Nagoya University Graduate School of Law

CREATING AN APPROPRIATE MODEL OF COURT-CONNECTED MEDIATION FOR UZBEK JUDICIAL SYSTEM

Doctoral Thesis in Law

by

Karaketov Maksud

ID: 431104107

LL.D (Comparative Law) Program

Principal Academic Advisor: Professor Sakai Hajime

Sub-Academic Advisor: Professor Yokomizo Dai

Sub-Academic Advisor: Professor Watanabe Miyuki

September 2014

ACKNOWLEDGEMENTS

Foremost, I would like to express my sincere gratitude to my advisor Prof. Hajime Sakai for the continuous support of my PhD study and research, for his patience, motivation, enthusiasm, and immense knowledge. His guidance helped me in all the time of research and writing of this thesis. Moreover, I would like to thank my sub-advisors Prof. Dai Yokomizo and Prof. Miyuki Watanabe for their encouragement, moral support and insightful comments.

My sincere thanks also go to Prof. Giorgio Fabio Colombo and Mr. Dmitry Davydenko for guiding, teaching and providing valuable suggestions. Furthermore, I would like to express my special appreciation to the professors of the Graduate School of Law, particularly Okuda Sensei for her kindly cooperation and friendly support.

Also, I gratefully acknowledge the scholarships received towards my PhD from the TAKASE Scholarship Foundation, HANAO 奨学 and Mitsubishi Corporation. This dissertation would not have been accomplished without these funds.

Last but not the least, I would like to thank my family: my parents, my brother and sister for being in my life and supporting me spiritually throughout my life. Your prayer for me was what sustained me thus far. **The dissertation is dedicated to my family.**

Karaketov Maksud

Nagoya University, Japan

September 25, 2014

ABSTRACT

Mediation is an innovative institution for Uzbekistan. There is no legal basis for this procedure in the state. Moreover, there are neither mediation programs at courts nor panels of approved mediators. Although so called "mediation" is practiced by private sectors like consulting and mediation[1] and *mahalla* reconciliation committees, its broad application at Uzbek court system is restricted.

The main purpose of this research is to investigate different models of mandatory mediation in order to create an appropriate model of court-connected mediation with a mandatory character for the Uzbek judicial system. The paper considers that the court-connected mediation can reform the judicial system and solve the difficulties, which civil and commercial courts are facing now.

Presently, the Uzbek judicial system is going through reforms. Uzbek legislators are trying to build a strong and active civil society. In order to establish this society, the state is intending to develop Alternative Dispute Resolution (ADR) procedures. Uzbekistan currently has three types of ADR procedures: arbitration, consulting and mediation, and settlement agreement. However, these procedures are not assisting in solving the main problems in litigation. The problem is regarding the workload of the courts. The civil and commercial courts of Uzbekistan are over loaded with cases. For instance, in 2012 the total number of civil cases was 599,522. Accordingly, one judge handled from 8 to 10 cases per day. From this statistic, it is clear that the courts are in a difficult situation. Consequently, it is hard for the judges to sufficiently devote themselves to the cases and review them objectively. Another factor that made the judges' work more difficult is the time limitation for the judicial proceeding. In Uzbekistan time limitation for the court proceedings is determined. The Civil Procedure Code and Commercial Procedure Code[2] set one-month procedural terms for court proceedings. In fact, because of the high number of the cases and the time limitation for court proceedings the quality of the judgments is deteriorating.

[1] The company provides consulting services in all areas, including the mediation for the citizens and business entities on the contractual basis. It operates under the Association of Arbitration Courts. The founder of the company is the AAC; accordingly the company gives report on its activities to the ACC.

[2] Civil Procedure Code of Uzbekistan, Art.131; http://www.lex.uz/pages/GetAct.aspx?lact_id=186098
Commercial Procedure Code of Uzbekistan, Art.125; http://www.lex.uz/Pages/GetAct.aspx?lact_id=185981

Therefore in order to ease the courts' burden and improve the quality of judgments, this paper suggests establishing a new ADR procedure, namely court-connected mediation with a mandatory character. The court-connected mediation has been used by several jurisdictions to solve the above-mentioned problem which Uzbekistan is facing now. In fact, in those jurisdictions the court-connected mediation helped to decrease the number of lawsuits. This procedure was more beneficial than litigation for the parties, since usually it required less time and money than court proceedings.

Furthermore this procedure was considered as a 'win-win' dispute resolution procedure despite the outcome. Generally there are two outcomes; first, the parties settle the dispute and conclude a mediation agreement; second, the parties cannot reach an agreement but clarify the key issues and narrow points of dispute. Both outcomes are advantageous for the parties and the court. For instance, in the first outcome, parties conclude the mediation agreement and terminate the dispute from litigation. As a result the number of lawsuits would be decreased. In the second outcome, because of the unsuccessfulness of the mediation, the dispute returns to litigation but requires less time and money for the parties involved. This is because the parties have already discussed the key issues and narrowed the points of dispute during the mediation process.

Nevertheless, in order to create an effective court-connected mediation, the paper recommends Uzbek legislators enact this procedure with a mandatory provision. Mandatory provision gives a right to the court to initiate mediation with or without the consent of the parties. In other words, in mandatory mediation, the court has a case management authority. According to the case management principle, the court checks the appropriateness of the dispute for the mediation process. Consequently if the dispute is appropriate, the court refers the case from litigation to mediation. Moreover, mandatory provision is necessary in order to introduce mediation to the parties. Accordingly, the court by using its case management authority motivates parties to try the new procedure. In fact, without the support and promotion from the court, mediation may not work as an effective dispute resolution procedure in Uzbekistan. At the initial stage parties may be unconfident about trying a new ADR procedure because of not having sufficient information about it. At such a time the role of the court is important. The court should

explain about this procedure and refer the case from litigation to mediation depending on the appropriateness of the mediation process. This referral might be considered as the impulse for the parties to try mediation.

In conclusion, the Uzbek government should create a law on mediation in order to implement court-connected mediation into the judicial system. The adoption of this law creates the necessary mechanisms based on which the mediation procedure would function in the Civil and Commercial Courts of Uzbekistan. Furthermore, this law should provide courts a right to order mediation without the consent of the parties. However, the parties should have the right to quit the process at any stage, when there is no possibility of settling the dispute.

TABLE OF CONTENTS

INTRODUCTION

I. Actuality of the Research

There are many definitions of the mediation procedure by different scholars and legal practitioners. Some consider that a mediation procedure should be independent; others think that it should be under the control of the courts. Moreover, there is also debate regarding the voluntary and mandatory character of the mediation procedure. Most states have their own policy and legal basis for such ADR (Alternative Dispute Resolution) procedures. However, the core definition of mediation *'[…] is a procedure based on the voluntary participation of the parties, in which an intermediary (or multiple intermediaries) with no adjudicatory powers systematically facilitate (s) communication between the parties with the aim of enabling the parties to themselves take responsibility for resolving their dispute'*.[3] In other words, mediation is the procedure where the parties try to reach an agreement with the assistance of a third party (mediator). This procedure has two main types: private mediation and court-connected mediation.

The difference between private mediation and court-connected mediation is the authority that controls the procedure. In the private mediation, the mediation centers control the procedure and the quality of the proceeding. On the other hand, the court-connected mediation is under the jurisdiction of the courts. The court is responsible for the quality of the procedure and legitimacy of the outcome. Usually, the mediation at courts is cheaper and quicker than the private mediation.

Moreover, in some states the courts have a strict time limitation for the mediation procedure. Consequently, if the parties are not able to reach an agreement in the court-connected mediation, they directly refer the case to litigation. This is another advantage of mediation under the court. However, despite the above-mentioned merits, the court-connected mediation, the court-connected mediation would not be so effective without the promotion of the court.[4]

Originally regardless of the type of the mediation, the basic idea under the mediation procedure was the voluntarism element. Nevertheless, over time the some legislatures decided to

[3] Klaus J. Hopt and Felix Steffek, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press, 2013)., p11

[4] Maksud Karaketov, "Court-Connected Mediation in Uzbekistan and Japan: A Comparative Analysis;" (Nagoya University, LLM Dissertation, 2011).

use mediation as a mandatory utility which would assist in the reform of the judicial system. The idea was to provide case management power to the courts. Consequently, the courts received the authority to order parties to mediation.[5] This idea contradicts the voluntarism element of mediation. In spite of this fact, some states made this procedure mandatory. Such states have tried to build their special mediation models[6] with a mandatory character, which would suit the judiciary. Those models' have various levels of mandatoriness. This variation is based on different factors. For instance, in theory the factors that affect the decision of the state to implement mandatory mediation have two types: internal and external. Internal factors are culture, legal tradition and the legal condition of the judicial system of the state. The external factor is being a part of regional and international organizations.[7]

Overall the main reason for permitting mandatory mediation is to make it effective in dispute resolution procedures, which would help to reform the judicial system of the state. If one researches the judicial systems of the states[8] with the mandatory mediation, one finds that these judicial systems were facing difficulties due to high number of lawsuits. Consequently, the main basis for implementing a mediation procedure with a mandatory provision has been to refer some percent of pending cases from litigation to mediation. Those states were trying to modify their judicial systems by creating their own model of mandatory mediation.

Currently, the Uzbek judicial system is facing the same difficulties. The civil and commercial courts are overloaded with the cases, and this factor has caused insufficiency in the quality of judgments. Moreover, the Commercial and Civil Procedure Codes determined a one-month procedural term for the litigation. Because of these two factors, Uzbek civil and economic courts are in a complicated situation, where they cannot guarantee objective legal proceedings. Therefore, in order to solve the above-mentioned problems and decrease the case load of courts, Uzbekistan could follow other jurisdictions' experiences and reform its current judicial system by the implementation of a mediation procedure with a mandatory character. Nevertheless, Uzbek

[5] David Spencer and Michael Brogan, *Mediation Law and Practice* (Cambridge University Press, 2006)., p271
[6] Presently there are three models or categories of mandatory mediation: categorical, discretionary and quasi compulsory. These categories are discussed in the next section.
[7] Melissa Hanks, "Perspectives on Mandatory Mediation," *University of New South Wales Law Journal* 35 (2012): 929., p929
[8] E.g., Italy, Belarus, Australia

legislator should not just copy one foreign model of mandatory mediation and enact it within the judicial system; it should create its own model that would be efficient and appropriate for the parties as well as the courts. If the Uzbek legislator adopts a law on mediation with a mandatory character, there is a high possibility that the current situation at civil and commercial courts might be improved.

II. Purpose of the research

Presently Uzbekistan is falling behind in the implementation of court-connected mediation in its judicial system. There is no legal basis for this procedure in the state. Moreover, legal professionals and the Uzbek people are not very familiar with it. Therefore, the main purpose of the study is to propose an appropriate model of court-connected mediation with a mandatory character for the Uzbek judicial system. This procedure would be directed to reduce the abundance of civil and commercial courts and improve the quality of the judicial proceedings. The proposed Uzbek model of the court-connected mediation would be based on three other states' experiences regarding the establishment of mediation with a mandatory nature.

The paper researched three jurisdictions with mandatory mediation: Italy, Australia and Belarus. The reason for choosing these jurisdictions is the variety of the mediation models, the different categories of mandatory mediation, as well as the ways of implementing this procedure into the judiciary.

Moreover, these states made mediation mandatory in order to establish efficient ADR procedures that would help to reform the judicial system. The judiciaries of these states have had the same difficulties that the Uzbek judicial system is facing now. The courts were overloaded with cases and because of that the quality of the judgment had been deteriorating. Consequently, these states reached their goal after establishing a mediation process of a mandatory nature. Because of the mandatory referral of some types of cases to mediation, the burden of the courts was eased.

After researching three jurisdictions with mandatory mediation models, the paper establishes a framework for an Uzbek model of court-connected mediation with a mandatory character and recommends the possible ways of implementation of this procedure into the judicial system of the

state. Accordingly recommendations are made regarding the following issues: (1) category of mandatory mediation; (2) the level of mandatoriness; (3) consent of the parties; (4) required level of participation in the mediation process; (5) objective participation standards; (6) role of the courts in referring the disputes to mediation; (7) duration of the mediation procedure; (8) rights and responsibilities of the parties; (9) parties' autonomy and good faith issue; (10) basis for creating a law on mediation;

Additionally, the paper explains what the role of the state and the court would be after the establishment of the court-connected mediation in Uzbekistan. The research recommends that the Uzbek legislature promotes this procedure by providing financial privileges for the parties who attempt court-connected mediation and settle disputes. Moreover, the legislator should also create qualification requirements for the mediators. These requirements should consist of the following factors: (1) impartiality of the mediators; (2) mediator's presence and its effectiveness; (3) mediator qualification and disputants expectation; (4) confidentiality of the proceeding and confidence in mediator. Also, the court should be responsible for organizing effective court-connected mediation processes.

III. Research Methodology

The following methodology was used in undertaking the current research:

Secondary Data:

The research was done through collecting, reviewing and analyzing related books, research papers, periodicals and court cases regarding court-connected mediation in the three jurisdictions: Italy, Australia and Belarus. Particular scientific attention was paid to the reasons for and the result of the establishment of mandatory mediation in those jurisdictions.

Primary Data:

The research is also based on data collected through discussions with professors from Italy, Australia, Belarus and Uzbekistan regarding the mediation procedure. Moreover, the data gathered from the interviews, which were conducted with the judges of the Civil and Commercial Courts of the Republic of Uzbekistan as well as the arbitrators of the Association of Arbitration Courts regarding the current situation of ADR procedures in Uzbekistan.

IV. Scope of the Research

The paper consists of two parts and five chapters. The first part explores the history and the development of mandatory mediation in three jurisdictions (Italy, Australia, and Belarus). The research of these jurisdictions is elaborated in three chapters. The main aim of this part is to compare the three jurisdictions with different mandatory mediation models and discover the most appropriate one for Uzbek judicial system. Moreover, scientific attention has been paid to the reason for establishing a mandatory mediation and the intention of the state for creating a legal basis for this procedure. Also, in this part, the paper explains the current situation of mandatory mediation in those jurisdictions in order to show either the effectiveness or ineffectiveness of that procedure.

The second part consists of two chapters. First chapter defines the term mediation and explains its difference from other ADR procedures (arbitration, negotiation, and conciliation). Also, this chapter gives information regarding the current situation of ADR in Uzbekistan and explains the reason why the Uzbek judicial system needs court-connected mediation to be implemented into the judicial system of the state.

The second chapter includes two parts. The first part is about the perspectives on mandatory mediation, in which the notion of mandatory mediation is explained in detail; specifically the following issues have been clarified: a. Categories of Mandatory Mediation; b. The level of mandatoriness; *c*. Consent of the parties; d. The required level of participation in mediation. As a result, based on the above-mentioned jurisdictions' experience of mandatory mediation and the Uzbek judicial system, a legal framework for a mediation model for Uzbekistan has been recommended.

The last part of the chapter addresses the ways for implementing this new ADR method into the Uzbek legal system by adopting either a law concerning mediation or by including a provision on mediation into the Civil and Commercial Procedure Codes. As a basis for this law, the paper recommends the use of the European Mediation directive, UNCITRAL Model Law on International Commercial Conciliation, as well as Belarusian law on mediation.

PART ONE: MANDATORY CHARACTER OF MEDIATION PROCEDURE

Chapter I. Mediation in Italy

1.1 Legal Framework of Mediation in Italy

Mediation has been a part of Italian dispute resolution procedures for a long time. Italian mediation has an interesting and complicated history. The history of this procedure reflects Italian culture, which is passionate and unpredictable. Therefore, the path to acceptance of mediation and creating an appropriate law required lots of effort from Italian governments and legislature. Even after the implementation of the law, disputes regarding the mediation procedure have not ceased.

(a) Background and History of Legislative Reforms. Mediation has a very long history in Italy. Court mediation was already provided for by the 1865 Code of Civil Procedure of the Kingdom of Italy, as a court procedure conducted by judges. This institution survived the enactment of the new Code of Civil Procedure in 1940.

Italy has various types of mediation (and ADR procedures): from very simple settlement agreements to judicial conciliation. From these many legal provisions related to the court-connected ADR in Italy, the following ones are worth mentioning: judicial conciliation, either before the Tribunal (Article 185, Code of Civil Procedure) or before the *Giudice di Pace*[9] (Article 320, Code of Civil Procedure); Non-judicial (court-annexed) mediation before the *Giudice di Pace*; non-judicial conciliation attempts in labor disputes[10] which was mandatory for a long time but now is optional (Law 183/2010); judicial conciliation required for divorce procedures (Article 708, Code of Civil Procedure).

In 1993 Law no. 580 was enacted, marking the first step of "consumer mediation" in Italy. This law entrusted the Chambers of Commerce to conduct mediation proceedings for disputes among businesses and consumers. This was an attempt to "outsource" the management of disputes from the court system to other entities. Accordingly, the Chambers of Commerce created more than a hundred mediation centers with their offices throughout Italy. Most of the cases that went to this new procedure were mid-value disputes between business entities and their

[9] *Giudice di Pace* is a court similar to Japanese Summary Court.
[10] Hopt and Steffek, *Mediation*.

consumers.[11] Later, the Chambers of Commerce received also the authority to conduct a mediation procedure in the disputes between franchisor and franchisee. However, these legislative reforms were unsuccessful in generating a significant number of cases.[12] Moreover, the Italian National Institute of Statistics (ISTAT) reported that 96 percent of Italian population did not know that the Chambers of Commerce provided a mediation proceeding. [13]

The next set of reforms occurred 10 years later, when the Italian Ministry of Justice adopted Decree[14] 5/03, Decree 222/04 and Decree 223/04. Decree 5/03[15] enabled corporate, financial, and intermediation disputes to be subjected to mediation. This statute included provisions regarding practical aspects of mediation, in particular, "confidentiality; enforceability of the mediation clause; suspension of limitation periods; fiscal benefits; enforceability of agreements resulting from mediation; conciliator's proposal only if demanded by both parties, and denial consequences on court's procedural costs even in case of win".[16] On the other hand, Decrees 222/04 and 223/04 regulated issues concerning the accreditation of mediation organizations. Moreover, the last two decrees allowed the creation of private mediation centers, which would provide out-of court mediation services. These centers have to apply to the Ministry of Justice for the registration at the National Register of Mediation Organization. In order to be registered the mediation centers should fulfill two main requirements: professionalism and efficiency. Additionally, Art.1.1 of the Decree 222/04 gave a concrete definition for the mediation procedure: 'the service offered by one or more entities, different from a judge or an arbitrator, under conditions of impartiality and having the aim of settling a dispute that has already arisen or may arise between parties through methods that promote an autonomous settlement'.[17]

The next reformation regarding the mediation procedure occurred in 2009, when the Italian Parliament issued a new Law (69/2009). This law considered a mediation proceeding as one of the dispute resolution procedures which settle civil and commercial disputes. Furthermore,

[11] Data from the year 2000 indicated an average value of mediated settlements at the Milan Chamber of Commerce was about €3000.
[12] Nadja Marie Alexander, *Global Trends in Mediation* (Kluwer Law International, 2006)., p264
[13] De Palo Giuseppe, "Cross-Border Commercial Mediation: How Legislation Affects Mediation Use," n.d., p2 http://www.europarl.europa.eu/comparl/juri/hearings/20071004/depalo5_en.pdf.
[14] **Decree** is a legislative act of a temporary nature having the force of law, adopted in cases of extraordinary need and urgency by the Government, pursuant to Art. 77 of the Constitution of Italy.
[15] The summary of Italian Mediation Laws is described in the Appendix, Table 1.
[16] Fred Schonewille and Martin Euwema, *Mastering Mediation Education* (Maklu, 2013)., p38
[17] Alexander, *Global Trends in Mediation*., p265

this statute gave authority to the Italian government to establish a legal decree on mediation. The basis for the implementation of this law was European Directive on Mediation 2008/52/EC.

Consequently, in 2010 Legislative Decree no 28 was adopted. This decree developed from Law 69/2009 on the matters of civil process, and included provisions of EU Directive 2008. The decree was pro mediation and recommended new modified mediation procedures for civil and commercial disputes. Moreover, it proposed a new definition for the mediation procedure. The term mediation[18] under this statute is "activity, conducted by a third party that aims to assist two or more persons in finding an amicable agreement of a dispute, and formulating a proposal for the resolution of the dispute".[19]

(b) Overview of the current mediation law. While Legal Decree 28/2010 clearly described the mediation procedure, it also provided three types of mediation: voluntary mediation, mandatory mediation and mediation suggested by the judge.[20]

Voluntary mediation as mentioned above has been part of the Italian judicial system for many years. Because of the voluntary character of the procedure, disputants have a right to request a mediation procedure at any stage of litigation. If there is such a request, the judge has to transfer the case from litigation to mediation. Moreover, according to Art.5 of Leg. Decree 28/2010 if the disputants chose the mediation clause as a dispute resolution procedure and have included it into their contract, then that clause becomes binding.

Art.5 also clarified the judges' authority regarding the recommendation for mediation. Judges do not have a right to send the case to mediation without the disputants' consent; they can only propose the mediation procedure before or during the litigation. While suggesting the mediation, the judge should explain the merits of the procedure and reasons why this procedure

[18] Italian legislature made a distinction between the terms mediation and conciliation in the Leg.Decree no 28. Before the adoption of the decree the term conciliation ('conciliazione') indicated mediation procedure. From 2010 the word mediation ('mediazione') began to be used. The reason for using different terms was a European Directive 2008/52 in which the term mediation represented the procedure. In spite of the fact that the term conciliation was replaced by mediation, the legislature kept the term in the decree by modifying its meaning. Presently, the term conciliation referred to the outcome of the mediation procedure. In fact one can use the word '*mediation'* for the procedure and the term '*conciliation'* for the result of the mediation procedure (mediation agreement).

[19] Hopt and Steffek, *Mediation*., p 669

[20] Silvestri, Jagtenberg, "Tweeluik – Diptych: Juggling a Red Hot Potato: Italy, the EU, and Mandatory Mediation," n.d., p 31 http://www.boomlemmatijdschriften.nl/tijdschrift/tijdschriftmediation/2013/1/TMD_1386-3878_2013_017_001_004.

would be more appropriate for the case rather than litigation.

Furthermore, in Italy court-connected mediation (*i.e. Conciliazione del Giudice di Pace*) is not very popular. Usually, mediation in Italy is conducted by mediation centers, which are private entities independent from the courts. For this reason, courts do not have any mediation branches. Therefore, while making a suggestion regarding the mediation procedure for the disputants, judges recommend some private mediation centers. Under this legislation, therefore, judges cannot act as mediators or conduct mediation procedures by themselves or transfer the case to another judge for conducting the mediation.[21] However Art. 18 of Leg. Decree 28/2010 gives authority to the bar associations to form mediation branches at each court with the permission of the President of those courts. These bar association branches may use court staff and court facilities for the procedure.

Italian legislation made mediation mandatory for the following disputes: tenancy in common; real property; division of assets; inheritance; family estates; leases of real property and of going concerns; gratuitous loans for use; medical liability; defamation in the press and other media; and insurance, banking and other financial agreements. Disputants in the cases regarding these issues must try mediation procedures first before going to the court. If the disputants refer the dispute to the court without an attempt of mediation the judge will order the mediation procedure and transfer the case to one of the mediation centers accredited by Italian Ministry of Justice.[22]

The main idea of Legal Decree 28/2010 was to create a workable dispute resolution procedure by implementing the provisions of European Directive on Mediation 2008/52/EC in order to decrease the workload of courts. For this reason, the legislature made mediation mandatory for some types of disputes.[23] However, after the adoption of this law with the mandatory provision many objections were raised. Moreover, it marked the beginning of extensive discussions among the scholars. In order to describe and name this situation the term

[21] Hopt and Steffek, *Mediation*., p 672
[22] Andrea Sturini, "New Mediation Law in Italy," n.d., http://www.disputescentre.com.au/assets/media/newsletters/April-Newsletter/New_Mediation_Law_Italy.pdf.
[23] Silvestri, Jagtenberg, "Tweeluik – Diptych: Juggling a Red Hot Potato: Italy, the EU, and Mandatory Mediation."

"Italian paradox"[24] was used.

A few months later after the adoption of the Legal Decree 28/2010, the Ministry of Justice issued Decree 180/2010, which amended provisions of Decree 28/2010 regarding the mediation organizations, mediators, mediators' training and mediation procedure fee. Moreover, in 2011 Ministry issued another Decree 145/2011 in order to increase the requirements for mediators' qualification and decrease the costs of mandatory mediation proceedings.[25]

1.2 Mandatory Mediation: Italian Paradox

The Italian judicial system has experienced various mandatory and voluntary mediation models in the last 20 years. These models were aimed at reforming the judicial system of the state. However, they were not considered sufficiently efficient dispute resolution procedures among the disputants. One of the main reasons for the unpopularity of mediation was the lack of awareness of people regarding this procedure.[26] The state after the establishment of mediation institutions had not fully promoted it. Moreover, the legal professionals were not so interested in suggesting this new procedure to their clients. From the above-mentioned facts one can hypothesize that despite the voluntary or mandatory character there was a possibility to make mediation an effective dispute resolution procedure with the support and promotion from the government. It seems like 'that the legislative activity in Italy has not secured mediation a prominent place in the minds and hearts of Italian legal community'. [27]

In 2010 Italian legislature adopted a new statute (Legal Decree 28/2010) regarding mediation procedures and made it mandatory for some kinds of disputes. This statute included provisions from the EU directive on Mediation (2008/52/EC), but the main difference in the Italian decree was regarding the mandatory character of the procedure. In fact, presently only Italy has a categorical mandatory mediation in the whole European Union.[28] Consequently, the Italian

[24] Section 1.2 of the paper explains this situation in detail.
[25] Hopt and Steffek, *Mediation*., p 670
[26] For instance, according to Italian national Institute of Statistics report only 4 percent of Italian people were informed about mediation services, which were conducted by Chambers of Commerce at that time. Additionally, the respondents of the CPR Institute's European Committee Survey expressed their interest in mediation procedure when they were informed about the advantages of this procedure.
[27] De Palo, "Cross-Border Commercial Mediation: How Legislation Affects Mediation Use."., p 3
[28] Silvestri Elisabetta, "Alternative Dispute Resolution in the European Union: An Overview," *Russian Law - Theory and Practice* N1 (2013)., p 115. For further details on categories of mandatory mediation, see Chapter V.

Parliament provided two main grounds for implementing the modified EU directive with a mandatory mediation provision.

The first one was regarding the workload of the courts. Before the adoption of the mandatory mediation Italian courts were overloaded with the cases. At that time the number of the pending cases was around 5.4 million. The Italian legislature intended to remove around 1 million of those cases by referring them to mediation.[29] Even if that planned number were a tiny part of the pending cases it would have a huge impact on the civil justice system as whole. But the main issue was regarding the promotion of the new mediation model among the disputants and finding a compromise with legal professionals because attorneys and other legal professionals usually recommended disputants to go to the court rather than using ADR procedures. This was mainly because they were not so familiar with the mediation process and, as far as professional fees were concerned, it was not as rewarding as litigation.[30]

The second argument was regarding the reformation of the entire judicial system of Italy. In 2009, a statistical report by the World Bank classified Italy on 158th position out of 183 countries in civil litigation efficiency. [31] As mentioned above, the courts were burdened with cases and because of the huge number of pending cases the average time duration for a civil case was eight years.[32] However the number of the judges per citizen was in line with other EU countries. For instance, in 2009 the number of the judges per population was around one per 9,478 people. Because of the unreasonably long court proceedings, the European Court of Human Rights criticized Italian judicial system and forced Italy to pay compensation to disputants who had suffered from the long proceedings. As a basis for this decision, the European Court of Human Rights applied Article 6.1 of European Convention on Human Rights and Article 111 of Italian Constitution. [33]

The above-mentioned two reasons were considered as main arguments during the

[29] Draft report on the adoption of Legislative Decree n. 28/2010
[30] Giuseppe De Palo and Lauren R. Keller, "The Italian Mediation Explosion: Lessons in Realpolitik," *Negotiation Journal* 28, no. 2 (April 1, 2012): 181–99, doi:10.1111/j.1571-9979.2012.00334.x. p 184
[31] Statistical report can be found under the following link: www.doingbusiness.org
[32] De Palo, D'urso, "Explosion or Bust? Italy's New Mediation Model Targets Backlogs to 'Eliminate' One Million Disputes, Anually," *Alternatives* Vol.28, no. No.4 (April 2010),. p 93
[33] Giorgio Fabio Colombo, "Alternative Dispute Resolution (ADR) in Italy: European Inspiration and National Problems," *Ritsumeikan Law Review*, no. No.29 (2012)., p 72

discussions regarding the adoption of the Legislative Decree n. 28/2010. The goal of Legislative Decree n. 28/2010 was to create a workable dispute resolution procedure with the provisions of EU directive 2008/52, which would help to decrease the courts' workload and improve the image of the Italian judicial system in EU. As result, the Italian legislature introduced three types of mediation (voluntary, mandatory mediation and mediation suggested by the court). The provision about mandatory mediation for some civil and commercial cases was controversial and it proved serious criticism from legal professionals.[34] As a matter of fact Italian attorneys began a strike against a new mediation law.

1.3 Opposition to the mandatory mediation

The opposition to the mandatory mediation began in 2009, during discussions on the adoption of Law 69/2010. While drafting the law, the parliament intended to include mediation as a mandatory dispute resolution procedure. However, because of significant opposition in the parliament Art.60 was included in Law 69/2010, which made a mediation procedure optional for civil and commercial cases. Moreover, Art.60 gave an authority 'to the government to enact a decree on mediation with provisions that would implement the European mediation directive'.[35]

After getting this authority, the Italian government enacted Decree 28/2010 with mandatory mediation provisions for some civil and commercial cases. While adopting this law the government asked the legal professional's opinion regarding the mandatory character of the procedure, but again it faced opposition. Nevertheless, at that time the state ignored the objections and made mediation mandatory for certain matters. Italian attorneys did not approve the new provision and expressed dissatisfaction with it. The main reason for the objection was regarding the role of legal representatives in the mediation procedure. Due to Decree 28/2010 the disputants can participate in the mediation procedure by themselves without legal professionals. However, under the legislation legal professionals had the duty not only to inform their clients about the mediation procedure but also to spread this procedure among them by explaining its advantages in written form. These provisions of the decree would force attorneys to promote the mediation

[34] Silvestri, Jagtenberg, "Tweeluik – Diptych: Juggling a Red Hot Potato: Italy, the EU, and Mandatory Mediation."p.32
[35] De Palo and Keller, "Italian Mediation Explosion." p.190

among their clients even if this procedure was not beneficial for them.[36] As a result one of Italy's leading association of attorneys "Unitarian Body of Lawyers" (*Organismo Unitario dell'Avvocatura* ,"OUA") engaged in strikes throughout Italy in opposition to the mandatory character of mediation procedures.[37]

The OUA has demonstrated its opposition in two ways by organizing strikes publicly and challenging mandatory provision of the decree in court. The OUA organized three countrywide strikes by requesting all attorneys to stop attending court proceedings as an act of pubic objection. These strikes could not annul mandatory mediation provision but they created huge discussion about mandatory mediation in the mass media. Furthermore, the OUA challenged two cases against the legality of mandatory mediation in the Decree 28/2010 under Italian Constitution and the European mediation directive.[38] These two cases will be discussed below.

In the first case, the OUA applied a case to the Regional Tribunal (TAR) of Lazio by arguing that mediation regulation contradicts the Constitution of Italy. In order to support its argument the OUA gave three reasons: first, mandatory mediation limits disputants' access to the justice; second, the fee of the mediation procedure is too expensive; third Decree 28/2010 does not provide definite regulation regarding the mediator's qualification and professionalism. The judge of TAR considered these arguments in detail and referred the case to the Italian Constitutional Court for review. [39]

A second case was submitted to the Tribunal of Bagheria, a subsection of the Tribunal of Palermo. The challenge was regarding the improper implementation of the European Union Directive on Mediation. After the hearings, the judge of the Tribunal of Bagheria found the submissions reasonable and referred the case to the European Court of Justice (ECJ). The case specifically challenged the following issues 'whether the decree provides appropriate guidelines for mediator certification and selection for a particular dispute, whether its grant of territorial jurisdiction to the first mediation organization contracted is valid, and whether the balance

[36] Silvestri, Jagtenberg, "Tweeluik – Diptych: Juggling a Red Hot Potato: Italy, the EU, and Mandatory Mediation."p33
[37] Alessandro Bruni, "Mediation in Italy," n.d., http://www.mediate.com/articles/BruniA1.cfm.
[38] De Palo and Keller, "Italian Mediation Explosion.".,p191
[39] Regional Administrative Tribunal of Lazio, decision n. 03202/2011 REG.PROV.COLL., referring recourse nn. 10937/2010 and 11235/2010 to Italian Constitutional Court.

between mediation and judicial resolution called for in the directive can be interpreted in such a way as to allow the mediator.'[40]

Regarding the first case the Constitutional Court made a judgment in December 2012. [41] According to the decision, the government exceeded its legislative authority, which was given by Law 69/2010 by making mediation mandatory. In the judgment the Constitutional Court did not touch two other submissions raised by the OUA regarding the access to the justice and due process. These two issues were very sensitive, because, on the one hand, the government was actively supporting the mediation by stating that it would help to decrease the workload at the court; on the other hand lawyers associations continuously opposed mandatory mediation. For this reason the Constitutional Court was in a demanding situation. Thus, it took quite a long time to announce the judgment.[42]

After three months the Constitutional Court announced the judgment. In the judgment the Legislative Decree 28/2008 was considered unconstitutional. As a basis for the decision the Constitutional Court used EU Directive on Mediation by addressing Art.5 of it. According to Art.5 'the directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system'. From this article one can imagine that the EU Directive supports the voluntary character of the mediation procedure. On the other hand, it does not completely reject mandatory mediation by stating that mandatory mediation does not limit a disputant's right of access to the judicial system. In fact, the Constitutional Court of Italy stated that the provision of Decree 28/2010 regarding mandatory mediation does not find its source in European Legislation, particularly EU Directive 2008/52. In short, the Constitutional Court decided that the legislator exceeded its authority provided by the enacting rules by making mediation mandatory, thus the provision regarding the mandatory mediation had to be considered unconstitutional. [43]

Nevertheless, the ECJ declared that Italian rules on mandatory mediation to be consistent

[40] De Palo and Keller, "Italian Mediation Explosion."., p.192
[41] Judgment no. 272, dated 24 October-6 December 2012.
[42] Silvestri, Jagtenberg, "Tweeluik – Diptych: Juggling a Red Hot Potato: Italy, the EU, and Mandatory Mediation.", p.33
[43] Ibid. pp.35-36

with EU Directive 2008/52 and EU Law. In order to support this argument they quoted the *Alassini vs Telecom Italia* case. In this case the judge ordered the disputants to try mediation first, because the issues of that case were subject to mandatory mediation. Later, this case was challenged at the ECJ. The ECJ decided that the mandatory provision of Italian law does not violate disputants' right of access to the justice. On the contrary, in this case the mediation procedure is mutually beneficial, since it does not 'cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs-or gives rise to every low costs – for the parties'.[44] As a result, the ECJ came to the conclusion that Italian law with a mandatory mediation provision fulfilled the principle of effective judicial protection and was consistent with EU law. [45]

Nevertheless, the European Parliament (EP) in its recommendation from October 25, 2011 on alternative dispute resolution in civil, commercial and family matters did not support mandatory character of mediation in Italy by stating that 'ADR must always be optional, allowing parties the possibility at any time to settle their dispute before the courts. […] Mediation must not under any circumstances constitute an initial compulsory step prior to the initiation of legal proceedings.' This freedom of choice principle came from the Commission Recommendation on Consumer ADR 98/257/EC.[46] It seems like the EP is confused in this situation. On the one hand, Italian mandatory mediation reforms the whole judicial system by decreasing pending cases. On the other hand, the mandatory character of the mediation procedure contradicts the principle of freedom of choice.

