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Mediation in Ukraine: Challenges of Peace and War
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The 2013 civil unrest in Kyiv, annexation of Crimea to Russia and subsequent armed conflict in Eastern Ukraine have unleashed an unprecedented fusion of deeply ingrained conflicts – from a geopolitical struggle between the world super-powers to inter-ethnic tensions within the region. In 2013 Ukraine became yet another divided society on our planet. Irrespective of the outcome of the current crisis, Ukraine and the whole region is in urgent need of healing and reconciliation. Mediation, as a dispute resolution mechanism is capable of offering a path to such reconciliation; it is internationally recognized as a “highly promising instrument to broker peace that can help to disentangle the knot of interests and needs in a structured and efficient way”.¹ Since the beginning of the crisis international donors and international organizations working in the area of peacebuilding offered an immediate support to mediation and dialogue initiatives at various levels of the society.

Yet, mediation is not a completely new conflict resolution mechanism for Ukraine. The first projects implementing mediation dated back to the early years of Ukrainian independence in 1991. Since that time the international community and local mediators invested substantial efforts into development of mediation in the country. However, at the present time, Ukraine remains an outsider in mediation development even compared to its former Soviet Union neighbors.² The Law on Mediation has not been adopted and the practice of mediation remains very scarce. Neither did mediation in Ukraine enjoy the financial support of international donor agencies in as much as, for example, Russia. Ukrainian mediators are under-resourced and therefore in the shadow. Information on various aspects of legal regulation of mediation and existing providers of mediation services becomes increasingly available on the Internet, yet it is mostly limited to Ukrainian language sources and remains inaccessible to the international community. No systematic, theoretically-informed, research on mediation in Ukraine has so far been published and widely disseminated³. All of this leads some experts to conclude that mediation in Ukraine is a rather ‘ghostly’ phenomenon

¹ Lars Kirchhoff, *Linking Mediation and Transitional Justice: The Use of Interest-Based Mediation in Processes of Transition. Studies on Transitional Justice, Peace and Development The Nuremberg Declaration on Peace and Justice, in BUILDING A FUTURE ON PEACE AND JUSTICE* (Judith Large Kai Ambos, Marieke Wierda ed. 2009).

² Russia has adopted the law on mediation in 2011, Kazakhstan – in , Belarus?, Georgia???

³ But See vasyliev, erbe, ???

that has been promoted by donors but failed to materialize into a functional market for mediation services.⁴

By filling this informational and research gap, this article argues that despite a low demand for mediation services, mediation is far from being non-existent in Ukraine, at least because of the presence of the highly competent and organized mediation community and its activity to promote mediation. However, to become fully viable, the mediation movement in Ukraine needs consolidation of efforts of all stakeholders in responding to the problems inherited from the Soviet past and challenges of the current armed conflict.

Thus, the aim of this article is twofold – firstly, to map the mediation field in Ukraine and to outline current challenges that Ukrainian mediators faced before the 2014 crisis and continue to face afterwards; and secondly - to serve as a starting point for exploring deeper cultural and institutional impediments to mediation development in the post-Soviet environment. The article does not aim to provide a comprehensive survey of mediation-related initiatives in Ukraine but rather to outline general trends.

The article presents preliminary findings of the qualitative study which was conducted in May-June 2016 in three parts of Ukraine (Kyiv, Odesa and L'viv) and consisted of four focus-group discussions with 28 participants and 40 in-depths interviews. The sample for the interviews was designed to focus on the mediation community but also to include the major stakeholders in mediation development. It was initially based on the information from the database of the National Association of Mediators of Ukraine, and later relied on the snowball sampling technique. The sample followed the logic of the most critical case design and aimed at the highest possible degree of variability of the answers. Therefore, proponents and opponents of mediation; the “patriarchs” of the mediation movement and the recent followers; representatives of the government, local authorities and civil society activists; lawyers and psychologists; Ukrainian and foreign experts were all interviewed in this study (see the list of organizations interviewed in Appendix 1). Interviews and focus-group discussions have been transcribed and analyzed through NVivo software for qualitative analysis of information.

Empirical data from the fieldwork was supplemented by information from Internet sources and policy documents of the Ukrainian mediation community and international donors, including reports of international experts – Bill Marsh,⁵ Ales Zalar,⁶ Friedrich-Joachim Mehmel, Frans van

⁴ Vasylyev vasylyev Legal, Political and Cultural Factors in Introducing Mediation to Post-Soviet Ukraine 2013 p 21

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Policy Issues Arising from Draft Mediation Laws in Ukraine

⁶ Reports by William Marsh and Ales Zalar, USAID Fair Justice Program, presented at the Round-table “Legal basis of Pre-trial and Alternative Dispute Resolution” 21 March 2016, Kyiv

Arem⁷ Finally, a lot of useful information and links for this research derive from the author's professional experience of advising various actors on mediation development in Ukraine for nearly fifteen years.

The article is structured as follows. The first part provides a general overview of the socio-political and institutional context of Ukraine, a brief historical sketch of mediation development and a 2016 map of the mediation community. The second part of the article presents challenges faced by Ukrainian mediators from 1991 to 2014 in terms of generation of demand for mediation, professional development of mediators, integration of mediation within the court system, and the relationship with international donor organizations. The third part demonstrates how the armed conflict in Eastern Ukraine, that started in 2014 and continues until now, has exacerbated the peacetime challenges by increasing environmental uncertainties, competition within the professional field and pressures from the international community. In conclusion, the paper evaluates positive and negative consequences of current challenges and suggests some policy implications and further avenues for research of mediation in the post-Soviet context.

I. Background

Uncertainties of the socio-political environment

Ukraine, with a population of around 50 million and the second largest economy within the former Soviet Union, was blessed with a well-developed industrial base, highly trained labor force and rich farmlands holding 40% of the world's black earth agricultural soil. It was considered to have the greatest potential among all the Soviet Republics. However, in twenty years after the Soviet Union broke, Ukraine remains one of the poorest countries in Europe.

On the one hand, by the second decade of transition, all major legal institutions, or at least their blueprints which laid the foundation for a market economy, were put into place. The private sector comprised 80% of all enterprises; a new or radically changed administrative system had been established; the court system, including specialized commercial courts, was functioning; monetary, fiscal, and tax systems and the system for regulation of private enterprises and competition were set up. Ukraine was recognized as a market economy by the European Union and the United States in 2006.

On the other hand, nearly every institutional reform in all spheres was late, incomplete or inconsistent⁸. Located between Russia and the European Union geographically and politically Ukraine remains under the external pressure of these competing powers. Therefore, internal

⁷ Friedrich-Joachim Mehmel, Frans van Arem, Court-bounded and Commercial Mediation— a Pilot Project in Ukraine: a story of success, CoE, 2011

⁸ Aslund 2009, p. 5 (Aslund 2008, p. 155)

political forces with radically different geopolitical orientation took turns running the country over the course of quarter century of Ukrainian independence. A high level of political instability was also caused by the semi-presidential model of governance which has led to endless confrontations between the president and prime ministers, a high rate of cabinet turnover and high levels of intra-executive conflicts.⁹

Similarly, economic and business environments remain highly volatile. Although in both economic crises of 1998 and 2008 Ukraine managed to escape major financial disasters, the country balanced on the edge of default. Needless to say that mass protests in Kyiv, the annexation of Crimea by Russia and the armed conflict in Eastern Ukraine in 2013-2014 have magnified the socio-political uncertainties. Thus, recurring political and economic crises made Ukrainians feel accustomed to permanent uncertainty and locked the country into a cyclical timeframe with an extremely low horizon aiming at survival ‘from one harvest to the next, from one budget to the next’.¹⁰

Within this highly unstable political and economic environment, reform of the judiciary played one of the key roles. From the very first days of independence it was seen as a priority by local reformers and international donors alike. Consequently, it has been undergoing a permanent, yet partial and selective, reform. The technical aid of international donors did improve the operational capacity of the courts through computerization, better case management and training of personnel. However, reforms aimed at the independence of judges were implemented partially and were informally subverted on the ground. Independence of judges remains an Achilles heel of the Ukrainian justice system. Corruption amongst judges and the political influence on them was one of the driving forces behind popular protests in 2004 and 2013.

Thus, instability and uncertainty remains the main characteristic feature of the Ukrainian post-Soviet transition.

Legal Framework for Settlements

Nevertheless, the Soviet legacy still played some positive role in offering a relatively stable foundation to many market-based institutions, including mediation. Among the factors that made mediation possible in post-Soviet Ukraine was the legal framework favorable for settlements. Settlement-friendly procedural legislation of Ukraine owes much to its immediate predecessor – Soviet procedural law.¹¹ In turn, Soviet procedural law inherited inquisitorial traditions of the civil

⁹ (Protsyk 2003, p. 1092)

¹⁰ (Pakhomov 2010, p. 26)

¹¹ It is often argued that mediation-like dispute resolution has been practiced in Ukraine, and generally on the territory of the Russian Empire, for centuries. However, it is difficult to see the immediate continuity and historical links of these

law systems. After the Bolsheviks came to power in Russia in 1917, the idea of widely accessible justice system made participation of lay people in administration of Soviet justice not only possible but politically desirable.¹² Litigants were free to settle their case out of court and to bring their settlement agreements (amicable settlement agreement – *myrova ugoda*) to be stamped by the courts.¹³ The overall aims of the civil procedure of the late Soviet period were directed towards “correct” and “rapid” disposal of civil cases.¹⁴

In relations between socialist enterprises the speed of case settlement became even more important. Since 1963 the law introduced a mandatory pre-trial dispute resolution procedure (*preteniiny poriadok*) for all inter-enterprise disputes.¹⁵ This procedure required parties, before initiating a lawsuit, to exchange written notices according to a specific template and thereby to attempt to amicably resolve their disagreement; otherwise, the courts¹⁶ would have to dismiss the claim.¹⁷ Furthermore, after the claim had been accepted by the court, the judge was obliged to actively promote settlement between the parties and only if it did not work, the case could proceed to full-blown trial. This was called a ‘principle of *arbitruvannia*’.¹⁸ Generally, procedural mechanisms that encouraged pre-trial settlements, as well as in-court settlements, did achieve the aim of clearing the dockets of the Soviet courts.¹⁹

community based institutions to modern mediation practice. See, Anastasia Kanariova, *Restorative Practices in Ukrainian Traditions*, BULLETIN OF RESTORATIVE JUSTICE (2011). Serhiy Biluga, *Genesis of Legal Thought as to Third-Party Dispute Resolution*

2EUROPEAN POLITICAL AND LAW DISCOURSE (2015).

¹² William E Butler, *Comradely Justice Revised*, 3 REVIEW OF SOCIALIST LAW (1977). Maria Łoś, *The myth of popular justice under communism: A comparative view of the USSR and Poland*, 2 JUSTICE QUARTERLY (1985). Yoram Goralzki, *Delegalization in Russia: Soviet Comrades' Courts in Retrospect*, 46 THE AMERICAN JOURNAL OF COMPARATIVE LAW (1998).

¹³ Kathryn Hendley, *Remaking an Institution: The Transition in Russia from State Arbitrazh to Arbitrazh Courts*, 46 THE AMERICAN JOURNAL OF COMPARATIVE LAW, 101 (1998); P. I. Bardin, *The Principles of Civil Procedure of the USSR and the Union Republics*, 1 SOVIET LAW AND GOVERNMENT (1962).

¹⁴ Principles of Civil Procedure of the U.S.S.R. and the Union Republics 1961 "Osnovy grazhdanskogo sudoproizvodstva Soiuza S.S.R. i soiuznikh respublik," *Vedomnosti Verkhovniogo Soveta Soiuza Sovetskikh Sotsialisticheskikh Respublik* (15 Dekabria 1961g.), pp. 1307-1323. See also, Don W Chenoweth, *Soviet civil procedure: history and analysis*, 67 TRANSACTIONS OF THE AMERICAN PHILOSOPHICAL SOCIETY (1977).

¹⁵ Postanovlenie Gosarbitrazha pri Sovete Ministrov SSSR “Ob utverzhenii Pravil rassmotreniia khoziaistvennykh sporov gosudarstvennymi arbitrazhami” (1 July 1963), *Sbornik instruktivnykh ukazanii Gosarbitrazha pri Sovete Ministrov SSSR* (1964) No.24 item 101.

¹⁶ From 1931 all the disputes between socialist enterprises were considered by *gosarbitraz* - a quasi-administrative state agency. See, Stanislaw Pomorski, *State Arbitrazh in the USSR: Development, functions, organization*, 9 RUTGERS-CAM LJ 61(1977).

¹⁷ Tatiana Kyselova, *Preteniia Dispute Resolution in Ukraine: Formal and Informal Transformation*, 40 REVIEW OF CENTRAL AND EAST EUROPEAN LAW (2015).

¹⁸ Tetiana Stepanova, *Pryntsyv arbitruvannia iak osnovny pryntsyv gospodarskogo sudochynstva*, 11 RYNKOVA ECONOMIKA (2008).

¹⁹ Soviet statistics from the 1980s and later estimates revealed that around two-thirds of commercial disputes among state-owned enterprises were fully resolved through the *preteniia* procedure without any resort to *gosarbitrazh*. Nikolai Abramov, *Khoziaistvenno-protseessual'noe pravo Ukrainy* (Odissey, Khar'kov, 2003), 25. Mikhail Kleandrov, *Ekonomicheskoe pravosudie v Rossii: proshloe, nastoiashchee, budushchee* (Wolters Kluwer, Moscow, 2006), 240.

