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JUDICIAL MEDIATION IN
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“Nothing is permanent except change”

Heraclitus

“Never doubt that a small group of thoughtful, committed citizens can change the world: indeed it’s the only thing that ever has”

Margaret Mead

INTRODUCTION

The Research problem

Although judicial mediation has been introduced into the Lithuanian legal system by adopting a related legal regulation in the framework of the launch of a pilot project in courts in the year 2005,¹ and though legal regulation is considered to be “the most important framework for the application of mediation”,² judicial mediation in civil disputes³ has not yet become a true alternative to litigation in the Lithuanian legal system and is rarely applied in practice⁴ despite the legislative initiatives, as well as the active promotion of this alternative dispute resolution (hereinafter also referred to as “ADR”) procedure by authorities. Nevertheless, in spite of the relatively recent implementation of judicial mediation in civil disputes, the legal regulation of this ADR procedure has been modified more than once during past years.⁵ Moreover, the further modification of the legal regulation of me-

1 The Council of Courts (later – the Judicial Council) adopted Resolution No. 13P-348 on the Pilot Project of Judicial Mediation on 20 May 2005, which constitutes the legal basis for the launch of the Pilot Project of Judicial Mediation (hereinafter “Pilot Project”). Resolution of 20 May 2005 No. 13P-348 on the Pilot Project of Judicial Mediation of the Council of Courts [interactive], [accessed 2014-03-31]. <<http://www.teismai.lt/teismu-savivalda/nutarimai/?nr=&f=331&tipas=1&metai=2005&menuo=05&diena=20&metai1=2005&menuo1=05&diena1=21&pavadinimas=&criteria1=all&q=&criteria=all&type=0&search=1>>.

2 Kaminskienė, N., et al. *Mediacija*. Vadovėlis. Vilnius: Mykolo Romerio universitetas, 2013; p. 196.

3 The legal regulation in force creates preconditions for the application of judicial mediation solely in civil disputes.

4 For example, during the period of 2010–2012, there were 45 cases referred to judicial mediation, in 2013 – 35 cases, and in 2014 – 53 cases. According to the *Summary of the Survey of Courts on the Civil Cases Dealt with the Help of Judicial Mediation and on the Settlement Agreements Concluded in Court Hearings During the Period of 2010–2012* (No. 3R) of 15 October 2012, prepared by the National Courts Administration; the *Statistical Data on the Application of Judicial Mediation in Civil Cases and Settlement Agreements Concluded in Court Hearings in 2012–2013*, provided for the purposes of this research by the National Courts Administration; the *Summary of Judicial Mediation Process of the Year 2014* (No. 3R-812-(6.20)) of 10 March 2015, prepared by the Legal Division of the National Courts Administration.

5 For example, the legal act that regulates the procedure of judicial mediation – the Judicial Mediation Rules (adopted by the aforementioned Resolution No. 13P-348 of the Council of Courts) has already been modified twice (by Resolution No. 13 P-15 of 26 January 2007 and Resolution No. 13P-53-(7.1.2.) of 29 April 2011) and, on 26 September 2014, a new wording of these rules was adopted (Resolution No. 13P-123-(7.1.2)).

diation, including its judicial form, is considered to be necessary for this ADR procedure to find its place and be applied in the Lithuanian legal system.⁶

It should be noted in this context that the existence of the universal principles of mediation, which create the basis for the qualitative and proper application of judicial mediation, is generally acknowledged; these principles are established by the rules that are requisite for the parties to a dispute to trust this ADR procedure; the compliance with such rules constitutes the very foundation of this ADR procedure.⁷ Thus, the rules that embody the universal principles of mediation, including its judicial form, *inter alia*, create preconditions for the application of this ADR procedure.

Therefore, before further elaborating on amendments essential to the framework for the application of judicial mediation, the existing legal regulation of this ADR procedure, as well as its relevance, must be thoroughly analyzed, *inter alia*, from the point of view whether it embodies the rules that consolidate the universal principles of, *inter alia*, judicial mediation, i.e. the rules that are required in order this ADR procedure can be trusted and applied in practice. Consequently, the legal regulation that constitutes the framework for the application of judicial mediation in civil disputes in Lithuania is examined in this research, *inter alia*, in terms of whether the main principles of this ADR procedure are embodied and whether the preconditions for their application are created therein, in order to evaluate the suitability of such a legal regulation, to determine its shortcomings and provide insights into its possible modifications and development.

The relevance and novelty of the dissertation and the significance of the research results

Relevance. Alternative dispute resolution has become a world-widely applied alternative or even supplement to traditional adjudication during the past decade essentially in all countries, and one of its forms – mediation – has gained considerable significance in almost every legal system. In the course of its introduction, mediation has been adapted to the individual features of a particular legal system and, thus, has eventually obtained a salient structure and content in every legal system, while the flexibility of mediation has determined the constant development of this procedure even after its implementation in the particular legal system.

The implementation of mediation, *inter alia*, in civil disputes, has been placed high on the agenda of the European Union, as well. The relevant steps for the promotion of ADR, namely mediation, included the adoption of the Green Paper on Alternative Dispute Resolution in Civil and Commercial Matters in 2002,⁸ the launch of the European Code of Conduct

6 Kaminskiėnė, N., *et al. Mediacija. Vadovėlis*, p. 218. In addition, the Ministry of Justice of the Republic of Lithuania has recently worked out the draft Conception of the Development of the System of Conciliatory Mediation (Mediation) (hereinafter also “the Conception of the Development of Mediation”), which envisages the prospective modifications of, among others, the model of judicial mediation.

7 *Ibid.*, pp. 76–77.

8 Green Paper on Alternative Dispute Resolution in Civil and Commercial Law [COM(2002) 196 final], adopted by the Commission of the European Communities in April 2002 [interactive], [accessed 2014-08-14]. <<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52002DC0196>>.

for Mediators in July 2004 by the European Commission,⁹ the proposal of the European Commission for a directive on certain aspects of mediation in civil and commercial matters on 22 October 2004 and the subsequent adoption of the Directive on Certain Aspects of Mediation in Civil and Commercial Matters in 2008.¹⁰ Consequently, mediation has essentially become the favored and the most promoted ADR procedure in the European Union.

At the same time, the development of modern society, as well as the growing range of the relations of legal nature, has gradually influenced the quantitative augmentation of legal conflicts almost in every state, hence, in Lithuania, as well.¹¹ Such conflicts were and still are most frequently¹² placed before courts in exercise of the right to apply to court under Paragraph 1 of Article 30 of the Constitution of the Republic of Lithuania;¹³ however, alternative dispute resolution, namely mediation, has, though relatively recently, become an integral part of the Lithuanian legal system, as well. In addition, despite the early initiatives for the implementation of extrajudicial mediation¹⁴ and the introduction of the legal basis for its application in 2008,¹⁵ the growth of interest in its application among different legal practitioners¹⁶ lead to the dispersal of the providers of extrajudicial mediation services, i.e. there is no common system or practice of the application of extrajudicial mediation.¹⁷ Furthermore, though the more active introduction of extrajudicial mediation

- 9 European Code of Conduct for Mediators [interactive], [accessed 2014-08-14]. <http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf>.
- 10 Directive 2008/52 of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters (hereinafter “Directive”). 2008 O.J. (L 136) 3.
- 11 Kavalnė, S., Saudargaitė, I. Mediation in Disputes Between Public Authorities and Private Parties: Comparative Aspects. *Jurisprudence: Research Papers*. 2011, No. 18(1): 251–265; p. 260.
- 12 For example, in 2013, the courts of general jurisdiction heard 183,062 civil cases as opposed to 181,877 in 2012. The *Review of the Activity of the Courts in 2013* (hereinafter “Review of the Activity of the Courts in 2013”) [interactive], [accessed 2014-08-15]. <http://www.teismai.lt/dokumentai/teismu%20ataskaita_2013_po%20pristatymo.pdf>. Whereas, in 2014, the courts of general jurisdiction heard even more civil cases – 196,723. The *Review of the Activity of the Courts in 2014* [interactive], [accessed 2015-06-14]. <http://www.teismai.lt/data/public/uploads/2015/03/2014_teismu_veiklos_apzvalga_.pdf>.
- 13 Constitution of the Republic of Lithuania. *Valstybės žinios*. 1992, No. 33-1014.
- 14 For example, in 1993, the Lithuanian Conflict Solving Center was founded; the following year featured the establishment of the Lithuanian Conflict Prevention Association. This association, with two other non-governmental organizations, carried out the joint project “Development of Mediation Services in Lithuania”.
- 15 Introduction of extrajudicial mediation was intended through the adoption of the Mediation Law.
- 16 For example, mediation services are provided by arbitration institutions (such as the Vilnius Court of Commercial Arbitration (<<http://www.arbitrazas.lt/?lid=6>>), the Lithuanian Court of Arbitration (<<http://www.arbitrazoteismas.lt/en/>>)), as well as entities that specialise in dealing with family conflicts (such as the non-governmental organization Children Support Center (together with Professional Law Partnership Vaičiūnas & Vaičiūnas) (<<http://www.seimosmediacija.lt/>>), the Institute for Family Relations (<<http://www.ssinstitut.lt/en/for-everyone/>>), other private entities usually providing legal (including advocate), financial, communication or other services (such as UAB “Justicija” (<<http://justicija.eu/asmeninis-teisininkas/mediacija-taikinamasis-tarpininkavimas/>>), the Communication agency MB “Mama ir vaikas” (<<http://www.komunikacijaverslui.lt/mediacija-taikus-ginco-sprendimas/>>), private mediators (such as Šarūnas Mačiulis, (<<http://www.mediator.lt/>>), etc.
- 17 General statistical data regarding the application of private (extrajudicial) mediation is not publicly presented. Juškaitė-Vizbarienė, J. Ar mediatoriumi kyla civilinė atsakomybė už ydingą vadovavimą me-

into the Lithuanian legal system is definitely on the agenda of national authorities, judicial mediation, which was first to be introduced into the Lithuanian legal system (which has the long-lasting traditions of litigation) through the Pilot Project in 2005, is the type of mediation that is very actively promoted by the Government, *inter alia*, due its relation to the system of courts.

However, despite the relevantly recent introduction of judicial mediation into the Lithuanian legal system, i.e. the recent adoption of the legal regulation of judicial mediation, applicable legal provisions have subsequently been modified more than once and, as mentioned, will be subject to additional future amendments. Hence, judicial mediation is still adapting to particular features of the Lithuanian legal system and, though this ADR procedure is not widely applied in practice, the introduced model of judicial mediation is considered to be in need of further amendments. It should be added that the subsequent development of judicial mediation in the Lithuanian legal system, i.e. *inter alia*, the need for legislative amendments, is envisaged as not only the future of this ADR procedure by legal scholars,¹⁸ but as one of the objectives of the legislature, as well.¹⁹

Therefore, the analysis of the legal framework for the application of judicial mediation in civil disputes, i.e. the legal regulation of this ADR procedure in the Lithuanian legal system, must be performed in order to identify the existing shortcomings and to provide certain insights into possible difficulties in the application of judicial mediation, as well as to envision requisite modification of the framework for the application, as well as possible development, of this ADR procedure.

Novelty. Judicial mediation is a relatively new dispute resolution procedure in the Lithuanian legal system; its application in practice has been poor.²⁰ Judicial mediation in civil disputes, thus, is also a fairly new subject matter in Lithuanian jurisprudence: any systematic analysis of the legal regulation of judicial mediation in civil disputes, *inter alia*, in respect of the introduction of the main principles of this ADR procedure, as well as of the guarantees for their implementation, has not been performed yet. The complementary

diacijų procesui? *Teisės apžvalga*. No. 1(11), 2014, pp. 99-138: 101. It should be noted, however, that extrajudicial (private) mediation (legal provisions regulating its application, as well as the relevant practical aspects of its application) does not (do not) constitute the subject-matter of this research; in addition, the author of this dissertation does not assert that any kind of common practice or anything similar to it is necessary for application of this type of mediation. It should also be noted that the mentioned lack of summarized statistical data on the application of private mediation (i.e. general statistics and not the relevant data in respect of application of extrajudicial mediation by one legal entity or in a certain area of relations) does not allow to identify more-favored (by disputing parties) type of mediation in Lithuania.

18 For example, Kaminskienė, N. Privaloma mediacija: galimybės ir iššūkiai. *Jurisprudence: Research Papers*. 2013, No. 20(2): 683–705; Kaminskienė, N. Teisminė mediacija Lietuvoje. Quo vadis? *Social Work: Academic Papers*. 2010, No. 9(1): pp. 54–63.

19 The most evident instances of the possible prospective development of judicial mediation may be determined taking into account, for example, the Plan of Measures for the Development of Conciliatory Mediation (Mediation) and the Promotion of Peaceful Settlement of Disputes, approved on 23 November 2010 by Order No. 1R-256 “On the Approval of the Plan of Measures for the Development of Conciliatory Mediation (Mediation) and the Promotion of Peaceful Settlement of Disputes” of the Minister of Justice of the Republic of Lithuania, as well as the aforementioned draft Conception of the Development of Mediation.

20 Kaminskienė, N. Privaloma mediacija: galimybės ir iššūkiai, p. 684.

analysis of the research object in the light of the relevant international legal context also reflects the novelty of the performed research.

Significance. The need for the development of judicial mediation in Lithuania, among others, requires, as mentioned, a thorough analysis of the legal framework for application of this ADR procedure in order to identify the existing shortcomings, provide insights into the possible difficulties in the application of judicial mediation and identify requisite future modifications of the framework of this ADR procedure. Consequently, the results of this research could be beneficial for drafting the amendments to the legal provisions regulating the application of judicial mediation, as well as for the practical application of legal regulation; the results could also contribute to the development of the relevant legal doctrine. The pre-conditioned amendments of the existing legal framework for the application of judicial mediation can influence the more successful application of this ADR procedure in Lithuania.

The research object of the dissertation

The research object of this dissertation is the legal regulation of judicial mediation²¹ in civil disputes²² in Lithuania.²³

Meanwhile certain aspects relevant to the application of judicial mediation in practice, such as the specific examples of cases referred to judicial mediation, the opinions of judicial mediation participants in respect of the application of this ADR procedure, do not constitute the object of this research and are referred to, where appropriate, only for the illustration of the provided statements.²⁴

- 21 Judicial mediation is understood in this research as it is defined in the Lithuanian legal system; therefore, the research does not entail a thorough analysis of other types of court mediation applied in foreign countries.
- 22 Due to the fact that only the legal regulation of judicial mediation in civil disputes, as it is understood in the Lithuanian legal system, constitutes the subject matter of this research, the possibility of the application of judicial mediation in other types of disputes is not thoroughly analysed within the scope of this research.
- 23 The legal regulation of judicial mediation within the scope of this research involves all relevant legal provisions that were in force up to the 1 January 2015.
- 24 Such a choice was conditioned by the following circumstances:
 - 1) judicial mediation in civil disputes has been up to the present applied in Lithuania, more or less, only fragmentarily: there were only 131 cases referred to judicial mediation during the period of 2010–2014, and only 23 of them resulted in the conclusion of the settlement agreement (see Chart 3 in the Appendix); according to the available data, only 141 cases were referred to judicial mediation from the moment of the launch of the Pilot Project (see Chart 1 in the Appendix); in other words, the application of judicial mediation could be considered as yet being too insignificant in order to create preconditions for making summarized conclusions in respect of the problematic aspects of the legal regulation of judicial mediation that were revealed in the course of its application in practice;
 - 2) the opinion of mediators in respect of the problematic aspects that have already arisen or may arise in the course of the application of the legal regulation of judicial mediation were thoroughly investigated (within the range of capability) by the legal authorities before drafting the new wording of the Judicial Mediation Rules (and other relevant acts), which came into the force on 1 January 2015; hence, the relevant *travaux préparatoires* (i.e. including relevant opinions provided by the courts in respect of the shortages of then valid legal regulation of judicial mediation – the problematic aspects of its application in practice) were analyzed when performing this research;
 - 3) during the period of 2012–2013 (the period of the increased application of judicial mediation) only

The aim and tasks of the research

The dissertation aims at (i) *identifying* whether the legal regulation of judicial mediation in civil disputes is adequate for the peaceful settlement of disputes, *inter alia*, whether it consolidates the rules that consolidate the universal principles of judicial mediation – rules that are required in order this ADR procedure can be trusted and applied in practice, and whether it creates preconditions for their application, also (ii) *establishing* relevant proposals for the legislator on the modification of the applicable legal regulation of judicial mediation in civil disputes, and (iii) *indicating* the peculiarities of the framework for the application of judicial mediation in civil disputes in the Lithuanian legal system.

This research, however, is not aimed at indicating or suggesting the single and the most appropriate for the Lithuanian legal system model of judicial mediation for the purposes of dealing with civil disputes.

The tasks of the research:

- 1) to present the evolution of the model of judicial mediation in civil disputes in Lithuania and identify the main factors that have influenced the implementation and development of this ADR procedure;
- 2) to provide a definition of judicial mediation in the Lithuanian legal system and identify the main principles of this ADR procedure;
- 3) to identify whether the participants of judicial mediation are provided with the legal status necessary to guarantee the implementation of the main principles of judicial mediation, including rights and duties requisite for the amicable resolution of the dispute;
- 4) to identify the peculiarities of the procedure of judicial mediation and determine whether the main principles of the latter are implemented throughout the procedure;
- 5) to characterise the main aspects of the possible prospective development of the legal framework for the application of judicial mediation in the Lithuanian legal system;
- 6) to formulate the proposals for the modification of the applicable legal provisions regulating judicial mediation in civil disputes in Lithuania.

12 per cent of the mediators from the List of Court Mediators (at that time, it comprised 8 mediators) conducted judicial mediation (see Chart 6 in the Appendix); therefore, the inquiry into the opinion of only a minor part of mediators in respect of the problematic aspects of the legal regulation of judicial mediation arising in the course of its application could not have preconditioned the relevant generalised conclusions;

4) on the basis of the principle of confidentiality, the examples of the particular cases referred to judicial mediation, as well as the opinion of the participants of judicial mediation remain publicly unavailable.

Therefore, the analysis of the identified practical aspects could not have been made and, if made, could not have conditioned the production of generalised conclusions and could not have constituted any useful source (especially in the context of the aforementioned analysis of opinions, *inter alia*, of mediators, conducted by the National Courts Administration) of information within the scope of this research.

The statements to be defended

1. The general principles of judicial mediation constitute an integral part of the legal framework for the application of judicial mediation in the Lithuanian legal system; the applicable legal provisions also establish, though not in all cases, guarantees for the implementation.
2. The rights and duties indispensable for the amicable resolution of the dispute within the scope of judicial mediation are provided for the main participants of this ADR procedure – the parties to a dispute and mediator, and the legal regulation creates preconditions for the application of such rights and duties.
3. The model of judicial mediation introduced in the Lithuanian legal system has its salient features (*inter alia* as compared to the relevant models introduced in other civil law countries) acquired in the course of its development.

THE OVERVIEW OF THE RESEARCH

Although judicial mediation in civil disputes was introduced into the Lithuanian legal system almost a decade ago, it has not been analysed in an integral manner in national jurisprudence. However, certain aspects of judicial mediation constituted the subject matter of the articles by assoc. prof. dr. N. Kaminskienė,²⁵ and the legal regulation of judicial mediation was also partially analysed by prof. dr. V. Valančius.²⁶

All other researches in the area of ADR and, namely, mediation have been either only partially related to judicial mediation, or judicial mediation has not constituted a subject matter of these researches at all. Researches in ADR field may be classified into the following generalised groups:

- I. Studies on the general aspects of ADR: studies of this nature were performed by assoc. prof. dr. N. Kaminskienė²⁷ and dr. F. Petrauskas,²⁸ research related to the conciliation of parties in civil procedure, as well as its relation to mediation, was performed by assoc. prof. dr. V. Vėbraitė;²⁹ issues related to conciliation in the public sector were analyzed by prof. dr. J. Lakis.³⁰
- II. Studies on ADR in particular areas of law:
 - 1) researches related to restorative justice were performed by assoc. prof. dr. R. Uscila³¹ and prof. dr. R. Ažubalytė;³²
 - 2) researches on ADR in civil law were conducted by assoc. prof. dr. N. Kaminskienė³³ and assoc. prof. dr. R. Simaitis;³⁴
 - 3) analysis of ADR in consumer disputes was performed by dr. F. Petrauskas.³⁵

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- 25 Kaminskienė, N. Teisminė mediacija Lietuvoje. Quo vadis?; Kaminskienė, N. Teisminė mediacija kaip socialinė inovacija įgyvendinant teisingumą Lietuvoje. *SOCIN 2012: 1st international interdisciplinary conference on social innovations: abstracts' book of Mykolas Romeris University research days 2012 "Social innovations: theoretical and practical insights"*. Vilnius: Mykolas Romeris University, 2012.
 - 26 Valančius, V. Lithuania, *EU Mediation: Law and Practice* (ed. De Palo, G., Trevor, M. B.). Oxford University Press, 2012: 220–238.
 - 27 Kaminskienė, N. Alternatyvus ginčų sprendimas. *Jurisprudencija: mokslo darbai*. 2006, No. 9(87): 84–91.
 - 28 Petrauskas, F. Alternatyvaus ginčų narinėjimo raida, teisinė padėtis ir reglamentavimas. *Jurisprudence: Research Papers*. 2011, No. 18(2): 631–658.
 - 29 Vėbraitė, V. *Šalių sutaikymas civiliniame procese*. Daktaro disertacija. Vilnius University, 2009.
 - 30 Lakis, J. Konfliktiškumas ir taikinimo būdai Lietuvos viešajame sektoriuje – problemos ir gairės. *Viešoji politika ir administravimas*. 2008, No. 26: 35–44.
 - 31 Uscila, R. Atkuriamasis teisingumas penitencinėje sistemoje. *Pedagogika: mokslo darbai*. [T.] 103 (2011): 92–98.
 - 32 Ažubalytė, R. Susitarimas (susitaikymas) viešojo kaltinimo byloje kaip viena iš diskrecinio baudžiamojo persekiojimo formų. *Jurisprudencija: mokslo darbai*. 2006, No. 6(84): 33–40.
 - 33 Kaminskienė, N. *Alternatyvus civilinių ginčų sprendimas*. Vilnius: Registrų centras, 2011; Kaminskienė, N. *Alternatyvus civilinių ginčų sprendimas*. Daktaro disertacija. Mykolas Romeris universitetas, 2009; Kaminskienė, N. Civilinių ir komercinių ginčų alternatyvus sprendimas. *Jurisprudencija: mokslo darbai*. 2005, t. 69(61): 74–80.
 - 34 Simaitis, R. Mediacijos privačiuose ginčiuose teisinio reguliavimo tendencijos Lietuvoje. *Justitia*. 2007, No. 2(64): 21–33.
 - 35 Petrauskas, F. Alternatyvus vartotojų ginčų sprendimas: kitų šalių patirties pritaikymas naujojoje vartotojų teisių gynimo įstatymo redakcijoje. *Jurisprudencija: mokslo darbai*. 2007, No. 9 (99): 34–40.

III. Studies on the general aspects of mediation and mediation in particular areas of law:

- 1) studies on the general aspects of mediation: the analysis of mediation as a means for resolution of disputes was performed by T. Milašius;³⁶ assoc. prof. dr. N. Kaminskienė³⁷ investigated issues related to mandatory mediation; the analysis of the opportunities for lawyers in the light of mediation trend was performed by prof. dr. I. Žalėnienė and A. Tvaronavičienė;³⁸ mediation in general was also a subject matter of a legal textbook;³⁹
- 2) researches on victim-offender mediation were conducted by assoc. prof. dr. R. Uscila⁴⁰ and assoc. prof. dr. I. Michailovič;⁴¹
- 3) studies on mediation in administrative disputes were conducted by dr. U. Trumpulis⁴² and A. Banys,⁴³ the analysis in the light of comparative aspects in respect of mediation in disputes between public authorities and private parties was conducted by assoc. prof. dr. S. Kavalnė and I. Saudargaitė;⁴⁴
- 4) studies on mediation in the activities of notaries were performed by G. Štaraitė-Barsulienė;⁴⁵
- 5) issues related to divorce mediation were investigated by prof. dr. R. Mienkowska-Norkienė.⁴⁶

36 Milašius, T. Mediacija kaip alternatyvus ginčų sprendimo būdas. *Teisė*. 2007, t. 63: 43–58.

37 Kaminskienė, N. Privaloma mediacija: galimybės ir iššūkiai.

38 Žalėnienė, I., Tvaronavičienė, A. The Main Features and Development Trends of Mediation in Lithuania: the Opportunities for Lawyers. *Jurisprudence: Research Papers*. 2010, No. 1 (119): 227–242.

39 Kaminskienė, N., et al. *Mediacija. Vadovėlis*. Vilnius: Mykolo Romerio universitetas, 2013.

40 Uscila, R. Nusikaltimo aukos ir nusikaltėlio mediacija Skandinavijos šalyse. *Jurisprudencija: mokslo darbai*. 2002, T. 29(21): 93–108; Uscila, R. Nusikaltimo aukos ir nusikaltėlio mediacijos instituto samprata, pagrindiniai modeliai ir jų veikimo principai. *Jurisprudencija: mokslo darbai*. 2001, T. 20(12): 74–84; Uscila, R. Nusikaltimo aukos ir kaltininko mediacijos įdiegimo galimybės Lietuvoje. *Teisės problemos*. 2006, No. 2(52): 84–99.

41 Michailovič, I. Nepilnamečio kaltininko ir nukentėjusiojo mediacijos galimybės Lietuvoje. *Teisė*. 2000, t. 35: 69–79.

42 Trumpulis, U. Teorinės ir praktinės mediacijos taikymo prielaidos sprendžiant administracinius ginčus Lietuvoje. *Jurisprudence: Research Papers*. 2012, No. 19(4): 1423–1437.

43 Banys, A. Mediacija administraciniame procese: samprata ir teisinės prielaidos. *SOCIN 2012: 1st international interdisciplinary conference on social innovations: abstracts' book of Mykolas Romeris University research days 2012 "Social innovations: theoretical and practical insights"*. Vilnius: Mykolas Romeris University, 2012.

44 Kavalnė, S., Saudargaitė, I. Mediation in Disputes Between Public Authorities and Private Parties: Comparative Aspects.

45 Štaraitė-Barsulienė, G. Mediacijos taikymo galimybės notaro veikloje. *Social Sciences Studies: Research Papers*. 2012, No. 4(1): 233–250; Štaraitė-Barsulienė, G. Notaro kaip mediatoriaus vaidmuo paveldėjimo teisiniuose santykiuose. *Social Work: Academic Papers*. 2012, No. 11(2): 301–314; Štaraitė-Barsulienė, G. Mediacijos taikymas sprendžiant ginčus dėl palikimo (ginčo analizė). *SOCIN 2012: 1st international interdisciplinary conference on social innovations: abstracts' book of Mykolas Romeris University research days 2012 "Social innovations: theoretical and practical insights"*. Vilnius: Mykolas Romeris University, 2012.

46 Mienkowska-Norkienė, R. Inequality in divorce mediation—reasons, manifestations and ways to avoid it. Lessons for Lithuania. *Social Work: Academic Papers*. 2012, No. 11(1):119–130.

It should also be noted that mediation from a psychological perspective has been the research interest taken by assoc. prof. dr. J. Sondaitė.⁴⁷

However, despite the obvious academic interest in ADR and one of its forms – mediation, judicial mediation in civil disputes in Lithuania has not up till now constituted the subject matter of the systemic research in Lithuanian jurisprudence.

It should be mentioned, that various aspects and forms of ADR, as well as the principles, types and diverse aspects of mediation, including one of its forms – judicial mediation, constitute an integral part of jurisprudence in foreign countries: different aspects have been thoroughly analyzed by legal scholars and still constitute the current research interest. F. E. A. Sander, L. Riskin, C. Menkel-Meadow, J. Nolan-Haley, K. K. Kovach, M. Moffitt, E. Brunet, L. Boulle, F. Mosten, N. A. Welsh, M. B. Trevor (the United States), N. Alexander, D. Spencer (Australia), A. Goodman, A. Hammerton (the United Kingdom), L. Otis (Canada), G. de Palo (Italy), and H. Eidenmüller (Germany) should be outlined as several of the most famous and representative scholars in this sphere.

However, despite the manifest scientific interest in mediation, as well as in one of the types of mediation – judicial mediation, judicial mediation in civil disputes in Lithuania has not constituted a subject matter of systemic research by foreign legal scholars.

47 For example, Sondaitė, J. Šeimos mediacija: užsienio šalių patirtis. *Socialinis darbas: mokslo darbai*. 2006, No. 5(2): 24–28; Sondaitė, J. Mediacijos stilių lyginamoji analizė. *Socialinis darbas: mokslo darbai*. 2004, No. 3(2): 114–118.

THE METHODOLOGY OF THE RESEARCH

In view of the object of this research, the following traditional jurisprudence methods have been applied in order to achieve the aim of this research and to draw the conclusions: document analysis, systematic analysis, also linguistic, teleological, logical-analytical, and historical methods. With the aim of achieving comprehensive results of this research, these methods have been applied in combination with each other throughout the research, and the choice of the particular methods and (or) their combination was determined by the particular issue and its features.

The method of document analysis has been applied in analyzing the legal provisions regulating judicial mediation in Lithuania, as well as the legal acts of the European Union, the studies of Lithuanian and foreign legal scholars, and other material relevant for this research. The method of data analysis has also been applied in this research for analysing the statistical data relevant to the application of judicial mediation in civil disputes in Lithuania.

The linguistic method has been applied when examining the definitions (of judicial mediation, mediator in judicial mediation, etc.) provided by the applicable legal acts, as well as when analysing the wording of the particular legal provisions of Lithuanian legal acts and the provisions of European Union law.

The teleological method has been applied for determining the true intentions of the legislator, i.e. the aims that were pursued by establishing particular legal provisions regulating judicial mediation.

The method of systematic analysis has been applied, *inter alia*, when examining the legal regulation of judicial mediation in the light of its application in practice, taking into account the insights provided in the special legal literature, generalizing it and providing systematic approach in respect of the subject matter of the research.

The logical-analytical method has been applied throughout the research, *inter alia*, for the analysis of the possible difficulties in the application of judicial mediation, for framing the proposals for the improvements of the respective legal regulation, for providing the conclusions, as well as for verifying the results of the research and their logical connection.

The historical method has been applied for the analysis of the evolution and development of judicial mediation in general, as well as for the analysis of the introduction and development of judicial mediation in the Lithuanian legal system in particular.

THE STRUCTURE OF THE DISSERTATION

The dissertation consists of the introduction, the overview of the research, the presentation of the methodology of the research, the main part, the conclusions, the appendix, and the bibliography.

The object, the aim and the course of the research predetermined the structure of the main part of the dissertation; hence, it consists of four chapters.

As judicial mediation is defined distinctively in every legal system, *inter alia*, due to the particularities of the development of this ADR procedure in the specific legal system, the factors that have influenced the evolution and still, to a greater or smaller extent, influence the development of the legal framework of judicial mediation in the Lithuanian legal system have had to be primarily analysed before defining the notion of judicial mediation and the one of a civil dispute. Hence, the Chapter One *The Evolution and Notion of Judicial Mediation* of the dissertation primarily deals with the main aspects of the development of judicial mediation, as the ADR procedure, in general and the peculiarities of its development in different legal traditions, as well as its development in the European Union – some of the key aspects that have had influence on the concept of judicial mediation in Lithuania, as well as the impact on the substance of the legal regulation of this ADR procedure and its application. Consequently, after the analysis of the general notion of judicial mediation, which has an influence on the definition of this ADR procedure in each particular legal system, the notion of judicial mediation in the Lithuanian legal system, as well as the one of a civil dispute, is formulated.

Following the findings of the Chapter One of the dissertation that the specific role of the participants of judicial mediation, namely the mediator and the parties to a dispute, is considered to be one of the substantial aspects that characterise and define this ADR procedure, *inter alia*, in the Lithuanian legal system, as well as that the principles of judicial mediation (*inter alia*, the consensual nature of the process itself and the self-determination of the parties) primarily relate to and may be reflected to a maximum extent through the aspects relevant to the role and legal status of the participants of judicial mediation, as they may influence the content and the scope of the application of the general principles, the Chapter Two *Participants of Judicial Mediation* of the dissertation focuses on the role and legal status, namely the rights and duties, of the parties to a dispute and the mediator in judicial mediation. Accordingly, an analysis is performed as to whether the participants of judicial mediation are provided with the rights and duties necessary to achieve the amicable settlement of the disputes.

Due to the fact that judicial mediation, in spite of the flexible nature of this ADR procedure, has been regulated rather rigorously in the Lithuanian legal system, the Chapter Three *Procedural Aspects of Judicial Mediation* of the dissertation deals with the analysis of the special features of the legal regulation of the procedure of judicial mediation. In order to identify, *inter alia*, whether the main principles of judicial mediation are maintained not only in terms of providing the necessary rights and imposing duties on the participants of this procedure, but also in terms of guaranteeing their application throughout the whole procedure of judicial mediation in the Lithuanian legal system, this chapter focuses on this issue separately in respect of every stage of judicial mediation: its initial stage, the process itself, and its conclusion (termination); special attention is also given to one of the main

principles of judicial mediation – the principle of confidentiality and its manifestations in the Lithuanian legal system.

The Chapter Four *The Future Development of Judicial Mediation* of the dissertation provides, taking into account findings of the previous chapters, brief insights into those instances of the development of the model of judicial mediation that are likely to appear in the near future of the application of this alternative to traditional litigation in Lithuania and that, presumably, would also help increasing the application of this ADR procedure. Hence, this chapter of the dissertation focuses on the possibility of the implementation of some kind of a mandatory element in the model of judicial mediation, as well as some possible development of the system that would guarantee the quality of judicial mediation, and other possible developments.

1. THE EVOLUTION AND NOTION OF JUDICIAL MEDIATION

Mediation, as one of the most frequently applied ADR procedures, is generally a popular alternative to traditional adjudication. It is agreed, that the flexibility of this procedure enables it to adapt to the ever-changing needs of the disputants and, thus, determines continuing alternation of its concept.⁴⁸ At the same time legal, political and cultural characteristics have affected and continue to affect structural issues related to its application leading to different answers for the same questions, and different solutions for the same global changes.⁴⁹ This continuing development has an undeniable influence on the changes of the concept of mediation. It is also true in respect of one of the types of mediation – judicial mediation: the concept of judicial mediation can be analyzed only after considering the main aspects of development of this ADR procedure, as well as the peculiarities of its development in different legal traditions and countries.⁵⁰

Thus, having in mind the formula – *the particular concept of judicial mediation is related to the development of this ADR procedure in general and its peculiarities in specific legal tradition, as well as its general concept, and depends on the development this ADR procedure has undergone in particular legal system*, – the notion of judicial mediation in Lithuanian legal system is analyzed in this chapter of the dissertation only after brief presentation and assessment of the evolution of judicial mediation in general and its peculiarities in different legal traditions, as well as its development in the European Union (hereinafter also referred to as “EU”) – some of the key aspects that have had and still have influence on the concept of judicial mediation in Lithuania, as well as the impact on the substance of legal regulation of the this ADR procedure and its application.⁵¹

48 In the words of Carrie Menkel-Meadow, the many ways of mediation are generated. Menkel-Meadow, C. The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices. *Negotiation Journal*. 1995, 11(3): 217-242.

49 In the words of Nadja Alexander, it is nothing less than misleading to consider mediation as universal process in isolation from its context. Context determines how mediation is absorbed and applied by mediators, dispute management professionals such as lawyers and clients. Context defines mediation and has direct impact on how it is practiced. Alexander, N. What's Law Got To Do With It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions. *Bond Law Review*. 2001, 13(2): 1–29, p. 1, 18.

50 It should be noted in this context that although alternative dispute resolution is in some instances equated to out-of-court dispute settlement, this does not preclude the existence of the form of mediation in some way (which depends on the features of particular legal system) related to court – judicial mediation. Petrauskas, F. Alternatyvus vartotojų ginčų sprendimas: kitų šalių patirties pritaikymas naujojoje Vartotojų teisių gynimo įstatymo redakcijoje. *Jurisprudencija: mokslo darbai*. 2007. 9(99): 34–40, p. 34.

51 Other factors, such as, for example, the activity of the United Nations Commission on International Trade Law (UNCITRAL), including the adoption of the Model Law on International Commercial Conciliation (hereinafter also referred to as “Model law”) or the adoption of relevant recommendations by the institutions of the Council of Europe, are not analyzed and presented separately in this part. Their influence on the concept and content of judicial mediation in Lithuania, however, is, in a sense, reflected in other parts of this dissertation.

1.1. The Evolution Of Judicial Mediation

This section of the Chapter One of the dissertation is devoted to an overview of the main aspects of evolution of judicial mediation that have influenced and, in certain way, still influence the concept of judicial mediation in Lithuania. For this purpose the following section is structured into four main subsections: genesis and evolution of modern judicial mediation are briefly presented in the first of them, in the second – peculiarities of development of judicial mediation in the countries belonging to different legal tradition are analyzed, development of judicial mediation in the European Union is surveyed in the third subsection, and the fourth subsection is devoted to the development of judicial mediation in Lithuania.

1.1.1. Genesis And Evolution Of Modern Judicial Mediation

Dispute resolution by non-judicial procedures in various civilizations was known as the first, natural and the most acceptable mean of dealing with the conflicts since the ancient times.⁵² First manifestations of traditional mediation can be identified more than two thousand years ago in ancient China and Japan, where it was applied not as an alternative to dispute resolution process controlled by the state, but as a primary and leading mode of dispute resolution. The origins of mediation can be traced generally to almost all cultures, including Judaism, Christianity, Islam, Hinduism, and Buddhism.⁵³

There is historical evidence that judicial mediation⁵⁴ also existed from the early stages of the formation of Chinese state; in addition there was even legal mandatory mediation (similar to modern compulsory mediation programs) in imperial China.⁵⁵ Other occurrences of application of judicial mediation could also be identified.

Nevertheless, judicial mediation, as a dispute resolution process, has gained a considerable importance only with the emergence of modern mediation – mediation that has originated from the United States. Mediation, as one of the means of dispute resolution, was occasionally applied in this country from the beginning of XX century.⁵⁶ However,

52 Kaminskienė, N. *Alternatyvus civilinių ginčų sprendimas*. Vilnius: Registrų centras, 2011, p. 47.

53 Milašius, T., p. 45.

54 The dispute resolution process namely applied by certain officials, which is here described as judicial mediation, cannot be entirely equated to the modern judicial mediation – procedure in which a third neutral person appointed or recommended by the court provides aid to the parties in the settlement of their disagreement.

55 The Chinese mediation tradition and popularity of mediation, including its judicial form, in this country are said to have been bolstered by a Confucian legal culture that has a strong cultural bias towards conciliation. Mediation in China, therefore, even nowadays, while increasingly being handled by legal and other professionals, continues to retain more of a mass character. Xu, X. Different Mediation Traditions: A Comparison between China and the U. S. *The American Review of International Arbitration* [interactive]. 2005, 16(515), [accessed 2013-11-02]. <http://www.lexisnexis.com/lxacui2api/results/docview/docview.do?docLinkInd=true&risb=21_T18530430073&format=GNBFI&sort=RELEVANCE&startDocNo=1&resultsUrlKey=29_T18530430048&cisb=22_T18530430075&treeMax=true&treeWidth=0&csi=168420&docNo=5>.

56 For example, the first mediation scheme for small claims was introduced in 1913 in District court of Cleveland. Milašius, T., p. 45.

primarily its application was related mainly to labor disputes and it was not widespread until 1960s.⁵⁷ The starting-point of modern mediation is considered to be the “Roscoe Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice” (“Pound Conference”) in 1976.⁵⁸ This date for many marks also the official starting-point of court-related mediation:⁵⁹ professor Frank E. A. Sander gave a speech “Varieties of Dispute Processing” and suggested the idea of “multi-door-courthouse” at which everybody could choose among a number of alternative methods to resolve a conflict, including mediation.⁶⁰ Hence courts were urged to propose to the litigants various means for the resolution of their disputes.⁶¹ Thus, the court was attributed an active role in order to improve system of justice by extending the possibilities for the parties to a dispute to resolve their dispute.⁶² The said presentation served as a ground for new ADR movement directed towards a new role of court in the developing society, as well as an impulse for application of various “out-of-court” dispute resolution methods.⁶³ Following it mediation centers were established throughout United States, courts and agencies obtained financial support from federal and state governments to start experimentation with various processes, numerous educational institutions started to offer courses in ADR procedures, including mediation.⁶⁴ Furthermore, in 1990s major steps were taken by the federal government – legal regulation demanding federal courts to consider specifically mediation was adopted.⁶⁵ Finally, mediation, including its judicial form, has become an integral part of the dispute resolution system in the United States.⁶⁶

The trend of intense development and application of judicial mediation was subsequently overtaken by other common law countries, for example, Australia, Canada (some parts thereof).

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- 57 Spencer, D., Brogan, M. *Mediation Law and Practice*. New York: Cambridge University Press, 2006, p. 25.
- 58 This date is considered by some researchers to signify the beginnings of ADR movement, as well as the starting point of upraise of ADR as a modern institute of resolution of civil and commercial disputes. Kaminskienė, N. *Civilinių ir komercinių ginčų alternatyvus sprendimas*, p. 76.
- 59 The phrase “court-related mediation” here is used to reflect any type of mediation which is in any way linked to court: either applied by a judge or ordered (recommended) by a judge, etc.
- 60 Hoffmann, A. *Mediation in Germany and the United States*. *European Journal of Law Reform*. 2007, 9(4): 505–551, p. 514.
- 61 Motiwal, O. P. *Alternative Dispute Resolution in India*. *Journal of International Arbitration*. 1998, 15(2): 117–128, p. 120.
- 62 Spencer, D., Brogan, *op. cit.*, p. 28.
- 63 Kaminskienė, N. *Civilinių ir komercinių ginčų alternatyvus sprendimas*, p. 76.
- 64 This led to the variety of the practices, even differences in dispute resolution cultures, and, therefore, to a conclusion, that it is difficult to speak of the “American experience” in mediation. Alexander, N. *What’s Law Got To Do With It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions*, p. 3.
- 65 In 1990 United States Congress promoted ADR by enacting Civil Justice Reform Act, reinforced by the Alternative Dispute Resolution Act of 1998. Hoffmann, A., *op. cit.*, p. 515–516.
- 66 Mediation there is believed to be not just for marginal or petty cases that are unworthy of litigation, but for the mainstream, not outside the court (distant from judges and lawyers), but located in the strongholds of adjudication, and not as radically separated from adjudication, but as a part of the same process. Galanter, M. *The Emergence Of The Judge As a Mediator In Civil Cases*. *Judicature*. 1986, 69(5): 257–262, p. 257.