Even though only the mandatory provision of the Decree 28/2010 was announced to be unconstitutional by the Constitutional Court of Italy other types of mediation also stopped working. The Constitutional Court's judgment annulled mandatory mediation but it did not touch the voluntary and court-referred mediation provisions of the Legal Decree 28/2010. Similar types of mediation have been part of the judicial system of Italy from 1993, but they were not

[44] Joined Cases C-317/08 to C-320/08, *Alassini and others v Telecom Italia* [2010] ECR I-2213
[45] Iris Benohr, *EU Consumer Law and Human Rights* (Oxford University Press, 2013)., p 198
[46] Silvestri, Jagtenberg, "Tweeluik – Diptych: Juggling a Red Hot Potato: Italy, the EU, and Mandatory Mediation." .,
p 43

considered as effective dispute resolution procedures among the disputants.[47] According to the statistics, voluntary mediation was used in less than 20 cases out of 100 and the percentage of court-referred mediation was around 2.7 percent.[48] In fact, Italian legislature again was faced with the same situation. It tried to improve the judicial system by implementing mandatory mediation but as a result it made the situation worse. After the abolishment of mandatory mediation a problem occurred regarding the mediation centers. At that time, there were 383 training centers for mediators and 983 mediation centers with 60,000 mediators in Italy. Most of those mediators were working on a part-time basis. Accordingly, because of the annulment of mandatory provision the number of mediation cases decreased rapidly.[49] Therefore the legislature had to solve this situation as soon as possible, otherwise another strike could occur throughout Italy. In order to solve this situation the legislature had to do two tasks. First, it needed to create a new mediation law with mandatory provision in order to decrease the court's workload. Second, before the adoption of the law, the legislature had to negotiate some provisions with lawyers. The new law needed to be beneficial for everybody.

Finally, in 2013 the Italian Parliament enacted new mediation rule Decree 69. This rule was prepared by the Minister of Justice Anna Maria Cancellieri. While rewriting this rule the author tried to modify the Decree 28/2010 by including the Constitutional Court and ECJ suggestions, which would satisfy disputants and attorneys. As a result the new mediation rules had several important modifications.

First of all, disputes regarding motor vehicle accidents were excluded from mandatory mediation cases. Presently mediation procedure is mandatory for the following types of disputes: tenancy in common; real property; division of assets; inheritance; family estates; leases of real property and of going concerns; gratuitous loans for use; medical liability; defamation in the press and other media; and insurance, banking and other financial agreements.[50]

Second, the new rules gave a right for disputants to withdraw their case from the

[47] De Palo & Oleson, "Lessons on Mediation in Italy: Bring Back Mandatory!," *Alternatives* Vol.31, no. No.4 (2013).p 54
[48] Minestro della Giustizia, Direzione Generale di Statistica, Mediazione civille [D.L. 28/2010]-Statistiche al 31 marzo 2012, available at www.governo.it/backoffice/allegati/68027-7686.pdf
[49] Silvestri, Jagtenberg, "Tweeluik – Diptych: Juggling a Red Hot Potato: Italy, the EU, and Mandatory Mediation."., p 38
[50] "Newsletter: Recent Changes to Italian Litigation System," n.d., http://www.milex.pro/pdf/Newsletter%20Recent%20changes%20to%20Italian%20litigation%20system..pdf.

mediation procedure and to enter litigation if they were not satisfied with the mediator's skill or qualification. Mediators' professionalism was one of the issues raised by the OUA. However, this right had a controversial side also. When the disputants cannot reach an agreement, the mediator has an authority to make a proposal for the solution of the dispute to the parties. This proposal is not mandatory but if the subsequent judgment of the court regarding the same dispute were to be consistent with the mediator's proposal, the judge may oblige the party who rejected the proposal to pay all mediation and litigation costs. Moreover, due to the new mediation rules, judges could order mediation procedures at any stage of the litigation. (Civil Procedure Code Art.185) This provision gives more power to the judge to decide the appropriateness of the case for the mediation. Based on the previous mediation law judges only could invite disputants to try mediation procedures.

During the draft discussion of the new mediation law, the members of the Italian bar took an active role and included a new provision in the law. That provision provided for the necessity of employing a lawyer in mandatory mediation procedures. Overall, the Italian bar was satisfied with the new mediation law.[51]

Another interesting factor regarding the new law is that after two years of implementation Minister of Justice will conduct a mid-term review of the Decree 28/2010 by September 2015. Moreover, after four years, in 2017, the trial period of the new law will end. If till that time the provisions of the law are effective then the legislature will not modify the law. Otherwise there should be some modifications.

In conclusion, the new law on mediation has more chances to be effective rather than previous ones. This is because this law has not just modified the previous one, but has included everybody's demands. In fact it combined the provisions of the EU directive on mediation and the Decree 28/2010. Moreover, in spite of the fact that the mandatory provision of the previous law was not well received by some lawyers and the disputants, the new law kept that provision. Without the mandatory character of the mediation for some types of cases, mediation procedures would not work and be so effective. Overall, the new law had a good reaction in the EU

[51] Giuseppe De Palo, "Mandatory Mediation Is Back in Italy with New Parliamentary Rules," *Alternatives*, 2013, http://www.mondoadr.it/cms/articoli/mandatory-mediation-italy-parliamentary-rules.html.

Parliament also.[52]

1.4 The European Directive on certain aspects of mediation in civil and commercial matters

European Parliament enacted the 'The European Directive[53] on certain aspects of mediation in civil and commercial matters' (Mediation Directive) on May 21, 2008. The directive is considered as a basis for mediation as a dispute resolution procedure in Europe. Consequently, all members[54] of the EU shall follow the provisions of the directive. The purpose of this directive is to create an effective alternative dispute resolution procedure 'by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings'.[55] Furthermore, the Directive meant to further develop institutional judicial cooperation among Member States. [56]

After creating a single economic zone throughout the EU and unifying European legal systems, the number of cross-border disputes, particularly consumer disputes, increased. In order to settle this issue the European Commission (EC) intended to develop and encourage ADR procedures by creating a unified regulation. Accordingly, the European Council while having a meeting in Finland in 1999 proposed that 'alternative, extra judicial procedures should be created by Member States'.[57] Consequently, in 2002 the EC issued a Green Paper on mediation. The Green Paper described ADR procedures as effective dispute resolution procedures, which would supplement litigation. However, there was criticism regarding the ADR procedures' with the view that they contradicted the right of access to justice, which is guaranteed by Art.6 (1) of the

[52] EU Parliament member Arlene McCarthy in the letter from 13 January 2014 stated that Italian Government made a creative and positive approach by adopting the new law on mediation. Moreover, according to EU Parliament 'EU needs to learn from this new Italian model and do more to encourage mediation as an alternative to legal proceedings. The letter can be under the following link: http://www.west-info.eu/files/Arlene-McCarthy-Member-of-the-European-Parliament-Letter-to-Ms-Anna-Maria-Cancellieri-13-January-20141.pdf

[53] '**EU directives** lay down certain end results that must be achieved in every Member State. National authorities have to adapt their laws to meet these goals, but are free to decide how to do so.' http://ec.europa.eu/eu_law/introduction/what_directive_en.htm

[54] All EU member states except Denmark.

[55] *Directive 2008/52/EC of the European Parliament and of the Council Directive on Certain Aspects of Mediation in Civil and Commercial Matters*, 2008, Art. 1 http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32008L0052.

[56] Hopt and Steffek, *Mediation*., p 6

[57] Presidency Conclusions; Tampere European Council 15 and 16 October 1999. Can be found under the following link: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00200-r1.en9.htm

European Convention on Human Rights (ECHR).[58] The response to this issue was a clear explanation in the Green Paper. It stated that:

> 'ADRs offer a solution to the problem of access to justice faced by citizens in many countries due to three factors: the volume of disputes brought before courts is increasing, the proceedings are becoming more lengthy and the costs incurred by such proceedings are increasing.'[59]

According to the Green Paper, ADR was not a barrier before litigation but it created other options for access to justice. Consequently, ADR procedures completely fulfill the requirements of ECHR. Six years after the release of the Green Paper, the EC enacted a Mediation Directive. Over all, to prepare and adopt the Mediation Directive it took around ten years. This directive was compulsory for EU member states (excluding Denmark), and it provided time limitations for the ratification of this directive into the legal system of the member states. According to Art.12 of the Mediation directive the final date of adoption was May 21, 2011. As a result most of the EU members implemented the Mediation Directive's provisions in their legal systems by that deadline. However, on July 22, 2011 the European Commission (EC) stated that nine countries (The Czech Republic, Spain, France, Cyprus, Luxembourg, the Netherlands, Finland, Slovakia and the United Kingdom) 'have not yet notified all national measures needed to fully implement the Directive'. Consequently, it began legal proceedings against above-mentioned states by sending them a formal notification. Responses to this notification should have been done within two months. Moreover, the EC pointed out the advantages of the mediation procedure by declaring that 'the time wasted by not using mediation is estimated at an average of between 331 and 446 extra days in the EU, with extra legal costs ranging from €12,471 to €13,738 per case'. [60]

The scope of the operation of the Mediation Decree is based on three factors. First, the provisions of the directive cover only civil and commercial matters; it does not touch administrative and criminal disputes. Second, it applies to cross-border disputes but the Member states are free to implement provisions of the directive to their domestic legal systems. According

[58] Hanks, "Perspectives on Mandatory Mediation.", p 933
[59] *Green Paper on Alternative Dispute Resolution in Civil and Commercial Law*, 2002, para5. http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002DC0196&qid=1399463750083&from=EN.
[60] European Commission, *Cross-border Legal Disputes: Commission Takes Action to Ease Access to Justice in Cross-border Legal Disputes*, 2011, http://europa.eu/rapid/press-release_IP-11-919_en.htm.

to Art.2 of the directive, a dispute is considered to be a cross border dispute when 'one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date […]'. Third, the directive does not cover procedural aspects of the mediation procedure. It focuses more on general aspects like enforceability of agreements resulting from mediation, confidentiality of mediation, and so on. The Code of Conduct for Mediators and domestic statutes regulate other aspects regarding the process, such as the mediators' competence and their appointment. [61]

Moreover, the preamble of the directive clearly states that 'nothing should prevent Member States from applying such provisions also to internal mediation provisions'.[62] This was a good opportunity for some states to reform their legal basis regarding the ADR. In fact, Germany and France adopted a new law and regulations on mediation. Some of these regulations exceeded the scope of the Directive, particularly regarding mediation with no cross–border aspects. However, other jurisdictions like Australia and England separated cross-border mediation from internal mediation procedures. The reason for the separation and adoption of two different laws was the existence of provisions of domestic mediation law, which were inconsistent with Mediation Directive. Therefore, two different laws were enacted; one for cross-border mediation and another for internal mediation.[63]

[61] Hopt and Steffek, *Mediation*..,p 6
[62] Hanks, "Perspectives on Mandatory Mediation."., p 934
[63] Hopt and Steffek, *Mediation*. p 7

1.5 Provisions of the Directive

EU Directive 2008/52/EC consists of a preamble and 11 articles. The preamble gives a general explanation of the directive's provisions. The directive does not cover any specific procedural aspects of the mediation. It leaves those issues to be regulated on a domestic legal basis. However, it gives a concrete definition of the mediation procedure and describes basic factors. Some provisions of the Directive are discussed below.

Art. 3 of the Directive states that 'Mediation means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.'

This article clearly indicates that mediation procedure should be on a voluntary basis. However, Art.5 (2) permits EU members to make mediation procedures mandatory in their national legislation. Moreover, the paragraph 14 of the preamble of the directive says that 'Nothing in this Directive should prejudice national legislation making the use of mediation compulsory or subject to incentives or sanctions provided that such legislation does not prevent parties from exercising their right of access to the judicial system. Nor should anything in this Directive prejudice existing self-regulating mediation systems in so far as these deal with aspects which are not covered by this Directive.' From this recital, one can understand that the Mediation Directive does not require the mandatory or voluntary character of the mediation. It is giving an opportunity for the states to choose a voluntary or mandatory mediation by themselves based on their legislation and mediation system. Furthermore, the issue regarding the mandatory mediation was considered by the European Court of Justice ('ECJ'). The ECJ supported the possibility of having mandatory mediation in the national legislature. In the judgment[64] the ECJ stated that 'EU directives and general principles do not prevent national law from providing for mandatory out of court mediation procedures as a pre-condition for court proceedings, provided that they: do not result in a binding decision; do not cause substantial delay in bringing proceedings; suspend any

[64] Joined cases C-317/08 to C-320/08, *Alassinin v. Telecom Italia SpA.*

time-bar period; and do not give rise to more than minimal costs'. [65]

Moreover, Art.3 (b) of the Mediation Directive defines the term mediator as 'any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation'. This provision only gives common explanation. It does not touch any particular aspects such as qualification, requirement and role of the mediator, as long as these aspects are set out in the European Code of Conduct for Mediators. [66] But the role of the mediator is mentioned neither in Mediation Directive nor in the European Code of Conduct for Mediators. It seems like the European Parliament was giving authority to the states to settle this issue, which means that the member states are free to choose different mediation categories, such as facilitative or evaluative mediation. Consequently, the mediator may act either as facilitator or evaluator of the process based on the national legal system of the state. Nevertheless, the directive gave responsibility to the member states to keep the quality of the mediation procedure high. According to the Art.4

> "1. Member States shall encourage, by any means, which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organizations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services.
>
> 2. Member States shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties."

Two other main provisions of the directive are in regard to the enforcement and confidentiality issues of the mediation procedure. The directive requires member states to enforce agreements resulting from the mediation process.[67] This provision is the fundamental basis for having an effective cross-border dispute resolution procedure in various states with different languages and legislations. Accordingly, this directive made most of the states include provisions

[65] Steven, Christian Philip Friel, Toms, "The European Mediation Directive—Legal and Political Support for Alternative Dispute Resolution in Europe," *Bloomberg Law Reports*, February 1, 2011.
[66] *European Code of Conduct for Mediators*, n.d., http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf.
[67] *Directive 2008/52/EC of the European Parliament and of the Council Directive on Certain Aspects of Mediation in Civil and Commercial Matters*., Art 6

about mediation in their Civil Codes.[68] In fact, the directive's preamble starts with saying that the EU legislature is trying to build a community in which area of freedom, security and justice as well as free movement of persons is guaranteed. Therefore, there should be 'measures in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market'.[69]

The next provision is in regard to the confidentiality issue. Confidentiality is a main condition of the mediation procedure, which motivates parties to settle their dispute in this proceeding.[70] Usually, the mediator requires a confidentiality agreement from the parties, in order to keep all information used in the mediation proceeding confidential. This condition keeps the disputants from using this information at court, if they cannot reach an agreement in the mediation.[71] The directive supports this condition of the mediation procedure by stating that '[…] Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process […]'.[72]

In conclusion, even if the European Union is trying to build a single economic zone with the unified European legal system, it still gives an opportunity for the EU members to modify some parts of the directives, which are approved by the EP. For instance, EU Directive 2008/52/EC on Mediation gives general instructions regarding the mediation procedure. It does not focus on specific aspects of the procedure, because member states may have difficulties while implementing those provisions into their legal system. Therefore, the directive on mediation does not give detailed directions on the mediation process. In order to have an effective alternative dispute resolution procedure such as mediation, it should be based on the cultural and legal environment of the state. It is almost impossible to create a directive with detailed instructions,

[68] Peter Philips, "The European Directive on Commercial Mediation: What It Provides and What It Doesn't," n.d., http://www.businessconflictmanagement.com/pdf/BCMpress_EUDirective.pdf.
[69] *Directive 2008/52/EC of the European Parliament and of the Council Directive on Certain Aspects of Mediation in Civil and Commercial Matters*., para 1; preamble
[70] Renske Anne Maria van Schijndel, *Confidentiality and Victim-Offender Mediation* (Maklu, 2009)., p 124
[71] Friel, Toms, "The European Mediation Directive—Legal and Political Support for Alternative Dispute Resolution in Europe."
[72] *Directive 2008/52/EC of the European Parliament and of the Council Directive on Certain Aspects of Mediation in Civil and Commercial Matters*. Art 7

which would be effective in the territory of every EU member states. Therefore, the EU 'requires states to achieve a particular result without dictating how to achieve it'.[73] In fact, most of the states modified some provisions of the directive while implementing it into their legislation. For instance, Italy went beyond the provisions of the directive by making mediation mandatory for certain disputes. Overall mediation directive has worked well and has been a reason for most states to make reforms in the area of ADR. As a result some states have included a provision regarding the mediation procedure while others have created a new law about mediation.

[73] Friel, Toms, "The European Mediation Directive—Legal and Political Support for Alternative Dispute Resolution in Europe."

1.6 Mediation Procedure

The mediation procedure in Italy begins by applying a petition for mediation procedure to one of the mediation centers registered in the Minister of Justice. The petition should include information regarding the dispute, the parties to the dispute, the reason for applying for the mediation procedure and the center. This information is needed in order to contact the opposite party and to know his/her desire regarding this procedure. [74] After receiving the petition, the mediation center should begin a mediation procedure in fifteen days.[75] The total duration of the procedure should not exceed a four-month term regardless of the outcome. However, this term may be prolonged as demanded by the disputants when they want to continue the procedure.[76]

As a basis for conducting the mediation procedure, the mediator uses the provisions of the Leg. Decree No.28/2010 and the rules of the mediation center. Each mediation center can adopt its own rules in accordance with the legislation of the State. Under these rules, mediation centers can determine the role of the mediator and give suggestions to the disputants. For instance, the mediation rules may define the mediator's authority regarding the provision of a proposal for the settlement of the dispute. Moreover, these rules may explain some parts of the procedure, which are not defined by the legislature. For example, even if the Italian mediation decree does obligate parties to have lawyers in the mediation only when the mediation is mandatory, some mediation organizations highly recommend parties to have them during all the procedures. [77]

The mediation center arranges the first meeting, but following meetings are organized by the mediator. Moreover, the mediator has a right to decide to have separate or joint meetings with the parties. Generally, the mediator should fulfill four stages during the process. The first stage is an introduction stage in which the mediator explains the parties regarding the procedure and listens to the parties' requirements. The second is an 'exploratory' stage, where the mediator tries to clarify the disputants' positions in regard to each other by finding out the core of the dispute. In the third stage, the mediator tries to help the parties to negotiate in order to reach a satisfactory agreement. The last stage consists of concluding the mediation agreement if the disputants have

[74] *Legislative Decree No.28/2010*, n.d., Art. 4
[75] Ibid., Art. 8(1)
[76] Ibid., Art 6(2)
[77] Hopt and Steffek, *Mediation*., p682

reached one. [78]

Outcomes: The mediation procedure may have three possible outcomes. First, the procedure is successful and the parties reach a mutual agreement. This agreement must be in written form and certified by the mediator. The mediator closes the procedure by receiving a mediation agreement and attaching it to the records of the procedure. However, one should not mix the two documents, *i.e.* the record of the procedure and the agreement. The record of the procedure is the official document filled by the mediator indicating that the parties reached an agreement. All the participants of the mediation procedure should sign this document. On the other hand, the agreement is the document which states that the disputants reached an amicable agreement and negotiated the terms of the agreement. Only disputants should sign it. Even if these two documents have different functions, they aim to become one since, in order to enforce the mediation agreement, both documents should be submitted to the court.[79]

Second, if the parties cannot reach an agreement by themselves, they may ask a mediator to suggest a possible resolution for the parties. This suggestion should be in written form without any information regarding the statements of the parties and other confidential facts. This suggestion does not have a mandatory character. It is just a suggestion for the parties, which the mediator thinks more appropriate for the dispute. The parties are free to accept or decline this suggestion in seven days term. If the disputants decline the mediator's suggested agreement, they can proceed to the litigation.[80] However, according to the Art.13 of the Leg. Decree No.28/2010 if the court's judgment is the same as what the mediator's suggested but declined agreement the 'winning party (the plaintiff or the defendant) who did not accept the proposal of the mediator shall not ask for compensation of judicial expenses and has to pay the defense expenses of the other party. In addition, that party has to pay a fine equal to the taxes paid for the enrollment of the case in the courts registry.' Moreover, if the judgment partially corresponds to the suggested but declined mediation agreement then the judge may deprive the winning party from requesting

[78] Carlos Esplugues Mota, José Luis Pereira Iglesias, and Guillermo Palao Moreno, *Civil and Commercial Mediation in Europe : National Mediation Rules and Procedures* (Cambridge: Intersentia, 2013)., p273
[79] *Legislative Decree No.28/2010*. Art.11
[80] Ibid.,

compensation for legal expenses.[81] From this provision, one may conclude that on the one hand the legislator is providing an authority for the mediator to draft an optional proposal for the settlement, on the other hand it is sanctioning the parties for not accepting it. As a result, the mediator's proposal comes close to the court decision, which is binding.[82] Thus, the parties should be very careful when declining the proposal otherwise they may have to pay a considerable amount of money. Probably the reason for including this provision is to make the parties settle their dispute in the mediation process.

The third possible outcome occurs in cases where disputants on the one hand cannot settle their dispute and on the other have not obtained any proposal from the mediator. In such cases, the mediator ends the procedure by drafting a record about the unsuccessfulness of the procedure. The parties and the mediator should sign this record. This record is then registered at the mediation center. Disputants before going to the court need to take a copy of this record in order to submit it to the judge.[83]

***Enforcement*:** The mediation agreement binds the parties to the obligations mentioned in the agreement. If one of the parties does not fulfill his/her obligations the counter party may go to the court for the enforcement. For enforcement, the mediation agreement should be first approved by the court. For the approval, the court requires and checks the following information: record of the mediation procedure; parties' signatures and their certificates; identification of the center, which performed the mediation procedure. After the approval the mediation agreement will have the same power as a court judgment. [84] The mediation agreement cannot be enforced whether it contradicts with public policy and mandatory rules. For example, the cross-border mediation agreements should be approved in the written form by the president of the court, under the territory of whom the agreement should be enforced, regarding the consistency of the agreement with the European Directive 2008/52/EC.[85]

***Court referred mediation*:** Directive No. 2008/52 not only regulates private mediation but also gives a right to refer the case to mediation with the consent of the parties. According to

[81] Mota, Iglesias, and Moreno, *Civil and Commercial Mediation in Europe*., p273
[82] Ibid.
[83] Ibid., p 276
[84] Hopt and Steffek, *Mediation*.., p676
[85] *Legislative Decree No.28/2010*. ,Art.12

Art. 5 of the directive the judge has an authority to invite the disputants to attempt a mediation procedure. While suggesting a mediation procedure, the judge should take into account the following factors: the stage of the trial; the nature of the dispute; and the parties' attitude. This invitation is not compulsory but voluntary. If the parties accept the judge's invitation to try mediation, the judge will assign a new hearing date in order to find out the result of the mediation procedure. This hearing should be held maximum for a period of four months. Where the parties reach an agreement during the mediation, the judge dismisses the case. Otherwise he/she continues the procedure from the stage where it was transferred to the mediation. The judge can recommend the parties to try mediation at any stage of the court proceeding. Parties have a right to decline the recommendation and continue the litigation.

***Confidentiality*:** The Italian legislature separates mediation from litigation. Therefore, the statute on mediation keeps the information gained during the mediation procedure confidential. Moreover, it prohibits the participants in the mediation to use this information anywhere outside of the mediation procedure. Regarding the confidentiality issue, Art.10 of the Decree 28/2010 clearly emphasizes that the evidence obtained during the mediation procedure cannot be used as a testimonial of the statements in the litigation. In line with this, the mediator is free from being testified as a witness. Furthermore, the Italian Code of Criminal Procedure states that 'mediators cannot be required to testify about information obtained during their professional mediation activities. This provision protects information and declarations exchanged between the mediator and the parties during all communications related to the mediation'.[86]

Moreover, the Italian mediation decree[87] regulates the confidentiality of the mediation procedure even outside of the court by stating that 'each individual who is involved in the mediation process has an obligation of confidentiality with respect to statements made and information acquired during the procedure.' This article is relevant to not only the mediator and disputants but also to all the mediation staff who have access to the information. Of course, these provisions do not apply to cases where the mediator finds out that by keeping confidential some evidence, it may threaten the health and life of the persons. Additionally, if the mediator realizes

[86] Hopt and Steffek, *Mediation*. P677
[87] *Legislative Decree No.28/2010*., Art.9

that the facts gained during the mediation process could be subject to criminal proceeding, he/she might disclose them.[88]

Cost of Mediation: The mediation fee for voluntary and mandatory mediation is standard in Italy. The table below indicates the fee based on the amount in controversy. However, an additional 40€ should be paid by each party in order to start mediation procedure. The initiating party should pay it while submitting the petition and the counter party pays it when he/she accepts the invitation. This fee can be considered as a registration fee. [89]

Amount in Controversy	**Fee**
Up to €1.000	€65
From €1.001 to €5.000	€130
From €5.001 to €10.000	€240
From €10.001 to €25.000	€360
From €25.001 to €50.000	€600
From €50.001 to €250.000	€1.000
From €250.001 to €500.000	€2.000
From €500.001 to €2.500.000	€3.800
From €2.500.001 to €5.000.000	€5.200
Above €5.000.000	€9.200

The fee listed in the table could be increased or decreased based on the complexity or difficulty of the mediation case. Moreover, it may be increased if the disputants request a mediator to prepare a settlement proposal. But the maximum fee increase cannot exceed 20-25% of the original fee. In some cases the fee may even be decreased. The main reason for doing this would be to attract more parties to try the mediation procedure. For instance, in mandatory mediation cases, if the counter party declines to accept the invitation to attempt the mediation procedure, the

[88] *European Code of Conduct for Mediators*.
[89] Legislative Decrees 180/2010 and 145/2011

fee should be decreased by €40 for the first level and €50 for other levels.[90] This is another step by the legislator to promote the mediation procedure in society. Furthermore, in case one of the parties needs legal aid he/she should file a declaration with the mediation organization with supporting documents. After reviewing these documents the mediation center decides if the party is eligible for legal aid or not. Eligible parties do not have to pay the mediation fee.[91]

1.7 Conclusion

Italy faced different complicated issues while implementing the EU mediation directive into the judicial system and creating its own domestic law. The main idea of the legislature was to create an effective ADR procedure while adopting a national statute on mediation. It seems that the Italian legislator did not just want to implement the EU Directive into the legal system but it wanted to reform the whole judicial system. At that point in time there were two main problems in that sphere: the number of pending cases and the duration of litigation. For that reason, the legislator intended to create a new procedure, which would help solve these problems. As a result, the legislator tried to settle this issue by making mediation procedures for some types of disputes. In fact the final aim of making mediation mandatory was to improve access to justice.

However, while drafting the law for mandatory mediation the state forgot to include the opinion of legal professionals. Later it created huge opposition from attorneys and society regarding the mandatory character of the process. The Italian parliament had followed a *'do now, plan later' policy*, which was the reason for the negative reaction. Consequently, this negative reaction was followed by two lawsuits against the Italian legislators' jurisdiction and the legality of the Mediation directive. One of the claims was regarding the consideration of mediation as a barrier to access to justice, and second was about the legitimacy of Italian law on mediation, which seemed not to be consistent with EU Directive 2008/52. After the huge opposition, the Italian legislator had to modify the mediation directive. The new directive kept the mandatory character but it also gave more opportunities for the legal councils in the procedures. Consequently, on the one hand the legislator exceeded its authority by establishing mandatory

[90] Hopt and Steffek, *Mediation*., p675
[91] Presidential Decree no.115 Art.76(L) ; Legislative Decree 28/2010 Art. 17(5)

mediation while implementing the Directive 2008/52, because it put in place a mediation framework for the parties which somehow restricts the right to access to justice. On the other hand, the mandatory provision is consistent with the EU Directive that provides a choice for the member states in national legislation to make the mediation mandatory or voluntary.[92]

From the legal steps taken by the Italian legislator, one can agree that the state is trying hard to promote this procedure among the legal councils and disputants. In order to make the mediation procedure more popular, the state provided several privileges to the disputants by decreasing the tax and mediation fee; limiting the duration of the procedure; giving a right to terminate the case from mediation if the parties were not satisfied with the quality of the mediation procedure and so on. Overall, presently the mediation procedure is considered effective in Italy. After these strikes and publicity, it seems that everybody has basic information about this procedure. Moreover, the reaction of the EU members has also been positive. Some of them are also considering making mediation mandatory for some types of cases.

Nevertheless, the path taken by the Italian legislature to create a mandatory mediation was critical. The legislature in order to promote this procedure took a categorical model of mandatory mediation, which requires certain matters to be referred to mediation directly. This categorization is considered a problematic one, because nobody analyzes the mediability issue of the case. In fact, mediation cannot be appropriate for every case. But in Italy if the dispute falls under the list of mandatory mediation cases, it automatically goes to mediation. Moreover, the categories involved are also considered to be the most frequent mediation model. The parties do not have any opportunity to avoid this procedure before going to the court if they have mediation mandated dispute. In general, presently only Italy has this category of mandatory mediation in Europe, thus it is very interesting what will happen with it in the future. Nobody guarantees that it will be effective in the long-term, and most of the legal professionals are skeptical about the development of the Italian mandatory mediation model.

[92] *Directive 2008/52/EC of the European Parliament and of the Council Directive on Certain Aspects of Mediation in Civil and Commercial Matters*. Recital N14

Chapter II. Mediation in Australia

The situation in Australia regarding dispute resolution procedure is complicated. First of all, Australia is a Federation with six states: New South West (NSW), Victoria, Queensland, South Australia, Western Australia, Tasmania; and two territories: the Northern Territory and Australian Capital Territory (ACT). Consequently, the Australian judicial system consists of states, territories, federal courts and the High Court, which is a final court of appeal. However, these courts, except for the High Court, are separated in every state. The High Court is considered to be the highest and single court in the whole of Australia. It is located in Canberra, the Australian Capital Territory. Nevertheless, states' Courts include three instances: lower courts (Magistrates' Court or Local Court), intermediate courts (District Court, Country Court), and Supreme Courts. Every state has its own Supreme Court.[93]

Secondly, Australia is a common law country, which does not have any codes including civil procedure code. Therefore, there are no unified procedural laws and rules in the land. However, some states have their own Civil Procedure Rules. For instance, Uniform Civil Procedure Rules of Queensland is used in all court instances in Queensland. Besides Queensland, NSW also has its own Uniform Civil Procedure Rules and the Civil Procedure Act.[94] These two lands are among the most populated states and have the most advanced dispute settlement systems.[95] Since the civil procedure rules vary between Australian states, the mediation procedure is different as well. Nevertheless the definition of mediation in Australia is similar in every state and territory. According to National Alternative Dispute Resolution Advisory Council (NADRAC)[96]:

> **"Mediation** is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

[93] Stephen Colbran et al., *Civil Procedure: Commentary and Materials* (LexisNexis Butterworths, 2012).,
[94] Erik Ficks, "Models of General Court-Connected Conciliation and Mediation for Commercial Disputes in Sweden, Australia and Japan," *Zeitschrift Für Japanisches Recht / Deutsch-Japanische Juristenvereinigung* 13 (2008): 131–152.
[95] *National Australian Dispute Resolution Advisory Council Statistics*, 2003.
[96] http://www.nadrac.gov.au/what_is_adr/GlossaryOfADRTerms/Pages/default.aspx

Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement."

Australian mediation has two types: inside and outside of the courts. However, this paper will focus only on mediation in the courts. This type of mediation differs from jurisdiction to jurisdiction. But, in most of the jurisdictions court connected mediation is mandatory; and others are in the course of implementing mandatory mediation programs in courts. Thus, disputes before going to litigation should be first settled through mediation procedures. The reason for requesting mediation procedures before litigation by courts, is justified by the following grounds: economical beneficence, time efficiency and maintenance of good relationships.[97]

Furthermore, the nation's policy was directed to support ADR procedures, particularly mediation. For instance, in 1998 the Australian Attorney General stated that: 'The government firmly believes that mediation and alternative dispute resolution should be norm rather than exception.'[98] From this statement one can consider that ADR procedures in Australia are not completely separate from litigation. On the contrary, they are part of litigation and the procedures fulfill each other. Therefore, during the adoption of laws regarding the mediation procedure prior to a trial, there were no objections from the states.

The reason for necessity of court-connected mediation was the workload of the courts with cases. Consequently, states tried to decrease the number of cases by transferring small civil and commercial cases to mediation. As a result, various court-connected mediation schemes were established all over Australia. For instance, currently almost all the courts provide this dispute resolution procedure. However, in some jurisdictions this procedure is voluntary (E.g. Federal Court of Australia, the District Court of New South Wales) in others it is mandatory (E.g. Queensland, Victorian, Western Australian Supreme Courts). Furthermore, the way of providing the court related mediation is also different. Generally there are five ways: "mediators are employed by the court, the mediation service is outsourced to an external mediation organization, the court maintains a panel of external mediators, the parties select their own mediator, or there is

[97] Monica Del-Villar and Stephen Jaques Mallesons, "Mediation in Australia," *Australian Construction Law Newsletter* (December 2005).p, 2-4
[98] Hopt and Steffek, *Mediation*., p872

a combination of the above".[99] The fee of the procedure is also based on the above-mentioned ways. For example, if the mediator is an employee of the court it is free of charge, but if the selected mediator is outside of the court the disputants have to pay the cost by themselves.[100]

However, not only courts and states but also commercial lawyers have supported mediation procedures. As a result, the Australian Commercial Disputes Center was created in 1986.[101] Later, in 1988 practitioner lawyers established a community of mediators and ADR experts named "Lawyers Engaged in Alternative Dispute Resolution (LEADR)". Presently, this nonprofit organization has more than 2700 members in Australia, New Zealand and the Asia Pacific region. The main goal of the LEDR is focused on training and the development of the skills of ADR practitioners, especially mediators. In these trainings any ADR specialist has a right to share his/her experience with others. Moreover, this organization provides a list of mediators and other ADR specialists for disputants.[102] Additionally, the government has established and provides funds for mediation centers, namely Australian Community Justice Centers. In these centers the disputants can solve their disagreement through mediation procedures. This procedure is usually free or relatively inexpensive for the public. Most of the disputes that go to this mediation procedure are related to family, neighborhood, small business or consumer disputes. Consequently, each state controls this procedure through its own legislation. [103]

The main reason for the quick development of mediation procedures in Australia is based on the following elements. First of all, courts were overloaded with cases, so disputants had to wait. Second, the cost of litigation was high and the disputants were not so satisfied with the process and the outcome. Finally, interest for the new procedure was high among the public, because it was essentially different from arbitration[104] and litigation.[105] As a result, current mediation procedures were established in almost all areas of Australian society. Consequently,

---

[99] Nadja Alexander, "What's Law Got To Do With It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions," *Bond Law Review* 13, no. 2 (December 1, 2001), http://epublications.bond.edu.au/blr/vol13/iss2/5.p,10

[100] *Ibid.*

[101] Del-Villar and Mallesons, "Mediation in Australia.", p2-4

[102] http://www.leadr.com.au/about-leadr/about

[103] Alexander, "What's Law Got To Do With It?". p10

[104] Professor Sourdin distinguished mediation from arbitration and litigation by stating that 'in contrast to litigation and arbitration, the mediator does not decide the result of a case. Mediation can produce legally binding result only with each party's consent to that result by entering into a settlement agreement'. (*Alternative Dispute Resolution 3rd ed. 2012*).

[105] Ibid.,p7

after the adoption of the law about mediation, the number cases going to litigation decreased.[106] However, the court and tribunal played an important role in analyzing and checking how mediation procedure functions. These bodies determined and clarified mediation processes, its standards and methods.[107]

2.1 Court-connected mediation in New South Wales

Court-connected mediation is not a new dispute resolution procedure in New South Wales (NSW). This procedure has being widely used for more than twenty years in the District Court and Supreme Court of NSW. However, in 2000 the Supreme Court Act 1970 (NSW) was amended and Section 110 K modified. According to the section 110 k, part one:

> "If it considers the circumstances appropriate, the Court may, by order, refer any proceedings, or part of any proceedings, before it (other than any or part of any criminal proceedings) for mediation or neutral evaluation[108], and may do so either with or without the consent of the parties to the proceedings concerned".