After the breakdown of the Soviet Union in 1991, Ukraine faced a task to rapidly reform its court system inherited from the Soviet Union according to the new standards of independent and fair justice. At the time of transition, justice based on adversarial principles was seen by the reformers as a far more important goal than efficiency. Consequently, the mandatory pre-trial dispute resolution (*pretenziia*) was seen as depriving citizens of their constitutional right to a fair trial and was abolished in 2001.²⁰ According to similar logic, the active role of a judge in assisting parties to settle in court was also eliminated in 2001.²¹ It was substituted with an informational obligation of the judge to make parties aware of their right to settle which most of the judges currently treat as an empty formality.²² What remained from the Soviet procedural law was the right of the parties to settle at any stage of court proceedings including at the enforcement stage²³ and an option to stamp the settlement agreement by the judge and to enforce it in the same way as a court judgement.²⁴

The move back to the greater informalism started again around the second decade of the new millennium. Since 2006 provisions on mediation began to be included into bits and pieces of legislation on legal aid,²⁵ social work²⁶ and juvenile justice,²⁷ as well as policy documents of the President.²⁸ In 2012 the new Code of Criminal Procedure has for the first time introduced a whole

²⁰ Zakon Ukraïny "Pro vnesennia zmin do Arbitrazhnogo Protseural'nogo Kodeksu Ukrayiny" (17 May 2001) No.2413-iii, *Vidomosti Verkhovnoi Rady Ukraïny* (2001) No.31 item 147. In 2002 Constitutional Court of Ukraine stated that "compulsory pre-action dispute resolution that excludes the possibility of considering the claim [by courts] and delivering justice based thereupon, violates the human right to a fair trial. [...] The choice of particular method of legal defense, including pre-action dispute resolution, is a right but not a duty of a person." Konstyutsiynyi Sud Ukraïny, "Sprava pro dosudove vreguliuвання sporiv (st. 124 Konstyutsiyi Ukraïny)" (9 July 2002) No.1-2/2002, *Ofitsiynyi visnyk Ukraïny* (2002) No.28 item 1333

²¹ Про судоустрій України: Закон України від 07.02.2002 р. // Відомості Верховної Ради України. - 2002. - № 27-28. - Ст. 180

²² During preliminary hearing and in the beginning of the hearing on the merits, the judge has to inquire with both parties *inter alia* whether they wish to sign an amicable agreement. See, Code of Civil Procedure, Articles 130, 173; Code of Administrative Procedure, Articles 111, 135. The Code of Commercial Procedure does not contain even this informative obligation of the judge

²³ Code of Civil Procedure, Articles 31, 306, 334, 372; Code of Commercial Procedure, Articles 78, 121; Code of Administrative Procedure, Articles 51, 196, 219, 262

²⁴ The court checks whether the settlement agreement is not in contradiction of the law and ensures that it does not violate third parties' rights, liberties or interests. Code of Civil Procedure, Article 175; Code of Commercial Procedure, Article 78; Code of Administrative Procedure, Articles 51, 113, 136

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²⁷ Концепція розвитку кримінальної юстиції щодо неповнолітніх в Україні, схвалена Указом Президента України від 24 травня 2011 року N 597/2011. <http://zakon4.rada.gov.ua/laws/show/597/2011> Лист Міністерства освіти і науки України «Щодо поліпшення превентивного виховання та профілактичної роботи з подолання злочинності серед неповнолітніх», N1/9-632 від 11.09.2009 р. Постанови Пленумів Верховного Суду України (2004, 2006): (№ 5 від 16 квітня 2004 р. «Про практику застосування судами України законодавства у справах про злочини неповнолітніх»; № 13 від 2 липня 2004 р. «Про практику застосування судами законодавства, яким передбачені права потерпілих від злочинів»; № 2 від 15 травня 2006 р. «Про практику розгляду судами справ про застосування примусових заходів виховного характеру»).

²⁸ In the presidential Conception on Reform of Judiciary According to European Standards (2006) mediation was defined as a professional activity aimed at directing parties towards compromise and resolution of a dispute by their

chapter on agreements into criminal procedure, including plea bargaining agreements and agreements between victims and offenders.²⁹ In June 2016 the Parliament amended Article 124 of the Constitution to directly allow the law to establish a mandatory pre-trial dispute resolution mechanism thereby giving a green light to mandatory court mediation if someday legislators would deem it necessary.³⁰

Thus, it is a commonly expressed opinion of Ukrainian mediators and judges that the legal framework, back in 1990-ies as well as today, is capable of accommodating mediation even without major legislative changes and without express authorization from the government. Mediation was not and is not prohibited by Ukrainian law and for those cases that have been mediated within pilot court projects functioned relatively well.

Bringing Mediation Ideas to Ukraine

The first attempts to plant institutionalized mediation into Ukrainian soil date back to the late Soviet times. The inevitable collapse of the Soviet Union caused chaos in all spheres of social life, and primarily in employment relations. The Donetsk region, as a hotbed of the coal-mining industry, faced a massive wave of industrial strikes. In the late 1980-ies a group of psychologists from Donetsk developed contacts with the American Arbitration Association and the US Federal Mediation and Conciliation Service and conducted a series of joint Soviet-American seminars on mediation and conflict resolution in Donetsk and Luhansk regions. This mission resulted in two rather independent developments.

First, in 1994 the Donetsk Psychological Center partnered with the US NGO Search for Common Ground to initiate the first mediation centre in Ukraine. This initiative eventually resulted in eight mediation centres being set up all over Ukraine and supported by a series of grants from USAID, Eurasia Foundation and other donors. The second development concerned labor disputes. In order to counteract industrial strikes, the Ukrainian government, with the financial assistance of USAID, set up a new governmental agency in 1998 – the National Mediation and Conciliation Service³¹ which was accountable solely to the President of Ukraine and authorized to facilitate settlements of collective labor disputes.³²

own means. Decree of the President of Ukraine On the Concept of Court Reform to Foster Fair Justice in Ukraine in accordance to European Standards, 10 May 2006, No 361/2006, <http://zakon3.rada.gov.ua/laws/show/361/2006>

²⁹ Code of Criminal Procedure. Chapter 35 grants victims and/or offenders the right to settle compensation issues arising out of minor and medium level criminal offenses

³⁰ The Law on Amendments to Constitution of Ukraine, 2 June 2016, No №1401-VIII, <http://zakon5.rada.gov.ua/laws/show/1401-19>

³¹ Law of Ukraine On the Resolution of Collective Labour Disputes of 3 March 1998, No 137/98-BP <http://zakon3.rada.gov.ua/laws/show/137/98-%D0%B2%D1%80>

³² Is not doing mediation now. Why require a separate research

By the end of the 90-ies the center for mediation moved from Donetsk to Kyiv. In 2001 the Ukrainian Centre for Common Ground (UCCG) was registered in Kyiv and became the leader of mediation in criminal matters, restorative justice, community building, and school mediation.³³ UCCG created its own network of more than 15 partner Ukrainian NGOs.³⁴

In 2006 the International Finance Corporation, World Bank Group (IFC) conducted a survey of 1,000 Ukrainian businesses³⁵ that indicated some desirability of the IFC's mediation intervention in Ukraine. Eventually, IFC offered a seed grant to set up a Ukrainian Mediation Centre at the Kyiv-Mohyla Business School that has become the leading training center in commercial and family mediation in Ukraine. Around a dozen regional mediation organizations, active mostly in popularization of mediation and mediation training, were registered in Ukraine over the course of the last twenty years.

The UCCG and the Ukrainian Mediation Center, along with the Odesa Mediation Group and a few individual mediators, established an informal Coalition for Promotion of Mediation in Ukraine³⁶ and focused their efforts at legal regulation. Despite ten drafts of a mediation law having already been registered with the Parliament by the time of this writing, the law is still to be adopted. In 2014 the Coalition succeeded in expanding itself into a Ukrainian National Association of Mediators (NAMU)³⁷ that seeks to represent Ukrainian mediators and mediation organizations at a national level.

In parallel to this process, the movement to introduce mediation into the court system of Ukraine was supported by international donors. Based on information obtained through the interviews in this study, at least six mediation projects were piloted in seven courts of general and administrative jurisdictions of the first and appellate instances since 1997.

Thus, as it has been shown by this brief historical sketch of mediation development, by 2016 Ukraine has got a recognized professional community of mediators that went through the stage of establishment of various professional organizations, competition among themselves and integration under a single umbrella association.

Mediation community in 2016

³³ <http://www.uccg.org.ua/> + Erbe erbe grown popularity of facilitative adr SURVEY UKRAINE p 387-389; http://www.sfcg.org/programmes/ukraine/programmes_ukraine.html

³⁴ <http://ipc.org.ua/en/about/>

³⁵ Ukraine Commercial Dispute Resolution Study: Researching Commercial Disputes among Ukrainian Companies. (2007).

³⁶ Initial Coalition included the Ukrainian Center for Common Ground, Ukrainian Mediation Center, Odesa Mediation group and Tatiana Khudyakova as an individual mediator.

³⁷ National Association of Mediators, Ukraine <http://namu.com.ua/>

In 2016 the mediation community in Ukraine consists of one national umbrella association, several powerful national centers of mediation and a number of local organizations promoting mediation.

Ukrainian National Association of Mediators (NAMU)

NAMU was established in 2014 as an umbrella organization for Ukrainian mediators active in all areas of mediation. It has individual membership and official partnerships with most mediation organizations in Ukraine. Its main goals are drafting and lobbying for legislation on mediation in coordination with all interested stakeholders in Ukraine and internationally; development of joint strategy of mediation development in Ukraine; coordination of efforts of mediators to set up and monitor professional standards of conduct; establishment of a national registry of mediators. In 2015-2016 NAMU implemented a project called “Promotion of Practical Implementation of Mediation in Ukraine and Interaction with the Justice System” sponsored by the USAID Fair Justice Program. Within the framework of the project, NAMU developed a database of the 23 projects on mediation implemented in Ukraine since 1997; conducted research of mediators on their vision of mediation in Ukraine; developed a consolidated draft of the law on mediation and conducted a series of consultations with members of the Ukrainian Parliament, Ministry of Justice, all levels of courts, Administration of the President of Ukraine, Ministry of Social Policy and other stakeholders. NAMU is a co-organizer of the annual OSCE Conference on Dialogue Initiatives in Ukraine.

Ukrainian Mediation Center (UMC)

UMC was established in 2007 under the auspices of the Kyiv-Mohyla Business School with financial assistance from the International Finance Corporation, World Bank Group. The start-up project included the production of an educational film about the benefits of mediation,³⁸ training and certification of mediators and mediation trainers by the British Centre for Effective Dispute Resolution (CEDR), UK. In 2008-2014 UMC implemented a court mediation project at Dniproviskiy court of general jurisdiction, Kyiv; a mediation project at the Ukrainian Insurance Agency “Tas”; a mediation project at the Darnitsa Children Service, Kyiv. Within these projects UMC’s mediators tested various models of case referrals to mediation.

UMC’s major expertise focuses on mediation training. Since 2010 more than 2.000 people have been trained at UMC’s educational courses in basic mediation skills, negotiation, family mediation, mediation competences for managers and others. UMC currently offers an international Business-Mediator certification programme in partnership with the IHK Academy of Chamber of

³⁸ Film “Mediation: How to Quickly and Effectively Solve Disputes”, nominee to the International Competition CEDR Awards 2009, available at <http://ukrmediation.com.ua/en/>

Commerce and Industry for Munich and Upper Bavaria.³⁹ UMC's trainers also conducted mediation courses in Kazakhstan, Kyrgyzstan, Tajikistan, Uzbekistan, Belarus, Moldova and Russia and are active in international research projects.⁴⁰ In 2013 UMC was awarded an international award "Mediation era" for achievements in ADR research. Since 2014 UMC leads the German-Ukrainian project on development of mediation centers at the national and regional Chambers of Trade and Industry.⁴¹

Institute for Peace and Common Ground (formerly Ukrainian Center for Common Ground - UCCG). The UCCG was established in 2001 as a sister organisation of the US Search for Common Ground.⁴² It had two main areas of activity – restorative justice/mediation in penal matters, and school mediation. Within the framework of restorative justice, UCCG's strategy was aimed at linking together the state agencies, mediators and disputants in order to create an operational mechanism of interaction. This multilevel referral mechanism has been implemented in 14 regions of Ukraine and resulted in 541 mediated cases and 152 family group conferences (2004-2012).⁴³ UCCG's members have conducted five national and international conferences, dozens of workshops and presentations in mass media; published more than thirty original and translated books and periodicals;⁴⁴ created two educational and promotional films about restorative justice and dialogues in Ukraine;⁴⁵ developed a University course on Mediation and Social Work which is taught at Kyiv-Mohyla Academy.⁴⁶ UCCG lobbied the Ministry of Justice, the Ministry of Internal Affairs, the Academy of Prosecutors, the Academy of Judges, and the Supreme Court of Ukraine to adopt recommendations encouraging the use of mediation in juvenile justice and penal matters by

³⁹ Business-Mediator Programme in Ukraine, <http://business-mediation.com.ua/> Academy of Chamber of Commerce and Industry for Munich and Upper Bavaria has trained more than 400 mediators during the last 10 years https://www.muenchen.ihk.de/de/recht/Mediation_Schiedsgericht/ausbildung-wirtschaftsmediator-ihk

⁴⁰ Galyna Eromenko & Tatiana Kyselova, *Mediation Regulation in Ukraine*, in THE VARIEGATED LANDSCAPE OF MEDIATION REGULATION: COMPARATIVE STUDY OF MEDIATION REGULATION IN EUROPE AND THE WORLD (Fred Schonewille & Manon Schonewille eds., 2013). In 2013 UMC has developed a cross-cultural case-study which was selected through blind peer-review for the EuroMed Academy of Business (EMBRI) conference in Portugal.

⁴¹ The project created mediation centers at chambers of trade and industry in Kyiv, Lviv, Zaporijia, Kramatorsk. See, for example, Mediation Center at Kyiv Chamber of Trade and Industry <http://kiev-chamber.org.ua/ru/100/>; Mediation Center at L'viv Chamber of Trade and Industry <http://lcci.com.ua/centr-mediaciji-pry-lvivskij-tpp/>

⁴² <http://www.uccg.org.ua/> http://www.sfcg.org/programmes/ukraine/programmes_ukraine.html See also Nancy Erbe, *Global Popularity and Promise of Facilitative ADR*, *The*, 18 TEMP. INT'L & COMP. LJ (2004)

⁴³ Roman Koval & Natallya Pylypiv, *Stan vprovadzhennia vidnovnogo pravosuddia v Ukraini*, 1-4 VIDNOVNE PRAVOSUDDIA V UKRAINI (2012); Natallya Pylypiv, *Vidnovne pravosuddia v Ukraini: Rezultaty ta perspektyvy*, 17 see id. at (2011). According to Roman Koval, the President of the UCCG, these statistics were collected in 8 regional centers and the number of mediations and restorative justice conferences in all 14 centers might well exceed 800 for the stated period.