Hence the common law jurisdictions and not the civil law countries were the first to implement mediation, including its judicial form. In addition, the rapid development of mediation, including its judicial form, in the United States and other common law countries was the reason (as it will be further highlighted) for different challenges of application of this ADR procedure, as compared to those that were faced in the course of its relatively hesitant development in continental Europe.

Despite the active expansion of ADR movement in the United States, ADR in general, as well as mediation and one of its forms – judicial mediation in particular, were for a long time not acknowledged in Europe. Interestingly, even in United Kingdom which, as one of the common law countries,⁶⁷ generally is a more active participant of ADR movement than other European countries, development of judicial mediation should be associated only with the year 1995 and the Lord Woolf's Interim Report on Access to Justice.⁶⁸ Judicial mediation, though, has quickly gained its place in English dispute resolution system after English courts took it upon themselves to promote ADR.⁶⁹

Generally, the tendencies of application of this ADR procedure were overtaken by European countries only in the beginning of 1990s.⁷⁰ Despite the relatively active application of mediation, including its judicial form, in the United Kingdom, this ADR procedure is a relatively new phenomenon in Europe. It has gained significant attention and has been implemented into legal systems of various European countries essentially only recently, partly following the savvy of the United States and that of the United Kingdom.

Hence, despite the manifestations of judicial mediation in the ancient times, the transformation of this ADR procedure into an integral part of dispute resolution system should namely be associated to the emergence of modern mediation in the United States and its subsequent implementation into the legal systems of other common law countries. The posterior introduction of *inter alia* judicial mediation into the legal systems of civil law countries was only a succession of the experience of common law jurisdictions. The subsequent implementation of judicial mediation into the legal systems of particular European

67 The peculiarities of development of judicial mediation in the countries of different legal tradition are presented in further subsection.

68 Lord Woolf essentially suggested courts encouraging the application of ADR procedures. Underhill, D. S. English Courts and the ADR – Policy and Practice since April 1999. *European Business Law Review*. 2003, 14(3): 259–276. It was only in the late 1990s that mediation was started to be used by the courts in civil and commercial cases (the first instances of application of mediation in divorce and family proceedings date back to 1970s). Tagg, J. UK – England and Wales. *Overview of judicial mediation in the World. Mediation, the first universal language of conflict resolution (First International Conference on Judicial Mediation, Paris, 16–17 October 2009)*. L'Harmattan, 2010: 59–61, p. 59.

69 The sharp integration of ADR procedures, including judicial mediation, into English legal system lead to disappearance of backlog of cases before the courts three years after their introduction. Therefore, the Lord Chancellor's Department is currently being faced with the opposite problem to that which it faced a decade ago: how to generate enough revenue from a disappearing case load in order to fund the judicial system. Newmark, C. *Agree to Mediate... or Face the Consequences – A Review of the English Courts' Approach to Mediation* [interactive], [accessed 2013-11-02]. <<http://beck-online.beck.de/default.aspx?printmanager=print&VPATH=bibdata%2Fzeits%2Fschiedsvz%2F2003%2Fcont%2Fschiedsvz.2003.23.1.htm&POS=14&HLWORDS=judicial%2Fmediation%2Fjudicial%2Fmediation+%2Fjudicial+%2Fmediation+%2Fjudicialmediation&mode=CurrentDoc&options=NewPage&x=65&y=7>>.

70 Kaminskienė, N. Civilinių ir komercinių ginčų alternatyvus sprendimas, p. 76.

countries, therefore, had to be made with regard to the experience of the countries where judicial mediation had already become an integral part of the dispute resolution system.

1.1.2. Development Of Judicial Mediation In Different Legal Systems

Although the rise of ADR movement and, consequently, the development of judicial mediation went on a more or less diverse path in different countries, whilst individual features of this development were predetermined by legal, political and cultural characteristics of particular countries, some systemic features relative to this process in countries that belong to the same legal tradition – in common and civil law jurisdictions – could be determined. Thus, the insights into the main factors that have generated and still influence the specific way of judicial mediation in Lithuania also could not be made without referring to the specificities of development of judicial mediation in different legal systems (common law and civil law) in general, as well as to some peculiarities of this development in different civil law countries.

1.1.2.1. Peculiarities Of Development Of Judicial Mediation In Common Law And Civil Law Countries

Development and subsequent application of judicial mediation, as a part of the modern ADR movement, was a phenomenon originated, as mentioned, in the United States and overtaken afterwards by other common law countries, including the United Kingdom, Australia, Canada (common law part). Although emergence, development and application of this ADR procedure had its salient features in particular common law countries,⁷¹ some generalised characteristics thereof could be indicated as well. Thus, the main common features of development and application of mediation, including its judicial form, in common law jurisdictions are presented hereafter.

- The major *cause* for emergence of judicial mediation in the common law world – *dissatisfaction with the litigation process* – reaction to impossibly expensive, long and drawn out litigation process.⁷² The growing case load lead to longer terms of litigation and, therefore – increase of litigation costs, which ended with dissatisfaction of the parties and, finally, the need of alternatives to traditional adjudication.⁷³

71 It should be noted in this context that, actually, the practice of application of mediation is intensely diversified in the common law countries; therefore, the model of mediation can in some aspects differ immensely. For example, it is observed that such practices in common law jurisdictions vary substantially as to the methods of communication employed, the structure of sessions and as to the scope of the mediator's intervention. Roberts, S., Palmer, M. *Dispute Processes: ADR and the Primary Forms of Decision-Making* (2nd edition). Cambridge: Cambridge University Press, 2005, p. 180.

72 Alexander, N. *What's Law Got To Do With It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions*, p. 24.

73 It should be noticed, that generally a larger distribution of mediation can be detected in common law countries; this may be explained by a greater pressure put on governments to respond to an inefficient and highly unsatisfactory litigation process in these countries, as well as being a result of implementation of courts' right to change the rules of practice, thus – adjust mediation procedure to individual needs. Hoffmann, A., p. 528–529.

- Judicial mediation, though steadily applied nowadays, was introduced into dispute resolution system only after the successful application of private mediation.⁷⁴ Mediation in common law countries began entirely separately to the court process,⁷⁵ formal links to the court system were not required to make it work.⁷⁶ Thus, the emergence of judicial mediation in those countries did not coincide with emergence of modern mediation and *occurred when private mediation had been already widely practiced.*⁷⁷
- Introduction of judicial mediation into dispute resolution system was *based on* (and its application generally still is based on) a “free market” approach.⁷⁸ In other words, the practice of judicial mediation was not legally regulated by the government – it was namely left to self-regulation; the institutionalization of judicial mediation also came only later.⁷⁹ Therefore, judicial mediation was *implemented in experimental “from court to court” manner – allowing courts to determine the form of judicial mediation which is the most suitable for their needs.*⁸⁰ Although the need to regulate to certain extent at least some aspects of judicial mediation is partly recognised nowadays,⁸¹ the application of this ADR procedure is still regulated to a very little extent in these countries.⁸²

74 The phrase “private mediation” here is used as an opposite to the notion of “judicial mediation” and is similar to the notion of “extrajudicial mediation”.

75 Certainly later court-related mediation was also started to being applied. For instance, an experiment in quasi-compulsory mediation was being executed in the Central London County Court between April 2004 and March 2005, also a voluntary mediation scheme which has been operating in the court since 1996 and was last evaluated in 1998. Genn, D. H., Fenn, P., Mason, M., *et al.* Twisting arms: court referred and court linked mediation under judicial pressure. *Ministry of Justice Research Series* [interactive]. 1/07, 2007, [accessed 2010-08-10]. <<http://www.justice.gov.uk/publications/docs/Twisting-arms-mediation-report-Genn-et-al.pdf>>. In addition, judicial mediation service was piloted in three regions of England (Newcastle, Central London and Birmingham) by the Employment Tribunal Service (June 2006 and March 2007). Urwin, P., Karuk, V., Latreille, P., *et al.* Evaluating the use of judicial mediation in Employment Tribunals. *Ministry of Justice Research Series* [interactive]. 7/10, 2007, [accessed 2010-08-10]. <<http://www.justice.gov.uk/publications/docs/evaluating-judicial-mediation-march10.pdf>>.

76 It must be added that discussion of legal reforms in order to enhance mediation came after it had developed a significant practical track record, not before. Marsh, B. The Development of Mediation in Central and Eastern Europe. *Mediators on mediation* (ed. Newmark, Ch., Monaghan A.). Tottel Publishing, 2005: 384–394, p. 389.

77 Kaminskienė, N. *Alternatyvus civilinių ginčų sprendimas*, p. 160.

78 Marsh, B., *op. cit.*, p. 389.

79 This so-called “free market approach” generated the variety of models and forms of mediation. Therefore, in practice there are various manifestations of judicial mediation in common law jurisdictions. This diversity of forms of judicial mediation and divergent practice of its application, therefore, can serve as useful material for implementation of judicial mediation in countries with less evolved ADR systems; specific features of particular legal system, however, still have to be bared in mind.

80 Kaminskienė, N. *Alternatyvus civilinių ginčų sprendimas*, p. 160.

81 This was witnessed, for example, by the adoption of the Uniform Mediation Act in the United States in 2001.

82 For example, Australian mediation industry has not been subject to national regulation. The existing regulation is imposed by service-provider organizations and industry groups, and, therefore, varies from provider to provider and industry to industry – the forces of free market regulate the practice of

- Some legal authors also mention another common feature – *courts (judges) do not perform functions of mediator*, they are only intermediates as the parties in courts only decide upon ADR mean to resolve their dispute after the initiation of the case.⁸³ This is not, however, true in all instances as judges may perform mediators’ functions in some states.

Despite the diversity of forms of mediation applied in common law jurisdictions, mediation, including its judicial form, in general has become part of mainstream dispute resolution in many common law countries.

Emergence, development and application of judicial mediation in civil law countries have taken (generally) quite an opposite path as compared to those in common law jurisdictions.⁸⁴ The main common features of development and implementation of mediation in general and judicial mediation – in particular in civil law jurisdictions are presented hereafter.

- There is *no common to all countries major factor which had influenced the introduction of judicial mediation into particular legal system*. Different aspects that had more or less significant influence on the implementation of judicial mediation may be determined: changes in global economy, increasing harmonization and development in the EU level, need to fight the backlogs of courts and judicial corruption, economic development.⁸⁵ Implementation of judicial mediation in civil law jurisdictions, hence, was not primarily urged by problems related to the access to justice. Judicial mediation, therefore, had been introduced to legal systems later than in common law jurisdictions.⁸⁶
- *Judicial mediation in general is a favored type of mediation*, whereas private mediation is not widely applied in civil law jurisdictions.⁸⁷ Therefore, mediation

mediation in Australia. Alexander, N. What’s Law Got To Do With It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions, p. 15.

83 Kaminskienė, N. *Alternatyvus civilinių ginčų sprendimas*, p. 160.

84 In the words of Jacqueline M. Nolan-Haley, the trend towards court mediation is remarkable as civil justice system has traditionally promised justice through law; whereas the promise of mediation is different: justice is derived not through the operation of law, but through autonomy and self-determination. Nolan-Haley, J. M. Court Mediation and the Search for Justice Through Law. *Washington University Law Review*. 1996, 74(1): 47–102, p. 49.

85 Marsh, B., p. 387–388.

86 Kaminskienė, N. *Alternatyvus civilinių ginčų sprendimas*, p. 161. It is believed, that the political “push” for mediation to increase access to justice, due to the less significant problems with the exercise of this right, has not occurred in civil law countries to the same extent as it has in common law jurisdictions. Alexander, N. What’s Law Got To Do With It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions, p. 24. Nevertheless, it should be noted that, for example in France, a long tradition of alternative dispute resolution exists, as well as a relatively long-standing practice of usage of mediation to resolve disputes. Gaillard, E., Edelman, J. Mediation in France. *Dispute Resolution Journal* [interactive]. 2000, 55(4), [accessed 2010-07-06]. <www.questia.com/reader/printPaginator/2128>.

87 However, in some civil law countries where mediation has been implemented into legal system by promoting a real culture of mediation, private mediation plays relatively important role in dispute resolution. The example of such country could be the Netherlands, where conventional mediation is widely practiced, and many private centers of mediation have been established. De Palo, G., Carmeli, S. Mediation in Continental Europe: a Meandering Path Toward Efficient Regulation. *Mediators on mediation* (ed. Newmark, Ch., Monaghan A.). Tottel Publishing, 2005: 340–355., p. 348.

therein is the most commonly primarily applied in some kind of form of court-related procedure. This may be partially explained by the long-standing traditions of litigation in civil law countries.⁸⁸

- *Introduction of judicial mediation into legal system was mainly based on centralised approach.* In other words, mediation was viewed primarily as an issue of legal reform, it was regarded as an adjunct to the court process, and it fell to be regulated by the state in the same way as the litigation procedure.⁸⁹ Application of judicial mediation, therefore, is regulated sometimes even in an exhaustive manner; the promotion of judicial mediation is namely on agenda of government and its officials, and not the issue of its, in a sense, spontaneous application in practice by private subjects.⁹⁰ *Although the procedure of judicial mediation is not necessarily regulated in an exhaustive manner, courts, contrary to the ones of common law jurisdiction, are not attributed a right to modify the existing rules in respect of every aspect; thus, they are not always allowed to adjust the existing procedure to the individual needs of mediation.*⁹¹
- *Different models of judicial mediation may be identified in the countries that belong to civil law tradition; for example, according to who may act as mediator judicial mediation may be classified into judicial mediation where judges and (or) members of court personnel perform the functions of mediator, where the functions of mediator are performed by other persons, and where judicial mediation may be performed by the both of the mentioned.*⁹²

Thus, the development and implementation of judicial mediation in civil law jurisdictions was essentially different as compared to its introduction into legal systems of common law countries. In addition, the mixed models of judicial mediation, i.e. as opposed to the mentioned two traditional approaches of the common law and civil law countries, may also be identified.⁹³

88 For example, even in France – country with fairly flexible approach to ADR, there has been a traditional view that it was against the public interest for administration to submit to the jurisdiction of anyone but the judge established by the law; though it is related to ADR in administrative law, it generally proves the existing resistance to implementation of ADR procedures. Bell, J., Boyron, S., Whittaker, S. *Principles of French Law* (Second edition). Oxford University Press, 2008, p. 52– 54.

89 Marsh, B., p. 389.

90 In general in many instances mediation, including its judicial form, emerged solely due to the intention of legislator to implement this ADR procedure in particular legal system. Kaminskiene, N., *et al. Mediacija. Vadovėlis*, p. 229.

91 However, judicial mediation procedure is usually regulated moderately; hence the parties to a dispute are granted the right to determine the procedural aspects important in particular case together with mediator.

92 For example, in Lithuania judicial mediation is performed by mediators, including judges.

93 For example, so-called “model of judges’ judicial mediation” which is applied in the province of Québec (Canada). According to Kaminskiene, N. *Alternatyvus civilinių ginčų sprendimas*, p. 162–164. Systems presenting analogies to the one of Québec have been in place for some time in Norway and Denmark, and were introduced in Finland. It should be noted in this context, that the Québec justice system now integrates adjudicative and mediational justice at every level and virtually every area of law, including family matters, civil and commercial law, administrative matters and criminal law. It is considered to be unified and integrated hybrid system of justice, unique in the world in its longevity and its comprehensiveness. Otis, L., Reiter, E. H. *Mediation by Judges: A New Phenomenon*.

It should be added, that the application of mediation in general, as well as judicial mediation, even nowadays face certain “resistance” in civil law countries. The hesitant application of judicial mediation in these countries is *inter alia* determined by the said peculiarities of its emergence, implementation and development. It must be, therefore, agreed with the opinion of N. Alexander,⁹⁴ that the differences between the common law and civil law jurisdictions may condition the possible failure to translate common law success stories to the ones of civil law.

Nevertheless, the universal nature of mediation process itself, as well as lack of other role models force civil law countries to look up to the relevant experience of common law jurisdictions.⁹⁵ Particularly the relevant experience of the United States not only has already had a deep influence in Europe, but, according to some authors,⁹⁶ today's growth of ADR in continental Europe is following the same pattern seen earlier in the United States. The analysis of the features of the model of judicial mediation introduced in particular civil law jurisdiction, the determination of necessary modifications to legal regulation thereof, as well as to the model itself, therefore, could not be properly accomplished without having regard to the practice of judicial mediation in the United States and other common law jurisdictions.

Thus, although the model of judicial mediation introduced into particular legal system must be analyzed individually in the light of a particular legal context, attention to the features of legal tradition inherent in particular legal system, as well as relevant experience of countries that belong to other legal tradition should be also paid.

1.1.2.2. Certain General Characteristics Of Development Of Judicial Mediation In Different Civil Law Countries

Although main common features of development and implementation of judicial mediation in civil law jurisdictions were pointed out, evolution of this ADR procedure actually was far from being unanimous in countries that belong to this legal tradition. For example, despite the general tendency throughout continental Europe to consider promotion and introduction of judicial mediation into legal systems as the activity of the governments (i.e. by adopting relevant legal regulation and not through the market-based approach), there were other practices in some European countries.

nomenon in the Transformation of Justice. *Pepperdine Dispute Resolution Law Journal* [interactive]. 2006, 6, [accessed 2013-11-02]. <http://www.lexisnexis.com/lxacui2api/results/docview/docview.do?docLinkInd=true&risb=21_T18530430073&format=GNBFI&sort=RELEVANCE&startDocNo=1&resultsUrlKey=29_T18530430048&cisb=22_T18530430075&treeMax=true&treeWidth=0&csi=247802&docNo=1>.

94 Alexander, N. What's Law Got To Do With It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions, p. 28.

95 Alexander, N., What's Law Got To Do With It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions, p. 28.

96 De Palo, G., Carmeli, S. Mediation in Continental Europe: a Meandering Path Toward Efficient Regulation, p. 341.

Namely two approaches in respect of promotion and implementation of mediation, including judicial mediation, could be indicated in continental Europe:⁹⁷

- 1) **“Legislatic” approach.** This approach is characteristic of the development of judicial mediation in France, Germany, Italy, Spain and Greece. Following it mediation, including its judicial form, is promoted by reforming civil procedure. Such modifications might also adopt different form. For example, in Italy civil procedure was reformed in 1991 in order to introduce court related mediation; in Finland civil procedure was modified for the lower courts in 1993 and for the Court of Appeal – in 1998; reformed civil procedure in France featured conciliation as one of the fundamental principles of judicial procedure; in Germany the federal government enacted in 2000 new Introductory Law on the Code of Civil Procedure, that permitted all German states to introduce mandatory court connected mediation with respect to certain kinds of civil disputes. *Hence, according to this approach, relevant legislative initiatives play crucial role in promotion of judicial mediation.* The legislation of mediation may also take a diverse form: the one of general legislation regulating mediation and mediators, specific court-related mediation legislation, legislation regulating mediation in a particular practice area, etc. Particular country sharing this approach, therefore, may have specific legislative base of judicial mediation.
- 2) **Pragmatic approach.** This approach was followed in the Netherlands, Norway and Denmark. According to it, *judicial mediation is promoted through practice* and not legislative modifications. In other words, judicial mediation is promoted by setting of pilot projects in courts. This pattern, as it is believed, raises awareness of both judges and disputing parties of the benefits of judicial mediation process.

However, the mixed-model approach in respect of promotion and implementation of judicial mediation presumably may also exist, i.e. when both of the mentioned approaches are merged: judicial mediation is promoted by setting a pilot project in courts and, additionally, by reforming civil procedure. In other words, judicial mediation is implemented through the practice and, more or less at the same time, by legally regulating its application.⁹⁸

Despite more or less common to all civil law jurisdictions characteristics of development and application of judicial mediation, there is no generalised pattern for promotion of this ADR procedure. Thus, no global solutions which could be applied for the successful implementation of judicial mediation into every legal system in civil law jurisdictions exist. Hence, the implementation and promotion of judicial mediation in particular legal system could be accomplished only after also taking into account the specific context, including individual features of particular legal system, national dispute management culture, as well as principles of legal regulation.

⁹⁷ *Ibid.*, p. 341–350.

⁹⁸ If suchlike approach was determined, it should be attributed to the practices of promotion and implementation of mediation in Lithuania: mediation was introduced into legal system by launching pilot project in courts, however, shortly civil procedure was reformed as well and general legislation on mediation was also adopted.

1.1.3. Development Of Judicial Mediation In the EU

General so-called “surge” in international rule-making in the area of mediation⁹⁹ did not pass the EU¹⁰⁰; Lithuania is a Member State of this organization. ADR in general, as well as mediation in particular, were put on the agenda of the EU rule-making.

The Commission of the European Communities in April 2002 published a Green Paper on Alternative Dispute Resolution in Civil and Commercial Matters (hereinafter also referred to as “Green Paper”). The purpose of the Green Paper was to initiate a broad-based consultation of those involved in a certain number of legal issues which have been raised as regards alternative dispute resolution in civil and commercial law. The special interest in ADR was linked to awareness of its positive effect on improving general access to justice in everyday life, adoption of relevant regulation in Member States encouraging its application, political priority status attributed to it by the EU itself.¹⁰¹ This was one of the most significant steps, even though not the first one, by the EU in promoting the ADR, namely mediation.

In July 2004, the European Commission launched the European Code of Conduct for Mediators.¹⁰² Although this code is voluntary it has not only been adopted by a number of mediation experts and organizations,¹⁰³ but it has also influenced the adoption of related regulation by the individual Member States of the EU (hereinafter also referred to as “Member States”).¹⁰⁴

On 22 October 2004 European Commission proposed a directive on certain aspects of mediation in civil and commercial matters,¹⁰⁵ which was adopted in 2008. The objective of

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- 99 According to Eric van Ginkel. Van Ginkel, E. The UNCITRAL Model Law on International Commercial Conciliation. *Journal of International Arbitration*. 2004, 21 (1): 1–65, p. 4–5.
- 100 The phrase “rule-making” here is linked to the activities of the EU as organization and not to similar legislative activities of particular Member States.
- 101 Green Paper on Alternative Dispute Resolution in Civil and Commercial Law [COM(2002) 196 final] [interactive], [accessed 2014-08-14]. <<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52002DC0196>>. It should be stressed that the provisions of the Green Paper were also taken into account in the course of preparation of draft mediation law.
- 102 European Code of Conduct for Mediators [interactive], [accessed 2014-08-14]. <http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf>.
- 103 Friel, S., Toms, C., Rudnick, B. *The European Mediation Directive – Legal and Political Support for Alternative Dispute Resolution in Europe* [interactive], [accessed 2014-03-30]. <http://www.brown-rudnick.com/uploads/117/doc/Brown_Rudnick_Litigation_European_Mediation_Directive_Friel_Toms_1-20110.pdf>.
- 104 For example, rules that are aimed at regulating the application of judicial mediation in Lithuania set out obligation for mediators to act in accordance with the European Code of Conduct for Mediators.
- 105 This proposal was boosted by the fact that mediation was becoming more and more important as a dispute resolution method for civil and commercial disputes in Europe. However, the efficient functioning of the European mediation market was inhibited by different mediation law regimes of the Member States (Eidenmüller, H. Establishing a Legal Framework for Mediation in Europe: The Proposal for an EC Mediation Directive. *German Arbitration Journal* [interactive]. 2005: 124–129, [accessed 2013-11-02]. <[28](http://beck-online.beck.de/default.aspx?printmanager=print&VPATH=bibdata%2Fzeits%2Fsc_hiedsvz%2F2005%2Fcont%2Fschiedsvz.2005.124.1.htm&POS=5&HLWORDS=judicial%C3%90mediation%C3%90+judicial%2Cmediation+%C3%90+judicial+%C3%90+mediation+%C3%90+judicialmediation&mode=CurrentDoc&options=NewPage&x=36&y=5>.>). According to some authors, even prior to the adoption of the Directive the judges in most, if not all, Member States have gradually come</p></div><div data-bbox=)

Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings (Article 1). Thus, according to some authors, with the Directive, the EU started promoting mediation as a method that was chosen for resolution of legal disputes in Europe. Its enactment culminated a ten-year legislative and political process in which each Member State was to consider the role of mediation in commercial affairs, and take a formal position on the minimum requirements of the use of commercial mediation throughout the EU.¹⁰⁶

Although Directive is aimed at legally regulating mediation of cross-border disputes indicated therein, the Member States were not prevented from applying its provisions to internal mediation processes (Recital 8 of Directive); in so far as a judge may act as a mediator under national law it is also applicable to mediation conducted by a judge who is not responsible for any judicial proceedings relating to the matter or matters in dispute (Recital 12 of Directive). Thus, the provisions of the Directive could be applied to any type of court mediation.¹⁰⁷ The adoption of the Directive, therefore, should be seen as an important step towards application of *inter alia* any type of court mediation, including mediation conducted by a judge (if he or she is not a sitting judge in particular case), in civil and commercial disputes.¹⁰⁸

It should be noted in this context that Article 12 of Directive set an obligation for Member States to bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive before 21 May 2011 (with certain exception). The deadline for the transposition of the rights and obligations determined in the Directive into the laws of the Member States has already ended. Available data proves that these rights and obligations were more or less accurately implemented into national legal systems of all Member States.¹⁰⁹

Thus, Directive has subsequently brought considerable changes into the legal framework relative to ADR procedures in all Member States. The original architecture of the Directive, however, is as of a flexible framework that allows mediation to be implemented as a collection of single method approaches within each Member State.¹¹⁰ Therefore, although Directive and, accordingly, obligation of transposition to legal systems of the Member States of rights and duties embodied wherein have influenced the changes of regulatory frameworks of all Member States, such influence may have had different character and may be only analyzed separately in every legal system.

to play a more interventionist role in the judicial process; it has become an important part of the judicial function to mediate between litigants and to work actively for the amicable settlement of disputes. Schonberg, S. Coping with Judicial Over-load: the Role of Mediation and Settlement in Community Court Litigation. *Common Market Law Review*. 2001, 38: 333–357, p. 334.

106 Feasley, A. Regulating Mediator Qualifications in the 2008 EU Mediation Directive: The Need for a Supranational Standard. *Journal of Dispute Resolution*. 2011, 2(5): 1–18, p. 333, 338.

107 The phrase „court mediation“ is used here because it marks any type of mediation which is initiated when the dispute is already addressed to the court.

108 This conclusion of course does not involve those Member States that chose not to apply provisions of the Directive to internal mediation processes, as well as those, whose national law does not embed mediation conducted by a judge.

109 According to De Palo, G., Trevor, M. B. *EU Mediation: Law and Practice*.

110 Feasley, A., p. 345.

Hence, during the years the EU has actively promoted ADR procedures, notably mediation, including its judicial form. Such activity subsequently has led (especially after the adoption of the Directive) to the acknowledgment (at least in the legislative level) of mediation as one of the leading ADR procedures¹¹¹ in the EU and to the changes, although differing, in legal frameworks of all Member States. Hereby even those EU Member States, that were still resistant to ADR movement, had to implement mediation, including its judicial form (if chosen), into their legal systems. Consequently, this ADR procedure has become an integral part (even if, in some instances, only in regulatory level) of dispute resolution system *inter alia* in those civil jurisdictions that were more or less unaware of mediation, including its judicial form. Thus, the provisions of mentioned legislative acts of the EU, namely Directive, must be addressed, when appropriate, in the course of analysis of mediation, including judicial, in particular Member State.

1.1.4. Development Of Judicial Mediation In Lithuania

However, even being recognised world-wide as an alternative to the means of traditional dispute resolution, in practice mediation finds itself at a more or less starting-point in many countries of continental Europe. Despite its active promotion by the authorities mediation should be essentially considered as being a novelty, especially with respect to the extent of its application,¹¹² in Lithuania as well.

ADR movement accepted and promoted not only by separate European countries, but also by the EU, of course has been recognised in Lithuania as well. Interestingly, although Lithuania is a civil law country, it was private mediation¹¹³ which basically was primarily (though incidentally) promoted in our country: some private initiatives directed towards the application of private mediation date back even to the early 1990s.¹¹⁴ The first legisla-

111 However, this ADR procedure is not applied very actively in the Members States. ADR, namely mediation, is considered to be far from being solidly established in Europe; whereas demand for ADR services and mediation is thought to represent only a small niche. Thus, it is assumed, that in reality mediation has a very small presence in the EU. It is explained by the fact that “mediating” is not a natural tendency of human beings in resolving conflicts, and mediation, accordingly, is something not inherent in dispute resolution. Directorate General for Internal Policies of European Parliament Quantifying the Cost of Not Using Mediation – a Data Analysis [interactive]. European Parliament, Brussels, 2010 [accessed 2014-08-23]. <<http://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19592/20110518ATT19592EN.pdf>>.

112 For example, according to available statistical data judicial mediation was applied in Lithuania only in 47 cases during the period 2012–2013. Although the number went to 53 cases per year in 2014, judicial mediation is still not widely applied in Lithuania. For statistical data see the Appendix (namely Chart 1).

113 The phrase “private mediation” is used here as opposed to “court mediation” or “judicial mediation”, i. e. as the form of mediation which is not related to proceedings in court.

114 In 1993 the Lithuanian Conflict Solving Center was founded; the following year featured the establishment of the Lithuanian Conflict Prevention Association. This association with two other non-governmental organizations executed joint project “Development of Mediation Services in Lithuania”. In the course of this project the group from 12 to 15 mediators was gathered and trained; other projects relative to alternative dispute resolution were also executed. Website of Lithuanian Conflict Prevention Association, [accessed 2014-03-31] <<http://www.konfliktai.lt/Formalu/English.htm>>. The role in the introduction of mediation was also played by Vilnius Court of Commercial Arbitration. In

tive activity in this field was also not related to the implementation of judicial mediation.¹¹⁵ These initiatives and activities, however, did not result in an actual introduction of private mediation into the Lithuanian legal system, i.e. private mediation had not become a widely applied alternative to traditional adjudication.

It should be noted in this context, that despite the relatively low percentage of the trust in courts¹¹⁶ the traditions of adjudication in Lithuania legal system are very strong.¹¹⁷ The institute of the state dispute resolution, as opposed to the private one, is the most acknowledged in Lithuania and disputants are generally willing to refer their dispute to a judge.¹¹⁸ Judicial mediation, therefore, was and still is believed by many legal scholars and legal practitioners to be the most beneficial way to promote mediation to society and to introduce it into the Lithuanian legal system.¹¹⁹

Accordingly, the most significant changes in the development of mediation are related to the introduction of judicial mediation into the Lithuanian legal system. The imple-

2004 the board of arbitration approved the Rules of Mediation and Conciliation Procedure (of Vilnius Court of Commercial Arbitration). According to these rules the parties willing to settle a dispute of economic, commercial or non-contractual nature without the recourse to court or arbitration may, on the basis of mutual agreement, apply to Vilnius Court of Commercial Arbitration for mediation. Rules of Mediation and Conciliation Procedure of Vilnius Court of Commercial Arbitration, approved by resolution of the Board of Vilnius Court of Commercial Arbitration of 8 March 2004 [interactive], [accessed 2014-03-31]. <http://www.arbitrazas.lt/failai/VCCA%20Documents_ENG/VCCA%20Mediation%20and%20Conciliation%20Rules_ENG_from%202004-03-08.pdf>.

- 115 In 2002 the new Law on Bailiffs was introduced; according to it, one of the bailiff's functions is to intermediate in the performance of property obligations. Law on Bailiffs of the Republic of Lithuania. *Valstybės žinios*. 2002, No. 53-2042. In 2005 the Law on Bar was modified and possibility for lawyer to act as a mediator was embedded. Law of the Republic of Lithuania on Bar. *Valstybės žinios*. 2004, No. 50-1632.
- 116 According to certain statistical data only 24,4 per cent of respondents indicated that they trust the courts and 28 per cent thereof stated that they do not trust our judicial system. The results of research on the trust of public in Lithuanian institutions of public opinion and market research company Vilmorus [interactive], [accessed 2014-08-15]. <<http://www.vilmorus.lt/index.php?mact=News.cntnt01,detail,0&cntnt01articleid=2&cntnt01returnid=20>>.
- 117 These traditions could even be seen as stronger than in general in all western countries. Whereas as western societies have evolved, their state justice institutions have increasingly become the principal locus for the formal expression and resolution of conflicts. According to Otis, L., Reiter, E. H. Mediation by Judges: A New Phenomenon in the Transformation of Justice. It should be added that the similar situation is, for example, in Croatia, where despite public dissatisfaction with the judiciary, every dispute is taken to court and every litigant wants to stick with the courts. Simac, S. Croatia: the Croatian Mediation Model. *Overview of judicial mediation in the World. Mediation, the first universal language of conflict resolution (First International Conference on Judicial Mediation, Paris, 16-17 October 2009)*. L'Harmattan, 2010: 85-88, p. 86.
- 118 For example, in 2013 the courts of general jurisdiction heard 183 062 civil cases as opposed to 181 877 in 2012. Review of the Activity of the Courts in 2013 (hereinafter also referred to as "Review of the Activity of the Courts in 2013") [interactive], [accessed 2014-08-15]. <http://www.teismai.lt/dokumentai/teismu%20ataskaita_2013_po%20pristatymo.pdf>.
- 119 Kaminskiėnė, N., *et al. Mediacija. Vadovėlis*, p. 207. According to some authors, the legal authority of the courts may be the single most important cause of the growth of application of mediation; the mediation field would not be growing rapidly without the institutionalization of mediation within courts. Senft, L. P., Savage, C. A. ADR in the Courts: Progress, Problems, and Possibilities. *Penn State Law Review*. 2003, 108(1): 327-348, p. 333.

mentation of this ADR procedure is also related to the further legislative changes relevant to the execution of the state's obligation to transpose rights and duties determined by the Directive into our legal system. Hence these two occurrences should be analyzed and briefly presented separately in order to reveal the main aspects of development of judicial mediation in the Lithuanian legal system.

1.1.4.1. The Launch Of the Pilot Project Of Judicial Mediation

Although primary steps for promotion of ADR procedures were directed to the application of private mediation, unsurprisingly judicial mediation was the first to be practically introduced into Lithuania. Thus, judicial mediation in Lithuania, as in many other civil law countries, is in general a favored type of mediation,¹²⁰ which was the first form of mediation that was promoted by authorities, implemented and applied in practice as an alternative to traditional adjudication.

The preconditions for implementation of judicial mediation can be traced back to 2002 when the new Code of Civil Procedure of the Republic of Lithuania was adopted. According to Article 231 of this code the court is obliged after the indication of the essence of the dispute in the stage of preparation for hearing civil case to perform conciliation. Such legislative initiative gave strong impulse to the development of ADR, allowed judges to appreciate advantages of peaceful dispute resolution, as well as encouraged disputants to resolve their disputes peacefully.¹²¹ The membership in the EU, which, as mentioned, actively promotes ADR procedures, specifically – mediation, has also influenced an urge to introduce mediation into the Lithuanian legal system.

Judicial mediation was introduced into the Lithuanian legal system by the legislative acts of the Council of Courts (now – the Judicial Council) – an executive body of the autonomy of courts ensuring the independence of courts and judges.¹²² The Council of Courts adopted the Resolution No. 13P-348 on the Pilot Project of Judicial Mediation on 20 May 2005¹²³ – legal basis for the launch of the Pilot Project of Judicial Mediation. Hence, it may seem from this perspective that Lithuania adopted the mentioned *pragmatic approach* in respect of implementation of judicial mediation, i.e. implemented judicial mediation not through legislative initiatives but by primarily applying it in courts.

120 Judicial mediation here is called a favored type of mediation only in a sense that judicial mediation was the first to be commonly introduced into our legal system, as well as promoted by the government. It should be noted in this context (in order to be precise) that due to the non-existence of collective statistical data of application of extrajudicial mediation, it is impossible to identify which type of mediation is favored in Lithuania among disputing parties.

121 Kaminskienė, N. Teisminė mediacija Lietuvoje. Quo vadis?, p. 55–56.

122 Website of the National Courts Administration, [accessed 2014-03-31]. <<http://www.teismai.lt/en/judicial-council/about-council/>>.

123 Resolution of 20 May 2005 No. 13P-348 on the Pilot Project of Judicial Mediation of the Council of Courts [interactive], [accessed 2014-03-31]. <<http://www.teismai.lt/teismu-savivalda/nutarimai/?nr=&f=331&tipas=1&metai=2005&menuo=05&diena=20&metai1=2005&menuo1=05&diena1=21&avadinimas=&criteria1=all&q=&criteria=all&type=0&search=1>>.

The Pilot Project was primarily aimed at creating the system of judicial mediation in civil cases and at test-driving it in the Second District Court of Vilnius City. Three stages of the Pilot Project were envisaged:

- I. Preparation for the execution of the Pilot Project (it had to end up no later than 31 December 2005). Steps necessary for the application of judicial mediation had to be taken at this stage, including the instruction of mediators and presentation of the Pilot Project to society.
- II. Implementation of the Pilot Project from the end of 2005 to the beginning of 2006. Results of the Pilot Project had to be analyzed in order to improve regulatory base for its application.
- III. Presentation of the conclusions related to the execution of the Pilot Project one year after its launch. These conclusions had to serve as a ground for evaluation if further implementation of judicial mediation was necessary and suitable for the Lithuanian legal system.

Although no proof that judicial mediation was widely accepted as an alternative to traditional adjudication not only by the members of society, but by the judges themselves, can be found,¹²⁴ the Pilot Project according to its promoters was successful.¹²⁵ The Pilot Project was extended on 26 January 2007 to the Court of Appeal of Lithuania, the Third District Court of Vilnius City, the District Court of Kaišiadorys Region and other courts which would be set to implement judicial mediation.¹²⁶ Whereas, on 28 January 2011 the Judicial Council gave its approval for the application of judicial mediation in all courts of the Republic of Lithuania¹²⁷ in order to guarantee recourse to mediation irrespective of the region.¹²⁸ The scope of application of judicial mediation in the framework of the Pilot Project was extended to all courts.

124 Judicial mediation, according to available data, was not considerably often applied during these initial stages of the Pilot Project. For example, there was only one case referred to mediation in the Third District Court of Vilnius City in 2009 and only two in 2010. Valančius, V. Lithuania. *EU Mediation: Law and Practice* (ed. De Palo, G., Trevor, M. B.). Oxford University Press, 2012: 220–238, p. 236.

125 Žalėnienė, I., Tvaronavičienė, A. The Main Features and Development Trends of Mediation in Lithuania: the Opportunities for Lawyers. *Jurisprudence: Research Papers*. 2010, No. 1 (119): 227–242, p. 233. However, according to other available data judicial mediation was applied only in two cases in the Second District Court of Vilnius City from 20 May 2005 to 31 December 2009. Kaminskienė, N. Teisminė mediacija Lietuvoje. Quo vadis?, p. 58.

126 Resolution No. 13P-15 on the Continuation of the Pilot Project of Judicial Mediation of the Judicial Council (former Council of Courts) of 26 January 2007 [interactive], [accessed 2014-03-31]. <<http://www.teismai.lt/teismu-savivalda/nutarimai/?nr=&f=331&tipas=1&metai=2007&menuo=01&diena=26&metai1=2007&menuo1=01&diena1=27&pavadinimas=&criteria1=all&q=&criteria=all&type=0&search=1>>.

127 According to available statistical data there were only 4 courts at the end of 2012 that either did not participate in the Pilot Project or they did not have their own mediator: the Supreme Court of Lithuania, the First District Court of Vilnius City, the District Court of Plungė Region and the District Court of Ukmergė Region. According to Summary of the Survey of the Courts on the Civil Cases Dealt with the Help of Judicial Mediation and on the Settlement Agreements Concluded in the Court Hearings During the Period of 2010–2012 No. 3R of 15 October 2012, carried out by the National Courts Administration (hereinafter also referred to as “Survey of the Courts”)

128 According to information about judicial mediation on the website of the National Courts Administration [interactive], [accessed 2014-03-31]. <<http://www.teismai.lt/lt/mediacija/visuomenei/>>.

Together with the said regulatory base for the execution of the Pilot Project additional regulation of judicial mediation – Judicial Mediation Rules – was adopted;¹²⁹ these rules regulate the procedure of judicial mediation.¹³⁰ Hence it was a special legal regulation which regulated (and, actually, still regulates) the application of judicial mediation, its procedure. Such model of implementation of judicial mediation was chosen having in mind the actualities of those days; moreover, the main aim of the Pilot Project was solely to create preconditions for development of mediation in Lithuania and not to increase the demand for and, accordingly, the supply for mediation.¹³¹

Nevertheless, concerns in respect of regulatory base of judicial mediation were raised. They were instigated by the fact that Judicial Mediation Rules in some points supplemented or even amended legal provisions embodied in the Code of Civil Procedure (superior legal act in the hierarchy of laws)¹³². Moreover, the right to adopt regulation of procedure of alternative dispute resolution or particular – of judicial mediation, was not delegated to the Council of Courts. Therefore, the legal status and position in the hierarchy of legal acts of these rules was not clear.¹³³ Such concerns were partly silenced after the adoption of the Law on Conciliatory Mediation in Civil Disputes of the Republic of Lithuania on 15 July 2008. It was believed that in the case of collision the rule *lex superior derogat legi inferiori* should be applied – Judicial Mediation Rules had to be applied only in as much as they were in conformity with the norms of Mediation Law. Furthermore it was proposed to “elevate” regulation of judicial mediation into another level – insert judicial mediation regulation into the Code of Civil Procedure.¹³⁴ These suggestions were partially taken into account when modifying the Code of Civil Procedure in 2011.¹³⁵

129 Judicial Mediation Rules were adopted by the Resolution of 20 May 2005 No. 13P-348 on the Pilot Project of Judicial Mediation of the Council of Courts (hereinafter also referred to as “Judicial Mediation Rules”). The current edition of the Judicial Mediation Rules may be found on the website of the National Courts Administration.

130 Another legal act adopted by the Council of Courts (later – the Judicial Council) which regulates the enrollment of persons in the List of Court Mediators should be mentioned in this context as well – Schedule of Procedure of Enrollment of Persons in the List of Court Mediators, approved by the Resolution No. 13-P-10-(7.1.10) of the Judicial Council (hereinafter also referred to as “Procedure Schedule”) [interactive], [accessed 2014-03-31]. <<http://www.teismai.lt/lt/mediacija/visuomenei/>>.

131 Simaitis, R. Mediacijos privačiuose ginčuose teisinio reguliavimo tendencijos Lietuvoje. *Justitia*. 2007, No. 2(64): 21–33; p. 31.