As a result, courts obtained a right to transfer any civil case to mediation without the consent of the parties. Furthermore, if the case is referred to mediation from litigation, the parties have to act in good faith, even if it is done without their consent. But, it does not mean that the court intends to transfer all cases to mediation. Usually before referring the case to mediation the court asks the registrar to discuss and explain the disputants, the appropriateness, and merits of the mediation. Then, the court after meeting with the parties and basing on the proposal or suggestion of the registrar may appoint a mediator for the process. Again, the consent of the disputants is not necessary either while transferring the case or appointing the mediator. Of course, the disputants by themselves may at any time request for the referral of the case from litigation to mediation, demand the mediator and ask the court for the necessary orders.[109]

***Court-connected mediation procedure**:* Court-connected (court-annexed) mediation is an

---

[106] For instance, in 1989 only 5.7 percent of commercial disputes were settled at the courts.
Maxwell J. Fulton, *Commercial Alternative Dispute Resolution* (Law Book Company, Limited, 1989).
[107] Nadja Marie Alexander, *Global Trends in Mediation* (Kluwer Law International, 2006).p63
[108] "**Neutral Evaluation** Program allows disputing parties to obtain a reasoned, non-binding assessment of their case from a neutral third party called an evaluator"; http://www.lawsociety.com.au/community/disputesandmediation/Earlyneutralevaluation/index.htm
[109] Supreme Court, *"Practice Note No.118*," 2001.

ADR procedure in which disputants reach an agreement regarding the dispute with the assistance of the mediator. The mediator is either a registrar or other court servant with a mediator's qualification. The court appoints a mediator; the disputants cannot choose candidates to act as mediator. The mediation is held in specially designed rooms for this procedure. In fact, disputants do not have to pay either for mediator or for the mediation room. The mediation proceedings at courts are totally free. However, the court does not provide legal representative for disputants in mediation, thus the disputants need to hire lawyers by their own expense. Generally, the duration of the court-connected mediation in NSW is half a day. In some cases, mediators may extend this term. But, usually this term does not last more than one day. Therefore, while going to mediation procedure the disputants should be ready for extended time.[110]

Before entering the court-connected mediation, the parties should prepare two things: documents and themselves. Since the main idea under the mediation procedure is compromise, the disputants should morally be ready to negotiate with each other. Thus, they need to point out crucial issues and their possible resolutions in advance. While participating in the procedure each party will have their own time for presenting and discussing disputing issues with a mediator. But since the mediation procedure is limited the parties' individual time is also restricted. Therefore, the parties should be as concrete and distinct as possible. Moreover, they have to participate in a good faith. Otherwise, the mediator has a right to terminate the case and transfer to litigation. If the case proceeds to a court hearing because of the unsuccessfulness of the mediation procedure, the disputants will have to pay legal costs. Hence, the disputants need to prepare themselves for the mediation procedure appropriately. [111]

In order to start court-connected mediation procedures, the disputants need to prepare the following documents: a notification letter to the other party and the mediator regarding the issues which need to be mediated; evidence requested by the mediator before the mediation procedure (E.g., expert reports, evaluations). Usually, they need to submit these documents to the court one week before the mediation procedure. [112]

[110] http://www.supremecourt.lawlink.nsw.gov.au/supremecourt/sco2_mediationinthesc/court_annexed_mediation.html.
[111] *Ibid*
[112] *Ibid*

2.2 Court-connected mediation in Queensland

In Queensland, the necessity for Alternative Dispute Resolution (ADR) procedure arose in the 1980s. This was because of the following reasons: civil and criminal courts were work loaded and the population was increasing in a rapid way. Thus, it was expected that there would be a demand for mass litigation. However, after the implementation of ADR procedures in the judicial system, the situation changed. As a result, the use of ADR procedures increased and a decrease in litigation occurred. [113]

Even if Queensland is part of the common law country, it has the Uniform Civil Procedure Rules, which were adopted in 1991. These Rules regulate various dispute resolution procedures, including ADR proceedings, and apply to all courts. Moreover, the Rules provide information on how to apply mediation procedure at courts. Therefore, in the following paragraph the court-connected mediation procedure in Queensland will be discussed based on the practical aspects.

In Queensland similar to NSW, the court-connected mediation may be initiated by the court or by the disputants. The court has an authority to order mediation at any stage of the litigation by giving referral notice to the disputants. However, within seven days the disputants can raise an objection, by submitting an objection notice at the registry of the court. This notice must include the reason for the objection.[114] If court finds the reason of the objection to be valid, it may reject the mediation order. Likewise, the parties by themselves may apply for the referral.[115] In the mediation order the court must include information about the mediator, the duration of the procedure, the mediation costs and so on. Accordingly, the court-connected mediation begins after the appointment of the mediator. Usually, it should last no more than 28 days. [116]

The mediator should be either appointed by the court or selected by the parties. Usually, each court has a list of mediators from which the disputants may choose. In the list, there will be information about the fees, qualifications and occupation of the mediator.[117] The disputants may

[113] Alexander, *Global Trends in Mediation*.p, 38
[114] *Uniform Civil Procedure Rules (Qld)*, 1991.s 319
[115] *Ibid,* s 320
[116] *Ibid,* 324
[117] Alexander, *Global Trends in Mediation*. p55

also decide on a candidate for mediator out of that list by mutual agreement.[118] The selection of the mediator is one of the key elements of the court-connected mediation procedure since the role of the mediator in the procedure is very crucial. The mediator's role is clearly set out in the Uniform Civil Procedure Rules. Consequently, according to the rule 326 the mediator's have an authority to

> (1) Gather information about the nature and facts of the dispute in any way the mediator decides.
> (2) Decide whether a party may be represented at the mediation and, if so, by whom.
> (3) See the parties, with or without their representatives, together or separately.

Moreover, the mediator may request legal or other recommendations regarding the dispute from an independent third party without the consent of the parties. But, if the recommendation is not free, the mediator should first either obtain the court's permission or the parties' agreement to pay the extra cost. If the court permits the seeking of independent advice, it should charge the parties with the extra cost by clarifying for whom and for what their money will be used. Accordingly, the mediator reveals the subject and the significance of the advice to the parties.[119] Besides the above-mentioned rights, the mediator may also withdraw the case from the mediation procedure if he/she decides that further efforts in negotiating with the disputants will be unsuccessful. Before withdrawal, the mediator should "inform the disputants about his intention" and give them another chance for reconciliation.[120] However, if any misunderstanding occurs during the mediation procedure regarding any matters, both mediators and disputants can apply to the court for the explanation at any time.[121] In fact, the court may replace the current mediator with another neutral person. [122]

If the disputants can reach an agreement in the court-connected mediation procedure, it will be recorded at the court. This agreement will have "the same legal effect as judgment and be considered binding".[123] However, if the mediation procedure is unsuccessful, the case may go to

[118] *Uniform Civil Procedure Rules (Qld).*,s 323
[119] *Ibid.* s328
[120] *Ibid,* s 331
[121] *Ibid.,*s327
[122] Ibid, s333
[123] Erik Ficks, "Models of General Court-Connected Conciliation and Mediation for Commercial Disputes in Sweden, Australia and Japan," *Zeitschrift Für Japanisches Recht / Deutsch-Japanische Juristenvereinigung* 13 (2008): 131–52.p, 139

litigation or be heard as a trial. [124]

2.3 Court-connected mediation in Victoria

Victoria is one of the first states, which started Court-connected mediation procedures in Australia. In 1983, the Victorian County Court Building Cases List defined the cases to be referred to mediation. However, only in the early 1990s did this procedure gain popularity. The Chief Justice of the Supreme Court of Victoria Justice Phillips was an active supporter of this procedure. In 1992, when the Supreme Court was overloaded with cases, Justice Phillips suggested transferring a percentage of the cases to mediation, which meant "massive and mighty effort using mediation as a vehicle for getting cases resolved".[125] Consequently, in that year 280 cases were transferred to mediation and 104 of them were resolved at mediation level. During that time there were no requirements regarding the mediator's training, thus barristers and senior solicitors acted as mediators. In fact, after this effective experiment the mediation procedure became common not only in Victoria but also in other states.[126]

In Victoria, both the Country Court and the Supreme Court established ADR procedures, including mediation. The court-connected mediation is considered to be a popular dispute resolution procedure among the people. Moreover, in most cases judges recommend this procedure for the disputants. Besides recommendation, the judges in the Country Courts have a right to order a case be transferred to mediation without the consent of the disputants. However, they can order the case only at the first directions hearings. For this reason, the mediation center under the court was created with the support of the Victorian Department of Justice. Additionally, the Supreme Court and Magistrates' Courts have the authority to transfer cases to mediation. For instance, the Supreme Court of Victoria can order and refer a dispute to mediation at any stage of the litigation without the parties' consent. However, the Magistrates' court can refer matters to the mediation only with the approval of the disputants.[127]

Even if the mediation procedure is closely related to the litigation, judges try to separate these procedures from each other. They consider mediation as an independent dispute resolution

[124] *Uniform Civil Procedure Rules (Qld)*., s333
[125] North John, "Court Annexed Mediation in Australia - an Overview," November 17, 2005. P3
[126] North John, "Court Annexed Mediation in Australia - an Overview," November 17, 2005. P3
[127] *Ibid*,p 5-6

procedure. For example, according to the Chief Justice of the Supreme Court, John Harber Phillips

> *"It should be stressed that mediation is not an inferior type of justice. It is a different type of justice. All studies of dispute resolution show that people greatly value quick resolution of disputes and the opportunity to put their case in the presence of a neutral person. Mediation satisfies both these requirements."*[128]

Moreover, some scholars[129] even believe that the mediation procedure should not be held by the judges. The reason for this view is based on the fundamental principle of the mediation procedure regarding the disputant's trust in the mediator. According to these scholars, the disputants might feel uncomfortable disclosing their confidential information to the neutral person, who may be also a judge under the assumption that the disclosure may influence on the judge's position toward that disputant. Additionally, the successfulness of the mediation procedure also depends on the mediator, whose main aim is to be a "bridge" between the disputants by using his/her skills and experience. Since a mediator does not decide the case, the parties should feel free to discuss any issue with that person without any fear. Since confidentiality is the key factor of the mediation procedure, the neutral person should be impartial without casting any doubt regardless of his/her career. 'In short, mediation should be left to the mediators – and judging, to the judges'.[130]

[128] It was said on August 16, 1995; http://www.supremecourt.vic.gov.au/.
[129] John North, President, Law Council of Australia;
[130] John, "Court Annexed Mediation in Australia - an Overview." p7

2.4 Court-connected mediation in other States and territories

a. Court-connected mediation in Western Australia.

Alternative dispute resolution procedure was a part of the judicial system of Western Australia for many years. The aim of that procedure was to improve access to justice and make court operations more effective as courts were overloaded and litigation was costly. The legal basis for creating a mediation procedure at courts was the Supreme Court Act 1935 and the recommendation of the Western Australian Law Reform Commission. Consequently, the Supreme Court Act gave a definition of the mediation and mediator. Accordingly '***mediation*** means mediation carried out by a mediator under a direction of the Court under and subject to the rules of court; ***mediator*** means (a) a registrar appointed by the Chief Justice to be a mediation registrar under the rules of court; or (b) a person approved by the Chief Justice to be a mediator under the rules of court; or (c) a person agreed by the parties'.[131]

The next reform occurred in 1990, when the Supreme Court implemented amendments to the Act from 1935. The main aspect of this rule was new case management provision. The new provision allowed a judge to order mediation procedures even without the disputants consent. This procedure is considered as a 'win-win' dispute resolution procedure for everybody despite the outcome. The judge, who refers the case to the mediation, expects from the disputants two possible outcomes: first, concluding a mediation agreement; second, clarifying the key issues or narrowing the points of dispute. The judge in such situations believes that even if the disputants cannot negotiate and reach an agreement in the mediation procedure, they can at least discuss and specify the issues by themselves. In order to narrow the disputed points, the judge even has the authority to direct experts for the procedure.[132] For this reason the procedure becomes mandatory for the disputants. The duration of the procedure should not extend for more than two weeks. After two weeks the plaintiff should inform the judge about the mediation procedure by submitting a report with the signature of the counter party. This report specifies the process and

[131] Western Australia, *Supreme Court Act 1935*, Sect.69 n.d., http://www.austlii.edu.au/au/legis/wa/consol_act/sca1935183/.
[132] Western Australia, *Rules of the Supreme Court 1971*, Order 29A 3(2) n.d.

the outcome of the mediation procedure. [133] Besides the Supreme Court, the District Court has also developed a scheme for pre-trial mediation procedures. [134] The mediation conferences are mandatory for the parties; accordingly each party has to participate in the conferences. [135]

b. Court-connected mediation in South Australia.

Mandatory mediation has been included in every court of South Australia. The legislative basis for the mandatory provision was the *Supreme Court Act 1935*. Later, in 1991 both Magistrate courts and District courts enacted acts regarding the court's authority to order mediation without the consent of the parties. According to section 32(1) of the District Court Act 1991'[...] the Court constituted of a Judge and Master may, with or without the consent of the parties, or the Registrar may, with the consent of the parties, appoint a mediator and refer an action or any issues arising in an action for mediation by the mediator'. [136]

c. Court-connected mediation in Tasmania.

Mandatory referral to mediation procedures does not have a long history in Tasmania compared to other states.[137] However, presently mandatory referral is used very actively at courts. Courts now have the power to direct a case to mediation when there is a reliable prospect of settlement. According to part. 20 of the *Supreme Court Rules 2000* '**(1)** At any stage in a proceeding a judge, with or without the consent of any party, may order that the proceeding or any part of it be referred for mediation; **(2)** If a matter is referred to mediation, the mediator is to be – (a) the Principal Registrar; or (b) a suitable person appointed by the Principal Registrar.' There were two main reasons for including the mandatory mediation into the judicial system of the state. The first reason was the long pending list of the cases. This list originated in the 1990s. Second reason concerned complicated 'courthouse steps' settlements. By giving authority to the court to order mediation without the consent of the parties, the legislator intended to narrow the disputed

[133] David Malcolm, "ADR in Western Australian Courts," p3 *ADR Bulletin* 5, no. 5 (September 1, 2002), http://epublications.bond.edu.au/adr/vol5/iss5/1.
[134] Alexander, *Global Trends in Mediation*., p56
[135] Western Australia, *Supreme Court Act 1935*.Sect.73(3)
[136] Wordings of the sect. 32(1) District Court Act 1991 and sect. 27(1) Magistrates Court Act 1991 are literally same.
[137] Alexander, *Global Trends in Mediation*., p57

issues before litigation ensued. Consequently, even if the disputants could not reach an agreement they would be able to simplify the dispute through discussions. As a result, the litigation proceeding would be shorter and less costly.[138]

Moreover, in order to support the mediation procedure, Tasmania enacted an *Alternative Dispute Resolution Act* (ADR Act) in 2011. This act also gave courts the right to order matters be sent for mediation procedure without the consent of the parties. According to section 5 of the act: "A court may, by order, refer a matter arising in proceedings before it (other than criminal proceedings) for mediation or neutral evaluation if the court considers the circumstances appropriate and whether or not the parties to the proceedings consent to the referral." However, in spite of the mandatory referral to mediation, the disputants have a right to withdraw the case from the mediation session at any time.[139] The idea behind the ADR Act was to improve access to justice at courts. Therefore, while presenting the ADR Bill to the Parliament the Minister mentioned that 'ADR can make a very positive contribution to access to justice because it offers, in its various forms, an inexpensive, informal and speedy means of resolving disputes.'[140]

Even with the Supreme Court Rules and ADR Act providing the authority for the court to refer matters to mediation, there are no referral criteria at courts. As a ground for referral the court uses the provision of the ADR Act, which states that 'the court considers the circumstances appropriate'.[141] Except for that provision there are no concrete requirements based on which the judge may order the mediation. But usually highly complicated matters with a large amount of money are not referred to the mediation procedure. Furthermore, while ordering mediation the judge should point out the parties' intention.[142]

d. Court-connected mediation in Australian Capital Territory.

Mediation is mandatory in Australian Capital Territory (ACT). The state promotes this

[138] O. C. Rundle, "How Court-Connection and Lawyers' Perspectives Have Shaped Court-Connected Mediation Practice in the Supreme Court of Tasmania" p184 (phd, University of Tasmania, 2010), http://eprints.utas.edu.au/10680/.
[139] Tasmania, *Alternative Dispute Resolution Act 2001*, Sect.6 n.d.
[140] Tasmania, Parliamentary Debates, House of Assembly, 21st August 2001, 54 (Peter Patmore, Minister for Justice and Industrial Relations).
[141] Tasmania, *Alternative Dispute Resolution Act 2001*.Sect.5(1)
[142] Rundle, "How Court-Connection and Lawyers' Perspectives Have Shaped Court-Connected Mediation Practice in the Supreme Court of Tasmania." p199

procedure among the disputants. The legal grounds for this procedure are the Mediation Act 1997 and the Civil Law Act 2002. The Mediation Act 1997 mainly focuses on the registration of the mediators. However, the Civil Law Act of ACT developed a main mandatory mediation scheme for civil matters. According to section 195(1) of the Act: 'A tribunal may, by order, refer any proceeding, or any part of a proceeding, before it for mediation or neutral evaluation, and may do so either with or without the consent of the parties to the proceeding'. This means that courts and tribunals have an exclusive right to order mediation at any stage of the proceeding despite the parties' will. Moreover, one can consider that the parties as being satisfied with the mandatory character of the mediation procedure, because there have been no cases applying to the Supreme Court of the state to counter the court's mandatory referrals to the mediation procedure. [143]

[143] Spencer and Brogan, *Mediation Law and Practice*., p279

2.5 Mediation in the Federal Court and the Federal Magistrates' Court

a. Pre-litigation requirement for mediation

After the enactment of the Civil Dispute Resolution Act ('CDRA') in 2011, the Australian legislator made the mediation procedure one of the pre-litigation requirements for the parties. Presently, the parties while beginning a civil proceeding either at the Federal Court of Australia or the Federal Magistrates Court[144] have to try genuine steps[145] to resolve their dispute.[146] The genuine steps are 'steps or requirements that a potential litigant is required to undertake in an effort to resolve a dispute without recourse to the courts as prerequisite to litigation'[147] Examples of genuine steps are negotiation, the exchange of information and documents as well as Alternative Dispute Resolution ('ADR') procedures.[148] ADR procedure in this section obviously means mediation, because CDRA clarifies this provision by stating that 'dispute could be resolved by a process facilitated by another person'.

Parties are free to try any genuine steps before litigation. There is no strict requirement regarding the specific types of steps, such as mediation or negotiation. However, the parties should inform the court regarding the 'genuine step' that they have tried in their genuine steps statement. The genuine steps statement should be submitted together with the application for the institution of the civil proceeding. This statement needs include information about the 'genuine step', which was attempted before the litigation or why it was not so effective.[149] Consequently, the court takes into consideration this information while exercising discretion to award cost. Based on the intention of the parties to resolve the dispute during the 'genuine step' proceeding the judge

---

[144] **Federal Magistrates Court** (Federal Circuit Court) is the lower level federal court, which was established to provide a simple and accessible alternative to litigation in the Federal Court of Australia and the Family Court of Australia and to relieve the workload of those courts. (More information can be found under this link http://www.federalcircuitcourt.gov.au/html/introduction.html)

[145] National Alternative Dispute Resolution Advisory Council (NADRAC) in its report, *The Resolve to Resolve - Embracing ADR to improve access to justice in the federal jurisdiction* (November 2009) suggested to use the term 'genuine step'**. 'Genuine step'** was preferred over formulations such as 'good faith' or 'genuine effort'. These concepts are more subjective and may undermine the confidentiality of ADR processes, and, in situations where there is a power or financial imbalance, could lead to injustice by causing some parties to feel they have to make concessions.

[146] *Civil Dispute Resolution Act 2011*, n.d., sect.4

[147] Legg and Michael Legg and Dorne Boniface, "Pre-Action Protocols in Australia," *Journal of Judicial Administration* 20, no. 1 (2010): 39.

[148] *Civil Dispute Resolution Act 2011*., sect.4

[149] *Ibid.,* sect.6

has the authority to make disciplinary costs orders.[150] In fact, even if the mediation is not an obligated procedure as a genuine step, there is a strong motivation for the parties to try it before the litigation in order protect themselves from adverse cost orders.[151]

Overall there are many merits to the 'genuine steps' requirement. The main idea of this procedure was to narrow disputable issues between the parties before the litigation. The legislator focused on the factor that even if the parties could not reach an agreement, they at least could share information, point out their positions and make issues of dispute more clear. Accordingly, after taking this procedure the duration of the court proceeding would be shorter and less costly. Regarding the CDRA, the Commonwealth Attorney-General has stated that 'the aim of the Act is to focus parties' attention on dispute resolution solutions rather that litigation'. For this reason the CDRA does not give a concrete definition of the genuine steps or procedures. It just obligates parties to try to solve their dispute outside of the court. However, the state in the explanatory memorandum for the Civil Dispute Resolution Bill 2010 provided a table with different ADR procedures such as mediation, conciliation, expert appraisal, early neutral evaluation and arbitration. In this table the legislator explained each procedure by pointing out the role of the neutral third person. Nevertheless, the mediation is considered as a primary 'genuine step' procedure.[152]

Moreover, the Bill promotes ADR procedures among disputants by stating that these procedures may be suitable 'genuine step' procedures for many cases, thus the parties should consider trying them before the litigation. On the other hand, it specifies that the outcome of the ADR procedures may not always be satisfactory, but these procedures may narrow the disputed factors and make court hearings productive and effective.[153] In fact, while filing the genuine steps statement at court, the parties need to indicate either which genuine step they attempted to resolve the dispute or why they never tried any steps before the litigation.[154]

Furthermore, CDRA requires the lawyers to recommend their clients try genuine steps. The

[150] *Ibid.,* sect.12
[151] Lukas Wiget, *Compulsory Mediation as a Prerequisite Before Commencement of Court Proceedings - Useful Requirement to Save Resources or Waste of Time and Money?*, p5 SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, September 30, 2012), http://papers.ssrn.com/abstract=2157385.
[152] Hopt and Steffek, *Mediation*.,p880
[153] *Civil Dispute Resolution Bill 2011; Explanatory Memorandum*, p6-7 n.d., http://www.austlii.edu.au/au/legis/cth/bill_em/cdrb2011306/memo_0.html.
[154] *Civil Dispute Resolution Act 2011*., sect.6(2)

lawyers have to encourage these steps among the disputants. Additionally, he/she should assist them during the process of taking genuine steps.[155] For instance, if the disputant would like to commence legal proceedings without trying any dispute resolution procedures outside of court, the lawyer has to explain to the client that he/she needs either to take genuine steps or identify the reason for not taking that procedure. When making their suggestion, the lawyer should propose different 'genuine step' procedures and assist them during that procedure.[156] If the lawyer fails to promote the 'genuine step' procedure or assist the client, the court has the authority to make disciplinary cost orders to the lawyers.[157]

What happens if a 'genuine step' is not taken and the parties go directly to the court? The answer is nothing special; the parties can file an application for the court proceedings, even without the 'genuine step' statement. However, after the initiation of the court proceedings, the judge may require the 'genuine step' statement from the parties or their lawyers. As mentioned above, in this statement the parties have to explain either the steps which they took to try to solve the dispute or the reason why they have not taken any 'genuine step' procedures. Based on that statement, the court may exercise discretion to award cost to the parties or their lawyers. Therefore, presently the lawyers inform their clients about this pre-litigation step. In fact, the CDRA does not mandate the parties to take genuine steps prior to the litigation.[158] The idea of this step is to make parties attempt to resolve their dispute regarding its circumstances and nature before the litigation. Even if the parties cannot reach an agreement, they may at least narrow the debated arguments. As a result, the court proceeding will be less complicated and less costly. Consequently, this step would be beneficial for both disputants and judges.

However, it is still unclear and slightly difficult for the parties to find out the precise meaning of the term 'genuine step'. The CDRA only provides some examples of that step and clarifies that citing these examples 'does not limit the steps that may constitute taking genuine steps to resolve a dispute'. [159] From this section of the Act, one can make a conclusion that the parties are free to

[155] *Ibid.,* sect.9
[156] *Civil Dispute Resolution Bill 2011; Explanatory Memorandum*., p10
[157] *Civil Dispute Resolution Act 2011*., sect.12
[158] "A Change in Pre-Litigation Requirements in the Federal Court and Federal Magistrates Court," accessed June 16, 2014, http://www.foxtucker.com.au/files/RiskWrap3.html.
[159] *Civil Dispute Resolution Act 2011*., sect. 4

try any procedure to resolve their dispute before the court and consider it as genuine step. It means that there is no requirement regarding appropriateness and effectiveness of the procedure. In fact, the genuine step requirement may become a barrier to access to justice. Therefore, some critics believe that this step makes the litigation process longer and more expensive.[160]

For this reason, this paper considers the ADR procedures, particularly mediation as a most effective 'genuine step' procedure. If the mediation were used as genuine step, the parties would have a real opportunity to negotiate and reach an agreement by themselves or at least simplify the points of disagreement in the case. The mediation outcome supports the aim of the genuine step. Moreover, in the mediation procedure the mediator facilitates the parties in negotiating, which makes the process more comfortable. The parties can choose the mediator based on his/her background and skills, which may help them to resolve their dispute. Additionally, each mediation center guarantees their clients effective proceeding. As a result, in cases where the parties mention the mediation as a 'genuine step' procedure in their settlement, the judge would not have any doubt regarding the efficiency of the step.

b. Practical analysis

Recently, the Federal Court supported the need for the genuine steps in its decision in the case of "*Superior IP International Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys* [2012] FCA 282".[161] The issue in the case was regarding the setting aside of a statutory demand by the defendant. The total statutory demand was $10,706.33. The quantity of filed affidavit evidence amounted to around 450 pages: 300 pages were filed by the plaintiff, and 150 pages by the defendant. Usually, in statutory demand cases judges obligate the defendant to pay the debt. However, in this case after a full day hearing the result was unexpected for everybody. Justice Reeves began the hearing by asking the parties about their genuine step statement, since the parties had to submit that document while filing application at the court. But the parties and their lawyers informed the judge that they had not tried any 'genuine step' to solve their dispute. The judge then addressed the lawyers to notify their clients about the legal fee, which they were going

[160] "A Change in Pre-Litigation Requirements in the Federal Court and Federal Magistrates Court."
[161] Superior IP International Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys FCA 282. (n.d.). http://www.nswbar.asn.au/circulars/2012/mar/superior.pdf

to charge. In fact, the plaintiff's lawyer's fee was around $12,205 and the defendant's lawyer's was $8,000. In fact, the lawyers' fee exceeded twice the amount of the statutory demand of the case. But, even after that information, the parties could not negotiate and resolve the dispute. After hearing the application of parties, the judge noted[162] that

> "[The application] lasted a full day, a large part of which was taken up with objections to the voluminous affidavit material described above. In keeping with their bellicose approach thus far, when I began to hear the objections, I discovered that there had been no discussion between the two lawyers to attempt to resolve any of them and thereby avoid their clients' and the court's resources being wasted on that exercise.''

Justice Reeves called that situation 'an absolute antithesis', since it contradicts with the purpose of the civil practice. Section 37M of the Federal Court Act states that the purpose of the civil practice and procedure provisions is to facilitate the resolution of disputes according to the law; as quickly, inexpensively and efficiently as possible.[163] Moreover, the judge reminded the lawyers that they had an obligation under s9 of the Civil Dispute Resolution Act to recommend their clients to try genuine steps and assist them during that procedure before the litigation. In the end, after analyzing the case, Justice Reeves made two directions:

> "Having identified them and put the parties and their lawyers on notice that I intend to have regard to them, I consider I should now give them the opportunity to make submissions as to how they say I should proceed to deal with this costs issue. However, since an obvious conflict is likely to arise between the interests of the clients and that of their respective lawyers on this issue, I consider I should make the following directions:
> " 1. That each of the two lawyers concerned is to provide a copy of these reasons to his respective client and advise it to seek independent legal advice on the question of the costs of these proceedings.
> 2. That the two lawyers concerned be joined as parties to these proceedings for the limited purpose of determining the question of the costs of these proceedings." [164]

From this decision, it is clear that the courts are trying hard to promote ADR procedures by giving an opportunity for the parties to settle their dispute by themselves. Accordingly, this decision can

[162] "Take Genuine Steps Statements Seriously," n.d., http://www.ags.gov.au/publications/express-law/el147.pdf.
[163] *Federal Court of Australia Act 1976*, n.d., http://www.austlii.edu.au/au/legis/cth/consol_act/fcoaa1976249/.
[164] Superior IP International Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys FCA 282. (n.d.).

be used as a reminder for the disputants and their lawyers that they have an obligation to take a 'genuine step' under the Civil Dispute Resolution Act. Otherwise, their court proceeding may have the same result as a previous one. Therefore, the parties and especially their legal representatives should keep in my mind this special Federal Court requirement, which encourages parties to achieve cost-effective and timely outcomes to their dispute. [165]

c. Court-ordered mediation in the Federal Court

The Federal Court of Australia has the authority to refer a case to mediation at any stage of the court proceeding with or without the parties' consent.[166] The idea behind this provision is to encourage the parties to solve their dispute through negotiation with the help of the mediator. Of course, the mandatory referral to mediation has faced huge criticism from academics. Critics have used the voluntary character of the mediation procedure as a basis, by stating that the disputants would not be able to reach an agreement if they were forced to do undergo mediation.[167] However, even if the case were transferred to mediation without the consent of the disputants, there is no pressure from the court during the mediation proceedings. The disputants are free to negotiate and conclude a mediation agreement. They are totally independent during the mediation proceeding.[168] In the referred mediation, the registrar will act as a mediator. [169] If the disputants reach an agreement during the mediation, it will have the same effect as a judgment. This paper next explains the principal factors that are used by the judge when referring a case to mediation.

One of the main factors for case referral to mediation is case management. The court has an authority to manage cases in order to improve the efficiency of the court proceedings. The aim of this authority is to decrease the workload of the courts by transferring cases from litigation to mediation. Thus, only the court decides whether the case is appropriate for the referral or not. It is obvious that mediation cannot 'lead to resolution in every case'.[170] Therefore the court should be

[165] "A Change in Pre-Litigation Requirements in the Federal Court and Federal Magistrates Court."
[166] *Federal Court of Australia Act 1976*., sect. 53A
[167] Richard Ingleby, "Court Sponsored Mediation: The Case Against Mandatory Participation," *The Modern Law Review* 56, no. 3 (2011): 441–51, doi:10.1111/j.1468-2230.1993.tb02682.x.
[168] Henderson Josh, "The Federal Court's Judicial Nudge: Court-Ordered Mediation," no. QLS Journal (July 2008).
[169] *Federal Court of Australia Act 1976*., sect. 54A
[170] *Civil Dispute Resolution Bill 2011; Explanatory Memorandum*., p7

very careful while deciding the appropriateness of the case. It should take into account the nature of the dispute, the intention of the disputants, and the effectiveness of the court ordered mediation.

The nature of the proceeding is an important factor when considering whether to refer the case to mediation. Presently, the Federal Court of Australia can refer any case to mediation regardless of its complexity and the number of parties. Usual mediated types of matters are in the field of corporation law, intellectual property, industrial law, consumer law, human rights, admiralty, tax, and costs.[171] In spite of the fact that the Federal Court has this authority it needs to be very accurate when ordering court-connected mediation. Without good consideration of the nature of the case, the mediation may become a useless mandatory pre-litigation procedure. For instance, before referring commercial disputes to mediation the court should consider the following reasons: '(a) the parties may have a continuing relationship; (b) large commercial disputes can be incredibly complex and wide; (c) large disputes are costly and it would be more efficient for the parties to attempt to reach a resolution themselves.'[172]

Another factor is the intention of the parties. The court before referring the case to mediation, first of all, should pay attention to the possibility of a settlement. If there is no fundamental difference between the parties and there is mutual understanding regarding the basis of the dispute, the court may order mediation.[173] Moreover, as grounds to find out the intention of the parties, the court may use the genuine step statement. In case the parties have already taken a genuine step before the litigation but could not reach an agreement, the court-ordered mediation would be an ineffective procedure. Additionally, this order would make the court proceeding involve more time and money. The decision of Justice Cooper, regarding the referral of the case between *Australian Competition and Consumer Commission v Collagen Aesthetics Australia Pty Ltd* to mediation, supports the importance of the intention of the parties. In this case, the disputants had tried to solve their dispute but failed because of the fundamental differences regarding the nature of the dispute. Therefore, the court had not ordered a mediation procedure by stating that "to order the parties to mediation would, in my view, simply incur additional cost and

[171] Federal Court of Australia, "Mediation". http://www.fedcourt.gov.au/case-management-services/ADR/mediation.
[172] Josh, "The Federal Court's Judicial Nudge: Court-Ordered Mediation."
[173] Hopt and Steffek, *Mediation*., p 873

delay without any reasonable prospect that the parties would by mutual agreement resolve the matters in dispute between them." [174]

The last factor is the effectiveness of the court-ordered mediation. As mentioned above, the court expects by ordering a mediation two outcomes: concluding a mediation agreement or narrowing disputable issues. This order should be desirable for the parties attempting a mediation procedure since the state tries to organize effective mediation procedures by providing a list of experienced mediators and making the procedure free. Furthermore, despite the mandatory referral, the parties still control the mediation procedure. For this reason, the parties should act in good faith by trying to reach an agreement or by simplifying the issue. In fact, the court ordered mediation is beneficial for both disputants and courts.[175]

d. Opposition to mandatory mediation

Needless to say that there is major criticism among lawyers and scholars regarding the court-connected mediation. In order to describe the whole picture of the current mediation situation in Australia, this paper will explain the main arguments used by those opposed to mandatory mediation.

The first argument made is about the mandatory character of the court-connected mediation. The critics state that the mandatory character contradicts the initial philosophy of the procedure. The philosophy of mediation is based on the willingness element. The parties should be motivated to find the solution to their dispute willingly without any pressure. However, in the court ordered mediation the situation is completely different. The parties from the beginning are ordered to try mediation without their consent. In this kind of mediation, the willingness element is removed from the process. Consequently, the parties would be less motivated to resolve their dispute. As a result, according to critics, the mediation procedure becomes an ineffective dispute resolution procedure.[176]

The second argument focuses on the role of the mediator in court-connected mediation. Court ordered mediation is referred to the registrar in the Federal Court. The registrar acts as a

[174] Spencer and Brogan, *Mediation Law and Practice*., p 274
[175] Josh, "The Federal Court's Judicial Nudge: Court-Ordered Mediation."
[176] Spencer and Brogan, *Mediation Law and Practice*., p 267

mediator in the mediation conferences. For this reason the critics indicate that these mediators handle the case 'in a judge-like manner' by controlling the procedure and limiting the role of the parties. Moreover, in practice these mediators have an evaluative role. They try to settle the dispute by focusing on the parties' rights rather than on their interests. Therefore, according to the critics, the mediators in the court-connected mediation are practicing quasi-judicial authority, which is not consistent with the third party neutral positions.[177]

The final argument is about the reverse effect of court ordered mediation. As mentioned above, the main goals of the mandatory mediation are to decrease the workload of courts, improve the accessibility to the justice and provide cheaper and quicker alternative dispute resolution procedures for the disputants. However, according to some legal practitioners the mandatory mediation would have negative effect for the court and disputants. For instances, Terry Naughton QC[178] says, "Compulsory mediation is a contradiction in terms and likely to lead to increased, rather than reduced, cost and delay". [179]

2.6 Case Study

The following two cases emphasize the courts intention regarding referral to mediation. The two decisions emerging from these cases are notable for understanding on what grounds the court relies before ordering a case to mediation. These cases can be used as evidence to prove that in spite of the fact that the court has an authority to refer any case to mediation without the consent of the parties, it does not order a mediation procedure for each case.