⁴⁴ Around 30 original books on restorative justice and school mediation in Ukrainian, seven books translated from English, and a periodical newsletter

⁴⁵ Film "Cured by Justice" <https://www.youtube.com/watch?v=9LHaWfZVD-o> Film "To the Country of People" <https://www.youtube.com/watch?v=UvXqEkw03yU&spfreload=10>

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these agencies.⁴⁷ Since 2006 the UCCG implemented a number of peer mediation projects at Ukrainian highschoools where school children mediated the disputes of their peers under the supervision of a teacher or a school psychologist.⁴⁸ In ten years the number of school mediation centers increased to more than 300. In 2012 UCCG was reorganised into the Institute for Peace and Common Ground as a fully independent organization. Its activity currently focuses on the consequences of the armed conflict in Eastern Ukraine, including a project on school mediation in Mariupol; a *pro bono* conflict clinic in Kyiv; a national network of 17 partner NGOs; and a project on disarmament, demobilization and reintegration of Ukrainian soldiers.⁴⁹

Odesa Odesa Mediation Group is the only fully-functional organization which survived from the first mediation centers since 1995. It continues to actively promote mediation in the South of Ukraine through mediation trainings, projects in courts and school mediation, publications and public events. Odesa Mediation Group has become a leader in the dialogue movement connected to the Odesa conflict of May 2014 and contributes to the dialogue movement nationally.⁵⁰ Recently, another Odesa-based organization came into active existence – the Ukrainian Academy of Mediators with the specific focus on promoting mediation for lawyers. The Academy conducts awareness raising events, regular trainings in mediation for lawyers, coordinates the mediation activity of the National Bar Association, and hosts annual national Mediation and Law conferences in Odesa.⁵¹

L’viv has had a more diverse and more crowded mediation movement. In the early 2000s L’viv and Ivano-Frankivsk NGOs were able to obtain some donor support to set up the L’viv Mediation Association which ceased to exist by the time of this writing. The lecturers of the L’viv Polytechnic University, Department of Social Work, in cooperation with the University of Manitoba, Canada have developed and taught several courses: “Mediation and dispute resolution” and “Management aspects of mediation and dispute resolution”. About 20 mediators from Western Ukraine have been trained under US and Canadian programmes at the University of Oregon, the Canadian Institute of Conflict Resolution and other international institutions. L’viv has hosted several annual ADR and Mediation Forums. In 2014 the L’viv Mediation Center was set up and began to lead the mediation movement in Western Ukraine. The L’viv Mediation Center has piloted

⁴⁷ For more information, see the websites on Conflict Resolution in Ukraine http://www.commonground.org.ua/ukr/uccg_main.shtml

⁴⁸ See, <http://www.safeschool.org.ua/>, <http://uccg.org.ua/index.html> For example, the Project by the Lugansk Regional Mediation Group and Polish partners, sponsored by the Polish Aid Agency “Polska Pomoc” <http://mediatsjavshkole.com/>

<http://school56.klasna.com/ru/site/shkilna-mediatsiya.html> <http://newspaper.pmg17.vn.ua/dovira>

⁴⁹ <http://ipcg.org.ua/en/about/>

⁵⁰ Odesa Mediation Group <https://www.facebook.com/OdesaGroupMediation/>

⁵¹ Ukrainian Academy of Mediators <http://mediation.ua/?lang=en> Founded in 2014 by Odesa Mediation Group and the law firm “Prioris”

several mediation projects in administrative disputes between local city authorities and individuals; it conducts trainings for mediators, and hosts annual national Mediation Forums in L’viv.⁵² The L’viv Chamber of Commerce and Industry has established one of the first chamber-attached mediation centers in Ukraine.⁵³

Luhansk. One of the oldest mediation centers was established in Luhansk – the Luhansk Mediation Group. Until the armed conflict of 2014, it was active in school mediation and a restorative justice project within the network of the Ukrainian Center for Common Ground. In 2010-2011 the Luhansk Didorenko State University of Internal Affairs introduced a course on mediation for their students in cooperation with American mediators from the Peace Corps.⁵⁴

Other regions A number of other mediation organizations in Kharkiv, Vinnitsa, Pyryatyn, Kherson, Ivano-Frankivsk and Kyiv⁵⁵ promote mediation in Ukraine through awareness raising and educational events, mediation trainings, University courses, and general popularization through mass media.

The following section will unravel how the interests of these mediation organizations evolved over time and interacted with other stakeholders of mediation development in the face of numerous challenges.

II. Challenges of Peace

Back in 1991, the mediation ideology fell into seemingly fruitful soil. International donor organizations, which were abounding in Ukraine in the early 1990s, were willing to offer financial support for mediation initiatives. The legal framework was settlement friendly and allowed for the operation of private mediation as well as voluntary court mediation schemes. The courts were perceived as inefficient and distrusted and this was expected to motivate people to avoid litigation altogether through alternative means of dispute resolution.⁵⁶ Nevertheless, the path to mediation turned out to be more difficult than initially expected. Some challenges faced by the first mediators were successfully worked out, yet others seem to have impeded or slowed down mediation development for at least two decades.

1. Professionalization of mediation

⁵² Lviv Mediation Center <http://www.mediation.lviv.ua/>

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⁵⁴ <http://cxid.info/v-lguvd-imeni-eduarda-didorenko-nachalis-zanyatiya-po-mediacii-foto-n86926>

⁵⁵ Center of Law and Mediation, Kharkiv <https://www.facebook.com/centerlawmediation> ; Podolsky Mediation Center, Vinnitsa; NGO Women Initiatives, Pyriatin; “Youth Center of Regional Development”, Kherson; Center at Law Institute of Stefanyk Prykarpatsky National University; School of Mediation at the Academy of Advocacy, Kyiv <http://aau.edu.ua/ua/mediation-school/>; Center for Mediation and Moderation at Kyiv-Mohyla Academy, Kyiv; Kyiv Mediation Center <http://www.kyivcm.com/>

⁵⁶ USAID Guide

Developing a distinct professional identity: whether to remain faithful to the pure facilitative approach?

From the early days of mediation development, Ukrainian mediators decided to rely on a single anglicized term “*mediatsiya*” as a marketing strategy.⁵⁷ They were keen to establish a distinct professional identity based on the interest-based facilitative mediation model which admittedly has its roots in the seminal works of Roger Fisher and William Ury.⁵⁸ Given deviations in practice and inconsistent ideologies the mere existence of this model is highly debatable,⁵⁹ nevertheless, it continuously serves as an aspirational ideal for Ukrainian mediators. It was first brought to Ukraine by the American Arbitration Association through the first USAID-sponsored projects in the 90-ies and later was spread by way of the training programs of the Ukrainian Mediation Center.⁶⁰ This model of mediation was referred to by Ukrainian mediators interviewed in this study as “the classic mediation”.

In short, the main goal of a facilitative mediator in this ‘classic mediation’ model is to facilitate a settlement process through the eliciting of interests of the conflict parties that underlie their initial positions in negotiations. Through enhanced communication, rephrasing, reframing and targeted questioning, the mediator helps the parties to generate creative solutions that satisfy at least some of their interests. The mediator should be perceived by the parties as neutral and independent and the process as confidential. The facilitative aspect of the model emphasizes the focus on parties’ empowerment and self-determination, full responsibility of the parties for crafting their own solutions, and delicate guidance of the mediator in procedural aspects of the mediation. The procedural framework of facilitative mediation usually includes a first joint meeting of the parties, individual caucuses, and concluding joint meeting to sign an agreement, which is the most desirable outcome of the process.

⁵⁷ In Russia, the term “mediation” (“*mediatsia*” – Russian anglicized term) and its competing Russian language counterparts - *posrednichestvo* and *primirenie* - have triggered many confusing terminological debates. See, Kathryn Hendley, *What If You Build It and No One Comes: The Introduction of Mediation to Russia*, 14 CARDOZO J. CONFLICT RESOL. (2012); Е. И. Носырева & И. А. Стернин, «Посредничество» или «медиация»: к вопросу о терминологии, ТРЕТЕЙСКИЙ СУД (2007); А. Д. Карпенко, *Terminy mediatsii kak element razvitiya praktiki v Rossii*, 3 TRETEYSKIY SUD (2011); Д. Давыденко, *Медиация. Посредничество и примирение*, МЕДИАЦИЯ И ПРАВО (2011).

⁵⁸ ROGER FISHER, et al., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Penguin, 2011); Carrie Menkel-Meadow, *Why Hasn't the World Gotten to Yes? An Appreciation and Some Reflections*, 22 NEGOTIATION JOURNAL (2006).

⁵⁹ John Lande, *Toward More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. (2000); Kenneth M Roberts, *Mediating the evaluative-facilitative debate: Why both parties are wrong and a proposal for settlement*, 39 LOY. U. CHI. LJ (2007).

⁶⁰ SCOTT BROWN, et al., *ALTERNATIVE DISPUTE RESOLUTION PRACTITIONERS GUIDE 8* (Center for Democracy and Government, USAID, 1998); Nancy Erbe, *Global Popularity and Promise of Facilitative ADR*, 18 TEMP. INT'L & COMP. LJ (2004); Carole J Brown, *Facilitative Mediation: The Classic Approach Retains Its Appeal*, 4 PEPP. DISP. RESOL. LJ (2003). See also the description of mediation at the website of Ukrainian Mediation Center <http://ukrmediation.com.ua/en/>; Kiev Mediation Center <http://www.kyivcm.com/#!about-us/c23uz>

The focus on the facilitative mediation model in Ukraine excluded differing styles of mediation such as transformative⁶¹ or evaluative mediation.⁶² Transformative mediation is expressly used only by the Institute of Peace and Common Ground in their restorative justice programs but rather as one of many methods alongside facilitative mediation, family group conferences and decision-making circles. These methodologies are jointly referred to as a ‘transformative approach to conflict’.⁶³ Training programs on civil and commercial mediation do not expressly mention the transformative model or style of mediation.

Evaluative mediation is outlawed by the mainstream mediation discourse both by commercial mediators and restorative justice practitioners as an illegitimate mutation of the facilitative mediation model. This nearly religious belief in facilitative mediation has obtained a remarkable and distinctive embodiment in the draft law on mediation. All the ten drafts reiterated the same basic principles of mediation: voluntary participation of the parties, parties’ self-determination, independence and neutrality of mediator, and confidentiality of information obtained in mediation. More precisely, the final two drafts registered in the Parliament in December 2015 contain the provisions that the decisions on the merits are made solely by the parties; the mediator has no right to solve the conflict of the parties; the mediator can advise parties exclusively on procedural matters and matters concerning the settlement agreement; finally, the mediator has no right to evaluate parties’ behavior and their positions.⁶⁴ This offers a ground to state that the mainstream Ukrainian mediation community remains faithful to purity of facilitative mediation both in training and legal regulation.

⁶¹ Robert Baruch Bush and Joseph Folger are the founders of the transformative mediation theory. See, ROBERT A BARUCH BUSH & JOSEPH P FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (John Wiley & Sons, 2004); Joseph P Folger & Robert A Baruch Bush, *Transformative mediation and third-party intervention: Ten hallmarks of a transformative approach to practice*, 13 *MEDIATION QUARTERLY* (1996); Lisa Blomgren Bingham, *Transformative mediation at the United States Postal Service*, 5 *NEGOTIATION AND CONFLICT MANAGEMENT RESEARCH* (2012); Joseph Folger & Robert A Baruch Bush, *Transformative Mediation: A Self-Assessment*, 2 *INTERNATIONAL JOURNAL OF CONFLICT ENGAGEMENT AND RESOLUTION* (2014). For critique of and debates around the transformative mediation model see Robert A. Baruch Bush, *The Unexplored Possibilities of Community Mediation: A Comment on Merry and Milner*, 21 *LAW & SOCIAL INQUIRY* (1996); Neal Milner, *Mediation and Political Theory: A Critique of Bush and Folger*, see id. at; Robert J. Condlin, *Curious Case of Transformative Dispute Resolution: An Unfortunate Marriage of Intransigence, Exclusivity, and Hype, The*, 14 *CARDOZO J. CONFLICT RESOL.* (2013); Robert A Baruch Bush & Joseph P Folger, *Response to Condlin's Critique of Transformative Mediation*, 15 see id. at.

⁶² Although admittedly now facilitative and evaluative mediation styles are quite difficult to distinguish in practice. Evaluative mediation practices permit the mediator to render advice with regards to the merits of the dispute, prospects of possible litigation, settlement options, etc. For the facilitative-evaluative debate see: Leonard Riskin, *Understanding mediators' orientations, strategies, and techniques: A grid for the perplexed*, 1 *HARVARD NEGOTIATION LAW REVIEW* (1997); Leonard L Riskin, *Decision-making in mediation: The new old grid and the new new grid system*, 79 *NOTRE DAME LAW REVIEW* (2003); Kimberlee K Kovach & Lela P Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 *HARVARD NEGOTIATION LAW REVIEW* (1998); Joseph B Stulberg, *Facilitative versus Evaluative Mediator Orientations: Piercing the Grid Lock*, 24 *FLA. ST. UL REV.* (1996); Dorothy J. Della Noce, *Evaluative mediation: In search of practice competencies*, 27 *CONFLICT RESOLUTION QUARTERLY* (2009).

