DOI: 10.34616/143582

Rozdział 3b

Mandatory mediation in family disputes in Lithuania: model and first year application experience

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I. Introduction

Even though mediation is not a new institute in Lithuania, this practice is still in its developmental stages. In some countries, mediation has naturally become an inseparable part of the local legal culture (a number of African countries, Japan, China, Vietnam, Australia)[1]. In Lithuania, as well as many other Central and Eastern European countries, however, a wider application of mediation can only be achieved through additional legal measures, such as specific procedural stimulation, obligations and even sanctions that are imposed if peaceful dispute resolution is not applied.

The passive development of alternative dispute resolution, which include mediation, is caused by the low culture of peaceful dispute resolution that is currently prevalent in Lithuania. Due to their personality and temperament, as well as habits and limited knowledge of alternative ways of dispute resolution, the dispute parties are prone to delegate others, such as the court, to resolve their conflicts. In many of the countries that took legal measures to promote mediation, some of the arguments in support of the development of this alternative for court include the length and costs of legal procedures. Therefore, paradoxical but the advantages of mediation as quick and considerably cheap way of dispute resolution are not as relevant for Lithuanian citizens. Compared with

[1] Agnė Tvaronavičienė and Natalija Kaminskienė (2019). Privalomoji mediacija šeimos ginčuose. Lietuvos teisė 2019, p. 53. Accessible online: https://repository.mruni.eu/handle/007/16244 (8 July 2022).

other European Union countries, legal processes in Lithuania are quite short and inexpensive. According to the 2020 EU Justice Scoreboard, Lithuania is leading in terms of the speed of resolution of civil and commercial disputes in courts of first instance, since such conflicts are resolved in less than 100 days[2]. However, despite the well-functioning judicial system, which gives the opportunity to defend one's violated rights and legitimate interests effectively, the development of mediation in Lithuania was inspired by the advanced international practice, positive experience in foreign countries and the desire to resolve more disputes without the intervention of state courts in order to achieve more sustainable legal and social peace. Referring to the 2020 EU Justice Scoreboard, Lithuania is ranked third amongst the EU member states in promoting and encouraging alternative dispute resolution in 2019[3]. In recent years, at the initiative of the Ministry of Justice of the Republic of Lithuania, which is responsible for implementing legislation and justice policy, a model of mediation in civil disputes has been developed, which is based on the principles of qualified mediation and universal access.

Lithuanian experience shows that mediation has become more widely used after the legislator specified the legal regulations of mediation, set high qualification requirements for mediators and established the requirement to pursue mediation in family disputes before going to court. This article will shortly introduce the mandatory mediation model implemented in Lithuania and review the results of this implementation after one year, as well as address the challenges that came along the way. The article is meant to present the Lithuanian experience of implementing mandatory mediation to foreign mediation experts and inspire them to keep improving legal regulation in their own countries, referring to good practice and avoiding mistakes that have been made in other countries.

II. Necessary preconditions for the establishment of mandatory mediation in Lithuania

In Lithuania, mediation was first applied in civil disputes as early as in 2005, when, on the initiative of several judges, the Council of Judges started a pilot project of judicial mediation in one of the Lithuanian courts. Since 2014 the project area had been expanded nationwide, and judicial mediation became available in all Lithuanian courts[4]. In

[2] European Commission (2021). 2020 2020 EU Justice Scoreboard, p. 11. Accessible online: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0306 (8 July 2022).

[3] European Commission (2021). 2020 2020 EU Justice Scoreboard, p. 32. Accessible online: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0306 (8 July 2022).

[4] Agnė Tvaronavičienė and Natalija Kaminskienė (2019). The Institutionalization of the Out-of-Court Civil Disputes Mediation in Lithuania: Experience and Main Future Challenges. IACSS 2019. The 7th International Academic Conference on Social Sciences: Conference Proceedings.

a decade, judicial mediation has become part of the civil process, but due to the habit of dispute parties to engage in litigation and the lack of knowledge about mediation, it has not been able to attract much interest to this date. According to the National Courts Administration's data, in 2020, 516 judicial mediation proceedings in civil cases were referred to judicial mediation (533 cases in 2019, 483 in 2018, 540 in 2017)[5]. Such low interest in these free-of-charge judicial mediation services signaled the need to create a legal framework and to promote out-of-court mediation to provide professional assistance to dispute parties in cases of lower degree conflict escalation before going to court.

In parallel with the pilot judicial mediation project, which aimed to implement the European Union Mediation Directive[6], on 15 July 2008, the Law on Conciliatory Mediation in Civil Disputes[7], establishing the legal base for the application of out-of-court mediation. In the first version of the law, the legislator chose and established a sufficiently liberal method of regulation, which resulted in the development of mediation being left in the hands of the market. This method of dispute resolution was not publicized, therefore the lack of a culture of peaceful dispute resolution, the limited number of practicing mediators, as well as the reluctance and resistance of the legal community to accept mediation as a possible and useful dispute resolution method for their clients caused the slow development of mediation[8]. Considering that this legal act did not impose any qualification requirements on mediation practice, lack of the public awareness and low demand for mediation and that no funds were allocated for publicizing the institute the adoption of law did not encourage the formation of the profession and practice of mediator.

