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The MEDIATION

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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

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

Editor-in-chief Allison Malkin

"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 Jonathan Barth

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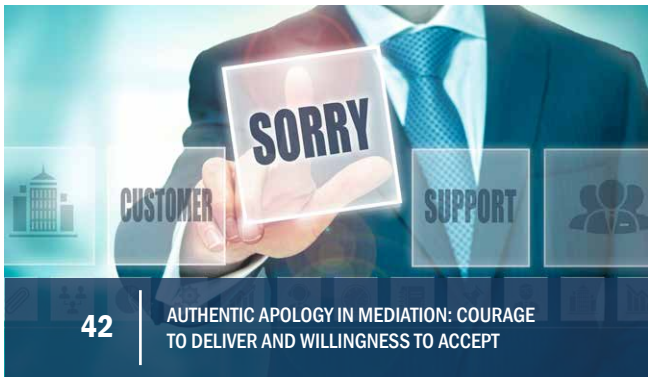
IMPULSE

IN FOCUS



METHODOLOGY

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SERVICE

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

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

Image Source: stock.adobe.com/ogichobanov

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.

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

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.

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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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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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.

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

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

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).

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

Image Source: stock.adobe.com/Prostock-studio

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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Mediation and/or Litigation – In Search of Balance

Valentyna Babiichuk and Olena Bilokon

Introduction

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

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

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.

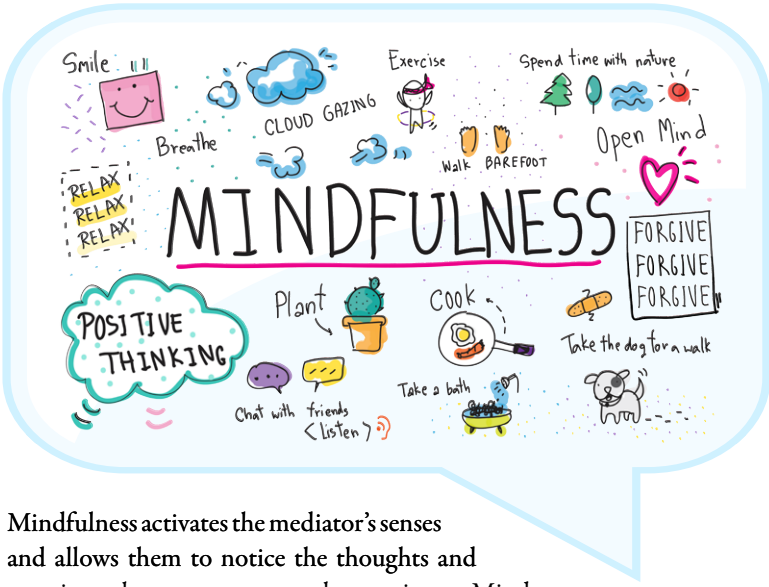
Katarzyna Przyłuska-Ciszewska

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.



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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.

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

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

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example of why it is important to have full transparency of the rules followed in algorithms.

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.

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.

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

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