⁶³ Interview with Koval

⁶⁴ Proekt Zakona Ukrayiny “Pro Mediatsiyu” [Draft Law of Ukraine on Mediation], 17 December 2015, available at art. 4-9; Proekt Zakona Ukrayiny “Pro Mediatsiyu” [Draft Law of Ukraine on Mediation], 29 December 2015, available at art. 6-12.

Relying that rigorously on the facilitative approach is a double-sided coin. On the one hand, it allowed for establishing a professional identity of the Ukrainian mediation community in a quick and consistent manner. On the other hand, it lacks the flexibility required to apply mediation to various contexts in varied fields. Some evidence obtained in this study suggests that lawyer-dominated commercial mediation practice in Ukraine is heavily infused with evaluation.⁶⁵ Thus, the question of whether to maintain legislative adherence to the purely facilitative model of mediation, or to meet the expectations of consumers by allowing some evaluation, awaits its answer.⁶⁶ At the moment, given the scarcity of mediation practice, the facilitative model remains prevalent throughout the training practices and discourse of the mediation community.

Retaining unity of the professional community

It will be untrue to say that the Ukrainian mediation community have gone through the process of establishing their professional identity painlessly and happily. As in many other parts of the world, this process was thwarted by conflicting interests of various groups of mediators. Having observed the process of professionalization of the mediation community for nearly twenty years as a neutral international expert I had an honor to serve as a facilitator in several informal negotiations within the mediation community that had to address two lines of disagreements.

The first line was drawn based on ideologies of mediators and their eventual professional goals. It became apparent in this study that Ukrainian mediators do divide themselves into ‘commercial’ mediators with an eventual goal of making one’s living through mediation; and ‘social’ mediators seeking to promote the culture of peaceful conflict resolution in Ukrainian society. Based on these ideologies, ‘commercial’ mediators are mostly lawyers who view business as a major potential moving force for mediation in Ukraine. Therefore, they focused their practice on business disputes and commercialized mediation training making it the main source of support for their activity. In contrast, ‘social’ mediators are mostly non-lawyers – psychologists, social workers, human rights activists and others; they view their mission as strengthening social cohesion through community building. Therefore they work primarily with vulnerable groups of the population and focus their practice on family mediation, school mediation and restorative justice. Taking this focus into account, international donors naturally remained the only source of support for ‘social’ mediators.

This division is not sharp but is rather a matter of emphasis as both orientations are present within each group. It is not unique for Ukrainian mediators; similar tensions were identified for

⁶⁵ Interview ????

⁶⁶ One of the latest drafts suggested a more softer provision in respect to evaluative practices by allowing them under written agreement of the parties. See Proekt Zakona Ukrayiny “Pro Mediatsiyu” [Draft Law of Ukraine on Mediation], 17 December 2015, available at art. 8(3).

example, in the US context between money-makers and peace-makers in mediation.⁶⁷ Nevertheless, Ukrainian mediators had to reconcile these ideological orientations while drafting the text of the mediation law and professional standards of mediation.

The second line of division that became soon apparent can be drawn based on the approaches to the professional regulation of mediation. The group of mediators located in Kyiv and central Ukraine insisted on a market mechanism of mediation regulation with extensive self-regulation by professional organizations. In their vision, multiple mediation providers and mediation training centers in Ukraine would have an equal right to certify mediators, to maintain registries of mediators, to set up professional standards and to monitor mediation practice. Mediator organizations should be free to unite themselves into one or several national associations but no preference should be given to any of them.

In contrast, the proponents of centralized self-regulation from Odesa, in South-Eastern part of Ukraine, suggested to divide the mediation profession into two groups – mediators and ‘authorized’ mediators. The latter would have higher requirements as for education and training and would obtain an exclusive right to mediate cases referred to by the courts. ‘Authorized’ mediators would be certified and supervised by a centralized body – the Council of Mediators – comprising of mediators, judges, advocates and representative of the Ministry of Justice. The Council would also govern activities of non-authorized mediators. The Ministry of Justice would maintain the registry of ‘authorized’ mediators. The Ministry of Education would approve educational curricula for ‘authorized’ mediators.

These two competing approaches resulted in two alternative drafts of the mediation law submitted to Parliament. However, it soon became obvious that only a single united professional community can introduce the idea of mediation to the society and lobby for its legal regulation. Therefore, to the honor of Ukrainian mediators, they were able to overcome these tensions and to negotiate a unified approach to mediation regulation. While several top-down attempts by the donors to unite Ukrainian mediators under a single national umbrella organization did not work out, since 2009 Ukrainian mediators began their own informal cooperation. They organized themselves into an informal Coalition for Promotion of Mediation in Ukraine.⁶⁸ The members of the Coalition have drafted and lobbied the first draft of a mediation law registered with the Parliament in 2011 and were able to influence all the subsequent drafts.

⁶⁷ Urska Velikonja, *Making Peace and Making Money: Economic Analysis of the Market for Mediators in Private Practice*, 72 ALB. L. REV. (2009).

⁶⁸ The initial Coalition included the Ukrainian Center for Common Ground, Ukrainian Mediation Center, Odesa Mediation group and a few individual mediators.

In 2014 the members of the Coalition and a number of other mediators registered a National Association of Mediators of Ukraine⁶⁹ which assumed the role of a mediator within the mediation community. By 2016 remarkable progress has been achieved. Mediators have developed a Concept Paper on the legal regulation of mediation in Ukraine and a single consolidated text of the draft mediation law. Yet, with the apparent unity on the surface, the mediation community in Ukraine still have to put greater efforts to practising what they preach – to apply transparent and mediation-like procedures to finally complete the drafting process and to include the voices of a wider mediation community as well as all interested stakeholders.

2. Developing the market for mediation

Demand for mediation services

As in many, if not all, jurisdictions,⁷⁰ mediation in Ukraine suffers from the profound lack of popular demand in mediation services. The services market has not developed on its own and the mediation movement in Ukraine remains guided by the supply and not the demand.

The number of cases mediated annually remains an enigma. Statistics are available only with regards to donor-sponsored projects. While the number of mediations outside donor-sponsored projects might be higher, at the moment it is not possible to give any estimates. It is only the Ukrainian Mediation Center that posts online the short accounts of success stories – cases mediated or negotiated by the graduates of its educational programs.⁷¹ However, this is far from representing the statistical data. Attempts to estimate the number of cases mediated outside donor-sponsored projects are impeded by the confidentiality requirements and by the unwillingness of mediators to reveal this information.

This research has collected statistical information with regards to the donor-sponsored projects since 1997 which is summarized in Table 1 in Appendix 2. Most of the cases mediated within donor-sponsored projects were reported by the Ukrainian Center for Common Ground (UCCG) in the area of restorative justice.⁷² UCCG has developed a model that links together the state agencies, courts, local community leaders, mediators and disputants through a three-level

⁶⁹ National Association of Mediators, Ukraine <http://namu.com.ua/>

⁷⁰ Dean B. Thomson, *A Disconnect of Supply and Demand: Survey of Members' Mediation Preferences*, 21 CONSTRUCTION LAWYER (2001); Christopher T Whitten, *Making mediation services work: A market perspective*, 9 MEDIATION QUARTERLY (1992); S. Merry & S. Silbey, *What Do Plaintiffs Want: Reexamining the Concept of Dispute*, 9 JUSTICE SYSTEMS JOURNAL (1984); Benoit Bastard, *Family mediation in France: a new profession has been established, but where are the clients?*, 32 JOURNAL OF SOCIAL WELFARE & FAMILY LAW (2010); Hendley, CARDOZO J. CONFLICT RESOL., (2012); *Rebooting the mediation directive: Assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU.* (2014); Carrie Menkel-Meadow, *Variations in the Uptake of and Resistance to Mediation Outside of the United States*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2014 (Arthur Rovine ed. 2015).

⁷¹ Ukrainian Mediation Center <http://ukrmediation.com.ua/ua/success/>

⁷² Ukrainian Center for Common Ground <http://www.uccg.org.ua/>

mechanism: 1) crime prevention through mediation trainings and other events; 2) mediation of disputes between peers at schools; 3) mediation of criminal cases referred by the courts, police officers, child service officers and others. This multilevel referral mechanism has been implemented in 14 local community restorative justice centers and resulted in 541 mediated cases and 152 restorative circles conferences (2004-2012). 70 % of these cases were referred to mediators in the centers by police officers, 20% - by the courts, and the remaining 10% - by the prosecutor office, advocates, welfare offices, NGOs, schools, or parties themselves. Although settlement rates for these cases were not reported, the positive achievement was that offenders who took part in mediation did not reoffend and where the settlement agreements were signed they were voluntarily executed in full, thus amounting to 100% compliance rate.⁷³

Other donor-sponsored projects, mostly pilot court mediation schemes, account for another 178 cases mediated in 1997-2015. Put together these numbers amount to approximately 38 cases per year which is far below the minimum quantity identified, for example, for the EU countries in the 2014 Rebooting Mediation Study (500 mediations per year).⁷⁴

The reasons for this low level of demand in mediation are multiple and require deeper research. The respondents in this study pointed towards cultural patterns of behavior inherited from the Soviet past as major impediments for the development of mediation. Mediators shared the view that general unwillingness of the parties to take responsibility over making crucial decisions of their lives precludes the mere attempt to meet for a mediation session. Additionally, the political culture of transitional Ukraine that relied upon extreme polarization between the East and West of the country, exclusion of political opponents up to their criminal prosecution, political manipulation and violence makes ideas of cooperation, win-win and consensus-building extremely difficult to accept. These cultural patterns render mediation institutionalization a daunting task that requires a massive cultural shift in the society and at the same time increases the need for it in a long-term perspective.

To conclude, the lack of manifest demand for mediation services seems to be a cornerstone of the vicious circle where mediation is not in demand by general population, consequently trained mediators do not have a chance to master their skills and many abandon the idea to pursue a mediation career, which in turn undermines the capabilities of the mediation profession to develop the demand. So far the professional mediation community in Ukraine remains under-resourced to develop a full-fledged demand for mediation services on their own and obviously require external support for doing this.

⁷³ Pylypiv, VIDNOVNE PRAVOSUDDIA V UKRAINI, (2011).

⁷⁴ 'Rebooting' the Mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Measures to Increase the Number of Mediations in the EU, 2014, available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET\(2014\)493042_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf)

Demand for mediation training

Although, several dozens of cases mediated within each donor-sponsored court project is indeed a drop in the ocean, Ukrainian mediators were successful in developing another market – the market for training services. This market has recently proved to be fully functional and potentially profitable in Ukraine. Initial support by international donors allowed Ukrainian mediators to design a number of high-quality training products in basic and advanced skills of mediation, family mediation, mediation competences for managers, interest-based negotiations and others. They adapted role-plays and simulation exercises from the Western context to meet cultural expectations of Ukrainian participants, wrote their own scripts based on the cases mediated in Ukraine, and developed innovative methodologies of training. At the time of this writing there were at least three training centers in Kyiv, and one in each region of L’viv, Odesa, and Kharkiv.

Most of the training centers clearly pursued a business-oriented approach aimed at attracting the highest possible numbers of participants including lawyers, psychologists, social workers, managers, entrepreneurs, and any other occupations. A noteworthy example of the business approach to mediation training programs is offered by the recent collaboration between the Ukrainian Mediation Center and the German-Ukrainian Business Partnership Project and a number of other partners.⁷⁵ The project created a mediation certification course under the brand of “Business Mediator”⁷⁶ that was tailored specifically for the Ukrainian market and at the same time fully complied with the requirements of the Federal Mediation Association (BM) in the Federal Republic of Germany. The course consists of 220 hours of theoretical and practical training including practical exercises, role-plays, supervised simulations, work in peer-groups, and individual supervision by trainers. It is implemented by the Ukrainian Mediation Centre in cooperation with the IHK Academy of Chamber of Commerce and Industry for Munich and Upper Bavaria.⁷⁷ The lecturers are CEDR certified Ukrainian trainers in mediation and leading German business mediators. Certification is granted by a commission of German and Ukrainian trainers based on the oral presentation of a research paper and assessed performance in a mediation simulation. Participants are awarded certificates issued by the Munich and Upper Bavaria Chamber of Commerce and Industry. This is perhaps the first programme in the former Soviet Union that grants an internationally recognized certificate in a local educational setting supervised by foreign partners. Thus, by having met both local needs and the recognized international standards of

⁷⁵ German-Ukrainian Business Partnership project <http://business-mediation.com.ua/wp-content/uploads/2015/01/Werbung-Project-2.jpg> Delegation of German Economy in Ukraine <http://ukraine.ahk.de/> Lviv Chamber of Commerce and Industry <http://eng.lcci.com.ua/>

⁷⁶ Official website of the Business-Mediator Course in Ukraine <http://business-mediation.com.ua/>

⁷⁷ IHK Academy of Chamber of Commerce and Industry for Munich and Upper Bavaria https://www.muenchen.ihk.de/de/recht/Mediation_Schiedsgericht/ausbildung-wirtschaftsmediator-ihk

mediation training - the course was able to attract trainees from Ukraine, Germany and Belarus, despite extraordinarily high course fees (for Ukrainian standards). The program might have good prospects of becoming a self-sustainable and long-term business endeavor although it is difficult to predict its success in the current uncertain political and economic environment of Ukraine.

Similarly to commercial mediation training programmes, training in mediation skills became an integral part of most donor-sponsored projects in court mediation, peer mediation at schools, restorative justice and criminal mediation, which were conducted on an *ad hoc* basis. It was estimated by the interviewees in this research that there were altogether more than 3.000 people trained both in commercial certification programs as well as within donor-sponsored projects.⁷⁸

In sum, the demand for mediation skills in the Ukrainian market at the moment highly exceeds the demand for mediation as a dispute resolution service although both remain insignificant on a national scale. Whether proliferation of a training market is unambiguously a positive achievement remains questionable. On the one hand, mediation professionalization is unthinkable without high quality education and practical training.⁷⁹ On the other hand, given that the educational market gives much quicker returns on investments than mediation practice as such, it is not surprising that most able Ukrainian mediators invest more efforts to promote themselves as trainers in Ukraine as well as in the countries of the former Soviet Union such as Russia, Georgia, Kazakhstan and Kyrgyzstan. Consequently, these mediators have less time and incentives for mediation practice and development of demand for mediation services. According to the interviewees in this study, mediation trainers become aware of the fact that the lack of demand in mediation services by the public may eventually threaten the demand for mediation training.⁸⁰ Therefore, new schemes of apprenticeship and supervision are being currently elaborated by the Ukrainian Mediation Center and the National Association of Mediators.