132 In the opinion of the author of this dissertation, it may be argued whether it is appropriate to regulate the procedure of judicial mediation by legal act of institution of autonomy of the courts (though Code of Civil Procedure refers to it) and it should not be regulated by executive legal act of defined legal power (for example, at least by the resolution of the Minister of Justice of the Republic of Lithuania). Nevertheless, this choice signifies the unique and undeniable link of judicial mediation to the court system in Lithuania.

133 Kaminskienė, N. Teisminė mediacija Lietuvoje. Quo vadis?, p. 56–57.

134 Code of Civil Procedure of the Republic of Lithuania. *Valstybės žinios*. 2002, No. 36-1340.

135 Law of the Republic of Lithuania on the Amendment and Supplement of the Code of Civil Procedure of 21 June 2011. *Valstybės žinios*. 2011, No. 85-4126. As it may be seen from the *travaux préparatoires* of this law the mentioned amendments were made in order to encourage the parties to a dispute to resolve their disputes peacefully (especially in the courts of first instance). Explanatory Notes of the Draft Law of the Republic of Lithuania on the Amendment and Supplement of the Code of Civil Procedure No. XIP-1409 of 16 November 2009 [interactive], [accessed 2014-03-31]. <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=358003&p_tr2=2>.

According to the modified Article 231 of the Code of Civil Procedure judicial mediation¹³⁶ can be conducted by the request or with the consent of the parties to a dispute in accordance with the procedure set out by the Judicial Council.¹³⁷ In other words, the Code of Civil Procedure – a codified legal act regulating civil proceedings – established legal basis for the application of judicial mediation. However, judicial mediation must be conducted following the procedure indicated in Judicial Mediation Rules.¹³⁸ Essentially the same legal regulation was embodied in the Mediation Law – general legal act designated to regulate mediation; according to Paragraph 1 of Article 10 of Mediation Law judicial conciliatory mediation is carried out in courts of general jurisdiction in the cases and according to the procedure established by the Judicial Council.

These regulatory changes to the legal basis for application of judicial mediation, hence, might be considered in this context as a consequent *reform of civil procedure* which was indispensable for application of judicial mediation. The adoption of such modified legal regulation of legal basis for application of judicial mediation, thus, might be considered as essentially signifying the *shift from* the mentioned so-called *pragmatic approach* which is actually more characteristic of common law countries, to the so-called “*legislatic*” *approach* – the most common approach in civil law countries - *towards the implementation of judicial mediation in Lithuania*.

However, despite the subsequent reform of civil procedure, judicial mediation was (and actually is) still being regulated by Judicial Mediation Rules – legal act adopted by the Council of Courts (later – the Judicial Council) – an executive body of the autonomy of courts ensuring the independence of courts and judges. Whereas the place of legal acts adopted by the Council of Courts in general hierarchy of legal acts could be defined only with difficulties. The reference by the Code of Civil Procedure and Mediation Law to the acts adopted by the Council of Courts could hardly be considered as expressly determining the legal status of Judicial Mediation Rules.¹³⁹ Therefore, the uncertainty as to which

136 Although the phrase “judicial conciliatory mediation” is applied therein, the consistent terminology is applied (if possible) throughout this dissertation; hence the notion “judicial mediation” is applied.

137 It also should be noted in this context that Article 2 of the Code of Civil Procedure embodies the prompt restoration of legal peace between parties as one of the aims of civil procedure. The restoration of legal peace between parties signifies that after the adoption of the decision or approval of settlement agreement the conflict between parties is legally solved, their mutual rights and obligations are clarified, hence any repeated dispute between the same parties on the same subject matter and on the same basis is not possible in the future. Valančius, V. *et al. Lietuvos Respublikos civilinio proceso kodekso komentaras. I dalis. Bendrosios nuostatos*. Vilnius: Justitia, 2004, p. 40.

138 This rule presumably was set in order to underline that judicial mediation should not be conducted in accordance with the procedure for hearing civil cases in courts which is embodied in the Code of Civil Procedure; thus, to draw an obvious line between judicial hearing of the cases and respectively judicial mediation.

139 It should be noted that Paragraph 4 of Article 1 of the Code of Civil Procedure entrenches general principle that other procedural rules for hearing the cases, adoption and enforcement of the decisions and other procedural rules (other than those embodied in this code) may be set out in other laws of the Republic of Lithuania following the implementation of the acts of the EU or international legal acts. Whereas Paragraph 2 of Article 1 sets out general rule of collision settlement, according to which the court must act in compliance with this code if the conflict between its provisions and provisions of the other law occurs, unless the code gives priority to the provisions of other legal act. These provisions are not applicable in respect of Judicial Mediation Rules; they cannot have effect on legal status of Judicial Mediation Rules likewise.

legal regulation should be applied if there was a collision between the provisions of the Mediation Law and Judicial Mediation Rules, as well as the one between the provisions of the Code of Civil Procedure and Judicial Mediation Rules may arise.¹⁴⁰

In the opinion of the author of this dissertation, according to the presumption the Code of Civil Procedure (superior legal act in this case) and Judicial Mediation Rules (inferior legal act in this case) regulate different aspects of judicial mediation, thus, if the collision occurs, the provisions of the inferior legal act (in this case – Judicial Mediation Rules) which presumably regulates procedure that is a subject matter of the superior legal regulation (in such case – of the one embodied in the Code of the Civil Procedure) should not be applied. The case of the collision between the provisions of the Judicial Mediation Rules and the ones of the Mediation Law should also be decided not in favor of the former. Nevertheless, these examples alone prove that legal regulation of judicial mediation only to that extent as to deciding on which legal provisions should be applied in the case of the collision with other legal provisions is already complicated and, in a way, misleading.

The already mentioned common to civil law countries need for a (more or less) thorough legal regulation *inter alia* of judicial mediation has urged the demand for subsequent modification of legal regulation of judicial mediation. The provisions relevant to application of judicial mediation have already been modified more than once; while the undisputable need for further regulatory changes is reflected by the fact that even recently the relevant draft legal acts were elaborated and have been already adopted.¹⁴¹

Hence, *in spite of the initial pragmatic approach towards the implementation of judicial mediation into the Lithuanian legal system, the subsequent shift thereof to common to the most of civil law jurisdictions “legislative” approach preconditioned the development of legal regulation of judicial mediation.* The adoption of such approach also resulted in numerous further amendments thereof, i.e. it has influenced further development of model of judicial mediation, including its legal regulation, in the Lithuanian legal system. However, judicial mediation was not only primarily introduced into legal system through the launch of the Pilot Project, i.e. by taking more of a pragmatic approach towards its implementation, but it is still applied in the framework of this Pilot Project – essentially with respect to the basis of its “from court-to-court” application. Thus, the approach taken towards the implementation of judicial mediation into the Lithuanian legal system *is not a theoretically “pure” approach.* Hence, it may be considered as a *mixed approach.*

The presentation of the evolution of judicial mediation also requires surveying the results of the Pilot Project. Primarily the insight into purely quantitative results of this

140 Although the possibility of collision between the provisions of these acts is doubtful, it still may not be entirely excluded from the agenda.

141 The National Courts Administration has elaborated the drafts of new Judicial Mediation Rules, of new legal act – Schedule of Procedure of Assignment and Removal of the Status of a Court Mediator (hereinafter – also referred to as “Schedule of Procedure of Assignment and Removal of the Status of a Court Mediator”), as well as of Regulations of Commission of Judicial Mediation (hereinafter also referred to as “Regulations of Commission of Judicial Mediation”). All these acts – new wording of Judicial Mediation Rules, together with Schedule of Procedure of Assignment and Removal of the Status of a Court Mediator and Regulations of Commission of Judicial Mediation were adopted on 26 September 2014 by the Judicial Council; their coming into force date was set to be 1 January 2015. Therefore, they are analyzed as an applicable legal regulation where appropriate in the course of this research.

project – statistical data must be made. There is yet no publicly available comprehensive statistical data concerning the application of judicial mediation.¹⁴² However, some of it can be found by analyzing the activity of particular courts participating in the Pilot Project.¹⁴³ Thus, there were two mediations during the first stage of the Pilot Project in the Second District Court of Vilnius City, six mediations from 1 January 2008 to 31 December 2009 in the Second District Court of Vilnius City (two mediations) and the Third District Court of Vilnius City (four mediations).¹⁴⁴ During the period of 2010–2012 there were 45 cases referred to judicial mediation, 13 of them ended in the conclusion of the settlement agreement, in 18 instances judicial mediation was terminated for other reasons, and judicial mediation in 14 cases was not yet finished at the time the statistical data was gathered;¹⁴⁵ in 2013 there were 35 cases referred to judicial mediation, settlement agreement was concluded in 2 of them, 28 were terminated without concluding the settlement agreement, and judicial mediation in 5 cases had not yet been finished at the time the statistical data was gathered;¹⁴⁶ in 2014 53 cases were referred to judicial mediation, settlement agreement was concluded in 12 of them, 40 were terminated without concluding the settlement agreement, and in 1 cases judicial mediation has not yet been finished at the time the statistical data was gathered. Hence, the so-called “direct results” of execution of the Pilot Project prove that judicial mediation is not yet frequently applied in Lithuania and has not yet become a true alternative to litigation.

Nevertheless the importance of so-called indirect results of the execution of the Pilot Project should and by many legal authors – is also underlined.¹⁴⁷ These results include the augmentation of the number of cases terminated by the conclusion of settlement agreement, increase of awareness of judicial mediation in society and public sector, as well as in the community of lawyers.¹⁴⁸ The indirect results of the Pilot Project, hence, are considered to confirm the importance of its application. Although statistical data prove a relatively hesitant recourse to judicial mediation, it is commonly agreed that the Pilot Project has helped to improve the common awareness of judicial mediation as an alternative to traditional adjudication.¹⁴⁹

142 This situation is directly conditioned by the fact that until recently there was no body which was required to gather relevant statistical data and make it publicly available. Such situation has been altered when the Commission of Judicial Mediation was instituted (based on the new Judicial Mediation Rules and other relevant acts that came into force on 1 January 2015).

143 Valančius, V., p. 236.

144 Kaminskienė, N. *Teisminė mediacija Lietuvoje. Quo vadis?*, p. 58.

145 According to the Survey of the Courts.

146 According to Statistical Data on the Application of Judicial Mediation in Civil Cases and Settlement Agreements Concluded in the Court Hearings in 2012–2013 (hereinafter also referred to as “Statistical Data of 2012–2013”) provided for the conduction of this research by the National Courts Administration. It should be noted, however, that in 2013 courts of the first instance received 185 150 civil cases as compared to 180 921 received in 2012; in other words, the number of civil cases received by the courts increased, whereas although the increase of the number of cases referred to judicial mediation was significant in comparison to previous years, there were still small number of cases referred to judicial mediation. For statistical data on the application of judicial mediation see also Chart 1 in the Appendix.

147 Kaminskienė, N. *Teisminė mediacija Lietuvoje. Quo vadis?*, p. 59.

148 Milašius, T., p. 51.

149 It is noted that the Pilot Project should be positively evaluated because of its great contribution to promoting mediation. Žalėnienė, I., Tvaronavičienė, A., p. 233.

However, in the opinion of the author of this dissertation, despite the importance of these indirect results of application of judicial mediation, the “shortage” in respect of the direct results, i.e. the modest application of judicial mediation in practice, signifies that society is still resistant to the application of this alternative to traditional adjudication. This ADR procedure has not yet truly become the integral part of dispute resolution system in Lithuania and the execution of the Pilot Project could not be considered as being very successful in this respect. Therefore, the adjustments, including the ones that are determined in the framework of this research, should be made to the existing model of judicial mediation in civil disputes for this procedure to become a true alternative to traditional adjudication.

In conclusion, judicial mediation, as a favored type of mediation, was introduced into the Lithuanian legal system primarily through the launch of the Pilot Project; whereas only subsequent modification of legal regulation of civil procedure has established veritable legal basis (and not the disputable one) for the implementation and application thereof, i.e. the some kind of mixed approach in respect of implementation and promotion of judicial mediation in the Lithuanian legal system was adopted. Despite the implementation of judicial mediation, its application is poor – judicial mediation is not yet a well-known and recognised alternative to litigation in court. Hence judicial mediation is taking its more or less initial steps in the Lithuanian legal system, its application is more promoted by the government¹⁵⁰ and courts than sought by the disputants, and society still has not accepted such alternative to traditional adjudication.¹⁵¹

1.1.4.2. The Adoption Of the Law On Conciliatory Mediation In Civil Disputes

Mediation Law also makes an integral part of legal regulation of judicial mediation and made an impact on the development thereof. Therefore, despite the already mentioned instances of influence this law has made to the legal basis of application of judicial mediation, the general features of this law that have had (and still has) influence on the implementation and application of judicial mediation.

According to the Annex to the Mediation Law Directive was implemented by this law; thus, hereby Lithuania executed its obligation set out in Article 12 of the Directive to bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive.¹⁵² However, the Mediation Law was primarily adopted on 15 July 2008, i.e. way before 21 May 2011 – the deadline for the transposition of the Directive into legal system of the Member States. As revealed by the deliberations on the draft Mediation Law,

150 It should be noted in this context that one of the examples of active (and, actually, in certain sense – unconventional) promotion of mediation in our Lithuania could be, for instance, the organization of international conference “Mediation – Easy Way to Settle” and short films festival “I Settle Dispute Peacefully” which were organised with the help of National Courts Administration and were held in 2012. *Review of the Activity of the Courts in 2012*. National Courts Administration, 2012; p. 47.

151 It should be stressed that the analysis of the reasons of the resistance to application of judicial mediation does not constitute a subject matter of this research.

152 The analysis of the transposition of the Directive into the Lithuanian legal system and the search for the answer to the question whether Directive was properly transposed therein does not constitute the subject matter of the conducted research.

this law was created and adopted *inter alia* based on the draft Directive.¹⁵³ Following the adoption of Directive Mediation Law had to be subsequently modified to be in accordance with the provisions of the former.¹⁵⁴ This provides the basis to conclude that implementation of namely judicial mediation was seen as necessity by the government; however, it also partially reflects the fact that judicial mediation was essentially promoted by the authorities and not sought to be applied by the disputants.

The general aspects, characterizing Mediation Law, that are (and will be in the course of the conducted research) also relevant in the context of judicial mediation, should be mentioned.¹⁵⁵

- Mediation Law is a *general* mediation *legislation*.¹⁵⁶ Therefore, under Paragraph 2 of Article 1 it is applicable both to judicial and extrajudicial mediation. Judicial mediation, however, under Paragraph 1 of Article 10 must be carried out according to the procedure established by the Judicial Council.¹⁵⁷
- This law is applicable to internal, as well as to cross-border disputes, thus Lithuania in compliance with the Recital 8 of Directive has chosen to implement provisions of the Directive not only to the latter but to internal mediation processes as well.
- Mediation Law regulates *only* judicial and extrajudicial conciliatory *mediation in civil disputes* and does not regulate legal disputes in other areas, such as competition law.¹⁵⁸
- Mediation Law embodies general principle that legislation regulating mediation in a particular practice areas, i.e. civil disputes of specific categories, may be adopted (Article 1(6) of the Mediation Law).¹⁵⁹

153 According to *travaux préparatoires* of the draft Mediation Law this law was elaborated taking into account Model Law; Recommendation Rec (2002)10 of the Committee of Ministers of the Council of Europe on mediation in civil matters of 18 September, 2002, and Recommendation No. R (98) 1 of the Committee of Ministers of the Council of Europe to Member States on family mediation of 21 January, 1998; Green Paper; Proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters; European Code of Conduct for Mediators; experience of regulation of mediation in private disputes of various European countries. Explanatory Notes No. XP-2809 on the Draft Law on Mediation in Private Dispute of the Republic of Lithuania of 11 January, 2008 (hereinafter also referred to as “Explanatory Notes”), [interactive], [accessed 2014-08-06]. <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=312611>.

154 According to *travaux préparatoires* of the draft of these modifications the original wording of the Mediation Law was essentially in conformity with the principles of Directive, however, the subsequent changes were also required in order to promote its application in practice. Explanatory Notes No. XIP-2708 on the Draft Law Amending and Supplementing and Appending the Annex to the Law of the Republic of Lithuania on Conciliatory Mediation in Civil Disputes of 25 November 2010, [interactive], [accessed 2014-08-15]. <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=387157>.

155 The particular provisions of Mediation Law in the light of judicial mediation are analyzed throughout this research.

156 There can also be other types of mediation legislation, for example, specific legislation of court-related mediation, legislation regulating mediation in a particular practice area, etc. According to De Palo, G., Carmeli, S. Mediation in Continental Europe: a Meandering Path Toward Efficient Regulation, p. 344.

157 It was already mentioned that this procedure is regulated by Judicial Mediation Rules – specific legislation of court-related mediation in Lithuania.

158 De Palo, G., Trevor, M. B. Mediation Is on the Books in Lithuania, But the Practice, So Far, Has Been Limited. *Alternatives*. 2011, 29(5): 99–101, p. 100.

159 No laws that would be designed to regulate mediation in specific area are adopted.

- Mediation Law *embodies general principles, whereas many specific aspects of mediation are left to decide for the parties to a dispute in the course of mediation.* Thus, this regulation allows parties to exercise the principle of self-determination which is in general inherent to mediation as ADR procedure.¹⁶⁰
- The so-called “*soft law*” approach in respect of the requirements for professional qualifications of mediators, accreditation of mediators, and monitoring of mediation services is reflected in this law;¹⁶¹ this sphere is *left more or less to self-regulation.*¹⁶²

Thus, Mediation Law – legal act adopted *inter alia* in order to transpose the principles of Directive into the Lithuanian legal system – is a general legal regulation in respect of implementation and application of mediation, including its judicial form; hence it supplemented and extended legal regulation of judicial mediation. Although Judicial Mediation Rules is a special legal act that regulates the procedure of judicial mediation, the principles embodied in Mediation Law are to certain extent applicable in respect of its application as well.

It may be concluded that the implementation and development of judicial mediation went, in a sense, on a different path in Lithuania as compared to the most common practice in civil law jurisdictions: judicial mediation in Lithuania was introduced with mixed and not solely “legislative” approach. This approach, as opposed to the most common practices in civil law countries, included also pragmatic aspects in respect of implementation of this ADR procedure. Judicial mediation was initially implemented through the Pilot Project, i.e. applied “from court-to-court”: the experimental application of judicial mediation, and not the reform of civil procedure, was seen as essential for introduction of judicial mediation. However, in spite of the initial pragmatic approach towards the implementation of judicial mediation into the Lithuanian legal system, the subsequent shift thereof to common to the most of civil law jurisdictions “legislative” approach preconditioned the development of legal regulation of judicial mediation. These modifications in respect of the adopted approach also resulted in numerous further amendments of legal provisions regulating judicial mediation, i.e. had influence (and still have) on further development of model of judicial mediation in the Lithuanian legal system. However, judicial mediation was not only primarily introduced into legal system through the launch of the Pilot Project, but it is still, in a sense, applied in the framework thereof¹⁶³ in spite of subsequent

160 Thus, the Mediation Law determines mediation as a flexible process, in the words of Kimberlee K. Kovach defined and re-defined by the disputants and the mediator in each case. Kovach, K. K. *Mediation. The Handbook of Dispute Resolution* (ed. Moffitt, M. L., Bordone, R. C.). San Francisco: Jossey-Bass, 2005: 304–317, p. 304.

161 The *travaux préparatoires* of the draft Mediation Law affirm that the method of “soft” regulation was applied in order to promote the development of mediation and not to undermine its effectiveness. Therefore, the mediation procedure was not regulated in details; only those aspects that were considered to have an essential influence on the quality, effectiveness and popularity of mediation were envisaged.

162 This choice by some authors is explained as the one that mirrors the lack of confidence in the mediation process itself. Valančius, V., p. 232.

163 This conclusion was made also bearing in mind the content and the wording of the Survey of the Courts. It should be noted in this context that such basis for application of judicial mediation also influences the specificity of its application in our legal system

reform of civil procedure in this respect. Thus, the approach taken towards the implementation of judicial mediation into the Lithuanian legal system should be considered as a mixed one.

However, despite the implementation of judicial mediation, its application should be considered as poor – judicial mediation is not yet a well-known and recognised alternative to litigation in court. Judicial mediation is taking its more or less initial steps in the Lithuanian legal system, its application is more promoted by the government and courts than sought by the disputants, and society still has not accepted such alternative to traditional adjudication.

Finally, despite the differences of the approach taken towards the implementation of judicial mediation into the Lithuanian legal system from the approaches not only of the common law countries, but from the one adopted in other civil law jurisdictions as well, the peculiarities of the model of judicial mediation, namely its legal regulation in the Lithuanian legal system, should be analyzed, where appropriate, only with respect to the savvy of the above-mentioned. The principles and provisions of Directive, as well as those of the law that Lithuania has brought into force in order to comply with the latter, have to be invoked for a thorough analysis of the model of judicial mediation in the Lithuanian legal system as well.

1.2. The Notion Of Judicial Mediation

This section of the Chapter one of the dissertation is focused on the analysis of the notion of judicial mediation. Due to the fact, that mediation in general, as well as judicial mediation in particular have salient features not only in countries that belong to the different legal traditions, but also in those of the same legal tradition, whereas the general notion of judicial mediation has an influence on its content in particular legal system, primarily the general notion of judicial mediation must be analyzed and only afterwards its concept in particular legal system can be introduced. This section is, therefore structured into two subsections – the first one deals with the general notion of judicial mediation and the second – with the notion of judicial mediation in the Lithuanian legal system.

1.2.1. General Notion Of Judicial Mediation

It is, as commonly agreed, very difficult to define such flexible and ever-changing ADR procedure as mediation. The same could be said about definition of judicial mediation. Although this type of mediation in general is more regulated than the private one, it does not preclude the existence of variety of forms of judicial mediation and the ever-shifting content thereof. Therefore, the main features and principles of this ADR procedure must be revealed before the presentation of the most common definition of judicial mediation.

This subsection consequently primarily introduces main features and principles of judicial mediation, the most common definition of judicial mediation is presented afterwards.

1.2.1.1. Main Features and Principles Of Judicial Mediation

Due to the fact that the model of judicial mediation generally has different content and may be applied in diverse form in every legal system, its form of application may be even

subject to particularities of individual dispute, only the most common features of judicial mediation may be indicated.

There is a strong interrelation between certain features of judicial mediation and some of its main principles,¹⁶⁴ therefore, the both are presented together.

- 1) Judicial mediation is always an *alternative procedure*. Despite its certain relation to the court,¹⁶⁵ judicial mediation is always an ADR procedure, thus – alternative to traditional adjudication. It is practiced outside traditional court procedure and it offers other type of justice, in the words of J. M. Nolan-Haley – “individualized justice”, i.e. justice where locus of decision making is placed in parties.¹⁶⁶
- 2) Judicial mediation is commonly a *consensual procedure*. This aspect directly relates to one of the main virtues of mediation in general – self-determination of the parties, as well as to informal nature of this ADR procedure. Although judicial mediation is usually to certain extent legally regulated¹⁶⁷ as it is linked in a way to the activity of a court, judicial mediation retains its informal nature in a sense that the process of judicial mediation is still left to be defined by the participants thereof, mainly parties. The aspects left to decide for the parties may vary in different legal traditions, as well as may depend on particular legal system. Nevertheless, generally the consensual nature is maintained throughout the whole procedure. The consensual nature of judicial mediation and, accordingly, the principle of self-determination of the parties are also reflected when the settlement agreement is concluded.¹⁶⁸ Thus, parties exercise their right of self-determination in the course of the whole procedure and may amicably solve their dispute by adopting settlement agreement – in a way may execute “individualized justice”.¹⁶⁹ Unlike decision making by a neutral third party in the adjudication process, decision making rests solely with the disputing parties in judicial mediation.¹⁷⁰
- 3) *Autonomy of the parties* is also one of the key features of judicial mediation, as it is a party-centered ADR procedure. During judicial mediation parties must be granted

164 Those together are sometimes identified as the virtues of judicial mediation.

165 There could be very different forms of this relation: the court in front of which the case is initiated can refer dispute to mediation carried out by private party, the judge hearing a case may act as a mediator (such practice is highly criticized by legal scholars), judge hearing a case may refer dispute to another judge for mediation, etc.

166 Nolan-Haley, J. M., p. 63.

167 Procedure of judicial mediation is generally legally regulated to the bigger extent in civil law jurisdictions, whereas in common law countries this procedure is either not regulated by the government, or legal acts have been adopted only recently.

168 Irrespective of terminology applied in particular legal system, the phrase “settlement agreement” here signifies an agreement, whereby the dispute is resolved, concluded as a result of judicial mediation.

169 Therefore, the consensual nature of judicial mediation is directly related to the freedom of contract – the principle that derives from the Article 46 of the Constitution of the Republic of Lithuania; it signifies the freedom of every person to decide whether to conclude or not the contract and under what conditions. Baranauskas, E. *et al. Civilinė teisė. Bendroji dalis* (2nd edition). Vilnius: Mykolo Romerio universitetas, 2008, p. 73.

170 Nolan-Haley, J. M., p. 55.

autonomy, i.e. must be guaranteed the right to act freely (with respect to regulatory requirements) during the settlement of the dispute, to decide upon the process of judicial mediation and to adopt (or not) the settlement agreement. This principle also ensures that parties participate in the nomination of particular mediator. The autonomy of the parties together with the principle of self-determination¹⁷¹ determine right of any of the parties to terminate judicial mediation at any stage of this ADR procedure. Thus every party is free to walk out of judicial mediation, in such case judicial mediation ceases.¹⁷² The disputing parties are, therefore, also able to solve their dispute creatively – decide inconsistencies in the most favorable (in respect to their needs) way.¹⁷³ The right of the parties to decide upon every instance of mediation is, however, in a sense limited in judicial mediation due to the fact that it is, in general, more extensively legally regulated than its private form.

- 4) *Mediator* in judicial mediation only *assists parties* and may not adopt the decision instead of them. Nevertheless mediation in general and judicial mediation in particular is always related to some kind of participation (sometimes – even intervention) of the third party – mediator – which brings together the positions of the parties.¹⁷⁴ Generally, although mediator is a guardian of the fairness of the process, as to its substance his or her role is limited to verifying that the parties give real consent to the agreement they reach and that the settlement respects public and is not manifestly and extremely unfair.¹⁷⁵ Though the right to decide in judicial mediation is never given to mediator, the role of this intermediary usually directly depends on the type of person acting as mediator – whether it is judge, other official or private person.
- 5) Traditionally mediation, including judicial one, is a *voluntary procedure* as consensus is in the essence of mediation;¹⁷⁶ this is in direct relation to the consensual nature of this ADR procedure. This voluntarism can be generally related to two main instances: to the entry into mediation procedure and to the conclusion of the settlement agreement.¹⁷⁷ However, the development of mediation, the occurring resistance to application of mediation,¹⁷⁸ the will to promote this ADR

171 It should be noted, however, that, according to J. M. Nolan-Haley, invocation of the principle of self-determination (with its underlying ideal of autonomy of the parties), as a guiding principle of this ADR procedure, is problematic in the context of judicial mediation. Nolan-Haley, J. M., p. 90–91.

172 Goodman, A., Hammerton, A. *Mediation Advocacy*. St. Albans: xpl, 2006, p. xvii.

173 Such creativity, however, should not condition the conclusion of the legally void settlement agreement.

174 *Dictionnaire de la Justice*. Paris: Presses Universitaires de France, 2004, p. 28–29.

175 Otis, L., Reiter, E. H. *Mediation by Judges: A New Phenomenon in the Transformation of Justice*.

176 Otis, L. Canada. *Overview of judicial mediation in the World. Mediation, the first universal language of conflict resolution (First International Conference on Judicial Mediation, Paris, 16–17 October 2009)*. L'Harmattan, 2010: 247–249.

177 Some legal authors provide different classification of so-called “dimensions of voluntarism” by adding the voluntary participation in judicial mediation procedure and the ability to accept or reject particular outcome. According to Boulle, L., Nestic, M. *Mediation: Principles Process Practice*. Haywards Heath (West Sussex): Tottel Publishing, 2005, p. 15.

178 Interestingly, historically voluntary mediation programs have not been well attended in the United States, country where modern mediation found its start, as well. Senft, L. P., Savage, C. A., p. 329.

procedure or other reasons have conditioned the development of mandatory mediation in some countries.¹⁷⁹ Thus, voluntarism in mediation is not absolute; the most evident exception to this principle is mandatory judicial mediation.¹⁸⁰ The mandatory nature, however, can only be attributed to the entry into judicial mediation and, in a sense, to participation therein, i.e. although parties may have an obligation to try to solve their dispute in judicial mediation, they may not be obliged to solve their dispute and to conclude settlement agreement.

- 6) All mentioned features and principles affirm that judicial mediation, despite its relation to the court, as well as more extensive legal regulation (as compared to private mediation), is commonly a *flexible procedure*: it may be adapted to particular legal system, as well as to the needs of the parties of particular dispute. The fact that this type of mediation is related to a certain role of a court, however, in some instances raises doubts as to whether this procedure is in every case apt to adjust to the needs of particular process.¹⁸¹
- 7) Judicial mediation is always a *private procedure* in a sense that the *principle of confidentiality* is at the core of judicial mediation and entire efficacy of mediation rests on the confidentiality of the proceedings.¹⁸² This principle applies not only in respect of the evidence produced in the course of judicial mediation by one of the parties, but to the whole process as well. The parties, therefore, can conduct themselves in judicial mediation process freely, i.e. disclose information, express views, make suggestions, refuse offers that were made in the course of mediation, etc.¹⁸³ It is also applicable in respect of information which mediator was provided with during the private meetings with the parties. Interestingly, the observance of this principle is sometimes considered to be challenged when a judge acts as mediator.
- 8) Judicial mediation *must be carried out only by neutral third person*. As a role of mediator is key to success of judicial mediation, only a truly neutral person may act as a mediator. Thus he or she must have no association with either of the parties nor any interest in the outcome.¹⁸⁴ Hence, this principle also incorporates

179 Mandatory mediation is a quite well-known phenomenon in common law countries. Whereas, despite the ongoing discussions about the need to implement mandatory mediation in the countries of continental Europe (including Lithuania), mandatory mediation is yet in general not implemented therein, with exception to its mandatory forms in certain cases (for example, in some cases in Germany).

180 There is an opinion, that two exceptions to the principle of voluntarism exist – judicial mediation and mandatory mediation (Milašius, T., p. 52). However, in the mind of the author of this dissertation this is not entirely correct as judicial mediation is not generally mandatory even though mandatory mediation is often the judicial one.

181 Some legal authors believe, that, for example in the United States instead of providing litigant with the originally intended alternative process of mediation, the courts' mediations "have capitulated to a watered down version of the alternative" – a process that is merely not a trial. Senft, L. P., Savage, C. A., p. 335.

182 According to Otis, L., Reiter, E. H. *Mediation by Judges: A New Phenomenon in the Transformation of Justice*.

183 This is in clear contrast to the process of traditional adjudication. Goodman, A., Hammerton, A., p. xviii.

184 Goodman, A., Hammerton, A., p. xix.

the requirement of impartiality of the person acting as assistant to the parties in settling their dispute amicably. Neutrality of mediator is of crucial importance in judicial mediation, especially when it is conducted by a judge or a member of court personnel.

Other features of and principles common to judicial mediation may be specified as well. The mentioned ones, however, constitute the integral part and reflect the very essence of mediation, as ADR procedure, as well as its judicial form. Although judicial mediation is a type of mediation and, more or less, basic means are used in the course of it, judicial mediation is unlike other forms of mediation; it has even more specificities in the case if mediator is a judge.¹⁸⁵ Hence, the content of the basic principles inherent in particular model of judicial mediation may be different.

The set out general features of judicial mediation and principles inherent in the essence of this ADR procedure, that constitute the requisite element of this ADR procedure, may have partially different content in particular legal system. Hence, they must be indicated when analyzing in any respect the particular model of judicial mediation, *inter alia* its legal regulation. The necessity to implement the main principles of judicial mediation, as well as to create the preconditions for the application thereof arise from the very essence of this ADR procedure as alternative to traditional adjudication.

1.2.1.2. Definition of Judicial Mediation

Mediation is commonly defined as a process in which a third party neutral, the mediator, assists disputing parties in reaching a mutually agreeable resolution.¹⁸⁶ It may also be defined as a voluntary system in which a neutral mediator controls a process but does not intervene in the content of a dispute and which leads to consensual outcomes for the parties.¹⁸⁷ The definitions highlight various features of mediation, as ADR procedure, *inter alia* its informality, the fact that no power to take a decision is given to the third party, the acceptability of the decision for both parties.¹⁸⁸ However, the mentioned flexibility of this ADR procedure, its ability to adapt to the needs of different legal systems, as well as to the demands of the parties to a dispute, and, thus, the ever-changing content of this procedure, do not allow to provide its general definition which would be apt in all instances.¹⁸⁹ The possibility to provide this general definition does not benefit from the fact that wide variety of practices is called mediation, either.

Everything that was said is also true when trying to provide general definition of one of the types of mediation – judicial mediation. Due to the fact that judicial mediation

185 Brunet, E. Judicial Mediation and Signaling. *Nevada Law Journal*. 2003, 3(2): 232–258, p. 233–234.

186 Kovach, K. K. Mediation, p. 304.

187 Boulle, L., Nescic, M., p. 14.

188 Žalėnienė, I., Tvaronavičienė, A., p. 230.

189 It is commonly agreed that to find a universally accepted definition of mediation is a challenge as many varying definitions exist, due to multiple mediation forms, styles, and practice areas. Hoffmann, A., p. 506. Certain legal authors also attribute the diversity of styles, and in a sense – models, of mediation, to variety of mediators and their individual features. Uscila, R. Nusikaltimo aukos ir nusikaltėlio mediacijos instituto samprata, pagrindiniai modeliai ir jų veikimo principai. *Jurisprudencija*. 2001, t. 20(12): 74–84; p. 76.

may also be applied in very different forms and may have its salient features not only in the countries of different legal tradition, but in the countries of the same legal tradition as well, there is no possibility to define judicial mediation in a manner that would involve the features of all its instances.¹⁹⁰

The opportunity to define judicial mediation is aggravated due to the terminology issues. There are many terms that are used in legal literature to indicate form of mediation somehow related to the court, such as: court-based mediation, court-annexed mediation, court-connected mediation, court-related mediation, in-court-mediation, judicial mediation, or simply court mediation. Although some of them may mark the same procedure (for example, court-connected mediation and court-related mediation – they generally refer to mediation that occurs in the “shadow” of the court:¹⁹¹ it is related to the court system in the way, that procedure which is already pending before a court, is advised by the judge into a mediation taking place outside the court)¹⁹², others reflect different types of mediation (for example, the concept “court-annexed mediation” may be used to identify mediation procedure which starts by the referral of the court and is conducted by mediator outside the court, whereas judicial mediation may be understood as mediation performed by the judge)¹⁹³. These differences of the types of mediation are subject to various aspects, for example existing court referral system, the status of mediator, the place where judicial mediation is conducted, etc.

It should be noted, however, that despite the said issues with terminology there is one (though, not the only one) factor that relates all these types of mediation and distinguishes them from the private mediation:¹⁹⁴ judicial mediation, or whatever notion is used to describe such form of mediation,¹⁹⁵ is always somehow related to court. This relation can have different forms. However, in general it means that parties have to address the court in order to be able to solve their dispute with recourse to judicial mediation.¹⁹⁶

190 It should be noted, that there is, though, the necessity of a clear and precise definition of judicial mediation in particular legal system. Magendie, J.-C. France. *Overview of judicial mediation in the World. Mediation, the first universal language of conflict resolution (First International Conference on Judicial Mediation, Paris, 16–17 October 2009)*. L'Harmattan, 2010: 47–51, p. 49.

191 The connection between mediation and the court still may vary in line with the nature of existing referral system. Alexander, N. What's Law Got To Do With It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions, p. 10.

192 De Vries, T. The Legal Regulation of Mediation in Germany. *Acta Universitatis Lucian Blaga*. 2012: 209–217, p. 211.

193 In the Lithuanian legal system the phrase “judicial mediation” marks mediation which is initiated after the complaint is lodged with the court, takes place in the court-house and is conducted by mediator, who may be either judge, assistant of a judge, or any other person possessing appropriate qualification who has acquired the status of mediator.

194 This type of mediation can also be named variously, for example extrajudicial mediation (this term is used in the Mediation Law), contractual mediation, private mediation, etc.

195 The term “judicial mediation”, which is applied by applicable legal provisions, is used in the framework of this research; it is used not only to indicate the relevant procedure inherent in the Lithuanian legal system, but also when providing examples relevant to mediation related to court in other countries as well.

196 Kaminskiėnė, N., *et al. Mediacija. Vadovėlis*, p. 222–223.

Thus, judicial mediation is a very diverse ADR procedure and all defined reasons make the provision of general definition of judicial mediation, apt for all cases, essentially impossible. Judicial mediation, therefore, must be the most accurately defined only considering special features of this ADR procedure in particular legal system.

Nevertheless, certain broad-brush definitions which reflect the most common principles of this ADR procedure are elaborated in legal literature. For instance, judicial mediation is defined as a procedure in which neutral mediator assigned or recommended by the court assists parties in reaching compromise decision in the matters defined by the court.¹⁹⁷ This definition underlines *inter alia* the role of the court in the appointment of mediator, requirement for mediator to be neutral, as well as the consensual nature of this procedure. According to another definition of judicial mediation provided by the European Association of Judges for Mediation (GEMME), judicial mediation consists of confiding to a qualified and impartial third person, without power of decision, mission of listening to the parties in conflict and establishing their views, whether contradictory or not, with the objective of helping them to reestablish communication and to find mutually acceptable agreements between themselves.¹⁹⁸ This definition emphasizes the role of mediator as an assisting intermediary between the disputing parties, as well as consensual nature of this procedure. According to another, rather distinctive, definition judicial mediation is mediation presided over by judges and characterised by the intervention and supervision of judicial power; dispute may be solely voluntarily submitted to such mediation.¹⁹⁹ Judicial mediation is also sometimes defined as the process of conflict resolution whereby impartial judges of persons indicated by the former assist parties to achieve peaceful settlement.²⁰⁰ According to more general definition judicial mediation is a procedure wherein neutral mediator who is either nominated or recommended by the court assists parties in reaching compromise on the issues defined by the court.²⁰¹

Thus, despite the different approaches in defining judicial mediation, this ADR procedure is always in a certain way related to the proceedings in the court: parties have to address the court (in a identified manner) in order to be able to solve their dispute with recourse to judicial mediation. The definitions of this ADR procedure most commonly highlight the aspects of this procedure that are considered to reflect the essence thereof. In general, when defining judicial mediation the emphasis is put on the role of participants of this ADR procedure, i.e. either the role of mediator or the one of the parties is this ADR procedure must be defined individually in particular legal system, taking into account *inter alia* national context.

197 According to Kaminskiene, N. *Alternatyvus civilinių ginčų sprendimas*, p. 158.

198 Magendie, J.-C., p. 49.

199 Liming, W. Characteristics of China's Judicial Mediation System. *Asia Pacific Law Review*. 2009, 17(67): 67–74., p. 67.

200 Zaksaitė, S., Garalevičius, Z. Teisminės ir neteisminės šeimos ginčų mediacijos galimybės. *Teisės problemos*. 2009/4(66): 70–108; p. 72.

201 *Dictionary of Conflict Resolution* (ed. Yarn D. H.). San Francisco: Jossey-Bass Publishers, 1999.

1.2.2. Notion Of Judicial Mediation In the Lithuanian Legal System

Judicial mediation, from the very beginning of its introduction into the Lithuanian legal system, has been directly related to the proceedings in court: this ADR procedure may be applied only when particular dispute has been already addressed to the court, i.e. when the particular civil case has been already initiated. Legal acts regulating this ADR procedure – Mediation Law and Judicial Mediation Rules – have envisaged²⁰² application of judicial mediation solely in civil disputes and have not provided the ground to apply this ADR procedure in the disputes of other categories. Hence, judicial mediation in Lithuania may currently only be applied for peaceful settlement of civil disputes.²⁰³

Therefore the notion of judicial mediation in the Lithuanian legal system may be revealed only after combining the analysis of regulatory definition of this procedure and definition of the civil dispute – the subject matter of this procedure.

1.2.2.1. Regulatory Definition Of Judicial Mediation

Mediation Law and Judicial Mediation Rules, as mentioned, are two main legal acts regulating judicial mediation in Lithuania.²⁰⁴ Judicial Mediation Rules – special legal act in respect of judicial mediation – regulate the procedure of this alternative to traditional litigation. Mediation Law embodies the main principles of mediation that are to certain extent (i.e. taking into account the specific content that is attributed to these principles by Judicial Mediation Rules) applicable to judicial mediation as well. However, before proceeding to the analysis of regulatory definition of judicial mediation embodied therein, the issue of terminology should be briefly addressed.

The notion “judicial mediation” is employed in Judicial Mediation Rules – the first legal act which provided legal basis for application of judicial mediation, while the notion “judicial conciliatory mediation” is embodied in Mediation Law – later adopted legal act designed to regulate the application of mediation (judicial and extra judicial).²⁰⁵ As it may be seen from the *travaux préparatoires* of the draft Mediation Law (i.e. posterior legal act) this inconsistency of terminology was determined by the will to conform to the requirements of the state language.²⁰⁶ Although the application of the notion “judicial conciliatory

202 However, the application of judicial mediation to deal with other types of disputes is on curricula of legislator: this ADR procedure is considered to be not a possibility, but a necessary measure to deal with administrative, as well as some criminal disputes.

203 Legal provisions that would enable application of judicial mediation in other types of disputes are not yet adopted.

204 It was already mentioned, that although the Code of Civil Procedure provides legal basis for application of judicial mediation, it does not entail additional provisions related to the procedure of judicial mediation and refers to the procedure set out by the Judicial Council, i. e. Judicial Mediation Rules.

205 It should be noted that the notion applied in Judicial Mediation Rules in Lithuanian language is “teisminė mediacija” (judicial mediation) and the one used by the Mediation Law – “teisminis tarpinankavimas” (judicial conciliatory mediation).

