Co-funded by the Erasmus+ Programme of the European Union

MEDIATS Mediation: Training and Society Transformation

NEGOTIATIONS AND MEDIATION: FROM DIFFERENTIATION TO MUTUAL COMPLEMENTARITY

***Bartusiak Pavlo*[1]**

[1]*Yuriy Fedkovych Chernivtsi National University, Chernivtsi, Ukraine, p.bartusiak@chnu.edu.ua, ORCID: 0000-0002-8355-779X*

Abstract. *Due to the permanent crisis in the judicial system Ukraine is constantly reforming the organization of courts, improving the legal regulation of the administration of justice. On the other hand, from the society itself, like mushrooms after the rain, there emerge alternative ways of resolving disputes, including negotiations and mediation. The purpose of this article is to study the variants for understanding by the scientific community of such concepts as «negotiation» and «mediation» through the use of methods of comparison, analysis and synthesis. The article demonstrates the existence of several approaches to the definition of negotiation and mediation, which are characterized by the differentiation of these phenomena or their complementarity by each other. The models for understanding of negotiation and mediation, that proposed in the article, will help all those, who are interested in these ways of alternative disputes resolution, to better understand their essence and purpose, to successfully apply negotiation techniques during mediation sessions.*

Keywords: *negotiations, mediation, alternative dispute resolution, conflict, mediation techniques.*

JEL Classification: *D74, F51, J52, K00.*

Formulas: 0; fig.: 0; tabl.: 0; bibl.: 18.

Introduction

Western European countries and many other developed countries are characterized by diversity in ways of resolving certain interpersonal or intergroup conflicts. As well as litigation, alternative methods of dispute resolution, especially negotiation and mediation, are used successfully there.

Instead, nowadays, Ukrainian society remains quite conservative in the use of means for alternative dispute resolution and traditionally prefers to resolve the vast majority of conflicts through the application to the courts.

The Ukrainian legislator is still looking for the optimal configuration for the legislative regulation of mediation, so that the latter meets the needs of society and, in particular, the professional community of practicing mediators. Thus, as of September 2020, the Verkhovna Rada of Ukraine (the parliament of Ukraine) of the IX convocation registered three bills on mediation for № 2706 from 28.12.2019, for № 3504 from 19.05.2020 and for № 3504-1 from 04.06.2020. One of them, namely the draft law of Ukraine «On Mediation» № 3504 of 19.05.2020 was adopted on 15.07.2020 by the Ukrainian Parliament in the first reading.

As for the actual use of mediation in Ukraine to resolve disputes, it must be argued that, firstly, mediation is beginning to be heard by the general public through the educational work of associations of mediators and universities, and secondly, more and more mediation sessions are being held by the mediators, who received professional training, both theoretical and practical, mostly in universities and professional associations of mediators.

On the other hand, the negotiations in Ukraine are still outside the field of view of legislators. They are also recognized as an alternative way of resolving disputes. In Ukrainian society it is generally accepted, that negotiation is a self-evident phenomenon, and negotiation skills are acquired by themselves and depend on the ability and talent of the lawyer or other negotiator. Only a small number of Ukrainian universities offer specialized training programs in negotiations.

In connection with the above there is a need to clarify the boundaries of the phenomena of mediation and negotiation, their significance for alternative dispute resolution and, ultimately, to define models for understanding negotiation and mediation in the scientific community.

Literature Review

It should be noted, that in Ukraine there are no large number of scientific works on mediation and negotiation, which indicates that these phenomena are at the initial stage of their development by domestic scientists.

Mykhaylo Tsyurupa in his work «Fundamentals of Conflictology and Negotiation Theory» explores negotiations in the field of business relations [1, p. 115]. Also, Tetyana Yakhno and Iryna Kurevina in the joint work «Conflictology and Negotiation Theory» consider the psychological, organizational features of business negotiations [2, p. 8].

In the work «Mediation in the Professional Activity of a Lawyer» edited by Natalia Krestovska and Louisa Romanadze the team of authors defines negotiations as the simplest way of alternative dispute resolution, in which the parties do not involve a third neutral person (mediator) but try to resolve the dispute themselves [3, p. 87].