1. *Australian Competition & Consumer Commission v Collagen Aesthetic Australia Pty Ltd.*[180] Australian Competition & Consumer Commission (ACCC) was the applicant and the respondent was Collagen Aesthetic Australia Pty Ltd. The claim was made regarding the information used in an advertisement of Collagen products. These products are used for the treatment of lines, blemishes, wrinkles and scarring of the skin, to reverse the aging process of skin, and, for cosmetic shaping of the lips. The ACCC stated that the respondent represented its

[177] Hopt and Steffek, *Mediation*., p 880
[178] Mr. Terry Naughton QC is barrister and critic of mandatory mediation.
[179] Spencer and Brogan, *Mediation Law and Practice*., p 266
[180] Australian Competition & Consumer Commission v Collagen Aesthetics Australia Pty Ltd (FCA 2002). http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2002/1134.html?stem=0&synonyms=0&query=collagen

products inaccurately, which resulted in misleading clients. Consequently, it sought a declaration and injunctive relief against the respondent, including the correction of inaccurate information used in the advertisement and the participation of the staff in the compliance seminars run by the ACCC. The applicant did not request any financial penalty from the respondent. On the other hand, the respondent sought an order for directing the case to mediation in accordance with section 53A of the *Federal Court of Australia Act 1976.* The applicant opposed mediation by stating that while the ACCC is not against the mediation procedure it considers the case inappropriate for mediation. As a basis for this statement the applicant listed the following circumstances[181]:

- the parties have tried to settle the matter between themselves and failed;
- it is unlikely that the matter will settle because there is fundamental divide between the ACCC and the respondent as to whether the contravention is trivial and not worth pursuing in the public interest;
- there are certain aspects of the present case which in the view of ACCC justify, in the public interest the further prosecution of the matter in the Court;

As a result, the court decided to dismiss the notice of motion seeking an order for the parties to mediate, because such an order would result in additional costs and time delay for the parties because there was little reasonable possibility that the parties could settle the dispute by mutual agreement. Consequently, there were no grounds in the circumstances of this case to refer it to the mediation procedure. [182]

2. *ACCC v Lux Pty Ltd.*[183] The applicant ACCC filed an application to set aside an order made regarding section 53A of the *Federal Court of Australia Act 1976* referring the case between the parties to mediation. The claim arose about the respondent's Lux Pty Ltd ('Lux') business activity. Lux supplied a vacuum cleaner to a complainant who has an intellectual disability. The applicant claimed that this client did not properly understand the terms of the contract while concluding it. Therefore, the ACCC filed injunctions to restrict the respondent to promote and sell its products to customers with intellectual disabilities, since they are unable to make decisions on

[181] Spencer and Brogan, *Mediation Law and Practice*., p.273
[182] Australian Competition & Consumer Commission v Collagen Aesthetics Australia Pty Ltd (FCA 2002).
[183] ACCC v Lux Pty Ltd (FCA 2001).
http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/federal_ct/2001/600.html?query=title(accc%20%20and

merits and demerits of the contract.

During the direction hearings, the judge ordered mediation since there was a real possibility for the parties to negotiate and narrow the disputed factors. However, the council of the claimant opposed the referral by stating the following arguments. The applicant submitted that mediation was inappropriate because of:

i. Type of the complaint. Since the complainer is the person with an intellectual disability, there is a little chance that mediation would be effective;
ii. Nature of the applicant as an entity. The main aim of the ACCC is to ensure the practice of the sections of the *Trade Practices Act.*[184] 'It is said that the public interest is best served by allowing the Court to exercise its judicial functions and determine whether the alleged breaches have occurred and where the matter is contested, the respondents having the opportunity to dispute the occurrence of any breach'.
iii. Complexity of the dispute. The applicant submitted that the mediation procedure would be ineffective for this case, since there are many disputed points. The possible outcome of the mediation procedure will have negligible prospect for the case.

On the other hand, the respondent stated that it supported the court order for mediation. It submitted that 'there is no reason why the mediation process should not continue because it could be beneficial and meaningful'.[185] Moreover, it declared that even if the parties could not settle and reach an agreement during the mediation, they would be able at least to reduce the points at issue.

Consequently, the court did not annul the referral to mediation 'because the competing interest in avoiding litigation unless there are reasonable prospects of success outweighs the public interest in prosecuting breaches of the Trade Practices Act 1974'. Additionally, there was an intention on the parties' part to negotiate as well as participate in the mediation procedure in good faith. Furthermore, taking into consideration the physical condition of the complainant, the judge stated that the mediation procedure would involve less pressure than court proceedings. [186]

In conclusion, the Federal Court has case management authority, which is focused on improving the efficiency of the court proceedings. Under the case management authority, the Federal court has the power to order mediation at any stage of the litigation with or without the

[184] Superior IP International Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys FCA 282. (n.d.).
[185] Spencer and Brogan, *Mediation Law and Practice*., p.273
[186] ACCC v Lux Pty Ltd (FCA 2001).

parties consent. In spite of this fact, the court tends to avoid making mediation procedure a barrier before litigation, something that may result in additional time and money costs for the parties.[187]

Based on these above-mentioned decisions, it is obvious that the court takes into account every circumstances of the dispute before ordering the mediation. It tends to clarify the core of the dispute before the referral. Thus, there are no general standards or scheme for referral; each case has its own approach from the court.

2.7 Conclusion

This chapter has provided an overview of court-connected mediation in Australia by explaining the occurrence and current situation of the process in that country. Next the paper will make a short analysis of the information provided in this chapter.

The development and establishment of the Australian model of mediation is interesting to observe. Mediation plays a fundamental role in the judicial system of Australia. The state and courts from the beginning supported and promoted this procedure. Therefore it is not considered as a completely separate dispute resolution procedure from litigation. Moreover, courts are actively involved in mediation by determining the way of operation of the process, as well as by analyzing the quality of it.[188]

The initial reason for the implementation of the court-connected mediation into the judicial system was the workload of the courts. Because of that factor, the legislator tried to reduce the number of the cases by establishing a mediation process. Moreover, in order to promote this process, the courts were provided with a discretionary power to order mediation with or without the consent of the parties. In fact, currently the courts have a case management authority, which means that the judges can refer any case to mediation. However, in spite of that authority, judges are very detailed when ordering mediation. For instance, in practice before ordering mediation they take into the consideration the following factors: the nature of the dispute, the intention of the parties and the effectiveness of the process. [189] These factors are directed to prevent 'court ordered mediation' from being a barrier before litigation. Nevertheless, there are no

[187] Josh, "The Federal Court's Judicial Nudge: Court-Ordered Mediation."
[188] Alexander, *Global Trends in Mediation*., p63
[189] Josh, "The Federal Court's Judicial Nudge: Court-Ordered Mediation."

commonly accepted standards or scheme for referral. Judges decide the appropriateness of the dispute based on the above-mentioned factors.

Another feature of Australian mediation is the mixture of two mandatory mediation categories: discretionary and quasi-compulsory.[190] The discretionary category represents judges' authority to refer the dispute to mediation from litigation. On the other hand, quasi-compulsory is not fully mandatory but there are some sanctions for not trying it. For instance, the requirement for taking a genuine step may be included in the quasi-compulsory category. In fact, it may be argued that the Australian mandatory mediation model has two stages in the procedure: pre-litigation and through litigation. In both stages, the role of the court is very important.

In conclusion, the Australian mediation model with its mandatory character could be considered a successful one. The legislator has already reached the goal because presently the court-connected mediation is a workable and effective ADR procedure in the Australian judicial system.

[190] Categories of mandatory mediation are discussed in Chapter V.

Chapter III. Court-connected mediation in Belarus

Belarusian legislator while implementing a mediation procedure into its judicial system chose a different path compared to the other states[191] of the Commonwealth Independent States (CIS). Initially, it created a court-connected mediation at the Economic Courts by adding a new chapter to the Commercial Procedure Code of the state. The name of the new chapter is a 'Mediation procedure in the court proceeding'. This chapter consists of seven articles, and provides general information regarding the mediation procedure. The first article of that chapter indicates the goals and objectives of the procedure. Consequently, the goals of the procedure are to settle disputes in a short time through reconciliation and help prevent breaches of contractual obligations. The objective of the procedure is to provide the parties an opportunity for settling their dispute themselves by negotiating the positions and requirements of each other with the assistance of the mediator. [192]

Mediation is a new institute in commercial procedural law consisting of rules governing the actions of the economic court, the parties, and the mediator. This procedure aims to decrease disputes under the jurisdiction of the economic courts by achieving mediated agreement and leading to the removal of the case from the court proceedings. The court-connected mediation procedure is an independent dispute resolution procedure, which is held by the judges and mediators of the economic courts. In spite of the fact that this procedure is under the jurisdiction of the economic courts, it is still considered to be a separate dispute resolution procedure. [193]

The main reason for reforming the judicial system and creating a new ADR procedure is the fact that the state courts were overloaded, and the amount of claims filed at the court were increasing year by year. In fact the quality of judgments were not so high, since the judges were overburdened with cases [194]. For this reason the development of the court-connected mediation

[191] Other states like Kazakhstan and Russia first adopted a law on private mediation and presently they are planning to create a court-connected mediation. The reason for creation of court-connected mediation is the unpopularity of the out of court mediation procedure among the disputants.

[192] *Хозяйственный Процессуальный Кодекс Республики Белорусь; Commercial Procedure Code of the Republic of Belarus*, 1998, Art. 153 http://etalonline.by/?type=text&regnum=HK9800219#load_text_none_1_.

[193] Бельская; Belskaya, *О Некоторых Вопросах Применения Примирительной Процедуры В Хозяйственных Судах;*
'On Some Issues of Mediation in Economic courts', n.d.,
http://www.court.by/onlinehelp/mediation/publications/f831be342b18fe82.html.

[194] Мартыненко; Martinenko, *Судоустройство и Судопроизводство по Хозяйственным Спорам; Judiciary*

procedure helps to realize two points: first, it expands the authority of the economic courts; second, it improves the quality of the judgment by referring some of the cases to mediation.[195]

In order to make mediation an effective and efficient dispute resolution procedure, the legislator has given authority to the courts to order mediation. According to Art.156 of the Commercial Code the court-connected mediation procedure can be initiated by either one of the disputants or by the court. The reason for providing the court with this right has been to promote the new procedure among the parties.

In spite of the fact that the legislator introduced court-connected mediation procedures in 2004, the first time it was applied in the commercial judiciary was in 2008. It proved itself to be highly efficient in commercial disputes. For instance, in 2009 around 15,000 mediation procedures were held in the economic courts. More than 80 percent of those cases were ended by the parties' mutual agreement. In 2010 every third case filed at the economic courts was settled through the mediation procedure. The total number of those cases in that year reached 23,479.[196]

3.1 Development of the Legal Basis for the Court-connected Mediation in Belarus

Court-connected mediation is still considered to be a new alternative dispute resolution procedure in the legal system of the Republic of Belarus. The chapter of the Commercial Code of Belarus regarding mediation was an initial basis for the court-connected mediation. The articles of this chapter provided an opportunity for the disputants to settle disputes by negotiation with the help of the mediator. As matter of fact, this procedure was considered to be a new dispute resolution procedure in the procedural legislation, thus it has not had any practical development for several years. Therefore, one can outline the development of the court-connected mediation procedure in Belarus in four stages.

The first stage was from 2004 to 2008; this stage began from the implementation of the provision about court-connected mediation in the Commercial Procedure Code of the state.

---

and Legal Proceedings in Economic Disputes, n.d., p384; http://www.elib.grsu.by/doc/838.

[195] Бельская; Belskaya, "О Некоторых Вопросах Применения Примирительной Процедуры В Хозяйственных Судах; 'On Some Issues of Mediation in Economic courts."

[196] Е. М. Огренич; Ogrenich and О. Л. Подлеская; Podleskaya, "К проблеме реализации института медиации в Республике Беларусь; On the problem of the implementation of mediation in Belarus," p139 2012, http://elib.bsu.by/handle/123456789/47737.

However, this procedure had not been used for four years. The reason behind was the unawareness and unpreparedness of the courts. The courts did not know how to initiate and handle this procedure, since there was no facility at courts for mediation. Moreover, there were no rules or regulations regarding the appointment of the mediators. Consequently, the court had not recommended this procedure to disputants. As a result, most people did not have sufficient information about this procedure. Therefore, from 2004 to 2008 there was no practical application of the court-connected mediation at courts.[197]

The second stage was from 2008 to 2011; this stage can be seen as a renaissance of the court-connected mediation procedure in Belarus. From 2008, mediation procedure at economic courts began working as an effective dispute resolution procedure. The mechanism launching the court-connected mediation was the rapid rise of commercial lawsuits in 2007-2008.[198] During that time the number of the cases was so high that each judge had to handle more than 100 cases per month. Accordingly there was a problem regarding the quality of the judgment. Thus, in order to keep up the quality of judgments, the Chairman of the High Economic Court made an order to start using court-connected mediation procedure at courts. The heads and the senior specialists of the judicial practice departments took the role and the function of the mediators. The main professional responsibilities for them were to analyze different categories of cases, do generalization of judicial practice, keep statistical records, work on interaction with public authorities, the media and so on.[199]

However the reason for the practical application of the court-connected mediation was the adoption of new amendments to the law "On State Duty" in 2008. According to Art.12 of the law, if the parties resolve a commercial dispute through mediation and reach an agreement they get back 50 percent of the state fee, which they paid at the beginning of the procedure. This provision was an incentive for the usage of the new procedure among the parties. Nevertheless, a problem occurred regarding the promotion of this procedure among the population, which did not have

[197] Мартыненко; Martinenko, *Судоустройство И Судопроизводство По Хозяйственным Спорам; Judiciary and Legal Proceedings in Economic Disputes*.

[198] The reason for the rise of the lawsuits was the economic crisis, which caused an incapacity of parties to pay their debts. Another, reason was the rapid increase of number of business entities. More information at http://www.worldbank.org/en/country/belarus/overview

[199] Бельская; Belskaya, "Развитие Медиации (посредничества) В Хозяйственных Судах Республики Беларусь В Целях Эффективного Разрешения Коммерческих Споров; Development of Mediation (mediation) in Economic courts of the Republic of Belarus in Order to Effectively Resolve Commercial Disputes," n.d.

enough information about this procedure at that time. Thus, at the early stage of the development of the court-connected mediation procedure, the economic courts were under pressure. The state required the economic courts not only to order but also promote this procedure among the disputants.[200]

Moreover, in 2009 the Chairman of the High Economic Court of the Republic of Belarus made an order № 21 "On measures on improvement of mediation institution at economic courts". This order was directed at implementing and improving the package of measures for the settlement of disputes through mediation. With this order, the chairman focused on the quality of the mediation procedure by stating that the parties during the mediation procedure should be confident in mediators' skills. Consequently, the requirements for the mediators should be high. The parties should not have any doubt about the objectivity and neutrality of the mediators. [201]

The third stage was from 2011 till 2013. The reforms occurred in 2011, when some amendments were included in the Commercial Procedure Code regarding improvements to court proceedings. These amendments also modified Chapter 17 of the Commercial Procedure Code, particularly the terms of the court-connected mediation. Consequently, the term 'mediator' was changed to 'conciliator' and the mediation became the conciliation.[202] The reason for modifying the terms was to make it more understandable for the people. New amendments included principles regarding mediation, the rights and obligations of the mediator, as well as his appointment. Moreover, the main difference made was in regard to the stage of litigation where the mediation procedure could be ordered. Presently, the Commercial Procedure Code allows the mediation procedure to begin at any stage of the litigation including appeal and cassation instances. In contrast, before the amendment the mediation procedure could only be initiated

[200] Миселюк; Miselyuk, "Опыт Хозяйственных Судов По Применению Медиации; Experience of Economic Courts on the Application of Mediation," n.d., http://www.court.by/onlinehelp/mediation/publications/e5052f0a096d4615.html.

[201] Мартыненко; Martinenko, *Судоустройство И Судопроизводство По Хозяйственным Спорам; Judiciary and Legal Proceedings in Economic Disputes*., p386

[202] English translation of these terms may have almost similar meaning, but in Russian and Belarusian languages the terms 'посредник, пасрэднік' (mediator) and 'примиритель, прымірыцель' (conciliator) are little bit different. The term 'примиритель, прымірыцель' is understood as a person who helps the parties to negotiate and reach an agreement. However, the term 'посредник, пасрэднік' is defined as a person who exchanges the information between the parties. Therefore, the term 'примиритель, прымірыцель' has more positive image among the people. Since these terms are interchangable in English language, the paper would continue using the term mediation.

before the end of the preparation of the court proceeding.[203]

Accordingly, significant practical experience was gained over the three years from 2008 to 2011 in the field of court-connected mediation. As a result of that experience and recent amendments, the following four forms of mediation initiation in different stages of the litigation appeared:[204]

1. At the stage of making a claim and instituting proceedings the judge shall consider the possibility of appointing a mediator to the case and requesting the assistant of judge to conduct explanatory work with the parties on the peaceful settlement of the dispute.

2. At the stage of preparatory conduct of court proceedings and during the consideration of the merits, judge contacts with the parties and their representatives in order to explain their right to settle the dispute in the mediation procedure.

3. At the stage of the enforcement of the judgment, the parties can apply for the court mediator to generate the actual conditions of execution of the judgment, without resorting to the mechanism of enforcement.

4. Even in the appeal and cassation instances, the parties still have an opportunity to resolve their dispute in the court-connected mediation.

From these forms, it is clear that the state and the courts really intended to promote this ADR procedure between the disputants. For this reason the legislator provided several opportunities for the disputants to attempt court-connected mediation at any stage of the litigation. Moreover, it still maintained the right of the court to order mediation.

The amendments also modified the provision regarding the requirement for the mediator. According to Art.156 of the Commercial Procedure Code, the mediator may be appointed either from persons who hold public office in the economic court or from persons outside of the court who have the appropriate skills which are necessary for the settlement. These persons act as mediators on a contractual basis. Before the amendment, the court usually appointed the mediators from the court staff and the parties did not have the option of asking for a mediator from outside

[203] Миселюк; Miselyuk, "Опыт Хозяйственных Судов По Применению Медиации; Experience of Economic Courts on the Application of Mediation."
[204] *Хозяйственный Процессуальный Кодекс Республики Беларусь; Commercial Procedure Code of the Republic of Belarus*., Art.156.

of the court. One of the main aims of this provision was to reduce the burden on judges, secretaries and assistant judges in the settlement of disputes through mediation. Because of the active promotion of the court-connected mediation, a significant number of cases were shifted from litigation to mediation. As a result court staff, who acted as mediators, could not handle the high number of mediation cases.[205]

The fourth stage has been from 2013 until now. In 2013 the parliament of Belarus adopted a law "On Mediation". This law has provisions regarding the definition of the mediation procedure, requirements for the mediators and so on. The law defines the mediation procedure as a 'negotiation of the parties with the assistance of a mediator in order to resolve the dispute (disputes) by the reaching a mutually acceptable agreement'.[206] This new law focuses more on the regulation of out of court mediation. However, the economic courts may use it as a fulfillment[207] to Chapter 17 of the Commercial Procedure Code, since that chapter gives only general information about the mediation procedure at courts. For instance, Art.2 of the Mediation Law states that

> 'Mediation can be carried out before the appeal to the civil or economic courts, and after the initiation of proceedings in courts. Features of mediation procedure after the commencement of the proceedings in the court are determined by procedural legislation'.

The term procedural legislation in the article relates to Commercial Procedure Code. As a result, one can make the conclusion that the legislator tried to specify by this law some of the provisions of the mediation procedure at courts which were not included in the chapter 17 of the Commercial Procedure Code.

Another particularity of the law was the scope of the out of court mediation procedure. The Law specifies that disputes arising from civil, commercial, family and labor law can be resolved by mediation.[208] In fact because of this provision a difference between out of court and court-connected mediation becomes obvious regarding the applicability of these two types of

[205] Огренич; Ogrenich and Подлеская; Podleskaya, "К проблеме реализации института медиации в Республике Беларусь; On the problem of the implementation of mediation in Belarus."
[206] *Закон Республики Беларусь "О Медиации"; Law On Mediation*, 2013, http://court.by/brest/extrajudicial-mediation/.
[207] For the issues not regulated by the Chapter 17, the court may refer to the law on mediation.
[208] *Закон Республики Беларусь "О Медиации"; Law On Mediation*., Art.2

mediation procedure. Presently court-connected mediation handles cases arising only from civil and commercial law. Moreover, it is obvious that these two types of mediation procedures in Belarus are separated, and they are considered different types of mediation. Regarding the interaction of the two procedures the Deputy Chairman of the High Economic Court of the Republic of Belarus Mr. Egorov stated that 'the development of the court-connected mediation and out of court mediation should proceed simultaneously without competing, but complementing each other. The aim of the two is focused on helping the parties avoiding lengthy legal procedures and keep good relations […]'.[209] Accordingly, the court-connected mediation in Belarus could be considered as a "locomotive" for private mediation. [210] There is n hypothesis that without earlier implementation of court-connected mediation, the legislator could face difficulties with the introduction of out-of-court mediation into the judicial system of Belarus.

In conclusion, looking at the way of implementing and promoting the mediation procedure in the Republic of Belarus shows that it is more effective to enact first court-connected mediation with a mandatory character rather than out of court mediation. This is so because both the court and the disputants need to get used to and fully understand the new alternative dispute resolution procedure. For this reason, it was a wise step by the legislators to give some time for the promotion of the court-connected mediation among the society before adopting the law on out-of court mediation.

3.2 Promotion of the Court-connected Mediation

From 2008, the Commercial Code of the Republic of Belarus began actively using court-connected mediation in practice. However, at that time a problem occurred regarding the unawareness of the disputants about this new procedure. Therefore in order to introduce this new procedure to the people the courts started a promotion of this procedure across the land. The courts used two main methods to encourage parties to try mediation.

The first method of promotion was made through the mass media. Judges and scholars

[209] High Economic court of the Republic of Belarus, "Круглый Стол 'Перспективы Развития Медиации В Республике Беларусь'; Round Table 'Development Prospects of Mediation in the Republic of Belarus,'" n.d., http://www.court.by/upload/11-2011%20kru.pdf.
[210] Бельская; Belskaya, "Развитие Медиации (посредничества) В Хозяйственных Судах Республики Беларусь В Целях Эффективного Разрешения Коммерческих Споров; Development of Mediation (mediation) in Economic courts of the Republic of Belarus in Order to Effectively Resolve Commercial Disputes."

published numerous articles on mediation; they actively participated in radio and TV programs explaining the merits of this procedure. Moreover, courts systematically organized seminars, lectures and roundtables with the representatives of business entities and legal services by state bodies. The main aim of this method was to inform business entities and citizens about the new alternative dispute resolution procedure at courts.[211]

Second method consisted of the active involvement of the courts, when the parties came to file a petition. For instance, economic courts while sending the ruling to the parties regarding the acceptance of the statement of claim and the commencing a suit, indicated an opportunity to settle the dispute in the court-connected mediation. The courts attached a special reference handbook about the advantages of the mediation procedure to the ruling. In fact, when the parties receive their ruling they simultaneously get the information about the new alternative dispute resolution procedure.[212]

At first the economic court initiated most of the mediation cases by itself without the consent of the parties. The parties did not have so much information about this procedure. Thus, before beginning the mediation sessions the mediator had meetings with the parties. Usually in these meetings the mediator explained the goal and merits of the procedure. Moreover, the mediator recommended the parties think about and come up with different options for the settlement for the dispute. In general the result of the court ordered mediation was satisfactory. Consequently, the main categories of the cases referred to mediation resulted from the non-execution or improper execution of the responsibilities arising out of the following contracts: contracts of delivery, purchase and sale (62%), contracts of services (9,2%), tender contracts (8%), rental contracts (5%). In fact in 2011, 85 percent of the court ordered mediation cases finished with the conclusion of a mediated agreement.[213]

Most of the cases referred to mediation were simple cases in which there was no dispute

[211] Николаева; Nikolaeva, "За Высокими Показателями Урегулирования Споров В Примирительной Процедуре Стоит Огромная Работа Суда; 'Under the High Level of Dispute Settlement in the Mediation There Is a Huge Work of Courts,'" n.d., http://www.court.by/upload/10-2011%20Nikolaeva.pdf.
[212] Каменков; Kamenkov, "Посредничество – Перспективный Способ Урегулирования Экономических Споров; Mediation - a Promising Way to Resolve Economic Disputes.," n.d., http://www.court.by/upload/5-2010%20%20Kamenkov.pdf.
[213] Николаева; Nikolaeva, "За Высокими Показателями Урегулирования Споров В Примирительной Процедуре Стоит Огромная Работа Суда; 'Under the High Level of Dispute Settlement in the Mediation There Is a Huge Work of Courts.'"

between the parties regarding the main obligations arising out of the contract. However, presently the nature of court-connected mediation is changing. The courts are trying to recommend and order mediation mainly for complicated cases, that is, those cases requiring more time and effort in litigation rather than the simple cases. Therefore, the economic courts are trying to follow the philosophy "from the simple to the complex".[214]

One of the examples of a complex case, which went to the court-connected mediation and benefited from the merits of this procedure, is the case between "Orshanskiy lnokombinat" and "Vodokanal" and Cotton Association. "Orshanskiy lnokombinat" is a factory focusing on the production of linen material. Two claims were made against the respondent (Orshanskiy lnokombinat) for not paying debts from the water-sewage supply company "Vodokanal" and the Cotton Association. The total amount of the claim was significant: 1 billion Belarusian rubles on the first claim and 400 million Belarusian rubles on the second one. Both disputes were referred to the court-connected mediation with the parties' mutual consent. As a result of the successful mediation procedure, the respondent was able to save only on the payment of the state taxes of 9.2 million Belarusian rubles. [215]

However, in the period of the implementation of the mediation procedure in the judicial system, both the economic courts and disputants faced several difficulties. One of the reasons was the lack of experience of the judges and mediators to perform the functions of the mediator in appropriate manner. Moreover in order to promote the mediation procedure between 2008-2010 years, the economic court tried to order mediation procedures for almost all cases that were filed. As a result, the mediators could not handle the high number of cases since at that time there were only 45 mediators in the whole system of the economic court. According to the statistics, between 2009-2010 the number of the mediation cases was 39,559 disputes (15,407 disputes in 2009 and 24,152 disputes in 2010). Consequently, one mediator had to participate in around 900 cases per year. The duration of the mediation procedure was about 20-30 minutes, accordingly the quality of

[214] Каменков; Kamenkov, "Посредничество – Перспективный Способ Урегулирования Экономических Споров;
Mediation - a Promising Way to Resolve Economic Disputes."
[215] Николаева; Nikolaeva, "За Высокими Показателями Урегулирования Споров В Примирительной Процедуре Стоит Огромная Работа Суда; 'Under the High Level of Dispute Settlement in the Mediation There is a Huge Work of Courts.'"

the procedure was not high.[216]

Most of these difficulties were solved by the amendment of the Commercial Procedure Code in 2011. As a result of the amendment, not only court staff but also people from outside of the court with appropriate skills can now act as mediators in court-connected mediation. This means that the goal of courts in promoting and ordering mediation procedures for every case was not just for statistical results but to define the problematic aspects of the court connected mediation and to seek to resolves this in the future.

3.3 Court- connected Mediation Procedure

Court-connected mediation is a court settlement of a dispute in which the parties try to reach an agreement with the help of a mediator. The mediator can be appointed at the request of the parties or by the court among court officials, who assist the parties in establishing the factual circumstances of the conflict arising between them. The parties attempt to reach an understanding of the legal validity of their position in their dispute in order to find possible conflict solutions that would satisfy both sides. The court-connected mediation consists of three main stages: initiation; conduct; and conclusion of the mediation procedure.[217]

1. Initiation of the mediation procedure. The basis for the initiation of the mediation procedure is the intention of the parties, which can be expressed in the application of one or both parties to settle the dispute through mediation. In addition, economic courts have the authority to initiate the mediation procedure. At this stage the role of the court is very significant. For instance, from 2008 to 2010 most of the cases applied to the economic courts were referred to mediation.[218] At that time, the courts actively used their authority and initiated mediation. However, before ordering mediation the judge handles meetings with the parties. In these meetings the judge informs the parties about the mediation and evaluates the appropriateness of the case for the

[216] Власова; Vlasova, "Судебное Примирение В Хозяйственном Процессе Беларуси; Judicial Mediation in the Commercial Process of Belarus," n.d., http://emediator.ru/index.php?option=com_content&view=article&id=363:sudebnoe-primirenie-v-khozyajstvennom-protsesse-belarusi&catid=9:alternativnye-metody-v-sporakh&Itemid=101.
[217] Кулак;Kulak, "Процедура Посредничества Как Форма Альтернативной Юрисдикции; Mediation Procedure as an Alternative Form of Jurisdiction," *Вестник Высшего Хозяйственного Суда Республики Беларусь;* N5 (2009).
[218] Власова; Vlasova, "Судебное Примирение В Хозяйственном Процессе Беларуси; Judicial Mediation in the Commercial Process of Belarus."

mediation procedure.

At the stage of the commencement of the suit, the judge promotes mediation and proposes it to the parties. Moreover, in their ruling about the admittance of the claim, the judge indicates the possibility of settling the dispute through court-connected mediation. Furthermore, while preparing the case for the trial, the judge can suggest or initiate mediation if he/she finds it effective for the case.[219] According to the amendment to the Commercial Procedure Code adopted in 2011, the economic court can also initiate mediation during the appeal and cassation instances also. Consequently, at present the court-connected mediation can be initiated either by the parties or by the court at any stage of the litigation.

After the initiation of the mediation, the court appoints the mediator. The mediator is appointed from persons who have a public authority in the economic court or from other persons with the skills relevant to the conflict engaged in the procedure on a contract basis.[220] Every court has a list of out of court mediators. These mediators are people who have had an internship at the mediation organizations provided by Republican Union of Lawyers. Presently, there are three organizations which are eligible to provide education in the field of mediation.[221] The economic court can appoint an out of court mediator upon the request of both parties. The parties are able to request an out of court mediator from the list provided by the economic court.[222] Regarding the appointment of the mediator, the economic courts issue a ruling. In the case of the appointment of the mediator by the economic court, parties have a right to submit an objection within seven days from the date of the ruling. If there is an objection from the parties, the economic court issues a ruling for the abolition of the ruling on the appointment of the mediator for the court-connected mediation procedure.[223]

2. Conduct of the mediation procedure. The court-connected mediation is considered

---

[219] Кулак;Kulak, "Процедура Посредничества Как Форма Альтернативной Юрисдикции; Mediation Procedure as an Alternative Form of Jurisdiction."

[220] For instance Center for Mediation and Negotiation (Центр медиации и переговоров) provides such services. http://www.mediation-center.by

[221] More information about the Belarusian Republican Union of Lawyers (Center Union of Lawyers) can be found at this link: http://union.by/cm/

[222] *Постановление Пленума Высшего Хозяйственного Суда Республики Беларусь От 27.05.2011 №10 "О Некоторых Вопросах Применения Примирительной Процедуры В Хозяйственных Судах"; Resolution of the Plenum of the Supreme Economic Court of the Republic of Belarus of 27.05.2011 № 10 "On Some Issues of Mediation Procedures in the Economic Courts,"* n.d., http://pravo.newsby.org/belarus/postanov4/pst178.htm.

[223] *Хозяйственный Процессуальный Кодекс Республики Беларусь; Commercial Procedure Code of the Republic of Belarus*., Art.156

to be initiated after the issuing of a ruling for the appointment of a mediator. In order to request a court-connected mediation, the parties need to fill and sign an application for mediation while submitting a statement of claim. Consequently, the economic court considers the claim files and decides on the possibility of the settlement of the dispute in the mediation procedure. If there is such a possibility, the court informs the parties about the satisfaction of their application for the mediation procedure in the ruling of admittance of the statement of claim. In this ruling, the court includes information about the time of the mediation and the data regarding the appointed mediator. Usually, the court makes a ruling about the initiation of the court-connected mediation procedure in five days.[224]

After receiving the case from the judge, the mediator researches the legal nature of the dispute and the cause of the arisen conflict between the parties based on the case files. During that period, the mediator can meet with the disputants and give them some recommendations regarding the mediation procedure. The mediation is handled indoor of the court building. Usually, there is a special room for conducting mediation. At the beginning of the mediation the mediator introduces himself and explains his role in the procedure and the procedure itself. In general the main aim of the mediator is to control the procedure by helping the parties find an amicable settlement for the dispute.[225]

However, the mediator in the court-connected mediation in Belarus has an evaluative role. He has the right to give a legal consultation regarding the legal nature of the dispute. This consultation does not have any binding effect, but it is directed to explain to the parties the possible outcome of the dispute in litigation. The duration of the court-connected mediation should not exceed one-month term. Nevertheless, the parties or mediator can terminate mediation at any stage of the proceeding if it is obvious that there is no possibility for settling the dispute in the mediation.[226]

---

[224] "Методические Рекомендации По Урегулированию Экономических Споров В Порядке Посредничества В Хозяйственных Судах Республики Беларусь; Guidelines for the Settlement of Commercial Disputes through Mediation in the Economic courts of the Republic of Belarus" (Вестник Высшего Хозяйственного Суда Республики Беларусь;, n.d.).

[225] Кулак;Kulak, "Процедура Посредничества Как Форма Альтернативной Юрисдикции; Mediation Procedure as an Alternative Form of Jurisdiction."

[226] *Хозяйственный Процессуальный Кодекс Республики Беларусь; Commercial Procedure Code of the Republic of Belarus*. Art.155

3. Conclusion of the mediation procedure. The main document confirming the settlement of the dispute in the mediation procedure is the mediated agreement signed by the parties. This agreement should satisfy the interests of the parties by covering all or part of the disputed issues. The language of the agreement should be clear and valid. If the parties cannot settle every debated issue they can negotiate about the specific matters of the dispute. Accordingly, they may conclude a new contract based on these matters. This contract should be attached to the mediated agreement when being submitting to the court. Additionally, the mediated agreement should contain an indication of the parties to enter into a new contract.[227]

After filing the mediated agreement, the mediator checks its appropriateness with the applicable law and explains the legal obligation of the parties arising from the agreement. Consequently, the mediator sends the case to the court for the approval of the mediated agreement. When the court approves the mediated agreement the mediation procedure is considered finished. However, if the economic court does not approve the mediated agreement, it issues a ruling on the termination of the case from the court-connected mediation procedure. In fact the case returns to the litigation and is handled in the court proceeding.[228]

Overall, the court-connected mediation procedure is concluded in the following three circumstances: a. when the parties settle the dispute and conclude a mediated agreement; b. when one or both parties, including the mediator, state that there is no possibility of reaching an agreement; c. when the mediation procedure's one month term expires.[229]

The legislator of the Republic of Belarus equated a mediated agreement with an amicable settlement agreement. Therefore, the approval and enforcement procedure of the mediated agreement is the same as the amicable agreement's one. Consequently, according to Art.124 of the Commercial Procedure Code, the parties should enforce their responsibilities arising from the amicable settlement agreement voluntarily. In case the provisions of the amicable agreement are not performed in the manner and time specified in it, the economic court upon the application of

[227] Ibid., Art.157
[228] "Методические Рекомендации По Урегулированию Экономических Споров В Порядке Посредничества В Хозяйственных Судах Республики Беларусь; Guidelines for the Settlement of Commercial Disputes through Mediation in the Economic courts of the Republic of Belarus."
[229] *Хозяйственный Процессуальный Кодекс Республики Беларусь; Commercial Procedure Code of the Republic of Belarus*., Art.157

an interested party gives a writ of execution without summoning the parties.

4. Mediability. Another important issue of court-connected mediation is the mediability**.** As noted above, court-connected mediation has been actively used since 2008 in the economic courts of the Belarus. At first, in order to promote this procedure, the courts were focusing on the quantity of the cases. The judges intended to order a mediation procedure for most disputes.[230] However, presently the courts are focusing more on the quality and effectiveness of the mediation procedure rather than on the quantity. For this reason, in order to provide efficient mediation procedures consistently reaching agreements, judges have begun evaluating cases on their appropriateness for the mediation procedure. In other words, the courts are paying more attention to the nature of each case.

The mediability issue depends on the scope of the application of the mediation procedure, which is defined by the Commercial Procedure Code. Consequently, mediation can be applied for commercial disputes arising from civil law relationships.[231] From this definition, one can conclude that the application of the mediation procedure in the economic court is wide and covers almost all commercial cases.

In spite of the fact that the scope of the application of the mediation procedure is broad, the court is very accurate in suggesting or initiating mediation procedures. The reason behind the court's discretion is not to restrict the access to justice. Thus, in practice, all registered cases first go to the Chairman of the Court. Then, after reviewing each case's materials, he/she distributes these cases to the judges. While distributing the cases to the judges, the Chairman can recommend to the parties for them to undergo a mediation procedure. Accordingly, the judge, based on the merits of the case defines the mediability of the case. Features of mediability could be the presence in the text of the contract the possibility of the settlement of the dispute through negotiation, or the long-term relationship of the parties. The chance of reaching an agreement by parties who know each other for a long time is very high.