Public awareness of mediation

Raising public awareness of mediation was logically seen as a primary objective for the development of demand in mediation. In contrast to Russia,⁸¹ Ukrainian mediation popularization

⁷⁸ Interviews with ????

⁷⁹ Harold L Wilensky, *The Professionalization of Everyone?*, 70 AMERICAN JOURNAL OF SOCIOLOGY (1964); David Ardagh, *Is mediation now a profession?*, 10 ADR BULLETIN (2009); Ronald M Pipkin & Janet Rifkin, *Social Organization in Alternative Dispute Resolution: Implications for Professionalization of Mediation*, 9 THE JUSTICE SYSTEM JOURNAL (1984); Geetha Ravindra, *Is Mediation a Profession*, 15 DISP. RESOL. MAG. (2008); Velikonja, ALB. L. REV., (2009).

⁸⁰ Interview????

⁸¹ Some Russian academics have objected to Russia following a European ideology of mediation. According to Professor Lisitsyn, "historical experience of conciliatory dispute settlement in our country is connected first of all to the state and the church and not to missionary activity of certain 'mediation providers'... Implementation of a court mediation model will demonstrate to our people that results of court reform can be successful. This will allow to actually (and not declaratorily) reduce court-loads and thereby decrease the attractiveness of "European justice". We need to prove to everyone that we can solve the problems of our court system by ourselves." See Valeriy Lisitsyn,

campaigns are characterized by the reliance on discourse of Europeanization that continues to inspire Ukrainian integration with the European Union.⁸² Ukrainian mediators have quickly adopted the official language of Europeanization and began representing mediation as an integral part of European culture and as an important European value.⁸³ Mediation was claimed to be directly “recognized” by the EU-Ukraine Association Agreement⁸⁴ and even “required for Ukrainian membership in EU and WTO”.⁸⁵ Mediation was marketed as a weapon against corruption that would help to build up a modern civilized court system.⁸⁶ Thus, by strategically using current political rhetoric Ukrainian mediators seek to gain political and popular support for mediation.

The European mediation discourse was equally supported by mediators and by international donors albeit from different starting points. Mediators campaigned for mediation at the grass-root level within wider professional communities of lawyers, psychologists, social workers, HR managers, entrepreneurs and other professions.⁸⁷ In contrast, donor-sponsored projects approached this task from above. They were relatively successful in conveying the benefits of mediation to the top-rank officials of the justice system - the heads of the ministries, prosecutors, presidents of the high courts, heads of the Qualification Commission of Judges and others - those to whom mediation NGOs had a restricted access.

Most popularization materials in both the top-down and bottom-up campaigns were published in narrowly specialized professional outlets targeted mostly at lawyers and businesspeople. Similarly, most of the presentations and awareness raising events were focused on this target group through meetings and conferences of various professional associations and groups. Such a marketing approach has resulted in a certain level of mediation awareness among professionals and triggered some interest in mediation training. However, these campaigns were

Mediation in Russia: Today We Observe Return to Roots. Such public sentiments are largely unthinkable in the current political climate in Ukraine.

⁸² Roman Petrov, *Constitutional challenges for the implementation of association agreements between the EU and Ukraine, Moldova and Georgia*, 21 *EUROPEAN PUBLIC LAW* (2015); Andrea Gawrich, et al., *Neighbourhood Europeanization through ENP: the case of Ukraine*, 48 *JCMS: JOURNAL OF COMMON MARKET STUDIES* (2010); Taras Kuzio, *Is Ukraine part of Europe's future?*, 29 *WASHINGTON QUARTERLY* (2006); Paul Kubicek, *The European Union and democratization in Ukraine*, 38 *COMMUNIST AND POST-COMMUNIST STUDIES* (2005); Oleksandr Shepotylo, *A Gravity Model of Net Benefits of EU Membership: The Case of Ukraine*, 25 *JOURNAL OF ECONOMIC INTEGRATION* (2010).

⁸³ Vitaliy Krupelnitsky, *Mediation as a Phenomenon of European Legal Relations*, *LAW TODAY* 2011; Yegor Vasylyev, *Alternative Dispute Resolution in a Global Perspective: Legal, Political and Cultural Factors in Introducing Mediation to Post-Soviet Ukraine*, June 5, 2013 *SSRN eLIBRARY*; Editorial, *Mediation as a Means of Europeanization of Ukraine*, *INVESTYTSIYNA GAZETA* 13 April 2013. 2013. Pavlo Yelnyk, *EU-Ukraine Association Agreement: Mediation is a European Value*, *KYIV MEDIATION CENTER* [HTTP://MEDYACIA.COM/PAGE102575.HTML](http://MEDYACIA.COM/PAGE102575.HTML)

⁸⁴ “Conditions for European integration of Ukraine and membership in WTO require implementation of alternative methods of dispute resolution”, See S.V. Vasylchak & L.V. Kutas, *Mediation as a Method of Civilized Resolution of Corporate Disputes*, 20 *SCIENTIFIC JOURNAL NLTU UKRAINE*, 136 (2010).

⁸⁵ “Mediation, as an alternative to courts and arbitration, is recognized by Ukraine and EU to be so efficient that EU-Ukraine Association Agreement dedicates a separate chapter to it. This highlights a world trend in dispute resolution – mediation gets more popular.” See Yelnyk, *KYIV MEDIATION CENTER* [HTTP://MEDYACIA.COM/PAGE102575.HTML](http://MEDYACIA.COM/PAGE102575.HTML)

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⁸⁷ List of articles

apparently not designed to reach a wider circle of potential users of mediation services. Furthermore, these popularization efforts were clearly seen as insufficient by the interviewees in this study. Raising demand for mediation requires more substantial efforts, greater resources and longer time.

Securing political support - working with the judiciary and the government

Soliciting political support for mediation by the government and the judiciary is another important condition for success of the reforms. It was seen as a priority by Ukrainian mediators as early as in mid-1990ies. However, unambiguous and strong political support was very difficult to gain primarily due to the high level of political instability in Ukraine. For the twenty years of independence, Ukraine has witnessed two massive revolutions, an armed conflict and numerous changes of political leadership of radically different political orientation. When one political force came to power, the first thing it did was to change people in all the key governmental positions. In most cases, this meant that investments into connections with and support by the political elite could not pay off in the long run.

Building the relationship with judges and the court system was equally problematic due to the same political instability and on-going reforms.⁸⁸ The Ukrainian judiciary elite, while politely embracing the idea of mediation at official events and publicly endorsing court mediation projects sponsored by international donors, could not play an active role of the champions in promoting mediation nationally. Uncertainty has especially risen in the aftermath of the 2014 Euromaidan revolution which increased political and societal pressure upon judges through new anti-corruption laws and the law on lustration.⁸⁹ In the atmosphere of public scrutiny of the judiciary, any change that is even slightly likely to be associated with possible informal dealings in courts is treated with high suspicion by Ukrainian judges. Thus, it is highly unlikely that judges assume individual responsibility for promoting mediation until it is collectively sanctioned from above through legislation or policy documents.

As a deeper cause of the lack of support from the judiciary, there might be a correlation between the efficiency of the court system and the willingness of judges to promote mediation.

⁸⁸ The latest reform of June 2016 has reorganized the whole system once again. Currently, it consists of the Constitutional Court and courts of general (civil and commercial), administrative and commercial jurisdictions. The courts are organized in three levels – local, appellate and cassation courts, the later function rests with the Supreme Court of Ukraine. The new law on Organization of Court System and Status of Judges has been adopted by the Parliament on 2 June 2016, along with Constitutional amendments. Both will come into force in October 2016. For the text of the draft law on Organization of Court System and Status of Judges, see http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=59259

⁸⁹ Pro ochyschennia vldy: Zakon Ukrainy, Ob al'ternativnoi protsedure uregulirovaniia sporov s uchastiem posrednika (protsedure mediatsii), ROS. GAZ. (June 30, 2010)

Where a court system is experiencing severe delays and inefficiencies, as it was, for example in Italy, mandatory mediation may be incorporated into it as a mechanism to ease court congestions and to address these inefficiencies. In contrast, where courts are relatively quick and cheap, mediation may be of less interest to the judicial elite as it was demonstrated by Kathryn Hendley's research of Russian courts.⁹⁰ In a similar vein, Ukrainian courts were shown by this author in her 2014 qualitative study of court experiences of Ukrainian businesses as relatively efficient in terms of time and costs albeit prone to corruption.⁹¹ This may play a role as a long-term disincentive for Ukrainian judges to promote mediation.

In a similar vein, other state agencies and the Ukrainian government so far have not shown an independent interest in mediation development. They remain passive by reacting either to the pressure of the international community from above or by the requests from grassroots mediation organizations.

For example, the project of the Council of Europe on social integration of gypsy communities resulted in mediation being included into the list of social services by the Ministry of Social Policy.⁹² Having learnt about this endeavour, mediators from the National Association of Mediators took the initiative and joined the Ministerial working group that has been developing the Standards of Mediation as a Social Service. Although the Ministry had its own rather specific understanding of mediation, NAMU's mediators managed to negotiate a text that generally conforms to the main principles of mediation.

Another example concerns the work of the Ukrainian Center for Common Ground and simultaneous pressure from the international community to reform the criminal justice system. These efforts resulted in several policy documents in 2006 and 2011 that declared the need to introduce mediation.⁹³ Yet, the actions of the government did not go further than just declarations partly because of the lack of self-interest and partly due to the recent political turmoil that reshuffled all the levels of the government.

Thus, the lack of political support of the judiciary and the government for mediation within a highly uncertain political environment remains an Achilles heel of mediation development in Ukraine.

3. Integration of mediation into the legal and court system

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⁹¹ Tatiana Kyselova, *Dualism of Ukrainian Commercial Courts: Exploratory Study*, 6 HAGUE JOURNAL ON THE RULE OF LAW (2014).

⁹² Decree of the Ministry of Social Policy of Ukraine "On the List of Social Services offered to the persons in hard life circumstances which they cannot face on their own", 19.09.12 p. № 1614/21926, <http://zakon4.rada.gov.ua/laws/show/z1614-12>

⁹³

Given the settlement friendly framework of Ukrainian law, it was possible to experiment with voluntary court mediation projects since the late 90-ies. The first known court mediation project in Ukraine dates back to 1997 when Donetsk Mediation Group solicited a grant from the Eurasia Foundation to set up mediation programs at pilot courts in Donetsk and Odessa. The model developed within this project allowed judges to refer cases to mediation with the consent of the parties to a dispute. This scheme resulted in 9 court cases being mediated by external mediators.⁹⁴

In 2009 the Ukrainian Mediation Center piloted its referral system with the Dniprovskiy Kyiv Court of general instance. UMC's mediators were present at the court premises during the hearings and attempted to persuade parties to agree to mediate their case. Although mediators conducted more than 100 information sessions with litigants (always only one party) it was possible to conduct only a few full-scale mediations.

These first experiences strongly suggested that until judges get interested in referring cases to mediation and actively divert litigants to mediation, mediators on their own are not able to break through to the parties. Therefore, the following court projects focused on judges.

In 2001-2012 the Ukrainian Center for Common Ground implemented a number of projects on mediation in criminal matters that *inter alia* included referrals from courts. They connected the prosecutor office, police, courts, mediators, victims and offenders through a multilevel mechanism of interaction and conducted 541 mediations and 152 family group conferences.⁹⁵

A large scale effort to initiate mediation within the Ukrainian court system was launched through two grants from the European Commission and the Council of Europe - 'Judicial Selection and Appointment Procedure, Training, Disciplinary Liability, Case Management and Alternative Dispute Resolution' 2006-2007 and 'Transparency and Efficiency of the Judicial system of Ukraine' 2008-2011. The mediation component of these projects was aimed at introducing the European model of judicial mediation promoted by Dutch and German experts. The project trained judges of four Ukrainian courts⁹⁶ who mediated 50 administrative, family, labor and land disputes with a 72% settlement rate.⁹⁷ Apart from judges, the project trained lawyers, attorneys, state officials and trainers in mediation, produced an educational film and conducted a number of

⁹⁴ Narrative report of the project, on file with the author.

⁹⁵ Pylypiv, VIDNOVNE PRAVOSUDDIA V UKRAINI, (2011); Roman Koval & Natallya Pylypiv, *Stan vprovadzhenia vidnovnogo pravosuddia v Ukraini*, 1-4 see id. at (2012).

⁹⁶ Bila Tserkva Miskrayonnyi Court, Vinnitsa Administrative Court, Donest Administrative Appeal Court, Ivano-Frankivsk City Court

⁹⁷ Iryna Zaretska, "Alternative Dispute Resolution – A Way to Improve Access to Justice", available at http://jurliga.ligazakon.ua/yurtv_detail/211

awareness-raising public events, including mediation weeks in pilot courts. The project has got very positive evaluations from local mediators, independent assessors and international experts.⁹⁸

In 2013-2016 another project ‘Educating Judges for Economic Growth’ opted for a different model – judicial settlement conferences – in two pilot administrative courts and one court of general jurisdiction in Odesa and Ivano-Frankivsk.⁹⁹ The project was supported by the National Judicial Institute of Canada and relied on the experience of court mediation in Ontario, Canada.¹⁰⁰ The project did not offer systematic training to the judges but rather relied on hands-on transfer of experience between Canadian and Ukrainian judges. Statistical information is not available for this project. Interviewees of this study suggested one indicator - in six months of the project the number of settlement agreements in the Malinovsky court of Odesa increased from 50 to 150.¹⁰¹

The most recent (2014-2015) USAID “Fair Justice”¹⁰² and Renaissance Foundation¹⁰³ project to support mediation in eight courts of the Volyn oblast relied on court referrals of the cases to external mediators and reported 47 information sessions, 29 mediated cases with 13 settlement agreements (45% settlement rate).