Those formulating and implementing public policy in the field of justice, particularly the Ministry of Justice, supported by the Judicial Council and non-governmental organizations, have continued to seek ways to develop mediation and public education in the field of amicable dispute resolution. Significant changes took place on September 17th, 2015, when the Minister of Justice approved the Conception for the Development of

[5] Annual report of the Judicial Mediation Commission (2020). Accessible online: https://www.teismai.lt/data/public/uploads/2021/03/tmk-ataskaita_2020.pdf (8 July 2022).

[6] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. OJ L 136, 24. 5. 2008.

[7] Law on Conciliatory Mediation in Civil Disputes (2008). Valstybės žinios, 87-3462. Accessible online: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.325294?jfwid=-robscjvu5 (8 July 2022).

[8] The results of a study on lawyers' attitudes towards peaceful dispute resolution, conducted by Mykolas Romeris University researchers in 2015, suggest that layers see mediation as competition, which threatens their own professional success and opportunities to earn income by representing clients in long court procedures as opposed to in a much more operative mediation processes. See Natalija Kaminskienė, Agnė Tvaronavičienė, Gražina Čiuladienė and Inga Žalėnienė (2016). Lietuvos advokatų požiūrio į taikų ginčų sprendimą ir mediaciją tyrimas. Socialinių mokslų studijos, 8(1), p. 44-82. Accessible online: https://www3.mruni.eu/ojs/societal-studies/article/download/4516/4191 (8 July 2022).

the Mediation System (hereinafter referred to as the Conception)[9]. In order to implement this Conception, the state took active steps to promote mediation and started to develop advanced legal regulation for mediation based on both successful foreign practice and the peculiarities of the national legal system. A working group was set up for the preparation of this Conception, where representatives of the Ministry of Justice and various other interested state institutions, higher education institutions and non-governmental organizations worked together based on social partnership. In the Conception, it is emphasized that in order to encourage out-of-court mediation in civil disputes and at the same time reduce the workload of the courts, it is proposed to introduce mandatory mediation for certain categories of civil disputes before taking the cases to court. Furthermore, it is also proposed to pay special attention to the development of mediation given that, in family disputes, the restoration of social peace between the dispute parties is as important as the resolution of the dispute itself, especially in disputes concerning the interests of children. The Conception also encourages the introduction of mandatory mediation in family disputes, as well as the possibility for the judge to direct the dispute parties to mandatory mediation in civil cases when there is a possibility to reach an amicable settlement in accordance with the principles and criteria established by law[10].

As a result of close social partnership, the Conception has set guidelines for the development of mediation in civil, administrative and criminal justice. Changes in legal regulation had first taken place in the field of civil justice, which will be discussed in Section 2 of the article.

Following the implementation of these changes, mediation in the field of administrative justice has also been reformed. In the coming years, it is planned to focus on fundamental changes in the application of mediation in criminal justice.

III. Legal regulation of mediation in Lithuania

1. Forms of mandatory mediation in Lithuania

Several forms of mandatory mediation are distinguished in the scientific literature that summarizes the advanced practice in foreign countries. For instance, according to N. Kaminskienė, the following examples can indisputably be considered to be forms of mandatory mediation: 1) initiation of mediation by a court order or obligation sustaining the court's right to assess the viability of mediation in each specific case taking into

[9] The order of The Minister of Justice of the Republic of Lithuania No. (17 September 2015) "In regard of the Confirmation of the Concept of the Development of the Mediation System". TAR, 13939. Accessible online: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/1de59bf05d7211e5beff92bd32ec99a1?jfwid=-fxdp6ur6 (8 July 2022).

[10] *Ibidem*.

account the circumstances, the dispute category, the relationship between the dispute parties in mediation, alternative ways of dispute resolution that were applied, the perspective of the application of mediation etc.; 2) initiation of mediation by establishing a legal obligation for the dispute parties to use the mediation procedure in certain or all categories of civil disputes before bringing the case to court[11]. F. Sanders outlines these two forms as discretionary and categorical[12]. Of course, researchers also highlight other, milder, forms of mandatory mediation. In the context of this article, the indirect obligation of mediation is relevant when the dispute parties feel the threat of certain procedural sanctions. According to M. Žukauskaitė-Tatorė, who conducted a comprehensive review of the scientific literature on this topic, it is the quasi-mandatory mediation, which manifests itself in two aspects: "First, the requirement to use mediation is not directly consolidated, but is rather implied or validated just as a recommendation. [...] Second, the dispute parties are subject to procedural sanctions which is enough to compel the parties to pursue mediation. This means that the threat of procedural sanctions forces the dispute parties to follow an implied requirement or recommendation"[13].

While implementing the recommendations and proposals for the development of mediation in civil justice that are outlined in the Conception, all three forms of mandatory mediation have been established in Lithuania: mandatory out-of-court mediation in family disputes (ordered by law mediation), mandatory judicial mediation, which judges have the discretion to order (discretionary mandatory mediation) and quasi-mandatory mediation.

In 2017, the new version of the Law on Conciliation of Civil Disputes was adopted and the title of the law was changed to "Law on Mediation"[14]. The most important changes in the legal regulation of mediation were related to the clear acknowledgement of mediation management institutions and their functions, the establishment of qualification requirements for mediators and the adoption of provisions on the procedure for the application of mandatory mediation. Article 20 (1) of the new version of the law established the application of mandatory mediation in family disputes, which are subject to dispute settlement and where amicable settlements are possible[15]. Provisions related to the mandatory application of mediation (ordered by law) came into force on January 1st, 2020.