Oleksandra Karmaza in the scientific article «Mediation and Negotiations as Alternative Ways of Resolving Disputes» points out, that negotiations and mediation have common and distinctive features, that relate them to alternative dispute resolution procedures, namely: the principle of dispositiveness, plurality of parties, confidentiality, universal nature, voluntary fulfilment of agreements, etc [4, p. 16-17]. However, according to her, negotiations take place without a third party, without a mediator, while during mediation a mediator participates, which does not make decisions for parties, but works within the mediation procedure with the interests of the parties, takes into account the balance of forces, etc [4, p. 17].

As for scientific achievements on negotiations and mediation in the Western world, their number is much greater, than the works of domestic scholars.

For the most part, negotiation and arbitration are considered here as ways of alternative disputes resolution. The most common is the following triad of methods for alternative dispute resolution: negotiation - mediation - arbitration.

Such works include, for example, the scientific research by Maria Goltsman and Johannes Hörner and others named «Mediation, Arbitration and Negotiation», where the authors determine that under arbitration, the two parties commit to conform to the decision of a neutral third party. Under mediation instead, compliance with the third party's suggested settlement is voluntary. Finally, under unfacilitated negotiation, the two parties engage in (possibly arbitrarily long) face-to-face cheap talk [5, p. 20].

In the work «Using Negotiation, Mediation, and Arbitration to Resolve IRS-Taxpayer Disputes» Gregory P. Mathews reveals the specific features of negotiation, mediation and arbitration in the disputes of taxpayers with Internal Revenue Service in USA. It is interesting, that Gregory P. Mathews refers mediation and arbitration to the formal ADR initiatives [6, p. 716].

The research «Dispute Resolution: Negotiation, Mediation, Arbitration, and Other Processes» edited by Stephen B. Goldberg, Frank E. A. Sander and others points out, that the most common form of dispute resolution is negotiation: «Compared to processes using neutral «third parties» negotiation has the advantage of allowing the parties themselves to control the process and the solution. If the parties cannot settle the dispute themselves and bring in a third party, they cede some control over the process, but not necessarily over the solution. In fact, a critical distinguishing factor among the third-party processes is whether the neutral has power to impose a solution or simply to assist the disputants in arriving at their own solution. The most common example of the latter is mediation; the former is commonly called adjudication, whether performed by a court or by a private adjudicator known as an arbitrator» [7, p. 42].

Authors of the above book emphasize that, elements of these three primary processes – negotiation, mediation, and adjudication – have been combined in a number of ways in a rich variety of «hybrid» dispute resolution processes [7, p. 42].

Another feature of Western scientific literature is its accent on certain types of negotiations depending on the specific scope of their conduct.

For example, Stefanie Jung and Peter Krebs in work «The Essentials of Contract Negotiation» pay attention to the business contract negotiations, i.e. B2B (business to business) negotiations. Their work is dedicated to the explanation of tactics, strategies, overall concepts as well as framework conditions, that can apply to negotiations between companies as well to negotiations held within the company [8, p. 1].

Wytze van der Gaast in scientific investigation «International Climate Negotiation Factors Design, Process, Tactics» unfold the peculiarities of international climate negotiations that are complex as they address a global environmental problem which affects and requires collaboration between all countries [9, p. 1].

Thomas Strentz in research «Psychological Aspects of Crisis Negotiation» shows methods and strategies of hostage/crisis negotiations in the practice of police and FBI. As Thomas Strentz argues, the goal of crisis anti-terrorism negotiations is the preservation of human life, trying to bring peace and termination of a conflict without injury to an-

yone [10, p. 6].

Despite the large number of English-language scientific investigations on negotiation, mediation, scientists have not yet conducted a comprehensive classification of approaches to understanding negotiation and mediation. That is, this problem was not put on the agenda by scholars and, accordingly, was not solved by the scientific community.