Introducing mediation in courts: to mandate or not to mandate?

All the court mediation projects, which are outlined above, piloted voluntary schemes of referrals that required express consent to mediation from both parties. The projects took advantage of an existing legal framework in the codes of civil and administrative procedure that permits settlements at any stage of proceedings including the stage of enforcement. Similarly, judges in all pilot projects relied on existing procedural devices to formalize settlements reached in mediation.¹⁰⁴

Given the absence of a provision in law that directly allows mediation within the court system, all the projects relied heavily on the personal support of the presidents of the respective courts. Yet, apparently, support of the individual judges and even presidents of the courts was not a sufficient safeguard and the pilot projects were seeking to gain some official backing of their mediation referrals. For example the Canadian court mediation project succeeded in lobbying for a decision of the High Qualifying Commission of Judges to grant exceptions for pilot courts in case judges-mediators would violate the statutory time-limits for consideration of cases (which luckily

⁹⁸ Friedrich-Joachim Mehmel, Frans van Arem, *Court-bounded and Commercial Mediation – a Pilot Project in Ukraine: a story of success*, CoE, 2011

⁹⁹ Odesa Administrative Court; Malinovsky Court of general jurisdiction, Odesa; Ivano-Frankivsk Administrative Court, Ivano-Frankivsk. See, *Judges of Administrative Courts Take Part in Ukrainian-Canadian Project “Education of Judges for Economic Development”*, 16 March 2015, available at <http://www.vasu.gov.ua/123378/>

¹⁰⁰ Sue Prince, *Mandatory mediation: the Ontario experience*, 26 *CIVIL JUSTICE QUARTERLY* (2007).

¹⁰¹ Interview with the judge or Fair report

¹⁰² USAID Fair Justice in Ukraine <http://www.fair.org.ua/index.php/en>

¹⁰³ Renaissance Foundation <http://www.irf.ua/en/>

¹⁰⁴ (1) judge may take into account the settlement when drafting judgement; (2) the claimant may drop his/her claims all together; (3) the respondent may recognize he claims; (4) parties may sign settlement agreement (*myrova ugoda*).

never happened). This proves that Ukrainian judges fear that mediation may actually increase their time spent for each case under the statutory time-limits of two months in each instance.

Furthermore, the court schemes piloted in Ukrainian courts offered mediation services to litigants on a *pro bono* basis and the administrative costs of the projects were borne by the donors. Nevertheless, in line with, for example, the Russian experience,¹⁰⁵ even *pro bono* services based on voluntary referrals to mediation did not result in a noticeable demand for mediation within court system. Mediators who worked in courts complained that it was extremely difficult to persuade parties to try mediation, although if they did manage to do this the parties were eventually satisfied with the settlement process. Thus, one of the major issues that evolved from the pilot court mediation projects was an obvious resistance of the litigants to even give a thought to the mediation option.

This uneasy experience of pilot mediation projects unsurprisingly raised the question whether to make mediation in courts compulsory. Several drafts of the mediation law, which were registered by Serhiy Kivalov on behalf of the group of mediators from Odesa, mandated mediation in divorce cases. These suggestions triggered a fierce discussion within the mediation community.

Indeed, mandatory mediation has an advantage of a quick outcome in terms of mediation statistics. Mandatory court mediation allows a quick reduction in the number of cases going to trial before the courts, which might positively influence the overall disposition time and costs of the court system. Within mandatory mediation schemes, it is more feasible to exercise control over the quality of mediators' training, mediation process and legal aid to disadvantaged groups of citizens. Finally, mandatory mediation guarantees a certain stable flow of mediation cases and consequent earnings for mediators.¹⁰⁶

However, there are risks and disadvantages of mandatory mediation, which should be carefully considered especially in the context of the post-Soviet Ukrainian transition. The following arguments have been raised by mediators during the public discussions of the draft law and in interviews for this study.

¹⁰⁵ Hendley

¹⁰⁶ Mediation in courts can be integrated in a dozen different designs – from just an opportunity of the parties to ask for a break in a court hearing to mediate their case – voluntary schemes - to mandatory pre-trial mediation when all the cases of a certain type are statutorily required to be mediated before the court can hear the case. For debates on the pros and cons of mandatory court mediation see, Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants about Institutionalized Mediation and Its Value*, 19 OHIO STATE JOURNAL ON DISPUTE RESOLUTION (2004). Jacqueline Nolan-Haley, *Is Europe Headed Down the Primrose Path with Mandatory Mediation?*, 37 NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION (2011-2012); Menkel-Meadow, *Variations in the Uptake of and Resistance to Mediation Outside of the United States*, 2015; Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA LAW REVIEW (1985).

First, a mandatory pre-trial mediation requirement can only force parties to attempt to settle but not to settle. Given that any formal mandatory requirement, especially in the post-Soviet context, is often treated by the parties and their lawyers as a bureaucratic formality and as an additional step on the way to the courthouse, many litigants may simply not show up even at the first information session.¹⁰⁷ This may result in quite low settlement rates in mandatory mediations, for example, around 23% in Italy, and the bouncing of the majority of the cases back to courts.¹⁰⁸ Consequently, time and costs increase for the cases that were mandated to attempt mediation but did not settle.

Second, mandatory mediation entails a tension between the need to guarantee affordable mediation procedures to the parties and the need to support the mediation profession. Mandatory mediation makes absolutely essential for the state to guarantee free legal aid and free access to mediation services to those categories of citizens who are entitled to free legal aid within court proceedings. Furthermore, given that the parties cannot be forced to pay high fees for mandatory mediation, for example in accordance to the *Alassini v Telecom Italia* case of the European Court of Human Rights,¹⁰⁹ the most feasible option is that the state subsidizes mandatory mediation schemes. This requires additional expenditures from the state budget, which is highly unlikely in the current political situation in Ukraine.

Third, a quick introduction of mandatory mediation even in the narrow category of disputes such as divorce disputes requires a stable and professional pool of trained and certified mediators that is currently absent in Ukraine. Furthermore, if mandatory mediation is introduced, the principles of access to justice require that mediators are available in all, even the most distant, courts. At the moment it is not feasible to provide such services equally in all the courts of Ukraine.

Finally, mandatory mediation in the post-Soviet context may entail some risks of corruption. Although these risks have not been proven empirically, the interviewees in this study suggested that judges may manipulate mediation to the advantage of certain mediators which in turn may lead to the phenomenon of the so-called “pocket mediators”.¹¹⁰

¹⁰⁷ In some countries, for example in many places in Australia, mandatory mediation schemes require parties to participate ‘in good faith’, which means people have to show up and, at a minimum, not blatantly ruin the process. However, ‘good faith’ requirement is not without problems. See, Penny Brooker, *Mediating in Good Faith in the English and Welsh Jurisdiction: Lessons from other Common Law Countries*, 43 COMMON LAW WORLD REVIEW (2014); Alexandria Zylstra, *Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled, The*, 17 J. AM. ACAD. MATRIMONIAL LAW. (2001).

¹⁰⁸ In Italy more than 50% of cases of mandatory mediation end up with only one party present at the first session. See Italian mediation statistics <https://webstat.giustizia.it>

¹⁰⁹ *Alassini v ItalTelecom* [2010] EUECJC-317/08, C-317/08, [2010] ECRI-221, [2010] 3 CMLR 17

¹¹⁰ Interview with Eremenko

Having weighted the above advantages and disadvantages of mandatory mediation in the context of the current justice system, by 2016 the Ukrainian mediation community has abandoned the idea of the immediate introduction of mandatory court mediation schemes. It was decided that the best way is to start gradually from voluntary schemes of court mediation with (1) the right of the parties to request a stay of court proceedings for a limited time-period in order to mediate their dispute; (2) the right of the judge in appropriate cases to recommend mediation to the litigants and with consent of one or both parties to stay the proceedings for a limited time-period, while leaving the doors open to possible mandatory elements in the future. Through experiments and pilot programs such a path can eventually bring Ukraine to mandatory court mediation but it was believed that this should not happen overnight.

At the same time, warned by international experts who analyzed these legislative proposals,¹¹¹ Ukrainian mediators became aware that without at least some pressure on behalf of the judiciary, mediation intake will not grow in Ukraine. Thus, the dilemma currently faced by mediators is to design a relationship between mediation and the courts that would preserve the values of mediation, on the one hand, and safely motivate parties to use mediation without substantive state expenditure, on the other. One of the possible solutions to this puzzle is to combine voluntary referral to mediation from the courts with financial incentives that will motivate the parties to use mediation to solve their disputes. Currently, mediators propose two motivational mechanisms which were discussed with the stakeholders during NAMU public events in 2016: (1) discount of 10% of court filing fees in case the parties attempted mediation and did not reach settlement; (2) refusal of the court to grant the winning party costs in case it declined to take part in mediation. Both proposals are still very raw and require further discussion and careful consideration with all the stakeholders.

Court mediation by external mediators or by judge-mediators?

Whether mediation in Ukrainian courts will be voluntary or mandatory, there remains a question about who should mediate cases referred by judges. The voluntary pilot court mediation projects outlined above have developed three models in this regard.

The first model is referred to as mediation by external mediators. It was relied upon by the projects in Donetsk, Odesa, Kyiv and Volyn courts. Mediators in this model are trained outside the court and cooperate with the court administration. In appropriate cases, judges inform litigants about the mediation option and suggest referring their case to a mediator outside the court. If both parties agree to mediate, they choose a mediator from the lists of external mediators available in the

¹¹¹ Many thanks to Bill Marsh and Ales Zalar???

courts. After the mediation procedure is over, the parties bring their settlement to the same judge who concludes the case through one of the available procedural options. Advantages of the model include the high level of training and independence of external mediators and excludes suspicions that the courts are interested in a specific settlement outcome of the case. On the negative side, the model requires a high level of judges' awareness about mediation and their trust in external mediators which is hard to achieve within a short time. Furthermore, given that the costs of mediation and connected administrative expenses in the pilot projects were born by international donors, it remains unclear how a mediator will be paid after financial support from donors is no longer available.

The second model which was developed by the 2006-2011 Council of Europe and EU court reform projects is referred to as a voluntary mediation by the judge-mediator. Judges in this model have extensive mediation training in interest-based facilitative mediation and are able to clearly distinguish between their roles as a judge and a mediator and to perform as mediators. When the judge decides that the case is suitable for mediation he/she refers it to another judge who serves as a mediator and conducts a mediation session in a special mediation room. Consent of the parties is essential. After the parties come to an agreement in mediation they come back to the initial judge. Thus, the case is mediated and judged by two different judges. Advantages of the model are connected to the high status of a judge-mediator, compared to external mediators, which better motivates parties to try mediation. Disadvantages of the model are mainly in its costs. The model requires additional financial and human resources for the training of judges, equipping mediation rooms within court premises, and coordination of case referrals. Also, the model, as piloted in Ukrainian courts, did not account for the time spent by the judge-mediators in mediation sessions, thereby decreasing the motivation of judges to mediate.

The third model was not referred to as mediation as such but was labeled as a judicial settlement conference (*protsedura dosudovogo vregulyuvannya sporu za dopomohoyu suddi*). This model was piloted by the Canadian court reform project. It relies upon settlement efforts of the judge at the preparatory stage of court proceedings which is not recorded. The settlement talks are led by the same judge who is assigned to make a final decision in the case. If the parties do not reach an agreement with the help of a judge, the same judge proceeds to the main hearing and makes the final judgment. In the model piloted through Canadian project, the judges did not have specific training in mediation but some of them visited Canadian courts with educational visits. The style that judges practiced in mediation remains unclear; there are some indications that they applied certain evaluative elements. An advantage of the model is that judges have the highest level of interest to practice mediation because this might decrease their time spent in court hearings. Disadvantages of the model concern the issues of trust and neutrality of the third-party. Mediation is

held in the judge's office and the roles of a judge and a mediator are not clearly distinguished. The trust between the parties and the judge-mediator as well as confidentiality are undermined by the fact that the same judge may eventually render the final judgment.

To conclude, all the three models have their advantages and disadvantages and it remains to be seen which of the models brings better results. This requires the flexibility of the legislation to a variety of court mediation models and further research to better understand the efficiency of each model and their contribution to the overall access to justice in Ukraine. The mediation community in their latest policy documents express the view that the law on mediation should encourage an experimental approach to court mediation through the setting up of pilot projects in courts and their careful assessment by external evaluators with resulting policy recommendations.

Struggling to pass the law on mediation: internal disagreements and external political obstacles

The law on mediation was seen from the very first days of mediation development in Ukraine as a priority and as a primary booster of nation-wide demand for mediation services. It is viewed as an important step to introduce the terminology of mediation, its main values and principles to the wider public in Ukraine. The law on mediation is first of all expected to offer a source of valuable official information about mediation and to legitimize mediation practice on a national level. However, by 2016 Ukraine is still far from having such a law.

Since the late 1990-ies at least ten drafts have been developed either on mediation in certain areas (criminal law and victim-offender mediation) or on mediation for general use (law on mediation). Five times the draft law on mediation has been submitted to the Verkhovna Rada (Parliament) of Ukraine – in 2010, 2011, 2013, in March 2015 and December 2015.

All the attempts were undermined by the lack of a unified vision of regulation by the mediation community. Each time the draft law was submitted to the Parliament there were in fact two alternative drafts from two different groups of mediators. This rivalry of the drafts originated in competing approaches of the two groups of mediators to main conceptual provisions. One approach favored open-ended market regulation of mediation and the other approach was seeking to introduce a more centralized regulation of mediation with mandatory court mediation for divorce cases, a unified registry of mediators, a central professional body and involvement of the Ministry of Justice and other state agencies.