Moreover, each economic court has a software called "Mediator". This software gives

[230] Власова; Vlasova, "Судебное Примирение В Хозяйственном Процессе Беларуси; Judicial Mediation in the Commercial Process of Belarus."
[231] *Хозяйственный Процессуальный Кодекс Республики Беларусь; Commercial Procedure Code of the Republic of Belarus*. Art.1

information about parties who tried a mediation procedure before. In cases where one or both parties settled the dispute through mediation in past, the judge orders this procedure again.[232]

However, this does not mean that the judge uses only the above-mentioned features as grounds for ordering the mediation procedure. For instance, at the preparatory stage of the court hearing the judge has to summon the parties for the meeting. In this meeting the judge contacts the parties in order to examine the subject of the dispute and the legal position of the parties. Usually during this time the judge informs the parties about the mediation procedure and clarifies its advantages. Consequently, he/she evaluates the mediability of the case and intentions of the parties by analyzing the essence of the conflict. In addition, the judge can check the willingness of the parties not only to negotiate, but also to make mutual concessions.[233]

The role of the judge in determining the appropriateness of the case for mediation is crucial. In the preparatory meeting, the judge should take an active position in the promotion of the mediation procedure for the parties. This promotion may be used as basis for parties, who were not familiar with the mediation procedure, to file a petition for conducting a mediation procedure. On the other hand, if the case is mediable but the parties hesitate to try it, the judge can use his right to initiate the mediation procedure by himself.[234]

In conclusion, while clarifying the possibility of settling legal conflict through mediation and communicating with the parties, the judge should not act as a 'judge'. On the other hand, the meeting should be handled in a friendly way. The parties should not see a judge ordering a mediation procedure but a person whom they can rely on and tell the core of the dispute. If the meeting is handled in an informal way, the possibility for the initiation of the mediation procedure by the parties is high.

---

[232] Кулак, Kulak, "Судебное Решение-Это Разрешение Спора, Примирительная Процедура-Разрешение Конфликта В Целом; The Court Decision-a Resolution of the Dispute, Mediation-a Resolution of the Conflict in General," n.d., http://court.by/online-help/mediation/publications/c01c6b8dea7e839f.html.
[233] Ibid
[234] *Хозяйственный Процессуальный Кодекс Республики Беларусь; Commercial Procedure Code of the Republic of Belarus*. Art.156

3.4 Conclusion

The path taken by Belarusian legislator while implementing and developing mediation can be considered to have been fruitful. The Belarusian legislator from the beginning tried to create an effective dispute resolution procedure, which would assist in reducing the burden of the economic courts. Therefore, after creating the legal basis for the court-connected mediation, the legislator intended to support and promote this procedure throughout Belarus. Overall, there are two main key points which enabled the efficiency of the court-connected mediation procedure.

The first key point was the implementation of the court-connected mediation into the judicial system of the state before the out-of-court mediation. This order of implementation was unique, since other Commonwealth of Independent States (CIS)[235] initially implemented out-of-court mediation procedures. Thus, the Commercial Procedure Court was amended with a new chapter regarding the mediation procedure in 2004. One of the provisions of this chapter provided the authority for the court to initiate mediation procedures by itself. Consequently, from 2008 to 2010 most of the cases were referred to mediation by the courts. Because of this, one can consider court-connected mediation procedures in the Republic of Belarus as being partly mandatory. The reason behind giving the right to the courts to order mediation was to promote this procedure among the parties. As a result, it worked and the number of the cases that went to mediation was high. Obviously, most of these mediation cases were initiated by the court because at that time courts were focusing more on the quantity rather than the quality.[236]

However, after the effective promotion of the mediation procedure, courts now give priority to quality. Before this the mediation procedure was considered effective if the parties could reach an agreement. Now one of the main goals of the procedure is understanding the core of the conflict and narrowing the disputable issues between the parties. For this reason, the courts are trying to order mediation procedures not for the simple cases but for the complex ones.[237]

Another key factor was the support of the court-connected mediation procedure by the

[235] E.g., Russia and Kazakhstan
[236] Власова; Vlasova, "Судебное Примирение В Хозяйственном Процессе Беларуси; Judicial Mediation in the Commercial Process of Belarus."
[237] Крывчик; Krivchyk, "Когда Третий Не Лишний; When the Third Is Not Superfluous;," *Вестник Высшего Хозяйственного Суда Республики Беларусь;* N5 (2009).

state. In 2007-2008 the number of the lawsuits at the economic courts increased rapidly. The judges were not able to handle the high number of cases that caused deterioration in judgments. In order to decrease the number of lawsuits and improve the quality of the judgments, the economic courts decided to actively use mediation procedures.[238] However, in order to encourage the parties to use mediation procedures, the courts needed to offer an incentive. This was the adoption of new amendments to the law "On State Duty" in 2008.[239] The amendment allowed the parties to get back 50 percent of the state fee they paid at the beginning of the lawsuit, if they conclude a mediated agreement. This provision was a great financial privilege for the parties because, even if an amicable agreement is concluded during litigation, they can return only 25 percent of state fee. As a result the court-connected mediation became the cheapest dispute resolution procedure in the judicial system of the Republic of Belarus.[240]

[238] Бельская; Belskaya, "Развитие Медиации (посредничества) В Хозяйственных Судах Республики Беларусь В Целях Эффективного Разрешения Коммерческих Споров; Development of Mediation (mediation) in Economic courts of the Republic of Belarus in Order to Effectively Resolve Commercial Disputes."
[239] Миселюк; Miselyuk, "Опыт Хозяйственных Судов По Применению Медиации; Experience of Economic Courts on the Application of Mediation."
[240] *Закон Республики Беларусь "О Государственной Пошлине"; Law of the Republic of Belarus "On State Duty"*, Art.12 1992, http://pravo.levonevsky.org/bazaby/zakon/zakb1409.htm.

PART TWO: CREATING AN APPROPRIATE MODEL OF COURT-CONNECTED MEDIATION FOR UZBEK JUDICIAL SYSTEM

Chapter IV: Mediation style and Values that underline the mediation process in Uzbekistan

4.1 Comparison of mediation and other ADR methods with litigation

In order to understand mediation procedure one should differentiate it from other Alternative Dispute Resolution (ADR) proceedings, namely, arbitration, conciliation, and negotiation. Therefore, the following part of this paper clarifies the difference from ADR proceedings and defines the idea of mediation procedures.

a. Arbitration

Arbitration is a private form of dispute resolution procedure. In this procedure parties have a right to choose the arbitration institution, place of arbitration, the rules of the arbitral institution, the applicable laws, the language of arbitration and the arbitrators.[241] As a result, the disputants can set the framework for the arbitration procedure based on their agreement. However, the arbitrators govern the procedure itself and make an arbitral award at the end of the proceedings, which is considered to be final and binding.

One of the most important aspects in arbitration is in the appointment of the arbitrators. For the reason that the skill, experience, and knowledge of the arbitrators are key issues that influence the quality of the procedure and arbitral award. Therefore, the parties should appoint arbitrators who have skills and knowledge in the field subjected to dispute. This aspect is the main difference between an arbitrator and a judge. In arbitration, contrary to the litigation, parties do not need to spend time instructing the arbitrator about certain matters of the case. Usually, the arbitrators explore the dispute before the arbitration process. Another difference is the necessity for a law degree qualification. Parties can appoint any person as an arbitrator. Even though there is no law degree requirement for arbitrators, usually parties try to choose at least one arbitrator who

[241] Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2012)., pp.1-4

is an expert in the legal field. The reason for this choice relates to the fact that the arbitrators have to check legality of a contract and the responsibilities of the disputants. Moreover, they need to make many decisions in order to settle the dispute using procedural or substantive rulings, and for non-lawyer arbitrators, the parties or their legal representatives need to spend much more time to introduce appropriate laws for the case.[242]

Even though, in most legal systems there is no requirement for a law degree for arbitrators, in Uzbekistan arbitrators must have a law degree. For instance, according to the Law "On Arbitration Courts" of Uzbekistan, if the sole arbitrator handles an arbitration procedure he/she must have a law degree. But if the arbitral tribunal consists of three arbitrators, the chairman must have a law degree. [243]

In general, the role and function of the arbitrator is very close to a judge's one. For instance, arbitrators have the power to summon witnesses, appoint experts, issue interim measures and ask for the assistance of state courts. From these functions it seems that arbitrators have almost similar rights to judges. However, according to Professor Margaret L. Moses 'the arbitrators have more power than judges, because their decision cannot be annulled or appealed based on the law or fact'.[244]

b. Negotiation

Negotiation is a dispute resolution in which disputants reach an agreement by themselves without the help of a third person. This procedure is considered to be the most flexible and informal because there is no framework or rule which controls it. In this procedure, disputants should take an active role in order to settle their dispute. Usually, during the procedure, the parties do not request any actions from each other. They just try to eliminate some misunderstandings to develop their relationship. Therefore, negotiation is considered to be the most common and mutually satisfactory method of dispute settlement[245]. In practice, lawyers recommend their clients

[242] Ibid., p. 122-123
[243] *Закон Республики Узбекистан "О Третейских Судах"; Law of the Republic of Uzbekistan "On Arbitration Courts,"* Art.14 n.d., http://www.lex.uz/pages/GetAct.aspx?lact_id=1072094.
[244] Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2012)., p.123
[245] Dennis Campbell, Susan Cotter, and Center for International Legal Studies, *Dispute Resolution Methods* (London; Boston; Norwell, MA: Graham & Trotman/M. Nijhoff ; Kluwer Academic Publishers, 1995)., p.90-91

to use negotiation before going on to other dispute resolution procedures, including mediation.

c. Mediation

Mediation is a facilitative process in which disputing parties try to negotiate with the help of third party (mediator) in order to reach an agreed resolution of their dispute. In this proceeding, the mediator uses his/her professional skills and techniques to assist disputants. The primary aim of the mediator is not to negotiate with disputants but to help disputants to negotiate with each other. In this sense, the mediator plays a facilitative role in the procedure by using communication, negotiation and explanation skills.[246]

Mediation procedure differs from arbitration in terms of the role and function of the neutral third party. In mediation, the mediator does not have the right to make decisions or possible settlement proposals in the procedure. Although in some models of mediation mediators may give their non-binding opinion regarding the dispute settlement. However, in arbitration the arbitrator analyzes all the aspects of the case and makes the final binding decision (arbitration award).[247] Therefore, "mediation is sometimes referred to as an *interest-based* procedure, while arbitration is referred to as a *right-based* procedure"[248].

d. Conciliation

Another ADR proceeding is conciliation. The definition of a conciliation process is very close or almost similar to mediation. These terms are used even interchangeably in some legal systems[249]. For instance, according to UNICITRAL Model Law Article 1:

> *"Conciliation means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship".*[250]

Theoretically, these two dispute resolution methods are similar. The aim of these

[246] Henry J Brown and Arthur L Marriott, *ADR Principles and Practice* (London: Sweet & Maxwell, 1999)., p 127-128
[247] Ibid.,
[248] Moses, *The Principles and Practice of International Commercial Arbitration*., p 14
[249] E.g., Japan, Singapore, Hong-Kong, China etc
[250] "UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002," 2004, http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf. Art,.1

procedures is to assist disputants to reach an agreement by using professional skills and knowledge. Moreover, according to the Model Law in both procedures the neutral third party (mediator/conciliator) may make proposals for a settlement, which has a recommendatory character but is not binding.[251]

However, from a practical perspective, these methods are different. In practice, the procedure in which disputants settle their dispute with the assistance of third party may be called conciliation, mediation, neutral evaluation, mini trials and so on. The term for this procedure may be different in the various legal systems. Furthermore, the function and the role of the third party may also vary in each procedure, but the idea and the characteristic of the procedure are common in most jurisdictions.

In some states the terms "conciliation" and "mediation" are used for two different procedures. Although the concept of these two procedures is similar, the legislation of these states distinguishes them based on the authority of the third party (conciliator and mediator). For instance, in India and in the United Kingdom the two expressions are clearly separated.[252] According to sec. 89 of the Code of Civil Procedure of India and the 1997year's Handbook of the City Disputes Panel of UK the conciliator has an authority to make possible proposals for settlement, 'formulate' or 'reformulate' the conditions of the settlement, whereas a mediator cannot do this but can only facilitate[253] parties to reach an agreement. The difference between mediation and conciliation in these legal systems is decided by the role of the neutral parties. In conciliation, the conciliator has an active role but the mediator plays a passive role in mediation.

The usage of conciliation and mediation terms in the US is completely opposite to the UK and India. For instance, some conciliators[254] consider the role of mediator to be more pro- active than the conciliator's one. Moreover, because of this, the conciliation is less formal compared to mediation. Consequently, if in the conciliation procedure, the neutral third person fails to facilitate the disputants in reaching an agreement he/she may act as a mediator by suggesting proposals for

[251] Ibid., p.11
[252] Rao Jagannadha, "Concepts of Conciliation and Mediation and Their Differences," n.d., http://lawcommissionofindia.nic.in/adr_conf/concepts%20med%20Rao%201.pdf., pp. 3-4
[253] According to Webster's New Collegiate Dictionary, ***"facilitate"*** means ***"to make easier."***
[254] Mr.Wally Warfield, Mr.Manuel Salivas etc.

the settlement.[255] The above paragraphs show that Indian and UK terms for conciliation and the US term for mediation are similar. Furthermore, the Indian conciliator's and US mediator's role in the procedure is equal to the pro-active role of conciliator mentioned in the Article 6 of UNICITRAL Model Law on International Commercial Conciliation.

In this paper the term 'mediation' is used to express the procedure in which disputants reach an agreement with the assistance of third neutral party. The reason for choosing the expression 'mediation' rather than 'conciliation' is based on the translation of these terms in the Uzbek language. The term 'conciliation' in Uzbek has the same meaning as 'negotiation'. Moreover, although there is neither a mediation institution nor mediation procedure in Uzbekistan, people are familiar with mediation procedures because of several ADR and mediation conferences[256], which were held recently. Furthermore countries bordering Uzbekistan, Kazakhstan and Russia have already adopted a law on mediation procedures and these countries use the term 'mediation' in their legal systems.

[255] "Can You Explain the Difference between Conciliation and Mediation," n.d., http://www.colorado.edu/conflict/civil_rights/topics/1950.html.
[256] International Conference "Alternative methods of dispute resolution as a way of protecting the legitimate interests of individuals and legal entities" Tashkent, 2011;
International Conference "Legal aspects of arbitration and mediation, international practice", Tashkent, 2012;

4.2 History and background of Mediation in Uzbekistan

a. Background and overview of mediation in Uzbekistan

The mediation procedure was a part of Uzbek society for many years. Traditionally, people used to ask advice from elder, respectful people or so called 'aksakal' for ways to settle disputes. "Aksakal" was considered to be an honorable person who had a rich life experience. People believed that they could rely on the life experience of such people. These elderly people tried to give some recommendations, which would help the parties to settle their dispute. In general, this procedure could be considered to be a type of mediation procedure. Even today this tradition is still kept in Uzbek culture.[257]

In Uzbekistan district, small towns and villages have self-government bodies or municipalities of citizens. According to the Art.1 of the Law of the Republic of Uzbekistan "About Self-government Bodies": 'Municipality of citizens are independent activities of citizens to address local issues, based on their interests, historical features of development, as well as national and spiritual values, local customs and traditions.' A Municipality of citizens or so-called "Mahalla" organizes systematical meetings with the inhabitants of the territory to review and resolve some issues regarding that community.[258] Moreover each 'mahalla' has to create a reconciliation committee. This committee consists of a chairman of the 'mahalla' and the citizens of the community who have a good reputation with the public. The inhabitants of the community elect the chairman for a two and a half year term. The candidates for the post of chairman (aksakal) must have a higher education and be a permanent residence of the appropriate territory. Moreover, he/she should possess organizational skills, life experience and a good reputation among the population of that territory.[259]

The main goal of the reconciliation committee is to assist inhabitants in reaching an agreement in settling disputes, such as quarrels between neighbors, and small domestic and family disputes. During the reconciliation sessions the committee members act as mediators by giving

[257] Karaketov, "Court-Connected Mediation in Uzbekistan and Japan: A Comparative Analysis;", p.46
[258] *Закон Республики Узбекистан "Об Органах Самоуправления Граждан"; Law of the Republic of Uzbekistan "About Self-Government Bodies"*, Art.10 n.d., http://www.lex.uz/pages/GetAct.aspx?lact_id=86238 .
[259] *Закон Республики Узбекистан "О Выборах Председателя (аксакала) Схода Граждан И Его Советников"; Law of the Republic of Uzbekistan "On the Election of Chairman (aksakal) Citizens and His Advisers.,"* Art.15 n.d., http://www.lex.uz/pages/GetAct.aspx?lact_id=208234.

suggestions and possible outcomes for the dispute. As a basis for the procedure the committee uses its own regulations, since there is neither law nor legal regulation for this procedure.[260]

Officially dispute resolution with the help of reconciliation committee is voluntary for all disputes. However, for divorce cases this procedure is considered mandatory, despite the fact that there is no legal basis for this. For instance, the couple before applying to the registration body (ZAGS) or court for the legal separation has to try to settle the dispute with the assistance of the reconciliation committee. After trying the procedure at 'mahalla' level, the couple either reaches an agreement and does not get a divorce or receives a certificate about the unsuccessfulness of the procedure from the 'mahalla'. After getting this certificate the couple will be able to apply to the ZAGS or court for the divorce lawsuit.[261]

It used to be the case that the reconciliation committees worked effectively. Members of committee visited the families with the difficulties and tried to help them to negotiate. However, the contemporary situation has changed. People are not eager to share their problems with the reconciliation committee members since they do not depend on them. Moreover the young generation, in contrast to the older one, does not even know about the existence of the committee and its members.[262]

The main reason for the unpopularity of the reconciliation procedure at 'mahalla' is the independence of the reconciliation committee. The reconciliation committee does not have any legal obligations, since there is no law or regulation, which could control its activity. As a result, the committee members handle the procedure based on their outlook and life experience. There are three further grounds for the ineffectiveness of this procedure:

1. Reconciliation committee does not have the appropriate knowledge.
2. Leaders of the "mahalla" have not had any training to act as a mediator.
3. People do not know the chairman very well. Young people often do not know him/her at all.

The procedure provided by the reconciliation committee is different from mediation in

[260] Karaketov, "Court-Connected Mediation in Uzbekistan and Japan: A Comparative Analysis;" p 47
[261] Amirova Narghiza, "Mediation in Family Dispute Resolution : Opportunities for Transforming Divorce Procedure in Uzbekistan" (Nagoya University, LLM Dissertation, 2011).
[262] The situation in the city and villages is different regarding the reconciliation committee. In the capital Tashkent the 'mahalla' reconciliation committee is losing its efficiency. On the other hand, in the regions and villages people still respect and rely on this committee.

the legal sense, but the core idea of two procedures is similar. The major aim of both procedures is to assist disputants to reach an agreement. Therefore, one can consider that presently Uzbekistan has its own mediation model that is close to out-of court mediation procedure. This procedure is being mainly used for the family disputes. However, currently it is losing its effectiveness in society. For this reason, one may conclude that the mediation institution is not new or something unaccustomed for Uzbekistan. It has been a part of the society for several decades.[263] Nevertheless, in order to make the mediation an effective and workable dispute resolution procedure in Uzbekistan, it should be reformed. This paper recommends creating mediation at courts first and later out-of-court mediation. By creating court-connected mediation, the legislator would be able to solve a number of problems[264] in the judicial system of Uzbekistan.

b. Necessity of the court-connected mediation procedure for judicial system of Uzbekistan

Recently the number of lawsuits in the civil and commercial courts of Uzbekistan is increasing rapidly. The civil courts are overburdened with cases and the judges are not able to handle the high number of cases. Presently there are 63 civil courts with 263 judges in Uzbekistan. Because of the exceeding number of civil cases, the courts are facing difficulties. For instance, according to 2012 year's statistics, the total number of the civil cases was 599,522. Consequently, one judge handled around 8-10 cases per day. From this statistic, it is clear that even on a physical level it is hard for the judges to review this number of cases.

Another factor is the time limitation for judicial proceedings. In Uzbekistan there is a strict time limitation for court proceedings. For example, according to Art. 131 of Civil Procedure Code of Uzbekistan 'the procedural term for judicial proceeding is one month. Except, alimony, health injury and labor cases. For these kind of cases procedural term is 10 days, if the disputants are located in the same district or region, otherwise 20 days'.[265] The one month procedural term comes from the old Civil Procedural Code of 1963. This Code stated that a one-month term is enough to settle civil cases objectively. As a result, because of the high number of the cases and time limitation for judicial proceedings the quality of judgments is getting worse.

[263] Karaketov, "Court-Connected Mediation in Uzbekistan and Japan: A Comparative Analysis;"
[264] E.g. caseload of courts and insufficient quality of the judgment,.
[265] *Гражданский Процессуальный Кодекс Республики Узбекистан; Civil Procedure Code of the Republic of Uzbekistan*, 1998, http://www.lex.uz/pages/GetAct.aspx?lact_id=186098.

Therefore in order to solve the above-mentioned problems and improve the quality of the judgment, the new ADR procedure, namely court-connected mediation, should be implemented into the judicial system of the state. There is a high possibility that after the application of this procedure, a certain percent of civil and commercial cases would be referred to mediation from litigation. Thus, the court-connected mediation procedure is considered cheaper and quicker than legal proceedings. Furthermore, the judges may refer some complicated cases to mediation in order to narrow the range of disputable issues. In fact, even if the parties were not able to reach a mediation agreement, they could at least simplify the conflict areas.

4.3 Current condition of ADR in Uzbekistan

Currently the Uzbek judicial system is under reform. The Uzbek legislator intends to establish an active civil society. In order to support this society, the state is trying to develop Alternative Dispute Resolution (ADR) procedures. Thus, presently there are three types of ADR procedures in Uzbekistan: arbitration, consulting and mediation, and settlement agreement.

1. Arbitration. In 2006 the Uzbek legislator adopted a new law 'On Arbitration Courts'.[266] This law was in accordance with the Presidential Decree of 14 June 2005 № UP-3619 "On measures to further improvement of the legal protection of business entities" and to ensure the protection of rights and the legitimate interests of businesses. The law 'On Arbitration Courts' allowed creating arbitration courts in Uzbekistan. Consequently, the Chamber of Commerce and Industry of Uzbekistan (CCI) and Association of Arbitration Courts (AAC)[267] established arbitration courts in every region.[268] The total number of arbitration courts is about 140 courts established by AAC and 14 operating at the CCI.[269]

Arbitration courts settle disputes arising from civil law, including commercial disputes between business entities. Arbitration courts do not handle disputes arising from administrative,

[266] Law 'On Arbitration Courts' can be found under this link: http://www.lex.uz/pages/GetAct.aspx?lact_id=1072094

[267] **Association of Arbitration Courts** is non-governmental non-profit association. Main objectives of the association: development and assist in the establishment of arbitration courts in the Republic of Uzbekistan, the protection of their rights and interests. More information can be found under this link: http://uzarbitration.uz

[268] Rules relating to the activities of the arbitration courts are also contained in the Civil Code, Code of Civil Procedure, Code of Commercial Procedure, the Tax Code of the Republic of Uzbekistan, the laws of the Republic of Uzbekistan "On the legal basis of economic entities", "On the performance of judicial acts and other bodies" "On the Chamber of Commerce of the Republic of Uzbekistan."

[269] Закиров; Zakirov, "Альтернативные Решения; Alternative Solutions," *Uzbekistan Today*, n.d., http://old.ut.uz/rus/obshestvo/alternativnie_resheniya50.mgr.

family and labor relations, or other disputes provided by law.[270] However, the arbitration procedure is still considered to be a new ADR procedure in Uzbekistan. Most of the people do not have sufficient information regarding this procedure. Moreover, since this procedure is more expensive than litigation, parties prefer litigation rather than arbitration. According to the statistics below (Table 1), not many cases are being settled using this procedure.

Furthermore, in 2011 the CCI formed an International Commercial Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan and approved its regulations, the list of arbitrators, and the provisions on arbitration fees and expenses. However, to date this court has not been so effective either. The main obstacle to the development of the International Commercial Arbitration Court (ICAC) in Uzbekistan is the lack of a specific law on international commercial arbitration. Currently the ICAC operates in accordance with the Law "On arbitration courts", international law, and local regulations governing its activities. The adoption of the law would make this court's activities more legitimate and more reliable for foreign companies.[271]

Table 1: Statistics for cases handled by the Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan[272]

Years	Number of cases	Amount of the claim
2007	2	2115960 soms[273]
2008	20	501294290 soms
2009	106	1217581663 soms
2010	114	3312 408 017 soms
2011	90	1978844032 soms
2012	100	16725148841 soms

[270] *Закон Республики Узбекистан "О Третейских Судах"; Law of the Republic of Uzbekistan "On Arbitration Courts,"* Art.9 n.d., http://www.lex.uz/pages/GetAct.aspx?lact_id=1072094.
[271] Отахонов; Otaxonov, "Организационно Правовые Меры По Развитию Международного Коммерческого Арбитража В Узбекистане; Organizational and Legal Measures for the Development of the International Commercial Arbitration in Uzbekistan," n.d., http://cisarbitration.com/wpcontent/uploads/2014/02/Организационно-правовые-меры-по-развитию-МКА-в-Узбекистане.pdf.
[272] Отахонов;Otaxonov, "Третейские Суды При Торгово-Промышленной Палате Республики Узбекистан; Arbitration Courts at the Chamber of Commerce of the Republic of Uzbekistan;," n.d., http://cisarbitration.com/wp-content/uploads/2014/02/Третейский-суд-в-Узбекистане.pdf.
[273] The **Som** is the national currency of Uzbekistan. 1 yen equals to 30 soms.

2013	73	29060227296 soms
Total	**505**	**52797620099 soms** **17630066 USD**

2. Consulting and Mediation. The Association of Arbitration Courts operates a subsidiary of the company "Consulting and Mediation". The founder of the company is the AAC; accordingly the company gives a report on its activities to the ACC. The company provides consulting services in all areas, including mediation for citizens and business entities on a contractual basis.[274]

The mediation process organized by the Consulting and Mediation consists of several steps. First, the parties sign a contract of agreement to conduct the mediation process by indicating the terms of the agreement. Then, the appointed mediator tries to assist the parties to find an appropriate settlement for the dispute. This procedure is based on the principles of the voluntary participation of the parties, impartiality, confidentiality, and respect of mutual interests.[275] If the parties reach an agreement they conclude an amicable agreement, otherwise the case goes to litigation or arbitration. In 2013 the number of the mediation cases, which were ended with an amicable agreement was 21.

Obviously the Consulting and Mediation company practices more consulting services rather than mediation ones. The main idea of creating of this company under the ACC was to prepare the disputing parties for arbitration. Consequently, because of this company, the number of the cases that were not under jurisdiction of the arbitration courts decreased.[276] In fact the goals of the company is to provide legal consultation for the parties, check the arbitrability of the dispute, and assist the parties in reaching an agreement. Overall, the mediation procedure provided by the Mediation and Consulting is recent, thus there are no valid facts to evaluate its

[274] More information could be found in the homepage of the Association of Arbitration Courts. http://uzarbitration.uz/konsultacionny_centr
[275] Джураев; Djuraev, "Медиация - Путь К Компромиссу; Mediation - a Way to Compromise," *Правда Востока*, no. N91 (May 10, 2014), http://www.pv.uz/economics/15031.
[276] Закиров; Zakirov, "Альтернативные Решения; Alternative Solutions," *Uzbekistan Today*, n.d., http://old.ut.uz/rus/obshestvo/alternativnie_resheniya50.mgr.

effectiveness.[277]

3. Settlement Agreement. In spite of the fact that the Uzbek legal system does not have any legal basis for the mediation procedure, it provides legal provisions for settlement agreements. For instance, Civil Procedure Code and the Commercial Procedural Code of the Republic of Uzbekistan contain rules governing the procedure for entering into settlement agreements. According to the part 4 of Art. 40 Civil Procedure Code, the parties in action proceedings are able to conclude an amicable agreement at any stage of the process. The Commercial Procedural Code also provides this right for the parties. If the parties reach an agreement, the court approves it.

Some scholars consider the settlement agreement as one of the elements of the mediation procedure. For example, OSCE Project Coordinator in Uzbekistan Istvan Venczel noted that '[…] At this stage, in Uzbekistan the elements of mediation have already been implemented (in criminal law-institution of reconciliation in civil and commercial law - the institution of a settlement agreement) […][278].

On the other hand, other scholars separate a settlement agreement from mediation procedure. For instance, Mr. Davydenko characterizes the difference between a settlement agreement and the mediation procedure as follows: 'an amicable agreement cannot be considered as a mediation procedure, since it is just an agreement reached by mutual concessions. Regarding the process of concluding an amicable agreement, then it is incorrect to compare this procedure with mediation procedure [...]. Meanwhile, one of the most successful outcome of the mediation procedure is the conclusion of the amicable agreement.'[279] In fact the main difference between the settlement agreement procedure and mediation is the role of the third person. In the settlement agreement the parties try to negotiate and reach an agreement by themselves. On the contrary, in mediation they do the same action but with the assistance of the mediator. [280]

---

[277] Джураев; Djuraev, "Медиация - Путь К Компромиссу; Mediation - a Way to Compromise."
[278] "Узбекистан – Германия: Взаимообмен В Судебно-Правовой Сфере; Uzbekistan - Germany: The Interchange in the Judicial Sphere," n.d., http://www.jahonnews.uz/rus/rubriki/politika/uzbekistan_germaniya_vzaimoobmen_v_sudebno_pravovoy5_sfere.mgr.
[279] Давыденко; Davydenko, *Медиация Как Примирительная Процедура В Коммерческих Спорах: Сущность, Принципы, Применимость; Mediation as Reconciliation Procedure in Commercial Disputes: The Nature, Principles, Applicability*, p71 n.d., http://www.iurisprudentia.ru/alternative/files/mediation.pdf.
[280] Масадиков; Masadikov], "Сущность медиации и проблемы ее правового регулирования в Республике Узбекистан; The essence of mediation and issues of legal regulation in the Republic of Uzbekistan, p 148 " 2008.

4.4 Conclusion

Mediation is not a new procedure for Uzbekistan. This procedure has been a part of Uzbek culture for many years. Uzbek people got used to asking advice from older people or the so called 'aksakals' regarding dispute settlements. This method has become implemented in the self-government bodies or municipality of citizens ('mahalla'). Each 'mahalla' has established reconciliation committees, which try to assist the parties in reaching an agreement. In general, people have some information about the so called mediation process. However, Uzbekistan does not have any legal basis for the mediation process.

Presently, in Uzbekistan there are only several ADR procedures, like arbitration and settlement. Moreover, there is also an organization called 'consulting and mediation', which provides consulting services in all areas, and mediation for citizens and business entities on a contractual basis. This organization is under the Association of Arbitration Courts. It would not be right to consider this organization to be a mediation center, since it is does not satisfy the requirements for such a center.

The reason why the Uzbek judicial system needs court-connected mediation involves two legal problems: firstly, courts are overloaded with the cases, and secondly, because of the time limitation for judicial proceedings, the quality of judgments is getting worse. For this reason, the state can reform the judicial system and solve these two problems by implementing court-connected mediation. There is a high possibility that some percentage of cases would be transferred from ligation to mediation, which would alleviate the burden for the courts. Moreover, judges would have more time to focus on complex disputes. The simple ones could be referred to mediation. Consequently, if the Uzbek legislator implements the court-connected mediation it can establish more options for access to justice. Usually, when courts are overloaded with cases, they cannot provide rapid access to justice for the disputants. But, when there are other options such as arbitration or mediation, parties can quickly access justice and solve their dispute. For this reason, it is appropriate today to create a mediation process in the judicial system. This paper suggests that the legislator first implement court-connected mediation under the courts and, after some time, when the people have sufficient information about this process, establish out-of-court mediation.

Chapter V. Institutional Integration of Mediation in Dispute Resolution Procedures and Substantive Law in Uzbekistan

5.1 Perspectives on mandatory mediation

At the outset, it is important to clarify the meaning of the term 'mandatory mediation'. Mandatory mediation is when the court with or without consent of the parties initiates the procedure, as opposed to traditional voluntary mediation. The meaning and the level of the mandatoriness is different depending on the categories of the mandatory mediation.

a. Categories of Mandatory Mediation

There are three categories of mandatory mediation[281]: categorical; discretionary; and quasi-compulsory.[282] All these categories mandate the parties to attempt the mediation procedure, but they do not mandate the outcome of the procedure. This paper will provide here an overview of each category of mandatory mediation.

1. ***Categorical mandatory mediation.*** This category requires certain matters to be referred to mediation automatically. The state should have a legal basis for the list of the cases for which mediation is considered compulsory. For instance, Italy has categorical mandatory mediation. Italy in adopting Legal Decree 28/2010 made mediation a prerequisite for the following matters: tenancy in common; real property; division of assets; inheritance; family estates; leases of real property and of going concerns; gratuitous loans for use; medical liability; defamation in the press and other media; and insurance, banking and other financial agreements.[283] The parties in these types of disputes have to first try mediation procedures before litigation. Even if they file a lawsuit at the court, the judge will refer the case to mediation and transfer it to the mediation centers.

This type of mediation is considered to be the most obligatory for the disputants because the disputes are referred to mediation regardless of the nature and characteristics of the case.

[281] The notion of mandatory mediation could be interpreted narrowly and widely. Narrow usage of mandatory mediation means that the mediation is compulsory for all disputes. On the other hand, wide usage of the term can elaborate different levels of mandatoriness of the mediation process. In this paper, the term mandatory mediation is used widely.
[282] Hanks, "Perspectives on Mandatory Mediation." p 930
[283] Sturini, "New Mediation Law in Italy."

Therefore, in this type of mediation the mediability issue of each case is not so important. The judge or registrar does not analyze the appropriateness of each dispute being sent for mediation. If the dispute falls under the list of mandatory mediation cases, it automatically goes to mediation.

2. Discretionary mandatory mediation. This type of mediation gives authority to the court to refer any case from litigation to mediation with or without the consent of the party. The role of the judge is important since he/she defines the mediability of the dispute. Thus, discretionary mediation is not mandatory for all disputes but comes into operation on a case-by-case basis. [284] This category is widely used in common and civil law countries (E.g. Australia and Belarus).

In Australia, the court has the power to order mediation at any stage of the litigation without the parties' consent by giving referral notice to the disputants. This referral is considered mandatory, but the parties have a right to object within seven days by submitting an objection notice at the registry of the court. This notice should provide a valid reason; otherwise the court will not nullify the referral.[285]

In Belarus similarly to Australia, the court has a right to initiate a court-connected mediation procedure by itself at any stage of litigation including appellation and cassation instances.[286] When mediation procedures first began to be used, most cases were initiated by the court. The court tried to promote this procedure among the disputants.[287] Nevertheless, the parties have still an authority to submit an objection within seven days. [288]

The level of mandatoriness in discretionary mandatory mediation is less than in a categorical one. With this type of mediation, the judge before ordering mediation takes into consideration several factors, such as nature of the dispute, intention of the parties, and the effectiveness of the mediation. When it is obvious from the beginning that there is no chance of settling the dispute, it is better to continue the court proceedings. Therefore, courts need to be very

[284] Hanks, "Perspectives on Mandatory Mediation." p.931
[285] E.g. Queensland. *Uniform Civil Procedure Rules (Qld)*. s.319
[286] *Хозяйственный Процессуальный Кодекс Республики Беларусь; Commercial Procedure Code of the Republic of Belarus*, 1998, Art. 156 http://etalonline.by/?type=text&regnum=HK9800219#load_text_none_1_.
[287] Николаева; Nikolaeva, "За Высокими Показателями Урегулирования Споров В Примирительной Процедуре Стоит Огромная Работа Суда; 'Under the High Level of Dispute Settlement in the Mediation There Is a Huge Work of Courts.'"
[288] *Хозяйственный Процессуальный Кодекс Республики Беларусь; Commercial Procedure Code of the Republic of Belarus*. Art. 156

accurate when referring cases to mediation. Consequently, mediation should not become a useless pre-litigation procedure or barrier to litigation. As a result, the role of the court is very important in this type of mediation. The judges should be well trained to exercise their discretionary referral authority.[289]

3. Quasi-compulsory mandatory mediation. This category is not officially considered mandatory but usually there is some kind of sanction for not trying mediation before litigation. Financial sanctions are a strong factor encouraging the use of mediation. Therefore for the parties it would be financially beneficial to attempt this procedure before the court even if they do not have any desire. [290]

Quasi-compulsory mediation is being used at the Federal Courts of Australia. According to the Section 12 of the Civil Dispute Resolution Act, the judge has the power to impose cost sanctions against the parties that do not reasonable take a genuine step and settle the dispute. The legislator established clear guidelines about the meaning of the 'genuine step', to assist the parties in deciding the appropriateness of ADR procedure for their dispute.

