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## **COULD MEDIATION AS ONE OF THE MOST IMPORTANT ADR FORMS EXIST UNDER TODAY'S LAW IN LITHUANIA?**

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The article was delivered for edition in January, 2002. The article was ready for publishing in October, 2002 for "International Journal of Baltic Law" Vol. 1, (2002).

### ***Introduction***

There were lots of changes in Lithuania's social and political life during the last decade of the 20<sup>th</sup> century. Its escape from the Soviet system and, thus, the transition from a socialist republic to a free democratic state resulted in big alterations in Lithuania's life. A new independent state had to reorganize many spheres of its life, to pass legislation conforming to needs and principles of the real democratic society. These changes also brought lots of new things and ideas from the western world.

One of these new things is mediation - a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.<sup>1</sup> There should be stated and considered that this new thing we talk about is one of the methods of alternative dispute resolution<sup>2</sup>, which has been developed in modern world over the last twenty - thirty years. The concept of mediation as a form where the third party helps disputants resolve their conflicts and come to their own decisions have probably been practiced since the existence of three or more people on earth. Mediation is not a novel invention but an adaptation of what has already existed in other cultures or in other times.<sup>3</sup> Lithuania is not an exception too. Traditionally it was a wise man in almost every village to whom people addressed with their problems and conflicts. Also, we should not forget the important role the catholic clergy played in making people to come together to solve their disputes. It could also be considered as a form of mediation.<sup>4</sup> But in his work the author will refer only to a modern approach of mediation.

This article analyzes the situation of mediation in Lithuania: its current status, laws regulating it and future perspectives. Using descriptive and comparative methods the author will try to show problems and obstacles to mediation in this country, will also try to find some solutions for the improvement of this dispute resolution form. Moreover, it will be looked at the experience of leading mediation countries, especially the U.S.A., and Eastern and Middle European countries, such as Hungary, Bulgaria, Romania, Poland etc., to highlight Lithuania's way to implementation of mediation. The experience of these European countries is especially important as they and Lithuania have lots of things in common: together they had escaped the Soviet influence, faced the same problems of becoming free democratic states.

In the first part the author will briefly describe the idea of mediation and its advantages which make it one of the most important and widely used forms of ADR. It will not be deeply looked at the mediation process, methods, techniques etc.

The second part will cover things related to mediation in Lithuania. As it was mentioned above, the author will look at laws regulating mediation and mediation organizations. This part is the most important one as it directly refers to the main aim of this paper. Here the author forms a hypothesis that mediation as such could exist under today's law in Lithuania but there is no or there is very poor legislative basis regulating this method.

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<sup>1</sup> See Draft of the Uniform Mediation Act By UMA Committee, November 2000, Section 3// <<http://www.mediate.com>>, visited 2001 04 05.

<sup>2</sup> Alternative Dispute Resolution - further referred as ADR.

<sup>3</sup> See JAY FOLBERG, ALISON TAYLOR, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* (San Francisco, CA: Jossey - Bass Publishers, 1984), p. 1.

<sup>4</sup> See SOLVEIGA POTAPOVIENE, "Tarpininkavimo institucijos Lietuvoje: alternatyvus budas užbegti konfliktui už akiu arba ji gesinti", *Lietuvos aidas* (1999 02 18, Nr. 33), p. 13.

The third part is related to mediation through the scope of Lithuania's international relations. This will cover some provisions concerning mediation in international law Lithuania is party to. The author will also look at the European Union<sup>5</sup> regulations and recommendations concerning mediation. This point is very important to Lithuania, which seeks and is supposed to join the EU in the nearest future and, thus, will have to change its law according to the EU law.<sup>6</sup> Moreover, this paper will cover only the mediation of disputes between private parties; not international disputes between countries or a country and a private person based on international treaty or public law.

The fourth section is devoted to problems of implementation of mediation in Lithuania. Additionally, some suggestions how the positions of mediation should be strengthened and improved will be provided.

The author wants to encourage discussions for the need to use mediation in Lithuania and to introduce this ADR process to the wider part of our society.

## **1. Mediation**

### *1.1. Mediation as one of the most important ADR forms*

Human beings have disputed with one another for millions of years but never have devised a perfect mechanism for resolving their disputes.<sup>7</sup> Legal systems were created as solution to sometimes violent, self-help dispute resolution. But, because an access to the courts has become time-consuming, expensive and stressful, additional methods of settlement have become established. These methods are referred collectively as Alternative Dispute Resolution and ought to be considered, along with litigation, for the resolution of disputes.<sup>8</sup> One of such ADR methods is mediation. As it was mentioned in the introductory part, mediation could be called negotiation carried out with the assistance of the third party – a neutral and impartial mediator. A mediator, in contrast to a judge or an arbitrator, has no power to impose an outcome on disputing parties.<sup>9</sup> The process of mediation is very flexible and is easily fitted to the needs of parties: they can agree and set their rules on how mediation is conducted, select a mediator and are free to leave the session at any moment. All these things make mediation to become the leader among other dispute resolution methods. It is reported that over 85% of all mediations result in a settlement.<sup>10</sup> Recently it has become one of the most important ADR forms. In some countries it is already widely used and accepted, while in others it is just making its way to recognition. Such countries as the USA or the UK have well established and developed system of mediation services. Over the last three decades of the 20<sup>th</sup> century mediation has been increasingly used in

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<sup>5</sup> The European Union - further referred as the EU.

<sup>6</sup> See European Committee under the Government of Lithuania, "*Lithuania's Progress towards Accession to the European Union, July 1999 – June 2000*"// <<http://www.euro.lt/indexeng.html>>, visited 2001 04 13.

<sup>7</sup> See SUSAN M. LEESON, BRYAN M. JOHNSTON, *Ending It: Dispute Resolution in America* (Cincinnati, OH: Anderson Publishing Co. 1988), p. 1.

<sup>8</sup> See Alternative Dispute Resolution Section of the Washington State Bar Association, *Manual On Alternative Dispute Resolution*, 1993.

<sup>9</sup> See STEPHEN B. GOLDBERG, FRANK E. A. SANDER, NANCY H. ROGERS, *Dispute Resolution: Negotiation, Mediation, and Other Processes*, Third edition (Gaithersburg, NY: Aspen Law & Business, 1997), p. 123.

<sup>10</sup> See MICHAEL J. ROBERTS, "Why Mediation works"// <<http://www.mediate.com>>, visited 2001 04 05.

these countries and has deeply set its roots there.<sup>11</sup> Lots of mediation organizations and institutions are working in this field: they provide mediation services, prepare various rules, ethics codes etc., make proposals for the legislation. Other countries are acknowledging benefits of mediation only now. Some few years ago this movement started in Eastern European countries and now it is also being started in Lithuania too.

### 1.2. Kinds of mediation

There are lots of kinds and variations of mediation. As the use of mediation is increasing it covers more and more different spheres of life. It could be used to resolve various disputes: from simple ones to complicated issues. Two main types of mediation could be sorted out - voluntary and mandatory.