Aims

The aim of this article is the searching, demonstration and comparison of different approaches of scientists to understanding such social phenomena as negotiation and mediation.

Methods

To achieve the aims of the article, the following scientific methods were used: the method of comparison – to identify common and distinctive features in phenomena of mediation and negotiation; the method of analysis – to identify the features of negotiations and mediation, their nature; the method of synthesis – for the classification of approaches to understanding negotiation and mediation, generalization of the obtained results and formulation of conclusions.

Results

Taking into account the existing scientific developments in Ukraine and the Western world, a number of approaches to understanding negotiation and mediation can be identified. As a rule, each of these approaches is already characterized by specific thematic scientific elaborations, that improve and detail it.

Firstly, negotiation and mediation are considered as separate ways of alternative disputes resolution.

A large number of scientific papers are based on the differentiation of negotiations and mediation and their joint typology as ways of alternative disputes resolution.

Thus, Carrie Menkel-Meadow notes, that in an era characterized by a wide variety of processes for resolving disputes among individuals, organizations, and nations, process pluralism has become the norm in both formal disputing systems, like legal systems and courts, and in more informal, private settings, as in private contracts and transactions, family disputes, and internal organizational grievance systems [11, p. 3]. She states: «There are a number of factors, that delimit the kinds of processes which parties may choose or may be ordered to use under rules of law, court, or contract. The «primary» processes consist of individual action (self-help, avoidance), dyadic bargaining (negotiation), and third party facilitated approaches (mediation), or third party decisional formats (arbitration and adjudication)» [11, p. 3].

The authors of the above-mentioned Ukrainian research «Mediation in the Professional Activity of a Lawyer» make the differentiation between negotiation and mediation. They indicate, that negotiation is a procedure in which two or more parties participate without the involvement of other persons in order to reach the agreements on issues of their interest and to develop ways to resolve disputes between them, mediation is the negotiation between the parties with participation of a third party, a mediator, who, carrying out the general management of the procedure, helps the parties to establish communication with each other and independently reach the most effective agreements on disputed issues, but has no authority to resolve the dispute [3, p. 89-90].

Finnish researcher Emmi E. Lehtinen identifies general, procedural and resulting differences between negotiation and mediation. According to her, the general distinguishing features between mediation and negotiation are the next: negotiation is not official, and mediation is more formal because of the presence of a mediator; negotiation does not require a conflict, even though it can be used as a soft dispute resolution method (negotiating is normal communication), but mediation requires a conflict, which will be mediated [12].

To the procedural differences of negotiation and mediation Emmi E. Lehtinen includes, the following: in negotiation parties decide on everything on procedure like time, place, logistics and they take care of everything themselves, but in the process of mediation mediator decides on all things on the procedure such as time, space, logistics and arranging them; negotiation usually happens at the premises of one party and in mediation parties meet mediator in a neural place; if negotiation has outsiders, they side with one the parties, in negotiation everybody is focused on what they are getting out of the deal, but mediation procedure includes a mediator, who has no personal agenda; no one decides on the procession of negotiation as it is based on the quality of communication skills of the parties,

instead mediator leads discussion, gives out turns to speak and decides on breaks; negotiation does not have formula and mediation has more structure than negotiation [12].

As for the resulting differences, according to Emmi E. Lehtinen, in negotiation parties decide on the outcome of the resolution together. Settlement after negotiation is a new contract, which is confirmed by the court usually only when the parties successfully negotiate during court procedure. Then in mediation parties decide on the outcome of the resolution together and mediator does not decide the matter. Settlement after mediation is a new contract, which can be confirmed to be enforced at national court [12].

Secondly, negotiation is considered as one of the mediation procedures (stages).

Negotiation can take place between the parties in mediation, most often at the stages of storytelling and the development of options, because these stages themselves at most require direct communication between the parties with the assistance of a mediator. In addition, negotiations between the parties of mediation lead to the conclusion of a mediation agreement between them.

Negotiations during mediation can also take place between mediators (e.g. in co-mediation), between representatives of the parties or their lawyers.