In Australia not only is mediation considered to be a 'genuine step' procedure or so called quasi-compulsory procedure but also ADR in general. Genuine steps are 'steps or requirements that a potential litigant is required to undertake in an effort to resolve a dispute without recourse to the courts as prerequisite to litigation'.[291] The Civil Dispute Resolution Act suggests mediation as the most effective and appropriate genuine step procedure. For instance, it lists 'genuine steps' and states that: 'considering whether the dispute could be resolved by a process facilitated by another person'.[292] The idea of the genuine step is to reduce the high number of civil litigation or the length as well as cost of the proceedings. For this reason the genuine step has two possible outcomes and both are beneficial. The first outcome is settling the dispute and the second is narrowing disputable issues. This means that even if the parties are not able to reach an agreement on the whole dispute they at least can clarify the key issues. As a result the dispute may become

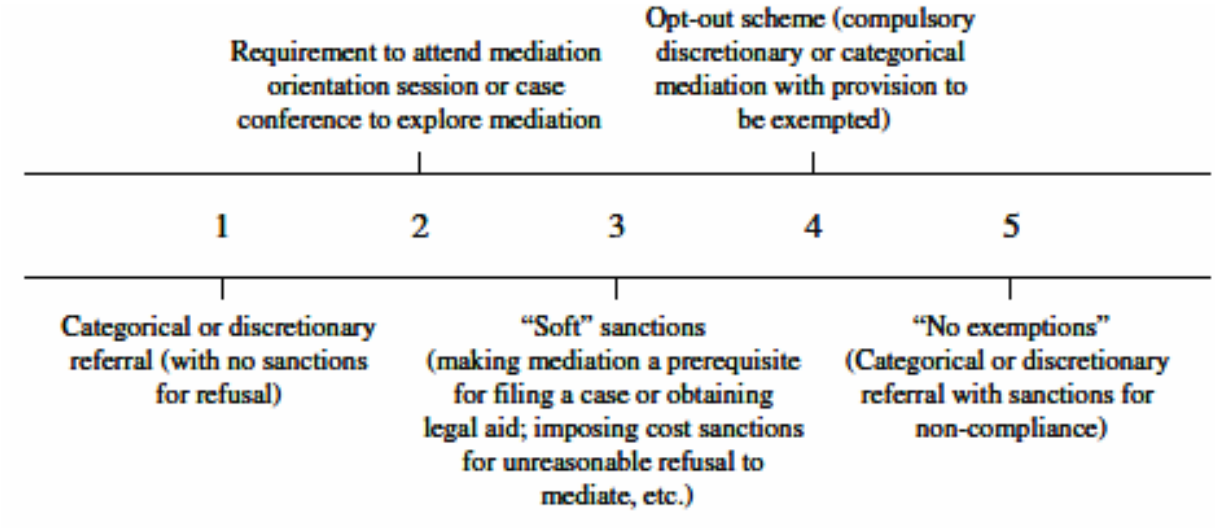
[289] Dorcas Quek, "Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program," *Cardozo Journal of Conflict Resolution* Volume 11.2, accessed August 5, 2014, http://cardozojcr.com/issues/volume-11-2/.
[290] Hanks, "Perspectives on Mandatory Mediation." p 932
[291] Legg and Boniface, "Pre-Action Protocols in Australia."
[292] *Civil Dispute Resolution Act 2011*, s4 (1)d n.d.

less complicated and less time consuming in the litigation. Therefore, currently courts tend to request parties to take a 'genuine' step in complex cases. These kinds of cases require more time and money in litigation.[293]

b. The level of mandatoriness

The level of mandatoriness is different in each category. Categorical and discretionary mandatory mediation are considered to be highly mandating types. On the other hand quasi-compulsory is less or not at all mandated.

Next, the differing levels of mandatoriness of the two types will be discussed. In general there are five levels of mandatoriness. These levels are summarized in the diagram[294] with a brief explanation below.



1. **Categorical or discretionary referral with no sanctions.** An example of this kind of referral is Automatic Referral to Mediation ('ARM') in the Central London County Court. ARM was used from 2004 to 2005 as a pilot scheme. The idea of the ARM was to randomly refer 100 cases to mediation each month in order to define the efficiency of the mandatory mediation. The result was that the scheme did not work and the disputants hesitated to accept mandatory

[293] Hopt and Steffek, *Mediation*., p 880
[294] This diagram is adapted from Dorcas Queck; Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program. Full text may be found by this link: http://cardozojcr.com/vol11no2/479-510.pdf

mediation.[295] According to some scholars the reason for the failure of this project was the unawareness of the legal profession of this procedure and , in particular, 'intransigence by solicitors'. They stated that without the support of lawyers and judges this scheme could not be successful.[296]

2. Requirement to Attend Mediation Orientation Session or Case Conference to explore mediation. This approach is practiced in Queensland and Western Australia. The District Courts of these states may require parties to participate in the mediation orientation sessions to decide the appropriateness of the dispute for the mediation.[297] Moreover, in the U.S state of Virginia the judge has the right to send civil matters to dispute resolution orientation session. In these sessions parties get information about the mediation and consider the mediability of their case. The session is free; and parties can leave the session at any time.[298]

3. Soft Sanctions for unreasonable reason to mediate. Federal Court of Australia provides the best example of this approach. The Civil Dispute Resolution Act gives an authority to the court to exercise 'its discretion to award costs against a person or a lawyer. Courts currently have powers to make disciplinary costs orders where costs have been incurred improperly or without reasonable cause'. While ordering sanctions, the court takes into consideration whether the parties took a genuine step and filed a genuine step statement or not. [299]

4. Opt-out scheme (compulsory discretionary or categorical mediation with provision to be exempted). The Commercial Procedure Court of Belarus authorizes the economic courts to initiate mediation for civil and commercial cases with or without the consent of the parties. However, the parties have a right to make an objection within seven days. If there is an objection with a reasonable cause the court annuls the mediation.[300] Moreover, the mediation program in Queensland also allows parties to submit an objection to the reference to the

[295] Hanks, "Perspectives on Mandatory Mediation." p 943
[296] Varda Bondy and Linda Malcahy, Mediation and Judicial Review: An Empirical Research Study (The Public Law Project, 2009) 25–6.
[297] Dorcas Quek, "Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program," p 491 *Cardozo Journal of Conflict Resolution* Volume 11.2, accessed August 5, 2014, http://cardozojcr.com/issues/volume-11-2/.
[298] More information can be found by this link: http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/faq.html
[299] *Civil Dispute Resolution Bill 2011; Explanatory Memorandum*, Clause 12(46,47) n.d., http://www.austlii.edu.au/au/legis/cth/bill_em/cdrb2011306/memo_0.html.
[300] *Хозяйственный Процессуальный Кодекс Республики Беларусь; Commercial Procedure Code of the Republic of Belarus*., Art.156

mediation. The objection notice 'must (a) state the reason why the party object to the referral; and (b) be filed within 7 days after the objecting party receives the referral notice'.[301]

5. No exemptions (Categorical or discretionary referral with sanctions for non-compliance). This approach is employed in Italy, where mediation is mandatory for all claims related to insurance, banking and financial agreements, joint ownership, property rights, division o assets and so on. The parties do not have the right to omit this procedure. They first have to try mediation for the mentioned matters before applying to the court.[302]

Regardless of the type and the level of the mandatoriness, the role of the court is very important. The idea behind the mandatory character of mediation is to reduce the work-load of the courts by promoting an effective ADR procedure. Thus, the courts expect from mediation two possible outcomes: either parties reach an agreement and settle the dispute, or they narrow the disputable issues to make the dispute less complex. The court is responsible for providing an effective mediation procedure, particularly court-connected mediation. Since the parties are obligated to use this procedure and spend money and time with it, the courts should organize effective court-connected mediation by providing a list of experienced mediators. Otherwise, mandatory mediation would become a barrier to the litigation and may contradict with the principle of 'access to the justice'.

c. Consent of the parties

As noted above, the philosophy under ADR procedures, particularly mediation, is the voluntarism. Mediation consent provides parties an ownership of their dispute by giving authority to resolve its outcome.[303] The parties should be free of any pressure during the mediation as well as when concluding a mediated agreement. Therefore, the implementation of mandatory mediation, regardless of the type of category, raises a question regarding the nature of consent. According to Prof.Jacqueline Nolan-Haley, there are two forms of consent in mediation: *'front-end, participation consent* which should occur at the beginning of the mediation process and continue throughout the process; *and back-end, outcome consent* which should be present when

[301] E.g. Queensland. *Uniform Civil Procedure Rules (Qld)*. s319
[302] *Legislative Decree No.28/2010*, Art. 5 (1) n.d.
[303] Jacqueline Nolan-Haley, "Mediation Exceptionality," *Fordham Law Review* 78, no. 3 (January 1, 2009): 1247., p1251

parties reach an agreement in mediation'.[304] Despite the type of consent, the courts or legislator may obligate parties to start mediation, but no one should force the parties during the procedure or at the end by insisting on accepting certain outcomes. For this reason in *front-end participation* consent may be dispensed but in *back-end, outcome* consent it is necessary.[305]

In *front-end, participation,* consent is less important than in the *back-end outcome* one. Usually in most judicial systems where mediation is a new ADR procedure, parties hesitate to try it. This is because of unawareness and unfamiliarity with the procedure. Thus, at the beginning, in order to introduce and promote mediation, courts should manage the disputes and order mediation without the consent of the parties. Regarding the uncertainty issue of the parties, former Chief Justice of the Supreme Court of NSW James Spigelman has stated that

> [p]eople are reluctant to admit that they might have some weakness in their case and therefore don't offer to settle or mediate … Whereas if they are forced into it, experience is that reluctant starters often become active participants … So although it is counter-intuitive, ordering someone to mediate actually works'. [306]

For this reason, the parties should not feel that they are being forced to try mediation. But they should understand that without some impulse they would never attempt this procedure. Moreover, the parties need to keep in mind that the court is obligating them to use a beneficial and appropriate dispute resolution procedure. Even if the mediation was ordered, the parties still control the procedure and the outcome. Consequently, this procedure is advantageous for the court and the parties.

d. The required level of participation in mediation

The required level of participation has two sides: theoretical and practical. The theoretical requires parties to act in a good faith; the practical one obligates parties to use mediation procedures until some appropriate stage or until the end. Consequently, the second side somehow limits parties' autonomy. The two sides of the required level of participation will be discussed

[304] Jacqueline Nolan-Haley, "Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking," *Notre Dame L. Rev.*, January 1, 1998, 775.
[305] Jacqueline Nolan-Haley, "Mediation Exceptionality," *Fordham Law Review* 78, no. 3 (January 1, 2009): 1247., p1251
[306] "Mediation in NSW Supreme Court Works: Spigelman," *TheAustralian*, accessed August 9, 2014, http://www.theaustralian.com.au/business/legal-affairs/mediation-in-nsw-supreme-court-works-spigelman/story-e6frg97x-1225932539482.

below.

(i). Good Faith. Some states with a mandatory mediation character require parties to participate in the mediation in good faith. The reason for the requirement is to establish an effective and workable ADR procedure. There is no conventional definition of the term 'good faith', and each legislator interprets it differently. For this paper the following definition will be used: good faith means the parties behave in a meaningful manner of in the procedure where they are willing to 'present their best arguments and to listen to those of the other side with an open mind'.[307] The good faith issue plays an important role in mediation because the outcome of the process depends on the parties but not on the third party. Actually, the 'good faith' factor in mediation varies from 'good faith' in arbitration or litigation. In mediation, if the parties do not act in a good faith or in a meaningful manner, the procedure may be considered to be an ineffective one. Consequently, the outcome of the mediation will be unsatisfactory because the parties could not settle the dispute. On the other hand, in arbitration or litigation the outcome depends on either the judge or tribunal. Thus even if one of the parties in such procedures did not act in good faith, there is still a possibility that the outcome will be effective.

There is an active debate concerning the good faith requirement among scholars. Some consider the requirement of good faith would make mediation similar to litigation, where parties feel pressure from the court. Moreover, this kind of requirement contradicts the nature of mediation.[308] On the other hand, other scholars state that the legislature should not only require good faith or meaningful behavior, but should establish clear and objective participation standards. These standards should include two requests: first, the participation of the parities or their representatives in mediation hearing; and second, the request for submission of position papers clarifying each parties' position in the dispute.[309] According to pro mandatory scholars, these standards would ease the procedure. Consequently, even if the parties were not be able to

[307] Edward F. Sherman, "Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required," *SMU Law Review* 46 (1993 1992): 2079., p 2089

[308] Iur. Ulrich Boettger, "Efficiency Versus Party Empowerment— Against A Good-Faith Requirement In Mandatory Mediation," *Rev.Litig.* 1,34 (2004), http://www.utexas.edu/law/journals/trol/volume_23/Boettger%20Abstract.pdf.

[309] David S. Winston, "Note & Comment: Participation Standards in Mandatory Mediation Statutes: 'You Can Lead A Horse to Water. . . .,'" no. 11 Ohio St. J. on Disp. Resol. 187 (1996), p 8 https://litigationessentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&srctype=smi&srcid=3B15&doctype=cite&docid=11+Ohio+St.+J.+on+Disp.+Resol.+187&key=f6a17fa5ea2e23be8b004c92c2ec906d.

reach an agreement they would know the actual issues, which would then be decided in the litigation. For instance, Los Angles studies indicate that attorneys after participating in mediation spent less time in litigation arguing the details of mediated dispute.[310]

Even if the court would have the authority to obligate parties to try mediation and require them to act in a good faith, it should not interfere in the mediation process itself. There is a possibility that the court, in order to support this procedure, may step into the process. In doing so it would be going against the philosophy and the nature of mediation.[311] Regarding this issue, there is a famous saying that a *'Horse may be led to the water (i.e. ordered to participate in mediation) but cannot be forced to drink*'.[312] However, at the initial stage of the implementation the mediation, there is a need to promote this procedure. In other words the court should 'motivate the horse to drink the water'. One of the options is requiring a good faith standard. As mentioned above, the term 'good faith' has different interpretations. Among these interpretations, Prof. Kimberlee Kovach's has provided the most detailed one. She elaborates good faith on six specific elements.[313] Until now these elements have not been used in any jurisdiction or litigation. Nevertheless there is no guarantee that this interpretation would work in practice.

As a result, based on the different interpretations, this paper suggests creating one's own objective participation standards, which would be comprehensible and neutral. However, the research does not support the request for a submission a file regarding the parties' positions. It recommends for the parties to introduce their positions not in written form but orally. Moreover, these standards should not allow the court to interfere in the mediation process and limit parties' autonomy.

(ii). Party autonomy. The main principle of the autonomy is the concept consisting in

---

[310] Ibid, p8

[311] Quek, "Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program.", p 492

[312] Winston, "Note & Comment: Participation Standards in Mandatory Mediation Statutes: 'You Can Lead A Horse to Water. . . .'" p 4

[313] Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation,* 28 Fordham Urb. L.J. 935, 963–964 (2001).

The factors listed include: (1) have knowledge of the case in terms of facts and solutions; (2) be ready to take into account the interests of the other side; (3) have all necessary decision-makers in person at the table; (4) engage in a frank and open discussion so that the other side is able to understand their own positions better; (5) not lie in response to direct questions; (6) not mislead the other side; and (7) demonstrate a broad willingness to listen and communicate about their own positions in detail, and explain why offers are accepted or not.

self-governance and self-determination. This concept distinguishes mediation from litigation by giving more authority to the disputant parties rather than the third party. The parties should exercise in cooperation with each other. Regarding this issue, Prof. Lon Fuller states that 'capacity to re-orient the parties toward one another, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward each other.'[314] From this definition it is clear that the role of the mediator is only in assisting the parities to reach an agreement. The mediator does not have any decision making power. The parties are free to determine their position regarding the dispute and decide the outcome. On the other hand, the mediator only controls the mediation process.[315] In fact in spite of mandatory character of mediation, the parties should have independence during the mediation process. Moreover, there should not be any pressure from the mediator or the court in the decision-making right of the parties.

Another factor that might limit the parties' autonomy is the obligated level of participation in the mediation process. Do the parties have the right to stop and leave the mediation at any time they want or should they reach some level in order to quit? This is a very important factor, since it expands the mandatoriness of the mediation to the process also. It means that the parties are mandated not only to try but also to participate in the mediation up to a defined point. As a result, a procedure may be 100 percent mandatory from the beginning till the end. However, presently there is no legislation entailing this type of mandatory mediation.

Furthermore, this factor also depends on the duration of the mediation process. If there were a strict limitation for the duration set by the legislator, the quitting the process would be more difficult. Usually the length of the mediation process can be from half day to a year. The following table gives information about the duration of court-connected mediation in some jurisdictions.

[314] Lon Fuller, "Mediation: Its Forms and Functions," *Southern California Law Review* 44 (1971).
[315] Nolan-Haley, "Informed Consent in Mediation." p 790

State	Duration
Italy	4 months
Belarus	1 month
Australia[316]	From 1 day to 1 month

Each legislature gives an opportunity for the parties to stop the mediation if there is a good reason. However, there is no specific definition of what constitutes a good reason. The court by itself defines the reasonability of the cause. For instance, in Italy the parties may require the termination of the case from mediation if they fail to reach an agreement.[317] In Belarus the mediation may be finished upon a written request by one or both parties submitted to the mediator.[318]

In fact after being obligated to try mediation, the parties still have two chances to subject and terminate the case. First chance occurs after receiving a determination letter on mediation. The parties can make an objection to the referral.[319] The second chance occurs during the mediation process. However, in both situations the cause for objection must be reasonable. Otherwise the court may impose financial sanctions for the parties.[320]

e. Mandatory mediation model for Uzbekistan

As mentioned above, there are internal and external factors that result in the implementation of mandatory mediation. In the case of Uzbekistan it is internal factors, particularly the legal condition of the judicial system. The judicial system of Uzbekistan is facing difficulties with the high number of lawsuits.[321] Therefore, in order to improve this situation, this paper recommends implementing mediation with a mandatory character. By implementing mandatory mediation, the state can also reform the judicial system. Consequently, the Uzbek legislator needs to establish a workable mediation model, which would be effective in practice. Next, the paper will introduce a framework for a mandatory mediation model for Uzbekistan.

[316] The timing of the mediation is different in every state and territories.
[317] *Legislative Decree No.28/2010*., Art.12
[318] *Закон Республики Беларусь "О Медиации"; Law On Mediation*, Art.14 2013, http://court.by/brest/extrajudicial-mediation/.
[319] E.g. Australia and Belarus. In categorical mandatory mediation the parties do not have such an opportunity.
[320] Hopt and Steffek, *Mediation*., p 677
[321] For further details see Chapter IV

From the three categories of mandatory mediation, the discretionary type would be the most appropriate one for Uzbek judicial system. The reason for choosing this type is that it requires the court to actively participate in the mediation process. The discretionary type provides the authority for the court to order mediation with or without the consent of the parties.[322] The role of the courts is crucial in the initial stage in the practical use of the mediation process. This is because at this stage most parties and legal practitioners will not have sufficient information regarding this procedure and they will hesitate in trying to use it. Probably at this stage most of the mediation cases will be initiated by the court. Accordingly after some time people will get used to this procedure.[323]

However the courts should be very careful while referring a case to mediation, because the mediation is not suitable for every dispute. Consequently the judge should not use his/her authority to order mediation for all disputes and should order mediation on a case-by-case basis depending on the mediability of each case. Therefore the court before ordering mediation should take into consideration the following factors: the nature of the dispute, the intention of the parties, and the effectiveness of the mediation. For this reason, it would be more effective if the judge or court registrar organizes a meeting with the parties in order to clarify the above noted factors prior to deciding the mediability of the dispute. The effectiveness of the mediation in this category depends on the court. The court should prepare the parties for the mediation process by introducing the new procedure and explaining the reasons why the dispute was referred to it. The parties should know about the process as well as their rights and responsibilities beforehand.

Additionally, at the initial stage the role of the judge is very important. The judge determines the appropriateness of the case for mediation. In the preparatory meeting, the judge should take an active position in the promotion of the mediation procedure for the parties. Since this promotion may be used as a basis for the parties, who were not familiar with the mediation procedure, to file a petition for conducting a mediation procedure. On the other hand, if the case can be mediated but the parties hesitate to try it, the judge should order a mediation procedure by himself. However, the state should be careful when making a mediation procedure mandatory since

[322] Hanks, "Perspectives on Mandatory Mediation.", p.931
[323] For instance, Belarus decreased the number of lawsuits by giving an authority to order mediation without the consent of the parties.

the mandatory provision of the mediation could violate the disputants' right of access to justice. The mediation procedure should not become a barrier before the litigation.

On the other hand, the court should take an active role before the mediation process, but not during or at the end of it. It should keep itself from interfering in the mediation process since there is a high possibility that the court in order to support this procedure may step in the process. But this action goes against the philosophy and the nature of the mediation.[324] Regardless of the mandatory character of the mediation and the authority of the court, the parties should be independent during and at the end of the mediation process. Moreover, there should not be any pressure from the mediator or court in the decision-making right of the parties.

The reason for not choosing categorical mandatory mediation is that fact that it entails the automatic referral of cases to mediation. As mentioned above, mediation cannot be appropriate for all disputes. In the categorical approach, depending on the case, the parties do not have any opportunity to go directly to litigation. They first have to try mediation and then litigation. Overall, the categorical approach looks like a barrier preventing litigation. Moreover, as the Italian experience of categorical mandatory mediation shows, this type of mandatory mediation may cause serious opposition from the parties and legal representatives. Regarding the difference between the two types, the National Alternative Dispute Resolution Advisory Council ('NADRAC') mentioned that it was against the categorical approach by stating that court should define the mediability of the dispute. The courts should always have discretionary authority to refer a dispute to ADR. The reason behind this is that the courts are 'well placed to identify those types of matters where a pre-action requirement to use a specific ADR process or processes may be desirable'.[325]

Another merit of discretionary mandatory mediation is the 'win-win' strategy. The courts can reduce their caseload by referring a certain percentage of disputes to mediation and even if the parties are not be able to settle the dispute they may at least narrow the range of disputable issues. Consequently, the court proceeding for this dispute can be shortened. For instance, courts in

[324] Quek, "Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program.", p 492

325 NADRAC, The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction: A Report to the Attorney-General (Report, Commonwealth of Australia, September 2009) 24 [2.16] <http://www.nadrac.gov.au/publications/PublicationsA-Z/Pages/default.aspx> ('The Resolve to Resolve').

Australia have been practicing this approach for many years. A judge, who ordered mediation, expects from the disputants two possible outcomes: first, the conclusion of a mediation agreement; second, the clarification of the key issues or the narrowing of the points under dispute. The judge considers that even if the disputants could not reach an agreement in the mediation procedure, they have at least discussed and specified the issues by themselves. In order to narrow the disputed points, the judge even had the authority to direct experts for the procedure.[326]

This paper proposes for the Uzbek legal system mandatory mediation with an opt-out scheme. The parties should have a right to quit the process at any stage, when they consider that there is no possibility of a settlement. However, the grounds for this action should be reasonable. The court should define the reasonability of these grounds. If the grounds are unreasonable, the parties should continue the mediation process. In addition to the court, the role of the mediator is also important in the opt-out scheme. The mediator is responsible for the effectiveness of the process. If he/she finds that the parties do not intend to settle the dispute, it is more efficient to terminate the case immediately.

Moreover, the legislator should create a set of objective participation standards. These standards should include two main elements: good faith and party autonomy. Good faith means that the parties should act in the process in an appropriate way. Consequently, there should be an obligation for the parties to commence and participate in the mediation in good faith.[327] Party autonomy is the concept consisting of self-governance and self-determination.[328] The parties by themselves should control the mediation and determine the outcome of the process. The mediator needs only to assist them to reach an agreement. This concept of mediation is the main difference from litigation, which provides more authority to the parties rather than the third party.

In addition, the duration of court-connected mediation in Uzbekistan should be limited. As noted above, the Civil Procedure Code of Uzbekistan sets one-month as the procedural term for judicial proceedings.[329] Desirably, the duration of the court-connected mediation should not exceed the term of judicial proceedings. Consequently, a one-month term for the mediation process is

[326] Western Australia, *Rules of the Supreme Court 1971*, Order 29A 3(2) n.d.
[327] For instance Art, 4 of UNCITRAL Model Law on International Commercial Conciliation also require the parties to act in good faith in the process.
[328] Lon L. Fuller, *Mediation-Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325(1971).
[329] "Civil Procedure Code of the Republic of Uzbekistan," n.d., Art. 131

proposed here.

Overall, the author believes that the previously discussed Belarus model of mandatory mediation is the most suitable model for Uzbekistan. The legal and judicial systems of these two states are close. For instance, there is a one-month procedural term for civil court proceedings in both jurisdictions. However, this does not mean that the Uzbek legislator should completely copy the Belarusian model of mandatory mediation and implement it into the judicial system. On the contrary it should create its own model that would be efficient and useful for the parties as well as the courts.

5.2 Impact of the European Mediation Directive and UNCITRAL Model Law

The European Mediation Directive of 21 May 2008[330] and the UNCITRAL Model Law on International Commercial Conciliation of 19 November 2002[331] are considered to be fundamental acts, which have been used as a basis for the regulation of mediation processes by most states. The EU Directive is a binding act for European member states, but the Model Law is a non-binding model for the members of the UN. These two legal acts will be discussed below.

a**. The European Mediation Directive** is a mandatory act for all European Member states (except Denmark), which is directed to regulate cross border disputes. The main aim of this directive is to create an effective ADR procedure 'by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings'.[332] In addition, the Directive is meant to develop an institutional judicial relationship among Member States. The member states have to implement the Mediation directive's provisions into their legal system. Because of this requirement, some states reformed their whole ADR procedures by modifying domestic laws and regulations on mediation. For instance, Germany and France established new internal rules on mediation using the provisions of the Mediation Directive for non-cross-border

[330] Full text of The European Mediation Directive could be found by this link: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32008L0052

[331] Full text of UNCITRAL Model Law on International Commercial Conciliation could be found by this link: http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf

[332] *Directive 2008/52/EC of the European Parliament and of the Council Directive on Certain Aspects of Mediation in Civil and Commercial Matters*, 2008, Art. 1 http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32008L0052.

aspects.[333] Moreover, Italy went way beyond the scope of the Directive by enacting internal mediation rules with a mandatory character. In fact this regulation was a reason for major debate among legal professionals.[334]

Other jurisdictions such as Austria and the United Kingdom have separated the Mediation Directive from domestic regulations by enacting a specific law restricted to cross-border mediation in the EU. The reason for splitting the Mediation Directive from domestic regulations is characterized by the inconsistency of these two regulations. These states were not eager to change domestic regulations on mediation, which have had a long history and development. However, these regulations were not in accordance with the directive. For this reason, the provisions of the Directive were minimally transposed into the regulations for domestic mediation. The transposed provisions were only in regard to cross-border mediation.[335]

In fact, one may consider that the EU Directive on mediation has had an effective impact on member states. Because of this directive some states reformed their domestic legal system on mediation, while others adopted new laws on international mediation. The directive's creators have not put any limitation on the scope of the directive, which may be modified and implemented in the domestic legislation. For instance, regarding the voluntary and mandatory nature of the mediation, paragraph 14 of the preamble of the directive says that

> '*Nothing in this Directive should prejudice national legislation making the use of mediation compulsory or subject to incentives or sanctions provided that such legislation does not prevent parties from exercising their right of access to the judicial system. Nor should anything in this Directive prejudice existing self-regulating mediation systems in so far as these deal with aspects which are not covered by this Directive.'*

From this text, one can understand that the Mediation Directive does not require a mandatory or voluntary character for mediation. It provides the right for the states to choose this by themselves based on their legislation and mediation systems. As a result, Italy chose a categorical mandatory mediation model for certain disputes.

The Mediation Directive is flexible about how it is to be implemented. It does not have

[333] Hopt and Steffek, *Mediation*., p.7
[334] For further details on Italian mediation model, see Chapter I.
[335] Hopt and Steffek, *Mediation*., p.108

any specific requirements. The reason for the flexibility is related to the difficulties that member states may face when implementing some provisions into their legal system. Consequently, the directive on mediation does not give detailed directions on domestic mediation procedures. It is almost impossible to create a directive with detailed instructions which would be effective in the territory of every EU member states. Therefore, the EU 'requires states to achieve a particular result without dictating how to achieve it'.[336]

b. UNCITRAL Model Law on International Commercial Conciliation. UNCITRAL[337] model laws are legislative acts enacted by a resolution of the UN General Assembly. These acts are directed to be a model for UN member states, which may be adopted into domestic legislation. Enacting states have a right either to fully enact the model without any change or enact it with some amendments in order to make it more appropriate with domestic substantive and procedural legal requirements. Although providing that right, the UNCITRAL encourages states to keep the main principles of the law. In general, UNCITRAL model laws may be considered very flexible. The enacting states chose which provision of the law to adopt and which to amend.[338] In the field of ADR there two model laws: UNCITRAL Model Law on International Commercial Arbitration (1985) and Model Law on International Commercial Conciliation (2002).[339]

The aim of the MLICC is to promote the use of international commercial conciliation and encourage UN states to integrate the provisions of the model law into a legal basis to increase the usage of domestic mediation procedures. Moreover, UN General Assembly 57/18 acknowledges that with the help of international commercial conciliation, the costs of justice administration could be reduced. The quantitative goals of the mediation are stated in the Guide to Enactment and

[336] Friel, Toms, "The European Mediation Directive—Legal and Political Support for Alternative Dispute Resolution in Europe."
[337] The United Nations Commission on International Trade Law (UNCITRAL) (established in 1966) is a subsidiary body of the General Assembly of the United Nations with the general mandate to further the progressive harmonization and unification of the law of international trade. The Secretariat of UNCITRAL is the International Trade Law Division of the Office of Legal Affairs of the United Nations Secretariat. (This information is drawn from the official homepage of UNCITRAL For more information, see http://www.uncitral.org/uncitral/en/about_us.html)
[338] Nadja Marie Alexander, *International and Comparative Mediation: Legal Perspectives,* p.339 (Kluwer Law International, 2009).
[339] Abbreviations for Model Law on International Commercial Arbitration are 'MLICA', and for Model Law on International Commercial Conciliation is 'MLICC'.

Use of MLICC. According to paras 23-24 the implementation of MLICC would improve the access to justice, reduce the cost of lawsuits, and improve the quality of judgments.

The MLICC indicates five main themes which represent the concept of a legal basis for mediation and conciliation. These themes are directed to provide effective orientation for the states that use this law. Each theme will be introduced in detail below.[340]

The first theme is regarding the definition of mediation. The MLICC defines the term 'conciliation as a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute'.[341] From this wording it is obvious that the terms 'mediation', 'conciliation' and even 'neutral evaluation' could also fall under this definition. Consequently, the MLICC does not provide a strict framework for the member states and motivates diversity in practice. The states are free to establish their own standards, which would be consistent with the provisions of the MLICC.

The second characteristic concerns the principle of party autonomy. Party autonomy is considered to be a core feature of mediation. This principle should last from the beginning of the mediation process until the end. Parties are free decide when to start and participate in mediation, how to settle the dispute, and in what form conclude the mediated agreement. [342] Furthermore, the MLICC gives a right for the parties to choose a different set of rules for their mediation; parties may even exclude the applicability of the Model Law.[343]

The third theme of the Model Law is the fair treatment principle, which should be maintained by the mediators during the process. The mediator has to be neutral and 'take into account the circumstances of the case'.[344] Moreover, another interesting fact is in regard to the role of the mediator. Art.6 (4) of Model Law gives a right for the mediators to suggest a possible

[340] Alexander, *International and Comparative Mediation*., p.345
[341] *UNCITRAL Model Law on International Commercial Conciliation*, Art.1 (3). 2002, http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf.
[342] Alexander, *International and Comparative Mediation*., p.345
[343] *UNCITRAL Model Law on International Commercial Conciliation*., Art.1(7)
[344] Ibid., Art.6(3)

settlement for the dispute at any stage of the mediation process.

Confidentiality is the next principle. The confidentiality element is the hallmark of the mediation process. In general, this issue is considered to be a main advantage of not only mediation but also of other ADR procedures. The Model Law elaborates three types of confidentiality: insider/outsider, insider/insider, and insider/court.[345] Insider/outsider confidentiality prohibits the parties of the mediation from disclosing information from the process to outsiders or non-participants. This obligation applies to all participants, including experts, interpreters, and witnesses.

Insider/insider confidentiality controls the information within the mediation. Usually, the mediator should manage this information during the private sessions with the parties. The mediator should define which information he/she may pass on to the other party and which he/she cannot. Sometimes the parties by themselves request the mediator keep confidential some facts from the counter party.

Insider/court confidentiality is the main concern for the mediation parties especially in court-connected mediation. The parties should be aware that the information disclosed during the mediation process will not be use in the court if they cannot settle the dispute. For this reason in court-connected mediation the court should guarantee that the information, documents, recordings, and other types of communication used in the mediation process will not be eligible in the litigation. If not, this issue may be a cause of concern for the parties or their lawyers when applying for mediation. [346]

The last feature of the Model Law is the enforceability of the settlement. The MLICC does not provide any methods for enforcement. It just states that the 'settlement agreement is binding and enforceable'.[347] The states, when implementing the Model Law into the legal system, are free to establish their own domestic enforcement procedures. Moreover, the Model Law recommends that the enforcement procedures should be mandatory.

These five themes characterize the Model law in regard to the provision and regulation of the mediation institution. The dominant principle of MLICC is party autonomy. The parties should

[345] Alexander, *International and Comparative Mediation*. p.346
[346] Ibid., pp.248-251
[347] *UNCITRAL Model Law on International Commercial Conciliation*., Art.14

act from the beginning until the end of the mediation process without any pressure. Party autonomy and fair treatment principles are considered mandatory provisions of the Model Law. Consequently, the states, when drafting laws based on the UNCITRAL Model Law, should include these two provisions. Regarding the other provisions, the states are free to modify and make them more suitable to the national legal system. [348] Presently, more than 25 jurisdictions (E.g. Russia, Canada, Afghanistan, Turkey, Croatia etc) used the UNCITRAL Model Law as a sample when implementing mediation laws.[349]

In conclusion, both the EU Directive on Mediation and the UNCITRAL Model Law on International Commercial Conciliation are two main legal acts that recommend how to establish a mediation institution. These two acts do not dictate how its provisions are to be implemented into the national law of the states. Instead, they give an opportunity to modify them by making them more appropriate to the legislation. There are only two main principles which must be included: party autonomy and fair treatment. Overall, the impact of these two acts on various jurisdictions' national mediation legal system has been crucial. Currently, the two acts are considered to be main legal documents regarding mediation.

5.3 Ways of implementation of court- connected mediation into the Uzbek judicial system

a. Possible ways of implementation

In order to create an effective dispute resolution procedure, there should be a legal basis for it. For this reason, the Uzbek legislator could use the European Union Directive on Mediation or UNCITRAL Model Law on International Commercial Conciliation as well as the Belarusian law on mediation as a basis.

Usually, there are two main ways of implementing court- connected mediation into the judicial system. The first one is making amendments to the Civil Procedure Code and including provisions regarding mediation. Second way is adopting a law on mediation. In general these ways are very similar. Moreover, some jurisdictions have provisions both in the Code and the

[348] Alexander, *International and Comparative Mediation*., p.346
[349] Hopt and Steffek, *Mediation*., p.108

law.[350] However, the most suitable way for Uzbek government is to create a law about mediation. The law on mediation should create necessary mechanisms based on which the mediation process would be handled. Additionally, every aspect of the procedure should be characterized in detail, in order to provide sufficient information for the legal professionals and the disputing parties.

