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Types of mediation: how to choose the best mediation format?

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Abstract. In this article mediation was classified according to various criteria, in particular, depending on the style of the process and depending on the content of the dispute. As a result, it was determined that according to the criterion of "style of the process" mediation can be Facilitative, Court-Mandated Mediation, Evaluative, Transformative, E-mediation and Mediation-Arbitration. According to the criterion of "content of the dispute", mediation can be Commercial, Workplace Mediation, Family Mediation, Sports Mediation, Political, and others. The peculiarities of each type of mediation were identified and analyzed, its advantages were highlighted.

Keywords: *mediation, mediator, negotiations, parties to the dispute, interests of the parties.*

Mediation is a unique process in the system of alternative dispute resolution. An important role in the effectiveness of this procedure is played by its organization. In preparation for mediation, it is necessary to determine the format and method of its conduct, on the basis of which the mediator will direct the course of negotiations between the parties. Mediation is a multifaceted way of resolving disputes and has specific features depending on its type.

According to the criterion of "style of the process" mediation can be: Facilitative, Court-Mandated Mediation, Evaluative, Transformative, E-mediation and Mediation-Arbitration.

Facilitative or traditional mediation originated in the era of activity of volunteer dispute resolution centers. In such centers, volunteer mediators did not have to be knowledgeable in the field of the particular dispute, and usually, they were not lawyers. They had professional knowledge and experience in various fields.

This type of mediation is focused on the interests of the parties. The most important thing is that mediation should be based on the principle of voluntariness. The main task of the mediator is to direct the negotiation process between the parties in conflict. He or she establishes contact between them and helps to build a dialogue. The mediator does not use his/her own judgments, does not impose his/her position on the dispute, but only assists the parties during the process. The outcome of mediation depends on whether the parties reach an understanding at the beginning.

Court-Mandated mediation implies that the court recommends the parties to turn to mediation, due to the need for a rapid settlement of a dispute. The outcome of any type of mediation depends on the will and desire of the parties. If one or both parties are reluctant to participate in mediation, the chances to make a mutually beneficial decision are low. The parties should understand the benefits of mediation over litigation in order to choose this method of dispute resolution.

This type of mediation is quite common in the UK, especially in resolving disputes concerning the protection of intellectual property rights. The courts are active in encouraging the parties to resolve disputes through mediation. For example, if a party refuses to try to resolve a dispute through mediation in court, he/she can be obliged to pay court costs. This rule is set out in the Code of Civil Procedure, which was adopted as a result of the 1999 reform of civil procedure. To promote mediation in England, there are a lot of organizations specialized in mediation, such as the Centre for Effective Dispute Resolution (CEDR), which trains mediators and provides counseling services on dispute resolution through mediation; Civil Mediation Council; "Civil Catalog of Mediators", which is a national hotline that provides assistance in resolving issues related to mediation and others [1, p. 105].

Evaluative Mediation is characterized by the fact that the mediator expresses his/her own views on the situation and provides the parties with recommendations on possible options for resolving the dispute. Typically, mediators are lawyers who have knowledge in the field of the particular dispute (for example, in the field of economics, protection of intellectual property rights, etc.). This is an advantage if the mediator is an expert on issues related to the content of the dispute, as its participants can obtain a professional assessment of the circumstances of their case. However, the mediator's advice is for guidance only, and the parties do not have to listen to it.

Transformative Mediation has in purpose to transform the positions of the parties from the confrontational to the positions of mutual understanding. This type of mediation is mentioned as part of auspicious mediation in the book "The Promise of Mediation" by Robert A. Baroque Bush and Joseph P. Folder. This process is aimed at transforming the parties to the conflict and their relationships by acquiring communication skills. Communication is one of the most important tools, which is necessary to build a successful negotiation between the parties. A special role in communication is played by active listening, which should be used by the parties. Through this technique, parties show their attitude to each other, support and respect, which is the key to building a successful dialogue [2, p. 70].

Transformational mediation can be seen as a way to overcome the crisis in communication between the parties to the dispute. During this process, the parties can:

a) strengthen personal strength;

b) develop the ability to react quickly to unforeseen circumstances;

c) establish constructive interaction;

d) develop an understanding of their needs and the needs of the opponent;

e) learn to provide a critical assessment of the situation and ways to solve it;

f) understand personal responsibility for decision making.