206 During the deliberations of the draft Mediation Law (at the beginning it was called the Law of the Republic of Lithuania on Mediation in Private Disputes) the State Commission of the Lithuanian Language presented its opinion that instead of the term “mediation” which was used in the draft law, either the term “conciliatory mediation”, or the term “dispute mediation” should be applied. Conclu-

mediation” in Mediation Law was sufficiently motivated from the perspective of protection of the state language one may raise doubts whether it was justified enough from the legal point of view.²⁰⁷ It is obvious that the notion “judicial conciliatory mediation” may seem in a way resembling another notion – “conciliation”, which identifies the different ADR procedure that should not be confused with or equated to mediation. This resemblance of course relates only to conciliatory nature reflected by both of these notions. However, as mediation, in general, and judicial mediation, in particular, is taking its more or less initial steps in the Lithuanian legal system and society still has not accepted such alternatives to traditional adjudication, the awareness and proper understanding of the procedure itself by the members of society are of crucial importance. Whereas, if the members of society, i.e. the potential parties to a dispute which may be dealt with recourse to judicial mediation, not only do not understand the process of judicial mediation, but do not identify this ADR procedure, the needed level of the said awareness could not be reached. This, however, does not mean that the notions employed in Mediation Law (“conciliatory mediation in civil disputes”, “judicial conciliatory mediation”, etc.) should be necessarily altered, still these aspects probably must be bared in mind when promoting judicial mediation.²⁰⁸ In addition, it should be noted, that although inconsistency in terminology of legal acts is not welcome, in the opinion of the author of this dissertation, legal regulation of judicial mediation in this aspect should be left intact.²⁰⁹ In that case the notion “judicial mediation” would still be entrenched in Judicial Mediation Rules – legal act specifically designed to regulate the procedure of judicial mediation and, therefore, applied in the course of judicial mediation. Otherwise, if the term “judicial mediation”, which is currently applied in the course of judicial mediation and, therefore, is better known to the members of society, would be changed, the unwelcome confusion may arise. It should be added in this context that the identified requirements for legal regulation in respect of its terminology are observed in the new wording of Judicial Mediation Rules: the notion “judicial mediation” remains the one employed therein. Nevertheless, it is also linked to the terminology of Mediation Law as the reference to the notion “judicial conciliatory mediation of civil disputes” is also made.

The Mediation Law, general legislation of mediation, provides only the general definition of mediation. Under Paragraph 2 of Article 2 of this law mediation (conciliatory mediation in civil disputes) means civil dispute settlement procedure whereby one or several mediators in civil disputes assist the parties to a civil dispute in reaching an amicable

sion of the Main Committee on the Draft Law of the Republic of Lithuania on Mediation in Private Disputes (XP-2809) (the Committee of the Legal Affairs of the Seimas of the Republic of Lithuania) of 18 June 2008 (hereinafter also referred to as “Conclusion of the Main Committee”) [interactive], [accessed 2014-04-02]. <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=323021>.

207 This does not mean of course that Lithuanian, as the State language (Article 14 of the Constitution of the Republic of Lithuania), should not be protected or must be protected to a lesser degree in this context.

208 It should be stressed that the author of the dissertation in general admits that the title used to identify the procedure cannot itself change the content of this procedure and is fully aware of the respective regulation of the Directive (according to Paragraph (A) of Article 3 mediation is a structured process described by the Directive however named or referred).

209 It is doubtful, however, whether the notion “judicial conciliatory mediation” should remain the one applied by the Code of Civil Procedure. Otherwise, if this notion remains to be applied, unnecessary confusion between the parties to a dispute may arise.

agreement. Thus the law emphasizes the role of participants of mediation – mediator and parties to a civil dispute, as well as consensual nature of mediation, autonomy and self-determination of the parties. The procedure is party-centered and mediator (one or several) acts only as an intermediary who may assist the parties, but is not provided with the right to solve the dispute. This definition also accentuates that the Law is only applicable in respect of civil disputes.²¹⁰

The special definition of judicial mediation is enshrined in Judicial Mediation Rules (Article 3); according to it, judicial mediation – settlement procedure of civil disputes wherein one or several court mediators help parties of civil proceedings to settle dispute amicably. Several aspects of this definition can be pointed out.

- This definition emphasizes the aim of judicial mediation – assistance to the parties in reaching amicable settlement of the dispute (i.e. the general aim of mediation). Thus, namely the parties are the decision makers in judicial mediation – the role and the status of the parties, as participants of judicial mediation, is hereby emphasized.²¹¹
- The role of mediator is also underlined – mediator’s function is to assist the parties in settling their dispute; mediator is not provided with the right to make the final decision (this right belongs to the parties). There is also possibility to have more than one mediator.

The main principles of judicial mediation are additionally enumerated in the new wording of Judicial Mediation Rules:²¹² the principle of voluntarism of the parties to a dispute, principle of confidentiality, principle of mutual respect and tolerance, principle of neutrality and impartiality of a court mediator,²¹³ principle of cooperation, principle of qualified activity of a court mediator, principle of good faith. Hence these principles are *expressis verbis* identified as the constituent part of the model of judicial mediation and also have become an integral part of the definition of judicial mediation. Although such enumeration of the main principles of this ADR procedure was not envisaged by formerly applied legal provisions, it does not mean that the main principles of judicial mediation were not implicitly embodied therein.²¹⁴ In addition, though the new notion “court mediator” and relation of this procedure to the settlement of civil dispute are embodied in the

210 Civil dispute, as a subject matter of judicial mediation, is presented further in this subsection of the dissertation.

211 Although it is not embodied *expressis verbis*, the mentioned emphasis derives from the accent on the aim of judicial mediation.

212 In the scope of this research Judicial Mediation Rules that came into force on 1 January 2015 are referred to as either „new wording of Judicial Mediation Rules“ or „New Judicial Mediation Rules“. Legal provisions that were applied prior to the said date are also cited and analyzed, when appropriate, in the scope of this research.

213 The constant modifications of legal regulation of judicial mediation also affected the terminology of this ADR procedure: primarily the notion “court mediator” was applied, which was latter substituted by the notion “mediator”, whereas recent changes have reinstated the notion “court mediator”. Therefore, the both mentioned notions are applied in this dissertation where appropriate. They are employed to identify the same person – person assisting the parties to a dispute in reaching amicable resolution of their dispute in the scope of judicial mediation.

214 In fact the research in question tends to prove quite contrary – the main principles of judicial mediation always have constituted an integral part of this ADR procedure in the Lithuanian legal system.

new definition of judicial mediation, the aim of helping parties to settle their dispute amicably, as well as special role of mediator have remained underlined. Hence in this respect the definition of judicial mediation does not differ from the one embodied by the formerly applied legal provisions.

Whereas the former Judicial Mediation Rules also entrenched provisions on who may act as a mediator together with the said definition. Under the said provisions judicial mediation could be conducted by mediators – specially trained judges, assistants of judges or other appropriately qualified persons, who are enrolled in the List of Court Mediators composed by the working group of the Judicial Council.²¹⁵ The systematic interpretation of these provisions together with the given definition enabled determining the notion of judicial mediation. Thus, judicial mediation was understood as a dispute settlement procedure aimed at helping parties to resolve amicably their dispute with the assistance of one or several mediators – specially trained judges, assistants of judges or other appropriately qualified persons enrolled in the List of Court Mediators.

The cited provisions of who may act as a mediator differ from the original wording of the Judicial Mediation Rules which envisaged only specially trained judges and assistants of judges acting as court mediators, the requirement to be enrolled in special List of Court Mediators was not set out either. The new wording of Judicial Mediation Rules does not envisage in this respect enumeration of particular subjects who may become a court mediator. Hence, any subject that has undergone the special procedure and has acquired the status of a court mediator will be able to become one.²¹⁶

Judicial mediation, as, in general, flexible ADR procedure, is very versatile, diverse models of judicial mediation may be embodied in legal systems. Different types of judicial mediation depending on who may perform judicial mediation may be identified:²¹⁷ so-called judicial mediation of judges, when judicial mediation is performed only by judicial mediators, appointed by the court from the special list of judicial mediators usually consisting of judges or other representatives of court personnel; and market-based judicial mediation, when judicial mediation may be performed by other neutral persons.

The mentioned regulatory changes as to who may act as a court mediator, hence, signify the essential changes made to the concept of a court mediator, and, accordingly, to the one of judicial mediation. Judicial mediation has stopped being an activity exclusively shaped for judges and judicial personnel, and has been opened to other persons willing to engage themselves therein (if they meet the requirements). Hereby judicial mediation has become more market-oriented, however it cannot be named an entirely market-based judicial mediation as the possibility for other (than judges and assistants of judges) persons to act as mediators is still restricted in a sense that they must be enrolled in the List of Court Mediators.²¹⁸ Due to the fact that this feature is common to so-called judicial medi-

215 The thorough analysis of the requirements for a person willing to become mediator and procedure of becoming one is provided in the Chapter Two of the dissertation.

216 Thus, the original notion of judicial mediation, inasmuch as it was related to who may act as a mediator, also was different from the former wording of these rules; whereas the former wording is different in this respect from the new legal regulation thereof.

217 Kaminskienė, N. Teisminė mediacija Lietuvoje. Quo vadis?, 57–58.

218 In the opinion of the author of this dissertation, following the changes of the concept of mediator in judicial mediation the term “court mediator” should be eliminated not only from the definition of

ation of judges, Lithuanian judicial mediation model to this respect should be determined as a *mixed model*: though it is open to other persons acting as mediators, it is not entirely market-based as well. Although the new Judicial Mediation Rules and other applicable legal acts envisage only the possibility for any person if he (she) has acquired the status of a court mediator to act as one, i.e. no particular groups of mediators are determined, *only* those persons who have undergone special procedure, have acquired the status of a court mediator and have been enrolled to the List of Court Mediators, thus – *special subjects, may become a court mediator*. In other words, the model of judicial mediation in the Lithuanian legal system remains mixed one to this extent.

Nevertheless, except the changes related to the concept of a court mediator, the regulatory definition of judicial mediation in general hasn't changed from the launch of the Pilot Project. Despite the different terminology and wording the definition of judicial mediation provided by Judicial Mediation Rules is essentially also identical to the one of mediation embodied in Mediation Law. It emphasizes the very principal features of this procedure, *inter alia* its consensual nature, autonomy and self-determination of the parties to a dispute; it also adds the accent on the special status of mediator in judicial mediation, as well as, in a sense, to the role of the parties. The provided definition also essentially matches the one embodied in the Directive.²¹⁹

Due to the fact that judicial mediation may solely be applied in civil disputes, the exhaustive definition of judicial mediation required to have the understanding about the disputes that may be dealt with within the framework of this ADR procedure.

1.2.2.2. Civil Dispute As a Subject Matter Of Judicial Mediation

Although judicial mediation is conducted in civil disputes,²²⁰ Judicial Mediation Rules do not provide with clarification in respect of which disputes (disputes of which category) are considered to be civil in this respect and may be dealt by having recourse to this ADR procedure.²²¹ The only particular requirement set therein is that the dispute must be such that the

judicial mediation set out in the Judicial Mediation Rules, but from the most of other provisions as well (for example, the said list should not be called the List of Court Mediators). Otherwise, it may be questioned that the provisions where the term "court mediator" is used are applicable only in respect of judges acting as mediator.

- 219 Under Paragraph (A) of Article 3 of Directive mediation is a structured process, however named or referred to, whereby two or more the parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator.
- 220 Due to the fact that Mediation Law applies the notion "civil dispute" and regulates mediation in civil disputes, the reference to this law is also made in the Code of Civil Procedure, the notion "civil dispute" is also applied in the scope of the conducted research, though the new wording of Judicial Mediation Rules applies notion "civil cases".
- 221 This situation could lead to misunderstandings in respect of this ADR procedure. The exhaustive list of the categories of the disputes in respect of which judicial mediation is applicable definitely does not have to be set by legal provisions. However, the situation when applicable rules merely mention civil disputes is unwelcome. Thus, in the opinion of the author of this dissertation, this legal regulation should be modified and at least the reference to the provisions which specify the disputes that might be the subject matter of judicial mediation must be made. This conclusion is supported by the fact, that the Mediation Law, as revealed further, does not specify the notion of civil dispute in this context as well.

parties could, based on the law, conclude settlement agreement whereon.²²² Legal definition of civil dispute specifically in the context of mediation is provided in Mediation Law.

In this context several provisions of this law should be taken into consideration:

- this law is applicable to extrajudicial and judicial conciliatory mediation in civil disputes,²²³ with the exception of the disputes that arose out of such civil rights and duties the settlement agreements concluded whereon would be considered void under the law (Paragraph 2 of Article 1);
- civil dispute means a dispute that is or may be heard in civil proceedings in a court of general jurisdiction (Paragraph 2 of Article 2).

Thus, under the general principle all disputes that are heard²²⁴ in civil proceedings accordingly can be settled in judicial mediation. The new wording of Judicial Mediation Rules refers in this respect to civil cases and not civil disputes, as well does not include the detailing of the cases that may be dealt with judicial mediation.²²⁵ These disputes (as well as cases) are detailed in the special legal act regulating civil procedure and, accordingly, embodying legal basis for application of judicial mediation – the Code of Civil Procedure. Under Paragraph 1 of Article 22 of this code disputes arising out of civil, family, labor, intellectual property, competition, bankruptcy, restructuring, procurement and other private legal relationship are assigned for hearing to courts according to the procedure laid down by this code.²²⁶ Thus, in general these categories of legal disputes may be settled in judicial mediation according to the procedure laid down by Judicial Mediation Rules.

However, there is an exception to this general principle – if the civil dispute originates from such civil rights and duties in respect of which the parties to a dispute could not conclude settlement agreement as it would be considered void under law, such civil dispute cannot be referred to judicial mediation. This exception is aimed at guaranteeing that mediation is performed only in the cases where it can result in a conclusion of legally binding settlement agreement. This is essentially in accordance with the provision of the Directive that preclude the application of the legal regulation embodied wherein to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law.²²⁷ Mediation Law, though, does not provide any examples of such disputes.

222 According to Article 7 of Judicial Mediation Rules.

223 In the draft Mediation Law the notion “private dispute” was applied. However, this notion was considered to be too broad, therefore it was changed into the notion “civil dispute”. According to the Conclusion of the Main Committee.

224 Due to the fact that Mediation Law is applicable both to judicial mediation, which is applied only after the particular case is initiated before the court, and extrajudicial mediation, which is applied outside the court, the phrase “is or may be heard” is used in this provision. Only those disputes that are heard in civil proceedings in a court of general jurisdiction can be dealt with the application of judicial mediation.

225 Such legal regulation could not be considered as adequately clear, thus, should be amended *inter alia* by inserting the reference to the provisions of the Code of Civil Procedure regulating which disputes may be heard in civil proceedings (Paragraph 1 of Article 22 of the Code of Civil Procedure).

226 Accordingly, under Paragraph 1 of Article 1 of the Code of Civil Procedure this code *inter alia* sets the procedure of hearing of civil, labor, family, intellectual property, competition, bankruptcy, restructuring, procurement cases and other cases from private legal relationship.

227 It also specifies that these disputes are particularly frequent in family law and employment law. Recital 10 of Directive.

Therefore, the provisions embodied in other laws, including the provisions of the Civil Code of the Republic of Lithuania²²⁸ (hereinafter also referred to as “Civil Code”), should be consulted.²²⁹ For example, under Paragraph 1 of Article 1.80 of Civil Code any transaction that fails to meet the requirements of mandatory statutory provisions is null and void.

Hence, although the definition of judicial mediation is embodied in Judicial Mediation Rules, various legal provisions of different legal acts must be consulted in order to find out which disputes can be settled within the framework of this procedure.

Despite the fact that judicial mediation occurs only when the civil case is initiated before the court of general jurisdiction and, therefore, its application is always linked to the activity of the judge, who is presumably well-aware of procedure of judicial mediation, this obscurity of applicable provisions should not be tolerated. The complexity and, in a sense, amplitude of legal regulation of judicial mediation (the legal basis for the application of judicial mediation in civil disputes are provided in the Code of Civil Procedure, general principles of mediation are embodied in Mediation Law, procedure is regulated by Judicial Mediation Rules; whereas the relationship between those acts is not always evident) may lead to distrust in procedure itself and, consequently, to resistance to its application, especially in the Lithuanian legal system, i.e. civil law jurisdiction, where the application of judicial mediation is more promoted by the government and courts than sought by the disputants. Therefore, legal regulation, in the opinion of the author of this dissertation, should be simplified at least by inserting references to other legal acts in the legal regulation of judicial mediation.

It is also important to notice in this context that not all cases may be considered to be suitable for judicial mediation:²³⁰ many cases are regarded as unsuitable because of the subject matter or the attitude of the parties. These “unsuitable” cases are usually determined by the judge hearing the case – person who refers particular dispute to judicial mediation. Thus, not all particular types of these cases which could not be referred to mediation are the subject matter of legal provisions; only the judge who refers particular case to judicial mediation and, subsequently, mediator, who mediates this particular case, are given the power to conclude that the case is suitable for this ADR procedure. Otherwise, the case is either not referred to judicial mediation, or judicial mediation should be terminated.²³¹

In conclusion, judicial mediation in the Lithuanian legal system generally should be defined as a dispute settlement procedure aimed at helping (after the initiation of the civil case in court) the parties to a dispute resolve amicably their civil dispute (as it is defined by the Code of Civil Procedure) by concluding a legally valid settlement agreement with the assistance of one or several mediators – special subjects enrolled in the List of Court

228 Civil Code of the Republic of Lithuania. *Valstybės žinios*. 2000, No. 74-2262.

229 The provisions of the Code of Civil Procedure in respect of the approval of settlement agreement concluded in the course of judicial mediation must also be bared in mind in this respect.

230 Some authors even believe that only few cases have the right profile to benefit from mediation. Boyron, S. Mediation in Administrative Law: the Identification of Conflicting Paradigms. *European Public Law*. 2007, 13(2): 263–288, p. 271.

231 The exact procedure depends on the rules applicable in particular legal system. This also underlines the importance of the role of mediator, as well as raises the question of the necessity of certain training for mediators; the role of the participants, including the question of mediators’ education, is analyzed in the Part II of this dissertation.

Mediators. The main principles of judicial mediation are its consensual nature, autonomy and self-determination of the parties to a dispute, as well as principle of confidentiality, principle of mutual respect and tolerance, principle of neutrality and impartiality of a court mediator, principle of cooperation, principle of qualified activity of a court mediator, principle of good faith. Judicial mediation in Lithuania is inextricably linked to the court system.

INTERMEDIATE CONCLUSIONS

To summarize in the context of judicial mediation in civil disputes in Lithuania the main aspects related to the evolution and notion of judicial mediation should be noted:

- There is no generalised pattern for promotion and implementation of judicial mediation, therefore specific context, including individual features of particular legal system, national dispute management culture, as well as principles of legal regulation, including not only national legal regulation, but the applicable provisions of the EU law as well, must be consulted together with legal regulation and experience of application of judicial mediation in countries of different legal tradition, in order to determine the model of judicial mediation and to identify the issues related to its implementation in the Lithuanian legal system.
- The main features of judicial mediation, as an ADR procedure, involve *inter alia* its alternative (to traditional litigation) character, as well as voluntary, consensual and private nature thereof, the fact that it is always conducted by a third person and it is a flexible procedure. The autonomy of the parties and the principle of their self-determination, the principle of confidentiality, as well as the principles of neutrality and impartiality of mediator constitute the main principles of judicial mediation. All mentioned features and principles are interrelated, hence – they may be delimited in practice only with great difficulty.
- Judicial mediation in Lithuania, as in many other civil law countries, was generally viewed as a favored type of mediation, which was primarily implemented into legal system as an alternative to traditional adjudication. However, judicial mediation was primarily introduced into legal system through the launch of the Pilot Project – by taking pragmatic approach towards its implementation, and it is still essentially applied in the framework of this project. Whereas the subsequent shift of such pragmatic approach to characteristic of the most of civil law jurisdictions “legislatic” approach preconditioned the developments of legal regulation of judicial mediation and had influence (and still has) on further development of model of judicial mediation in the Lithuanian legal system. Thus, the development of judicial mediation in Lithuania went on a different path in comparison to the most common practice in civil law jurisdictions: the approach taken towards the implementation of judicial mediation into the Lithuanian legal system is not a theoretically “pure” approach, hence, it may be determined as a mixed approach in this respect.
- Judicial mediation in the Lithuanian legal system may be generally defined as a dispute settlement procedure aimed at helping (after the initiation of the civil case in court) the parties to a dispute resolve amicably their civil dispute (as it is defined by the Code of Civil Procedure) by concluding a legally valid settlement agreement

with the assistance of one or several mediators – special subjects enrolled in the List of Court Mediators. The special status of mediator in judicial mediation, as well as the role and the status of the parties, as participants of judicial mediation, are emphasized as the key aspects of judicial mediation; hence their role may be considered to be essential when characterizing and defining this ADR procedure in the Lithuanian legal system. In addition, consensual nature, autonomy and self-determination of the parties to a dispute are embodied as several of the essential features of this ADR procedure, whereas the principles of voluntarism of the parties to a dispute, of confidentiality, of mutual respect and tolerance, of neutrality and impartiality of a court mediator, of cooperation, of qualified activity of a court mediator, and of good faith are determined as one of the main principles of this ADR procedure. Judicial mediation in Lithuania is inextricably linked to the court system.

2. PARTICIPANTS OF JUDICIAL MEDIATION

Although judicial mediation, essentially the favored type of mediation in civil law jurisdictions, is implemented in different forms in various countries, the already identified *main principles of this ADR procedure are generally the same in all legal systems*. Judicial mediation is, however, an outstanding type of mediation due to its special relation to the court procedure, hence, such special relation together with the peculiarities of particular legal system reflect on the content of the principles of the latter.

The role of the parties to a dispute and mediator – main participants in judicial mediation, as mentioned, may be considered to be essential when characterizing and defining this ADR procedure in the Lithuanian legal system. Hence, although consensual nature of the process and the self-determination of the parties are also underlined as the important principles of this ADR procedure, these, as well as other, *principles primarily relate to and may be reflected to maximum extent through the aspects relevant to the role and status of the parties to a dispute and mediator – participants of judicial mediation, who may essentially influence the content and the application of these general principles*.

Therefore, the role (i.e. legal status, namely the rights and the duties of particular subjects) of the main participants²³² of judicial mediation – parties to the dispute and mediator – must be depicted in order to characterise judicial mediation in the Lithuanian legal system, *inter alia* to identify, whether legal regulation creates preconditions for application of the main principles of this ADR procedure.

This chapter of the dissertation, thus, is aimed at characterizing the legal status of the participants of judicial mediation, namely their rights and duties, and, accordingly, identifying relevant controversial aspects of the legal regulation of this ADR procedure. This part is divided into two sections: the first one deals with the role of the parties to a dispute, the role of mediator is analyzed in the second section.

2.1. The Parties To a Dispute

Judicial mediation is a dispute settlement procedure. Dispute obviously always involves more than one natural and (or) legal person and happens between at least two of the disputing parties. The particularity of judicial mediation, as ADR procedure, is that generally the parties to a dispute exercise their self-determination and autonomy throughout the procedure, i.e. usually the *parties* are the ones that determine the whole course of the procedure and, thus, *are at the core of this procedure, alternative to traditional litigation*. *Their role and status*, however, *vary* not only because of the differences of legal systems and models of judicial mediation implemented therein, but due to the specificity of judicial mediation (as compared to the extrajudicial one) as well. It is, therefore, particularly important to primarily analyze the role of the parties to a dispute in judicial mediation in the Lithuanian legal system.

232 Although there may definitely be other participants of judicial mediation, the main participants thereof are the parties to a dispute and mediator – subjects that are provided with the right (though varying in respect of its scope and content) to frame the procedure in order to achieve the main goal of this ADR procedure – peaceful settlement of the dispute.

Hence this section is dedicated to the analysis of the legal status and role of the parties to a dispute²³³ in judicial mediation and consists of three subsections: the concept of the parties to a dispute is presented in the first subsection, their rights and duties are presented and analyzed respectively in the second and the third subsections, whereas some aspects related to the representation of the parties, as well as to the provision of the state-guaranteed legal aid are presented in the fourth subsection.

2.1.1. Concept Of the Parties To a Dispute

First of all definition of the parties to a dispute should be analyzed. According to Mediation Law party to a civil dispute means a person involved in dispute whose rights and duties are affected by the resolution of the dispute (Article 2(1)). Although it is not directly set out in this law, natural, as well as legal, persons may act as a party to a dispute.²³⁴ The cited regulatory definition also involves the main requirement for a person in order to appear as a party to a dispute – this person must meet the criteria to become a party to a dispute in civil proceedings. This person, therefore, must have legal interest in the outcome of the dispute.²³⁵ Thus the dispute and, consequently, its resolution must have an effect on the rights and the duties of this person.

It should be noted, that the notion “party to a dispute” applied by Mediation Law does not have the same meaning as the related notion applied in civil proceedings, in a sense that all persons who have legal interest²³⁶ in the outcome of the dispute are called the parties to a dispute and have theoretically the same rights and duties in mediation irrespective of their procedural status in the “simultaneously”²³⁷ heard case; whilst rights and obligations of the participants of civil proceedings may differ dependently on their procedural status. However, as it may be seen from the wording of Judicial Mediation Rules,²³⁸ this is not true in respect of judicial mediation: the notion “party to a dispute” is related to the parties to the proceedings and does not also involve other persons. Hence, the status of

233 The notion “party to a civil dispute” and its abbreviation “party to a dispute” are applied in Mediation Law; however the notion “party to a dispute” and its abbreviation “party” will be applied throughout the dissertation where appropriate.

234 The Code of Civil Procedure sets out the general rule that the parties to the dispute (plaintiff and defendant) can be natural or legal persons (Paragraph 1 of Article 41); the same rule is applied in respect of other participants (third parties) as well.

235 The general rule that parties to the dispute must have legal interest in the outcome of the case is embodied in the Code of Civil Procedure (Paragraph 1 of Article 37).

236 It should be noted in this context that the notion “legal interest” may envisage two aspects – material legal interest and procedural legal interest, that are actually interrelated as the procedural legal interest may exist only when there is material legal interest. Krivka, E. *Intereso problema civilinio proceso teisėje. Jurisprudencija: mokslo darbai*. 2007. 5(95): 25–31, p. 31.

237 The case of course is not *strictu sensu* heard and mediated simultaneously.

238 Although Judicial Mediation Rules do not embody the definition of the parties to a dispute in judicial mediation, according to Article 15 of these rules only parties to the proceedings, third persons and their representatives may participate in judicial mediation. In other words, under the special legal regulation of the procedure of judicial mediation the parties to a dispute are equated to parties to the proceedings and not any other persons participating in the proceedings. Hence the notion “party to a dispute” is applied in this dissertation with respect to the said legal regulation embodied in Judicial Mediation Rules.

particular person in respect of judicial mediation is identified according to his (her) status in civil proceedings and is determined by his (her) legal interest in the outcome of particular dispute. In other words, if particular person is a party in civil proceedings, he (she) will be considered to be party to a dispute in judicial mediation as well.

In case if it was established that the court decided on the rights and duties of the person who did not participate in the proceedings the decision of the court of the court would be invalid: such finding is one of the absolute grounds for invalidity of decision of the court of first instance.²³⁹ In other words, if such person was, in a way, “excluded” from the proceedings with respect to which he (she) has legal interest, such decision of the court should be held invalid. However, the mentioned finding is considered to be an absolute ground for the invalidity of the decision of the court of first instance only in the case when the consequences set out by the law appear – the court must have decided upon the rights and the duties of such person, i.e. not always when certain person was not involved in particular proceedings. Thus, the court must have determined, recognised, altered, annulled or adopted another decision in respect of his (her) rights and duties, which, therefore, has an effect on the legal status of such person who did not participate in particular legal proceedings.²⁴⁰ The ruling of the court of first instance, as well as appellate court, though may be annulled only when the exact effect on the legal status of the person who did not participate in legal proceedings and the legal consequences set out by the law are determined.²⁴¹

The principal aim of mediation, including judicial mediation, is amicable resolution of particular dispute, consequently, the termination of judicial mediation by the conclusion of a settlement agreement is the pursued result of this ADR procedure. According to applicable legal provisions this settlement agreement, although binding on the parties (in the wording of Paragraph 2 of Article 6 of the Mediation Law – it has “statutory effect” on the parties to the dispute), still has to be submitted to the court for approval in order to be treated as a final judgment (*res judicata*).²⁴² This procedure of course is relevant only to extrajudicial mediation. Judicial mediation is, on the contrary, always related to the court procedure, as a case concerning the dispute in question is always already initiated before the court. Therefore, the settlement agreement must always be approved by the court and

239 Under Paragraph 2 of Article 329 of the Code of Civil Procedure.

240 This rule is determined in the jurisprudence of the Supreme Court of Lithuania. For example: the ruling of 9 January 2007 adopted in civil case *A. J. v. Administration of Vilnius City Municipality*, case No. 3K-3-159/2007; the ruling of 7 October 2008 adopted in civil case *R. J. v. the Head of Kaunas County Administration et al.*, case No. 3K-3-462/2008.

241 The ruling of the Supreme Court of Lithuania of 15 July 2011 adopted in civil case *S. T. v. UAB “Mineraliniai vandenys” et al.*, case No. 3K-7-278/2011.

242 According to Paragraph 3 of Article 6 of Mediation Law, where a dispute being settled through conciliatory mediation is not simultaneously heard in court, a settlement agreement may, at the joint request of the parties to the dispute or one of the parties to the dispute with the written consent of the other party to the dispute, be submitted to court for approval in accordance with the simplified procedure set forth in the Code of Civil Procedure of the Republic of Lithuania. An effective settlement agreement approved by a court ruling is treated as a final judgment (*res judicata*) by the parties to the dispute and its execution may be enforced.

The procedure of judicial mediation, including its termination by adoption of settlement agreement is analyzed in the Part 3 of this dissertation.

is treated as a final judgment (*res judicata*), accordingly – its execution may always be enforced.

Hence the mentioned ground for the absolute invalidity of the court decision – the finding that the court decided on the rights and duties of the person who did not participate in the proceedings, is *inter alia* the ground for absolute invalidity of the court decision which ratifies the settlement agreement concluded in the course of judicial mediation. The court decision whereby approved the said settlement agreement adopted as a result of judicial mediation would, therefore, also be annulled if the settlement agreement was adopted and then approved by the court decision without the inclusion into legal proceedings and, consequently – into the procedure of judicial mediation, of all the persons who have legal interest. Accordingly, all persons in respect of whose rights and duties the particular dispute in question and, consequently, its resolution by the conclusion of the settlement agreement, may have an effect, i.e. all persons who have such legal interest in the outcome of the dispute that they would enjoy the status of party in civil proceedings, must be included into the process of judicial mediation as the parties to a dispute. Otherwise, judicial mediation would not be terminated by the conclusion of the settlement agreement as it could not be approved.

In conclusion, the lawfulness in respect of the procedure of judicial mediation, as well as of the decision adopted wherein, which was, consequently, approved by the court, is directly related to the precise identification of the parties to the particular dispute.²⁴³ The definition of the parties to a dispute, hence, is very important for the application of judicial mediation: the very essence of this ADR procedure as of procedure which is generally initiated, more or less framed and terminated by the mutual agreement of the subjects whose dispute is the subject matter thereof, i.e. the consensual nature of judicial mediation, pre-conditions the need for precise identification of persons who are (or may be) at the core of this procedure. Otherwise, the settlement of the dispute would be rendered impossible.

In general the parties to a dispute in the Lithuanian legal system may be defined as natural and (or) legal persons who have such legal interest in the outcome of particular dispute, i.e. whose rights and duties would be affected by the resolution of the dispute, that they would enjoy the status of party in civil proceedings. In addition, if particular person is a party in civil proceedings, he (she) generally will be considered to be party to a dispute in judicial mediation as well. However, the application of this definition in practice, hence – the identification of the persons whose rights and duties would be affected by the resolution of the dispute in such way that they should be attributed the status of party to a dispute, depends immensely either on the person who refers case to judicial mediation or on mediator.

243 This identification should normally happen in the early stages of the preparation of the case for the court hearing (thus, before the beginning of judicial mediation procedure); hence it is normally performed by the judge. However, mediator – a person who acts as an assistant to the parties in the course of judicial mediation, should also estimate the ongoing dispute in this respect. It is, therefore, crucially important for the mediator to be able to identify the possible existence of such legal interest. Requirements for a person willing to become mediator, as well as the aspects relevant to his (her) qualification are analyzed in the second section of this chapter of the dissertation.

2.1.2. Rights And Duties Of the Parties To a Dispute

Due to the fact that parties to a dispute are in general the main decision-makers in respect of judicial mediation of particular dispute, as well as the ones who have influence on procedural aspects thereof, their rights and, accordingly, their duties in this procedure should be thoroughly analyzed in order to determine the relevant aspects of their role and status in this ADR procedure. This section, therefore, deals with the analysis of the role and legal status of the parties to a dispute by examining the rights and duties they are awarded with in judicial mediation in Lithuania; it is divided into two subsections – the first one is designated to the rights of the parties to the dispute and the second one is dedicated to their duties.

2.1.2.1. Rights Of the Parties To a Dispute

Although legal regulation of judicial mediation is generally more thorough than the one of extrajudicial mediation, judicial mediation, as mentioned, still remains flexible procedure – the flexibility in respect of procedural aspects of this ADR procedure is one of the main characteristics thereof. Therefore, legal regulation of judicial mediation, though more extensive as compared to the one of extrajudicial mediation, is not exhaustive in the Lithuanian legal system as well: many aspects are left to be determined to particular market (to the self-regulation thereof, i.e. the “soft law” approach)²⁴⁴, as well as to be established in the course of the process of particular judicial mediation. Although the new wording of Judicial Mediation Rules will regulate the procedure of judicial mediation generally more thoroughly, the legal regulation of judicial mediation essentially remains far from being comprehensive. Due to the flexible nature of judicial mediation, the principles of self-determination and autonomy of the parties inherent in the very concept of judicial mediation (in the Lithuanian legal system, as well), the general right to influence the procedure of judicial mediation in particular dispute is granted to the parties to a dispute. Consequently, the parties to a dispute – the main decision-makers in judicial mediation – are provided with the possibility to influence almost every aspect of procedure of judicial mediation in particular dispute.²⁴⁵ It must be, therefore, agreed, that despite the judicial origin of this type of mediation, it still remains in a way consensual, as it cannot proceed without the agreement of the parties.²⁴⁶

244 The notion “soft law” is used here to identify legal regulation which is not binding and leaves certain aspects (procedural and other) unregulated or regulated in a not obligatory manner in order to provide the market with the possibility of self-regulation (of course taking into the account the existing regulatory framework).

245 The parties to a dispute, hence, have a specific role in judicial mediation which is influenced by their relation to subject matter of judicial mediation – dispute. It should be agreed in this context with the opinion, that only the parties to a dispute know the best the circumstances of their dispute. Valančius, V., Norkus, R. Nacionalinis teisinis diskursas dėl administracinio proceso. *Jurisprudencija: mokslo darbai*. 2006. 3(81): 91–98, p. 93.

246 For example, in France parties have the right to influence almost every aspect in respect of judicial mediation. Nougéin, H-J., et al. *Guide pratique de l'arbitrage et de la médiation commerciale*. Paris: LexisNexis, 2004, p. 147.

Hence, the parties to a dispute are provided with and may exercise various rights in the course of judicial mediation. These rights can be grouped in a certain way in respect of whether they are related to substantive or procedural aspects of judicial mediation.²⁴⁷ They may also be classified in respect of the stages of procedure of judicial mediation – into the rights exercised at the initiation of the procedure, in the course of the procedure and during the conclusion (termination) of the procedure; whereas some rights are exercised throughout the procedure. The classification of the rights provided to the parties in judicial mediation, thus, is relative. Therefore, each particular right should be analyzed separately in order to determine the status and the role of the parties in judicial mediation in Lithuania.

Neither former, nor applicable legal regulation of judicial mediation in Lithuania does not provide with the exhaustive list of the rights of the parties. Although such legal regulation could be justified by the flexibility of this procedure, as well as its consensual nature, the enumeration of at least general rights provided to the parties to a dispute, could serve as to the clarification of the procedural aspects of judicial mediation in general, as well as to the determination of the role and the status of the parties to a dispute in this ADR procedure.

Due to the fact that the complete classification of the rights into particular groups could not be accomplished, only most common rights of the parties to a dispute could be listed. All the rights of the parties are generally interrelated, therefore, some of them may be indicated separately only with difficulty. Although former, as well as applicable, legal regulation of judicial mediation in Lithuania does not list the rights of the parties to a dispute, the latter may be distinguished by systematically analyzing legal provisions and comprehend the following.

- *The right to engage into judicial mediation.* Generally judicial mediation is a voluntary process in a sense that the parties to a dispute are given the right to decide whether to deal with their dispute by the application of judicial mediation or not.²⁴⁸ However, this voluntary nature of judicial mediation has experienced certain modifications in some countries following the adoption of legal provisions enabling courts to refer disputes to judicial mediation²⁴⁹ or providing them with the right to “penalize” parties if they *inter alia* do not consider ADR.²⁵⁰ Nevertheless, judi-

247 The notions “substantive” and “procedural” are used here in order to separate the rights which are related to the determination and resolution of the dispute itself (for example, the right to settle) and the ones which are directly related to the aspects of the procedure (for example, the right to choose mediator); however, this classification is relative and cannot be considered as a single one.

248 Several dimensions of voluntarism are distinguished in legal literature: they relate to the voluntary entry into and participation in mediation, as well as the absence of settlement pressures and ability to accept or reject particular outcome. Boule, L., Nestic, M., p. 14.

249 It should be noted that some legal authors believe it is not possible to draw a clear line between voluntarism and mandatoriness in relation to entry into, and continued participation in, mediation. According to them, in reality, entry into mediation is sometimes voluntary, but in other cases it is affected by differing degrees of pressure or duress. Mediation is voluntary only in respect of the outcome. *Ibid.*, p. 16.

250 Under the Civil Procedure Rules in England and Wales, courts are under a duty to encourage the use of alternative dispute resolution (often mediation) in appropriate cases, and may take account of whether the parties considered this when making case management decisions and ordering costs.

cial mediation is yet an *entirely voluntary process in the Lithuanian legal system*.²⁵¹ Although the judge (as well as any of the parties) is given the right to initiate the referral of particular dispute to judicial mediation and is also entitled to adopt relevant procedural decision the realization of these powers depends directly on the will of the parties. Thus, only with the consent or according to the request of the parties to a dispute particular dispute may be transmitted to judicial mediation.²⁵² Nevertheless, there is ongoing discussion²⁵³ on the alteration of the legal regulation in order to provide the basis for mandatory application of judicial mediation in particular categories of disputes.²⁵⁴ In addition, the parties to a dispute have the right to withdraw themselves from judicial mediation at any time without specifying the reasons.²⁵⁵ This may be considered as a manifestation of the principle of disposition of the parties – principle of civil procedure that gives right to dispose of both subject matter of the dispute (claims of material legal nature) and procedural measures for the parties,²⁵⁶ as well as the direct expression of the principles of judicial mediation – the autonomy and self-determination of the parties to a dispute.

- *The right to settle* and, accordingly, *the right not to settle the dispute in judicial mediation*.²⁵⁷ The locus of decision-making in judicial mediation is placed with the parties to a dispute – they are generally urged to act creatively and to pursue their personal sense of fairness which would lead, in the words of J. M. Nolan-Haley, to “individualized justice”.²⁵⁸ The right not to settle stems from the legal inability

Department for Constitutional Affairs (2004), *Transforming Public Services: Complaints, Redress and Tribunals*. White Paper [interactive], [accessed 2010-08-14], p. 8. <<http://www.dca.gov.uk/pubs/adminjust/transformfull.pdf>>.

- 251 The same system of referral to mediation in this sense is, for example, in Genève (Switzerland): civil mediation is always a conventional one in spite of the fact that magistrates are provided with the right to propose parties to have recourse to mediation. *Médiation civile en Suisse: nouvelle législation à Genève*. GEMME-SUISSE: 2005, p. 15.
- 252 Article 6 of Judicial Mediation Rules. In addition, the new wording of Judicial Mediation Rules even includes the prohibition of unlawful influence to the parties to a dispute in respect of initiation and participation in judicial mediation – parties may not be neither unlawfully forced into judicial mediation, nor unlawfully compelled to participate therein. Such legal regulation, however, obviously does not preclude inserting of legal requirement to consider judicial mediation for settlement of the dispute, i. e. does not preclude modifications of voluntary nature of judicial mediation.
- 253 For example, Kaminskiėnė, N. Privaloma mediacija: galimybės ir išūkių. In addition recent legislative initiatives prove that mandatory mediation in family disputes is an instance of near future in the Lithuanian legal system.
- 254 This idea is partially based on the fact that the possibility of mandatory element in mediation (only in a sense of referral of dispute to mediation and not in a sense of the termination of this ADR procedure) was envisaged in the Directive as well (According to Recitals 12, 13 of Directive). The relevant issues related to implementation of mandatory mediation are also briefly presented in the Chapter Four of the dissertation.
- 255 Under Article 20 of Judicial Mediation Rules.
- 256 The Ruling of the Supreme Court of Lithuania of 20 June 2014 adopted in the civil case initiated following the request of the *bailiff G. J.*, case No. 3K-3-361/2014.
- 257 This right, actually the most of the others as well, should be related to the principle of self-determination of the parties. It is also sometimes identified as “the principle of free will” which requires the parties’ free will in both procedural and substantive issues. Liming, W., p. 71.
- 258 Nolan-Haley, J. M., p. 63–64.

of mediator to impose a settlement on the parties.²⁵⁹ Thus this right signifies the already-mentioned “substantive” aspect related to the settlement of the dispute itself. This principal right of the parties to a dispute is, though not named directly, reflected both in Judicial Mediation Rules and Mediation Law, which is also in accordance with the general principles laid down in the Directive. This right should also be linked to the principles of self-determination and autonomy of the parties which are at the core of judicial mediation.

- *The right to choose mediator.* Generally parties may choose particular mediator for the settlement of their dispute.²⁶⁰ This right, however, may be limited due to, in a sense, more imperative nature of judicial mediation. The right to appoint mediator (as well as the right to replace the appointed one) in the Lithuanian legal system is given to judge (the panel of judges) hearing the case, i.e. the power to appoint mediator is entirely left within the scope of ongoing civil proceedings (the chairman of the court and chairman of the civil section of the court are not entitled to appoint mediator anymore)²⁶¹. Although these provisions concern only appointment and replacement of mediator, the choice of particular mediator is not entirely left within the discretion of the parties to a dispute. According to applicable legal regulation, the opinion of the parties to the dispute (expressed when asking or agreeing to refer the dispute to judicial mediation) is assessed when appointing the mediator. It is not clear, however, what this assessment would entail. Moreover, these provisions actually leave the possibility for the identified subjects to appoint particular mediator without paying attention to the will of the parties.²⁶² Notwithstanding everything that was said, legal provisions that entitle the judge (who adopts the decision to refer the dispute to judicial mediation) to appoint mediator not necessarily with respect to the relevant opinion of the parties, may not be considered as adequately reflecting the main principles of this procedure. Thus, they should probably be altered by leaving the right to choose mediator entirely for the parties to particular dispute or by giving the right to appoint particular mediator to entitled subject but only within the limits set out by the parties to a dispute. Such modifications would

259 This feature is also said to be the one (not the only one) which distinguishes mediation from, and therefore constitutes it as an alternative to, adjudication. Ingleby, R. Court Sponsored Mediation: The Case Against Mandatory Participation. *The Modern Law Review*. 1993, 56(3): 441–451, p. 445.