In this case, negotiations are no longer an independent way of alternative disputes resolution, but a structural element of the mediation procedure.

Well-known mediator and negotiator Jeffrey Krivis identifies negotiation as one of the stages of mediation. He indicates, that it was the right time to move into the negotiation stage when the parties were starting to repeat themselves and he could see, that the attorneys were anxious to work on what they came to the table for the deal. To accomplish this, the task was to begin the bargaining dance between the parties [13].

As Jeffrey Krivis argues the important action of mediator on this stage is the suggestion to the parties, that he and his attorney start considering other options, that would require courageous thinking on his part, including significantly reducing his expectations so that other party could start figuring out some ways to get to the agreement[13]. Then Jeffrey Krivis states: «… the result on the negotiation stage, we were trying to achieve was «flexibility and innovation». This would allow us to close the gap in the negotiation and ultimately come together» [13].

Trey Bergman in his work «How to «Win» Every Mediation» reveals features of the negotiation procedure in the framework of mediation and gives recommendations to the participants of mediation on its successful conducting. The author notes: «Whether it is face to face negotiations with your opposing counsel or through the assistance of a mediator, the basic rules are the same. Just remember that the key to a successful win-win result is preparation and commitment to a cooperative mutual problem solving style. There is nothing more empowering and enjoyable then when the parties successfully conclude a mediation or a negotiation feeling like they have both won» [14].

Thirdly, negotiation is considered as one of the techniques, skills of a mediator.

Quite often practicing mediators and scholars perceive negotiation as one of the strategies for successful mediation. The mediators themselves use different styles of these negotiation, their techniques at the appropriate stages of mediation.

Mediator Alexander Polsky identify mediation as the facilitated negotiation. In his opinion, one of the stages of mediation is the negotiation stage [15].

Alexander Polsky distinguishes a number of mediator styles in negotiation:

«The competitive bargainer is often referred to as a «hard» bargainer or a «positional» bargainer. This negotiator wants to «win» and often at all costs. Winning is defined in a unilateral sense and may often come without full regard to the costs. Arguing over «positions» endangers relationships, increases costs in litigation and often produces inferior results.

The cooperative negotiator, sometimes thought of as «soft» wants to get along with everyone and produce an easy outcome in what is often a difficult situation. This technique often succeeds, but frequently leaves the cooperative negotiator asking the question «What did I leave on the table?».

Then there is interest-based negotiation. The Harvard Negotiation Project deserves credit for coining this concept. In actuality, smart negotiators have been doing it throughout history. This process focuses on basic interests, mutually satis-

fying options and fair standards wherever possible.

In this process there are four key points: (1) separate the people from the problem (2) focus on interests and not positions (3) create a variety of possibilities before negotiation or deciding what to do (4) focus on objective standards» [15].

As Alexander Polsky resumes, the negotiator's style might be distributive (offer followed by counter offer, etc.) or facilitative (mediator talks privately and facilitates movement of issues, terms and numbers until agreement is reached.): «The back-and-forth of distributive negotiation is hard on the parties. Emotional experiences tend to feel as impersonal as negotiating for a commodity. In a facilitative negotiation, the mediator does not deliver offers as much as concepts, wrapping into the discussion an interest-based analysis through the use of open-ended questions. In this way, the parties themselves can come to their conclusions in an objective manner. It's not who is right or wrong, it's what the jury says, and how the process impacts one's life or business. This is well used in emotional cases. It is driven by issues, and can be much easier and softer on the parties» [15].

Most often, the skills of negotiation in mediation are used by the mediator during, in particular, but not exclusively, caucuses, «shuttle mediation». It should be noted, that the purpose of using any style of negotiation by a mediator should not be to convince the party or to reach an agreement with him or her, as it is in the classical negotiation as a method of alternative dispute resolution. The purpose of the use of negotiation techniques in mediation is to bring the parties closer to resolving their conflict, to remove the confrontation, to shift the communication of the parties in a non-aggressive, productive direction.