[11] Natalija Kaminskienė (2013). Privaloma mediacija: galimybės ir iššūkiai. Jurisprudencija, 20(2). Accessible online: https://ojs.mruni.eu/ojs/jurisprudence/article/view/977/933 (8 July 2022).

[12] Frank A. E. Sander (2007). Another View of Mandatory Mediation. Dispute Resolution Magazine, 13(2).

[13] Miglė Žukauskaitė-Tatorė (2021). Privalomosios mediacijos civiliniuose ginčuose ir teisės į teisminę gynybą santykio problemos. Doctoral Dissertationaktaro disertacija, p. 67. Accessible online: https://www.tf.vu.lt/wp-content/uploads/2021/04/Disertacija_Migle%cc%87_Z%cc%8cukauskaite%cc%87-Tatore%cc%87.pdf (8 July 2022).

[14] Law on Mediation (2017). TAR, 2017-12053. Accessible online: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.325294/iUegWIIpmP (8 July 2022).

[15] *Ibidem*.

The 2017 amendments of the Code of Civil Procedure included mandatory mediation by the order of a judge. In Article 2311 (1) of this act, it is stated that "The transfer of the dispute to judicial mediation may be initiated by the judge who is hearing the civil case (panel of judges) or any party. The dispute is referred to the judicial mediation by a ruling of a judge (panel of judges) hearing the civil case, when the court clarifies the essence of the judicial mediation to the parties and when the parties' consent or request to refer the case to court mediation has been obtained. Once the judge (panel of judges) hearing the case has identified a high chance of an amicable settlement, the case may be referred to mandatory mediation"[16]. Thus, regardless of the category of the civil dispute, judges may exercise their discretion and refer the parties to mandatory mediation. This provision is now applied in Lithuania since January 1 of 2019. Unfortunately, such referrals are quite rare. By the opinion of some judges mediation and such obligations are incompatible, therefore, they abstain from taking the initiative to actively refer the dispute parties to mediation and leave the choice up to the parties[17].

The features of quasi-mandatory mediation in Lithuania are reflected in several provisions of the Law on Mediation and the Code of Civil Procedure. First, parties are encouraged to pursue mediation in all civil disputes through the reduced court fees. Referring to Article 80 (8) of the Code of Civil Procedure, in civil disputes where mediation has been pursued before going to court the court fees are reduced by 25%[18]. Second, Article 93 (4) of the Code of Civil Procedure establishes the possibility for judges to deviate from the set rules while allocating litigation costs, if they find that a party has refused to pursue mandatory mediation without proper argumentation or has requested for the case to be referred to mediation unfairly, used mediation unfairly or has made unfair requests during mediation[19]. This could be considered as a procedural sanction for non-use or unfair use of mediation. However, practice shows that the latter provision is not an effective instrument for promoting mediation. Judges do not use this provision in practice. It is believed that this is due to the difficulty of determining whether the party's behavior is inappropriate.

Since discretionary and quasi-mandatory forms of mandatory mediation are not widely used in Lithuania, only the Lithuanian model of mandatory mediation applied based on law will be analyzed further in this article.

[16] Code of the Civil Procedure (2002). Valstybės žinios, 36-1340. Accessible online: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.162435/asr (12 July 2022).

[17] Agnė Tvaronavičienė, Natalija Kaminskienė, Irena Žemaitaitytė and Maria Cudowska (2021). Towards more sustainable dispute resolution in courts: empirical study on challenges of the court-connected mediation in Lithuania. Entrepreneurship and Sustainability Issues, 8(3): 633-653. https://doi.org/10.9770/jesi.2021.8.3(40) (12 July 2022).

[18] Code of Civil Procedure (2002). Valstybės žinios, 36-1340. Accessible online: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.162435/asr (12 July 2022).

[19] *Ibidem*.

2. The institutional system of mediation management and qualification requirements for mediators

In order to properly prepare for the implementation of the provisions of the Law on Mediation that were drafted in 2017 and include the application of mandatory mediation in family disputes, implementation of these provisions was postponed until the 1st of January 2020. During the preparation period, relevant legal regulation were adopted, completing the development of the mandatory mediation service system. As well as that, active public education was started[20].

The new version of the Law on Mediation established high requirements for mediation services and the individuals seeking to provide these services, thus defining the subjects of mediation management and their functions in the field of mediation. The Law on Mediation established that the application of mediation is controlled and supervised by five entities: the Ministry of Justice, which is responsible for drafting legal acts establishing the legal regulation of mediation and supervising the implementation of those legal acts; Council of Judges, which coordinates the organization and execution of judicial mediation; Mediation Coordination Council, which helps to ensure the implementation of the functions that are assigned to the Ministry of Justice in the field of mediation; State Guaranteed Legal Aid Service (hereinafter – SGLAS), responsible for the organization and conduct of the mediator examination, maintenance of the List of Mediators, administration of the provision of mandatory mediation services through SGLAS; The Mediators' Examination Committee, which assesses the applicants' readiness to perform the duties of a mediator through examination, and the Mediators' Activity Evaluation Committee, which examines complaints about any possible inappropriate practice of mediators.