260 However, there may be some exceptions to this general rule. For example, in Croatia parties are not entitled to select judge who will serve as mediator in particular judicial mediation; the dispute is mediated by a judge as an officer of the court whom the mediation is assigned as part of his (her) official duties. Babić, D. Mediation Law in Croatia: When EU Mediation Directive Met the UNCITRAL Model Law on Conciliation. *German Arbitration Journal* (SchiedsvZ) [interactive]. (2013), 4 [accessed 2014-11-02]. <<http://beck-online.beck.de/default.aspx?printmanager=print&VPATH=bibdata%2Fzeits%2Fschiedsvz%2F2013%2Fcont%2Fschiedsvz.2013.214.1.htm&POS=3&HLWORDS=judicial%2Fmediation%2Fjudicial%2Fmediation+%2Fjudicial+%2Fmediation+%2Fjudicial%2Fmediation&mode=CurrentDoc&options=NewPage&x=35&y=11>>.

261 According to the provisions of the former Judicial Mediation Rules the chairman of the court, chairman of the civil section of the court or the judge appointed by them could appoint mediator.

262 Such situation, of course, normally would not occur, as, otherwise, judicial mediation presumably could not be terminated by the conclusion of the settlement agreement and parties would simply withdraw from judicial mediation.

allow parties to exercise their right to participate in shaping the procedure of judicial mediation in particular dispute more thoroughly and would meet the essential principles of judicial mediation.

- *The right to participate in the determination of the procedure.* In general, the parties to a dispute are given the right to determine the procedure of mediation – choose the set of applicable procedural rules or set the rules themselves (together with mediator). The specificity of judicial mediation, however, usually translates into more thoroughly legally regulated procedure, i.e. the rules of procedure are usually more or less already determined by the laws. Judicial Mediation Rules also include provisions regulating the procedural aspects of judicial mediation. These rules are more specific, as compared to the ones set out in the Mediation Law, i.e. the rules applicable to extrajudicial mediation.²⁶³ Furthermore, mediator in judicial mediation is provided with bigger authority to fix these rules or determine their content as compared to his (her) role in extrajudicial mediation. The parties to a dispute, as a consequence, have less authority in the determination of the rules. As it may be seen from the wording of applicable Judicial Mediation Rules mediator is the one who is provided with the power to determine the procedure. The regulatory provisions, as well as the requirements of effectiveness, promptness, fairness and the principle of the equality of the parties must be taken into consideration when shaping the procedure. Despite of such discretion of mediator, the parties to a dispute remain the main decision-makers when it comes to the resolution of the dispute, they may also participate to a certain extent when mediator decides upon the procedural aspects. Furthermore, they still may not agree to act in a way suggested by mediator and, consequently, decide to terminate judicial mediation; some aspects related to the course of judicial mediation though depend solely on the mutual agreement of the parties to a dispute.²⁶⁴ Moreover, the new Judicial Mediation Rules embody the requirement for mediator to determine the course of judicial mediation only after it is coordinated with the parties to the dispute (Article 15). Hence, the applicable legal regulation not only expressly entrenches the right of the parties to determine procedure of judicial mediation, but also embodies the corresponding duty for mediator – he (she) must receive confirmation of the parties as to the course of judicial mediation. These modifications, in the opinion of the author of this dissertation, fortify the role of the parties to a dispute and, thus, possibly contribute to the popularity of this ADR procedure as an alternative to traditional adjudication.
- *The right to terminate judicial mediation.* This right is related to other mentioned rights of the parties, including the right to settle the dispute. The parties' right to terminate judicial mediation is generally unconditional. However, in some countries the parties to a dispute may face negative consequences if they cannot properly motivate the impossibility to deal with the dispute through mediation and,

263 The relevant legal provisions of Mediation Law are more of the general principles related to the procedural aspects of judicial mediation; the procedural aspects in particular mediation (if not regulated in an exhaustive manner), hence, are left to be determined to the parties also taking into account these general principles set in Mediation Law.

264 The parties to a dispute may mutually agree, for example, to reveal certain confidential information obtained in the course of judicial mediation to the court (Article 27.2 of Judicial Mediation Rules).

accordingly, to justify their decision to terminate mediation.²⁶⁵ This is not yet the case of judicial mediation in Lithuania.²⁶⁶ The parties to a dispute may terminate judicial mediation at any stage of this procedure. According to Article 22 of Judicial Mediation Rules reasons of withdrawal from judicial mediation do not have to be revealed.²⁶⁷ Thus, the declaration of any of the parties to a dispute or the common declaration of all the parties to a dispute conditions without reservations the conclusion (termination) of this procedure in the Lithuanian legal system;²⁶⁸ such conclusion (termination) of judicial mediation may not yet precondition the imposition by the court of any kind of sanctions on the party (or parties) to a dispute that terminated the judicial mediation.

Other rights of the parties may also be distinguished,²⁶⁹ however the mentioned ones could be considered as the principal ones, which reflect the essence of judicial mediation.

Thus, it may be concluded, that applicable legal regulation of judicial mediation in Lithuania essentially provides the parties to a dispute with the rights necessary for amicable settlement of a dispute and creates preconditions for the exercise thereof. Despite some unclear legal provisions, applicable legal regulation of judicial mediation in Lithuania ensures the principles of self-determination and autonomy of the parties to a dispute by providing them the power to settle the dispute, as well as, in a sense, the right to frame the procedure with regard to the execution of the relevant powers by mediator. Hence, the identified powers of the parties to a dispute in this respect affirm the status and the role thereof as of the key participants of this ADR procedure in the Lithuanian legal system.

2.1.2.2. Duties Of the Parties To a Dispute

Although legal regulation of judicial mediation, as a commonly more intensely legally regulated type of mediation, has certain particularities, *inter alia* legal provisions are generally of the more imperative character as compared to private mediation, the essence of mediation – including its consensual nature – is still maintained. The parties to a dispute, therefore, generally *are provided with certain requisite rights* and *have only minimum duties* in respect of judicial mediation procedure. The parties to a dispute, however, must respect, especially in their interaction, the general principles of such procedure,²⁷⁰ as well as the

265 For example, courts in United Kingdom may impose certain sanctions related to the obligation to pay the litigation costs of the other party on the party to a dispute if it is decided that this party refused to try mediation or terminated mediation without good cause. Kaminskiene, N., *et al. Mediacija. Vadovėlis*, p. 223.

266 As mentioned, there are ongoing discussions on the need to implement mandatory judicial mediation in the Lithuanian legal system. These discussions occasionally involve debates related to the provision of the power to courts to impose sanctions on the parties to a dispute if they have refused to refer their dispute to judicial mediation or have terminated such procedure without a good reason.

267 Judicial Mediation Rules additionally expressly set out in this respect the right to initiate recourse to judicial mediation after its termination.

268 This legal regulation reflects the general principles set by Directive, as well (for example, Recital 13 of Directive).

269 For example, the right to have representative in judicial mediation.

270 These rules are set out in Judicial Mediation Rules, as well as in Mediation Law. Some of the applicable principles are also embodied in the Code of Civil Procedure – the law regulating civil proceedings.

procedural rules set out by mediator. Hence, certain duties (either directly regulated or determined by the principles of the procedure), though not expressly listed by applicable legal regulation may be distinguished as well.

- *The duty of cooperation.* This duty was directly laid down by the former provisions of Judicial Mediation Rules.²⁷¹ Although the applicable legal regulation does not expressly set this duty anymore, it is still one of the most important duties of the parties, as principle of cooperation is *expressis verbis* set as one of the main principles of judicial mediation.²⁷² This duty is also related to one of the principles of civil procedure – principle of cooperation (collaboration).²⁷³ This duty occurs in two dimensions: cooperation between the parties and cooperation of the parties with mediator. Thus it reflects the very essence of judicial mediation as the dispute may be settled amicably only in the light of joint actions of the participants of judicial mediation, namely the parties to a dispute and mediator.²⁷⁴ Therefore, the parties to a dispute in order to achieve amicable settlement of their dispute must act jointly, primarily in respect of procedural aspects of the process in question, in judicial mediation; otherwise, the risk of not achieving the goal of judicial mediation would emerge.
- *The duty to act in good faith.* The principle of good faith²⁷⁵ is also one of the main principles of judicial mediation related to other principles of this procedure – effectiveness, promptness and equality of the parties; it also concerns the duty of cooperation. The principal of good faith is set as the principle of this ADR procedure in applicable legal regulation.²⁷⁶ Thus, it may be considered that the importance of the corresponding duty of the parties to a dispute – to act in good faith throughout the procedure – for the success of judicial mediation is acknowledged by legal regulation as well. The parties must, therefore, act in good faith throughout the procedure, thus, in all of its stages. This is essential for the success of judicial mediation. In other words, the parties to a dispute must act in good faith when referring the dispute to judicial mediation and in the course of judicial mediation – they must

271 According to Article 13 of Judicial Mediation Rules the parties to a dispute must cooperate with each other as well as with mediator in the course of judicial mediation.

272 The new wording of Judicial Mediation Rules sets out general principles of judicial mediation – the principle of voluntarism of the parties to a dispute, principle of confidentiality, principle of mutual respect and tolerance, principle of neutrality and impartiality of a court mediator, principle of cooperation, principle of qualified activity of a court mediator, principle of good faith.

273 This principle is laid down in Article 8 of the Code of Civil Procedure. It obliges both – the parties and the court – to cooperate with each other in order to allow the proper examination of the case. E

274 Other participants of judicial mediation that could influence the peaceful settlement of the dispute (Article 15 of Judicial Mediation Rules; for example person who can witness certain circumstances) do not have the same duty of cooperation as the parties to a dispute and mediator.

275 In general, this principle requires parties to a transaction to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage. D'Amato, A. *Encyclopedia of Public International Law* [interactive]. (1992), p. 599–601 [accessed 2014-05-04]. <<http://anthonydamato.law.northwestern.edu/encyclopedia/good-faith.pdf>>.

276 The parties to a disputes, as well as mediator are required under Article 7.7 of Judicial Mediation Rules to act in such way that judicial mediation would unroll in good faith, transparently and without fraud.

use this ADR procedure in good faith, *inter alia* express the requests only in good faith, otherwise judicial mediation may be terminated.

- *The duty of confidentiality.* The principle of confidentiality is inherent in the very nature of this ADR procedure.²⁷⁷ This principle in general is related to the private nature of mediation and signifies that the parties to a dispute are safe to act freely during the mediation, to express their opinions, make offers, offer “discounts” knowing that they will be able to defend the position, opposite to the one expressed in judicial mediation, if the case gets back to the court. The principle of confidentiality essentially allows delimitate mediation and adjudication.²⁷⁸ This principle, which is directly related to the duty of confidentiality of the parties to a dispute (it is also applicable to other participants of judicial mediation), is essential for the success of mediation, especially – its judicial type. Applicable legal regulation requires the parties to a dispute, as well as mediator, to maintain confidentiality in respect of judicial mediation – embody the principle of confidentiality. Hence the parties to a dispute are not allowed to invoke or submit as the evidence in civil cases information obtained in the course of judicial mediation.²⁷⁹ This confidential information may involve the propositions on the resolution of the dispute by other party to a dispute or mediator, circumstances related to the will of other party to a dispute to accept the proposal to participate in judicial mediation or any proposal of other party to a dispute or mediator, documents prepared solely in the purposes of mediation.²⁸⁰ In other words, applicable legal provisions create certain preconditions for maintaining confidentiality in respect of the information obtained during judicial mediation. In addition the duty *inter alia* for the parties to a dispute to refrain from revealing in any manner (including its dissemination to any other person) the information received in the course of judicial mediation to other subjects is also set. Such duty actually was only recently expressly implemented in the new wording of Judicial Mediation Rules.²⁸¹ Hence, the duty of confidentiality has not only been currently embodied by applicable legal provisions, but it is also seen as the crucial one for the success of judicial mediation.

Other corresponding duties of the parties to a dispute in judicial mediation may be also pointed out. However, the specified ones should be considered as the most important, reflecting the very essence of this procedure.

277 This principle, as the essential one, which must be respected in the course of mediation is embodied in the Directive as well (Recital 23 and Article 7 of Directive).

The principle of confidentiality and its application in judicial mediation are more thoroughly analyzed in the Part 3 of this dissertation.

278 Goodman, A., Hammerton, A., p. xviii.

279 The duty of confidentiality is embodied in all legal acts applicable in respect of judicial mediation: Judicial Mediation Rules, Code of Civil Procedure, Mediation Law, and European Code of Conduct for Mediators (in respect of mediators).

280 Under Article 28 of Judicial Mediation Rules. It should be noted, however, that legal regulation in respect of the principle of confidentiality is ambiguous; it is more thoroughly analyzed in the Chapter Three of the dissertation.

281 In the opinion of the author of this dissertation, such supplementation of legal regulation provided additional guarantees in respect of confidentiality of the whole process by embodying more rigorous requirements for the participants of judicial mediation in this respect.

In the opinion of the author of this dissertation, one additional duty of the parties to a dispute, which is not yet specifically regulated in our legal system, nevertheless, should be mentioned and, consequently, expressly fixed in the regulatory framework of judicial mediation, may be determined. This is the *duty of participation* in judicial mediation – duty that envisages the participation of the parties to a dispute in particular procedure as *conditio sine qua non* in respect of judicial mediation. This necessity of participation is obviously predetermined by the very nature of the procedure, i.e. judicial mediation, despite its relation to the proceedings in court, is an ADR procedure, which is, to a bigger or smaller degree, defined by the parties to a dispute – only with the participation of the parties to a dispute the course of this procedure may be determined, only they are at the core of this procedure and the main decision-makers when it comes to procedural, as well as substantive aspects. Therefore, the participation of the parties in judicial mediation is of crucial importance.²⁸² The duty to participate, the most preferably – in person, in judicial mediation of course cannot deny the right of the parties to a dispute to act through their agents²⁸³ or to have representatives in this ADR procedure. It should not be forgotten, however, that the very nature of this alternative to traditional litigation generally requires the clear expression of the will of the parties to a dispute to participate in such procedure and to settle their dispute amicably, as well as their participation while framing this process. This is, as a rule, better guaranteed when the parties to a dispute participate in judicial mediation in person.

The duty of the parties to a dispute to participate (in person or through their representatives) was not *expressis verbis* entrenched in former Judicial Mediation Rules.²⁸⁴ Although, some discussions on the necessity of its consolidation were carried out, such duty of the parties to a dispute in judicial mediation is yet essentially not entrenched in our legal system. Despite the different wording of the new legal regulation in this respect, the parties to a dispute are still not imposed an obligation to participate in judicial mediation.²⁸⁵ However, the very nature of judicial mediation, as well as its relatively low

282 It should be noted in this context that the practice of other countries that have longer standing traditions of application of judicial mediation (for instance – the practice of the United States) proves that mediation is starting to depart from its core mission as a mechanism for meaningful and voluntary resolution of dispute; in practice the emergence of “satellite litigation” over the issues relevant to the application of mediation is observed. One of the issues that provoke such “satellite litigation” is related to the lawyers’ authority to enter into mediated settlements on their clients’ behalf. Welsh, N. A. The Current Transitional State of Court-Connected ADR. *Marquette Law Review*. 2012, 95 [interactive], [accessed 2013-11-06]. <<http://www.lexisnexis.com/hottopics/lnacademic/>>.

283 The right to act through the agent is understood here in general as the right to conclude contracts through agents (with the exception of those contracts which, due to their nature, may be concluded only personally as well as other contracts prescribed by the law) which is set out in Article 2.132 of Civil Code.

284 If the parties do not intend to participate or do not participate in judicial mediation (either in person or through their representatives) judicial mediation should not be initiated or, if initiated, should be terminated. The issues related to the participation in person of the parties are also partially analyzed together with the need for representation of the parties in judicial mediation.

285 Under Article 18 of New Judicial Mediation Rules the parties to a dispute participate by themselves in judicial mediation, their representatives may also participate. In the opinion of the author of this dissertation, although these provisions presumably envisage the requirement for the parties to a dispute to participate in the process of judicial mediation, the wording could not be considered as adequate.

recognition and, therefore, not frequent application in practice in Lithuania,²⁸⁶ that lead to the unfamiliarity of the society, including the potential parties to a dispute, even with the basic principles of this ADR procedure, require, in the opinion of the author of this dissertation, entrenching the imperative requirement for the parties to the dispute to participate in person.²⁸⁷ Otherwise, this procedure risks of becoming a formal alternative without the real perspective of peaceful settlement of the dispute. It should be noted in this context, that although the new legal regulation, as mentioned, sets out general rule that the parties to a dispute participate in the process of judicial mediation, the requirement for parties to participate in judicial mediation should be made even more stringent: legal provisions, in the opinion of the author of this dissertation, should state that participation of the parties to a dispute in person in the process of judicial mediation is obligator. Consequently, mediator should be provided with the right to terminate judicial mediation if one or both parties to a dispute did not participate in person in judicial mediation without justifiable reason.

Normally the breach of obligation inflicts the personal responsibility on the infringer, however the duties of the parties to a dispute in judicial mediation (due to the particularity of this ADR procedure, i.e. its consensual, private nature, as well as due to its role as alternative to the most acknowledged traditional dispute resolution process – litigation, also because of the role of the parties to a dispute as of the main decision makers of this procedure, both – in substantive and procedural respect) are of a different nature. The notion “duty”, therefore, here signifies that in general these requirements, though in a certain way of a compulsory nature, may be guaranteed only with the free will of the parties to a dispute and do not inflict other negative outcomes thereof, except obviously the possible failure of particular judicial mediation procedure.²⁸⁸

Despite the identified “shortcomings” of legal provisions when determining the duties of the parties in judicial mediation in Lithuania, legal regulation imposes the duties that are necessary for amicable settlement of a dispute on the parties to a dispute and creates preconditions for the exercise thereof. The identified duties of the parties to a dispute in this respect affirm the status and the role thereof as of the key participants of this ADR procedure in the Lithuanian legal system. However, the express requirement for the parties to a dispute to participate in person in judicial mediation is of crucial importance for the success of this ADR procedure, hence – it should be expressly envisaged by applicable legal provisions.

Hence, if given presumption is correct, such legal provisions should be modified, as otherwise, legal regulation would not achieve its alleged aim – to set the requirement for the parties to a dispute to participate in judicial mediation.

286 In the opinion of the author of this dissertation, participation of the parties to a dispute in judicial mediation in person may have positive effect on the outcome of particular judicial mediation.

287 These provisions should presumably be set out in Judicial Mediation Rules – special legal act regulating judicial mediation.

288 It should be noted in this respect, that the infringement of the duty of confidentiality by mediator may inflict his (her) liability according to the law; hence the role and the status of mediator are substantially different from the role and status of parties to the dispute in judicial mediation.

2.1.3. Representation Of the Parties To a Dispute

Despite the consensual, non-binding nature of judicial mediation, as well as the flexibility of this ADR procedure, the subject matter thereof is, essentially, legal dispute. Therefore legal knowledge, if possessed, could serve not only for better understanding of the procedure in question in general, but also for better apprehension of its application in specific case.²⁸⁹ Hence the very nature of this ADR procedure presumably may and even should²⁹⁰ engender not only the already-mentioned express necessity of participation in person of the parties to a dispute, but also the need (of greater or lesser extent) for representation (namely of legal character) thereof. In such case only if the issues related to the representation of the parties to a dispute in judicial mediation were properly addressed by legal provisions and implemented in practice, the parties to a dispute would be provided with the necessary procedural guarantees and would be able to exercise their role in this ADR procedure properly.

Hence this section is devoted to the aspects relevant to the representation of the parties to a dispute in judicial mediation. It is divided into three subsections: the first one analyses the necessity of representation of the parties to a dispute in judicial mediation, the question whether the parties to a dispute should be represented by lawyers is analyzed in the second subsection, whereas the third subsection provides with analysis of aspects related to provision of the state-guaranteed legal aid in the framework of this ADR procedure.

2.1.3.1. Necessity For Representation Of the Parties To a Dispute

The decision-making in judicial mediation, as noted, is placed within the parties to a dispute. Judicial mediation – ADR procedure which is related to the court proceedings in a way that the dispute in respect of which the case is already initiated before the court is primarily attempted to settle therein²⁹¹ – is always more or less related to legal matters. In addition, it is believed that parties must know their legal rights²⁹² and their possibilities in order to par-

289 The need for a representation by lawyers or other legal advisors (and not the representation by other specialists), due to the specificity of judicial mediation in Lithuania, is presumed by the author of this dissertation.

290 In the opinion of the author of this dissertation, legal representation of the parties to a dispute should be considered to be a prerequisite of this ADR procedure in the Lithuanian legal system, where judicial mediation is only taking its more or less initial steps as the possible dispute resolution procedure and the parties to a dispute are not well-acquainted with it.

291 Sometimes, of course, not entire dispute, but only certain of the submitted claims, are directed to judicial mediation.

292 However, there are also other opinions stating that the knowledge of law in mediation is not indispensable. Some legal authors, for example, believe that the goals of court procedure differ from the goals of mediation in a sense that decision adopted in the latter should be acceptable for the parties rather than to be in accordance with the laws; thus, mediation does not seek to apply laws, its aim is simply to restore peace. Žalėnienė, I., Tvaronavičienė, A., p. 231. However, although it may be agreed that the application of legal provisions is definitely not the aim of judicial mediation, legal knowledge, in the opinion of the author of this dissertation, is indispensable for a proper resolution of legal dispute in the framework of judicial mediation (as it is understood in the Lithuanian legal system), i. e. by application of alternative dispute resolution procedure which is closely and inextricably linked to traditional adjudication.

ticipate in a less legally regulated process (as compared to traditional adjudication) – judicial mediation.²⁹³ Therefore, it is the most commonly agreed that knowledge (regardless the extent thereof) of legal rights is a necessary prerequisite to the exercise of self-determination in judicial mediation where the parties to a dispute exercise their powers in producing so-called individual justice – justice apt for individual circumstances of a particular dispute.²⁹⁴ The question remains, however, what is the best way to guarantee the appropriate level of such knowledge by the parties to a dispute in order the trust into judicial mediation procedure not to be undermined and the success of this procedure to be guaranteed.

Different opinions concerning the representation of the parties to a dispute in judicial mediation may be found in legal literature. However, it is most commonly agreed that each party must be present in person or have present at the mediation a representative with full authority to negotiate and settle the dispute;²⁹⁵ i.e. it is agreed on the necessity of the requirement of personal participation²⁹⁶ – if party to a dispute is natural person, and, accordingly, on the requirement of participation of properly authorised representative of the party to the dispute – if this party is legal person, in mediation. However, generally, the requirement for a natural person to be additionally represented in judicial mediation is not all together seen as indispensable for the success of this ADR procedure.

Nevertheless, the practice of application of judicial mediation in other countries proves that mediation with self-represented litigants results in a higher than average number of complaints related to the work of the judges (mediators).²⁹⁷ Thus, the “self-representation”, i.e. the situation when the party to a dispute is not represented in judicial mediation and, therefore, may be less satisfied with this ADR procedure, may result not only in the failure of judicial mediation in particular dispute, but in addition – in decline in trust in judicial mediation. Hence the representation of the parties to a dispute in the light of the need to operate legal knowledge in the course of judicial mediation in such case becomes not only a possibility, but “a must” in this ADR procedure, together with the need of the personal participation of the parties to the dispute therein as it lies in the very essence of this ADR procedure.²⁹⁸

While lawyers from other countries, that are more experienced in application of mediation, including judicial, more or less agree on the need of representation of the parties in

293 Nolan-Haley, J. M., p. 91.

294 Nolan-Haley, J. M., p. 91.

295 Street, L. p. 367–368.

296 It must be agreed with the opinion, that personal participation in mediation is essential; whereas the task of the lawyer as legal representative (if there is one) would commonly involve his (her) task to help mediator to coordinate the process, to halt the emotional battle and to follow the legal direction of the process in order to protect the rights of the person represented, if necessary. Žalėnienė, I., Tvaronavičienė, A., p. 239.

297 Winkler, W. K. Canada (Ontario). *Overview of judicial mediation in the World. Mediation, the first universal language of conflict resolution (First International Conference on Judicial Mediation, Paris, 16–17 October 2009)*. L'Harmattan, 2010: 237–243, p. 240. It should be noted that this aspect would probably affect the activity of other types of mediators as well.

298 It would have to be agreed with the point of view of some legal authors, that participation of the representatives of the parties to a dispute without their clients basically signals that this ADR procedure „capitulates to the routine“. In other words, it is losing its very essence. Senft, L. P., Savage, C. A., p. 336.

this procedure,²⁹⁹ this necessity is yet not expressly acknowledged in our legal system.³⁰⁰ According to Judicial Mediation Rules³⁰¹ the parties to a dispute may have representatives, who may participate in judicial mediation. Thus, the parties to a dispute have a right, and not an obligation, to have their representative or representatives³⁰² (legal regulation does not limit their number) in judicial mediation, i.e. the parties to a dispute are provided with the right to decide whether to be represented in this ADR procedure; such legal regulation reflects the general principles of civil procedure.³⁰³ Whereas other legal provisions specifically aimed at regulating aspects relevant to representation of the parties to a dispute in judicial mediation are not set.

It should be noted in this context that legal regulation related to the participation of representatives in mediation differs in EU countries. Generally the representation of the parties to a dispute is not required, i.e. this question is regulated similarly to Lithuanian legal regulation. For example, according to applicable legal provisions legal representatives may participate (following will of the parties to a dispute) in mediation proceedings in Austria;³⁰⁴ although statutes do not require attorneys to attend mediations in Italy, their participation is encouraged by legal provisions;³⁰⁵ the parties to a dispute do not need to be represented by professional legal counsel under Polish law.³⁰⁶ Nonetheless, there are some exceptions to the mentioned general rule: representation of the parties to a dispute is made mandatory in some countries. For example, although according to the provisions of the Mediation Act participation of the parties in mediation is not mandatory in Greece, the presence of the parties' lawyers in the mediation session is compulsory – the parties must participate in mediation with the assistance of an attorney at law.³⁰⁷ Thus, there are not only no general rules common to all Member States related to the application of judicial

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- 299 The need for representation is more commonly discussed in academic level and usually is not entrenched by the applicable legal provisions.
- 300 It should be noted in this context, that generally representation in court is an independent institute of civil procedure; the aim thereof is to guarantee the proper protection and defense of persons' participating in the case rights and interests protected by the law. Asser, D., et al. *Lietuvos CPK įgyvendinimo problemos. Nacionaliniai ir tarptautiniai aspektai* (kolektyvinė monografija). Vilnius: Teisinės informacijos centras, 2007, p. 165.
- 301 Under Article 18 of Judicial Mediation Rules.
- 302 The notion "representative" is applied here (in dissertation, as well as in legal provisions) to signify the procedural status of this person; it is not applied in order to show the functional difference between representatives and legal advisers.
- 303 According to Paragraph 1 of Article 51 of the Code of Civil Procedure the parties may conduct their cases in the court themselves or through a representative. The participation of the advocate is not obligatory, except the cases indicated by this code or other laws (Paragraph 3 of Article 51). There are no legal provisions that would determine mandatory representation of the parties in judicial mediation.
- 304 Leon, C., Rohrachner, I. Austria. *EU Mediation: Law and Practice* (ed. De Palo, G., Trevor, M. B.). Oxford University Press, 2012: 11–18, p. 16.
- 305 Marinari, M. Italy. *EU Mediation: Law and Practice* (ed. De Palo, G., Trevor, M. B.). Oxford University Press, 2012: 187–203, p. 197.
- 306 Gmurzyńska, E., Morek, R. Poland. *EU Mediation: Law and Practice* (ed. De Palo, G., Trevor, M. B.). Oxford University Press, 2012: 256–272, p. 267.
- 307 Anthimos, A. Greece. *EU Mediation: Law and Practice* (ed. De Palo, G., Trevor, M. B.). Oxford University Press, 2012: 148–161, p. 153–154.

mediation, there is no consensus in respect of the requirement for representation of the parties to a dispute as well.

Despite differences of regulatory approach towards the representation of the parties to a dispute in mediation, including its judicial form, in different countries, the necessity thereof is partially recognised, as mentioned, in legal literature. However, it is sometimes related solely to the need for participation of the parties or other persons with the full authority to negotiate and settle dispute in mediation,³⁰⁸ i.e. only the participation of any person who is entitled to act in the name of the party to a dispute is required. However, in the opinion of the author of this dissertation, the question of participation of the party or other person with the authority of the party to a dispute (in a procedural sense) in judicial mediation should not even be raised. It is clear that the very nature of judicial mediation predetermines the behavior of the parties in this sense – they must personally participate (preferably) or act through an agent who is given the decision-making authority of the party in judicial mediation. The representation of the parties (without the right to settle the dispute), therefore, should be seen only as an additional procedural guarantee and complementary requirement for the parties in judicial mediation, but not as a supplement in the case if the parties do not participate personally in this ADR procedure.³⁰⁹

While judicial mediation is tightly linked to the court proceedings in the Lithuanian legal system, and is not yet a well-known dispute settlement procedure in the society, the requirement for representation of the parties to a dispute in judicial mediation could and, in the opinion of the author of this dissertation, even should be seen as prerequisite of this ADR procedure. Therefore, the fact that applicable legal provisions in the Lithuanian legal system do not set such requirement for the parties to a dispute should be seen as another “shortcoming” of existing regulatory framework. Hence, the very nature of judicial mediation together with the specific features of legal system predetermine the need to alter legal regulation, namely – Judicial Mediation Rules, not only by inserting the express requirement for parties to the dispute to participate in person in judicial mediation, but also to have representatives. Such alteration of existing legal framework would *inter alia* contribute to guaranteeing that the trust into judicial mediation procedure would not be undermined, as well as to the possibility of more successful application of this ADR procedure.

308 For example, Sir Laurence Street. Street. L. Commentary on Some Aspects of the Advent and Practice of Mediation in Australia. *Mediators on mediation* (ed. Newmark, Ch., Monaghan A.). Tottel Publishing, 2005: 357–374, p. 367.

309 It should be noted in this context that the issues related to representation of the parties may also affect the success of judicial mediation. As it may be seen from the Summary of Application of Conciliatory Mediation Procedures, Judicial Mediation in Courts during the Period of 2012–2013 (hereinafter also referred to as „Summary of Application of Judicial Mediation in 2012–2013“) the uneven representation of the parties to a dispute was considered to be one of the main reasons for unsuccessful application of judicial mediation (especially in the cases when one of the parties to a dispute did not participate in the process and was represented by the advocate who was provided with the limited powers in the context of judicial mediation). *Summary of Application of Conciliatory Mediation Procedures, Judicial Mediation in Courts during the Period of 2012-2013* of 16 June 2014 No. 3R-1028-(6.20) [interactive], [accessed 03-01-2015]. < <http://www.teismai.lt/dokumentai/2012-2013%20m.%20taikin-amojo%20tarpininkavimo%20proced%C5%AAr%C5%B2,%20teismin%C4%96s%20mediacijos%20taikymo%20teismuose%202012%E2%80%932013%20m.%20apibendrinimas.pdf>>.

2.1.3.2. Lawyers As Legal Representatives Of the Parties To a Dispute

The importance of participation of lawyers³¹⁰ in mediation, including its judicial form, is occasionally undervalued by lawyers and by mediators.³¹¹ However at the same time it is agreed that lawyers play an important role in this ADR procedure as they can ensure that their clients do not give up legal advantages to other party and especially that they do not give up something unintentionally not knowing the strength of their legal position.³¹² In other words, although representation of the parties in judicial mediation is sometimes already considered to be a necessity, the representation thereof by the lawyers is not yet recognised by legal practitioners, as well as in legal literature as an indispensable procedural guarantee which is in the best interest of the parties to a dispute.³¹³

It is important to stress once more in this context, that the parties in order to achieve the result in judicial mediation – individually framed justice, must know their legal rights.³¹⁴ The parties must be well-aware of the actions taken in the course of mediation and the possible outcomes thereof. Otherwise, the termination of judicial mediation by conclusion of settlement agreement would become desirable, but unlikely result. This may be generally achieved in two ways – either with the relevant help of representatives of the parties (person holding degree in law) or, even more preferably, with the help of mediator.³¹⁵ The represented party in this case is, therefore, in a sense in a more favorable position than the unrepresented one:³¹⁶ the representative may provide the party with the necessary information related to his (her) rights and duties in the course of judicial mediation, as well as give the general evaluation on the dispute under consideration. This finding is even truer if

310 The notion „lawyer“ here signifies any person holding a degree in law who may act as a representative of the party to a dispute in judicial mediation.

311 This assertion is *inter alia* based on the personal observations of the author of this dissertation formed in the course of various conferences and round table discussions relevant to alternative dispute resolution.

312 Koenig, S. Germany. *EU Mediation: Law and Practice* (ed. De Palo, G., Trevor, M. B.). Oxford University Press, 2012: 131–147, p. 144.

313 The representation by other persons is not additionally analyzed in the framework of the conducted research.

314 J. M. Nolan-Haley sees it as the prerequisite for abandoning legal rights in judicial mediation; according to her, this happens when trying to achieve the analogue to justice through law. Nolan-Haley, J. M., p. 91.

315 Although the role of mediator is analyzed in other sections of this dissertation, it should be stressed that his (her) role is very important if the parties are unrepresented in judicial mediation and even more (perhaps even the most) important if one of the parties is unrepresented while the other has a lawyer as representative.

316 Some legal authors even argue that the system when represented parties dominate over the unrepresented ones could not be considered as fair or impartial; it is believed, that in such cases mediator and judge must assist unrepresented party. Furthermore, some court programs even prohibit mediation to *pro se* litigants and, for example, in some parts of the United States (the Southern District of New York) there are special court programs designed specifically to offer mediation to *pro se* litigants. Baer, H. Jr. History, Process, And a Role For Judges in Mediating Their Own Cases. *New York University Annual Survey of American Law* [interactive]. 2001, 58, [accessed 2013-11-04]. <http://www.lexisnexis.com/lnacui2api/results/docview/docview.do?docLinkInd=true&risb=21_T18538463747&format=GNBFI&sort=RELEVANCE&startDocNo=1&resultsUrlKey=29_T18538463736&cisb=22_T18538463749&treeMax=true&treeWidth=0&csi=224659&docNo=18>.

the representative is advocate or other person holding a degree in law: such representative would be more set to inform the party about his (her) legal rights and duties, as well as to provide with the knowledge related to the procedure. Therefore, the representation of the parties by the lawyers might be considered as contributing to the success of this ADR procedure, hence – as a necessary element of judicial mediation.

The role of lawyer (mainly – advocate or his (her) assistant) in judicial mediation is different as compared to his (her) role in traditional adjudication. Generally, lawyer, as a legal representative, has an active role in civil proceedings, i.e. he (she) gathers and presents evidence to the court, presents his (her) client's position to judge, asks questions in the court hearing, etc. The role of lawyer in judicial mediation, unlike in traditional adjudication, is special, *inter alia* less active. The particularity of his (her) role is occasionally originated from the specific nature of a lawyer's activity in mediation. It is believed that lawyer should act not as legal representative but be more of a legal advisor for a party.³¹⁷ Otherwise the very nature of judicial mediation would be contradicted. Hence the particularity of his (her) role derives from the very nature of this ADR procedure. Therefore the lawyer's, as legal advisors, role in mediation (the same is generally applicable in respect of judicial mediation) is essentially seen as being threefold:³¹⁸ advising and assisting their clients; discussing with the mediator, with each other (there may be usually more than one representative) and with their clients any matters related to mediation; preparing the agreement at the end of mediation. This generally reflects the advisory nature inherent to a lawyer's activity in mediation, including its judicial form. The lawyer's role in judicial mediation would become even more important in the case if non-participation of the parties in judicial mediation was made possible.³¹⁹

Without the further repeated analysis and justification of the need for imperative requirement of participation in person in judicial mediation for the parties to the dispute,³²⁰ the question of representation of the parties by lawyers must be analyzed in the light of applicable legal provisions.

The possibility of representation of the parties to the dispute constitutes the mentioned integral part of judicial mediation in the Lithuanian legal system. The represen-

317 However, some legal authors agree, that leaving control with the client may be counter-intuitive for many legal counsels. Zutter, D. L. Incorporating ADR in Canadian Civil Litigation. *Bond Law Review*. 2001, 13(2): 1–18, p. 5.

318 Street, L., p. 367.

319 In the opinion of the author of this dissertation, such discussion should not be encouraged as the situations when the parties to the dispute do not participate in mediation, especially its judicial form, would probably contravene the general principles of judicial mediation and would not be in accordance with the very essence of this ADR procedure. However, it should be noted, that some legal authors maintain the opinion, that only the presence of party representatives with the authority to negotiate a settlement is sufficient for reaching the effectiveness of mediation. Hill, R. Non-Adversarial Mediation. *Journal of International Arbitration*. 1995, 12(4): 135–143., p. 138.

320 It was already mentioned, that this requirement is seen by the author of this dissertation as the prerequisite of the procedure under examination. Such requirement, though, does not constitute an integral part of the Lithuanian legal system: the parties to the dispute are not expressly required to participate in person in judicial mediation in civil disputes. The lack of such express requirement in the opinion of the author of this dissertation may shatter the very basis of this ADR procedure. It should also be added that the lack of direct embodiment of this requirement *per se* may have negative effect in respect of application of judicial mediation.

tation of the parties in the course of judicial mediation, is, in a sense, regulated as well: although there are no specific rules regarding representation of the parties in judicial mediation, this aspect is covered by legal provisions of judicial mediation, as well as regulated by the provisions of civil procedure.³²¹

According to the provisions of Mediation Law³²² only the parties to a dispute, their representatives and a mediator may be present in the process of conciliatory mediation; under Judicial Mediation Rules³²³ only the parties to a dispute, third parties and their representatives may participate in the process of judicial mediation. Thus, the general principle that parties may be (but are not required to be) represented in the process of judicial mediation is determined. According to legal provisions that regulate civil procedure parties in general may be represented by advocate, assistant of advocate or other person holding a university degree in law (only if he (she) represents his (her) close relatives or spouse (partner)).³²⁴ The applicable legal provisions, hence, relate the representation of the parties to the dispute in judicial mediation with the requirement to have degree in law: only lawyers may be representatives.³²⁵

The rights and the duties of lawyers as representatives in judicial mediation (as well as in general any other representatives) are not *expressis verbis* regulated. Although it is understandable and even commendable due to the dispositive and flexible nature of judicial mediation, as well as because of the fact that the exact role of the representatives also depends on particular procedure and even on whether the other party to the dispute is represented or not, this does not relate to the question of the professional liability of legal representatives. In other words, issues relevant to the professional liability of the representatives, as well as their obligation to act in accordance with certain rules regulating their professional activity, in the opinion of the author of this dissertation, should constitute an integral part of the regulatory framework of judicial mediation.

It should be noted in this context that only advocates and assistants of advocates are required to follow certain rules regulating their professional activity, i.e. rules of ethics set out in the Code of Ethics of Advocates of Lithuania: act in the best interests of the client, perform his (her) duties properly, be independent, etc.³²⁶ The non-compliance with such rules may even lead to the removal of particular person from the list of advocates or assistants of advocates.³²⁷ The professional activity of other possible representatives of

321 It was already mentioned that the issues of representation of the parties to a dispute were regulated implicitly by former legal regulation; whereas applicable legal provisions expressly determine the right of representatives of the parties to participate in judicial mediation.

322 Under Paragraph 4 of Article 5.

323 Under Article 15 of applicable and under Article 18 of Judicial Mediation Rules.

324 Under Paragraph 1 of Article 56 of the Code of Civil Procedure.

325 This conclusion covers only the authorised representatives, as the parties to the dispute in some cases may be represented according to the law (for example, in the case of legal incapacity).

326 Code of Ethics of Advocates of Lithuania adopted by the Order No IR-345 of 27 October 2005 of the Minister of Justice of the Republic of Lithuania. *Valstybės žinios*. 2005, No 130-4681.

327 According to Paragraph 1 of Article 39 of the Law on Bar of the Republic of Lithuania the advocate is required to act in accordance with the requirements set out in the Code of Ethics of Advocates of Lithuania, otherwise a disciplinary case may be initiated; assistant of the advocate may be also removed from the list of assistants of the advocates if these requirements are not followed (Paragraph 1 of Article 36 of the Law on Bar).

the parties to a dispute in judicial mediation is not yet regulated in the same manner. Therefore, currently only advocates and assistants of advocates in the said context could be considered as suitable (at least – the most suitable) legal representatives of the parties to a dispute in judicial mediation: solely their professional activity is legally regulated in such way that is the best for guaranteeing its quality necessary for representation in judicial mediation. Hence, legal provisions that require parties in judicial mediation to be represented only by advocates or assistants of the advocates would currently be the most appropriate for legally regulating judicial mediation as they are framed to guarantee that the parties would be represented only by professionals – persons with the most suitable qualification who are required (and the execution of this requirement is guaranteed by the possibility of the initiation of disciplinary case otherwise) to act in accordance with special ethical requirements.

Thus, it would be reasonable in the scope of judicial mediation in the Lithuanian legal system not only to establish express legal requirements for the parties to be present in judicial mediation in person, to have representative (or representatives), but also to require them to be represented by one of the mentioned legal representatives – either advocate or assistant of the advocate.³²⁸ Such regulation could be in the best interest of the parties and have effect on the recourse to this procedure,³²⁹ i.e. the members of society would be better informed about this alternative to traditional adjudication and presumably would be even more comfortable with the procedure itself.³³⁰

2.1.3.3. Provision Of State-Guaranteed Legal Aid

The conclusion that representation by lawyers (*inter alia* advocates and assistants of advocates) of the parties to a dispute in judicial mediation should be seen as necessary, raises another issue – the need for provision of certain legal-aid by the state in the case if the parties to a dispute (or one of the parties to a dispute) do not have the possibility to have the mentioned representatives.

The need for provision of state-guaranteed legal aid (or any other equivalent aid in the form of appointment of the state granted legal representatives of the parties to a dispute in mediation, including its judicial form) is recognised in some legal systems where this ADR procedure is applied more actively. However, even in the countries where mediation (including its judicial form) has become an integral part of dispute resolution system, the

328 It should be noted in this context that the possibility of other representatives is not excluded; however, their professional practice should be regulated in such manner which would guarantee the best quality of their activity in judicial mediation.