Furthermore, the paper recommends first of all implementing court-connected mediation and after some time, when people get used to this process, out-of-court mediation. The reason for choosing this order of implementation comes from the experience of several countries, where out-of-court mediation was established initially.[351] After the implementation of the law on mediation, the following two activities should be done: the promotion of the mediation and the creation of qualification requirements for the mediators.

b. Promotion of mediation

At the initial stage, the court and state need to actively promote mediation among the parties and the legal practitioners. If one looks at the Belarusian experience of promotion, there are two possible ways: one is through the mass media, the other is at the courts.[352] These two ways can be realized in Uzbekistan also. Regarding the first way, scholars and judged should make lectures and publish materials on mediation. Moreover, as with the courts of Belarus, the Uzbek courts should systematically organize seminars, lectures and roundtables with the representatives of business entities and legal services. The idea under these seminars would be to inform business entities and citizens about the new ADR procedure at courts. The second way may be done at courts. The registrar or other court staff should organize explanatory meetings with parties when they come to file a petition. In these meetings, the court staff provides information regarding the court-connected mediation, its merits and demerits.

Besides the court, the state also needs to support the new ADR procedure. Usually the state provides financial privileges for parties who try court-connected mediation. For instance, in

[350] E.g Republic of Belarus
[351] E.g. Kazakhstan and Russia. These states first adopted a law on private mediation and presently they are planning to create a court-connected mediation. The reason for creation of court-connected mediation is the unpopularity and ineffectiveness of the out of court mediation procedure among the disputants.
[352] For further details see Chapter III.

Italy the fee for mandatory mediation is less than the voluntary one.[353] On the other hand, in Belarus the legislator, in order to promote the mediation procedure, amended the law "On State Duty". This amendment permitted the parties to have 50 percent of paid state fee returned if they tried a mediation procedure and concluded a mediation agreement.[354] This financial privilege was an incentive for parties to try mediation. Because of this privilege, court connected mediation became the cheapest dispute resolution procedure in the judicial system of Republic of Belarus. It was even cheaper than amicable agreements.[355] For this reason, the Uzbek legislator should take into consideration the experience of the above-mentioned states and support court-connected mediation through certain financial privileges.

c. Creating qualification requirements for the mediators

The courts are responsible for providing an effective mediation procedure, particularly court-connected mediation since it orders the parties to try mediation regardless of consent. Consequently the disputants have to spend their money and time for this procedure even if they do not want to. For this reason, courts should organize effective court-connected mediation by introducing to the parties a list of qualified mediators who have the required qualifications. If not, mandatory mediation becomes an obstacle to litigation and would, accordingly, contradict the principle of 'access to the justice' that is guaranteed by the Constitution of Uzbekistan. In fact, the research suggests that the following factors need to be provided and controlled by the courts.

1. Impartiality of the mediators. The disputants settle their dispute in the mediation procedure in order to reach an agreement with the help of a mediator. Naturally, they will have tried to solve their dispute before using mediation proceeding. However, since they could not do a, they will have decided to use the mediation procedure. Therefore, both of the disputants will make an effort to ensure their rightness to the mediator. Moreover, each of them will propose a settlement beneficial to them to mediator and ask the mediator to pressure the other party to accept this settlement. In this kind of situation the mediator should keep his/her impartiality and

[353] Hopt and Steffek, *Mediation*., p.675
[354] *Закон Республики Беларусь "О Государственной Пошлине"; Law of the Republic of Belarus "On State Duty"*, Art.12 1992, http://pravo.levonevsky.org/bazaby/zakon/zakb1409.htm.
[355] Миселюк; Miselyuk, "Опыт Хозяйственных Судов По Применению Медиации; Experience of Economic Courts on the Application of Mediation."

neutrality. The mediator may listen to both of the proposals but he/she cannot pressure any of the parties.[356]

2. The mediator's presence and its effectiveness. It is hard to define the effectiveness of the mediator's presence in the mediation procedure, since there is no concrete designation regarding the presence and position of the mediator. This term is used differently from jurisdiction to jurisdiction and from one mediator to another. In some judicial systems, the mediator's (conciliator) presence is an active one: he/she may lead the disputants and propose possible solutions to the dispute. However, in other systems, the mediator is restricted: he/she seeks to "bring peace into the room"[357] and help disputants reach an agreement.[358] Moreover, some mediators even consider the mediator's role and its effectiveness problematic even paradoxical. For instance, mediator Gary Gill-Austern said that:

> *"The mediator's role is complex, even paradoxical. A mediator must be remarkably and uniquely present – a full participant. At the same time, and more fundamentally, the mediator must be present in a manner that embodies an understanding that she or he has no significance at all to the dispute and its resolution. ... The mediator must function within a paradox: how to be central and matter not at all."*[359]

From this, one can make the conclusion that the presence and the role of the mediator should be flexible and variable based on the case and the disputants. Thus, the mediators should be professionally ready for any unpredictable conditions which may occur in the procedure.

3. Mediator qualification and disputants' expectation. Usually at the beginning of the mediation proceeding when disputants meet with the mediator, they expect the mediator to share his/her experience with them regarding similar kinds of disputes. Moreover, they may ask the mediator legal advice about the settlement of the dispute. However, since mediation procedure is completely different from litigation, the mediators should not council parties in the legal field. Furthermore, not all mediators are lawyers. Therefore, if any of the disputants need legal recommendations they should ask lawyers but not mediators. In regard to this issue, David A.

---

[356] David A. Hoffman, "Paradoxes of Mediation," n.d., http://www.bostonlawcollaborative.com/blc/63-BLC/version/default/part/AttachmentData/data/2005-07-paradoxes-of-mediation.pdf?branch=main&language=default. p,3.
[357] D.Bowling & D. Hoffman, *supra*
[358] David A. Hoffman, "Paradoxes of Mediation" , p 4
[359] G. Gill-Austern, *supra,* at 353

Hoffman[360] a mediator as well as a lawyer has said "Even if we are lawyers, ethical principles prohibit us from mixing the two roles, and those mediators who are not lawyers are also prohibited by statute from practicing law. Thus, parties who came to us in order to minimize the role of lawyers in the resolution of their dispute are being sent to the law offices they sought to avoid"[361].

For this reason, before beginning mediation procedures, mediators should give basic information and explain about the proceeding to the disputants. Disputants should know that the main aim of the mediation procedure is not to define who is right or wrong but to help them reach an agreement. Thus, they do not need to prove their reasonableness or fairness to the mediator. The mediator, as mentioned before, is not a lawyer or a judge. He is merely a neutral, impartial person who tries to help disputants solve their dispute peacefully. For this reason, the mediator does not have a right to answer disputants' questions regarding the reasonableness, rightness or legal aspects of the dispute[362].

4. Confidentiality of the proceeding and confidence in the mediator. If the mediator does not give any legal advice to the disputants then what is his/her position in the mediation procedure? Briefly, the mediator functions as a "bridge" between the disputing parties. Therefore, from the beginning of the procedure, the mediators should be able to earn the trust of the parties. They need to convince the parties that he/she is neutral and fair since disputants should be confident in the mediator when sharing information that they do not want to disclose to the other party. Therefore, during the separate meetings with each disputant, mediator should act as a link between them. According to Brown and Ayres, "mediators can productively control the flow of information between the parties by filtering or inserting noise into their private disclosure."[363] It means that the mediator should professionally manage and filter all the information which they get from the disputants. This information may include some emotional outbursts from disputants (some of the disputants may be very emotional: they may cry, shout, and be angry towards the other party). Thus, the mediator should get rid of any tension from either side while making clear each disputant's position. Consequently, the mediator should lead the parties to reach a

[360] http://www.mediate.com/people/personprofile.cfm?auid=570
[361] Hoffman, "Paradoxes of Mediation." p,5
[362] Ibid, p9
[363] Ibid, p5

settlement.[364]

In conclusion, first of all, in order to implement court-connected mediation into the judicial system, the legislator should create a law on mediation. This paper suggests that the legislator take into consideration the above-mentioned factors. These factors may assist the state in establishing an effective dispute resolution procedure. However, after implementation some unpredicted issues might occur. This is natural since there is no correct method to develop court-connected mediation in a new judicial system without systematic improvements. These improvements may include some practical, cultural and legal matters. Therefore, the courts and the mediators should be ready to support this kind of reform in the field since they are responsible for the efficiency of the process and they have a crucial impact on the mediation process and the disputing parties.

[364] Christopher Honeyman, "Confidential, More or Less," *Dispute Resolution Magazine* 5 (1999 1998): 12.

5.4 Conclusion

This chapter can be considered to be one of the most important chapters of this paper. In this chapter, three categories (categorical; discretionary; quasi-compulsory) of mandatory mediation have been discussed. Jurisdictions with each category of mandatory mediation have been given as examples. After researching each category, the paper considers that discretionary model of mandatory mediation to be the most appropriate category for the Uzbek judicial system. Additionally, the chapter has explained the practical issues of the mediation process. Overall, the framework for a mandatory mediation model for Uzbekistan has been suggested. Moreover, the last two sections of the chapter looked at the legal basis of the mediation process. Two international legal acts, the European Mediation Directive and the UNCITRAL Model Law on International Commercial Conciliation, have been explained and the basic elements of each revealed.

As noted above, the research suggests a discretionary mandatory mediation model for Uzbekistan. In this model the court has a right to order mediation at any stage of the litigation with or without the consent of the parties. Usually, in this category the court refers the case to mediation on a case-by-case basis according to the mediability of each dispute. The paper gave as examples two jurisdictions, Australia and Belarus, which are practicing this category of mandatory mediation. From these two jurisdictions the Belarusian one is more suitable for Uzbek judicial system. The grounds for choosing the Belarusian model of mandatory mediation will be discussed below.

First of all, the judicial systems of Uzbekistan and Belarus were established in the same way. Both states have been part of the Soviet Union for several decades. Consequently, the judicial and legal systems of both were instituted during this period. As a matter of fact, these systems are very similar. For instance, the Belarusian and Uzbek Code of Commercial Procedure[365] set a one-month procedural term for judicial proceedings.

Second, because of similarity of the legal and judicial systems the problems occurring in

[365] Commercial Procedure Code of the Republic of Belarus, Art.175;
http://pravo.kulichki.com/vip/hoz/00000014.htm#g20
Commercial Procedure Code of the Republic of Uzbekistan, Art.125;
http://www.lex.uz/Pages/GetAct.aspx?lact_id=185981

the judicial system of both states are also the same. In 2007-2008 Belarus courts faced the same difficulties (e.g. the caseload of the courts and the not sufficiently high quality of judgments), which Uzbekistan is facing now. During that time, because of the high number of the cases, each judge had to handle more than 100 cases per month. Consequently, there was a problem regarding the quality of judgments. Thus, in order to decrease the number of lawsuits and keep up the quality of judgments, the courts decided to actively practice court-connected mediation. In fact, court-connected mediation helped to decrease the workload of the courts.

The Belarusian way of implementation of mediation into the legal system was effective. The Belarusian legislator chose a different path for the implementation of mediation institutions compared to other states[366] in the Commonwealth of Independent States (CIS). It initially established a court-connected mediation at the Economic Courts by adding a new chapter to the Commercial Procedure Code and later, after almost ten years, enacted the law 'On Mediation'. This law was a legal basis for out-of-court mediation, and it allowed disputes arising from civil law, commercial, family and labor law to be resolved by mediation.[367] However, other CIS states (e.g. Kazakhstan and Russia) first adopted a law on private mediation and presently they are planning to establish court-connected mediation under the courts. The reason for the creation of court-connected mediation is the unpopularity of the out-of-court mediation procedures among the disputants. Therefore, Uzbekistan can also choose the Belarusian path of implementing mediation into the judicial system by first establishing court-connected mediation and after some time out-of-court mediation.

Additionally, Uzbekistan needs to enact a law on mediation. As a legal basis for this law, the legislator may use the European Mediation Directive and UNCITRAL Model Law on International Commercial Conciliation as well as the Belarusian law on mediation. After implementing the law, the Uzbek legislator should follow two actions, which Belarus realized. These factors are the support of mediation from the government and the systematical modification of the provisions on the court-connected mediation. Consequently, in order to support the new process, the Uzbek government should provide some financial privileges for parties who try

---

[367] *Закон Республики Беларусь "О Медиации"; Law On Mediation*., Art.2

mediation and settle their disputes this way. Overall, the fee for mandatory mediation should be less than other dispute resolution procedures, including out of court mediation. For instance, in some states of Australia court-referred mediation is free of charge. In Belarus, court-connected mediation is the cheapest dispute resolution procedure. Moreover, the Uzbek legislator should be ready to modify the provisions for mediation systematically because during the practical application of this process some unexpected difficulties may occur.[368]

Nevertheless, Uzbekistan does not need to copy the Belarus mandatory mediation model and implement it into the legal system. Uzbek legislator should create a new model based on the legal culture of the state that would be appropriate for the parties as well as the courts. As a sample it may use the Belarusian model. Therefore, the paper does not suggest that the Belarusian model is perfect and that it alone would be effective in Uzbekistan. It only argues that the Belarusian mandatory mediation is the most appropriate one compared to the two other jurisdictions (Italy, Australia) under consideration.

Accordingly, the Uzbek legislator should modify the following aspects of the Belarusian model. First of all, this paper does not support article 156 of the Commercial Procedure Code of the Republic of Belarus, which provides the parties with the right to make an objection for referral. Parties do not need this right since the mediation process is not so long, being only one month. Furthermore, in the initial stages, parties may abuse this right due to ignorance of the new ADR procedure.

Second, the Belarusian legislator established a court-connected mediation only at the Economic Courts. But for the Uzbek judicial system it would be more effective to create a court-connected mediation not only at the Economic Courts but also at the Civil Courts. This is mainly because presently the Civil Courts are the most case loaded courts in the state.[369] Consequently, after the establishment of this process, the courts should take responsibility for organizing a qualitative and effective mediation process.

---

[368] E.g. In Belarus after practical application of mandatory mediation, the courts staffs that acted as mediators were not able to handle the high number of mediation cases. Consequently, the legislator modified the provision on mediation and allowed the court to appoint as a mediator people from outside of court.

[369] For instance, according to 2012 year's statistics, the total number of the civil lawsuits was 599.522. Consequently, one judge handled around 8-10 cases per day.

CONCLUSION

The dissertation has investigated issues concerning court-connected mediation with a mandatory character. The main goal of the paper has been to create an appropriate model of court-connected mediation for the Uzbek judicial system. In order to do that the paper analyzed three jurisdictions that have established mandatory mediation. As a result of the analysis, the author came to conclusion that the discretionary category of mandatory mediation is the most suitable category for Uzbekistan.

The paper consists of two parts with five chapters. First part gave an overview of the mediation model of three jurisdictions: Italy, Australia and Belarus. The reason for choosing these jurisdictions was the effectiveness and variety of the mediation models that are practiced in these states. The reasons for making mediation mandatory arose from the problems in the judicial system of those states. The judiciaries of those states have had difficulties which the Uzbek judicial system is facing now. The courts were overburdened and this has caused inadequate judgments. Consequently, these states intended to reform their judicial system in order to decrease the number of lawsuits by implementing a mediation model with a mandatory character. In spite of the fact that these three jurisdictions have had different categories of mandatory mediation and the fact that the level of mandatoriness varies, the mediation is considered mandatory there. As a result, these jurisdictions have been able to realize their goals after the establishment of mandatory mediation.

The second part includes two chapters. This part explains the current situation of ADR in Uzbekistan and the necessity for court-connected mediation in the Uzbek judicial system. Moreover, it provides detailed information regarding the mandatory nature of mediation and recommends possible ways of implementing this procedure into the legal system of Uzbekistan. Next an overview of each chapter will be given below.

Chapter I. Mediation in Italy. Italy tried to reform its judicial system and create its own domestic law on mediation while adopting the EU Mediation Directive and creating its own domestic law on mediation. Historically, Italy has had many types of ADR procedures,[370]

[370] Italy has various types of mediation (and ADR procedures): from the very simple settlement agreement to judicial conciliation.

including mediation. However, because of frequent reforms to the legal system regarding ADR procedures, people and legal professionals were not so familiar with these procedures. Consequently, these procedures were not working so well. For this reason, the legislature tried to enact a new law on mediation based on the EU Directive. The main goal while adopting a national statute on mediation was to create an effective ADR procedure, which would help to solve two main problems in the judicial system: the high number of pending cases and the long duration of litigation. As a result, the legislator intended to solve those problems by making mediation mandatory for certain types of disputes. In fact the final aim of making mediation mandatory was to improve access to justice.

Italy has categorical mandatory mediation. This type of mediation requires for certain matters to be referred to mediation automatically. Thus, the state provides a legal basis where a list of cases for which mediation is considered compulsory. This means that if the parties have a dispute mentioned in the list, they will not be able to apply for a lawsuit in the courts. They have to try mediation and then when they cannot settle the dispute apply to the litigation. This type of mediation is considered to be the one with the most obligations for the disputants. Certain cases are referred to mediation despite the nature and intention of the parties. Therefore, in this type of mediation, the mediability issue of each dispute is not so crucial. The judge or registrar does not check the appropriateness of the dispute for mediation. If the dispute is mentioned in the list of mandatory mediation cases, it directly goes to mediation. Because of this notion, the Italian mediation model came under pressure[371] from scholars, legal professionals, as well as the parties. Legal professionals were not so supportive of the law on mediation, particularly the mandatory provision in it. As a result, the Italian government had to find compromise with the lawyers. Consequently, the legislature had to amend the decree on mediation several times in order to establish an appropriate one.

Chapter II. Mediation in Australia. In spite of the fact that Australia is a federation with six states, the reason for the implementation of mediation with a mandatory character in each

[371] E.g. One of Italy's leading association of attorneys "Unitarian Body of Lawyers" (*Organismo Unitario dell'Avvocatura* ,"OUA") has organized strikes throughout Italy against mandatory provision of the Law on mediation. The OUA has expressed its objection in two ways by making strikes publicly and challenging mandatory provision of the decree at the court.

state was the same. The legislator used the following grounds for the establishment of mandatory mediation: the workload of the courts and the rapid rise in the population. It was expected that the number of the lawsuits would be increased massively. Therefore, the legislator while making mediation mandatory sought to decrease the caseload of the court, improve access to justice, and make court operation more effective.

The Australian model of mandatory mediation includes two types: a discretionary and quasi-compulsory one. The discretionary type provides authority to the court to order mediation with or without the consent of the parities. The judge can refer any case to mediation at any stage of the litigation. Usually before the referral, the judge tries to analyze factors regarding the nature of the dispute, the intentions of the parties, and the efficiency of the process for the case. In general complicated matters are not referred to mediation. The judge's case management power is characterized as defining the mediability issue of the case. However, judges do not intend to order mediation for each dispute. He/she is very careful in assigning mediation in order not to make it an ineffective dispute resolution procedure before litigation so that the parties do not feel the court ordered mediation to be a barrier to pursuing a lawsuit.

On the other hand, the Federal Court and some states are practicing quasi-compulsory mandatory mediation. These courts require the parties to try 'a genuine step' before litigation. The genuine step involves 'steps or requirements that a potential litigant is required to undertake in an effort to resolve a dispute without recourse to the courts as prerequisite to litigation'.[372] Mediation, negotiation, and exchange of documents may be considered as a genuine step procedure. From these procedures, mediation is considered to be the most effective one. The purpose of this step is to let the parties settle their dispute regarding its circumstances and nature before the litigation. Even if they are not be able to settle the conflict, they can at least clarify and narrow the disputable arguments. Consequently, the court proceeding for such a case would be less complex and less costly. The genuine step requirement is partly mandatory; the court merely suggests that the parties take this step. However, there are some financial sanctions for not trying it.

Among the three jurisdictions with mandatory mediation discussed in this paper, Australia is the most experienced one. Mandatory mediation has been practiced for several

[372] Legg and Boniface, "Pre-Action Protocols in Australia."

decades, and, interestingly, it has fulfilled its initial purposes. Australian mediation institutions can be considered as part of the court system. The courts support and promote the procedure actively. Moreover, the courts monitor the quality of the procedure. Therefore, court-connected mediation is a workable and effective ADR procedure in the Australian judicial system. Consequently, the Australian mediation model with a mandatory mediation provision can be considered to be an efficient one.

Chapter III. Mediation in Belarus. The way court-connected mediation in Belarus has developed is interesting to observe.[373] In spite of the fact that the provision regarding mediation processes was included in 2004, it was not practiced for another 4 years. The impulse for the usage of mediation was the rapid growth of commercial lawsuits in 2007-2008. Because of the high number of the cases, judges were overloaded and had to handle more than 100 cases in one month. Consequently, this situation affected the quality of the judgment. Therefore, in order to reduce the number of cases and improve the quality of judgments, the Chairman of the High Economic Court made an order to actively practice court-connected mediation.[374] This order made the economic courts not only use mediation but also promote it.

Accordingly, the courts began to initiate mediation processes with or without the consent of the parties. As a matter of fact, from 2008 to 2010 the courts initiated almost all of the mediation cases. Most of the cases were simple cases without any arguments between the parties regarding the main obligations arising out of the contract.[375] But, after promoting mediation, courts began focusing on the quality and efficiency of the process more. For instance, courts took into consideration the mediability issue. Currently, courts are now analyzing the appropriateness of a case for mediation prior to initiating it. Moreover, nowadays courts are tending to order mediation for complicated cases. They expect the parties to simplify the disputable issues in the

[373] Belarusian legislator while implementing a mediation procedure into its judicial system chose different path comparatively to other states of Commonwealth Independent States (CIS). Initially, it created a court-connected mediation at the Economic Courts by adding a new chapter to the Commercial Procedure Code of the state. Other states like Kazakhstan and Russia first adopted a law on private mediation and presently they are planning to create a court-connected mediation. The reason for creation of court-connected mediation is the unpopularity of the out of court mediation procedure among the disputants.

[374] Бельская; Belskaya, "Развитие Медиации (посредничества) В Хозяйственных Судах Республики Беларусь В Целях Эффективного Разрешения Коммерческих Споров; Development of Mediation (mediation) in Commercial Courts of the Republic of Belarus in Order to Effectively Resolve Commercial Disputes."

[375] Власова; Vlasova, "Судебное Примирение В Хозяйственном Процессе Беларуси; Judicial Mediation in the Commercial Process of Belarus."

court-connected mediation even if they do not settle the dispute. It seems that the economic courts are following the philosophy "from the simple to the complex".[376] Overall, court-connected mediation is working well and one can consider it to be a fruitful one.

The reason for the effectiveness of mandatory court-connected mediation in Belarus is based on the following factors. First of all, the path for the implementation of the mediation process into the judicial system was precise. The legislator added a new chapter to the Commercial Procedure Code regarding court-connected mediation in 2004. As noted above, it was not practiced for 4 years because there was no need for this procedure at courts. However, when the courts faced difficulties providing quick and approachable access to justice, the Chairman of the High Economic Court ordered this issue be solved with the help of court-connected mediation. This step did solve these problems, but it took some time to establish a workable dispute resolution procedure.

The second factor was the systematical modification of the provisions regarding court-connected mediation. For instance, in 2011 two main amendments were enacted; one regarding the stage of litigation when the mediation procedure could be ordered and on regarding the appointment of people from the outside of court to act as mediators. The ground for these amendments was the high number of mediation cases.[377] Finally, in 2013 the legislator adopted a law 'On mediation' which was the legal basis for out-of-court mediation. If the court-connected mediation is applicable only for commercial disputes, the out-of-court mediation may handle disputes arising from civil, commercial, family and labor law.

Another interesting factor about the development of mediation in Belarus is the supportive behavior by the state. The state, in order to promote this procedure, amended the law 'On state duty'. Because of that amendment, the parties are able to get back 50 percent of the state fee that they paid at the beginning of the procedure if they try court-connected mediation and settle the dispute.[378] As a result court-connected mediation has become the cheapest form of

[376] Original wording in Russian language is "от простого к сложному".
Каменков; Kamenkov, "Посредничество – Перспективный Способ Урегулирования Экономических Споров; Mediation - a Promising Way to Resolve Economic Disputes."
[377] Огренич; Ogrenich and Подлеская; Podleskaya, "К проблеме реализации института медиации в Республике Беларусь; On the problem of the implementation of mediation in Belarus."
[378] *Закон Республики Беларусь "О Государственной Пошлине"; Law of the Republic of Belarus "On State*

dispute resolution procedure. The fee for the process is even lower than the settlement agreement's one. Accordingly, the low-cost of the procedure became another reason for the parties to try mediation.[379]

The Belarusian model of court-connected mediation with a mandatory character may also be referred to as being of a discretionary kind. The court has a right to initiate a mediation process without the consent of the parties. In general, court-connected mediation in Belarus reached its aims in a short period. The number of cases at the economic courts decreased and the quality of judgments improved. However, without the promotion by the court and the support by the state, this procedure would not have been so effective. In fact, court-connected mediation became a 'locomotive' for out-of-court mediation.[380] There is hypothesis that without earlier implementation of court-connected mediation, the legislator could face difficulties with the introduction of out-of court mediation into the judicial system.

Chapter IV. Mediation style and Values that underlie the mediation Process in Uzbekistan. This chapter introduced the history and the current situation of ADR procedures, in particular court-connected mediation in Uzbekistan. Historically, the mediation process has been used in Uzbekistan. People with disputes were accustomed to contacting elder, experienced persons ('aksakals') for the advice for a settlement. However, currently there is no legal framework for this ADR procedure in the state. Furthermore, there are neither mediation programs at courts nor panels of approved mediators. Although so called "mediation" is being practiced by 'mahalla' reconciliation committees, its broad application in the Uzbek court system is still restricted.[381]

Presently, three ADR procedures have been established in Uzbekistan: arbitration; consulting and mediation, and settlement agreement. From these procedures, consulting and mediation is the least usual procedure, which may draw the reader's attention. Consulting and media is a company under the Association of Arbitration Courts ('ACC'). The idea of creating this

---

Duty".

[379] *Хозяйственный Процессуальный Кодекс Республики Беларусь; Commercial Procedure Code of the Republic of Belarus*., Art.156.

[380] Бельская; Belskaya, "Развитие Медиации (посредничества) В Хозяйственных Судах Республики Беларусь В Целях Эффективного Разрешения Коммерческих Споров; Development of Mediation (mediation) in Economic courts of the Republic of Belarus in Order to Effectively Resolve Commercial Disputes."

[381] Karaketov, "Court-Connected Mediation in Uzbekistan and Japan: A Comparative Analysis;"

company under the ACC was to prepare the disputing parties for arbitration. Usually the company organizes explanatory sessions about arbitration. In fact the goals of the company are to provide legal consultation for the parties, checks on the arbitrability of the dispute, and assistance to the parties in reaching an agreement.[382] Overall, the mediation procedure provided by the Mediation and Consulting is recent, thus there are no valid facts to evaluate its effectiveness.[383] On the other hand, court-connected mediation has not been used at courts at all.

Moreover, this chapter explains why Uzbekistan needs court-connected mediation and why it should be mandatory. The necessity of court-connected mediation procedure for the judicial system is characterized by the rapid rise of civil and commercial lawsuits. Because of the exceeding number of lawsuits, the courts are not able to provide quick and qualitative access to justice. Another reason is the time limitation for judicial proceedings. The Civil Procedure Code and Commercial Procedure Code[384] of Uzbekistan put one-month procedural term for judicial proceedings. Accordingly, the courts have faced difficulties with a high number of lawsuits and time limitations for court proceedings.

Thus in order to solve the above-mentioned problems and improve the quality of judgments, the paper proposes to implement court-connected mediation into the judicial system of the state. However, in order promote this procedure the legislator should make it mandatory and provide some financial privileges for the parties.

Chapter V. Institutional Integration of Mediation in Dispute Resolution Procedures and Substantive Law in Uzbekistan. In this chapter the reason why Uzbekistan needs court-connected mediation with a mandatory character has been explained. The research has tried to create an appropriate model of mandatory mediation for the Uzbek judicial system. Consequently, different models of mandatory mediation have been compared and the advantages and disadvantages of each have been revealed. Overall, this chapter gives detailed information about the mandatory nature of mediation. Next, the main points of this chapter will be listed below.

First of all, mandatory mediation has three categories: categorical, discretionary and quasi-

[382] Закиров; Zakirov, "Альтернативные Решения; Alternative Solutions," *Uzbekistan Today*, n.d., http://old.ut.uz/rus/obshestvo/alternativnie_resheniya50.mgr.
[383] Джураев; Djuraev, "Медиация - Путь К Компромиссу; Mediation - a Way to Compromise."
[384] Civil Procedure Code of Uzbekistan, Art.131; http://www.lex.uz/pages/GetAct.aspx?lact_id=186098
Commercial Procedure Code of Uzbekistan, Art.125; http://www.lex.uz/Pages/GetAct.aspx?lact_id=185981

compulsory. For the Uzbek judicial system, the research proposes the second one, in which the court would have the authority to refer any case to mediation with or without the consent of the parties at any stage of litigation. Additionally, the factors based on which the court defines the mediability of a dispute have also been discussed. Consequently, the author considers that the efficiency of mediation depends on the court. The court has an obligation to prepare the parties for the mediation by introducing and explaining the reason why the dispute was referred to this process. Thus, the parties should have sufficient information about the mediation process as well as their rights and responsibilities beforehand.

Second, in spite of the mandatory nature of the procedure, this paper suggests that the parties should have a right to leave the process at any stage when they find that there is no chance of a settlement. However, the cause for these actions should be reasonable. The court should define the reasonability of such decisions. Moreover, the parties' decision also depends on the role and professionalism of the mediator. The mediator is responsible for organizing circumstances conducive to the parties settling their dispute. However, if he/she finds out that the parties do not intend to settle the dispute, the case should be terminated immediately.

Third, the chapter explains and compares two fundamental acts: the European Mediation Directive and the UNCITRAL Model Law on International Commercial Conciliation, which were successfully implemented into many national laws. The core notions of both and some crucial provisions have been discussed. Accordingly, the paper recommends that the legislative body of Uzbekistan enact a law on court-connected mediation based on these two acts.

Finally, as mentioned in the last section of the chapter, after the adoption of the law two main actions should be taken in order to make court-connected mediation an effective dispute resolution procedure. First, the court and the state should actively promote this procedure among the parties and the legal representatives by organizing seminars on mediation and explanatory meetings with the parties. Moreover, the state should provide financial privileges for parties who try the court-connected mediation and settle their dispute. Second, the courts should provide an effective ADR procedure by setting and controlling the following factors: impartiality of the mediators; mediator's presence and its effectiveness; mediator qualifications; disputants'

expectations; and confidentiality of the proceedings.

In conclusion, after researching the above-mentioned jurisdictions, which have had the same legal problems and which were able to solve them with the help of court-connected mediation with a mandatory character, the paper came to the conclusion that the Belarusian model of mandatory mediation is the most appropriate model for Uzbekistan. First of all, Uzbekistan and Belarus are historically close to each other. Both states were members of the Soviet Union. Consequently, the legal and judicial systems of these two states were established first during that period, and so as a matter of fact these systems are very close to each other. For instance, the Belarusian Code of Commercial Procedure is similarly to the Uzbek one[385] in defining a one-month procedural term for judicial proceedings. Because of these similarities, the problems in the judicial systems are also the same (e.g. the caseload of for the courts and the inadequate quality of judgments). However, presently Uzbekistan is very much behind Belarus in solving these problems. Belarus has been already practicing court-connected mediation for six years, and after systematic reforms, this procedure is working well now. Therefore, Uzbekistan can use the Belarusian model as a sample. Nevertheless, the Uzbek legislator should not simply copy Belarusian model of mandatory mediation and implement it into the legal system. It should establish a new model based on the legal culture of the state that would be appropriate for the parties as well as the courts.

After some years when the people and legal profession get used to and have sufficient information regarding the mediation procedure, the state may establish out-of court mediation. As a matter of fact, the paper supports the idea that mediation should be voluntary. Nevertheless, at the present stage it is better to choose the path from court-connected mediation with a mandatory character to out-of-court mediation with a voluntary character. In fact, in the future these two types of mediation procedure can exist parallel. As a result, the disputants would have different ways[386] of accessing justice.

In short, the paper recommends the legislator take into consideration the following provisions while enacting a law on mediation:

---

[385] Commercial Procedure Code of the Republic of Belarus, Art.175; http://pravo.kulichki.com/vip/hoz/00000014.htm#g20

[386] E.g. litigation, court-connected mediation, out of court mediation etc.

1. Category of mandatory mediation. Uzbekistan should have court-connected mediation with discretionary mandatory mediation. The court should have authority to order mediation with or without the consent of the parties at any stage of the litigation.
2. Mediability issue. The court, before ordering mediation, should take into consideration the mediability of the dispute, particularly the following factors: the nature of the dispute, the intention of the parties, and the effectiveness of the mediation.
3. Objective participation standards. The legislator should create objective participation standards. These standards should consist of good faith and party autonomy.
4. Mandatory mediation with opt-out scheme. The parties should have a right to leave the mediation process at any stage if they find that there is no opportunity for a settlement.
5. Duration of court-connected mediation. Since the procedural term for civil and commercial lawsuits is one month, the mediation process should not exceed this term.
6. Appropriate model of mandatory mediation. From the researched three jurisdictions, the Belarusian model of mandatory mediation stands out as being more appropriate for the judicial system of Uzbekistan. However, some provisions[387] of this model should be modified in order to suit the legal and judicial system of Uzbekistan.
7. Possible ways of implementation. The state should create a law on mediation with detailed mechanisms based on which the mediation process would be handled. Rules relating to the activities of the mediation should also be included in the Civil Code, Code of Civil Procedure, and Code of Commercial Procedure.
8. Basis for the law. As a basis for law, the legislator could use the European Directive on mediation and the UNCITRAL Model Law on International Commercial Conciliation that are considered as world standards for mediation as well as the Belarusian Law on Mediation.
9. Promotion of mediation. After enacting a law on mediation, the court and the state should actively promote mediation among disputants and legal practitioners. Also, the state should provide some financial privileges for parties who try court-connected mediation

[387] The paper does not support the following provisions of the Belarusian model: first, the parties right to make an objection for the referral to mediation; second, establishing a court-connected mediation only at Economic Courts.

and settle their dispute there.

10. Creating qualification requirements for the mediators. These requirements should include the following factors: (1) impartiality of the mediators; (2) mediator's presence and its effectiveness; (3) mediator qualifications and disputants' expectation; (4) confidentiality of the proceedings and confidence in mediator. Additionally, the court should be responsible for organizing an effective court-connected mediation process. Therefore, the mediators should be trained and pass accreditation examinations.

The adoption of a law on mediation with the above mentioned provisions would create the necessary legal framework for the legal regulation of mediation procedures in the Republic of Uzbekistan. This paper argues that if the Uzbek legislator takes into consideration these issues there will be high possibility that court-connected mediation will be a workable ADR procedure in Uzbekistan. Consequently, such a procedure would help to reform the judicial system and reduce the caseload for the civil and commercial courts.

BIBLIOGRAPHY

BOOKS:

Alexander, Nadja. International Comparative Mediation: Legal Perspectives. Austin : Frederick, MD: Kluwer Law International, 2009.

Alexander, Nadja Marie. Global Trends in Mediation. Kluwer Law International, 2006.

Alexander, Nadja Marie. International and Comparative Mediation: Legal Perspectives. Kluwer Law International, 2009.

Alexander, Nadja Marie. International Comparative Mediation: Legal Perspectives. Austin; Frederick, MD: Wolters Kluwer Law & Business ; Sold and distributed in North, Central and South America by Aspen Publishers, 2009.

Alexander, Nadja Marie. Mediation: Process and Practice in Hong Kong. Hong Kong: LexisNexis, 2010.

Alfini, James J. Mediation Theory and Practice. LEXIS Pub., 2001.

Bagshaw, Dale. Mediation in the Asia-Pacific Region: Transforming Conflicts and Building Peace, 2013.

Barnes, Bruce E. Culture, Conflict, and Mediation in the Asian Pacific. University Press of America, 2007.

Bevan, Alexander. Alternative Dispute Resolution. Sweet & Maxwell Ltd, 1992.

Bierbrauer, Günter. Factors Affecting Success in the Mediation of Legal Disputes: Third Party Attributes of the German Schiedsman. Univ., 1980.

Born, Gary Brian. International Commercial Arbitration. Vol. 2 Vol. 2. Alphen [u.a.]: Kluwer, 2009.

Boulle, Laurence. Mediation: Principles, Process, Practice. LexisNexis Butterworths, 2005.