Voluntary mediation is mediation, which is initiated by parties. It is the responsibility of the parties to select a mediator, create rules to govern the negotiations and negotiate an agreement. Voluntary mediation tends to be popular in situations where the disputants have an ongoing relationship, want or need to preserve that relationship, and wish to resolve their dispute privately.<sup>12</sup> As examples of this kind of mediation are family, neighborhood disputes. Moreover, business, consumer, environmental disputes are being increasingly solved by this method. In addition, voluntary mediation is also proving useful for the resolution of disputes that arise in schools, churches, work places etc.<sup>13</sup> The mediation, author refers to in this work, is mostly voluntary mediation.

Mandatory mediation is the process similar to voluntary mediation, though there are some differences. First, it occurs by statute or by court order. Second, a mediator is usually appointed to disputants. There are some specific cases where legislation or court mandates mediation in order parties at least try to resolve their disagreements. Examples of mandatory mediation cases could be marriage dissolution, labor dispute or a narrow range of criminal cases<sup>14</sup>

### 1.3. Characteristics of mediation

ADR methods are structured to meet specific client needs. Each technique has certain advantages but also presents some disadvantages or risks. The objective is to find and use the least expensive and intrusive method to achieve the most positive result for a client.<sup>15</sup> This part will cover things that make mediation more and more popular in the world.

Mediation has several characteristics, which enables us to refer to it as one of the most important dispute resolution forms available.

#### 1.3.1. Advantages

First, it is private and confidential. Only disputants and their mediator know things said and discovered during the process of mediation; even if mediation is ordered by court or mandated by legislation it takes place out of public eyes.<sup>16</sup> Parties fear to disclose all the information as it could be, for example, later used as evidence at trial and need to know that they will not be disadvantaged in the future. Confidentiality is the corner stone of

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<sup>11</sup> See BUSH ROBERT BARUCH, JOSEPH P. FOLGER, *The Promise Of Mediation: Responding to Conflict Through Empowerment and Recognition* (San Francisco, CA: Jossey - Bass Publishers, 1994), front flap.

<sup>12</sup> See SUSAN M. LEESON, BRYAN M. JOHNSTON, *supra* note 7, p. 135.

<sup>13</sup> See *id.*

<sup>14</sup> See SUSAN M. LEESON, BRYAN M. JOHNSTON, *supra* note 7, p. 4, p. 141.

<sup>15</sup> See *Manual On Alternative Dispute Resolution*, *supra* note 8.

<sup>16</sup> See SUSAN M. LEESON, BRYAN M. JOHNSTON, *supra* note 7, p. 133.

mediation. A central goal of mediation is to encourage disputants to put forth whatever information may be needed to resolve the dispute.<sup>17</sup> If the disputants will not disclose all the relevant information, which would be useful for resolving the dispute their efforts would be vain. The protection of information needs to be established. Mediation is confidential, to the extent parties desire, be that by statute, contract, rules of evidence or privilege. Mediation discussions and all materials developed for a mediation are not admissible in any subsequent court or contested proceedings, except for a finalized and signed mediated agreement for enforcement purposes.<sup>18</sup> It needs to be noted that legislation and its policy play very important role here. There have to be sufficient legal background for confidentiality in order for mediation to work.

Second, it is cheaper and less time consuming if compared to adversary processing. Mediation is far less expensive than arbitration or litigation. It is three to four times cheaper.<sup>19</sup> As expected, because of the differences in the structure of these procedures, mediation also differs in the length of time from the beginning to the end of the procedure. The time difference is even bigger than cost difference - mediation usually takes ten and more times less.<sup>20</sup>

A third characteristic of mediation is that the process typically is created and controlled by disputants and their mediator. Even when it is mandatory mediation parties control many of the details of the process that is to govern their mediation.<sup>21</sup> Alternative mediation processes recognize that there may be a need to customize the dispute resolution process to the unique needs and interests of parties. If parties are involved in the creation of the dispute resolution process from the initial stages, they are more likely to settle. The parties have bought into, or own the process, therefore accept it, and want to see the process succeed.<sup>22</sup> One of the most important features of mediation is that any agreement should be voluntary arrived at by parties. The belief is that the parties will be more satisfied, and thus more likely to abide the agreement, if it is of their own creation.<sup>23</sup>

Finally, mediation is a "forward looking" process. The focus of mediation, in contrast to arbitration or litigation, is on the future conduct of the parties required to resolve their dispute. Determining what occurred in the past is not the central focus of mediation.<sup>24</sup> Mediation provides for a win - win solution and parties' ongoing relationship is preserved.

### 1.3.2. Disadvantages and risks

They are minimal if compared to the benefits and advantages of the same method, but nevertheless should be briefly mentioned here. As it is considered and was already discussed that mediation is cost effective it could turn vice versa if the case does not settle and the parties still must go to court. Thus, expenses will increase. Moreover, mediation is not a good and proper process in some kinds of cases. E.g., in cases where there is a need to establish a legal principle or in some cases related to racial, sexual discrimination. Also,

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<sup>17</sup> See *id.*

<sup>18</sup> See *What is Mediation?* <<http://www.mediate.com>>, visited 2001 04 05.

<sup>19</sup> See LEONARD L. RISKIN, Westbrook James E., *Dispute Resolution And Lawyers*, Second edition (St. Paul, MN: West Publishing Co., 1997), p. 451-452.

<sup>20</sup> See *id.*

<sup>21</sup> See SUSAN M. LEESON, BRYAN M. JOHNSTON, *supra* note 7, p. 133.

<sup>22</sup> See PAUL R. FISHER, *Creative Mediation Design* <<http://www.mediate.com>>, visited 2001 04 05.

<sup>23</sup> See JOHN S. MURRAY, RAU ALAN SCOTT, EDWARD F. SHERMAN, *Processes of Dispute Resolution: The Role of Lawyers* (Westbury, NY: The Foundation Press, Inc., 1989), p.248.

<sup>24</sup> See SUSAN M. LEESON, BRYAN M. JOHNSTON, *supra* note 7, p. 134.

mediation would not be an appropriate process for disputes where there is a big power difference or big difference in values of the parties.