329 It should be noted that the Canadian experience proves that judicial mediation with so-called self-represented litigants results in higher than average number of complaints to the judicial discipline body. Winkler, W. K., p. 240.

330 As it may be seen from the practice of foreign countries, although the aims of mediation (including the peaceful settlement of the dispute) are still reached despite the fact that some parties to a dispute are sometimes unrepresented in mediation, the question whether the result would not be even more suitable (and the self-determination of the parties to a dispute would not be exercised more thoroughly) if they were appropriately represented is raised. According to Nolan-Haley, J. M., p. 91–92.

introduction of legal aid particularly designed for mediation several years ago was still being demanded by legal practitioners.³³¹

Implementation of mediation, including its judicial form, is, as mentioned, very actively promoted by the government and increasingly supported by legal practitioners in Lithuania. This has led to implementation of mediation into our legal system, as well as various subsequent initiatives related to the improvement of legal regulation of mediation. These subsequent alterations also affected the institute of state-guaranteed legal aid.

Traditionally state-guaranteed legal aid – state aid aimed at enabling persons to adequately assert their violated or disputed rights and the interests protected under law – consisted of primary legal aid (provision of legal information, legal advice and drafting of the documents to be submitted to state and municipal institutions, with the exception of procedural documents) and secondary legal aid (drafting of documents, defense and representation in court, including the process of execution, representation in the event of preliminary extrajudicial consideration of a dispute, where such a procedure has been laid down by laws or by a court decision) in the Lithuanian legal system.³³² However, the adoption of Mediation Law and introduction of mediation into the Lithuanian legal system have led to the changes in the system of state-guaranteed legal aid as well: state-guaranteed extrajudicial conciliatory mediation has become a constituent of this aid.³³³ It should be stressed that legal regulation of the said state-guaranteed legal aid applies *expressis verbis* only to extrajudicial conciliatory mediation; it does not cover its judicial form.

Hence the Law on State-Guaranteed Legal Aid does not involve legal rules specifically designed to regulate state-guaranteed legal aid in judicial mediation: it is not explicitly stated that the state guarantees secondary legal aid in judicial mediation, i.e. aid for drafting the documents, representation in this procedure. However, as judicial mediation is a dispute settlement procedure which is closely related to traditional litigation, *inter alia* because judicial mediation is initiated and conducted, in a sense, in the course of court proceedings, the said legal regulation of state-guaranteed legal aid should be understood and interpreted in a way that secondary legal aid is also ensured in respect of judicial mediation. In other words, the parties to a dispute may request nomination of state-guaranteed representative under the provisions of the secondary legal aid. Such finding is based on the fact that on the basis of secondary legal aid the said help is provided for the persons throughout the process in court; as judicial mediation may be initiated at any stage of the court process, it becomes, in a certain sense and only to a certain extent, an integral part of this process in the context of the provision of state-guaranteed legal aid.³³⁴ The said conclusion is also affirmed by one of the principles of state-guaranteed legal aid – priority

331 For example, in Germany mediators, mediation organizations and the federal bar association demanded the introduction of this kind of aid in 2006. According to Hoffmann, A., p. 534.

332 According to Articles 1, 2 of the Law of the Republic of Lithuania on the State-Guaranteed Legal Aid. Law of the Republic of Lithuania on the State-Guaranteed Legal Aid. *Valstybės žinios*. 2000, No 30-827.

333 According to Paragraph 11 of Article 2 of the Law on the State-Guaranteed Legal Aid the state-guaranteed legal aid consists of primary and secondary legal aid, as well as of state-guaranteed extrajudicial conciliatory mediation.

334 Of course it does not mean that judicial mediation is a stage of proceedings in court; however, there is, as mentioned, obvious interrelation between court process and judicial mediation.

to the amicable settlement of disputes,³³⁵ as well as by one of the aims of civil procedure – prompt restoration of peace between the parties to a dispute.³³⁶ Thus, secondary legal aid guaranteed by the state also involves the aid for drafting the documents and representation throughout the judicial mediation process.

In the case if the essence and, accordingly, the provisions relative to state-guaranteed legal aid were to be understood otherwise and secondary legal aid was not granted in the course of judicial mediation, the priority of amicable settlement of disputes – one of the principles of state-guaranteed legal aid would not be ensured. Such situation would also be incompatible with the aims of civil procedure. However, in order to avoid the possibility of suchlike interpretations, in the opinion of the author of this dissertation, the legal regulation of state-guaranteed legal aid in this sense should be clarified: the provisions of the Law on the State-Guaranteed Legal Aid should be supplemented and secondary legal aid should be *expressis verbis* defined as also involving drafting of documents and representation of the parties to a dispute in judicial mediation.

To summarize, the system of state-guaranteed legal aid has been already modified due to the introduction of mediation into the Lithuanian legal system. Although these modifications did not directly relate to the application of judicial mediation, applicable legal provisions implicitly allow provision of the said aid to the parties in judicial mediation. Hence the applicable legal provisions provide the guarantees that the role of the parties to a dispute was properly exercised in the cases if they (or one of the parties to a dispute) did not have possibility to have their own representatives. Respective legal regulation of the state-guaranteed legal aid on the purpose of legal clarity, however, should be modified in this respect.

INTERMEDIATE CONCLUSIONS

To summarize in the context of judicial mediation in civil disputes in Lithuania the main aspects related to the role of the parties to a dispute in judicial mediation should be noted:

- The parties to a dispute may be defined in the Lithuanian legal system as natural and (or) legal persons who have such legal interest in the outcome of particular dispute, i.e. whose rights and duties would be affected by the resolution of the dispute, that they would enjoy the status of party in civil proceedings; if particular person is a party in civil proceedings, he (she) generally will be considered to be party to a dispute in judicial mediation as well.
- Despite some vague legal provisions that should be altered, applicable legal regulation of judicial mediation in Lithuania creates the preconditions for guaranteeing the application of the principles of self-determination and autonomy of the parties to a dispute by providing them the power to settle the dispute, as well as, in a sense, the right to frame the procedure with regard to the exercise of the relevant powers by mediator, i.e. the parties to a dispute are provided with requisite rights necessary to settle their dispute peacefully in the scope of this ADR procedure. The parties to

335 Under Paragraph 3 of Article 3 of the Law on State-Guaranteed Legal Aid.

336 Under Article 2 of the Code of Civil Procedure.

a dispute are also in principle imposed required duties that create preconditions for proper application of judicial mediation, *inter alia* duty of cooperation, duty to act in good faith, duty of confidentiality.

- It would be in the best interest of the parties to a dispute if applicable legal provisions would be modified and the participation in person of the parties to a dispute would be expressly set as a prerequisite of judicial mediation; this would also ensure the proper application of judicial mediation, as well as provide additional guarantees for the implementation of the role of the parties to a dispute as of the ones who determine the course and the outcome of the whole procedure. The representation of the parties to a dispute by legal representatives (namely advocates and assistants of advocates) may also act in benefit of this ADR procedure. Applicable legal provisions do not preclude provision of the state-guaranteed legal aid to the parties in judicial mediation if necessary; legal regulation on the purpose of legal clarity, however, should be modified in this respect.

2.2. Mediator

Mediator is one of the main participants of judicial mediation, hence his (her) role as of a third neutral person who acts as an intermedie between the parties to a dispute, constitutes the essence of judicial mediation (together with the role of the parties to a dispute); it is also essential for characterizing and defining this ADR procedure in particular legal system. Moreover, mediator (and not only the parties to a dispute) may have influence on the content and application of the core principles of judicial mediation (*inter alia* consensual nature thereof and self-determination of the parties to a dispute). In addition, the applicable legal provisions that regulate judicial mediation also put the emphasis on the importance of the status of mediator. Hence, the role of mediator (i.e. legal status, *inter alia* his (her) rights and duties) must be also analyzed in order to identify, among other things, whether legal regulation creates preconditions for application of the main principles of judicial mediation, i.e. to characterise in this respect judicial mediation in the Lithuanian legal system.

This section of the dissertation is dedicated to the analysis of legal status of mediator and it is divided into two generalised subsections: the concept of mediator in judicial mediation is analyzed in the first one, whereas the second subsection deals with the rights and duties of mediator.

2.2.1. Concept Of Mediator In Judicial Mediation

As in general mediator is one of the core figures in mediation, the importance of the latter as of the participant of judicial mediation is also recognised by legal regulation in Lithuania: the role of mediator is seen as the key one in judicial mediation. However, prior to the analysis of mediator's role (his (her) legal status, i.e. his (her) rights and duties) in the Lithuanian legal system, the definition of mediator in judicial mediation should be provided and the main characteristics of the latter as of one of the participants of judicial mediation should be identified. The analysis of who may become mediator in judicial mediation, as well as of the special requirements for the latter together with the procedure of

becoming mediator in judicial mediation must be also performed in order to characterise this participant of judicial mediation, as well as to identify relevant specific features of the model of judicial mediation in the Lithuanian legal system.

2.2.1.1. Definition Of Mediator

In general, mediator is commonly described as a third party neutral, who assists disputing parties in reaching a mutually agreeable resolution.³³⁷ Mediator is also defined as merely a facilitator who brings the parties together in a neutral setting and assists them in reaching a mutually satisfactory and acceptable resolution of their dispute.³³⁸ According to Paragraph (b) of Article 3 of the Directive mediator is any third person who is asked to conduct mediation in an effective, impartial and competent way.

The provided definitions underline the main attributes of mediator – his (her) neutrality and his (her) role as of the assistant of the parties in settling their dispute. However, these features, though general, may include different aspects in particular legal systems. Therefore, only after the recourse to applicable legal provisions is made, the definitions of mediator in judicial mediation in particular legal system may be provided.

However, before defining mediator,³³⁹ as one of the participants of judicial mediation, in the Lithuanian legal system, the general definition of mediator must be also taken into account. According to Paragraph 5 of Article 2 of Mediation Law mediator in civil disputes means a third impartial natural person who is involved in settling a civil dispute between other persons with a view to assisting in reaching an amicable agreement. Thus, mediator:

- is only a natural person; legal provisions do not entail possibility to confide mediation to legal person³⁴⁰;
- is a third neutral person – person not involved in the dispute, without any association with either of the parties, who has no material interest in the outcome of particular dispute; as mediation requires all parties to trust and give authority to mediator, he (she) must be truly a neutral person;³⁴¹

337 Kovach, K. K. *Mediation*, p. 304.

338 Hutchinson, C. C. *The Case for Mandatory Mediation*. *Loyola Law Review*. 1996, 42: 85–96, p. 86.

339 It must be noted that, the notion “court mediator” was eliminated from Judicial Mediation Rules prior to 2015 and was not being used to describe mediator in judicial mediation anymore, instead of it the notion “mediator” was applied. However, the provisions of the new Judicial Mediation Rules indicate reoccurrence of the term “court mediator”. Such reoccurrence, in the opinion of the author of this dissertation, should be considered as causing confusion, especially when the former elimination of the notion “court mediator” was considered by some legal authors as signifying the transition from judges’ judicial mediation to market-based judicial mediation.

340 It should be noted in this context that in France judicial mediation could be confided either to natural person or association, as the judge (who is given certain powers in the nomination of particular mediator) may be willing to address not an isolated individual but the organised structure. Nougéin, H-J., *et al.*, p. 168. Nevertheless, according to Paragraph 4 of Article 2 of Mediation Law there can be an agency administering the provision of conciliatory mediation in civil disputes – legal person which may *inter alia* recommend or appoint mediators.

341 Goodman, A., Hammerton, A., p. xviii.

- is aimed at assisting the parties to a dispute to reach an amicable agreement;³⁴² mediator is seen as an assistant of the parties to a dispute, who are the real decision-makers in judicial mediation, and not as an authoritative body with the powers to decide the dispute as a judge in traditional adjudication.

Generally the same features may be attributed to mediator in judicial mediation, as well.

Interestingly, definition of mediator in judicial mediation (court mediator) embodied in Judicial Mediation Rules has been substantially modified during the years; the most significant alterations, though, were envisaged after the adoption of new Judicial Mediation Rules. Nevertheless, primarily the former definition of mediator in judicial mediation should be addressed in order to disclose the changes of the latter from the beginning of the year 2015.

The Article 2 of the former Judicial Mediation Rules defined mediators as specially trained judges, assistants of judges or other appropriately qualified persons, who were enrolled in the List of Court Mediators composed by the working group of the Judicial Council. Thus, only a person who fulfilled the set requirements could act as mediator in judicial mediation:

- a person, who was willing to become mediator in judicial mediation, had to be either judge, assistant of judge or other appropriately qualified person, i.e. legal regulation accentuated the requirement of special qualification of such person and, in a sense, gave the priority to judges and assistants of judges as mediators in judicial mediation by distinguishing them from other appropriately qualified persons;³⁴³
- he (she) had to be specially trained;
- particular person had to be enrolled in the List of Court Mediators in order to act as mediator in judicial mediation.

In other words, mediators in judicial mediation were special subjects who had appropriate qualification, had undergone special procedure and were enrolled in the List of Court Mediators. The specificity of such legal regulation remained in the fact that group of subjects – judges and assistants of judges were distinguished from other appropriately qualified persons. Hence the preference as to who should become mediators in judicial mediation was seemingly given to the mentioned subjects.

The definition of mediator in judicial mediation (as well as the list of requirements for person willing to become mediator in judicial mediation) has faced some considerable changes after the coming into force of the new Judicial Mediation Rules. First of all, the new Judicial Mediation Rules embody the term “court mediator”, which is also applied in the Schedule of Procedure of Assignment and Removal of the Status of a Court Mediator – new legal act aimed at regulating the assignment and removal of the status of a court mediator. Hence, the notion “court mediator”, despite of being previously eliminated from the legal regulation of judicial mediation, is reinstated as the one which should be ap-

342 It is a common practice, that mediator has no authority to impose a decision on the parties; he or she is merely a facilitator who brings the parties together and assists them in reaching a mutually satisfactory and acceptable resolution of their dispute. Hutchinson, C. C., p. 86.

343 Such legal regulation, in the opinion of the author of this dissertation, was a remnant from even prior legal provisions which had given the right to act as mediator in judicial mediation solely to judges and their assistants.

plied³⁴⁴ by the new legal regulation of judicial mediation.³⁴⁵ Secondly, legal regulation does not define a court mediator anymore. It is only set that judicial mediation is performed by court mediators, who are provided with the status of a court mediator by the decision of Commission of Judicial Mediation³⁴⁶ under the procedure laid down by the Judicial Council. Thirdly, though the provisions of such special procedure (regulated by Schedule of Procedure of Assignment and Removal of the Status of a Court Mediator) determine other (new) requirements for persons willing to acquire the status of a court mediator, they are, in a broad manner, not dissimilar, though much more detailed, from the prior ones³⁴⁷: person willing to become mediator is still required to have special qualification.

To sum up, the new legal regulation, though also requires only special subjects to act as a court mediator, does not distinguish any group of subjects in this respect and does not give the preference as to who should become a court mediator. Such modifications seemingly not only add up to legal clarity in this context, but also, in a sense, “purify” the existing model of judicial mediation by providing any person (of course only the one who meets additional requirements) with the opportunity to acquire the status of a court mediator. Nevertheless, the general requirement to acquire the special status of a court mediator, which is interrelated with the need of special qualification, and hence – being enrolled in the List of Court Mediators, is essentially left unchanged in new Judicial Mediation Rules.

In other words, despite the elaboration of requirements for the qualification of persons willing to act as a court mediator, as well as the fact, that the new legal regulation does not enumerate the groups of persons that may become a court mediator, the role of a court mediator is still related only to special subjects, who have met special requirements (*inter alia* possess appropriate qualification, have acquired the status of a court mediator and are enrolled to the List of Court Mediators). That is to say, the notion of mediator in judicial mediation (court mediator), despite the modifications in terminology and establishment of new requirements for persons willing to act as mediators, essentially remains the same in this respect. Thus, according to applicable legal provisions, as well as former legal regulation, *only special subjects can act as mediators in judicial mediation* (court mediators).

The mentioned rules differ, in a sense, from the ones adopted at the beginning of implementation of judicial mediation into the Lithuanian legal system: only judges and assistants to judges were allowed to act as court mediators; there was also no list containing all persons who may act as mediators in judicial mediation. Hence, after all the persons that

344 Although such modification of terminology *per se* could not be considered as a considerable change in the framework of judicial mediation, the latter together with the alteration of requirements for persons willing to become mediators signify the fundamental change in the framework of judicial mediation in Lithuania.

345 Due to the fact that this research was conducted during the period of 2010-2014 and it envisages the analysis of both –provisions of the former and of the new Judicial Mediation Rules – the common notion “mediator” is applied throughout this dissertation where appropriate.

346 New body specially designed to decide *inter alia* upon assignment and removal of status of a court mediator. It will consist of 9 members, 6 of whom will be judges, who will be appointed by the Judicial Council. Hence the Commission of Judicial Mediation is seen as a special body, which is, in a sense, dependent one of the institutions of self-governance of the courts – the Judicial Council.

347 The new requirements for persons willing to become a court mediator are analyzed in a more detailed manner in other subsections of this section of dissertation.

comply with additional requirements were allowed to acquire the status of mediator in judicial mediation, *the mixed type of judicial mediation has been chosen*³⁴⁸ *instead of internal judicial mediation* – judicial mediation performed solely by the judges and other court personnel in the court premises,³⁴⁹ which was previously implemented in the Lithuanian legal system. It is also considered, that at the beginning of implementation of judicial mediation into the Lithuanian legal system the so-called “model of judges’ judicial mediation”³⁵⁰ was chosen; whereas the amendments that allowed other appropriately qualified persons acquiring the status of mediators in judicial mediation and required all mediators to be enrolled in the List of Court Mediators reflect the transition to the so-called “model of market judicial mediation”.³⁵¹ The new Judicial Mediation Rules, that see a court mediator as any person who has acquired the special status of a court mediator, without distinguishing any particular groups of persons, definitely take even one step further towards the mentioned model of judicial mediation.

In addition, the definition of mediator in judicial mediation (court mediator) is also closely related to the definition of judicial mediation provided in Judicial Mediation Rules: judicial mediation is defined as civil dispute settlement procedure during which one or several court mediators help parties in civil proceedings to solve amicably their dispute.³⁵² Thus, the role of mediator in judicial mediation is generally seen as the one of a “helper”, i.e. of an assistant of the parties to a dispute in reaching amicable agreement.

Hence, based on the systematic analysis of applicable legal provisions, *mediator in judicial mediation (court mediator) may be defined as a special subject, who possesses appropriate qualification, has acquired the status of a court mediator thereby is enrolled in the List of Court Mediators, and whose aim is to assist the parties to a dispute (parties in civil pro-*

348 It should be noted in this context that depending on who performs judicial mediation and in what location it takes place, judicial mediation may be classified into internal and external judicial mediation. Vėbraitė, V. *Šalių sutaikymas civiliniame procese*. Doktoro disertacija. Vilnius University, 2009, p. 26. Thus, when other appropriately qualified persons (and not only judges and assistant of judges) were allowed to conduct judicial mediation, the internal type of judicial mediation essentially had been replaced by the external judicial mediation. However, the chosen type has certain specificity as judicial mediation may only be performed by mediators enrolled in special list; thus the type of judicial mediation applied in Lithuania in this respect should be considered as the mixed one, i. e. such that has the features of both – internal and external judicial mediation.

349 According to Article 3 of the former Judicial Mediation Rules judicial mediation could be performed solely at the premises of the court, whereas Article 16 of the new Judicial Mediation Rules also allows performing judicial mediation in other premises agreed by mediator and the parties to a dispute.

350 Although this notion itself is not entirely correct, it is applied here in order to mark its difference from current form of judicial mediation (notion intended to be applied by Mediation Law) in the Lithuanian legal system.

351 One of the main differences between these two models is that in general only judges or other members of court personnel are allowed to conduct judicial mediation in the “model of judges’ judicial mediation”, whereas the “model of market judicial mediation” from the previous one is primarily distinguished by the fact that generally any person may act as mediator in judicial mediation. Kaminskienė, N. *Teisminė mediacija Lietuvoje. Quo vadis?*, p. 57–58. However, judicial mediation in Lithuania has some salient features: only persons with specific qualification who are enrolled in special list may act as mediators in judicial mediation.

352 According to Article 3 of the new Judicial Mediation Rules. It should be noted in this context, that despite certain minor amendments the regulatory definition of judicial mediation essentially remained the same since the beginning of implementation of judicial mediation in the Lithuanian legal system.

ceedings) in reaching an amicable agreement of their dispute. Thus, the key characteristics (apart from the role of mediator as an “assistant” of the parties to a dispute) of mediator in judicial mediation (court mediator) is that he (she) must have a required qualification³⁵³ and must have acquired the status of a court mediator, he or she also must be enrolled in the List of Court Mediators.

Therefore, these two aspects – persons who may become mediators in judicial mediation (including the requirements for persons willing to become mediators) together with the procedure of acquisition of the status of a court mediator (and consequently – enrollment of persons to the List of Court Mediators) – must be analyzed individually for a thorough understanding of who may act as mediator in judicial mediation in Lithuania.

2.2.1.2. Persons Who May Become Mediators

Although since the beginning of implementation of judicial mediation into the Lithuanian legal system only special subjects could have become mediators in judicial mediation, the most significant modifications of the model of judicial mediation were related to alteration of legal framework of this ADR procedure in respect of who may become mediator in judicial mediation (court mediator), as well as requirements set for persons willing to become the latter. Therefore, in the context of analysis of the status and consequently – the role of mediator in judicial mediation in Lithuania, the said two aspects – types of subjects who may become mediators in judicial mediation, as well as special requirements for the latter, must be analyzed also having regard to the former legal regulation.

2.2.1.2.1. General Types Of Mediators In Judicial Mediation

Due to the fact that the specific characteristics of particular legal system predetermine individual features of every model of judicial mediation, *inter alia* diverse types of mediators, general types of mediators in other models of judicial mediation in other countries must be described prior to analyzing the legal framework of judicial mediation in respect of what types of persons may become mediators in judicial mediation.

The lack of legal regulation and the flexibility of this ADR procedure aggravate the establishment of common classification of mediators in judicial mediation. Hence there are very diverse types of mediators in general and mediators in judicial mediation in particular, also very divergent models in respect of who act as mediators in judicial mediation exist in different legal systems. For example, there are various models of this ADR procedure in the United States depending on how mediators are sourced, such as: whether mediation is performed by mediator from the panel of volunteer mediators, the one from the registry of attorneys who are willing to mediate court-referred cases for a fee, registry of qualified neutrals or professional staff mediators employed by the court.³⁵⁴ Retired judges are distinguished as a special type of mediators (together with the judges and representa-

353 The exact content of this requirement may only be revealed when analyzing the provisions related to the enrollment of persons to the List of Court Mediators; such analysis is provided in the second subsection of this section of the dissertation.

354 Beckwith, S. S. District Court Mediation Programs: A View From the Bench. *Ohio State Journal on Dispute Resolution*. 2011, 26(357): 357–362, p. 357–359.

tives of the court-personnel)³⁵⁵ in Germany. Legal provisions distinguish between notaries, attorneys-at-law and other natural persons or mediation organizations in Estonia.³⁵⁶ Meanwhile Croatian legal acts allow only judges of the court where the dispute is being litigated serving as mediators.³⁵⁷ According to how mediators are sourced models of judicial mediation are sometimes also classified into models where mediators are employed by the court, the parties select their own mediator, mediation service is outsourced to an external mediation organization or the court maintains a panel of external mediators, there can also be combined models.³⁵⁸ There can also be judicial mediation, which is organised and takes part in the court, and judicial mediation, which takes part in specially designed institutions or which is carried out by professional mediators who are not employees of the court;³⁵⁹ in other words, mediators can be classified in respect of what is their relation with the court – non-court employees and those, related to the court.

Thus, there may be different models of mediation and, consequently, diverse types of mediators in judicial mediation and there is no general typology of the latter. The most commonly mediators in judicial mediation can be classified, taking into account their relation generally with the court, into those, who are related to the court, and neutrals. The first would combine judges, retired judges, court personnel and the second group would entail all other persons who are neutral and have no connection with the court.³⁶⁰

In some instances any person if he (she) meets special requirements set by the law (if such requirements are set) and undergoes special procedure of registration, licensing or any other procedure established (if such procedure is established) by the law or by the statutes of mediation organizations may act as mediator in judicial mediation. However, the models where no special requirements for persons willing to become mediators in judicial mediation are set by certain authority and the issue under consideration is essentially left to the self-regulation of the market may more commonly be met only in legal systems where judicial mediation already indisputably constitutes an integral part of dispute resolution system.³⁶¹ Therefore, the benefits of typology of mediators in judicial mediation are more of a theoretical nature; such typology does not have significant effect on the application of judicial mediation in practice. Whereas in the countries where judicial mediation is only being introduced into legal system identification of the possible types of court mediators (thereby – determination of the types of persons who may become mediators in

355 Alexander, N. Mediation in Practice: Common Law and Civil Law Perspectives Compared. *International Trade and Business Law Annual*. 2001, 6: 1–17, p. 7.

356 Ginter, C. Estonia in *EU Mediation: Law and Practice* (ed. De Palo, G., Trevor, M. B.), p. 90.

357 According to Babić, D.

358 These models, including the combination of these models exist in Australia. Alexander, N. What's Law Got To Do With It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions, p. 10

359 Kaminskienė, N. *Alternatyvus civilinių ginčų sprendimas*, p. 154–155.

360 This classification, however, is not an exhaustive one, as some mediators could be attributed to a certain type with difficulty (for instance, advocates who act as mediators are in a sense related to the court).

361 For example, in the United States due to the peculiarities of this common law system after the initiation of mediation by court this procedure is performed by private subjects (though only the ones that meet the defined requirements). Fischer-Zernin, V., Junker, A. Arbitration and Mediation: Synthesis or Antithesis. *Journal of International Arbitration*. 1988, 5(1): 21–40, p. 22.

judicial mediation) in some cases gains greater importance: the choice of particular type by legislator not only characterises the model of judicial mediation but also, obviously, may have effect on introduction and application in practice of this procedure.

Additionally, the rapid developments of mediation (including its judicial form) in other legal systems has led to the changes of the general concept of mediator in judicial mediation. Nowadays the question of whether it is possible to combine individual features of different types of mediators in order to obtain “ideal settlement officer”³⁶² is raised. Hence, the identification of particular type of mediator in judicial mediation is less significant as compared to the need to determine what kind of person would be the most suitable in assisting the parties to a dispute to reach amicable solution, what sort of characteristics and qualifications a person willing to act as mediator in judicial mediation must possess. The types of mediators in judicial mediation in practice merge and it becomes difficult to distinguish their absolute forms.

However, although generalised types of mediators in judicial mediation could be identified with difficulty and the need for their identification in general started to lose its importance, the identification and analysis of model of judicial mediation implemented in particular legal system could benefit from determination of types of persons who may become mediators in judicial mediation. Thorough comprehension of the existing model of judicial mediation in Lithuania in the context of the role and the status of mediator in judicial mediation also requires performing a certain analysis (including retrospective) in this respect, i.e. determining whether and what kind of (if existent) typology of persons who may become mediators (types of mediators in judicial mediation) is set therein.

2.2.1.2.2. Types Of Subjects That May Become a Court Mediator

According to legal regulation (former, as well as the new one), as mentioned, only special subject may act as a mediator in judicial mediation in Lithuania – he (she) must possess appropriate qualification, as well as acquire the status of mediator in judicial mediation (court mediator).

Hence although the concept of mediator in judicial mediation has been modified and any person (and not only the one who belongs to the one of the specified groups of persons) currently may become a court mediator, the priority has been given to judicial and not referral mediator in Lithuania.³⁶³ It is relevant in a sense that despite the said changes, judicial mediation may still be conducted only by someone enrolled in the special list – not any person, but only certain subjects who have undergone special procedure and are enrolled in the List of Court Mediators, i.e. judicial mediation in Lithuania may be conducted only by those special subjects who meet the requirements set out by the law.³⁶⁴

362 “Ideal settlement officer” is described by some legal authors as combining the expertise, legitimacy, an authority of the trial judge with the distance of the referral mediator. Longan, P. E. Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators. *Nebraska Law Review*. 1994, 73: 712–755, p. 738–739.

363 This classification is presented here considering suchlike classification marked by Partick E. Longan. Longan P. E., p. 712–755.

364 Whereas the referral mediators are in this context understood as those who act “from the side” in a sense that wither usually anyone may be picked to act as mediator and no special requirements are set

It should be noted in this context, that it was the initial need to let only special subjects to conduct judicial mediation, which was partially conditioned by the strong will to implement mediation through its judicial form into the Lithuanian legal system.³⁶⁵ This, however, does not have to be seen as any kind of limitation in the context of judicial mediation as judicial mediation still may be conducted by any appropriately qualified person, if he (she) undergoes the procedure for acquisition of the status of a court mediator. This is also presupposed by the very nature (different from the one of private mediation) of this ADR procedure: *inter alia* it occurs in the “shadow” of the court,³⁶⁶ i.e. is connected to court process; thus, it has its salient features that reflect the peculiarity of this ADR procedure.

Due to the developments in the model of judicial mediation in Lithuania, any person (and not as formerly only the ones who belong to one of the groups of persons listed by the legislator) may become mediator in judicial mediation (court mediator) in Lithuania if he (she) meets special requirements: according to applicable legal provisions he (she) must possess appropriate qualification, must have acquired the status of a court mediator thereby has been enrolled in the List of Court Mediators. Applicable legal provisions do not specify the particular groups of subjects who may become mediators, hence according to general rule – *any person* if he (she) meets the other requirements may become mediator in judicial mediation (court mediator).

Former legal regulation, as mentioned, enlisted the groups of persons who could become mediators in judicial mediation: only judges, assistants of judges or other persons possessing appropriate qualification³⁶⁷ could have acted as mediators. Thus, generally the same subjects may become a court mediator under the former and the new legal regulation, i.e. former legal provisions essentially also enabled all persons becoming mediators in judicial mediation if they had met special requirements. However, the fact that judges and their assistants were still distinguished separately (identified as separate groups) could not be interpreted as purely accidental. In other words, such wording revealed the true intentions of legislator: in the terms of who could acquire the status of mediator in judicial mediation the principle subjects in this context were judges and their assistants.³⁶⁸ Thus,

by the law for the latter, or special requirements are set by the organization that unites referral mediators, however there are no common requirements for the latter.

365 It has also led to the initial choice of mediators only from judges and assistant of judges – distinct subjects in the light of this ADR procedure (especially the first ones) whose role may be considered as strongly affecting the procedure itself.

366 Alexander, N. What’s Law Got To Do With It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions, p. 10.

367 Surely these persons had also to fulfill special requirements and had to be, subsequently, enrolled in the List of Court Mediators. It also should be noted in this context that in the very beginning of implementation of judicial mediation into the Lithuanian legal system only judges and their assistants were allowed to become mediator, i. e. the model of judges’ judicial mediation was instituted. The shift from suchlike legal regulation to the one, that also allowed other appropriately qualified persons to become mediators, as mentioned, marked the transition to the model of market-based judicial mediation in this respect.

368 If understood otherwise – as if none of the mentioned subjects was granted the preference in the eyes of the legislator – the classification of subjects into judges, assistants to judges and other persons possessing appropriate qualification would have been meaningless, as the third group would generally comprise the first two. It should be noted in this context, that in practice, despite the rapidly changing market in respect of mediators in judicial mediation (court mediators), the biggest part of the latter

although legal regulation has granted the right to acquire status of mediator in judicial mediation to “other person possessing appropriate qualification” as well, the priority was still given to judges and assistant of judges.³⁶⁹ In the opinion of the author of this dissertation, the provision of such priority had become an obstacle for implementation of judicial mediation, especially in the light of transition to market-based judicial mediation. Therefore it had to be altered: this problematic aspect has been eliminated from the curricula after the adoption of new Judicial Mediation Rules.³⁷⁰ In addition, the existence of such theoretical priority reflected another aspect – mediators who were lawyers and who were well-aware of traditional adjudication generally were preferred to mediators of different profession and with diverse educational background in judicial mediation in Lithuania.

However, although the identification of types of subjects that may acquire the status of a court mediator is not characteristic of the new legal provisions, the priority is also not expressly provided to lawyers as mediators,³⁷¹ the question remains whether applicable legal regulation should not be different in this respect.³⁷²

remain judges and assistants to judges. For example, according to statistical data of 12 August 2014 44 out of 75 persons enrolled in the List of Court Mediators were either judges or assistants of judges (58,67 percent) (List of Court Mediators [interactive], [accessed 2015-10-15]. <<http://www.teismai.lt/lt/mediatoriams/>>); whereas according to statistical data of 12 January 2015 55 out of 109 mediators remain judges and their assistants (50,46 percent) (List of Court Mediators [interactive], [accessed 2015-01-17]. <<http://www.teismai.lt/lt/mediatoriams/>>)

- 369 This conclusion can be partially substantiated by the fact that legal regulation related to the evaluation of the activity of judges was amended willing to encourage judges to mediate (and also to refer cases to judicial mediation). Hence, the Judicial Council has amended the Schedule of Procedure of Evaluation of Judges' Performance (by the Resolution No. 13P-54-(7.1.2.) of 29 April, 2011) and, accordingly, the Methodology of Calculation of the Statistics of Courts' Performance (by the Resolution No. 13P-52-(7.1.2.) of 29 April, 2011), in such manner, that judicial mediation has been included as an indicator of, respectively, judges' and courts' performance. Schedule of Procedure of Evaluation of Judges' Performance adopted by the Resolution No. 13P-162-(7.1.2.) of the Judicial Council on 19 September, 2008; Methodology of Calculation of the Statistics of Courts' Performance adopted by the Resolution No. 276 of the Council of Courts (later – the Judicial Council) on 8 October, 2004. It should be noted that suchlike legal regulation remained valid after the adoption of the new Judicial Mediation Rules.
- 370 Elimination of enumeration of types of subjects that may become a court mediator from applicable legal provisions may be explained by the fact that the new legal regulation aims at unification of existing and determination of additional requirements for persons willing to become a court mediator regardless of their status or job title. In other words, the recent changes in this respect contributed to legal clarity of the applicable legal regulation.
- 371 Suchlike priority is absent in the Schedule of Procedure of Assignment and Removal of the Status of a Court Mediator: the groups of subjects that may become a court mediator are not distinguished and although person willing to become a court mediator is required to have higher university degree (Article 6.2.) it may not necessarily be degree in law.
- 372 The repeated identification of particular groups of subjects who could act as a court mediator is, in the opinion of the author of this dissertation, not only unnecessary, but also incompatible with the existing model of judicial mediation in Lithuania, i. e. market-based model. It should be noted (entirely for the sake of curiosity) that even some of the practitioners of private family mediation agree with the necessity to have special help of a lawyer or with the need for lawyer to act as family mediator in private mediation (especially in matters related to the divorce of parents). *Summary on Application of Mediation in Family Disputes* prepared by State Child Rights Protection and Adoption Service under the Ministry of Social Security and Labour [interactive], [accessed 2015-06-14]. <<http://www.google.com/url?sa=t&rcrj=&q=&esrc=s&source=web&cd=32&cad=rja&uact=8&ved=0CCUQFjABOB5qF>>

The most common practice of application of judicial mediation in foreign countries affirm that acting as mediator is principally not a prerogative of lawyers, i.e. any person may become mediator in judicial mediation if he (she) meets requirements set by legislator or the ones that result from practice. Nevertheless, there is uncertainty as to whether mediation, when disputes related to legal issues are mediated, should not be a prerogative of the lawyers.³⁷³ Even in the United States – country where the modern form of mediation was born and this ADR procedure, including its judicial form, has already become an integral part of dispute resolution system, mediators are often lawyers, who have been previously trained to view disputes and conflicts from legislative, rights-based perspective.³⁷⁴

Therefore, having in mind the specificity of judicial mediation – very close connection to court procedure, the fact that judicial mediation may be initiated only after the complaint is lodged in court and it is, therefore, as a rule related to legal issues,³⁷⁵ the settlement agreement, though obligatory submitted to the judge hearing the case for the approval, must be elaborated and signed by the parties in the course of judicial mediation, i.e. and not after it is submitted to the judge³⁷⁶ – together with the fact that the application of judicial mediation is, more or less, at the initial stage in the Lithuanian legal system, requirement for at least one of the mediators to be lawyers should be considered as a requisite of this ADR procedure.³⁷⁷ In other words, it should be agreed with dr. N. Kaminskienė that it would be reasonable to require at least one of the mediators (if there is more than one) to hold degree in law.³⁷⁸ This would not mean, though, that judicial mediation could not be performed with the help of other mediators; however, legal knowledge is crucial in this procedure.

Therefore, to be thorough, when judicial mediation is conducted by several mediators, at least one of them should be a lawyer. In the case if there is only one mediator – he (she)

QoTCI7_6sn2jsYCFcJcFAodOfMAMg&url=http%3A%2F%2Fwww.ivaikinimas.lt%2Fassets%2F%2FMediacijos%2520taikymas2.doc&ei=vVB9Vc6sC8K5Ubnmg5AD&usg=AFQjCNH905HTQkPAiYg6jd0K5AalXMRS-Q&bvm=bv.95515949,d.d24>.

373 For example, alike question that had been raised in Germany preconditioned the amendment of legal regulation related to the provision of legal services: legal regulation that *expressis verbis* allowed mediation not only by lawyers (previously legal advising was solely reserved for lawyers) was drafted in 2007. However, non-lawyer mediators are allowed to act as mediators only as long as they do not actively give their own opinion on legal matter. Hoffman, A., p. 533–534.

374 This was explained by the fact that courts had become more involved and had played direct role in administration of mediation. Kovach, K. K. Costs of Mediation: Whose Responsibility? *Mediation Quarterly*. 1997, 15(1): 13–27, p. 16. On the other hand, in the United Kingdom there is no requirement for mediator to be legally qualified. Hildebrand, A. The United Kingdom. *EU Mediation: Law and Practice* (ed. De Palo, G., Trevor, M. B.). Oxford University Press, 2012: 374–393, p. 386.

375 This is to be said not only in general about the dispute that is heard in the court, but also about the issue (if it does not coincide with the aforementioned dispute) that is referred to judicial mediation.

376 It should be noted in this context that applicable legal acts (namely Civil Code) set, in a sense, legally complicated requirements for a settlement agreement; hence they may be properly met only when mediator is someone who has undergone legal studies.

377 This finding is true only in respect of judicial mediation and cannot be considered as valid for private mediation, which, although an ADR procedure, is in its essence quite different as compared to the judicial form of mediation.

378 Kaminskienė, N. Alternatyvus civilinių ginčų sprendimas. Daktaro disertacija. Mykolo Romerio universitetas, 2009, p. 158.

should preferably have legal education. Otherwise, if judicial mediation was conducted by non-lawyer mediators who would not be provided with the necessary help for drafting the peaceful settlement agreement and in some cases the settlement agreements would not be approved by the judge due to their defects, the trust in judicial mediation, in the opinion of the author of this dissertation, could be undermined and, therefore, create a barrier for its application.

Interestingly, the statistical data proves that judicial mediation in Lithuania is in practice conducted namely by lawyers, i.e. with respect to the choice of parties to dispute only lawyers are appointed as mediators.³⁷⁹ Thus, preference for mediators – lawyers is in fact invoked in practice as well.

The insertion of the requirement for at least one of the court mediators in particular dispute to hold a degree in law would be (and in fact – is (as it may be seen from the application in practice of this ADR procedure)), in the opinion of the author of this dissertation, in the best interests of the parties to the dispute. Such modification could also work in the benefit of increasing the trust in this ADR procedure in Lithuania, as well as enhancing its rate of success.

In addition, under former legal regulation (former Procedure Schedule) enrollment to the List of Court Mediators was, in a sense, related to the fact that particular person was holding certain working position.³⁸⁰ This aspect is eliminated after the adoption Schedule of Procedure of Assignment and Removal of the Status of a Court Mediator. The dismissal from particular office that a person, who may act as a court mediator, holds in some occasions may still lead to the removal of his (her) status of a court mediator. There are no reasons, however, to conclude that acquisition and holding of the status of a court mediator are directly related to the working position of particular person. Such amendments, in the opinion of the author of this dissertation, provide additional guarantees that any person under the procedure defined by legal acts may become a court mediator.

To summarize, the peculiarities of the Lithuanian legal system in respect of implementation of judicial mediation were reflected *inter alia* when regulating who may become mediators. The choice to regulate judicial mediation in such way that only special subjects were allowed to conduct this procedure and priority primarily was essentially given to those, who are generally better aware of process in court,³⁸¹ in fact was indispensable in the

379 According to Statistical Data of 2012–2013 judicial mediation was conducted in 47 cases; all mediators, who conducted this procedure, were lawyers (6 judges, 1 assistant of a judge and 1 person from the bar). In addition, only 7 out of 102 court mediators enrolled in the List of Court Mediators are not lawyers, i. e. 93,58 percent of court mediators are lawyers. List of Court Mediators [interactive], [accessed 2015-01-17]. <<http://www.teismai.lt/lt/mediatoriams/>>.

380 These are the relevant provisions of the Procedure Schedule: mediator is removed from the List of Court Mediators if he (she) is elected to other position or transferred with his (her) consent to another workplace and does not express his (her) will to continue to conduct judicial mediation (Article 15.2); mediator is also removed from the said list if he (she) is suspended from permanent position for his (her) fault (Article 15.4); if mediator changes his (her) workplace, position, he (she) must inform Working Group about the modifications if he (she) wants to maintain his (her) status of mediator (Article 17). In other words, the fact that the person holds particular working position may be the deciding factor for the enjoyment of the status of mediator, hence – for the acquirement of this status as well.

381 Although judicial mediation is not an integral part of court procedure, but an independent alternative to traditional adjudication, awareness court procedure, as well as knowledge of dealing with the

Lithuanian legal system where mediation in general was (and still is) not widely-applied and well-known alternative to traditional adjudication. The subsequent modifications of legal regulation and, accordingly, the shift in the model of judicial mediation to external, as well as market-oriented judicial mediation with certain special features, served as a ground for any person to become mediator in judicial mediation. Nonetheless, the specificity of this ADR procedure requires additional modifications of applicable legal provisions: the requirement for lawyer-mediator to participate in judicial mediation should become (at least temporary) an integral part of legal regulation of judicial mediation in the Lithuanian legal system.

