognising." So, let's explore and develop mediation on a new level. Why? Because it is much more than we think!

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