## **2. Mediation in Lithuania**

### *2.1. Lithuania's experience in mediation*

As it was mentioned above, mediation as an ADR form is making its first steps in Lithuania. The only alternative to litigation was, and still remains, arbitration. But this method is also not widely used. In most cases arbitration is used by large businesses and usually at the request by foreign partner. Otherwise, litigation in courts is preferred.<sup>25</sup> Mediation and its concept is a new thing even for some lawyers or judges, not to speak about the rest part of our society. It is Lithuanian's mentality that in the case of any serious problem or conflict he seeks for stronger force to solve that for him. In order to do this legally the only way is to apply to court. The court is this strong power that makes a decision for you and always there is a big chance that this decision could be against you. There is also no state policy towards mediation. The state is "silent" in this issue, though, it should favor and encourage the use of such methods, which are really working and helping in the settlement of disputes. The prevention, settlement, and de-escalation of conflict are components of any political system.<sup>26</sup> Even if, there is no regulation of mediation, some few provisions could nevertheless be found in today's law of Lithuania. In most cases mediation as a dispute resolution method is provided in a number of Lithuanian international treaties<sup>27</sup> and in some domestic statutes and regulations. E.g. Law on Commercial Arbitration has a provision of pre-arbitral mediation<sup>28</sup> or, there is a requirement for members of Lithuanian Bar Association to handle their dispute to bar's self-government for mediation first before taking legal proceedings.<sup>29</sup>

The fact that some mediation centers and organizations were established could be considered as a confirmation that mediation is making its start here. More and more people would be able to find out what mediation is, how it works, what the advantages of this process are, etc. Similar experience by some Eastern European countries shows that mediation programs are gaining more and more popularity and recognition in various spheres of life. The Mediation Program was simultaneously launched in 1996 by four countries in of Central and Eastern Europe - Bulgaria, Hungary, Poland and Slovakia through the financial support of the United States Agency for International Development (USAID). The program aims at cultivating and fostering advanced culture of conflict resolution in former soviet society by promoting mediation as an alternative method for dispute resolution. At the very beginning the program was targeted at the business sector. Today the mediation is applied to wider range of disputes.<sup>30</sup> Various legislative initiatives,

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<sup>25</sup> See PATRICIA A. STREETER, "Arbitration in Lithuanian Commercial Agreements: Establishment and Development", *Teises apžvalga* (2000, Nr. 4), p. 25.

<sup>26</sup> See RAYMOND SHONHOLTZ, "Community Mediation Centers", *Mediation Quarterly* (2000, No.4, Vol. 17).

<sup>27</sup> Lithuanian international experience with mediation will be discussed in the next part of this work.

<sup>28</sup> See LR Komercinio arbitražo įstatymas, *Žin.* (1996, Nr. 39-961), chapter 9; official translation: see LR Law On Commercial Arbitration, Parliamentary record No.4 (1998)// <<http://www3.lrs.lt>>, visited 2001 04 28.

<sup>29</sup> See Advokatu profesines etikos kodeksas, LR advokatu konferencija (1999 05 21), Art. 15// <<http://www.advoco.lt>>, visited 2001 04 12.

<sup>30</sup> See Mediation Program// <<http://www.partner-bulgaria.dir.bg>>, visited 2001 03 26.

mediation trainings, media policy and, of course, mediation services are the activities of the mediation centers in these countries.<sup>31</sup>

It should also be noted that now there is only one kind of mediation - voluntary - available in Lithuania. So far no court has ordered or legislation has mandated mediation. Next section covers issues related to the current applicable law under which mediation is regulated in this country.

## 2.2. Domestic law regulating and affecting mediation

The law has a limited but important role to play in encouraging the effective use of mediation and maintaining its integrity, as well as the appropriate relationship with the justice system. In particular, the law has the unique capacity to assure that reasonable expectations of participants regarding advantages of mediation process are met, rather than frustrated.<sup>32</sup> Though Lithuanian Law does not directly regulate the process of mediation we cannot say that it could not be used here. The rule "what is not forbidden is allowed" could be applied here. As mediation is covering more and more different disputes of various backgrounds more different laws, acts and other regulations are involved there. The author will discuss only the main law used today to regulate mediation in Lithuania. In order to show the applicable law in the best way the author will divide mediation process and mediation itself into several parts.

First, we will look at the law regulating the use of mediation: how the process is organized and executed. Then at the law regulating and affecting relations between parties and a mediator. In addition, the law of some specific issues of mediation, as, for example, law regulating confidentiality of mediation, will also be discussed.

### 2.2.1. Law regulating and allowing the use of mediation

As it was mentioned above, mediation can be used in Lithuania. There is no law, which would restrict that use.

First step in providing mediation services is to establish some mediation organization.

One of the options is the establishment of a mediation enterprise. Mainly two laws apply here: the Lithuanian Civil Code<sup>33</sup> and the Law on Enterprises.<sup>34</sup> Under article 2 the enterprise shall be an economic unit having its own name, and is established to carry out certain commercial-economic activities in compliance with the procedures established by law.<sup>35</sup> Articles 17 - 19 of the Law on Enterprises regulate the establishment of enterprises. According to these articles the founder of an enterprise may be a natural or legal person, or the state (local government body) represented by its bodies or by the managing body of the enterprise that is being established. An enterprise may be established by one or several founders. Documents concerning the establishment of an enterprise shall comprise the

<sup>31</sup> See *id.*; see Annual Report of Partners Hungary, 1999// <<http://www.partnershungary.hu>>, visited 2001 03 26.

<sup>32</sup> See Draft of the Uniform Mediation Act, *supra* note 1.

<sup>33</sup> The author refers to the new Civil Code that came in force on 2001 07 01. It substituted the Civil Code that was in Lithuania from 1964 and had been amended lots of times to conform to the needs and changes in the new democratic state. It is Lithuania's one of the most important laws, which was prepared in accordance with laws of other democratic countries (Civilinio kodekso patvirtinimo, isigaliojimo ir igyvendinimo istatymas, *Žin.* (2000, Nr. 74-2262); also LR Civilinis kodeksas, *Žin.* (2000, Nr. 74-2262)).

<sup>34</sup> See LR Imonių istatymas, Lietuvos Respublikos Aukščiausioji Taryba - Atkuriamasis Seimas, *Žin.* (1990, Nr. 14-395); official translation: see LR Law On Enterprises, Parliamentary record No. 9, (1992)// <<http://www3.lrs.lt>>, visited 2001 04 22.

<sup>35</sup> See *id.*

bylaws of the enterprise, a license to engage in certain economic activities, a qualification certificate. Article 13 of this Law describes what kinds of activities need to obtain a license from the Government. Previous wording of this Law provided a list of such activities. Mediation was not listed there. The new amendment does not provide such list but says that subject to licensing shall be the spheres of commercial-economic activities connected with increased danger to human life, health, the environment, manufacturing and acquisition of armament, also with goods and services for which a special procedure of product sale or service provision may be established under laws. So, this wording suggests that Government's policy did not change and mediation did not fall into this category of licensed activities.<sup>36</sup> Nevertheless, some other requirements provided by this law are not clear. E.g. it is not clear who and using what standards will issue the certificate of qualification required by article 19.<sup>37</sup> Also, there will always be some problems related to mediation services provided by any kind of the enterprise as it first seeks profit from its activities. Sometimes, for this reason, the main principles and ideas of mediation could be violated: e.g. mediator's neutrality: he could thrust his opinion on parties in order to end the process quicker or just simply support one party's interests etc. To sum up, a profit seeking enterprise is not the best choice for mediation and its conformity to recent regulations is problematic.