David Goldwich points out, that the mediator's skill in negotiation and dispute resolution, combined with his people skills, can often help the parties overcome their differences and reach an acceptable solution [16].

He argues: «The beauty of mediation is its win-win philosophy. The parties are usually emotional and looking to beat their counterpart. (Remember, they may have been on their way to court a few minutes earlier.) Their attorneys are trained to be adversarial and are looking to justify their fees by giving their client a resounding victory, perhaps destroying their opponent in the process. However, the mediator is trained to look for win-win solutions that others may overlook. She is often able to help the parties reach a win-win agreement, or at least an acceptable compromise... Of the three methods of dispute resolution, mediation is most useful in keeping with the spirit of a win-win negotiation. In fact, mediation is a form of negotiation, with the guidance of an expert» [16].

Fourthly, negotiation is considered as an independent phenomenon, that may or may not be relevant to alternative dispute resolution.

The latter approach is characterized by great diversity. This includes all types of negotiations, where their participants first of all establish cooperation, achieve mutually beneficial results. In these types of negotiations, the existence of a dispute between the negotiators is not a mandatory attribute.

Fourth approach includes international (diplomatic) negotiation, political negotiation, business (commercial) negotiation, and so on.

According to Roman Shypka, international negotiation is a special type of interaction between participants in international relations in order to resolve conflicts, settle disputes or establish cooperation in various fields, coordinate foreign policy actions through mutual discussion by representatives of states on bilateral and multilateral levels [17, p. 87].

Yulia Sekunova points out that political negotiation is the most effective method of overcoming political conflicts, as negotiation leads to the solution of problems peacefully and take into account the interests of the parties [18]. She states: «Negotiation is first and foremost a dialogue that helps people with different views, nationalities, religions, desires to find common ground, reach consensus and coexist in the complex conditions of the modern world. And most importantly, political negotiation is the main component of diplomatic protocol and etiquette of current international politics» [18].

Mykhaylo Tsyurupa in his work «Fundamentals of Conflictology and Negotiation Theory» notes that negotiation in the field of business relations – is an active process of effective communication and discussion of positions in the business by the parties, which is aimed to reconcile common interests [1, p. 115].

The same researcher, based on the analysis of the American professional literature, identifies the following types of business negotiations: distributive (negotiation, the slogan of which is the traditional dilemma of the result «win-lose»), integrative (joint solution of problems in order to achieve the desired results for both parties on the principle «win-win»), negotiations on structuring relations (held to create desirable situations of interaction between different organizational structures, for stable cooperative relations), internal organizational negotiation (negotiation of groups, conducted through representatives to resolve conflicts in the production cycle), international negotiation (a form of formal communication between governments and peoples) [1, p. 116-119].

Therefore, business negotiations can include the participation of lawyers as representatives of legal entities or individuals in negotiations with private (e.g. adjustment and conclusion of contracts) and public (e.g. obtaining a license) sectors.

Discussion

Each of the above approaches to understanding negotiation and mediation complements each other. All of them coexist, leaving their impress on the perception of negotiations in a particular community.

What they all have in common is that both negotiation and mediation are aimed at non-conflicting communication between stakeholders in order to reach joint decisions, agree on issues etc.

We can trace a certain tendency in the understanding of negotiations among Ukrainian scholars. Negotiation until the mid-2000s were mostly considered by them in the framework of business negotiations, diplomacy (including international negotiations), political negotiations, but with the rooting of the idea of alternative dispute resolution, mediation in particular, into the social matrix Ukrainian researchers began to look at negotiation as a method of ADR. That is why national investigations of negotiation as a method of alternative disputes resolution, comparing them with litigation, arbitration and mediation have significantly multiplied.