In order to ensure high-quality mediation services, the Law on Mediation establishes additional requirements for these services. Referring to Articles 4–6 of the Law

[20] The campaign, which was targeted at preparing for mandatory mediation and disseminating mediation, can be identified as an example of good practice. Together with the National Courts Administration, the State Enterprise Center of Registers and the State Guaranteed Legal Aid Service, the Ministry of Justice of the Republic of Lithuania implemented the project "Development of the Conciliatory Mediation System". The project was financed under the measure titled "Meeting Public Needs and Smart Public Administration" of the Priority 10 titled "Increasing the Efficiency of the Justice System" of the European Union Funds Investment Operational Program for 2014-2020. A total of almost one million euros have been allocated to the project (more information: Ministry of Justice (2018). Project "Development of the Conciliation Mediation System". Available online: https://tm.lrv.lt/lt/veiklos-sritys-1/mediation/project-conciliation-mediation-mediation-system-development (12 July 2022)). Within the scope of the project, inter alia, 420 mediators and 150 judges were trained, a methodological publication for mediators was prepared (available online: https://tm.lrv.lt/uploads/tm/documents/files/Mediatoriaus%20vadovas_%20Metodinis%20leidinys%20TM%20(pdf)(2).pdf (12 July 2022)), promotional animated films on the topic of mediation were created (for example: https://tm.lrv.lt/lt/video/mediacija-alternatyvus-ginco-sprendimo-budas (12 July 2022)), many articles were published on the national and regional media, an international conference was organized (available online: https://www.youtube.com/watch?v=5wVhMxLIVHs (12 July 2022)), etc.

on Mediation, mediation services can only be provided by mediators who are in the List of Lithuanian mediators. The List of Mediators is administered by the SGLAS. Only people of impeccable reputation who have completed at least 40 hours of mediation training and passed a special qualifying exam can be included in the above mentioned list. Exemptions are applied only for judges with at least three years of experience in their position and at least 16 academic hours of introductory mediation training, individuals with a Doctoral degree in Social Sciences, who have delivered training on mediation for a total duration of at least 100 academic hours over the last three years prior to applying to be included in the List of Mediators of the Republic of Lithuania, as well as lawyers, bailiffs or notaries, who have at least 3 years of experience in their position and completed at least 40 hours of mediation training.

Between 2019 and July 1st of 2021, 587 mediators were included to the List of Mediators of the Republic of Lithuania. Currently, most of the mediators on this list are lawyers. One of the reasons why is precisely the fact that lawyers and notaries have the option not to take the exam. The legislature's decision to exempt lawyers, notaries and bailiffs in the mediation community is viewed in two ways. On the one hand, it cannot be disputed that the representatives of the mentioned professions have legal knowledge and great negotiation skills. On the other hand, although the specificities of mediation include not only legal knowledge and negotiation skills, but mediators must need knowledge in psychology, conflict management, interpersonal relationships, communication facilitation, etc. Theoretical knowledge about mediation and its peculiarities alone does not ensure provision of quality services. This is confirmed by the results of the mediators' examination. According to the 2020 SGLAS report, the service organized 15 qualification exams for aspiring mediators, during which 94 out of 191 who took the mediators' qualification exam passed it, and 97 did not pass it.[21] It could be argued that the division of candidates based on education, experience or any other criteria in order to exempt some of the groups from taking the exam has not worked.

3. The definition of categorical mandatory mediation and the main features of the model that is applied in Lithuania

Article 2 (7) of the Law on Mediation defines mandatory mediation as mediation which must be applied in cases prescribed by law before going to court to settle a civil dispute. This means that the initiating party or potential claimant has an obligation to initiate mandatory mediation. Without applying for mandatory mediation and without being able to provide evidence that mediation has taken place or that the other party's

[21] The Annual report of the State Guaranteed Legal Aid Service (2020). Accessible online: https://vgtpt.lrv.lt/uploads/vgtpt/documents/files/VEIKLOS%20ATASKAITA%202020%20(2021%2002%2025)%20FINAL.pdf (12 July 2022).

consent to take part in mediation was not obtained, the court may refuse to accept the action. Extensive experience in courts confirms the strict application of this provision in practice.

As mentioned before, since January 1st, 2020 the provision of the Law on Mediation, which was concerned with the application of pre-trial mandatory mediation in resolving certain categories of family disputes, was enforced and applied. The peculiarities of mandatory mediation and the organizational procedures are outlined in a separate chapter of the Law on Mediation – Part V. In Article 20 (1) of the Law on Mediation, it is stated that mandatory mediation is used to resolve family disputes (for example, divorce due to the fault of one of the spouses, disputes related to the child's place of residence, interaction procedures, maintenance and payment procedures, and other disputes settled under Section XIX of the Code of Civil Procedure of the Republic of Lithuania, (hereinafter CCP)). Amendments to this article were adopted in April of 2021, providing exemptions from mandatory mediation in cases where a person who has experienced domestic violence seeks legal redress and the other dispute party is a potential perpetrator and a pre-trial investigation into domestic violence has been is in progress, a case related to domestic violence is already being heard in court, the dispute party has already been convicted of domestic violence, or a legally authorized certificate entitling the dispute party to the provision of specialized comprehensive assistance due to a potential case of domestic violence in accordance with the procedure established by law has been submitted, as well as in other cases outlined by the law[22].