2.2.1.2.3. Requirements For Persons Willing To Become a Mediator

Under applicable legal provisions person willing to become a court mediator must undergo special procedure in order to acquire the status of a court mediator and, consequently, to be enrolled into the List of Court Mediators, i.e. such person must meet special requirements and carry out certain procedural steps that he (she) could act as mediator in Lithuania. In other words, the core aspects of the mentioned pattern that only special subjects may become mediators in judicial mediation in Lithuania, involve *imperative to meet the requirements set by law* and *necessity to undergo the special procedure defined by applicable legal provisions*. This subsection, hence, is devoted to the investigation of the regulatory requirements for persons willing to act as a court mediators and their analysis *inter alia* in the light of general legal regulation of mediation, as well as relevant requirements in foreign countries.³⁸²

Since the launch of Pilot Project – the very beginning of implementation of judicial mediation into the Lithuanian legal system, persons willing to become mediators in judicial mediation were required to undergo special procedure in order to be enrolled in the special list of mediators (under applicable legal provisions – the List of Court Mediators). Legal regulation has not been much modified since then in this respect (with the exception to the extension of the list of subjects that may become mediators): the rule that only special subjects, that have acquired the status of a court mediator, may act as one, is still applicable. However, the requirements for persons willing to become mediators (court mediators), i.e. requirements that must be met in order to acquire such status of the latter, have been recently modified immensely.

The former wording of Judicial Mediation Rules set the only requirement for persons willing to become mediators in judicial mediation: they had to be either specially trained (for judges and assistants of judges) or possess appropriate qualification (for other persons), i.e. requirement to have special qualification was set.³⁸³ However, the former legal provisions essentially did not provide the clarification as to what this special qualification should have entailed. Hence, such legal regulation was missing certainty. Meanwhile the lack of special requirements for persons willing to become mediators was generally con-

complaints and cases should be considered as useful skills for a person acting as mediator in judicial mediation.

382 The procedure of enrollment to the List of Court Mediators is analyzed in further parts of dissertation.

383 The qualification requirements for mediators are directly related to the issue of the quality of judicial mediation which is briefly analyzed in further parts of this dissertation.

sidered as one of the biggest drawbacks of the model of judicial mediation in Lithuania. It should be noted, however, that such legal regulation had been chosen deliberately: the exhaustive legal regulation in this respect was estimated to have possible impeding effects on the development of mediation until the mediation market has not evolved, i.e. the embodied legal provisions could be considered as, in a sense, “transitory legal regulation”.³⁸⁴

Nonetheless, the requirement for mediators to have appropriate qualification is, actually, of crucial importance as, obviously, persons who acquire the status of mediator (court mediator) should be properly qualified as mediators and experienced in communication and negotiation in order to be able to guide parties in their negotiations.³⁸⁵ Actually, the success of mediation as an effective method for dispute resolution greatly depends on the professionalism of mediators³⁸⁶ which, being a complex phenomenon, has its routes at the very beginning – acquisition of the status of mediator. It is even believed that when judges – from their position of authority – or others on behalf of judiciary propose mediation, the quality of mediation must be exemplary, as it is crucial for the success of judicial mediation.³⁸⁷ Therefore, only persons with special qualification, whatever knowledge and skills it involves, that would create the preconditions for and guarantee the proper conduct of mediation should become mediators and be allowed to mediate in judicial mediation.³⁸⁸

Although European Code of Conduct for Mediators – legal act mandatory for a court mediators³⁸⁹ – also did not (and still does not) set particular requirements for the qualification of the latter, the general obligation to have a competence for conducting mediation was set (mediators must be competent and knowledgeable (Article 1.1)). This obligation involves duty of proper training and continuous education necessary for conducting judicial mediation.³⁹⁰ The European Code of Conduct for Mediators, though, did not set specific requirements for the competence of mediators and in general established the “locus of

384 According to the Conclusion of the Main Committee.

385 Street, L., p. 368–369.

386 Standards for Mediators’ Training adopted by the Civic Council for Alternative Dispute Resolutions at the Ministry of Justice (Poland) on 29 October 2007.

387 For example, special quality standards for mediators in judicial mediation concerning training, experience and expertise of the mediators were elaborated in the context of the similar pilot project in the Netherlands. Niemeijer, B., Pel, M. Court-Based Mediation in the Netherlands: Research, Evaluation and Future Expectations. *Penn State Law Review* [interactive]. 2005, 110, [accessed 2013-11-06]. <http://www.lexisnexis.com/Inacui2api/results/docview/docview.do?docLinkInd=true&risb=21_T18559803627&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T18559803631&cisb=22_T18559803630&treeMax=true&treeWidth=0&csi=145280&docNo=5>.

388 This is said having in mind that there are no limitations or additional requirements in our legal system for a person who acquired the status of mediator to conduct judicial mediation. Whereas in some other foreign countries, for example Italy, person after acquiring the status of mediator must assist seasoned mediator in mediation in order to gain additional skills. Marinari, M., p. 195.

389 According to Article 2 of Judicial Mediation Rules judicial mediation in civil cases is performed also in accordance with the European Code of Conduct for Mediators. Thus, mediators are not only made aware of this code (as it is determined by Recital 17 of Directive), they are imposed an obligation to act in accordance with the requirements set in this code.

390 Article 1.1 of the European Code of Conduct for Mediators sets: “Mediators must be competent and knowledgeable in the process of mediation. Relevant factors include proper training and continuous updating of their education and practice in mediation skills, having regard to any relevant standards or accreditation schemes.”

decision” in particular legal system; mediators are *per se* obliged to maintain qualification required to mediate. Thus, this legal act, in a sense, entrusted national legislators (or practice) to set specific requirements for mediators’ qualification in particular legal systems.

In addition, although Directive generally encouraged preservation of the flexibility of mediation process and the autonomy of the parties when regulating mediation process, it also requested to ensure that mediation was conducted in an effective, impartial and competent way,³⁹¹ and obliged the Member States to encourage the initial and further training of mediators.³⁹² Hence, in the opinion of the author of this dissertation, although national legislators were not required to regulate thoroughly issues related to qualification of persons willing to become mediators, as well as the one of mediators, ensuring that mediation was conducted in a competent way could be difficult to achieve if no requirements were set at all.

Thus, *the need to require special qualification from persons willing to become court mediators, as well as requirement to clearly define it* were determined not only in academic level, but could also be derived from regulatory norms. This need is especially evident in respect of legal systems wherein mediation, including its judicial form, is still being implemented by in regulatory level and is not widely applied in practice; hence, in respect of the Lithuanian legal system as well.³⁹³

The necessity of certain qualification of mediators was actually acknowledged from the very beginning of implementation of mediation in Lithuania: the Mediation Law – *lex generalis* in respect of application of judicial mediation – related (and still relates) the role of mediator to the requirement of professional conduct.³⁹⁴ However, it did not (and still does not) set any specific requirements not only for the qualification of a person who is willing to become mediator in judicial mediation, but also for mediator. Hence, general legal regulation in this respect remains “soft”, i.e. the kind of regulation that leaves to decide upon issues to the subjects of particular legal relation.³⁹⁵

391 According to Recital 17 of Directive.

392 According to Paragraph 2 of Article 4 of the Directive. In the opinion of the author of this dissertation the obligation to guarantee the initial training of mediators in our legal system should be also related to the requirement of specific training of persons willing to become mediators.

393 Interestingly, this could also possibly have effect on enhancing the trust in judicial mediation – lawyers who may advise their clients to attempt to settle their dispute by applying judicial mediation. Such finding is partially confirmed by the fact that in some occasions the increased acceptance of mediation noted with lawyers could be explained by their longer and greater experience with mediation. Zutter, D. L., p. 6.

394 Article 4 of Mediation Law regulates issues related to appointment of mediators, their impartiality, professional conduct and responsibility; it requires mediator to provide the parties to a dispute with information on his education and experience.

395 It should be noted that in the deliberations of Mediation Law the Institute of Law proposed to include specific requirements for educational background of mediators. This proposal was based on mediation practice of Austria, England, Wales and namely pursued to embody the requirement for a person willing to become mediator to have special education or have attended specific mediation courses. This proposition was rejected on the basis of lack of persons able to provide mediation services and education services for mediators. It was concluded that such provisions could limit the development of mediation in Lithuania. Conclusion of the Committee on Legal Affairs of the Seimas of the Republic of Lithuania of the Principal Committee on the Draft Law on Mediation in Private Disputes of the Republic of Lithuania, 18 June 2008 (XP-2809) [interactive], [accessed 2014-07-31]. <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=323021>.

Therefore, until the elaboration of special requirements for the qualification of persons willing to become mediators (acquire the status of a court mediator) and the consolidation of latter (actually in Judicial Mediation Rules), the subject that was provided with the right and authority to decide upon provision of status of mediator in judicial mediation was provided with the full margin of appreciation in deciding whether particular person was apt for becoming mediator in judicial mediation in this respect. In the opinion of the author of this dissertation, such legal regulation that did not set any special requirements related to the qualification of persons willing to become mediators, could not be considered as suitable for implementation of judicial mediation, especially in the Lithuanian legal system, i.e. the one that sees traditional adjudication as the most important, suitable and preferred, dispute resolution procedure. Hence, it had to be modified; consequently the new Judicial Mediation Rules were adopted, *inter alia* with the view of detailing the requirements for persons willing to become a court mediator.

The procedure of provision of status of a court mediator is currently regulated by the Schedule of Procedure of Assignment and Removal of the Status of a Court Mediator which deals with the submission of the documents, basis for assignment and removal of the status of a court mediator, enrollment of persons into the List of Court Mediators, etc. According to applicable legal provisions³⁹⁶ a person willing to become a court mediator (actually, as well as the one that has already acquired such status) must, among other things, have university degree, must have attended the courses on mediation of duration of at least 32 academic hours, must have personal, as well as professional characteristics required for mediator. In other words, instead of the prior provisions that did not specify the requirements for persons willing to become mediators in judicial mediation at all, current legal regulation sets *three relevant requirements* – requirements of particular level of education, of completion of special courses of particular length and of possession of special characteristics. It may seem that legal regulation has been properly modified, however the question remains, whether suchlike legal regulation should be considered as comprehensive, as well as sufficiently clear for implementation of judicial mediation in Lithuania.

First of all, it is not clear why *the first requirement* – to have university degree was set. If it was inserted with the view to guarantee that only the ones who are of the highest qualification would become a court mediator (i.e. with the view to guarantee the observance the requirement of qualified activity of a mediator, which is inherent in the essence of judicial mediation), the said aim, in the opinion of the author of this dissertation, could not be achieved with the chosen means. This is especially true in the light of the particularity of mediation, as a dispute resolution procedure, as well as the specificity of mediator – third neutral who assists parties to settle their dispute. Presumably a person who does not have university degree may, due to his (her) special qualifications and characteristics, be even a better court mediator as compared with the one that holds the mentioned degree. Hence, the choice of the mentioned special requirement, in the opinion of the author of this dissertation, could not be clearly justified.³⁹⁷ Therefore, the absence of suchlike requirement would not have a negative effect on the quality of judicial mediation, especially

396 Under Article 6 of the Schedule of Procedure of Assignment and Removal of the Status of a Court Mediator.

397 However, this is true, in the opinion of the author of this dissertation, only if mediators or one of the mediators (if there is more than one) is lawyer.

if the already-mentioned requirement for at least one of the court mediators who perform particular judicial mediation to be lawyer would be set.

Although *the second requirement* – to complete special courses of particular length (i.e. to acquire special knowledge and skills indispensable for performance of judicial mediation – inherent in the requirement of qualified activity of a mediator) – could not be regarded otherwise as beneficial for the implementation of judicial mediation in Lithuania, legal provisions lack clarity in this respect. Despite the fact that the length of the courses³⁹⁸ on mediation are determined by Schedule of Procedure of Assignment and Removal of the Status of a Court Mediator, there is no clarification as to what should be the subject matter³⁹⁹ of these courses, who may organise and conduct them,⁴⁰⁰ whether all persons should attend the same courses, whether certificate issued by any entity (if it has to be issued) would be considered as suitable, if the same courses and the same certificate are required from all types of subjects who may become mediators. In other words, in spite of elaboration of such requirement, its content is not sufficiently clear. Although relevant legal regulation would serve as a, more or less, suitable clarification of the requirements at this stage,⁴⁰¹ would still require further amendments. Whereas until suchlike modifications are made the special subject that is entitled to grant the status of a court mediator is essentially provided with the discretion to take final decision as to the relevance of the qualification particular person has obtained in this respect; in the opinion of the author of this dissertation, this special subject should be provided with this kind of margin of appreciation only temporary.

The exception to the requirement to attend such special courses is, in a sense, made in respect of two groups of persons – judges that have undergone special courses in the

398 It should be noted in this context that there is no general agreement when it comes to the length of the courses, as well as their form in other countries. For example, it is believed by some authors that requirements to undergo forty or sixty hours of mediation training and observe two or three mediation sessions in order to be approved for court rosters (in the United States) are minimal and do not ensure that a person could be relied upon to mediate competently and consistently. Senft, L. P., Savage, C. A., p. 346.

399 It should presumably include not only general knowledge of judicial mediation, but also issues related to the application of European Code of Conduct for Mediators – legal act which is compulsory for mediators in judicial mediation in Lithuania, ethics of mediators. The issues related to conflict management, maybe even certain psychological knowledge could also be considered as relevant ones in this respect.

400 It is not clear which providers of mediation training services could issue certificate which would be considered as suitable to certify that a person meets in this respect requirements in order to become mediator in judicial mediation; especially when there is no system of accreditation (or any other system) that would allow identification of suitable providers of such services.

401 That is to say – in such relatively early stage of application of judicial mediation in Lithuania suchlike legal provisions, i. e. provisions framed in a generalised manner, could be considered as sufficient in order to be in consistency with the imperative of legal clarity. However, suchlike legal provisions should be seen a “transitional”, i. e. temporal, regulation which should be in force only until the subsequent modifications thereof in order adapt to the changes in the market of mediation services. It should be noted in this context, that the practice in the United States proves that as the need for mediators has grown, so have the numbers and types of providers, and states have started to regulate, though modestly, mediators by requiring training, experience and adherence to ethical codes. Thus, in the case of growth of the need for mediators, the market should adapt and, accordingly, legal regulation should be modified as well. Senft, L. P., Savage, C. A., p. 332.

framework of judges training program and legal scholars that have at least 3 years of legal pedagogical work experience in the field of mediation. Hence these subjects are not required to attend the said general courses on mediation that are obligatory for all other persons willing to become court mediators. The fact that the said persons are singled out in this respect essentially proves that *judges and legal scholars are considered to be more qualified for conducting judicial mediation than other persons willing to acquire the status of a court mediator*. However, in the opinion of the author of this dissertation, situation when judges, who are agents of traditional adjudication, are considered to be *per se* more qualified to perform process which is actually alternative (and, in a sense – exactly the opposite) to the one they practice, is less than desirable. Generally the same could be said in respect of the mentioned legal scholars: although their qualification as of lawyers in the field of mediation could hardly be disputed, this does not mean that the said qualification should always be considered as sufficient, let alone – the most suitable, to actually perform judicial mediation. Hence, it is assumed in the framework of this research, that there is no justification for the elaboration of exception to the mentioned requirement to attend special courses on mediation in respect of the mentioned two groups of subjects, therefore, for the sake of legal clarity and consistency, it should be eliminated from legal regulation.⁴⁰²

The third requirement for those who are willing to become a court mediator is to possess special characteristics, both – personal and professional; the establishment of non-conformity with the said requirement is also the ground for removal of the status of a court mediator,⁴⁰³ i.e. this requirement is one of the key ones when deciding upon the acquisition and removal of the status of a court mediator. However, applicable legal provisions in this respect remain silent, i.e. there is no clarification as to the content of this requirement. Although certain aspects of this requirement could be, presumably, deduced following the systematic analysis of relevant legal regulation (provisions of the European Code of Conduct for Mediators, Mediation Law, as well as Directive) in the light of general principles of judicial mediation, the exact content thereof could still be determined only in the course of its practical application. In other words, the special subject that is entitled to grant the status of a court mediator is provided with the right to ascertain the exact content of the said requirement when analyzing the particular application. In the opinion of the author of this dissertation, the provision of this kind of margin of appreciation in this respect to the mentioned special subject could, presumably, result in inconsistency and uncertainty of this very ADR procedure. Hence, the said requirement, as well as the requirement to attend special courses, must be elaborated.

As there is no generalised pattern for promotion and implementation of judicial mediation, specific context, including individual features of particular legal system, as well as

402 It should also be noted the establishment of suchlike reservations to the general requirement to attend general courses on mediation proves one more thing, actually essential to the performed research, despite of the shift in model of judicial mediation into market-based form, priority, in a sense, is given not only to lawyers, but also to certain specially identified types of court mediators – judges and legal scholars. In other words, despite the less restrictive tone of legal provisions in this respect, the true intention of legislator is to regulate court mediation in such manner that those, who are in his eyes the most qualifies, would be provided with, in a sense, less complex way to become a court mediator.

403 Under Article 13.6 of the Schedule of Procedure of Assignment and Removal of the Status of a Court Mediator.

applicable provisions of the EU law, experience of foreign countries must be also consulted in order to identify and set the best framework relevant to the qualification requirements for those, who are willing to become a court mediator, as well as for the ones that have already become the latter and must maintain their qualification. Therefore, all further modifications of legal provisions in respect of qualification and training requirements for persons willing to become a court mediator (as well as court mediators) could be effectuated, in the opinion of the author of this dissertation, only with reference to the mentioned aspects, including the relevant foreign experience.⁴⁰⁴

It should be noted, however, that the practice of foreign countries in respect of training and qualification requirements for those, who want to become mediators, is very diverse;⁴⁰⁵ for example:

- Mediation practice and regulation is very heterogeneous in the **United States** – a common law country that originated the modern form of mediation; thus, there is no uniform mediation practice when it comes to qualification and training requirements as well, those may differ from one state to another.⁴⁰⁶ In general, legislative requirements for education of mediation are virtually non-existent:⁴⁰⁷ this guarantees the flexibility of mediation and leaves the parties to a dispute to frame the process, including the choice of mediator (*inter alia* based on qualification needed to mediate particular dispute) who is the most suitable in particular case, themselves. Consequently, qualification and training requirements, though not regulated, are framed in practice (market-based approach: demand shapes the supply). It should be noted in this context that mediation training is a part of university curricula in the United States.⁴⁰⁸
- There are no general requirements for qualification and training of mediators in the **United Kingdom** – another common law country in which mediation is widely

404 This practice entails the requirements for judicial, as well as private mediators. However, as mediation in general, as well as implemented judicial mediation schemes, is “individual” in every legal system, there is no sense to distinguish solely the existing requirements for mediators in judicial mediation. It is also important to note, that this diversity is also relevant to the requirements of continuing training for mediators.

405 For example, there is no consensus in different countries as to who could act as mediator in family disputes – the field which is one of the most common action fields of this ADR procedure (especially in civil jurisdictions): family mediation, hence, may be performed either only by individual mediators that have undergone special training programs or by teams of mediators consisting of lawyers and specialist in the field of psychoanalysis, mediators may be required to obtain special qualification and continue identified training or no special requirements for their qualification may be set, etc. Sondaitė, J. Šeimios mediacija: užsieni šalių patirtis. *Socialinis darbas*. 2006, No. 5(2): 24–28, p. 25–26.

406 For example in the state of Florida in the framework of court-connected mediation training, persons are required to undergo stand-alone courses in the various subject areas in which mediator practices (for example, 40 hours in civil mediation); in the state of Georgia a basic mediation course must be taken first (for example, civil mediation) with more advanced courses coming later (for example, domestic relations, dependency, etc.). Raines, S., Hedeem, T., Barton, A. B. Best Practices for Mediation Training and Regulation: Preliminary Findings. *Family Court Review*. 2010, 48(3): 541–554, p. 545.

407 Hoffman, A., p. 543.

408 This is not an occurrence inherent only in the United States or common law countries: for example, after the enactment of the Law on the Reform of the Legal Education in July 2003 legal education in Germany was complemented by integrating so-called key qualifications, *inter alia* mediation. *Ibid.*, p. 544.

applied. The market-based approach in general leaves the parties to a dispute to decide upon mediator suitable for particular dispute and, consequently, to formulate demand for particularly qualified and trained mediators from case to case. In practice many mediators are solicitors and barristers, many of whom were previously litigators.⁴⁰⁹

- The requirement for mediators to have specific training in mediation is set in **Spain**. Such training may be provided only by accredited training institutions; attendance of training courses must provide mediators with the necessary knowledge (on practical and theoretical basis) in the legal, psychological, communication and negotiation and conflict resolution fields, as well as mediation ethics. However, such aspects as which subjects are entitled to provide such courses and what is length of these courses are not yet determined.⁴¹⁰
- The law sets special qualification requirements only for family mediators in **Poland**; they must have an education in psychology, education, sociology or law, as well as practical knowledge of conflict resolution.⁴¹¹ There are no other mandatory qualification standards, however, some standards of recommendatory nature⁴¹² were adopted by a body of experts advising the Minister of Justice on all issues concerning mediation and other ADR forms.⁴¹³
- Although the law does not set accreditation requirements for mediators in extra-judicial mediation in **Luxembourg**, judicial mediation can only be conducted by mediators accredited by the Minister of Justice. Accreditation requires that the candidate has qualities that would guarantee honorability, independence and impartiality. The candidate is also required to have certain qualification: have master's degree in mediation, have three-year experience completed by specific mediation formation or mediation formation accepted in any Member State to become mediator in civil and commercial mediation in that member state.⁴¹⁴
- Mediators must meet various requirements to be accredited in **Italy**, the burden of verifying their qualification is placed on mediation organization. The organization must *inter alia* verify that all of its mediators hold a minimum of a three-year university degree, are enrolled in a professional society, complete training for mediators as well as recertification every two years, and assist a seasoned mediator in at least 20 mediations in their first two years of certification.⁴¹⁵
- Requirements to have necessary qualifications with respect to subject matter and the necessary training and experience relevant for the practice of mediation are set in **France**. In addition, in certain areas of law mediators must possess specific

409 Hildebrand, A., p. 386.

410 Sánchez-Pedreño, A. Spain. *EU Mediation: Law and Practice* (ed. De Palo, G., Trevor, M. B.). Oxford University Press, 2012: 328–340, p. 336–337.

411 Such choice was generally based on the will not to limit the parties' choice of mediator.

412 Standards for Conducting Mediation; Standard for Mediator Training; Code of Ethics of Polish Mediators.

413 Gmurzyńska, E., Morek, p. 264–266.

414 Moyse, F., Kayser, J. Luxembourg. *EU Mediation: Law and Practice* (ed. De Palo, G., Trevor, M. B.). Oxford University Press, 2012: 239–243, p. 241–242.

415 Marinari, M., p. 195.

qualifications: mediator must pass a state examination to act in family matters; for employment disputes, the mediator must possess relevant experience in particular field.⁴¹⁶

- No special accreditation requirements are needed for natural persons wishing to perform as mediators in **Estonia**. In general under the law anyone wishing to become mediator can do so.⁴¹⁷
- In **Austria** mediator training and qualification requirements are very detailed and codified by the law: all mediators in civil matters must be registered with the Federal Ministry of Justice, must be over 28 years of age, hold a professional qualification, be trustworthy, possess the necessary professional indemnity insurance, and have completed a training course (200 hours of theoretical learning and additional practical modules) at a Ministry of Justice approved training facility.⁴¹⁸

The provided examples are those that reflect the most the diversity in foreign practices. There are certainly other examples that prove qualification and training requirements for mediators together with the procedure of acquiring status of mediator have individual features in particular legal systems.⁴¹⁹

Hence the subsequent modifications of applicable legal provisions regulating the qualification requirements for persons willing to become a court mediator (as well as the ones regulating continuing training of court mediators), thus – model of judicial mediation in this respect as well, could only be effectuated after the additional thorough analysis of the said practices in the light of particularities and special needs of the Lithuanian legal system. However, due to the variety of the mentioned practices, as well as because of the need to take into consideration the exigencies of the market and relatively low application of judicial mediation in Lithuania, the definition of the relevant finite model best fit for the Lithuanian legal system, in the opinion of the author of this dissertation, may not be made at this stage of application of judicial mediation. Whereas until the relevant practice that would allow identifying the specific needs of the Lithuanian legal system in this respect becomes more extensive, the mentioned “transitional” legal provisions allowing the special subject to decide upon the exact content of the qualification requirements for persons willing to become a court mediator (as well as for those who have already acquires such status) should be considered as sufficient.

It also should be noticed in this context that there is *additional requirement* for those who are willing to become a court mediator – they must be of impeccable reputation, i.e. the principle of credibility of mediator is set. This requirement is inherent in the very essence of

416 Betto, J.-G., Canivet, A. France. *EU Mediation: Law and Practice* (ed. De Palo, G., Trevor, M. B.). Oxford University Press, 2012: 112–130, p. 122–125.

417 Ginter, C., p. 91.

418 Feasley, A., p. 347.

419 In addition, it should also be noted in this context that, interestingly, the model of attainment of status of mediator (including training and qualification requirements for mediators) varies not only in the countries of different legal tradition, but in the countries of the same legal tradition as well. This is particularly true in respect of civil law countries – the mentioned models vary dramatically: in some countries the said issues are generally left to self-regulation of the market (for instance, in Estonia), in others certain requirements are set only for mediators in particular fields (for example, Poland, France), whereas in some – detailed qualification requirements are set (for instance, Italy, Luxembourg, Austria).

judicial mediation as ADR procedure: a third person who is aimed at assisting the parties to a dispute in reaching amicable agreement could hardly perform his (her) role properly, if he (she) could not be trusted due to his (her) behavior.⁴²⁰ The applicable legal provisions provide particular grounds when person is not considered to be of impeccable reputation. In the opinion of the author of this dissertation, the elaboration of the said grounds by legal regulation (and not the provision of the right to decide upon this issue entirely to special subject that decides upon granting, as well as removal of status of a court mediator) contributes to consistency of legal regulation of judicial mediation, as well as provides necessary restraints in this respect to the authority of the mentioned special subject.

In conclusion, although recently adopted legal provisions have established the requirements for persons willing to become a court mediator in a more detailed manner as compared to the former legal regulation, suchlike elaboration could not be considered as ultimate: the applicable legal regulation does not specify all requirements and leaves for a special subject that is entitled to grant the status of a court mediator to decide upon the relevance of qualification of particular person willing to become the latter. As the applicable legal provisions do not specify to the necessary extent the requirements for persons willing to acquire the status of mediator, they must be modified in order to create the preconditions for guaranteeing one of the most important aspects of judicial mediation – the necessary qualification of mediator in judicial mediation, as well as his (her) qualified activity. Although suchlike modifications could be made only with certain delay (after the thorough analysis or application of the said provisions in practice, as well as analysis of foreign experiences), further modifications of legal regulation especially in respect of qualification and training requirements for mediators in judicial mediation are inevitable.

2.2.1.3. Judge As a Person Willing To Become a Court Mediator

The gradual shift from a specific form of so-called “judges’ judicial mediation” to a particularly shaped market-based judicial mediation in Lithuania has had, at least until recently, less than obvious impact on practical aspects of application of judicial mediation in a sense that judges (and, actually assistants of judges) remained the main mediators in judicial mediation (court mediators).⁴²¹ Hence, due to this (among other aspects) the issues related to the role of a judge as a court mediator remains relevant and Lithuanian

420 The questions related to the impeccable reputation are analyzed more thoroughly together with the grounds for removal of status of a court mediator in further subsection of this section of dissertation.

421 Actually, judges constitute the biggest group in the List of Court Mediators: there were 27 judges out of 61 mediators, who were lawyers, and out of 64 mediators in general in former List of Court Mediators (accessed 25 July, 2014); there were also 11 assistants of judges in the said list. Whereas according to updated List of Court Mediators of 12 January 2015 there are 38 judges out of 102 mediators who are lawyers and out of 109 mediators in general; there are also 17 assistants of judges who have acquired the status of a court mediator. It was also already mentioned, that according to Statistical Data of 2012–2013 judicial mediation was conducted in 47 cases by only 8 mediators: 6 judges, 1 assistant of a judge and 1 person from the bar. For statistical data on types of mediators and amount of judicial mediation procedures conducted by particular types of mediators see also Chart 4, Chart 5, Chart 6 and Chart 7 in the Appendix.

model of judicial mediation in this sense is particular, as the role of judges in judicial mediation may be different in other legal systems.⁴²²

Judicial mediation has its certain exclusive features when mediator is a judge. Therefore, in a way the same applies to a procedure when the judge becomes mediator – judge is in this context particular subject in comparison to other persons willing to acquire the status of mediator.⁴²³ Therefore, although the already analyzed general requirements for all subjects willing to become a court mediator are generally the same (with certain exception), the specificity of such requirements when a judge is willing to act as a court mediator (especially the ones related to the qualification) should be examined separately.

The exclusivity of judges as persons willing to become mediators and, consequently, as mediators, is partially determined by their special status⁴²⁴ – they are at the core of traditional adjudication. Their role in this respect is even more unique in countries of civil tradition where judge is generally rather active than passive. Moreover, the status of a judge, his (her) role as a mediator and particularities of the process of judicial mediation when mediator is a judge also have effect on specific status of a judge who is willing to become mediator. Judges are generally estimated as being special mediators: someone enjoying special ability and credibility in assessing cases and therefore having unique ability to bring parties' expectations together; someone who has more experience with the results of trial than even the most experienced lawyer; hence someone who makes a fair settlement more likely.⁴²⁵ However, there are also opinions that judges should not act as mediators.⁴²⁶ Nevertheless, judges may become mediators and some of them not only have already acquired the status of mediator in Lithuania, but actually are in practice the main mediators

422 At the beginning of implementation of judicial mediation into the Lithuanian legal system judges together with assistants of judges were, as mentioned, the only subjects who could become mediators in judicial mediation. Thus, judicial mediation in our legal system was linked from its initial stage to the role of a judge as mediator. Whereas, for example, in Japan mediation is integrated into the official judicial process: mediation process held at court is under the supervision of the judge, however mediators are usually lay people or attorneys. Nishikawa, R. Judges and ADR in Japan. *Journal of International Arbitration*. 2001, 18(3): 361–369, p. 363.

423 Although it must be agreed with dr. N. Kaminskienė that the role of a judge as a mediator is more a role of a “tool” (as opposed to the role of the only decision-maker in court process), his (her) role has still some salient features as compared to other mediators. Kaminskienė, N. Teisminė mediacija Lietuvoje. Quo vadis?, p. 56.

424 Some legal authors stress the importance of the role of judge as mediator in respect of the requirement of independence of mediator. For example, it is believed, that the status enjoyed by judges ensures that mediators are perceived as possessing the same degree of independence as their peers in Germany. Boyron, S., p. 271.

425 Longan, P. E., p. 734.

426 Some authors consider that judicial case or settlement conferences, judicial early neutral evaluations and summary trials (rather than mediation) are better result of the pursuit of direct judicial involvement in ADR. Warren, M. Should Judges be Mediators? *Alternative Dispute Resolution Journal*. 2010, 21: 77–84, p. 84. It should be also noted, that even, for example, District Court of Appeal of Florida in the decision *Evans v. State* of 10 July 1992 suggested that mediation should be left to the mediators and judging to the judges. *Evans v. State*, 603 So. 2d 15 (Fla. Dist. Ct. App. 1992) District Court of Appeal of Florida [interactive], [accessed 2014-07-31]. <<https://www.courtlistener.com/fladistcapp/axGL/evans-v-state/>>.

in judicial mediation.⁴²⁷ Therefore, the question of whether judge should be allowed to conduct judicial mediation was not raised within the scope of the conducted research.

Applicable legal provisions, as noted, set three general qualification requirements for persons willing to become a court mediator: he (she) must meet certain educational requirements, must have attended general courses on mediation of specified length and must possess personal, as well as professional characteristics indispensable for a court mediator. However, the second requirement – requirement to attend courses on mediation is not applicable *inter alia* in respect of judges who are willing to become a court mediator.

This does not mean, of course, that judges are not required to acquire special qualification necessary for performing judicial mediation, however, the general requirements are not applied in this respect – judges must undergo special courses in the scope of judges' training program. Due to the fact that one of the main activities of the National Courts Administration – institution formed to provide services to the institutions of autonomy of courts in pursuance of ensuring the efficiency of the court system, its government and organization of work as well as the independence of judges and autonomy of courts – is organizing the training of judges,⁴²⁸ the latter is entitled to organise special training for judges willing to become a court mediator.⁴²⁹ Hence applicable provisions directly relate the requirement to attend special courses in respect of judges with the judges' training program, i.e. program administered by the National Courts Administration. Nevertheless, the subject matter, length, other relevant aspects of these courses are not clarified.

In the opinion of the author of this dissertation, the need for special training in fact should be considered as being bigger when judges want to become a court mediator than in the cases when someone who is willing to acquire the status of a court mediator is any other person having appropriate qualification. This conclusion is based on the specificity of the role of the judge in traditional adjudication and consequent particularities of his

427 In fact according to Statistical Data of 2012–2013 judges conducted the vast majority of mediations: 41 mediations out of 47 (87,23 per cent). This in fact could be explained as the issue of authority: in the words of E. Brunet, judges who wear black have almost automatic authority when assessing case and parties naturally respect judges, whether they are judging, sentencing or mediating; whereas such institutional respect is simply absent in the market for most private mediators. Brunet, E., p. 239. It should be noted, however, that the statistical data of the year 2014 proves these tendencies are, though slowly, changing.

428 According to the Internet site of National Courts Administration [interactive], [accessed 2014-08-02]. <<http://www.teismai.lt/en/national-courts-administration/about-administration/?type=0>>.

429 It should be noted, that National Courts Administration started executing project (financed by the Republic of Lithuania and Norwegian Financial Mechanism) "Strengthening the Competence of Representatives of Judicial System (Including Judges, Court Staff and Representatives of NCA) (Training)"; one of the fields of this project is strengthening the competence of the mentioned subjects in the field of judicial mediation. It was announced that special funding would be granted for funding of activity „Pilot Mediation project” (activity will proceed until the December 2014). According to the information on the project "Strengthening the Competence of Representatives of Judicial System (Including Judges, Court Staff and Representatives of NCA) (Training)" available at the website of National Courts Administration, [accessed 2014-08-01]. <<http://www.teismai.lt/en/nor/>>. It is also scheduled to organise trainings on mediation for judges and other relevant subjects during the following two years. According to the interview with dr. N. Kaminskienė in the website of the Court of Appeal of Lithuania [accessed 2014-08-01]. <<http://www.apeliacinis.lt/lt/naujienos/kada-lietuviu-ai-prades-a729.html>>.

(her) professional behavior, as well as the importance of the role of judge-mediator.⁴³⁰ Hence, the fact that a person willing to become a court mediator is a judge should not act as misleading aspect and give raise to belief of the self-sufficient competence of particular judge in judicial mediation (which is obviously not the same as in traditional litigation process). In other words, the requirement of special training for judges willing to become mediators is indispensable due to the specificity of their role as judges⁴³¹ and could not be seen as a pure formality.⁴³² Therefore, the related legal regulation should be sufficiently detailed and not only require *all* judges⁴³³ to undergo special courses in the framework of judges' training program, but also to specify (at least to the minimum) the subject matter, length and other relevant aspects of such special training. The subsequent modifications of applicable legal provisions in this respect presumably could only be made after the analysis of in as many instances of relevant foreign practice as possible in the light of particularities and special needs of the Lithuanian legal system.

It should be noted in this respect, that no general model related to the special training of judges willing to become mediators⁴³⁴ exists in other countries. In addition, the requirements for this special training (its subject matter, length, etc.) may sometimes even vary in different courts⁴³⁵ of the same country. However, some aspects that are commonly involved in the training of judges willing to become mediators may be pointed out.

- I. Training of the judges willing to act as mediators encompasses **theoretical knowledge**. This knowledge may cover the general understanding of mediation as ADR procedure, its principles, forms, the particularities of judicial mediation, main principles and rules of its procedure, as well as special knowledge of methods for car-

430 In the words of Ben Overton, judges are considered to be "the most experienced neutrals in the justice system and should be excellent mediators, but they need to fully understand the process and know when to bite their judicial tongue and eliminate their authoritative face". Therefore, judges cannot act as mediators before being trained in the mediation process. The fact that judge has a multiple years of judicial experience does not mean that the judge is automatically competent as mediator. Overton, B. Training is Essential for Judges as Mediators! *Dispute Resolution Magazine*. 2001, 72(2).

431 Their role is to resolve dispute and interpret law as opposed to the role to assist parties to reach amicable solution of their dispute themselves.

432 On the contrary, in some other countries, for example in Croatia, objection to mediation conducted by sitting judges was expressed; it was substantiated by the fact that judges were not necessarily the best mediators, most acting judges had no training in mediation or had very little training. According to Babić, D.

433 According to Article 8 of Schedule of Procedure of Assignment and Removal of the Status of a Court Mediator only those judges that have undergone special courses in the framework of judges' training program are dismissed from the requirement to undergo general courses on mediation as any other persons willing to acquire the status of a court mediator. However, legal provisions remain silent as to what should happen in the case if particular judges wants to become a court mediator without attending the special courses in the framework of judges' training program; presumably he (she) should undergo the mentioned general courses on mediation. Nevertheless, in the opinion of the author of this dissertation, suchlike situation would be less than desirable, especially in the light of specific status and role of judges; hence applicable legal provisions should require all judges that want to become a court mediator to attend special courses in the framework of judges' training program.

434 Due to the variety of models of private, as well as judicial mediation existent in foreign countries, the identified aspects could also be considered as relevant in respect of court mediators.

435 This is generally relevant in the United States as occasionally special training is provided in the auspices of particular courts; thus, training of judges in such cases may have individual variations.

rying out mediation,⁴³⁶ strategies for successful resolution of conflict, specificities of the behavior of mediator, other relevant knowledge;⁴³⁷ thus, not only legal, but knowledge of psychology, as well as other relevant knowledge is involved.

- II. Judges willing to act as mediators envisage (should envisage) practical training in order to gain **practical skills** indispensable for mediation. It may entail simulations of mediation, participation in real mediation sessions, etc. The main aim of such practical training is to train judges how to mediate and, more specifically, to negotiate the particular challenges of judicial mediation.⁴³⁸

In the opinion of the author of this dissertation, the special training of the judges willing to become a court mediator in the Lithuanian legal system presumably should also entail these *two main aspects* – *provision of theoretical knowledge and acquisition of practical skills*, and, accordingly, at least some of the identified points of subject-matter as well.⁴³⁹ In other words, training of judges in respect of judicial mediation (especially of those who are or want to become a court mediator) should not be limited solely to the analysis of theoretical aspects of this ADR procedure. Otherwise, the unacceptable risk that judges will not be able to perform properly their role as a court mediator may arise.

It must be stressed in this respect, that although the discretion of the special subject that is provided with the right to grant status of a court mediator is not unlimited, as long as legal provisions do not specify what kind of special training is required from judges – in certain sense “special” mediators – and in this respect do not entail at least minimum criteria for evaluation if particular judge meets the requirements to become mediator, this issue (as well as many others) remains “in the hands” of the said subject. Suchlike situation, as mentioned, is to be corrected in a longer perspective.

436 It should be noted, that one of the main reasons for opposition to mediation conducted by judges, as well as one – for its approval, is the specificity of the role of the judge and consequent features of his (her) professional behavior. It must be agreed with the opinion of some legal authors that the judges are seen as “arm-twisters” by nature who are accustomed to being on top of a hierarchical chain of command; although they exercise an undeniable authority in the society, they are more used to rely on it in their role and not on consensus inherent in judicial mediation, as well as on dispassionate distance and not intimate connection. Therefore, the training related to the methods to carry out mediation, as well as better understanding of this process in general, is crucial for judges willing to become mediators. According to Senft, L. P., Savage, C. A., p. 336, 348. It should be noted in this context that various models of mediation in respect of the role of mediator and peculiarities of mediation process are determined in theory; for example, facilitative, evaluative, transformative, bureaucratic, open or closed, pragmatic, etc. Milašius, T., p. 49.

437 For example in Canada (Ontario), in addition to teaching about general principles and practices of mediation, special attention is drawn within the curriculum to the force of judicial office when conducting mediation; to the fact that judicial mediations are the subject of judicial complaints to the judicial discipline body; the manner in which judges conduct themselves at mediations reflects on the entire court. Winkler, W. K., p. 242.

438 For example in Canada (Québec), only those judges who have undergone intensive training may participate in judicial mediation program; this training is aimed at allowing the judges to negotiate the transition from adjudication to mediation and to mediate effectively. According to Otis, L., Reiter, E. H. *Mediation by Judges: A New Phenomenon in the Transformation of Justice*.

439 The further examination of this issue, though, due to the limited extent of the conducted research does not constitute the subject matter of this dissertation.

In conclusion, the specific role of judge as a core figure in adjudication process, characteristics of his (her) professional behavior, together with inherent legal knowledge and evaluative skills, the weight of his (her) authority in the eyes of litigants and society in general, predetermine the specificities of the role of a judge as mediator, *inter alia* the need for a special training for a judge to act as an assistant of the parties in amicably settling their dispute. Therefore, until there is no certainty as to the length and other relevant aspects of the special training of judges willing to become a court mediator, the good quality of judicial mediation could presumably be sometimes difficult to attain, hence, this situation predetermines the need for further regulatory modifications.

2.2.1.4. Assignment Of the Status Of a Court Mediator

A person may act as a court mediator in Lithuania only after he (she) undergoes special procedure and, consequently, acquires the status of a court mediator. The analysis of this procedure, hence, may contribute to disclosure of specificity of model of judicial mediation implemented in the Lithuanian legal system, as well as to determination of possible shortcomings thereof. Therefore, this subsection is dedicated to analysis of procedure of provision of the status of a court mediator. The subject matter of recent regulatory changes, though, predetermines the need to primarily analyze the issues relevant to the status of special subject that is granted the right to provide, as well as remove the status of a court mediator.

2.2.1.4.1. Subject That Decides On Assignment And Removal Of the Status Of a Court Mediator

The recent regulatory changes are essentially the most evident in the field of assignment of the status of a court mediator: recently not only the procedure of provision of the said status has been modified, but also the new body in the field of judicial mediation has been established. The adoption of Schedule of Procedure of Assignment and Removal of the Status of a Court Mediator has immensely changed the relevant legal framework.

From the very beginning of implementation of judicial mediation into the Lithuanian legal system, i.e. essentially even prior to the adoption of special legal act for regulating the procedure of enrollment of persons into the List of Court Mediators – Procedure Schedule – the special subject was designated to decide issues relevant to the enrollment of persons into the said list, i.e. to deal with the provision of the status of a court mediator.⁴⁴⁰ The subject that was given such rights was the same Working Group of the Judicial Council (hereinafter also referred to as “Working Group”) that has been formed at the very beginning of the launch of the Pilot Project.⁴⁴¹

440 Only recently the possibility to act as a court mediator was linked to such legal category as “acquisition of the status of a court mediator”, whereas prior to it solely the reference to enrollment to the List of Court Mediators was made.