Another choice is to establish a non-profit mediation organization. Most of the world mediation organizations come from the non-profit sector. Usually it is a non-governmental organization<sup>38</sup> or an association of such organizations. The Law on enterprises does not apply here.<sup>39</sup> In Lithuania such organizations are subject to the regulations of the Civil Code and the Law on Public Institutions.<sup>40</sup> This Law does not apply to the state and municipal institutions financed from the budget.<sup>41</sup> A public institution is a non-profit organization, founded according to the procedure established by this Law from the assets of partners (owner) engaged in social, educational, scientific, cultural, sport or any other analogous activities and public to the members of the community. The specific requirements for the activity of a public institution are regulated by the law on the appropriate sphere of activities engaged in by the public institution. The founders of public institutions shall be natural and legal persons who have concluded a public institution contract of founding, or a person who has concluded a contract of founding. Natural and legal persons of the Republic of Lithuania and foreign states may become founders of public institutions.<sup>42</sup> As it is seen from this particular Law the requirements for establishment of a public institution is far lower than for a commercial enterprises. The problematic issue is the above-mentioned requirement that the law of appropriate sphere, in our case - mediation, should regulate the activities of such institutions. But there is no special law on mediation, so it means that such institutions should follow the principles of fairness, prudence and honesty provided in Civil Code.<sup>43</sup> In addition to these public institutions we should also mention public organizations. Separate Law regulates these

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<sup>36</sup> See *id.*

<sup>37</sup> See *id.*

<sup>38</sup> Non-governmental organizations further referred as NGOs.

<sup>39</sup> See: LR Įmonių įstatymas, *supra* note 34, Art.1.

<sup>40</sup> See: LR Viešųjų įstaigų įstatymas, *Žin.* (1996, Nr. 68-1633); official translation: see LR Law on Public Institutions, Parliamentary record No. 6, (1997)// <<http://www3.lrs.lt>>, visited 2001 04 25.

<sup>41</sup> See *id.*; also LR Civilinis kodeksas, *supra* note 33, Art. 2.34.

<sup>42</sup> See: LR Viešųjų įstaigų įstatymas, *supra* note 40, Art. 2, 3(2) and 5(1).

<sup>43</sup> See: LR Civilinis kodeksas, *supra* note 33, Art. 1.5.

organizations.<sup>44</sup> These are also non-profit organizations that are established and run in a similar way as public institutions. Article 4 says that foreign public organizations could establish their sections or branches in Lithuania if their activities, aims and bylaws do not contradict Lithuanian Constitution.<sup>45</sup>

It is more likely that the quality of mediation services provided by NGOs will be much better than by for-profit enterprises. These organizations aim to satisfy the needs of the society and are established for the benefits of the community. They are more free to organize its' activities. The fact that they are not seeking profit eliminates risks and doubts described in the section above. Another attractive feature is that these institutions could be established by foreign founders. It is especially important in the mediation field. Well-known world mediation organizations could share their experience and knowledge and, thus, help to improve the situation of mediation in Lithuania. The experience of Central and Eastern European countries shows that foreign mediation organizations that came there contributed very much to success of mediation in the last few years.

#### 2.2.2. Law regulating and affecting relations between parties, a mediator and the third parties

In the absence of special regulations on these relations the Contract Law applies here. Parties make an agreement-contract between themselves to mediate their dispute, they sign a mediation agreement with mediation organization, after successful mediation session they sign a settlement agreement etc. In Lithuania these contractual relations will be covered under the Civil Code's section - Law on Contracts.<sup>46</sup> Under this section parties are free to make any lawful agreements between themselves and thus create duties and obligations.

The main contract in mediation will be the mediation agreement. Parties may set up the ground rules of their mediation, including their agreement about what use will be made of mediation communications and agreements outside of legal proceedings.<sup>47</sup> Mediation agreement should cover and set as many things as possible: from previously mentioned ground rules how the process is conducted to mediator's reward, confidentiality clauses etc. It is also important to discuss the responsibility of parties and mediator and the remedies for the breach of the agreement. Usually, parties do choose their mediation rules provided by mediation organization, which organizes and takes care of the process. These organizations have standard rules prepared according to legal and ethical requirements for mediation. More to add, they usually have lists of mediators and offer parties to choose the most suitable and acceptable one. Mediators' relations with mediation organization could be regulated either by contract or by employment laws.<sup>48</sup> If a mediator is an employee of a mediation organization and breaches his duties to parties or third persons - under Lithuanian law - the organization will be liable. The same happens if a mediator is tied with a mediation organization by contractual relations. He is supposed to act as an agent and thus, organization will be held liable for its agent's acts which he did while performing his duties. But it will be able to recover its loses from the mediator later under the concept of restitution.<sup>49</sup>

<sup>44</sup> See LR Visuomeniniu organizacijų istatymas, *Žin.* (1995, Nr. 18-400); official translation: see LR Law On Public Organizations, Parliamentary record Nr.10, (1995)/ <<http://www3.lrs.lt>>, visited 2001 05 02.

<sup>45</sup> See *id.*

<sup>46</sup> See LR Civilinis kodeksas, *supra* note 33, Book 6, Part II: Sutarciai teise.

<sup>47</sup> See Draft of the Uniform Mediation Act, *supra* note 1.

<sup>48</sup> For employment Law in Lithuania see: LR Darbo sutarties istatymas, *Žin.* (1991, Nr. 36-973); LR Darbo istatymo kodeksas, *Žin.* (1972, Nr. 18-137).

<sup>49</sup> See LR Civilinis kodeksas, *supra* note 33, Art. 6.264.

### 2.2.3. Other domestic laws

It is also important to look at special important issues of mediation and at the Lithuanian law that regulates them. One of the most important of these issues is the enforceability, validity and status of the settlement agreement and the confidentiality. Moreover, it is also important whether some other provisions could be applied here. If so, in what cases?

As previously mentioned, the biggest part of mediations ends by signing the settlement agreement - the result of parties' compromises achieved in mediation process. This is the main goal of parties to come to a mutually beneficial decision. So, it is very important for them to know what legal status this agreement will have and what duties it will impose. Under today's law in Lithuania the settlement agreement is regulated by Contract Law provided in the Civil Code.<sup>50</sup> The duties and obligations of parties will be the same as imposed by any other contract or agreement made between them. The agreement will be binding upon the parties and they will have to follow its provisions. If later their case is submitted to court, the court will use standards regulating contractual relations. If parties first apply to court and then decide to mediate where they reach settlement agreement, under current Lithuanian law it can be considered as a peace treaty. The Civil Code has a separate section related to peace treaties. Article 6.983 provides that by making a peace treaty parties resolve their dispute and, thus, prevent the occurrence of legal disputes on the same issue in the future.<sup>51</sup> Article 6.985 says that after a court approves a peace treaty it gets the same status as the decision of the court (*res judicata*) and is enforceable by it.<sup>52</sup> So, the paradoxical situation is created - in order for disputants to get *res judicata* status for their settlement agreement they should be first involved in the litigation web. This contradicts the nature of mediation and lots of its virtues become useless.