Referring to Article 21 of the Law on Mediation, mandatory mediation shall be initiated at the request of one or both dispute parties. All dispute parties who are obligated to use mandatory mediation may refer to a private mediator who is on the List of Mediators and pay for his or her services or submit a request in an authorized form to the SGLAS. It can, therefore, be stated that there are two models of the use of mandatory mediation in Lithuania: mandatory mediation financed using state funds and private mandatory mediation administered by the SGLAS.

In the case of mandatory mediation administered by a state-guaranteed legal aid service, one or both dispute parties shall apply to the SGLAS for the appointment of a mediator in writing. If both dispute parties apply with a joint request for mandatory mediation, the SGLAS shall select a mediator among the mediators who have signed an agreement with them and appoint a mediator for that dispute once the SGLAS have received their consent to do so. Once the appointed mediator is given the contact details of

[22] The Law amending the Law on Mediation in regard of the changing of 20 and 21 articles (2021). TAR, 8872. Accessible online: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/2de9d334a37211ebb458f88c56e2040c?jfwid=-2w5iqfylz (12 July 2022).

the dispute parties and they initiate the mandatory mediation process. If a request for mandatory mediation is submitted to the SGLAS by one of the dispute parties, the SGLAS shall contact the other party in writing and set a time limit of 14 days for them to express their consent or dissent to engage in mandatory mediation. Once the consent is received, a mediator is appointed, and mandatory mediation begins. At the end of the mandatory mediation, the state pays the mediator, who submitted the request in the required form, for 4 hours of the mediation process, as well as for 1 hour of preparation for the mediation and for 1 hour of formalizing the results of the mediation process. If the dispute parties request for the mediation to be conducted by two mediators (co-mediation), the state pays only for the services of one mediator – the dispute parties pay for the services of another mediator. Also, if four hours of mediation are not enough to reach an agreement, the law does not provide the possibility of additional payment for the extension of mediation, but with a written agreement with the mediator, the dispute parties can continue the process if they agree to pay the mediator for the services themselves.

Private mandatory mediation is mediation, when the dispute parties choose a mediator who will perform the mandatory mediation independently by mutual agreement. If the dispute parties choose the mediator at their own discretion and sign a written agreement on the provision of mediation services, the parties themselves pay for the mediator's services. The price of private mediation services depends on what the parties agree on with the mediator. The state does not regulate the prices of private mediation services. In the case of private mediation, there are also no time limits. Unfortunately, there is no statistical data collected on the number of requests received and the number of private mandatory mediations performed.

As mentioned before, while initiating mandatory mediation one or both dispute parties may submit a written request to either the SGLAS or to a mediator of their choice from the List of Mediators of the Republic of Lithuania. In cases when only one of the dispute parties applies to initiate mediation, the SGLAS or the mediator chosen by the party shall, three working days upon receiving of the party's request, send a notice to the other party indicating that no later than 14 days after the date of dispatch of the notice, the other party must submit its decision regarding participation in mediation. When the party initiating the mediation contacts the mediator directly, there are cases when the other dispute party agrees to participate in mediation but does not agree with the initiating party's choice of mediator. In these cases, the dispute parties may agree on the choice of another mediator or apply to the SGLAS for the appointment of a mediator. Also, when mediation is initiated by one of the dispute parties, the initiating party must know the address of the other party's place of residence and indicate it in the request that is submitted to either the SGLAS or their chosen mediator in order to properly fulfill the

requirement to use mandatory pre-trial mediation. Otherwise, the SGLAS or the mediator cannot inform the other party of the possibility to use the pre-trial dispute settlement procedure – mediation. Not knowing the contact details of the other party must not restrict a person's right to judicial protection. The party initiating the dispute resolution must contact the SGLAS or the chosen mediator to initiate mandatory mediation proceedings, and in case of failure to determine the other party's place of residence, to submit to the court evidence of attempts to initiate mandatory mediation, as well as evidence that the mediation proceedings could not be applied because one of the party's place of residence was unknown.

In cases where the address of the other dispute party is known and the SGLAS or the mediator has sent them an invitation to participate in mediation, but consent is not received within the specified period or the other party refuses to participate in the mediation, the initiating party shall be deemed to have completed the statutory requirement to use mandatory mediation and has the right to apply to court to resolve the dispute. Although no procedural sanctions are established for a party who does not agree to mediation, it should be noted that a party who does not agree to mediation takes the risk of being allocated an unfavorable portion of the litigation costs by the court which has the right to deviate from the normal rules (Article 93 (4) of the CCP).