Despite these disagreements, even with two alternative drafts in the Parliament, the law on mediation did have a chance to be adopted. Both groups of drafters and political forces that supported them were about to agree on the single text but every time the legislative process was

aborted for reasons outside their control. In 2011 there was simply not enough time to agree on the single draft before the Parliament got reelected which meant that the drafts had to be submitted *de novo*. In 2013 the legislative process was cut off by the Euromaidan protests and subsequent change of government. After the drafts were submitted again in 2015 there is a hope that finally under the current pro-European regime the law will be adopted.

By 2016 Ukrainian mediators through the National Association of Mediators were able to come up with a strategy of legal regulation of mediation and a single text of the draft law on mediation based on this strategy.

The drafters of the single draft declared their aspiration to implement the best international practices.¹¹² Legal regulation of mediation was seen as gradually developing from the general mediation law applicable to the widest possible circle of disputes of all types to specialized legal acts in civil, commercial, family, administrative, tax, criminal, penal, and other areas.

Ukrainian mediators confirmed that they are aware of the danger of overregulating mediation at the outset. According to the research of the Center for Common Ground, the biggest threat to restorative justice and mediation in Ukraine “may be posed if it is ordered from above through some state institution that will cause its bureaucratization, loss of trust, formal implementation by order of the superior, and false reporting”.¹¹³ Therefore, to avoid this trap the draft law on mediation attempts to remain within the framework structure by introducing only minimal legislative standards and incorporates mediation into the existing legal framework through available procedural devices such as amicable settlement agreements (*myrova ugoda*), conciliation agreements (*ugoda pro prymyrennia*), pre-trial dispute resolution (*dosudove vregulivannia sporu*), etc. The drafters of the single draft also rejected the temptation to introduce mandatory court mediation from the outset. Instead, the current draft includes voluntary models of court mediation along with motivational mechanisms.

With regards to professional regulation of mediators, the eventual consolidated draft incorporated an open-ended market regulation of mediation that offers maximum freedom to professional mediation organizations to self-regulate and control mediation practice in all possible areas.

¹¹² 2002 UNCITRAL Model Law on international commercial conciliation http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html 2008 EU Directive on certain aspects of mediation in civil and commercial matters <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF> Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters, <https://wcd.coe.int/ViewDoc.jsp?id=1223897&Site=DG1-CEPEJ>

¹¹³ Pylypiv, VIDNOVNE PRAVOSUDDIA V UKRAINI, (2011). At 57

Thus, so far Ukrainian mediators opted for careful and gradual legal regulation of mediation that requires experimentation through pilot schemes and further reconsideration and amendments in several years.

4. Relationship with donor organizations and democracy support aid

Mediation in Ukraine has not enjoyed the same wealth of financial support by international donor organizations compared to Russia. Neither has mediation become a focus of international aid in as much as the rule of law, justice and legal reforms programs. In the 90-ies these were organizations mostly from the United States and Canada which brought an idea of modern mediation to Ukraine and other former Soviet Union countries. These organizations became the main partners of Ukrainian mediation NGOs in terms of financial support, expertise transfer, and mediation ideologies. Among the most active foreign donors at that time were USAID, Eurasia Foundation and Renaissance Foundation (George Soros Foundation).

After 2008, the European Union emerged as a leading promoter of mediation and other ADR mechanisms among its member-states influencing neighboring countries such as Ukraine. Additionally, geographical proximity of the EU, links to European mediation communities and appealing success stories of mediation in some EU member-states inspired Ukrainian mediators. Therefore, by the first decade of the new millennium most of the donors which sponsored mediation projects were European, including the European Commission, Council of Europe, UK Embassy, Swedish International Development Agency, Swiss Agency for Development and Cooperation, Polish Aid and others.

International donors which invested into mediation development in Ukraine, however, had their own agendas and structural constrains that framed their policies towards mediation. With a few exceptions, mediation could not enjoy an independent status within donors' agendas and was adjacent to other larger programs in the areas of rule of law and justice reform which narrowly treated mediation as one of the elements of court reform aimed at increasing court efficiency. For example, six out of eight projects that are listed at the website of the Ukrainian Center for Common Ground operated within broader programs on the rule of law and focused on cooperation with the courts, police and prosecutor office.¹¹⁴ Usually a court mediation project sponsored under the rule of law heading included a public relations component, fees for foreign experts to conduct trainings and research; mediation awareness training for representatives of the Ukrainian legal system: judges, lawyers, prosecutors, etc.; training and certification of mediators and trainers; study tours abroad for high-ranking Ukrainian officials; and often a pilot court mediation scheme.

¹¹⁴ Website of the Ukrainian Center for Common Ground <http://www.uccg.org.ua/projects.html>

It became clear quite soon that courts are very difficult partners in the institutionalization of mediation and “commercially-oriented’ mediators need to turn to the business and legal community to develop self-sustainable mediation training programs. Nevertheless, the structural location of many mediation projects within judiciary reforms programs still imposed the need to focus on courts.

Furthermore, the donors were keen to see mediation in action – the cases settled, the settlement rates reported and institutional mechanisms implemented – promptly by the end of the one- or two-year period of funding. And some Ukrainian NGOs took a risk to promise these results knowing in advance that they are difficult to achieve. The requirement to produce tangible outcomes was at odds with the undeveloped mediation market in Ukraine. As suggested by the informants in this study, it was important to understand that before the cases can actually be mediated, Ukrainians would have to raise the nation-wide demand for mediation services, which was impossible to do within a few years of the project’s duration. Mediators interviewed in this study believe that the projects should be supported at least for five and ideally for 10 years.

Finally, court mediation projects that were sponsored by different donors relied on the models of court mediation specific to certain jurisdictions. This resulted in multiple models of mediation piloted and unintentionally created a competition among them. For example, one of the court mediation projects drafted the amendments to procedural codes incorporating ‘their’ model of judicial mediation and succeeded to lobby these amendments, while other courts who piloted other models felt excluded from this process.

These structural constrains of democracy aid were seen as regrettable but largely unavoidable by the interviewees in this study. Indeed, for many Ukrainian mediation NGOs active both in commercial mediation as well as in socio-political conflicts, grants from international donors remain an important source of support and they cannot afford to completely disregard financial aid from abroad.

III. Challenges of War

The violent Euromaidan protests in Kyiv in 2013 and 2014, which demanded integration of Ukraine with the EU, and the fight against corruption ousted the then President Yanukovich and brought a pro-European government to power. This, in turn, triggered an unprecedented sequence of events on a global scale. In spring 2014 Russian troops covertly invaded Ukrainian territory of the Crimean peninsula and organized a referendum which annexed Crimea to Russia. Simultaneously, Eastern parts of Donetsk and Luhansk oblasts bordering the Russian Federation rebelled against the

new central government and, after a series of military operations backed by Russian troops, separated themselves as two unrecognized “republics”. The active fighting between the pro-Russian separatists and the Ukrainian government took place during 2014. In response, the international community has imposed economic sanctions against Russia and deployed an OSCE Special Monitoring Mission to monitor the situation at the contact line. Although it became possible to sign two ceasefire agreements in Minsk in September 2014 and February 2015 until now they remain unimplemented, military hostilities are on-going and people are still being killed weekly.¹¹⁵ This conflict was seen by experts as a threat ‘to the wider European security order of a greater magnitude than anything since the end of the Cold War’.¹¹⁶

Political turmoil and armed conflict has changed the overall political and societal context in the region and affected the process of mediation institutionalization in two ways. First, there emerged a competing field of professional practice called dialogue facilitation. Second, the nature and the magnitude of the pressure from the international community has qualitatively changed and has begun to expressly require mediation.

Competing with Dialogue Facilitators

The armed conflict in Eastern Ukraine prompted a fast response by the international mediation community through humanitarian assistance and support to peacebuilding initiatives in the conflict zone as well as throughout the country. International experts who arrived in the country already during the Euromaidan protests in 2013 brought with them a number of mediation-like methodologies that were previously tested in other hot conflict zones. Among such methodologies were Non-violent Communication, Alternatives to Violence, Process-oriented psychology, Technology of Participation, Round-tables, Restorative Circles, Theatre for Dialogue and others. This eclectic pool of methodologies derives from the single ideology of the respect for human dignity; inclusion, empowerment and recognition of the conflict parties; safe communication and a

¹¹⁵ At 1255 Nadezhda Arbatova & Alexander Dynkin, *World Order after Ukraine*, 58 SURVIVAL (2016); Taras Kuzio, *Competing Nationalisms, Euromaidan, and the Russian-Ukrainian Conflict*, 15 STUDIES IN ETHNICITY AND NATIONALISM (2015); Elizabeth Dunn & Michael Bobick, *The empire strikes back: War without war and occupation without occupation in the Russian sphere of influence*, 41 AMERICAN ETHNOLOGIST (2014); Lawrence Freedman, *Ukraine and the Art of Limited War*, 56 SURVIVAL (2014); Robert Wade, *Reinterpreting the Ukraine Conflict: The Drive for Ethnic Subordination and Existential Enemies*, 58 CHALLENGE (2015); Mykola Makhortykh & Yehor Lyebyedyev, *#SaveDonbassPeople: Twitter, Propaganda, and Conflict in Eastern Ukraine*, 18 THE COMMUNICATION REVIEW (2015); Yuri Zhukov, *Trading hard hats for combat helmets: The economics of rebellion in eastern Ukraine*, 44 JOURNAL OF COMPARATIVE ECONOMICS (2016); Joshua Mulford, *Non-State Actors in the Russo-Ukrainian War*, 15 CONNECTIONS: THE QUARTERLY JOURNAL (2016).

¹¹⁶ Roy Allison, *Russian ‘deniable’ intervention in Ukraine: how and why Russia broke the rules*, 90 INTERNATIONAL AFFAIRS (2014). At 1255 Arbatova & Dynkin, SURVIVAL, (2016); Kuzio, STUDIES IN ETHNICITY AND NATIONALISM, (2015); Dunn & Bobick, AMERICAN ETHNOLOGIST, (2014); Freedman, SURVIVAL, (2014); Wade, CHALLENGE, (2015); Makhortykh & Lyebyedyev, THE COMMUNICATION REVIEW, (2015); Zhukov, JOURNAL OF COMPARATIVE ECONOMICS, (2016); Mulford, CONNECTIONS: THE QUARTERLY JOURNAL, (2016).

joint search for understanding and solutions. As an umbrella term they are labeled as dialogue or dialogue facilitation. According to the OSCE reference guide:

The key features of dialogue facilitation are the same as for mediation. However, dialogue facilitation represents a distinct approach insofar as it is ‘a more open-ended communication process between conflict parties in order to foster mutual understanding, recognition, empathy and trust. These can be one-off conversations, or go on over a longer period of time. Although dialogues can lead to very concrete decisions and actions, the primary aim is not to reach a specific settlement, but to gain a better understanding of the different perspectives involved in a conflict.’¹¹⁷

Although there are indeed multiple points of similarity between mediation and dialogue, not to mention that it is one method applicable in varied contexts, professional communities in Ukraine prefer to keep them separate. Only a few representatives of the Ukrainian mediation community directly responded to the wartime challenge by applying their mediation skills to the new socio-political conflicts. Similarly, a few mediation NGOs, including the Institute of Peace and Common Ground, Odesa Mediation Group and former Donetsk Mediation Group (currently Donbas Dialogue), who used to work in the area of community mediation and community capacity building began facilitating dialogue sessions in Eastern and Southern regions of Ukraine. Yet, most mediators remain faithful to their professional identity based on the facilitative model of mediation.

Instead, a different professional community of dialogue facilitators began to establish itself in Ukraine. In contrast to mediators many of whom are lawyers, dialogue facilitators come from a more varied background of psychology, international relations, cultural studies and other professions. Although many claim that dialogue facilitation has been practiced in Ukraine since early 90-ies, they admit that it received a true impetus only after 2014 when Ukraine experienced a new massive wave of donor aid programs aimed at peace-building. Many NGOs which are now implementing projects in dialogue facilitation and peace-building come from the general civil society and had no previous experience in conflict resolution before the 2014 crisis.

During the Euromaidan protests in 2013-14 dialogue facilitators experimented with moderating meetings between conflict parties on the streets, in particular between protesters and the police. Later, the dialogues moved on to tackle the problems of internally displaced persons, ‘decommunization’ and coordination between local government and civil society within the national decentralization reform.¹¹⁸ Special dialogue initiatives were conducted in Odesa in the aftermath of the violent clashes between groups of opposing political orientation in May 2014.¹¹⁹ More

¹¹⁷ Mediation and Dialogue Facilitation in the OSCE: reference guide p. 10

<http://www.osce.org/secretariat/126646?download=true>

¹¹⁸ For detailed description of the dialogue initiatives, the issues discussed in the dialogue sessions and the map of the dialogues conducted since 2014 see the reports of the Dialogue Support Platform in Ukraine, WEBSITE

¹¹⁹ One of the relatively long-term dialogue projects implemented in Odesa was the project “The Common House: Supporting and Broadening Dialogue Processes in Odesa” by the Berlin Center for Integrative Mediation <http://www.cssp-mediation.org/>, Inmedio <http://www.inmedio.de/en/>, and the Center for Peace Mediation

politicized topics such as the relationship between Ukrainians and Russians have not been directly addressed in the latest dialogue initiatives because of the obvious difficulties of the ongoing armed conflict.¹²⁰

Dialogue facilitators in Ukraine are still in search of their professional identity by attempting to distinguish themselves from mediators.¹²¹ The task is not an easy one as mediation itself remains generally an unknown dispute resolution method in Ukraine let alone dialogue facilitation. Furthermore, dialogue facilitators do not have a unified vision of their practice as they rely on an eclectic pool of methodologies. Similarly, it remains unclear what professional qualifications facilitators should possess in order to be able to competently facilitate very sensitive inter-group conflicts.¹²² Dialogue facilitators in Ukraine generally oppose the idea of formal institutionalization of their practice as they fear that this might bureaucratize and corrupt their practice. Finally, dialogue facilitators have got strong support from international donor organizations, which might foster their development.