Another important feature of mediation is confidentiality. As it was mentioned above the state legislation plays or could play a very important role here. The legislative branches of leading mediation countries enact lots of different acts and privileges of confidentiality of mediation communications. Their policy is to encourage people to use such a method of ADR. E.g. in the U.S. all states have adopted some form of confidentiality protection, reflecting a strong public policy favoring confidentiality in mediation. This policy is enacted through approximately 250 different state statutes!<sup>53</sup> There are several methods used to protect information revealed in mediation: contract, rules of evidence, common law and mediation privileges.<sup>54</sup> Lithuanian law provides only one - the weakest protective - option of all of these methods, i.e. contract. Before starting mediating parties and a mediator in most cases agree to hold mediation communications confidential. While such an agreement may create expectations of confidentiality their enforceability is problematic. Public policy forbids contracting to exclude evidence and agreements between individuals are not permitted to restrict the court's access to testimony in its pursuit of justice.<sup>55</sup> Section five of Lithuanian Code of Civil Procedures provides rules of evidences. There are no

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<sup>50</sup> See LR Civilinis kodeksas, *supra* note 33, Book 6, Part II: Sutarciu teise.

<sup>51</sup> See LR Civilinis kodeksas, *supra* note 33, Book 6, Part V, Section LII: Taikos sutartis.

<sup>52</sup> See *id.*

<sup>53</sup> See Draft of the Uniform Mediation Act, *supra* note 1.

<sup>54</sup> See LEONARD L. RISKIN, JAMES E. WESTBROOK, *Dispute Resolution And Lawyers*, *supra* note 19, p. 489.

<sup>55</sup> See ALAN KIRTLEY, "The Mediation Privilege's Transition From Theory To Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest", *Journal of Dispute Resolution 1*, (1995).

special provisions regulating inadmissibility of confidential information obtained during mediation communications as evidence.<sup>56</sup> In article 68 of this Code we find a provision, which defines who and for what reason cannot be called to testify as witnesses - agents and attorneys in civil cases and counsels in criminal ones for information they obtained performing their duties. Also, priests for information they found out during the confession.<sup>57</sup> Rules of evidence in the criminal procedure provide other types of persons, who cannot be called upon to testify. Besides the already mentioned defendant's counsel, these also include advocates, representatives of labor union or other public organizations that performed their duties as agents.<sup>58</sup> If a mediator is considered as an agent for mediation organization, which is public organization will it be enough for the court to apply this privilege? It will be problematic. Moreover, this privilege applies to criminal proceedings and the biggest part of these confidentiality issues relates to the civil law. So, we see that Lithuanian laws provide some privileges for certain types of relationships in which confidentiality is a matter of public policy in this country. In the U.S. - common law country - nearly all cases in which mediation privilege has been found, the court relied heavily on the existence of a strong legislative policy supporting confidentiality for mediation.<sup>59</sup> As Lithuania is a civil, not a common law country only the last method for protecting mediation information - common law - does apply here. But nevertheless, the policy of the Supreme Court of Lithuania and its decisions and recommendations are binding upon lower courts. Thus, if the Supreme Court once decides the issue of confidentiality policy in mediation the lower courts will have to follow this guideline.

### 2.3. Mediation institutions in Lithuania

Parallel to the idea and concept of mediation coming to Lithuania the mediation organizations are also being established here. The pioneer one is "Lietuvos konfliktu prevencijos centras"<sup>60</sup>. It was established in 1993 but started promoting its activities only after some 5 - 6 years. This center has premises in the Lithuanian Pedagogic University. It has a big methodical library and has already organized lots of seminars for various governing institutions and for individuals too. When asked, why they are letting know about themselves for a broader part of society only after a number of years, Dr. J. Lakis - the founder and director of this center - explained they were worried that their initiative and this bold step would not become a adventure. Their first efforts to announce this idea during first seminars raised a question - was it worthy at all? The society was not ready to accept these ideas.<sup>61</sup> And only in the last years of the 20<sup>th</sup> century, after two more organizations joining the mediation movement in Lithuania, things started to get better. These two are: the public institution "Socialiniu ir psichologiniu paslaugu centras"<sup>62</sup> and the NGO "Baltic Partners for Change Management". These two organizations together started the project "Tarpininkavimo paslaugu pletra"<sup>63</sup> under the financial support of PHARE<sup>64</sup> in 1999. 15 mediators were trained and prepared to provide mediation services in Lithuania. First, this service was available in two biggest Lithuanian cities - Vilnius and Kaunas - and first years

<sup>56</sup> See LR Civilinio proceso kodeksas, *Žin.* (1964, Nr. 19-139), Part V: Irodymai.

<sup>57</sup> See *id.*

<sup>58</sup> See LR Baudžiamojo proceso kodeksas, *Žin.* (1961, Nr. 18-148), Art. 78.

<sup>59</sup> See KIRTLEY ALAN, *supra* note 55.

<sup>60</sup> "Lithuanian Center For Prevention Of Conflicts".

<sup>61</sup> See SOLVEIGA POTAPOVIENE, "Tarpininkavimo institucijos Lietuvoje, *supra* note 4.

<sup>62</sup> "The center of social and psychological services".

<sup>63</sup> "Broadening of Mediation Services".

<sup>64</sup> PHARE - the EU program which aim is to help Middle and Eastern European Countries to prepare for the EU membership.

was provided for free.<sup>65</sup> But it was not popular in the society. Only few mediations took place. Lithuanians mostly applied for mediator's help in resolving neighbour, spousal disputes and also those involving issues of conflicts in communities and conflicts of individuals with local government institutions. Mediators helped disputants to settle ~ 80% of all their disputes.<sup>66</sup>

Recently the best performing and the most active of these institutions in providing mediation and other change management services is the Baltic Partners for Change Management. It is a Baltic region branch of the U.S. NGO "Partners For Democratic Change". Baltic Partners for Change Management (Partners-Baltic) was established in Vilnius, Lithuania in March 1998. The mission of Partners-Baltic is to create a culture of democratic management of conflict and change towards the advancement of civil society in the Baltic States, namely Estonia, Latvia and Lithuania. Partners-Baltic provides services, trainings and consultations for clients in the business and private sectors, governmental and parliamentary institutions, municipalities and non-governmental organizations. Mediation services are one of the most important among other provided by this organization. Partners-Baltic acts as an external, impartial mediator or facilitator between disputing parties who are unable to agree or resolve contractual disputes through direct negotiation and offers alternative conflict management methods to assist community groups, businesses, government bodies and NGOs in resolving disputes and reaching a mutually satisfying agreement.<sup>67</sup>

Though, if compared to the experience of similar eastern and central European mediation organizations, Lithuanian mediators are still behind in the quantity, quality and the spectrum of services.<sup>68</sup> But, nevertheless, the progress made during last years gives us good hopes that soon mediation will be wide known and accepted in Lithuanian society and more enthusiasts and supporters will join the mediation movement started by these pioneers.