If both dispute parties apply for mediation or the consent of the other dispute party is obtained, the SGLAS or the mediator chosen by the parties shall organize a mediation meeting. The legislator leaves it up to the dispute parties and the mediator to agree on the nature and the procedure of mediation in the civil dispute by specifying the chosen set of rules or by establishing separate rules of mediation by consensus. If the dispute parties and the mediator do not agree on the nature and the procedure of the mediation or the agreement of the dispute parties does not specify the mediator's actions, the mediator shall take appropriate action, considering the circumstances of the dispute, like the possible power imbalance between the parties, the parties' wishes and the need to settle the dispute as quick as possible in reference to the law and any other legislation concerning mediation. Any of the dispute parties may withdraw from mediation without specifying the reasons for their withdrawal. The mediator shall also have a right to terminate the mediation and notify the dispute parties if find it unlikely that by continuing the mediation, the civil dispute will be settled amicably, or if, in the circumstances of the dispute and the competence of the mediator, the amicable settlement that may be reached between the dispute parties is highly unlikely or illegal. Article 19 of the Law on Mediation states that the day of the end of dispute mediation shall be the day of receipt of a written statement of disagreement or non-response of the dispute party to offer to mediate and settle the civil dispute through mediation within 14 calendar days; the day

of the submission of the mediator's written statement announcing the end of mediation to all dispute parties; the day of the submission of the any of the parties' written statement regarding the withdrawal from the mediation to the mediator and the other dispute party; the day of the submission of a written statement of all dispute parties regarding the end of the mediation to the mediator; and the day of conclusion of the settlement agreement between the dispute parties.

IV. Results and challenges of the first year of mandatory mediation

The SGLAS report[23] states that during the first year of mandatory mediation in family disputes, the SGLAS has received 6789 requests, only 203 of which were submitted at the joint request of the dispute parties. In 2751 mediation cases, mediators were selected and appointed by the SGLAS, which makes up 40.52% of all requests received. Thus, in 2020, in as many as 3442 cases, the mandatory mediation procedure ended due to one of the dispute parties disagreeing to take part or not responding until the set deadline. This makes up 50.69% of all requests to implement mandatory mediation. Data shows that Lithuanian model of mandatory mediation, according to which the initiation of mediation is only obligatory for the party who is intending to seek legal settlement, is not effective to the extent that in many mediated cases the other party does not agree to participate in mandatory mediation and this choice is allowed by law. It could, therefore, be argued that the classic model of mandatory mediation, according to which the first meeting with the mediator is mandatory for both dispute parties[24], is more effective.

Considering the results of mandatory mediation in 2020, 1983 mandatory mediations administered by the SGLAS were completed. This makes up 72.08% of all decisions taken by the SGLAS to appoint mediators. Of all the mediation cases completed in 2020, in 1045 cases – 57.61% of the all 2020 cases – a peaceful settlement was reached. Thus, mandatory mediation has the potential to reduce the number of family disputes reaching

[23] The Annual report of the State Guaranteed Legal Aid Service (2020). Accessible online: https://vgtpt.lrv.lt/uploads/vgtpt/documents/files/VEIKLOS%20ATASKAITA%202020%20(2021%2002%2025)%20FINAL.pdf (12 July 2022)

[24] This model has been successfully applied in Italy and Turkey (more on that: Miglė Žukauskaitė-Tatorė (2021). Privalomosios mediacijos civiliniuose ginčuose ir teisės į teisminę gynybą santykio Problemos. Doctoral dissertation. Available online: https://www.tf.vu.lt/wp-content/uploads/2021/04/Disertacija_Migle%cc%87_Z%cc%8cukauskaite%cc%87-Tatore%cc%87.pdf, 13 July 2022). Making it obligatory for both of the dispute parties to attend a meeting with a mediator and only then gaining the right to withdraw from mandatory mediation allows the dispute parties to have access to the service that is offered to them and to calmly assess its benefits in collaboration with a professional in the field. On the other hand, according to such a model, the parties are equal, and in the event that one of them fails to perform his or her duties, the judges can apply procedural sanctions.

the courts by more than half through navigating the dispute parties towards agreeing on more sustainable solutions that are in their best interests.

As mentioned before, mandatory mediation that is financed by the state can last up to four hours. The state budget also pays the mediator for their preparation for mediation, which can take up to one hour, and for the processing of mediation results, which can take up to one hour as well. In 2020, a total of EUR 146147.19 was paid to mediators for the mandatory mediation services that they provided[25].

When planning the further development of mandatory mediation in Lithuania, the biggest concern is that in 2020 more than 50 percent of people did not agree or did not respond to the offer to participate in the mandatory mediation financed by the state. This indicates that the institute has not gained public trust yet. There are also outstanding concerns about the rather unfavorable attitude of lawyers towards peaceful settlement of disputes[26].

Afterall, it should also be noted that an objective assessment and analysis of the 2020 statistics on the dispute parties' participation in mandatory mediation is complicated due to the pandemic caused by Covid-19 disease. The 2020 quarantine that was enforced from March to June and from December onwards limited the possibility of providing direct (in person) mandatory mediation services. Some of the dispute parties and mediators had limited access to remote communication information technology and postponed mediation until the end of quarantine. It is also likely that, for the same reason, not all the dispute parties who received information from the SGLAS by email about the offer to participate in the mediation were able and knew how to read it. It is also undeniable that a significant number of individuals still view mandatory mediation as a "mandatory" formality and not as an effective way of resolving a dispute. This may have been influenced by how inadmissible the name of the mediation itself – "mandatory mediation" – is. The word "mandatory" has a negative connotation for many members of society and evokes negative associations, thus, there is a natural desire to avoid it if possible. This is reinforced by the fact that the SGLAS sends information about the offer to participate in mediation in the form of a formal written request, therefore, not everyone can understand what, how and why they should do after receiving such a letter.