The role of the mediator in this process is that he should focus on the conversation between the parties, in order to recognize the possibility of establishing the aforementioned factors.

E-mediation or online mediation is carried out with the help of online information technologies such as Skype, Zoom, Google Meet and others. The advantage of this type of mediation is its cost-effectiveness, which includes both cost savings and time savings. The parties and the mediator do not need to spend time and energy on the way to the meeting place. Also, e-mediation can be combined with face-to-face meetings to conduct preparatory discussions. Only confidentiality remains a contentious issue. Internet is not a safe place for private conversations. The negotiation process and the information under discussion cannot be made public.

In e-mediation, a mediator provides mediation services to parties who are located at a distance from one another, or whose conflict is so strong they can't stand to be in the same room, write Jennifer Parlamis, Noam Ebner, and Lorianne Mitchell in a chapter in the book "Advancing Workplace Mediation Through Integration of Theory and Practice"[3].

The next type of mediation is mediation-arbitration. The hybrid of these two procedures is formed as a result of the transition from mediation to arbitration in the dispute. First, the parties agree on the terms of mediation, select a mediator, and sign an agreement on participation in mediation. Typically, signing agreement implies the impossibility of refusing mediation later, which is the obligation to make a decision.

If negotiations between the parties come to a standstill, the case can be considered through arbitration. The role of an arbitrator may be performed by a mediator if he/she has the appropriate qualifications, or the parties can choose another person. If the mediator becomes an arbitrator, he makes a decision on the whole case or on unresolved issues.

This process is more appropriate in civil matters where rules of evidence or jurisdiction are not in dispute. It resembles, in some respects, criminal plea-bargaining and Confucian judicial procedure, wherein the judge also plays the role of prosecutor rendering what, in Western European court procedures, would be considered an arbitral (even 'arbitrary') decision [4].

The problematic aspect of this type of mediation is the transformation of the mediator to arbitrator. The success of mediation largely depends on the nature of the mediator, which is that he/she has no power over the parties or the end result. A mediator is a neutral participant in the process. The realization by the parties at the beginning of mediation that the mediator may make a final decision in the future distorts this process, as it is contrary to its nature. Therefore, it is appropriate to elect a new arbitrator, not to transform the mediator into this role.

According to the criterion of "content of the dispute", mediation can be: commercial, workplace mediation, family mediation, sports mediation, political, and others.

Commercial mediation is suitable for resolving disputes between companies, private entrepreneurs, etc. Commercial mediation covers disputes in the field of business relations. The popularity of this procedure can be explained by the fact that litigation can negatively affect the relationship between business partners, cause bad publicity for entrepreneurs and destroy the personal brand of the company or individual entrepreneur, which is built over the years.

Workplace mediation is used to resolve a dispute that has arisen between employees of one company. Typically, the mediators in such cases are the managers or owners of the enterprise.

The next type of mediation is family mediation. Most often, family mediation deals with issues concerning divorce, property division, and others. Family mediation is highly emotional. Usually, the parties are relatives who, as a result of personal insults to each other, do not want to respect each other.

The subject of disputes belonging to the field of family mediation includes:

a) determining the place of residence of children;

b) financial maintenance of children;

c) division of spouses' property;

d) succession;

e) division of inheritance, etc.

Family disputes can be resolved through mediation only if the parties are willing to make concessions and are ready to build a dialogue.

During mediation, mediators recommend the parties to engage their lawyers who will provide individual legal advice during mediation. At the final stage of mediation, the parties sign a written agreement, which states the procedure for implementing the decision. It is important that all details are in accordance with the law and are understandable to the parties to the conflict. Lawyers can help them to clarify the unclear issues.

Sports mediation is designed to resolve disputes that arise over the rules of suitability, drugs that increase the effectiveness of the athlete, selection criteria, the terms of the contract of athletes, and so on. The advantages of mediation over litigation are that, usually, sports competitions are a seasonal phenomenon, and therefore the delay of athletes due to participation in litigation can undermine the sports season. Also, mediation helps to resolve a dispute faster with a small number of financial costs.