### ***3. Lithuania and International mediation***

#### *3.1. Lithuania's international treaties containing mediation provisions*

Lithuania's international experience of mediation is in far better position than the domestic one. Lithuania is a party to a number of international treaties, which have provisions of mediation or conciliation as methods for resolving disputes between parties. Signed and ratified international treaties have the status of law here and if there is a collision between an international treaty and a domestic law - the treaty prevails.<sup>69</sup> Lots of international treaties as a method for the alternative dispute resolution provide conciliation rather than mediation. The term "conciliation" is widely used in the international context (mostly in commercial disputes) and has some slight differences from mediation, though, they usually come together and are often confused. The main difference between them is that the conciliator evaluates the dispute and makes non-binding recommendations to the

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<sup>65</sup> See JOLANTA VAITIEKUNIENE, "Atpirkimo ožys savo noru", *Verslo žinios* (1999 12 22), p.16.

<sup>66</sup> See RASA MASIOKAITE, "Taikdariai - pagalba nesugebantiems susitaikyti", *Laikinoji sostine* (2000 08 17).

<sup>67</sup> See <<http://www.partnersbaltic.lt>>, visited 2001 04 25.

<sup>68</sup> See <<http://www.pdcs.sk>>, <<http://www.fpd.ro>>, <<http://www.partner-bulgaria.dir.bg>>, <<http://www.partnershungary.hu>>, visited 2001 05 05.

<sup>69</sup> See LR Civilinis kodeksas, *supra* note 33, Art. 1.13.

parties for a solution to their dispute.<sup>70</sup> So, some of Lithuanian international treaties provide for mediation<sup>71</sup> while others for conciliation.<sup>72</sup> There are also some treaties Lithuania is party to, which provide mediation and conciliation for the settlement of disputes between states, but it is not the subject of research of this paper as it was already mentioned in the introduction.<sup>73</sup> Reasonable question could arise – why does Lithuania deal with international mediation more than with the domestic one? According to the author there is only one logical explanation - all these treaties were drafted by other countries with the experience in the ADR field and Lithuania has just simply joined them, thus, accepting these provisions. But, nevertheless, it did not provide or create any mechanism of how to implement these obligations. Although, on the other hand, it could be considered a big step forward the acknowledging of such process.

### 3.2. UNCITRAL Rules

There is a pre-arbitral mediation provision in Lithuanian Law on Commercial arbitration.<sup>74</sup> This law is the only law in Lithuania that has such mediation provision. It is discussed in this section because it gives a possibility for applying the Conciliation Rules of UNCITRAL<sup>75</sup> in pre-arbitral mediation.<sup>76</sup> As it was said above the conciliation slightly differs from "pure" mediation mostly because of the conciliator giving recommendations on how to settle the dispute. E.g. article 7 of UNCITRAL conciliation rules provides that the conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute - as a mediator. But further it is said that the conciliator may, at any stage of the conciliation proceedings, make proposals for the settlement of the dispute.<sup>77</sup> One more thing, which enables us to doubt the nature of the pre-arbitral mediation provided by the article 43 of the Law on Commercial Arbitration is in its wording: Mediation awards made to resolve disputes by means of pre-arbitral mediation shall be enforced only in good will of the parties.<sup>78</sup> Under the concept and nature of mediation parties themselves should reach the agreement. No binding awards or decisions should be imposed on them. And it goes without saying that parties act in good will and faith during mediation as it is only their decision to take part in this process. The pre-arbitral mediation may be also conducted, besides UNCITRAL rules, by rules prepared by one or both parties and approved by either parties or any other act setting procedure of dispute resolution acceptable to both parties.<sup>79</sup> At the present time it is rare for a Lithuanian

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<sup>70</sup> See JAY E. GRENIG, *Alternative Dispute Resolution: With forms*, 2<sup>nd</sup> ed. (St. Paul, MN: West Publishing Co., 1997), p. 220.

<sup>71</sup> See 1985 m. Vienos Konvencija del ozono sluoksnio apsaugos, *Žin.* (1998, Nr. 23-570), also 1992 m. Helsinkio Konvencija del Baltijos jūros baseino jurines aplinkos apsaugos, *Žin.* (1997, Nr. 21-494), also 1988 m. JTO Konvencija del kovos su neteiseta narkotiniu priemoniu ir psichotropiniu medžiagu apyvarta, *Žin.* (1998, Nr. 38-1004).

<sup>72</sup> See Europos Konvencija del televizijos be sienu, *Žin.* (2000, Nr. 29-805), also Biologines ivairoves Konvencija, *Žin.* (1995, Nr. 69-1662).

<sup>73</sup> See ESBO Sutaikymo ir arbitražo konvencija, *Žin.* (1997, Nr. 111-2798).

<sup>74</sup> See LR Komercinio arbitražo istatymas, *supra* note 28, Part IX: Ikiarbitražinis tarpininkavimas.

<sup>75</sup> UNCITRAL - United Nations Commission on International Trade Law.

<sup>76</sup> See UNCITRAL Conciliation Rules, Resolution 35/32 by the UN General Assembly (1980 12 04) // <<http://www.un.org>>, visited 2001 04 05.

<sup>77</sup> See *id.*

<sup>78</sup> See LR Komercinio arbitražo istatymas, *supra* note 28, Art.43.

<sup>79</sup> See LR Komercinio arbitražo istatymas, *supra* note 28, atr.42.

contract to specify the rules of the UNCITRAL Model Law, even though they are recognized by Lithuanian scholars as advanced.<sup>80</sup>

### 3.3. *The EU recommendations on mediation*

The most important task of Lithuania's foreign policy in recent years is to join the EU. As it was previously mentioned, Lithuania is supposed to join other member states in the nearest future. So it becomes very important to look at the EU law and regulations, as it will be later binding to Lithuania. Candidate states have to prepare and adopt their law to conform the EU law.

The EU has been working in the ADR field during last few years. The most significant document prepared on these issues was the recommendation of the Commission on principles applicable to ADR.<sup>81</sup> These proposals for the establishment of minimum standards of quality for ADR were inspired by the EU policy to ensure legal security and equal access to justice. Although this recommendation established principles to ensure people confidence in alternative dispute resolution methods, these were limited to out-of-court bodies where a third party proposes or imposes a decision to resolve the dispute. So, it means that this does not include mediation. The EU Council also noted that many ADRs exist in Member States that fall outside the scope of recommendation 98/257/EC but which also play a useful role and invited the Commission to develop common criteria for the assessment of such out-of-court bodies.<sup>82</sup> And as a result, the commission has recently published a communication on "Widening consumer access to alternative dispute resolution".<sup>83</sup> There commission states that ADR methods have a key role to play in improving access to justice for individual consumers and it is necessary that effective mechanisms exist, which provide them with realistic and affordable options to obtain redress. This communication widens the previously mentioned recommendation 98/257/EC and adds the second category of ADRs where a third party facilitates the resolution of a dispute by bringing the parties together and assisting them in reaching a solution by common consent. It also states that it is necessary to encourage a wide range of flexible solutions that are proportionate to the problem, efficient, responsive and understandable to users generally.<sup>84</sup> Thus, mediation falls into this second category. Also, mediation alongside with conciliation is listed as ADR methods in this communication.