Not only did the 2020 experience in the application of mandatory mediation highlight certain shortcomings of the Lithuanian model, but it also identified gaps in legal acts and provisions, which need to be improved. For example, the legislation does not clearly outline which categories of family disputes need mandatory mediation and which

[25] The Annual report of the State Guaranteed Legal Aid Service (2020). Accessible online: https://vgtpt.lrv.lt/uploads/vgtpt/documents/files/VEIKLOS%20ATASKAITA%202020%20(2021%2002%2025)%20FINAL.pdf (13 July 2022).

[26] Natalija Kaminskienė, Agnė Tvaronavičienė, Gražina Čiuladienė and Inga Žalėnienė (2016). *op. cit.*

do not. There is no conclusive list of disputes that would require mandatory mediation as a pre-trial dispute resolution procedure established by law. Not only does this uncertainty pose problems for the dispute parties themselves, who usually do not have sufficient legal knowledge, but even for their lawyers. Therefore, it remains unclear exactly when it is a duty to apply mandatory mediation. Besides, family disputes often consist of several issues to be resolved, not all of which can be resolved during mediation (for example, the issue of paternity cannot be resolved during mediation, but other issues related to parental responsibility and the best interests of the child, such as the procedure for maintaining communication with the child, etc. may be mediated in a comprehensive manner).

Another important aspect is the protection of the best interests of the child during mediation. Article 15 (4) of the Law on Mediation states that a mediator who has established that there are children or other people whose interests must be protected in resolving a dispute in accordance with the procedure established by law may involve children or other persons in the process of resolving the dispute through mediation[27]. However, neither the law nor the by-laws or recommendations detail how and when a child can be integrated, what special qualification requirements apply to a mediator who engages in mediation, which includes a child.

The use of mandatory mediation as a mandatory pre-trial dispute resolution procedure established by law is also a cause for concern in family disputes in cross-border situations. In certain cases, the dispute is settled in the court which it was first brought to. In such a case, Lithuania loses the fight for jurisdiction, since mandatory mediation may last from a few weeks up to several months and does not prevent the other dispute party from initiating legal proceedings in a more favorable jurisdiction.

Time constraints in mandatory mediation processes administered by the SGLAS are often discussed in the community of mediators. The main concern is that the parties are reluctant to continue the mediation process at the end of the state-funded mediation period. Practice also shows that one hour is hardly ever enough to negotiate a peace treaty. Although there is no legal obligation for mediators to prepare such a document, in practice, the parties expect that. A well-drafted peace agreement, even in simple cases, takes more than an hour, so mediators either work for free or refuse to provide such a service, which makes the parties dissatisfied with their need to then consult lawyers and pay the market price for drafting legal documents.

On the one hand, a system of mandatory mediation funded by the state and administered by a state institution can give the dispute parties greater confidence in the process. On the other hand, a considerable part of the public is skeptical about free services and

[27] Law on the Mediation (2020). TAR, 2020-13616. Accessible online: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.325294/asr (13 July 2022).

mistrust the qualifications of those who provide it. Time and examples of successful mediation processes are required to change this view. Participation in mandatory mediation gives an opportunity to resolve family disputes in a deeper sense. They help the parties themselves to understand the causes of the dispute, as well as their own and the other party's interests, thus reducing the escalation of the dispute, restoring their connection, increasing the involvement of the parties themselves in making decision that are acceptable to them, while at the same time protecting the children's interests in family disputes, saving time and money and preventing new conflicts from arising in the future.

What's next? The Law on Mediation establishes the mandatory application of mediation in family disputes and the possibility to expand the application of mandatory mediation in separate categories of civil disputes through other laws. It is noted that in 2017 a draft law was submitted to the legislator's hearing, where in addition to family disputes, it was also proposed to use mandatory mediation in low-value disputes. However, during a hearing in the Law-and-Order Committee in the Lithuanian parliament, it was decided to first test mandatory mediation in family disputes and, based on the results of its application, decide regarding the possibilities for its development in other categories of disputes. Paragraph 8.3.5. of the plan for the implementation of the provisions of the government program[28] states that an ex-post evaluation of the impact of the legal regulation of mandatory mediation in family disputes, Paragraph 8.3.6. states that a decision on the development of mandatory mediation in criminal proceedings and consumption disputes will be made in accordance with the ex-ante evaluation on the impact of the legal regulation of mandatory mediation.

V. Conclusions

Although mediation in Lithuania was first applied in practice a few decades ago, it is still on the path of intense development. One of the most important steps is the establishment of mandatory mediation in family disputes. The preconditions for this change were the experience of applying judicial mediation, the European Union's policy in the field of justice that promotes the use of mediation, and the fruit of social partnership – the Conception for the Development of the Mediation System, which provides a clear strategy for introducing this alternative means of dispute resolution into the Lithuanian legal system.

[28] The ruling of the Government of the Republic of Lithuania from 10 March 2021 No. 155 „In regard of confirmation of the Measures of the implementation of the Government Program". TAR, 5318. Accessible online: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/bef7d43286fe11eb998483d0ae31615c?jfwid=72zogvklp (13 July 2022).