Boulle, Laurence, Michael T. Colatrella (Jr.), and Anthony P. Picchioni. Mediation: Skills and Techniques. LexisNexis Matthew Bender, 2008.

Brown, Henry J, and Arthur L Marriott. ADR Principles and Practice. London: Sweet & Maxwell, 1999.

Cairns, Bernard C. Australian Civil Procedure. 9th ed. Pyrmont, N.S.W: Thomson Reuters, 2011.

Campbell, Dennis, Susan Cotter, and Center for International Legal Studies. Dispute Resolution Methods. London; Boston; Norwell, MA: Graham & Trotman/M. Nijhoff ; Kluwer Academic Publishers, 1995.

Clark, Bryan. Lawyers and Mediation. Springer, 2011.

Colbran, Stephen, P. Spender, S. Jackson, and R. Douglas. Civil Procedure: Commentary and Materials. LexisNexis Butterworths, 2012.

Davis, Joseph. Dispute Resolution Japan. 1st ed. Kluwer Law International, 1996.

Filler, Ewald A. Commercial Mediation in Europe : An Empirical Study of the User Experience. Global Trends in Dispute Resolution. Alphen aan den Rijn: Kluwer Law International, 2012.

Fulton, Maxwell J. Commercial Alternative Dispute Resolution. Law Book Company, Limited, 1989.

Genzberger, Christine. Japan Business: The Portable Encyclopedia for Doing Business with Japan. World Trade Press, 1994.

Goldberg, Stephen B., Frank E.A. Sander, Nancy H. Rogers, and Sarah Rudolph Cole. Dispute Resolution: Negotiation, Mediation, and Other Processes. 5th ed. Aspen Publishers, 2007.

Henderson, Dan Fenno. Conciliation and Japanese Law Tokugawa and Modern. Volume I. University of Washington Press, 1965.

Henderson, Dan Fenno. Conciliation and Japanese Law Tokugawa and Modern. Volume II. University of Washington Press, 1965.

Hilmer, Sarah E. Mediation in the People's Republic of China and Hong Kong (SAR). Utrecht; Portland, OR: Eleven International Pub. ; International Specialized Book Services [distributor], 2009.

Hopt, Klaus J., and Felix Steffek. Mediation: Principles and Regulation in Comparative Perspective. Oxford University Press, 2013.

James, Paula. The Divorce Mediation Handbook: Everything You Need to Know. 1st ed. Jossey-Bass, 1997.

Kenkyūjo, Nihon Hikakuhō. Perspectives on Civil Justice and ADR: Japan and the U.S.A. Chuo University Press, 1990.

Klimenko, A. V, and S. F Gafarova. Руководство по третейскому разбирательству для практикующих юристов и спорящих сторон" "Guide to arbitration for practitioners and the parties of the dispute. Tashkent: Norma, 2008.

Kovach, Kimberlee K. Mediation in a Nutshell, 2d. 2 edition. St. Paul. MN: West, 2010.

Lee, Joel, and Hwee Hwee Teh. An Asian Perspective on Mediation. Academy Publishing, 2009.

Moore, Christopher W. The Mediation Process: Practical Strategies for Resolving Conflict. 3rd Edition Revised. Jossey-Bass, 2003.

Moses, Margaret L. The Principles and Practice of International Commercial Arbitration. Cambridge University Press, 2012.

Mota, Carlos Esplugues, José Luis Pereira Iglesias, and Guillermo Palao Moreno. Civil and Commercial Mediation in Europe : National Mediation Rules and Procedures. Cambridge: Intersentia, 2013.

Palo, Giuseppe De, and Mary B. Trevor. EU Mediation Law and Practice. Oxford University Press, 2012.

Parkinson, Lisa. Family Mediation. Sweet & Maxwell, 1997.

Saharay, H.K. Law of Arbitration and Conciliation. Eastern Law House, 2001.

Sato, Yasunobu. Commercial Dispute Processing and Japan. Kluwer Law International, 2001.

Schijndel, Renske Anne Maria van. Confidentiality and Victim-Offender Mediation. Maklu, 2009.

Schonewille, Fred, and Martin Euwema. Mastering Mediation Education. Maklu, 2013.

Service, United States. Federal Mediation and Conciliation. Annual Report - Federal Mediation and Conciliation Service. University of California Libraries, 2011.

Singapore Law Review. University of Singapore Law Society, Law Faculty, University of Singapore, 1998.

Sourdin, Tania. Alternative Dispute Resolution. Lawbook Company, 2012.

Sourdin, Tania. Mediation in the Supreme and County Courts of Victoria. SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, April 1, 2009. http://papers.ssrn.com/abstract=1395550.

Sourdin, Tania, and Archi Zariski. The Multi-Tasking Judge: Comparative Judicial Dispute Resolution. Thomson Reuters Australia, Limited, 2013.

Spencer, David, and Michael Brogan. Mediation Law and Practice. Cambridge University Press, 2006.

Spencer, David, and Samantha Hardy. Dispute Resolution in Australia: Cases, Commentary and Materials. Thomson Reuters (Professional) Australia, 2009.

Trachte-Huber, E. Wendy. Mediation and Negotiation: Reaching Agreement in Law and Business. Revised 2nd. LexisNexis, 2007.

Welsh, Nancy. Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?. SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, 2001. http://papers.ssrn.com/abstract=1687804

Давыденко; Davydenko. Медиация Как Примирительная Процедура В Коммерческих Спорах: Сущность, Принципы, Применимость; Mediation as Reconciliation Procedure in Commercial Disputes: The Nature, Principles, Applicability, n.d. http://www.iurisprudentia.ru/alternative/files/mediation.pdf.

Мартыненко; Martinenko. Судоустройство И Судопроизводство По Хозяйственным Спорам; Judiciary and Legal Proceedings in Economic Disputes, n.d. http://www.elib.grsu.by/doc/838.

ARTICLES:[388]

Alexander, Nadja. "What's Law Got To Do With It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions." Bond Law Review 13, no. 2 (December 1, 2001). http://epublications.bond.edu.au/blr/vol13/iss2/5.

"Australia: At What Stage Is It Appropriate for the Court to Refer Cases to ADR?" Herbert Smith Freehills ADR Notes. Accessed October 28, 2013. http://hsf-adrnotes.com/2012/12/19/australia-at-what-stage-is-it-appropriate-for-the-court-to-refer-cases-to-adr/

"Australian Federal Court Rules on Compliance with 'genuine Steps' Requirement." ADR Notes. Accessed June 23, 2014. http://hsfnotes.com/adr/2012/12/10/australian-federal-court-rules-on-compliance-with-genuine-steps-requirement/

Ayres, Ian, and Jennifer Brown. "Economic Rationales for Mediation." Faculty Scholarship Series, January 1, 1994. http://digitalcommons.law.yale.edu/fss_papers/1529

Boettger, Iur. Ulrich. "Efficiency Versus Party Empowerment— Against A Good-Faith Requirement In Mandatory Mediation." Rev.Litig. 1,34 (2004). http://www.utexas.edu/law/journals/trol/volume_23/Boettger%20Abstract.pdf

Bose, K S, and R H Sarma. "Delineation of the Intimate Details of the Backbone Conformation of Pyridine Nucleotide Coenzymes in Aqueous Solution." Biochemical and Biophysical Research Communications 66, no. 4 (October 27, 1975): 1173–79.

Bruni, Alessandro. "Mediation in Italy," n.d. http://www.mediate.com/articles/BruniA1.cfm

Court-Mandated Mediation: Perspectives from Europe, Australia and America." http://businessconflictmanagement.com/blog/2012/01/court-mandated-mediation-perspectives-from-europe-australia-and-america/

"Can You Explain the Difference between Conciliation and Mediation," n.d. http://www.colorado.edu/conflict/civil_rights/topics/1950.html

Carroll, Robyn. "Trends in Mediation Legislation: All for One and One for All or One at All." University of Western Australia Law Review 30 (2002 2001): 167.

Center for Dispute Settlement. "National Standarts for Court-Connected Mediation Programs," n.d.

"Civil Dispute Resolution Act 2011." Bell Legal Group. Accessed June 10, 2014. http://belllegal.com.au/civil-dispute-resolution-act-2011/

Colombo, Giorgio Fabio. "Alternative Dispute Resolution (ADR) in Italy: European Inspiration and National Problems." Ritsumeikan Law Review, no. No.29 (2012).

Cortes, Pablo. Can I Afford Not to Mediate? Mandatory Online Mediation for European

[388] All the links has been accessed and checked in September 22, 2014.

Consumers: Legal Constraints and Policy Issues. SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, July 18, 2008. http://papers.ssrn.com/abstract=1162893

Supreme Court of New South Wales, "Court-Annexed Mediation," http://www.supremecourt.lawlink.nsw.gov.au/supremecourt/sco2_mediationinthesc/court_annexed_mediation.html

DeGaris, Annesley H. "Role of Federal Court Judges in the Settlement of Disputes". University of Tasmania Law Review 13 (1994): 217.

Del-Villar, Monica, and Stephen Jaques Mallesons. "Mediation in Australia." Australian Construction Law Newsletter, December 2005.

De Palo, D'urso. "Explosion or Bust? Italy's New Mediation Model Targets Backlogs to 'Eliminate' One Million Disputes, Anually." Alternatives Vol.28, no. No.4 (April 2010).

De Palo, Giuseppe. "Mandatory Mediation Is Back in Italy with New Parliamentary Rules." Alternatives, 2013. http://www.mondoadr.it/cms/articoli/mandatory-mediation-italy-parliamentary-rules.html

De Palo, Giuseppe. "Cross-Border Commercial Mediation: How Legislation Affects Mediation Use," http://www.europarl.europa.eu/comparl/juri/hearings/20071004/depalo5_en.pdf

De Palo, Giuseppe, and Lauren R. Keller. "The Italian Mediation Explosion: Lessons in Realpolitik." Negotiation Journal 28, no. 2 (April 1, 2012): 181–99.

De Palo & Oleson. "Lessons on Mediation in Italy: Bring Back Mandatory!" Alternatives Vol.31, no. No.4 (2013).

Drummond, Rita. "Court-Annexed Mediation in England: Foundations for an Independent and Enduring Partnership." http://papers.ssrn.com/sol3/papers.cfm?abstract_id=962122

Elisabetta, Silvestri. "Alternative Dispute Resolution in the European Union: An Overview." Russian Law - Theory and Practice N1 (2013).

"Federal Court Examines the Consequences of Failing to take 'genuine Steps' to Resolve Disputes." http://www.nortonrosefulbright.com/knowledge/publications/71167/federal-court-examines-the-consequences-of-failing-to-take-genuine-steps-to-resolve-disputes

Ficks, Erik. "Models of General Court-Connected Conciliation and Mediation for Commercial Disputes in Sweden, Australia and Japan." Zeitschrift Für Japanisches Recht / Deutsch-Japanische Juristenvereinigung 13 (2008): 131–52.

Friel, Toms, Steven, Christian Philip. "The European Mediation Directive—Legal and Political Support for Alternative Dispute Resolution in Europe." Bloomberg Law Reports,

February 1, 2011.

Fuller, Lon. "Mediation: Its Forms and Functions." Southern California Law Review 44 (1971).

Funken, Katja. "Alternative Dispute Resolution in Japan." SSRN eLibrary, June 2003. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=458001

Funken, Katja. "Court-Connected Mediation in Japan and Germany." SSRN eLibrary, March 2001. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=293495.

"Genuine Steps in the Right Direction? The Civil Dispute Resolution Act 2011." Clayton Utz. http://www.claytonutz.com/publications/news/201108/03/genuine_steps_in_the_right_direction_the_civil_dispute_resolution_act_2011.page

County Court of Victoria "Going to Court." http://www.countycourt.vic.gov.au/going-to-court

Green, Cameron. "ADR: Where Did the 'Alternative' Go? Why Mediation Should Not Be a Mandatory Step in the Litigation Process." ADR Bulletin 12, no. 3 (March 28, 2012). http://epublications.bond.edu.au/adr/vol12/iss3/2

Hanks, Melissa. "Perspectives on Mandatory Mediation." University of New South Wales Law Journal 35 (2012): 929.

High Commercial Court of the Republic of Belarus. "Круглый Стол 'Перспективы Развития Медиации В Республике Беларусь'; Round Table 'Development Prospects of Mediation in the Republic of Belarus,'" n.d. http://www.court.by/upload/11-2011%20kru.pdf

Hill, Alicia. "Civil Dispute Resolution Act 2011 (Cth): Genuine Steps to Resolve Disputes Required prior to Commencement of Proceedings | Lexology."

Hilmer, Sarah Elisabeth. Mediation in the People's Republic of China and Hong Kong (SAR). Rochester, NY: Social Science Research Network, May 1, 2009. http://papers.ssrn.com/abstract=1482912

Hoffman, David A. "Paradoxes of Mediation," n.d. http://www.bostonlawcollaborative.com/blc/63-BLC/version/default/part/AttachmentData/data/2005-07-paradoxes-of-mediation.pdf?branch=main&language=default

Honeyman, Christopher. "Confidential, More or Less." Dispute Resolution Magazine 5 (1999 1998): 12.

Ingleby, Richard. "Court Sponsored Mediation: The Case Against Mandatory Participation." The Modern Law Review 56, no. 3 (2011): 441–51.

Isaac, Kendall D. Pre-Litigation Compulsory Mediation: A Concept Worth Negotiating. SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, 2011. http://papers.ssrn.com/abstract=1988384.

Jagannadha, Rao. "Concepts of Conciliation and Mediation and Their Differences," n.d. http://lawcommissionofindia.nic.in/adr_conf/concepts%20med%20Rao%201.pdf.

John, North. "Court Annexed Mediation in Australia - an Overview," November 17, 2005.

Josh, Henderson. "The Federal Court's Judicial Nudge: Court-Ordered Mediation," no. QLS Journal (July 2008).

Karaketov, Maksud. "Court-Connected Mediation in Uzbekistan and Japan: A Comparative Analysis" Nagoya University, LLM Dissertation, 2011.

Lande, John. Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs. SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, February 5, 2003. http://papers.ssrn.com/abstract=358420

Legg, and Michael Legg and Dorne Boniface. "Pre-Action Protocols in Australia." Journal of Judicial Administration 20, no. 1 (2010): 39.

"Litigation and Dispute Resolution Insights | Civil Dispute Resolution Bill - a Genuine Step towards More ADR?" Clayton Utz. Accessed June 10, 2014. http://www.claytonutz.com/publications/newsletters/litigation_and_dispute_resolution_insights/20100823/civil_dispute_resolution_bill-a_genuine_step_towards_more_adr.page

Malcolm, David. "ADR in Western Australian Courts." ADR Bulletin 5, no. 5 (September 1, 2002). http://epublications.bond.edu.au/adr/vol5/iss5/1

"Mandatory Mediation for Every Fifth Case in New York County's Commercial Division?" JD Supra. Accessed August 3, 2014. http://www.jdsupra.com/legalnews/mandatory-mediation-for-every-fifth-case-69100/

"Mandatory Mediation in Italy – Reloaded | Kluwer Mediation Blog." Accessed May 1, 2014. http://kluwermediationblog.com/2013/10/09/mandatory-mediation-in-italy-reloaded/

McEwen, Craig A., and Thomas W. Milburn. "Explaining a Paradox of Mediation." Negotiation Journal 9, no. 1 (1993): 23–36. doi:10.1111/j.1571-9979.1993.tb00687.x.

County Court of Victoria., "Mediation." http://www.countycourt.vic.gov.au/mediation

Courts Of Administration Authority of South Australia "Mediation." http://www.courts.sa.gov.au/RepresentYourself/CivilClaims/Pages/Mediation.aspx

"Mediation | Details of Services | Japan Intellectual Property Arbitration Center." http://www.ip-adr.gr.jp/eng/business/mediation/#805

"Mediation in NSW Supreme Court Works: Spigelman." TheAustralian. Accessed August 9, 2014. http://www.theaustralian.com.au/business/legal-affairs/mediation-in-nsw-supreme-court-works-spigelman/story-e6frg97x-1225932539482

Narghiza, Amirova. "Mediation in Family Dispute Resolution : Opportunities for

Transforming Divorce Procedure in Uzbekistan." Nagoya University, LLM Dissertation, 2011.

"National Alternative Dispute Resolution Advisory Council (NADRAC)," n.d. http://www.nadrac.gov.au/Pages/default.aspx

"Newsletter: Recent Changes to Italian Litigation System," n.d. http://www.milex.pro/pdf/Newsletter%20Recent%20changes%20to%20Italian%20litigation%20system..pdf

"No Genuine Steps Statement? Watch Out. The Federal Court Enforces the Civil Dispute Resolution Act." http://www.dibbsbarker.com/publication/No_Genuine_Steps_Statement_Watch_out-_The_Federal_Court_enforces_the_Civil_Dispute_Resolution_Act.aspx

Nolan-Haley, Jacqueline. "Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision making." Notre Dame L. Rev., January 1, 1998, 775.

Nolan-Haley, Jacqueline. "Mediation Exceptionality." Fordham Law Review 78, no. 3 (January 1, 2009): 1247.

Oregon Judicial Department, State of Oregon. "Court-Connected Mediator Qualifications Rules," 2005.

Ota, Shozo. "Reform of Civil Procedure in Japan." The American Journal of Comparative Law 49, no. 4 (October 1, 2001)

Philips, Peter. "The European Directive on Commercial Mediation: What It Provides and What It Doesn't," n.d. http://www.businessconflictmanagement.com/pdf/BCMpress_EUDirective.pdf

Quek, Dorcas. "Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program." Cardozo Journal of Conflict Resolution Volume 11.2. http://cardozojcr.com/issues/volume-11-2/

Rundle, O. C. "How Court-Connection and Lawyers' Perspectives Have Shaped Court-Connected Mediation Practice in the Supreme Court of Tasmania." Phd, University of Tasmania, 2010. http://eprints.utas.edu.au/10680/.

Sherman, Edward F. "Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required." SMU Law Review 46 (1993 1992): 2079.

Silvestri, Jagtenberg. "Tweeluik – Diptych: Juggling a Red Hot Potato: Italy, the EU, and Mandatory Mediation," n.d. http://www.boomlemmatijdschriften.nl/tijdschrift/tijdschriftmediation/2013/1/TMD_1386-3878_2013_017_001_004

"Solving Problems through Conciliation by Talking." Accessed May 1, 2011. http://www.choutei.jp/english/index.html

Sourdin, Tania. Rochester, "Mediation in the Supreme and County Courts of Victoria"

http://papers.ssrn.com/abstract=1395550

Sourdin, Tania, and Nikola Balvin. "Mediation in the Supreme and County Courts of Victoria: A Summary of the Results." ADR Bulletin 11, no. 3 (December 22, 2010). http://epublications.bond.edu.au/adr/vol11/iss3/1

Spencer, David L. Casenotes: Pre-Litigation Procedures: A Legislative Update and Mediation Media Watch. http://papers.ssrn.com/abstract=1912204

Stephen, Lynn. "Mediation and ADR: A Regional View from Western Australia." ADR Bulletin 6, no. 2 (May 1, 2003). http://epublications.bond.edu.au/adr/vol6/iss2/5

Sturini, Andrea. "New Mediation Law in Italy," http://www.disputescentre.com.au/assets/media/newsletters/April-Newsletter/New_Mediation_Law_Italy.pdf

"Take Genuine Steps Statements Seriously," n.d. http://www.ags.gov.au/publications/express-law/el147.pdf

Wade, John. "'Don't Waste My Time on Negotiation and Mediation, This Dispute Needs a Judge.' Which Conflicts Need Judges? Which Conflicts Need Filing?." Law Papers, 2001. http://works.bepress.com/john_wade/8

Welsh, Nancy. Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?. http://papers.ssrn.com/abstract=1687804

Welsh, Nancy. "The Place of Court-Connected Mediation in a Democratic Justice System." http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1726218

Welsh, Nancy A. "Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise without Procedural Justice." Journal of Dispute Resolution 2002 (2002): 179.

Weston, Maureen. "Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality." 76 Indiana Law Journal 591 (2001) 76, no. 3 (July 1, 2001). http://www.repository.law.indiana.edu/ilj/vol76/iss3/2

Wiget, Lukas. Compulsory Mediation as a Prerequisite Before Commencement of Court Proceedings - Useful Requirement to Save Resources or Waste of Time and Money?. SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, September 30, 2012. http://papers.ssrn.com/abstract=2157385

Winston, David S. "Note & Comment: Participation Standards in Mandatory Mediation Statutes: 'You Can Lead A Horse to Water. . . .,'" no. 11 Ohio St. J. on Disp. Resol. 187 (1996). https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&srctype=smi&srcid=3B15&doctype=cite&docid=11+Ohio+St.+J.+on+Disp.+Resol.+187&key=f6a17fa5ea2e23be8b004c92c2ec906d.

"A Change in Pre-Litigation Requirements in the Federal Court and Federal Magistrates Court." http://www.foxtucker.com.au/files/RiskWrap3.html.

Бельская; Belskaya. "О Некоторых Вопросах Применения Примирительной Процедуры В Хозяйственных Судах; 'On Some Issues of Mediation in Commercial Courts,'" n.d. http://www.court.by/online-help/mediation/publications/f831be342b18fe82.html.

Бельская; Belskaya. "Развитие Медиации (посредничества) В Хозяйственных Судах Республики Беларусь В Целях Эффективного Разрешения Коммерческих Споров; Development of Mediation (mediation) in Commercial Courts of the Republic of Belarus in Order to Effectively Resolve Commercial Disputes," n.d.

Валдайцев; Valdaycev. "Некоторые Процессуальные Особенности Урегулирования Споров В Порядке Посредничества; Some Procedural Peculiarities of Dispute Settlement through Mediation;" Вестник Высшего Хозяйственного Суда Республики Беларусь; N5 (2009).

Власова; Vlasova. "Судебное Примирение В Хозяйственном Процессе Беларуси; Judicial Mediation in the Commercial Process of Belarus," n.d. http://emediator.ru/index.php?option=com_content&view=article&id=363:sudebnoe-primirenie-v-khozyajstvennom-protsesse-belarusi&catid=9:alternativnye-metody-v-sporakh&Itemid=101.

Джураев; Djuraev. "Медиация - Путь К Компромиссу; Mediation - a Way to Compromise." Правда Востока, no. N91 (May 10, 2014). http://www.pv.uz/economics/15031.

Закиров; Zakirov. "Альтернативные Решения; Alternative Solutions." Uzbekistan Today, n.d. http://old.ut.uz/rus/obshestvo/alternativnie_resheniya50.mgr.

Каменков; Kamenkov. "Посредничество – Перспективный Способ Урегулирования Экономических Споров; Mediation - a Promising Way to Resolve Economic Disputes.," n.d. http://www.court.by/upload/5-2010%20%20Kamenkov.pdf.

Крывчик; Krivchyk. "Когда Третий Не Лишний; When the Third Is Not Superfluous;" Вестник Высшего Хозяйственного Суда Республики Беларусь; N5 (2009).

Кулак; Kulak. "Процедура Посредничества Как Форма Альтернативной Юрисдикции; Mediation Procedure as an Alternative Form of Jurisdiction." Вестник Высшего Хозяйственного Суда Республики Беларусь; N5 (2009).

Кулак, Kulak. "Судебное Решение-Это Разрешение Спора, Примирительная Процедура-Разрешение Конфликта В Целом; The Court Decision-a Resolution of the Dispute, Mediation-a Resolution of the Conflict in General," n.d. http://court.by/online-help/mediation/publications/c01c6b8dea7e839f.html.

Масадиков; Masadikov. "Сущность медиации и проблемы ее правового регулирования

в Республике Узбекистан; The essence of mediation and issues of legal regulation in the Republic of Uzbekistan," 2008.

"Методические Рекомендации По Урегулированию Экономических Споров В Порядке Посредничества В Хозяйственных Судах Республики Беларусь; Guidelines for the Settlement of Commercial Disputes through Mediation in the Commercial Courts of the Republic of Belarus." Вестник Высшего Хозяйственного Суда Республики Беларусь;, n.d.

Миселюк; Miselyuk. "Опыт Хозяйственных Судов По Применению Медиации; Experience of Economic Courts on the Application of Mediation," n.d. http://www.court.by/online-help/mediation/publications/e5052f0a096d4615.html.

Николаева; Nikolaeva. "За Высокими Показателями Урегулирования Споров В Примирительной Процедуре Стоит Огромная Работа Суда; 'Under the High Level of Dispute Settlement in the Mediation There Is a Huge Work of Courts,'" n.d. http://www.court.by/upload/10-2011%20Nikolaeva.pdf.

Огренич; Ogrenich, E. M., and О. Л. Подлеская; Podleskaya. "К проблеме реализации института медиации в Республике Беларусь; On the problem of the implementation of mediation in Belarus," 2012. http://elib.bsu.by/handle/123456789/47737.

Отахонов; Otaxonov. "Организационно Правовые Меры По Развитию Международного Коммерческого Арбитража В Узбекистане; Organizational and Legal Measures for the Development of the International Commercial Arbitration in Uzbekistan," n.d. http://cisarbitration.com/wp-content/uploads/2014/02/Организационно-правовые-меры-по-развитию-МКА-в-Узбекистане.pdf.

Отахонов;Otaxonov. "Третейские Суды При Торгово-Промышленной Палате Республики Узбекистан; Arbitration Courts at the Chamber of Commerce of the Republic of Uzbekistan;," n.d. http://cisarbitration.com/wp-content/uploads/2014/02/Третейский-суд-в-Узбекистане.pdf.

"Узбекистан – Германия: Взаимообмен В Судебно-Правовой Сфере; Uzbekistan - Germany: The Interchange in the Judicial Sphere," n.d. http://www.jahonnews.uz/rus/rubriki/politika/uzbekistan_germaniya_vzaimoobmen_v_sudebno_pravovoy5_sfere.mgr.

LEGAL ACTS:

Civil Dispute Resolution Act of Australia 2011,
n.d. http://www.comlaw.gov.au/details/c2011a00017.

Civil Dispute Resolution Bill 2011; Explanatory Memorandum, n.d.
http://www.austlii.edu.au/au/legis/cth/bill_em/cdrb2011306/memo_0.html.

Directive 2008/52/EC of the European Parliament and of the Council Directive on Certain Aspects of Mediation in Civil and Commercial Matters, 2008.
http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32008L0052.

European Code of Conduct for Mediators, n.d.
http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf.

European Commission. Cross-Border Legal Disputes: Commission Takes Action to Ease Access to Justice in Cross-Border Legal Disputes, 2011.
http://europa.eu/rapid/press-release_IP-11-919_en.htm.

Federal Court of Australia Act 1976, n.d.
http://www.austlii.edu.au/au/legis/cth/consol_act/fcoaa1976249/.

Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, 2002.
http://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52002DC0196&qid=1399463750083&from=EN.

Legislative Decree No.28/2010, n.d.

Oregon Judicial Department, State of Oregon. "Court-Conected Mediator Qualifications Rules," 2005.
http://www.ojd.state.or.us/web/OJDPublications.nsf/Files/05cER001sh.pdf/$File/05cER001sh.pdf.

South Australia. District Court Act 1991 (South Australia), n.d.
http://www.austlii.edu.au/au/legis/sa/consol_act/dca1991187/.

Alternative Dispute Resolution Act 2001, Tasmania. n.d.
http://www.thelaw.tas.gov.au/tocview/content.w3p;doc_id=57++2001+AT@EN+20081201000000;rec=0.

———. Supreme Court Rules 2000 (Tasmania), n.d.
http://www.supremecourt.tas.gov.au/practice_and_procedure/supreme_court_rules.

Trade Practices Act 1974, n.d.
http://www.austlii.edu.au/au/legis/cth/num_act/tpa1974149/.

UNCITRAL Model Law on International Commercial Conciliation, 2002.
http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf.

Uniform Civil Procedure Rules (Qld), 1991.

http://www.austlii.edu.au/au/legis/qld/consol_reg/ucpr1999305/.

Western Australia. Rules of the Supreme Court 1971, n.d.

Western Australia. Supreme Court Act 1935 (Western Australia), n.d.
http://www.austlii.edu.au/au/legis/wa/consol_act/sca1935183/.

Гражданский Процессуальный Кодекс Республики Узбекистан;
Civil Procedure Code of the Republic of Uzbekistan, 1998.
http://www.lex.uz/pages/GetAct.aspx?lact_id=186098.

Гражданский Кодекс Республики Узбекистан;
Code of The Republic of Uzbekistan, 1997.
http://www.lex.uz/Pages/GetAct.aspx?lact_id=111181.

Закон Республики Беларусь "О Государственной Пошлине'';
Law of the Republic of Belarus "On State Duty", 1992.
http://pravo.levonevsky.org/bazaby/zakon/zakb1409.htm.

Закон Республики Беларусь "О Медиации";
Law of the Republic of Belarus On Mediation, 2013.
http://court.by/brest/extrajudicial-mediation/.

Закон Республики Узбекистан "Об Органах Самоуправления Граждан";
Law of the Republic of Uzbekistan "About Self-Government Bodies", n.d.
http://www.lex.uz/pages/GetAct.aspx?lact_id=86238.

Закон Республики Узбекистан "О Выборах Председателя (аксакала) Схода Граждан и Его Советников";
Law of the Republic of Uzbekistan "On the Election of Chairman (aksakal) Citizens and His Advisers.," n.d. http://www.lex.uz/pages/GetAct.aspx?lact_id=208234.

Закон Республики Узбекистан "О Третейских Судах";
Law of the Republic of Uzbekistan "On Arbitration Courts," n.d.
http://www.lex.uz/pages/GetAct.aspx?lact_id=1072094.

Конституция Республики Узбекистан;
Constitution of the Republic of Uzbekistan, 2001.
http://www.lex.uz/Pages/GetAct.aspx?lact_id=35869.

Постановление Пленума Высшего Хозяйственного Суда Республики Беларусь от 27.05.2011 №10 "О Некоторых Вопросах Применения Примирительной Процедуры В Хозяйственных Судах";

Resolution of the Plenum of the Supreme Economic Court of the Republic of Belarus of 27.05.2011 № 10 "On Some Issues of Mediation Procedures in the Economic Courts ," n.d.
http://pravo.newsby.org/belarus/postanov4/pst178.htm.

Семейный Кодекс Республики Узбекистан;

Family Code of the Republic of Uzbekistan, 1998.

http://www.lex.uz/Pages/GetAct.aspx?lact_id=104723

Хозяйственный Процессуальный Кодекс Республики Беларусь;

Commercial Procedure Code of the Republic of Belarus, 1998.

http://etalonline.by/?type=text&regnum=HK9800219#load_text_none_1_.

Хозяйственный Процессуальный Кодекс Республики Узбекистан;

Commercial Procedure Code of the Republic of Uzbekistan, n.d.

http://www.lex.uz/Pages/GetAct.aspx?lact_id=185981.

民事調停法; Civil Conciliation Act of Japan (Act No.222)

CASES:

Australian Competition & Consumer Commission v Lux Pty Ltd, (FCA 2001).
http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/federal_ct/2001/600.html?query=title(accc%20%20and

Australian Competition & Consumer Commission v Collagen Aesthetics Australia Pty Ltd*, (FCA* 2002).
http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2002/1134.html?stem=0&synonyms=0&query=collagen

Coca Cola Amatil (NSW) Pty Ltd v Pareezer & Ors, (NSWCA 2006).
http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWCA/2006/45.html?stem=0&synonyms=0&query=coca%20cola%20amatil

Idoport Pty Limited v. National Australia Bank and others;
http://netk.net.au/Australia/Idoport.asp

Orshanskiy lnokombinat and "Vodokanal" and Cotton Association; (Republic of Belarus).

Rosalba Alassini v Telecom Italia SpA (C-317/08), Filomena Califano v Wind SpA (C-318/08), Lucia Anna Giorgia Iacono v Telecom Italia SpA (C-319/08) and Multiservice Srl v Telecom Italia SpA (C-320/08),
http://curia.europa.eu/juris/liste.jsf?num=C-317/08&language=en

State of Tasmania v Leighton;
http://crisplegal.com.au/state-of-tasmania-v-leighton-contractors-pty-ltd-2005-tassc-133/

Superior IP International Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys FCA 282;
http://www.nswbar.asn.au/circulars/2012/mar/superior.pdf

APPENDIX

Table 1: Summary of Italian Mediation Laws[389]

Law No. 374 (1991)	Establishes the possibility of voluntary mediation before a justice of the peace.
Law No. 580 (1993)	Empowers the chambers of commerce to create a mediation service f the resolution of business to consumer and business to business
Law No. 192 (1998)	Mandates pre-trial mediation at the local Chamber of Commerce for disputes that pertain to subcontracting agreements (as defined in the law)
Law No. 281 (1998)	Offers certain consumer associations the opportunity to initiate voluntary mediation with a business before the Chamber of Commerce.
Decree 5/03	Attempts to promote mediation in corporate and financial matters.
Law No. 129 (2004)	Extends public-sponsored mediation introduced by *Decree 5/03* to franchising disputes.
Decree 222/04	Enacts Article 38 of *Decree* 5/03. Determination of criteria and registration procedures in the National Register of Mediation Organizations.
Decree 223/04	Enacts Article 39 of *Decree* 5/03. Determines the fees for mediation by duly registered public organizations; establishes the minimum and the maximum to be paid by disputing parties for the mediation.
Law No.69 (2009)	Considers a mediation proceeding as one of the dispute resolution procedures for civil and commercial disputes. Additionally, gives an authority to Italian government to establish a legal decree on mediation
Decree 28/2010	Describes the mediation procedure and provides three types of mediation: voluntary mediation, mandatory mediation and mediation suggested by the judge. The main idea of the Legal Decree 28/2010 was to create a workable dispute resolution procedure by implementing provisions of European Directive on Mediation 2008/52/EC in order to decrease the workload of courts.
Decree 180/2010	Amends provisions of Decree 28/2010 regarding the mediation organizations, mediators, mediators' training and mediation procedure fee.
Decree 145/2011	Increases the requirements for mediators' qualification and decrease the costs of mandatory mediation proceedings.
Decree 69/2013	Makes several modifications: - exclude disputes regarding the motor vehicle accidents from the list of mandatory mediation cases; - give a right for disputants to withdraw their case from the mediation procedure to the litigation, if they are not satisfied with the mediator's skill or qualification.

[389] This continuum is adapted and modified from the book "Global Trends in Mediation" by Nadja Alexander (p.267)

Table 2: Overview of the development of court-connected mediation in the Republic of Belarus

The first stage (from 2004 to 2008)	Implementation of the provision about court-connected mediation in to the Commercial Procedure Code of the state. The court-connected mediation had not been used for four years. The reason behind was the unawareness and unpreparedness of the courts. Moreover, there were no rules or regulations regarding the appointment of the mediators.
The second stage (from 2008 to 2011)	From 2008, mediation procedure at economic courts began working as an effective dispute resolution procedure. The mechanism launching the court-connected mediation was the rapid rise of commercial lawsuits in 2007-2008 and small state fee for this procedure.
The third stage (from 2011 till 2013)	In 2011 some amendments were included in the Commercial Procedure Code regarding improvements to court proceedings. These amendments also modified Chapter 17 of the Commercial Procedure Code, particularly the terms of the court-connected mediation. Consequently, the term 'mediator' was changed to 'conciliator' and the mediation became the conciliation. The reason for modifying the terms was to make it more understandable for the people. New amendments included principles regarding mediation, the rights and obligations of the mediator, as well as his appointment. Moreover, the main difference made was in regard to the stage of litigation where the mediation procedure could be ordered. Presently, the Commercial Procedure Code allows the mediation procedure to begin at any stage of the litigation including appeal and cassation instances. In contrast, before the amendment the mediation procedure could only be initiated before the end of the preparation of the court proceeding.
The fourth stage (from 2013 till present)	In 2013 the parliament of Belarus adopted a law "On Mediation". This law has provisions regarding the definition of the mediation procedure, requirements for the mediators and so on. The law defines the mediation procedure as a 'negotiation of the parties with the assistance of a mediator in order to resolve the dispute (disputes) by the reaching a mutually acceptable agreement. This new law focuses more on the regulation of out of court mediation. Another particularity of the law was the scope of the out of court mediation procedure. The Law specifies that disputes arising from civil, commercial, family and labor law can be resolved by mediation.

Table 3: Civil Proceeding in Uzbekistan