In order to accomplish these aims the EU is establishing the European Extra-Judicial Network.<sup>85</sup> The EEJ Net will provide a communication and support structure made up of national contact points (or "Clearing Houses") established by each Member State. Each state's nationals will address their Clearing Houses for advice and support. The EU mostly

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<sup>80</sup> See PATRICIA A. STREETER, "Arbitration in Lithuanian Commercial Agreements", *supra* note 25.

<sup>81</sup> See EU Commission Recommendation 98/257/EC on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, (OJ L/115, 17.4.1998)// <<http://www.europa.eu.int>>, visited 2001 04 10 or <<http://www.mediate.com>>, visited 2001 04 05.

<sup>82</sup> See the Council resolution on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes (OJ C/155, 06.06.2000), p. 1-2// <<http://www.europa.eu.int>>, visited 2001 05 07.

<sup>83</sup> See Communication from the Commission on widening consumer access to alternative dispute resolution, (COM(2001) 161 final, Brussels, 4.4.2001)// <<http://www.europa.eu.int>>, visited 2001 05 07.

<sup>84</sup> See *id.*

<sup>85</sup> See Commission working document on the creation of an Extra-Judicial Network (EEJ Net), (SEC(2000) 405)// <<http://www.europa.eu.int>>, visited 2001 05 08.

speaks and is concerned about consumers but these principals and ideas show the EU bodies' efforts to improve access to justice for all its individuals.

So it is time for Lithuania to start putting into practice these proposals and ideas. Lithuania has prepared its National Plan of actions in order to ascertain the requirements, problems and terms of the coordination of Lithuanian and EU laws. Thus, now it needs to be supplemented by these new recommendations. As it was mentioned above, the EU is already helping Lithuania through the PHARE program in the ADR field and mediation in particular.<sup>86</sup>

#### ***4. Implementation of mediation in Lithuania***

##### *4.1. Obstacles and problems*

After short survey of Lithuania's mediation and its legal basis it is appropriate to have a look at the biggest obstacles and problems to the mediation's implementation. Though, some problems and risks were already pointed in this work it is necessary to group them together in order to make proposals and find solutions for their future improvement and solution.

First, one of the biggest problems with mediation in Lithuania is the lack or absence of legal norms regulating this ADR method. The parties do not know what to expect from this process, what status their settlement agreement would get, what institutions would control the mediators' fairness and impartiality, what law and rules would be applied by court if confidentiality issues were raised etc. Also, a big problem is the absence of rules regulating the conduct of mediators or the procedures and standards needed to comply with in order to become a mediator. Moreover, there is some uncertainty, as already mentioned, in regulating the establishment of mediation enterprises. More to add, the legal indetermination creates lots of problems and risks to the implementation of mediation. The participants are uncertain what rules of law would be applicable and suitable at the particular stage of the process. There is no legal mechanism, which would control the realization of the agreements by parties and also, which would control the process itself.

In today's Lithuania it is extremely important to gain the confidence of individuals to the mediation as it is making its first steps here. People need to know the benefits and advantages of this process and if they face some or all of these mentioned problems - it will be very difficult for mediation to take its roots here. So, parallel goes other obstacle, which needs to be removed. It is the society's ignorance about such process. Mediation organizations should play a big role in spreading the mediation throughout Lithuanian society. The experience of Bulgarian colleagues could serve as an example for Lithuanian mediators. They are taking various initiatives in promoting mediation: publishing articles and interviews in leading magazines and newspapers, preparing educational TV series on mediation, which were shown on national TV and were reported to be very successful.<sup>87</sup>

##### *4.2. Proposals for the improvement*

###### *4.2.1. Policy of the State*

A state is the most important player in helping mediation to take its roots here. The State's policy towards this issue determines on the implementation of mediation. Lithuania is in a favorable situation now. It does not need to discover new things about mediation. It just simply

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<sup>86</sup> See PHARE, *supra* note 65.

<sup>87</sup> See Mediation Program, *supra* note 30.

has to adapt the experience of other countries to its particular situation and needs. As it is seen from the practice and experience of others it took a lot of time and efforts until the best approaches to mediations were found. As a result, the mistakes and risks could not be escaped from. E.g. in the U.S.A., states in the past twenty-five years have been able to engage in considerable experimentation in terms of statutory approaches to mediation, just as the mediation field itself has experimented with different approaches and styles of mediation. Over time clear trends have emerged, and scholars and practitioners have a reasonable sense as to which types of legal standards are helpful, and which kinds are disruptive. So, state legislators have to study this experimentation carefully and, in accordance to that, enact laws with the confidence, which can only come from the learned experience.<sup>88</sup> More to add, the mediation organizations should take initiatives and make various proposals to the state's legislative branch and should cooperate with other state's bodies responsible for the implementation of ADR methods. Again, the experience of Bulgarian colleagues could serve as a good example - mediation organization Partners-Bulgaria - in this particular field.

The legislative initiative of the Partners – Bulgaria Foundation involves a research on the possibilities of inclusion mediation in current Bulgarian law and the elaboration of a project for legal regulation of the dispute resolution through mediation in certain areas of Bulgarian legislation, which allow insertion of mediation as one of the possible forms for settlement of legal disputes. The Partners – Bulgaria Foundation in cooperation with experts from different areas of the social life prepared the material “Mediation and Reconciliation as Methods of Settling Legal Disputes According to Current Bulgarian Law”. Partners- Bulgaria Foundation work in collaboration with a number of NGOs and state institutions, which are interested in development of an initiative for legal regulation of mediation such as American Bar Association Central and Eastern European Law Initiative (ABA CEELI), Institute for the Principles of Law, Association of Women in Law Profession, etc.<sup>89</sup>

So, having in mind the experience of other countries and knowing the needs for Lithuanian particular situation we can draw some suggestions to the legislation. First, some laws need to be passed in order to regulate the process itself. The State should create the mechanism, which would control this process of mediation. Of course, some powers on some issues - e.g. such as elaboration of professional and ethic standards for conducting mediation - could and should be given over to some mediators' local governing body or similar institution. The example could be Lithuanian BAR and its activities, the American BAR Association Dispute resolution section or the Mediators' Club as it is in Bulgaria.<sup>90</sup> Also, besides the above-mentioned things, such an association or institution would be responsible for the mediators' preparation and the setting of the qualification requirements for them. In addition, they should also be responsible for the promotion of mediation and the education of the society. Moreover, the legislation should pass some laws or regulations regarding the enforcement of settlement agreements. People will be more eager to use mediation if they know that their agreement has similar status as a peace treaty under the Lithuanian Law. Alongside, some laws and rules need to be amended or supplemented in order to conform these new mediation regulations and to avoid the collision of law. This is especially applicable to the proceedings' laws. Also, the legislation should think about the issues of confidentiality in mediation and whether it would be useful and appropriate for Lithuania to have a mandatory model of mediation.

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<sup>88</sup> See Draft of the Uniform Mediation Act, *supra* note 1.

<sup>89</sup> See Mediation Program, *supra* note 30.

<sup>90</sup> See *id.*; also the official website of Lithuanian BAR// <<http://www.advoco.lt>>, visited 2001 05 01; also// <<http://www.abanet.org/dispute>>, visited 2001 04 05.