In present, all three forms of mandatory mediation mentioned in the scientific literature are established in Lithuania. The Mediation Law established the use of categorical mandatory mediation in family disputes, the Code of Civil Procedure provides the judge with the discretion to order mandatory mediation in any civil dispute where a peaceful settlement is possible, and the law includes some procedural mediation incentives (stamp duty reduction) and even procedural sanctions for judges (the judges' right to deviate from the established set of cost-sharing rules in cases when the judge establishes that the dispute party has refused to participate in mediation unreasonably or acted in bad faith). Unfortunately, the latter forms are generally not applied in practice.

In Lithuania, the introduction of mandatory categorical mediation was a thoughtful and consistent process. In order to ensure the high quality of mediation services, qualification requirements for mediators have been established, institutions responsible for the management of mediation have been chosen, the legal regulation of mediation has been detailed, and the procedure for initiating mandatory mediation has been established. At the same time, after the mandatory initiation of mediation, the dispute parties were given the freedom regarding participation in the mediation, its process and execution procedure, and the possibilities of agreement.

The liberal model of mandatory mediation chosen in Lithuania requires the initiation of mandatory mediation for the party that intends apply to court. The other dispute party has a right to decide whether it is acceptable to participate in such proceedings. Such "requirement" does not violate the essence of the mediation and ensures that the voluntary nature of mediation is sustained. The purpose of this model is to provide the possibility to parties to try out mediation, giving the dispute parties freedom to choose a mediator, to withdraw from mediation at any stage, and freedom to come to an agreement. The implementation of this model ensures the availability of mediation to all dispute parties, regardless of their income, by providing access to 4 hours of state-financed mediation with a mediator appointed by the SGLAS, and 2 more hours which are dedicated to preparing for mediation and concluding its results.

The experience of the first year suggests that many disputes covered by the mandatory mediation rule do not reach the mediator because, if one of the dispute parties is obliged to initiate the proceedings, the other party can respond negatively to the offer to mediate without any consequences. For this reason, more than 50 percent of family disputes are still settled in the courts without pursuing out-of-court mediation. The emerging practice of mandatory mediation has also pointed out other gaps in the present legal framework and provisions that need improvement. There is a lack of clarity regarding disputes that the mandatory mediation rule applies to. There are no provisions detailing the protection of the best interests of a child and the hearing of a child during

mandatory mediation. Sometimes, Lithuania loses the battle for jurisdiction in family disputes in cross-border situations because of mandatory mediation. Experience of working in mandatory mediation processes administered by the SGLAS has revealed a lack of state funding. These are just some of the most important challenges that Lithuania needs to overcome in order to meet society's expectations and strengthen its confidence in mediation.

Abstrakt

Obowiązkowa mediacja w konfliktach rodzinnych na Litwie: model i doświadczenia po pierwszym roku obowiązywania

Jednym z najważniejszych dotychczas etapów rozwoju mediacji na Litwie stało się wprowadzenie obowiązkowej mediacji w sprawach rodzinnych. W opracowaniu opisano model obowiązkowej mediacji przyjęty na Litwie oraz omówiono skutki jego wprowadzenia, które dało się zaobserwować w ciągu roku od jego wejścia w życie, ponadto zidentyfikowano największe wyzwania tego modelu. Elastyczny model mediacji wprowadzony na Litwie wymaga od strony zamierzającej wszcząć postępowanie sądowe uprzedniego rozpoczęcia obowiązkowego postępowania mediacyjnego. Druga strona sporu ma możliwość wyboru – albo przystąpienia do mediacji, albo odrzucenia tej propozycji. Nadto, koszt obowiązkowej mediacji w sprawach rodzinnych jest pokrywany ze środków budżetowych. Doświadczenia pierwszego roku obowiązywania przepisów wprowadzających obowiązkową mediację w sprawach rodzinnych pokazują, że pomimo wysokiego odsetka mediacji zakończonych ugodą ponad połowa spraw objętych zakresem stosowania obowiązkowej mediacji nie dociera do etapu spotkań z mediatorem, kończąc się odmową udziału w mediacji przez drugą stronę. Z uwagi na dopuszczoną w przepisach możliwość przystąpienia do mediacji albo odrzucenia udziału w niej wiele stron korzysta z tej drugiej możliwości. Dotychczasowa praktyka pokazała również inne luki w obecnej regulacji obowiązkowej mediacji w sprawach rodzinnych, takie jak: nieostry katalog spraw, które podlegają obowiązkowej mediacji, brak odpowiednich reguł mających chronić najlepszy interes małoletnich czy dopuszczających wysłuchanie małoletnich dzieci w procesie mediacji. Niedoskonałość obecnych przepisów regulujących obowiązkową mediację skutkuje m.in. tym, że w niektórych transgranicznych postępowaniach w sprawach rodzinnych strona litewska przegrywa spór o ustalenie jurysdykcji. Ponadto, niskie stawki godzinowe przewidziane dla mediatorów prowadzących mediację finansowaną ze środków budżetowych skutkują spadkiem ich motywacji z uwagi na niskie wynagrodzenie za wykonaną pracę. Nakreślone wyżej wyzwania, będące konsekwencją obecnie przyjętego na Litwie modelu obowiązkowej mediacji w sprawach rodzinnych, stanowią przeszkodę na drodze jego pełnej skuteczności.