Political mediation is designed to resolve international disputes. Usually, the parties are the states. Traditionally, the participants of the dispute turn to mediation when the conflict has already unfolded. An alternative was suggested by the 6th Secretary-General of the United Nations Boutros Boutros-Ghali. He thought that mediation should prevent the unfolding of the conflict. The idea of preventive mediation arose during the war in the Balkans after the partition of the former Yugoslavia and the genocide in Rwanda as a way to prevent violent and bloody wars.

There are several examples of successful preventive mediation: conflict resolution in 1984 by Pope John Paul the second, in settling the border disputes between Chile and Argentine over the Beagle Channel, at that time the

war was avoided; The Belfast Agreement, or Good Friday Agreement, which got its name from the fact that it was signed on Friday, April 10, 1998. It is an agreement between the British and Irish governments and most of the political parties in Northern Ireland, which addressed issues that had provoked conflicts between countries in previous decades.

An important role in shaping this agreement was played by the 42nd President of the United States Bill Clinton, in particular, he: appointed US Senator George Mitchell as special ambassador to lead the negotiations between the parties; in 1994, President Clinton granted a 48-hour visa to Gerry Adams, the President of the Sinn Fein party, which was a pivotal point for the peace process. This move supported Adams internationally but also was a significant influence on the republican move from the Irish Republican Army (IRA) to constitutional legitimacy, signaling a change in US policy. Adams' visit and Congressman Bruce Morrison were both used to help convince the IRA of the benefits of a ceasefire, highlighting the influence of the US on the historic decision of the IRA to call a ceasefire in 1995. Despite resistance from the British government, the US granted Gerry Adams a second visa to fundraise in the US for the Sinn Fein party. As a result, Sinn Fein became the richest party in Northern Ireland. During this time, the British government had been discussing the unresolved decommissioning of weapons, which was holding back negotiations in Northern Ireland. Adams' visit to the White House helped nudge this process forward [5].

Another example of mediation that has affected relations between the two conflicting parties is the settlement of the Palestinian-Israeli conflict, aimed at their mutual recognition and discussion on the distribution of territories, settlements, Jerusalem, and the situation of Palestinian refugees. The mediator between the parties was the Norwegian government. The negotiations ended up with the Oslo Treaty, which was signed on September 13, 1993, in Washington.

After analyzing different types of mediation, we can conclude that the choice of style of the process is an important stage of preparation for mediation. Comparing the types of mediation, we can say that facilitative mediation is the most popular format, as it focuses on the interests of the parties, which reflects the main purpose of this procedure – to achieve a solution that satisfies the interests of all parties.

REFERENCES

1. Логвиненко М., Кордунян І. Особливості поетапного здійснення медіації у сфері інтелектуальної власності: перспективи для України. Теорія і практика інтелектуальної власності. 2019. № 6. С. 100–108.
2. Lohvinenko M., Kordunian I. Buildind a dialogue between the parties to the dispute as a guarantee of the successful completion of mediation. The XXIII th International scientific and practical conference «THEORETICAL AND PRACTICAL FOUNDATIONS OF SOCIAL PROCESS MANAGEMENT» (29 – 30 June, 2020). San Francisco, USA 2020. 321 p. Available at: DOI:10.46299/ISG.2020.XXIII: URL: http://isg-konf.com
3. Katherine Shonk. Types of Mediation: Choose the Type Best Suited to Your Conflict. URL: https://www.pon.harvard.edu/daily/mediation/types-mediation-choose-type-best-suited-conflict/.
4. Types of Mediation. *Triad Divorce Mediation*: website. URL: https://www.triaddivorcemediation.com/types-of-mediation/.
5. US Involvement in the Northern Irish Peace Process and the Good Friday Agreement. *Center Forward*: website. URL: https://center-forward.org/us-involvement-in-the-northern-irish-peace-process-and-the-good-friday-agreement/

REFERENCES

1. Lohvynenko M., Kordunyan I. Osoblyvosti poetapnoho zdiysnennya mediatsiyi u sferi intelektual′noyi vlasnosti: perspektyvy dlya Ukrayiny. Teoriya i praktyka intelektual′noyi vlasnosti. 2019. № 6. S. 100–108.OGY