Dialogue projects or more general projects to strengthen social cohesion in Ukrainian society that included a dialogue component were supported by international organizations and donor agencies such as for example, the Organization for Security and Cooperation in Europe (OSCE),¹²³ United Nations Development Program (UNDP),¹²⁴ UK Embassy,¹²⁵ MATRA

<http://www.peacemediation.de/index.shtml> in cooperation with Odesa Mediation Group. It was financed through the German Department for Foreign Affairs. International experts have identified a core group of local actors in Odesa and trained them in basic mediation and dialogue skills, offered coaching sessions and strategic support for further self-sustainability of dialogue platforms. The group was able to organize regular dialogue meetings in Odesa involving civil activists of both pro-Russian and pro-Ukrainian orientation in 2014 and 2016. The project has also conducted a systematic conflict study in Odesa that focused on conflict-driving positions and interests, the dynamics between different (political) groups and potential barriers to dialogue among these actors/groups.

¹²⁰ The cross-border dialogue initiatives between Ukrainian and Russian civil society remain very few. One example is a project by Swisspeace on Transnational Russian-Ukrainian dialogues that brought civil society activists from Russia and Ukraine to dialogue sessions in Stambul, Turkey in 2014. WEBSITE. Dialogues connecting Ukrainians from the territories uncontrolled by the Ukrainian government and the rest of the country are currently possible only in online format. The only dialogue initiative of this kind was conducted by the Donbass Dialogue NGO (Svyatogorsk and Donetsk) in October 2015 and April 2016. The goal of this dialogue session was reported to be “presentation of the method and assessment of the effectiveness of on-line dialogue as peace-making tool.” On-line dialogues connected participants were from Svyatogorsk, Donetsk, Western Ukraine, Russia, Norway and the US. Methodology of on-line dialogues is still in the process of testing and adjustment. WEBSITE

¹²¹ According to Ukrainian informants of this study, currently the notions of dialogue and mediation need more conceptual clarity to distinguish one from the other. See also, Alex Azarov, “The Boy Who Cried Dialogue: Ukraine Reflections”, available at <http://www.iicp.ch/sites/default/files/2015%20Publication%20Alex%20Azarov.pdf>

¹²² OSCE advert???

¹²³ OSCE through its Project Coordination Unit in Ukraine organized and conducted dialogue forums at tracks 2 and 3 in the conflict zone (Mariupol, Severodonetsk,); established a pool of moderators who are called to facilitate the dialogue sessions; conducted annual international conferences on dialogue facilitation, coordinates peace-building activity of international donors in Ukraine through regular meetings, cooperates with the National Association of Mediators in training and popularization of dialogues and mediation. See, OSCE National Dialogue Project <http://www.osce.org/ukraine/117808>

¹²⁴ Social Cohesion project

¹²⁵ Conflict Prevention Pool in Ukraine peacebuilding projects <https://www.gov.uk/government/publications/conflict-prevention-pool-work-in-ukraine>

Netherlands¹²⁶, and German Federal Ministry of Foreign Affairs.¹²⁷ By 2015 chaotic and uncoordinated initiatives were partly systematized through several reports and databases.¹²⁸ By mid-2015 the Brussels-based organization MediatEUr and UNDP launched an Internet platform to collect content from dialogues and to coordinate future efforts of all participants and funders of the dialogue initiatives in Ukraine. At the time of this writing the Platform offered information on 23 Ukrainian organizations active in dialogue facilitation in Kyiv, L'viv, Kharkiv, Donetsk oblast, Dnipro, Kryvyi Rih, Kherson, Kremenchug.¹²⁹ Additionally, this research identified more than 15 international organizations which entered Ukraine after 2014 with various projects on peace mediation, dialogue facilitation and peace-building.

Thus, after 2014 Ukraine has witnessed the mushrooming of dialogue initiatives and the rapid emergence of a professional community of dialogue facilitators. Whether this movement poses serious challenges to mediation is unclear. A parallel professional field can support the development of the mediation field and there is great potential for constructive exchange and co-support between the two fields. At the same time, some mediators have expressed their concern about professional competencies of dialogue facilitators that might negatively affect perceptions of the consensual dispute resolution by the Ukrainian population. Furthermore, the emergence of a dialogue facilitation practice has noticeably increased the competition for limited financial resources offered by international donors and contributed to the general sense of uncertainty in the mediation field.

Post-EuroMaidan pressures from the international community

The second challenge to mediation development in Ukraine that emerged after the 2014 crisis has to do with the increased pressure from the international community to reform the Ukrainian judiciary. Popular perceptions of the Ukrainian judiciary as a completely corrupt system and demands for fair justice for all were among the driving factors of the Euromaidan protests. In the aftermath of the protests court reform was again recognized as a priority both by the new Ukrainian government and the international community. However, in contrast to the previous waves of reforms, this time mediation was clearly spelled out in the policy documents simultaneously in three areas.

¹²⁶ International Center for Policy Studies, Ukraine <http://ndialog.org.ua/golovna>

¹²⁷ Federal Foreign Office, Germany http://www.auswaertiges-amt.de/EN/Startseite_node.html

¹²⁸ Agder Research Project, Norway <http://dialogue-ukraine.org/>; Report: Mapping of Dialogue Initiatives to Resolve Conflict in Ukraine by International Center for Policy Studies, Ukraine supported by MATRA http://icps.com.ua/assets/uploads/files/mapping_of_dialogue_initiatives_eng_.pdf

¹²⁹ The platform aims to collect dialogue content on conflict issues for conflict analysis; coordinates capacity building in the field through mapping of dialogue initiatives, runs face-to-face meetings of Ukrainian dialogue facilitators and international experts, and produces regular reports on the activity of the platform. Ukraine Dialogue Support Platform <http://ukraine.dialoguesupport.org>

First, the European Union supported the development of the strategic policy document on court reforms - the Strategy of Reform of the Court System, Judicial Procedures and Related Legal Instruments for 2015-2020. The Strategy was endorsed by the President by his Decree.¹³⁰ It states that “mechanisms of alternative dispute resolution should be expanded, in particular through practical implementation of mediation and conciliation”.

Second, the latest pressure for reforms, in particular by the World Bank, has materialized in the requirement to improve Ukraine’s Doing Business ranking.¹³¹ Given aid conditionality, the Ukrainian government is desperately seeking the ways to gain better results in the ranking. Therefore, all of a sudden, mediation began to be seen by governmental officials as a feasible option that can bring Ukraine a few points in the Doing Business rating. The Cabinet of Ministers has issued a Decree in December 2015 to entrust the task to supervise the legislative process on adoption of the law on mediation to the Ministry of Justice.¹³² Representatives of the Ministry of Justice, along with the NGO “Easy Business in Ukraine”,¹³³ took an active part in development and discussions of the draft law on mediation chaired by the National Association of Mediators during 2016.

Third, Ministry of Finances and the State Fiscal Service are currently under pressure to meet requirements of the International Monetary Fund to implement mediation in tax disputes. Discussions about the possibility of tax mediation within state fiscal agencies were started in 2013. In 2014 the Draft Law on Amendments to the Tax Code introducing mediation was registered in the Parliament but apparently got stuck there.¹³⁴ The Draft suggested detailed regulation of the mediation procedure that is inbuilt into the internal administrative review of tax authorities. At the time of writing of this article, in summer 2016, there were some indications that the Ministry and the State Fiscal Service would renew their work on designing the system of tax mediation.

All of these three initiatives that are imposed by the international community from above require greater transparency and more active involvement of the mediation community in deliberations. It remains to be seen whether the pressure of the international community from above

¹³⁰ Decree of the President of Ukraine «Strategy of Reform of Court System, Court Procedures and Related Legal Institutions 2015-2020» 2015 № 276/2015, 20.05.2015 <http://zakon4.rada.gov.ua/laws/show/276/2015>

¹³¹ World Bank ‘Doing Business Survey’ <http://www.doingbusiness.org> In 2016 World Bank Doing Business Rating for the first time included ADR rating that gives points for 1) availability of arbitration, mediation and other ADR mechanisms; (2) legal regulation of ADR through separate laws or as a part of other legislative acts; and (3) financial mechanisms that motivate parties to settle.

¹³² Decree of the Cabinet of Ministers of Ukraine «Action Plan on Implementation of the Best Practices of High Quality and Efficient Regulation by the World Bank Group rating “Doing Business 2016”», 16.12.15, № 1406-p, <http://zakon1.rada.gov.ua/laws/show/1406-2015-%D1%80>

¹³³ WEBSITE

¹³⁴ Draft Law on Amendments to Tax Code (mediation procedure), available at http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53239

will break the passive resistance of the Ukrainian judiciary and government to mediation and result in the adoption of the mediation law.

Conclusions

Development of mediation in Ukraine is similar to many other countries. The seed of mediation has been brought to Ukraine by foreigners and gave its first fruits in the form of a professional mediation community. Since the early 90-ies Ukrainian mediators managed to establish their distinct professional identity, develop a market for mediation training, and integrate their organizations within a national umbrella association. Although the professional community still faces many dilemmas such as whether to open up the doors to evaluative practice, and whether to leave mediation self-regulation fully decentralized, mediators present a highly competent and vibrant professional community which is on the right track of integration and dialogue with all the interested stakeholders. Yet, the presence of the professional community as such turned out to be an insufficient factor for mediation to grow. For twenty years public awareness and consequently the demand for mediation services have remained nearly non-existent in Ukraine. In this sense mediation indeed, remains somewhat of a ‘ghostly’ phenomenon. However, this fact is not that much different from other European countries, mediators throughout the continent complain about insufficient demand for their services.

What is different in Ukraine is the highly volatile political and economic environment where these developments take place. Frequent changes of governments and of the geopolitical orientation, currently aggravated by the armed conflict in Eastern Ukraine, and the subsequent economic recession did not allow the mediation movement to gain political support. The grassroots mediation community lacked resources for powerful lobbying and did not have access to the top judicial and political elite. Furthermore, each time mediators submitted the drafts of the mediation law to the Parliament (there were at least five attempts to do so) the legislative process was aborted due to the political turmoil. In a similar vein, although international donors did reach some top-rank officials and judges through court mediation projects, political instability and objectively low interest expressed by relatively efficient courts in decreasing their caseloads did not allow the generation of strong and stable support. Finally, the judicial elite who have been trained within the framework of the pilot projects have been reshuffled in recent reforms and those who remain in place do not risk taking up innovative initiatives under the severe pressure of anticorruption campaigns. All of these lead Ukraine to remain on the sidelines of the mediation movement.

There is, however, a positive gain of being the outsider – the chance to learn the lessons from others. One lesson that has firmly been learned by Ukrainian mediators is that overly strong

involvement of the state in mediation may destroy its values and spoil the whole enterprise but without support from the government and the judiciary mediation is unlikely to move either. Thus, the major challenge that Ukrainian mediators currently face is to strike the right balance between these two risks and to find the mechanisms that would motivate parties to use mediation, be perceived as safe by mediators and would not require substantive state expenditures.

Being terrified by the prospects of the coopting of mediation by the state, Ukrainian mediators rejected the idea of mandatory court mediation, centralized professional regulation and a unified registry of mediators thereby opting for market driven regulation. If the current draft law incorporating this model passes through the Parliament, Ukraine will become one of the few, if not the only one, continental European country with an open-ended market regulation of mediation similar to the ones in the UK and the US.

These peaceful challenges are amplified by the war-time pressures. The annexation of Crimea in 2014 and the armed conflict in Eastern Ukraine have undeniably increased political and economic uncertainties on the ground. Similarly, the emergence of a parallel professional field of dialogue facilitators as a response to the current crisis contributes to the general sense of uncertainty within the mediation field. Yet, the crisis might also play a positive role for mediation development. After 2014 the pressure of the international community for further rule-of-law reforms has increased and has become qualitatively different. This pressure has been formalized through demanding aid conditionality with clear indicators of performance, which for the first time have expressly spelled out the requirement to introduce mediation as part of the court reforms. This might help Ukrainian mediators to get the law on mediation finally passed through the Parliament despite current war-time uncertainties. Whether Ukrainian mediators manage to take advantage of these positive side effects of the crisis and to promote mediation without threatening its values remains to be seen.

To realize this ambitious goal, it is important to understand root causes of resistance to mediation specific to the post-Soviet environment, in particular cultural patterns inherited from the Soviet past which impede the acceptance of mediation ideologies among the wider population, professional communities of lawyers, governmental officials and judiciary. In a similar vein, more research is required to understand in what way post-Soviet courts with their high efficiency and corruptibility can become interested in the promotion of mediation and what will be the societal consequences of such an active promotion. These issues are highly contingent upon the socio-legal environment of post-Soviet countries and will require a socio-legal approach to their study.

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Annex 1. TABLE 1

Organization/project	Supported by	Year	Cases mediated	Settlement rate
Ukrainian Mediation Group	USAID	1997	9	No

network of 8 regional centers ¹³⁵		-1999	0	t reported
Ukrainian Mediation Group court mediation project in Donetsk, Odesa	Eurasia Foundation	1999	9	No t reported
Ukrainian Center for Common Ground	Various	2004 -2012	5 41	No t reported
‘Transparency and Efficiency of the Judicial system of Ukraine’ in 4 courts ¹³⁶	European Commission and the Council of Europe	2008 -2011	5 0	72 %
Mediation support in 8 courts of Volyn oblast ¹³⁷	USAID, Renaissance Foundation	2014 -2015	2 9	45 %
Total		1997 -2016	7 19	

¹³⁵ USAID Project ‘Improving Dispute Resolution Capabilities in Ukraine’, Narrative report available at http://pdf.usaid.gov/pdf_docs/pdabs114.pdf

¹³⁶ Irina Zaretskaya, “Alternative Dispute Resolution – A Way to Improve Access to Justice”, available at http://jurliga.ligazakon.ua/yurtv_detail/211

¹³⁷ Mediation in Courts: Experience and Prospects, 22 June 2015
http://www.irf.ua/knowledgebase/news/mediatsii_v_sudakh_dosvid_ta_perspektivi/