Conclusion

In the course of research on the question of scientific understanding of the negotiation and mediation, we identified four approaches:

- an approach in which negotiation and mediation are differentiated as separate ways of alternative disputes resolution with their own peculiarities;

- an approach in which negotiation is considered as one of the integral elements of the mediation procedure, when the parties communicate directly with each other to reach a consensus on the phases of storytelling, developing options, formation of the text for the mediation agreement. Some scholars even single out a separate stage of mediation – the stage of negotiation;

- an approach in which negotiation is considered as the necessary skill of the mediator, his technique. The success of mediation itself depends on the success of the mediator's mastery of the negotiation technique. The mediator uses the technique of negotiation during joint sessions or caucuses. His goal is not to convince the party in his rightness, but to establish non-conflicting communication between the parties and to reach «win-win» solution for them;

- an approach in which negotiations are considered as an independent way of communication, often not even related to the emergence of a dispute. Under this perspective, the broad concept of negotiation includes international (diplomatic) negotiation, political negotiation, business (including commercial) negotiation, etc.

Acknowledgements

This publication is prepared as part of the implementation of Grant Project «Mediation: Training and Society Transformation» of the EU Program ERASMUS + KA2: CBHE.

References:

1. *Tsyurupa, M. (2004). Fundamentals of Conflictology and Negotiation Theory: Study Guide. Kyiv, Ukraine: Kondor.*
2. *Yakhno, T., & Kurevina, I. (2012). Conflictology and Negotiation Theory: Study Guide. Kyiv, Ukraine: Tsentr uchbovoyi literatury.*
3. *Krestovska N., & Romanadze, L. (2019). Mediation in the Professional Activity of a Lawyer: Textbook. Odesa, Ukraine: Ekolohiya.*
4. *Karmaza, O. (2020). Mediation and Negotiations as Alternative Ways of Resolving Disputes. Pidpryyemstvo, Hospodarstvo i Pravo, 5, 13-18.*

5. Goltsman, M., Hörner J., Pavlov G., & Squintani F. (2009). Mediation, Arbitration and Negotiation. Journal of Economic Theory, 144 (4), 1397-1420.
6. Mathews, G. (2004). Using Negotiation, Mediation, and Arbitration to Resolve IRS-Taxpayer Disputes. Ohio State Journal on Dispute Resolution, 19:2, 709-738.
7. Goldberg, S., Sander, F., Rogers, N., & Cole, S. (2012). Dispute Resolution: Negotiation, Mediation, Arbitration, and Other Processes. New York, USA: Wolters Kluwer Law & Business.
8. Jung, S., & Krebs, P. (2019). The Essentials of Contract Negotiation. Cham, Switzerland: Springer Nature Switzerland AG.
9. van der Gaast, W. (2017). International Climate Negotiation Factors: Design, Process, Tactics. Cham, Switzerland: Springer Nature Switzerland AG.
10. Strentz, T. (2018) Psychological Aspects of Crisis Negotiation. Third edition. New York, USA: Routledge.
11. Menkel-Meadow, C. (2015.) Mediation, Arbitration, and Alternative Dispute Resolution (ADR). Legal Studies Research Paper, 2015-59, 2015.
12. Lehtinen, E. (2017). Difference Between Negotiation and Mediation. Retrieved from http://www.riidanratkaisu.com/difference-negotiation-mediation/?lang=en
13. Krivis, J. (1999). The Five Stages of Mediation. Retrieved from https://www.mediate.com/articles/krivis.cfm
14. Bergman, T. (2013). How to "Win" Every Mediation. Retrieved from the website of the Association of Attorney-Mediators: https://www.attorney-mediators.org/Resources/Documents/How%20to%20Win%20Every%20Mediation.PDF
15. Polsky, A. (2012, September). The Five Steps Of Mediation (and Negotiation). Plaintiff, 1-3.
16. Goldwich, D. (2010). Win-Win Negotiations: Developing the Mindset, Skills and Behaviours of Win-Win Negotiators. Singapore, Singapore: Marshall Cavendish Business.
17. Shypka, R. (2012). Models of International Negotiation. Visnyk Lvivskoho universytetu. Seriya mizhnarodni vidnosyny, 30, 87-92.
18. Sekunova, Yu. (2015). Negotiations and Diplomatic Protocol as a Means of Solving Political Conflicts. Retrieved from https://sworld.education/konfer39/335.pdf