#### 4.2.2. Privilege of mediation's confidentiality

The role of confidentiality in the mediation process was already mentioned above. State legislation has to find the most suitable way to implement this top important issue. The easiest way is to amend the Codes of Civil and Criminal procedures and add mediator - disputant privilege in addition to already existing attorney - client or priest - confessant privileges.<sup>91</sup> As with other privileges, a mediation privilege operates to allow a person to refuse to disclose and to prevent another from disclosing particular information.<sup>92</sup> Of course, this privilege should not be absolute. The exceptions to the privilege have to follow these changes. The U.S. experience could be applied here. E.g. there is no privilege against disclosure for a mediation communication made during mediation that is required by law to be open to public, or for a threat made by a mediation participant to inflict bodily harm or unlawful property damage, or for a mediation participant who uses or attempts to use the mediation to plan or commit a crime and for some other exceptions.<sup>93</sup> Also, mediation privilege should not provide safe haven for participant wrongdoing, injustice or mediator's malpractice. So, it is important task for the legislators to find the balance between the public interest and the participants of mediation.<sup>94</sup>

#### 4.2.3. Mandatory mediation

The last important question, which should be answered by Lithuanian policy makers, is - whether mandatory mediation could be used here. Lots of mediation countries have this mandatory - state or court mandated - mediation alongside with the voluntary one. It is also very useful and successful in some special areas of disputes, where strong public interest exists (e.g. in labor, divorce, child custody disputes or in some victim-offender cases). Author thinks that this kind of mediation would be useful and appropriate for Lithuania too. There are some provisions in today's law of Lithuania where mandatory mediation could be applied under the similar experience of leading mediation countries. E.g. there is a requirement for the court in divorce cases to take appropriate measures to reconcile both spouses. Under the request of one of the spouses or upon its own initiative, the court can set term for reconciliation of no longer than six months.<sup>95</sup> But the law does not say what particular measures could be used by court. Thus, the author thinks that the court appointed mediation would be the most appropriate solution here. Also, the Lithuanian labor law could have a provision requiring pre-trial mediation as the first step in labor disputes. Under today's law there is a requirement for an employee and an employer to try to solve their dispute by negotiations first. If they fail to reach an agreement, the next step is to submit their dispute to a special commission of labor dispute resolution and only after this step disputants can apply to the court.<sup>96</sup> It is clear that the state cares a lot about these labor matters and it would also be a reasonable step for it to set the

<sup>91</sup> See LR Civilinio proceso kodeksas, *supra* note 57, see LR Baudžiamojo proceso kodeksas, *supra* note 59.

<sup>92</sup> See Draft of the Uniform Mediation Act, *supra* note 1.

<sup>93</sup> See *id.*

<sup>94</sup> See ALAN KIRTLEY, "The Mediation Privilege's Transition From Theory To Implementation", *supra* note 56.

<sup>95</sup> At the time the article was written matrimonial issues were still regulated by the old Matrimony and Family Code that became ineffective on 1<sup>st</sup> of July 2001. After that date they started to be regulated by the new Civil Code's book three - Family Law (see LR Civilinis kodeksas, *supra* note 33, Art. 3.54, 3.64; also LR Santuokos ir šeimos kodeksas, *Žin.* (1969, Nr. 21-186)).

<sup>96</sup> See LR Darbo ginču nagrinėjimo istatymas, *Žin.* (2000, Nr. 56-1640), Art. 5-11; also: LR Darbo istatymo kodeksas, *supra* note 49.

requirement for mediation here. Moreover, this law already provides the possibility of direct negotiations but usually it does not work mostly because of the difference of powers. Third party's help is necessary here. A mediator could serve as this third party instead of the previously mentioned commission that makes binding decisions. So, we see that both kinds of mandatory mediation - state mandated or court ordered - could be applied in Lithuania and this would be a reasonable step towards the implementation of ADR methods.

### ***Conclusions***

Mediation is coming to Lithuania. It is starting to make the first steps here. This process is widely acknowledged as an alternative to the expensive and time consuming litigation and is world wide used for the settlement of various conflicts. At present Lithuania's law does not regulate mediation, nevertheless few provisions concerning mediation could be found in some laws and regulations, especially in its international treaties. The rule "what is not forbidden is allowed" could describe today's mediation situation in Lithuania. The main Lithuanian laws regulating civil relations are used, the Civil Code in particular. Some mediation organizations are already established and starting their activities. Beside the already mentioned absence of relevant law, they face such problems as the society's ignorance of such process or the government's unwillingness to help. Legal indetermination is also a big obstacle to the implementation of mediation here. The state's policy towards ADR processes, including mediation, is the most important factor in helping mediation to set its roots in Lithuania. State should recognize the benefits and importance of mediation and allow its citizens to use this method to resolve various disputes. With help and assistance from the state, mediation should strengthen its position quickly. Similar experience of other countries shows that under favorable circumstances this process becomes more and more popular and widely used. The more people are involved in this process, the bigger and stronger will mediation be.

### ***Abstract in Lithuanians***

**Rolandas Taraškevičius**

**AR TARPININKAVIMAS, KAIP VIENA SVARBIAUSIU ALTERNATYVIU GINCŲ SPRENDIMŲ FORMŲ, GALI EGZISTUOTI PAGAL ŠIUOLAIKINĘ LIETUVOS TEISĘ?**

*Santrauka*

Tarpininkavimas Lietuvoje pradeda žengti pirmus žingsnius. Šis procesas yra plačiai naudojamas bei pripažįstamas pasaulyje kaip alternatyva brangiems bei laika užimantiems ginčams. Dabartiniai Lietuvos įstatymai tarpininkavimo beveik nereguliuoja, bet galima rasti kelias nuostatas kai kuriuose įstatymuose bei aktuose, ypač tarptautinėse sutartyse. Turbut situacija geriausiai apibudintu taisykle "kas nedraudžiama, tas leidžiama". Autorius vadovaujasi pagrindiniais Lietuvos įstatymais, reguliuojančiais civilinius santykius, o būtent Civiliniu Kodeksu.

Lietuvoje jau yra įsteigtos bei pradede veikla keletas tarpininkavimo organizacijų. Bet, be jau minėto įstatyminio reguliavimo trukumo, jos susiduria su tokiomis problemomis kaip visuomenės abejingumas bei vyriausybės nenoras padėti. Dar viena kliūtis tarpininkavimo išigalejimui - teisinis neapibrėžtumas. Valstybės politika dėl alternatyvių ginčų sprendimo formų, tam tarpe ir dėl tarpininkavimo, yra vienas svarbiausių faktorių. Lietuva turėtų įvertinti tarpininkavimo svarbą bei naudą, ir leisti pilieciams naudoti šį metodą įvairiuose ginčiuose. Kitu šalių patirtis rodo, kad šis procesas vis populiarėja ir yra vis plačiau naudojamas. Šiuo straipsniu autorius nori padrasinti diskusijas apie tarpininkavimo naudą bei pristatyti šią alternatyvią ginčų sprendimo formą platesnei visuomenei.