441 The aim of the Working Group was to coordinate the execution of the Pilot Project and to evaluate its results. This group consists of 16 persons, mainly judges (11), however, there are also representatives from the Ministry of Justice, National Courts Administration, academic society and others. Resolution of 27 June 2014 No. 13P-88-(7.1.2) on the Amendment of the Resolution of the Judicial Council

However, recent modifications of legal framework (namely – adoption of the new wording of Judicial Mediation Rules, as well as adoption of Regulations of Commission of Judicial Mediation) have envisaged the establishment of entirely new body in the sphere of judicial mediation – Commission of Judicial Mediation. This commission is a permanent institution, which is designed to decide upon the assignment and removal of status of a court mediator, to generalise practice of application of judicial mediation in courts, as well as to decide on other relevant matters.⁴⁴² The establishment of suchlike institution with the following objectives defined, in the opinion of the author of this dissertation, signifies the important qualitative motion towards more definite system of acquisition of the status of a court mediator, i.e. towards implementation of guarantees that only the most suitable persons would acquire the status of a court mediator. In addition, its function of generalization of practice of application of judicial mediation, though a complete novelty in the Lithuanian legal system, is indispensable for proper application of this ADR procedure.⁴⁴³ Thus, recent modification of regulatory framework of judicial mediation in this respect could be very beneficial for the practice of judicial mediation.

Despite the undisputable advantages of the establishment of the said special subject, the question remains whether its legal status, *inter alia* given authority, procedure of its composition, are satisfactory, as well as the most suitable for its aims to be achieved; it is also important for guaranteeing that the acquisition and removal of status of a court mediator would be performed in consistency with the main principles of judicial mediation.

The Commission of Judicial Mediation is formed by the Judicial Council for the term of office thereof,⁴⁴⁴ i.e. one of the institutions of self-governance of courts shapes this new body designed to decide upon the assignment and removal of status of a court mediator. The role of, and, consequently – relation with, the Judicial Council in shaping of suchlike body that is essential in the system of judicial mediation, in general, is inherent in the very essence of the chosen model of judicial mediation implemented in the Lithuanian legal system: *judicial mediation is intrinsically related to the activity of courts*. In addition, such relation emphasizes also another aspect of the model of judicial mediation in Lithuania – despite of transition to a specific form of market-based judicial mediation, judicial mediation may only be performed by special subjects that are provided with such right by the body formed by one of the institutions of self-governance of courts. In other words, judicial mediation is not entirely market-based (as understood in traditional sense), because it may not be performed by any person and even after a person willing to act as a

of 26 January 2007 No. 13P-15 „On the Continuation of the Pilot Project of Judicial Mediation“ of the Judicial Council [interactive], [accessed 2014-07-31]. <<https://www.e-tar.lt/portal/legalAct.html?documentId=f3f87c2000e011e4bfca9cc6968de163>>.

442 Under Article 2 of Regulations of Commission of Judicial Mediation.

443 The statistics of application of judicial mediation in Lithuania, especially the one provided in the Chart 2 of Appendix, proves that judicial mediation, though started to being introduced, some time ago, is not applied successfully. Although the low success rate may be linked to very diverse reasons, the generalization of the application practice of this ADR procedure, both – successful and unsuccessful, in the opinion of the author of this dissertation, could only be beneficial for application of judicial mediation in Lithuania and could even influence the possible growth of trust in this procedure.

444 Under Articles 2, 6 of Regulations of Commission of Judicial Mediation.

court mediator meets the requirements for acquisition of such status, he (she) may not be granted it⁴⁴⁵ (by the mentioned special body).

Nonetheless, the general idea that one of the institutions of self-governance of courts is provided with the right to frame the body entitled to the said activity, in the opinion of the author of this dissertation, could not be seen as having negative effect on implementation and application of this ADR procedure. The participation of the said institution should be seen as a guarantee that the “selection system” of those who will be entitled to perform judicial mediation would operate in the best manner.

The Commission of Judicial Mediation consists of 9 members, 6 of whom must be judges. Interestingly, the chairman of the commission is elected by the Judicial Council from the members who are judges. In the opinion of the author of this dissertation, such-like provisions provides the Judicial Council with the powers that are too broad and, actually, may create difficulties to make a distinction between adjudication system and judicial mediation.

In addition, legal regulation does not prevent even the situation when all members of the Commission of Judicial Mediation are judges.⁴⁴⁶ Although there is no doubt that judges would be the most suitable agents for generalization of the practice of application of judicial mediation in courts, it should not be forgotten that one of the requirements for persons willing to acquire the status of a court mediator is possession of special characteristics, both – personal and professional, hence – not only the ones related to his (her) legal professionalism. Therefore, the members of the said commission should also be those who could determine properly the existence of the said characteristics in respect of particular person willing to become a court mediator. This is especially relevant until the mentioned amendments to legal regulation concerning special requirements for persons willing to become a court mediators are made as the special subject that grants the status of a court mediator – the Commission of Judicial Mediation – is in fact the main “barrier” guaranteeing that only properly qualified persons would become a court mediator. Due to the fact, that the quality of mediator is crucial for success of judicial mediation and, consequently – for the growth of trust in this procedure,⁴⁴⁷ the granting of the status of a court mediator becomes, hence, of crucial importance for application of this ADR procedure.

Meanwhile in the case if all members of the Commission of Judicial Mediation were judges, suchlike requirements and, in a sense, even the main principles of ADR procedure under investigation, could be jeopardized: the possibility to identify whether particular person possesses professional, as well as personal characteristics intrinsic for the role of a court mediator could be called into question. Thus, in the opinion of the author

445 The discretion of the Commission of Judicial Mediation in this respect is analyzed in further subsection.

446 Nevertheless, the Commission of Judicial Mediation currently consists of 6 judges and 3 legal scholars. Resolution on the Formation of Commission of Judicial Mediation No. 13P-133-(7.1.2) of the Judicial Council of 31 October 2014.

447 It should be agreed with the legal authors, who assert that the misplaced assumption by the parties to a dispute about the type of process being ordered and the degree of court oversight can lead to disappointment not only with the process, the outcome, but also with the courts in general. In the opinion of the author of this dissertation, the possibility to prevent such disappointment and consequent decline of trust in courts lies *inter alia* in the very outset – when deciding who may acquire the status of mediator. For more see: Senft, L. P., Savage, C. A.

of this dissertation, the Regulations of Commission of Judicial Mediation should be at least amended in such manner that the said commission would be formed from 6 judges and 3 other professionals best fit for performance of the activity thereof. In other words, applicable legal provisions should guarantee the participation not only of judges, but also of other “non-judicial” professionals in formation of “body” of court mediators. There is also no justification as to why the members of the Commission of Judicial Mediation are not given the right to elect the chairman of the commission themselves; such right, hence, should also be provided to them.

Nevertheless, the establishment of the special body for granting the status of a court mediator, in the opinion of the author of this dissertation, is, actually, one of the strengths of recent modification of legal framework of judicial mediation. This conclusion is also reinforced by the fact, that the new legal regulation implements the right to give the appeal against the decision of Commission of Judicial Mediation, as opposed to former legal provisions that rendered decisions of the Working Group not susceptible to appeal. Suchlike changes, in the opinion of the author of this dissertation, provide a glimpse of the necessary clarity for the procedure of provision of the status of a court mediator.

2.2.1.4.2. Procedure Of Assignment Of the Status Of a Court Mediator

One of the core aspects of the existent pattern in order to become a court mediator involves *inter alia* necessity to undergo the special procedure defined by applicable legal provisions. It should be noted in this context, that the very essence of judicial mediation, including one of its aspects – requirement that a court mediator is qualified, precondition the need to determine the procedure of acquisition of the status of a court mediator in such manner that it would provide guarantees of implementation of the mentioned requirement.

Essentially from the beginning of implementation of judicial mediation into the Lithuanian legal system legal regulation set the general rule – the person had to (and still has to) acquire the status of mediator to be enrolled in the List of Court Mediators and to have the right to act as mediator in judicial mediation (court mediator). In other words, the person had to (and still has to) be enrolled in such list and could (and still can) act as a court mediator only if he (she) had met the requirements to acquire the status of a court mediator.

Interestingly, such system of enrollment of persons to the List of Court Mediators has more similarities to licensing than to simple registration.⁴⁴⁸ It is, in a sense, comparable to the system of licensing which is, in general, legally regulated in detailed manner: in both cases persons must have special qualification and undergo special courses (under a general rule) in order to be provided with the legal right to engage in certain activities by the authoritative institution;⁴⁴⁹ in the case of the procedure of enrollment of persons to

448 The registration of the persons by authorised entity would solely reflect the public recognition of formal training received by the persons who become mediators, but not the fact that only the persons enrolled to special list are provided with the right to perform particular activities – act as mediator in judicial mediation. According to Babić, D.

449 In the case of licensing it is most commonly government, in the system of acquiring the status of a court mediator Lithuania – Commission of Judicial Mediation.

the List of Court Mediators – the right to become a court mediator.⁴⁵⁰ Thus, the procedure of assignment of the status of a court mediator (accordingly – of enrollment of persons to the List of Court Mediators) which is established to grant the right to become a court mediator for those who meet special requirements, should also be made comprehensible and regulated more exhaustively, including the grounds for acquiring the status of a court mediator, as well as the procedure itself. This conclusion is also reaffirmed by the inherent relation between judicial mediation and court system in Lithuania.

Although the applicable legal provisions embody more detailed requirements for persons willing to become a court mediator as compared to former legal regulation, it still leaves to a certain extent (though to a lesser) to the special subject – Commission of Judicial Mediation to decide whether qualification and characteristics of particular person are eligible for him (her) to acquire the status of a court mediator. Hence, as long as there is no rigorous restriction of margins of such discretion of the mentioned body the legal regulation of procedure of acquisition of status of a court mediator gains crucial importance; it guarantees that selection procedure of those who may be enrolled in the List of Court Mediators would be in consistency with the requirements of impartiality and objectivity, that originate from the very nature of this ADR procedure.

The applicable procedure of acquisition of status of a court mediator may be virtually divided into *three main stages*⁴⁵¹ – submission of the documents, examination of the documents and adoption of the decision on assignment of the status of a court mediator (accordingly – enrollment to the List of Court Mediators). The additional stage – filing of an appeal against the decision of the Commission of Judicial Mediation may also be identified.

According to applicable legal provisions a person willing to become a court mediator must submit to the Commission of Judicial Mediation relevant request with required personal data and other documents, *inter alia* documents certifying his (her) qualification, as well as certificate of attendance of the courses on judicial mediation.⁴⁵²

Although the list of required documents is determined, there is, to certain extent, no clarity as to what particular documents must be provided: as the requirement to attend special courses on mediation is not specified, i.e. it is not clear what such courses would entail, what subject may conduct special training, etc., the requirement to provide the certificate of attendance of the courses on mediation remains also obscure. Hence, the desirable extent of clarity is not guaranteed in *the stage of submission of the documents for acquisition of status of a court mediator* as well. The mentioned documents must be submitted via National Courts Administration – institution formed to provide certain services to the institutions of autonomy of courts. Hence, the existing system of submission of the said documents reaffirms the inextricable link between judicial mediation and court system in Lithuania.

450 The system of enrollment to the List of Court Mediators in Lithuania certainly is not licensing *strictu sensu*.

451 This kind of division is provided only in the framework of the performed research and serves only for the purposes thereof.

452 Under Article 3 of Schedule of Procedure of Assignment and Removal of the Status of a Court Mediator.

The qualification requirements for persons willing to become a court mediator are not detailed enough under the applicable legal provisions; hence – although person willing to carry out the activities of mediator must submit the documents specified by legal regulation that confirm his (her) eligibility in order to become a court mediator to the Commission of Judicial Mediation and the latter grants the status of a court mediator only after the relative assessment of the said documents, the said assessment is of discretionary nature as the mentioned requirements are unclear. Therefore, the adoption of the decision to grant particular person a status of a court mediator and, accordingly, to enroll person in the List of Court Mediators could be seen as directly dependent on the will of the subject deciding upon the assignment of the status of a court mediator. Consequently, the question arises, whether the existing system of assignment of the status of a court mediator guarantees the already mentioned necessary objectivity and impartiality or if the discretion of Commission of Judicial Mediation in this respect is unlimited in *the stage of examination of the documents and adoption of the decision on assignment of the status of a court mediator* in this respect.

The analysis of the applicable legal regulation relevant to assignment of status of a court mediator preconditions the conclusion that the discretion of the Commission of Judicial Mediation to decide upon assignment of status of a court mediation (enrollment of person to the List of Court Mediators), is not unlimited: it must be exercised in accordance with legal provisions that predetermine the grounds for refusal to grant the status of mediator in judicial mediation. In other words, the special subject that is provided with the discretion to grant the status of a court mediator may refuse to grant it to a particular person only on the grounds deriving from applicable legal provisions.

The systematic analysis of the provisions of Schedule of Procedure of Assignment and Removal of Status of a Court Mediator allows determining the grounds for refusal to grant the status of a court mediator identified below.

- *Lack or defects of documents submitted to Commission of Judicial Mediation for acquisition of status of a court mediator.* Although the list of required documents is provided, there is no clarity as to the form and content of some of the latter: the subject that may issue the certificate of attendance of the courses on mediation, as well as requirements for such certificate are not clear; therefore, the requirement to provide the certificate of attendance of the said courses is not clear⁴⁵³ as well, consequently – the subject that is provided with the right to grant the status of a court mediator is given the discretion in this respect to decide if to refuse the provision of such status on this ground to a particular person.
- *Non-compliance with requirements for a person willing to become a court mediator.*

This ground envisages nonconformity with qualification requirements, as well as

453 Thus, it is not clear if the courses that are occasionally organised by private entities and the certificates that are provided for participation therein could be considered as suitable in respect in this context. The examples of such courses would be: courses “Resolution of the Disputes Without the Court – Mediation: Theory and Practice” organised by Mykolas Romeris University ([interactive], [accessed 2014-08-01] <http://www.mruni.eu/mru_lt_dokumentai/centrai/paslaugu_pardavimo_centras/Mediacija2.pdf>); courses of conciliatory mediation (mediation) organised by the Lithuanian Confederation of Industrialists ([interactive], [accessed 2014-08-01] <<http://www.lpk.lt/lt/taikinamojo-tarpininkavimo-mediacijos-mokymu-programa>>), etc.; or whether only the courses organised by National Courts Administration or under its auspices would be suitable.

requirement of impeccable reputation. Hence, if particular person does not meet at least one of these requirements he (she) may not be granted the status of a court mediator. Although the requirement of impeccable reputation is clearly defined by applicable legal provisions, the qualification requirements are not entirely clear, therefore the application of this ground in this respect essentially remains solely in the discretion of the Commission of Judicial Mediation until the already identified necessary modification of relevant legal regulation is performed.

No other grounds for refusal to grant the status of a court mediator may be deduced from applicable legal provisions. The refusal to grant the status of a court mediator, therefore, may be made only based on one of the said two grounds. Nevertheless, their content is less than comprehensible as essentially it is left to be framed to the subject that is provided with the right to assign the status of a court mediator.

However, in the opinion of the author of this dissertation, forasmuch as the quality of judicial mediation must be exemplary for this procedure to be successful and, actually, trusted as well, legal regulation of the issues related to the execution of judicial mediation must also be clear and comprehensive. Legal provisions must *expressis verbis* set conditions for the exercise of discretion of special subject that may decide to refuse particular person such status, i.e. detailed criteria for the adoption of the decision on refusal to grant person status of a court mediator (enroll him (her) to the List of Court Mediators).⁴⁵⁴ Therefore, the possible modification of relative legal regulation in this respect should be debated and performed after the associated alteration of legal regulation of requirements for persons willing to become a court mediator.

In addition, not only the said grounds are not entirely clear, but legal provisions require the Commission of Judicial Mediation to adopt the decision on assignment of the status of a court mediator within 60 working days,⁴⁵⁵ i.e. determine a long deadline (in the opinion of the author of this dissertation – too extensive) for adoption of the said decision. Although this kind of legal regulation, certainly, *per se* may not jeopardize the system of assignment of status of a court mediator, not to mention – judicial mediation, as ADR procedure, in general, the set time limit, however, could hardly be justified especially in the light of constantly (and rapidly) changing framework of judicial mediation in Lithuania. Therefore, the time limit for adoption of decision on assignment of the status of a court mediator should be reduced, advisable – up to 20 working days;⁴⁵⁶ the possibility to prolong such time limit if necessary should also be set. Otherwise, even the doubts as to the transparency and impartiality in the system of assignment of status of a court mediator could be raised.

454 It seems that some foreign legal practitioners also agree that it would seem prudent to regularize and publish the criteria and the methods by which individuals are placed on that list, and the process by which individuals are placed on the list of mediators. Beckwith, S. S., p. 360–361.

455 Under Article 5 of Schedule of Procedure of Assignment and Removal of Status of a Court Mediator.

456 The said time limit is identified here by applying the analogy with time limits of administrative procedure: in the opinion of the author of this dissertation this kind of analogy (having in mind the ever-changing nature of judicial mediation, the aim and the course of this procedure) would be suitable in this context. According to article 31 of the Law on Public Administration, administrative procedure should last and the decision related to assignment of the status of a court mediator should be adopted no longer than after 20 working days since the beginning of the procedure. Law of the Republic of Lithuania on Public Administration. *Valstybės žinios*. 1999, No. 60-1945.

Finally, one of the most important recent amendments to the system of assignment of status of a court mediator is institution of the right to *appeal against* the relevant *decision* of the subject that decides upon provision of the mentioned status.⁴⁵⁷ Under former legal regulation decisions of the Working Group – body that was provided with the right to grant status of a court mediator to particular person – were not made subject to appeal. Whereas under applicable legal provisions decisions of Commission of Judicial Mediation in respect of assigning the status of a court mediator may be made subject to appeal.⁴⁵⁸ Interestingly, the appellate body in this respect is the Judicial Council, i.e. one of the bodies of self-governance of courts – hence, the institution of appeal against decision not to grant particular person status of a court mediator (or to remove one) in this respect reaffirms once more the inherent relation between judicial mediation and courts in Lithuania. This interrelation is, in a sense, also verified by the fact that the Judicial Council examines such appeal under the same procedure which is applied when it examines the questions on the advice to the President of the Republic of Lithuania, i.e. *inter alia* issues related to the formation of corps of judges.⁴⁵⁹ It should also be added, that identification of the right to appeal against unfavorable decision *inter alia* in respect of acquisition of status of a court mediator contributed to making the system of assignment of status of a court mediator (and removal thereof) more transparent.

Hence, although the procedure of assignment of status of a court mediator is, in general, quite well-defined, and has been even more adapted to the needs of the ADR procedure under consideration recently, it still cannot be considered as comprehensive enough due to the defects of legal regulation in respect of the grounds for acquiring the status of a court mediator. In other words, the said two aspects – the content of the grounds for acquisition of status of a court mediator and procedural aspects of provision thereof – are interrelated in this respect.

In conclusion, though it is clear, that the person willing to act as a court mediator must acquire the status of a court mediator and, consequently, must be enrolled in the List of Court Mediators, relevant legal provisions are in some instances vague and misleading.⁴⁶⁰ Although the procedure of acquisition of status of a court mediator is more or less defined, as well as consistent with the nature of judicial mediation, the requirements for persons willing to become a court mediator are less precise. Whereas as the quality of judicial mediation must be exemplary and it is directly dependent on the qualification of mediator

457 The appeal may be filed both – against decision to refuse to grant the status of a court mediator to particular person, as well as against the decision to remove the status of a court mediator.

458 Under Article 20 of Schedule of Procedure of Assignment and Removal of the Status of a Court Mediator.

459 According to Article of Schedule of Procedure of Assignment and Removal of the Status of a Court Mediator the Judicial Council examines the appeals under the procedure laid down in the section X of Regulation of the Judicial Council. The said section regulated the procedure of examination of the questions for which the Judicial Council advises the President of the Republic of Lithuania. Resolution on Approval of Regulation of the Judicial Council No. 13P-87-(7.1.2) of the Judicial Council of 28 June 2013.

460 It must be agreed with the opinion of dr. N. Kaminskienė that criteria of enrollment of the persons into the List of Court Mediators, as well as requirements for their qualification must be specified. Kaminskienė, N. Privaloma mediacija: galimybės ir iššūkiai, p. 700.

(which should, to certain extent, already be guaranteed when granting the status of a court mediator), such legal regulation should be respectively modified.

In addition, as applicable legal provisions clarify modestly the requirements for persons willing to become a court mediator, the discretion to decide whether qualification and characteristics of particular person are eligible for him (her) to acquire the status of a court mediator is in great number of cases left, though to the different extent, within the scope of competence of specially-formed body. Such procedure of acquisition of status of a court mediator could not be considered as being in conformity with the requirements of legal clarity, as well as utterly creating the necessary preconditions for guaranteeing that only the properly qualified persons become mediators in judicial mediation. Therefore, it should be respectively modified by identifying and defining the grounds for adoption of corresponding decision.

2.2.1.5. Removal Of Status Of a Court Mediator

A person, willing to act as court mediator, as mentioned, must acquire the status thereof, hence – the possession of the status of a court mediator (and thereby – presence in the List of Court Mediators) is the condition for having the right to act as “an assistant” of the parties to a dispute in reaching amicable resolution of their dispute in framework of the ADR procedure under consideration; accordingly the loss of the said status incapacitates person in this respect. As the grounds for acquisition of status of a court mediator, as well as procedure of provision of such status, must be regulated in a detailed manner, especially due to the inherent relation between judicial mediation and court system in Lithuania, same should be applied in respect of the grounds and procedure for removal of the status of a court mediator.

Some of the procedural aspects in this respect are similar to the ones of acquisition of status of a court mediator: the same subject is given the right to adopt the relevant decision – the Commission of Judicial Mediation, person is provided with the right to appeal against corresponding decision, the person involved is informed about the meeting of the said commission and may participate therein.⁴⁶¹ No other additional procedural aspects are legally regulated, the specificity of judicial mediation, though, essentially does not require more detailed legal regulation in this respect. However, due to the special role of mediator in judicial mediation, as well as the importance of his (her) role and qualification for *inter alia* success of judicial mediation, the grounds for adoption of decision to remove status of a court mediator, i.e. to remove particular person from the List of Court Mediators, and, consequently, to deprive him (her) of the right to perform judicial mediation, are of crucial importance for implementation of this ADR procedure; therefore – should be regulated thoroughly.

It should be noted in this context that after the recent adoption of new legal provisions on assignment and removal of status of a court mediator, the grounds for removal thereof have been eventually legally regulated: former legal regulation did not distinguish the grounds for removal from the List of Court Mediators (loss of the status of a court mediator), i.e. they had to be deduced from the overall legal regulation. Hence, such recent

⁴⁶¹ Under Articles 13–14 of Schedule of Procedure of Assignment and Removal of the Status of a Court Mediator.

modifications contributed to legal clarity in this respect. The question remains, however, whether the grounds for removal of status of a court mediator are regulated sufficiently enough to guarantee that the status of a court mediator – one of the key participants of judicial mediation – is removed only on the eligible grounds that stem from the essence of judicial mediation.

The applicable legal provisions define the following grounds for removal of status of a court mediator.

- *Personal choice of mediator.* This ground guarantees the implementation of one of the principles of judicial mediation – the freedom of mediator to decide if he (she) wants to perform particular judicial mediation; hence, accordingly – to continue acting as mediator in judicial mediation.
- *Discredit of the title of a court mediator by his (her) behavior.* This ground for removal of person from the List of Court Mediators was also embodied by former legal regulation. However, neither former, nor applicable legal provisions do not disclose the notion “discredit of the title of a court mediator”; in addition there are no practical examples that would allow determining its content, as well. Although there is no doubt as to the need of such ground that would entitle the Commission of Judicial Mediation to remove person from the said list if his (her) behavior is incompatible with general principles of judicial mediation, its content should be determined in more exhaustive manner. Otherwise, the questions of the consistency of such provision with the requirements of legal clarity and certainty, as well as the doubts as to the objectivity and impartiality of the procedure of removal of person from the List of Court Mediators could be raised. It should be noted in this context, that the grounds for recusal of mediator are essentially the same as for recusal of the judge. In addition, judicial mediation is intrinsically related to the system of courts in Lithuania. Therefore, presumably the “discredit of the title of a court mediator” as a ground for removal from the List of Court Mediators could be explained by making analogy to the “discredit of the title of a judge” as a ground for disciplinary responsibility of judges.⁴⁶² In such case a court mediator would be considered as having discredited the title of a court mediator, if *inter alia* he (she) had infringed the requirements of the European Code of Conduct for Mediators; it would also always entail clearly negligent performance of a specific duty of the mediator or failure to carry out his (her) duty without a valid reason.⁴⁶³ However, as completely direct analogy could hardly be made, the relevant provisions should be amended in this respect; such amendments, in the opinion of the author of this dissertation, should

462 According to Paragraph 3 of Article 83 of the Law on Courts of the Republic of Lithuania one of the grounds for the disciplinary responsibility of a judge is behavior discrediting the title of a judge. This behavior involves such behavior that is incompatible with honor of the judge and requirements of the Code of Ethics of Judges which discredits the title of a judge and undermines the authority of the court; it also always entails clearly negligent performance of a specific duty of the judge or the failure to carry out his (her) duty without a valid reason. Law on Courts of the Republic of Lithuania. *Valstybės žinios*. 2002, No. 17-649.

463 It is important to stress in this context, that some legal authors believe, that namely market forces should drive out unethical or incompetent providers. According to Eidenmüller, H. Thus, in such case the possibility to remove person from the List of Court Mediators in the case of discredit of the title of a court mediator would seem optional.

only by effectuated after the proper evaluation of the peculiarities of the role of a court mediator.⁴⁶⁴ Such modification should, presumably, also embody the right not to grant (at least for a certain period of time) person the status of a court mediator after he (she) has discredited the title of a court mediator.

- *Failure to possess professional and personal characteristics indispensable for a court mediator.* This ground is directly related to one of the requirements for person willing to become a court mediator – requirement to possess mentioned special characteristics. However, as mentioned, this kind of requirement for person willing to become a court mediator is unclear; and the Commission of Judicial Mediation is essentially left with large margin of appreciation in this respect. Accordingly, the same is true in respect of the corresponding ground for removal of status of a court mediator – the special subject that is provided with the right to deprive person of the status of a court mediator has discretion in this respect; it should be limited after the detailing of the mentioned special requirements for person willing to become a court mediator. Despite the lack of clarity in this respect, this ground is aimed at guaranteeing one of the most important aspects of judicial mediation – that this ADR procedure was performed only by appropriately qualified persons.
- *Existence of the judgment of his (her) conviction (it has to come into effect) or of circumstances under which person is not considered of impeccable reputation.* The very essence of judicial mediation (hence – applicable legal provisions as well) requires that only those persons, who are unbiased, equitable, reliable, and exemplary, could assist parties in amicable settlement of their dispute. Hence, this ground for removal of status of a court mediator reflects also the importance of the role of a court mediator.
- *Concealment of substantial information when acquiring the status of a court mediator.* The principle to act in good faith, as one of the main principles of judicial mediation, also determines the corresponding duty of the parties to a dispute to act in good faith. Hence, mediator, as well as person willing to become a court mediator is also required to act likewise – *inter alia* to disclose all relevant information that could have effect on the adoption of decision to grant particular person status of a court mediator. Thus, this ground for removal of status of a court mediator should be considered as underlying in the nature of the ADR procedure in question.
- *Failure to provide information on changes of data provided in the List of Court Mediators.* This ground should be considered as indispensable for guaranteeing the constant update of the said information; it is especially important in the early stages of implementation of judicial mediation into legal system. Therefore, such ground should be considered as yet prerequisite in the Lithuanian legal system.

Thus, in general the grounds for removal of status of a court mediator not only match the general principles of judicial mediation, but also, to a certain extent, provide preconditions for implementation of this ADR procedure into the Lithuanian legal system. However, some of the circumstances which constitute the grounds for removal of this status may be considered as being ambiguous and not well-defined, hence – the vast discretion in this respect is left to the subject that decides upon removal of status of a court media-

464 Such analysis does not constitute the subject matter of this dissertation.

tor – Commission of Judicial Mediation. Although provision of certain discretion to this body could not be considered as *per se* ineligible, it should be limited by identifying at least in general terms the grounds that could condition the loss of the right to perform judicial mediation, i.e. such circumstances that lead to removal of status of a court mediator as discredit of the title of a court mediator by his (her) behavior and failure to possess professional and personal characteristics indispensable for a court mediator.

To conclude, although mediator is a key participant in judicial mediation, who assists the parties to a dispute in reaching amicable settlement of their dispute, the existing system related to the assignment of status of a court mediator, as well as deprivation of the latter, though reflecting the main principles of judicial mediation, cannot be considered as finite and should be respectively modified.

2.2.2. Rights And Duties Of Mediator

Although judicial mediation, as well as mediation in general, is an ADR procedure wherein the parties to a dispute exercise their autonomy and self-determination, and, accordingly, mediator exercises more of a role of an assistant to parties, mediator is still one of the key participants in judicial mediation. Hence, the role of mediator is at the very essence of judicial mediation: he (she) does not only act as a neutral intermediate between the parties to a dispute when seeking how to settle their dispute amicably, but he (she) may, accordingly, also have influence on the content and application of the main principles of judicial mediation. Therefore, ensuing aspect of his (her) legal status – rights and duties he (she) is provided with, must be analyzed in order to identify whether legal regulation creates preconditions for application of the main principles of judicial mediation, and consequently – to characterise judicial mediation in the Lithuanian legal system.

Hence this section of dissertation is dedicated to the analysis of the rights and duties of mediator entrenched by applicable legal provisions. It consists of two subsections: the rights of mediator are analyzed in the first one and the duties – in the second one.

2.2.2.1. Rights Of Mediator

The main “decision makers” in judicial mediation are the parties to a dispute and, accordingly, they essentially exercise the authority over the framing of particular procedure in a sense that procedure generally could not be determined without their consent. However, it’s mediator’s role not only to lead parties in defining the procedural aspects and settling their dispute, but also to personally decide upon certain procedural issues as well. In other words, the rights (actually, the duties as well) that should be (and are) provided to mediator in judicial mediation *directly depend on the aim of this procedure and the role of mediator therein.*

As it stems from the definition of judicial mediation in the Lithuanian legal system, the aim of this ADR procedure is essentially helping parties to settle their dispute amicably and the role of a court mediator is considered to be as the one of an assistant of the parties to a dispute in reaching an amicable agreement. Therefore, mediator should be provided with such rights (as well as such duties must be imposed on him (her)) which would allow

him (her) achieving the mentioned aim of judicial mediation and, accordingly, exercise his (her) role in assisting parties in the settlement of their dispute. Hence, all rights (and, accordingly, the duties) of mediator should be intended to allow him assisting parties to the dispute in reaching amicable resolution of their dispute.

Nonetheless, the main subjects for framing the particular procedure of judicial mediation generally are the parties to a dispute: they are the only ones who may settle dispute amicably, accordingly, they are provided with the right to decide in respect of almost every procedural aspect of judicial mediation. Hence, the role of mediator, as well as the exercise and, in some instances, even the content of his (her) rights (and, certainly, duties) is *directly related to the role of the parties to a dispute*, including the rights and duties of the latter. Consequently, although mediator may exercise certain rights in respect of procedural aspects of judicial mediation independently, the implementation of vast majority of the latter could not be effectuated in the “absence of the parties”. In other words, essentially almost all *rights of mediator are conditional*, as their content and implementation in many cases depend on the corresponding consent of the parties.

As judicial mediation remains flexible procedure (though legally more regulated than its extrajudicial form), and one of the main characteristics thereof is its consensual nature, the particular rights, as well as the content thereof may differ in every particular case. Thus, the content of the rights of mediator is *individually framed* in the course of particular process of judicial mediation.

Due to the fact that mediation, including its judicial form, is a flexible procedure that should not be regulated rigorously, the applicable legal provisions do not embody the exhaustive list of the rights of mediator in judicial mediation in the Lithuanian legal system. It should be added, that the rights of mediator are interrelated in such way that some of them can be distinguished from the others with difficulty. Hence the systematic analysis of legal regulation allows identifying only the most general rights of mediator.

The general rights of a court mediator in the Lithuanian legal system that may be derived from applicable legal provisions are presented below.

- *The right to decide upon performance of judicial mediation in particular dispute.* The aim of judicial mediation, as of ADR procedure, requires providing mediator with the right to decide whether to participate in particular procedure. In other words, only a person, who is participating in the process of resolution of the dispute and helps parties in reaching amicable settlement of the latter voluntarily, may exercise the role of an “assistant” to the parties to a dispute. Therefore, according to applicable legal provisions particular person may be nominated as a court mediator in respect of particular process of judicial mediation only with his (her) consent.⁴⁶⁵ This general rule is applicable regardless of which person is called upon to act as mediator, i.e. in respect of all persons enrolled in the List of Court Mediators, including judges.
- *The right to frame the procedure of judicial mediation.* Although legal provisions regulate certain procedural aspects of judicial mediation more rigorously than of the extrajudicial one, the flexibility of this procedure and, actually, the very essence of mediation as an alternative to strictly regulated traditional adjudication, do not

465 Under Article 12 of Judicial Mediation Rules.

presuppose rigorous and comprehensive regulation of procedural aspects. The latter, hence, are determined with respect to particular circumstances of the dispute in question by mediator⁴⁶⁶ (with or without the consent of the parties) in the course of the procedure. Accordingly, the general rule that a court mediator identifies the proceedings is *expressis verbis* set by applicable legal provisions as well.⁴⁶⁷ This rule, however, requires coordination with the parties to a dispute. Although the exact content of this right is not and, actually, could not be determined,⁴⁶⁸ some of the aspects thereof may be derived from legal regulation. Hence a court mediator may:

- identify (with the consent of the parties) where judicial mediation will take place;
- determine (or at least make an impact on) the timing of particular procedure; however, the process must be organised in such manner that the time limits set when making recourse of particular dispute to judicial mediation were respected;
- decide on the possibility for other persons (either participating in civil proceedings or not) to participate in particular procedure of judicial mediation;
- decide to have recourse to particular procedural means, if he (she) finds it necessary for reaching the aim of judicial mediation: for example, may decide to have consultations with one of the parties without the presence of another, i.e. to have caucus sessions;⁴⁶⁹
- decide to apply particular technical means in the course of judicial mediation (IT and communication technologies).

Although applicable legal provisions do not specify other aspects of the said right, there is, in the opinion of the author of this dissertation, no necessity to regulate the issue more rigorously: the right of a court mediator to frame the procedure of judicial mediation essentially covers all other procedural aspects that may be needful to precise in the course of particular procedure. However, it should be noted in this context, that applicable legal provisions embody one other relevant right of a court mediator implementation of which depends on the judge hearing the case⁴⁷⁰ – right to require that the time limit set for particular procedure of judicial mediation was prolonged; in such case the right of decision belong to the judge.

466 Therefore the importance of possession of appropriate qualification of persons acting or willing to act mediators should be stressed once more.

467 Under Article 15 of Judicial Mediation Rules.

468 There is no possibility to identify the exhaustive list of aspects that mediator may decide upon when framing the procedure, because they depend on the course of particular procedure of judicial mediation.

469 The private caucus sessions with the parties are considered by some legal authors to be the means for guaranteeing flexibility of the process. Namely through these sessions mediator is often able to help the parties achieve a creative settlement that recognises the interests of each. Hutchinson, C. C., p. 89.

470 It should be noted in this context that one of the crucial recent modifications to legal framework of judicial mediation faced the establishment of the right for a judge hearing the case to act as mediator in the case he (she) is hearing. Although the opinion of the author of this dissertation that such possibility should not be established in the Lithuanian legal system is presented in other chapter of this dissertation, it should be noted in this context that the implementation of the right to require to prolong particular procedure of judicial mediation when a court mediator is the same judge who has made the recourse of particular dispute to judicial mediation, remains difficult to imagine.

Hence, the right to define the procedural aspects of particular procedure of judicial mediation, i.e. the right intrinsic in the role of a court mediator as assistant of the parties, is one of the most important his (her) rights, which is provided and properly guaranteed in the Lithuanian legal system. Nonetheless, mediator, certainly, does not have the unlimited authority when framing the procedure as he (she) is not only in a way restricted by legal provisions and must act, in a sense, within the limits set out by the parties to a dispute, but also must act with impartiality and properly, taking into account the circumstances of the dispute.⁴⁷¹

- *The right to have influence on the settlement of the dispute by offering parties to the dispute proposals for the settlement thereof.* The functions of a court mediator may vary from mere informational to the ones of a real assistant, even with certain decisive aspects. A court mediator in the Lithuanian legal system is attributed a rather active role: according to applicable legal provisions he (she) may give proposals to parties to the dispute as to the settlement thereof, as well as discuss their legal and factual arguments.⁴⁷² Legal provisions provide, in a sense, guarantees for implementation of such right: proposals of mediator for the settlement of the dispute constitute confidential information in the context of judicial mediation.⁴⁷³ It should be noted, that mediator's right to frame the procedure of judicial mediation entails also his (her) right to choose the means and manner of provision of proposals for the settlement of the dispute; whereas the right to give proposals for the settlement of the dispute is also directly related to the right of mediator to get and, accordingly, to examine the file of the civil case in question.⁴⁷⁴ Thus, mediator may frame his proposals to the parties being well-acquainted not only with the position of the parties, but also with the issue in general; this is crucial for the settlement of the dispute. The fact that the right to have influence on the settlement of the dispute not only derives from a court mediator's role in general, but is also determined by applicable legal provisions, reveals one of the specificities of judicial mediation in Lithuania – the need and, accordingly, the will to identify the active role of a court mediator as one of the key characteristics of judicial mediation.
- *The right to terminate judicial mediation.* This is one of the key rights of mediator, which is also translated into his (her) obligation to terminate judicial mediation when certain circumstances arise.⁴⁷⁵ Such right is inherent in the role of mediator as he (she) is the best aware of the state of ongoing mediation, the intentions of the

471 Obligations of mediator to act with impartiality and properly are directly embodied in Mediation Law (Paragraph 4 of Articles 4, Paragraph 2 of Article 5). However, the mentioned ones are the common obligations of mediator deriving *inter alia* from the European Code of Conduct for Mediators – compulsory legal act for mediators in judicial mediation in Lithuania.

472 Under Article 19 of Judicial Mediation Rules.

473 Under Article 28.4 of Judicial Mediation Rules.

474 Under Article 14 of Judicial Mediation Rules.

475 It is considered that mediator should terminate mediation at any time in the process if it appears obvious that the parties are engaging in mediation for an improper purpose (an improper purpose, for example, could include the will to intimidate the opposing party, search of media/public relations goals only, intention to obtain free discovery, when doing it all without the intention of settling). Winkler, W. K., p. 242.

parties, and it is indispensable in judicial mediation.⁴⁷⁶ The right to terminate judicial mediation on specific grounds is also attributed to mediator by the European Code of Conduct for Mediators – a mandatory legal act for mediators in judicial mediation in Lithuania, as well. This mediator's right is set in the Lithuanian legal system as well: the right of mediator to terminate judicial mediation is *expressis verbis* embodied by legal regulation, which *inter alia* determines the grounds for the adoption of such decision.

A court mediator has a right to terminate judicial mediation on such basis:

- a) if the continuation of judicial mediation in the opinion of mediator is unlikely to result in a settlement, i.e. if he (she) sees that amicable resolution of the dispute in question could not be possible;⁴⁷⁷
- b) if the settlement in the opinion of mediator would be unenforceable or illegal. It is obvious that if settlement agreement was unenforceable or not in compliance with legal provisions, it could not be submitted to court for approval or eventually would not be approved if submitted.

It should be noted in this context that the former wording of Judicial Mediation Rules also embodied the possibility for a court mediator to terminate judicial mediation if it occurs that one of the parties to a dispute requested to refer dispute to judicial mediation or uses this procedure not in good faith, or expresses unfair requests in the course of judicial mediation.⁴⁷⁸ Having in mind the aim of judicial mediation, as well as the need to maintain amicable relations between parties, if possible, the existence of possibility to terminate judicial mediation if unfair behavior of the party to a dispute during judicial mediation occurs, should be considered as indispensable for proper implementation of this ADR procedure. Although such right of a court mediator may be considered as being component of his (her) right to terminate judicial mediation if the settlement would be unenforceable, the legal regulation does not set *expressis verbis* the right to terminate judicial mediation on the said basis related to unfair behavior of the parties; such provision should be seen as indispensable in purpose of legal clarity.⁴⁷⁹ Therefore, in the opinion of the author of this dissertation, this ground should be re-established in the new Judicial Mediation Rules.

Although other rights of a court mediator may also be distinguished, the identified ones, though not exhaustively legally regulated, are essentially the most important for proper execution of the role of court mediator; hence – for reaching the aim of judicial mediation as well. While more rigorous legal regulation of the rights of a court mediator could become not an incentive, but even an obstacle to application of judicial mediation. Nonetheless, as judicial mediation in the Lithuanian legal system is regulated to consider-

476 The European Code of Conduct for Mediators also embodies the right of mediator to terminate the mediation under certain conditions (Article 3.2) and attributes it to the safeguards of the fairness of the process.

477 Under Article 25.3 of Judicial Mediation Rules.

478 Under Article 22 of the former wording of Judicial Mediation Rules.

479 It should be noted in this context that one of the explicitly determined principles of judicial mediation in the Lithuanian legal system is principle of mutual respect and tolerance (Article 7.3 of Judicial Mediation Rules); hence the insertion of the right to terminate judicial mediation basically due to the violation of the said principle would contribute not only to clarity, but to the consistency of legal regulation as well.

able extent, the list of the rights of a court mediator (the most general ones), in the opinion of the author of this dissertation, should still be established in Judicial Mediation Rules. Otherwise, the existing risk of uncertainty when it comes to regulatory requirements for the process of judicial mediation would remain.

Thus it may be concluded, that applicable legal regulation of judicial mediation in Lithuania essentially provides (though it is evident only after the systematic analysis of applicable legal provisions) mediator with the rights inherent in his (her) role in judicial mediation, i.e. such rights which enable him (her) assisting the parties to the dispute in reaching amicable solution of their dispute. The identified powers of mediator in this respect affirm the status and the role thereof as of one of the main participants of this ADR procedure in the Lithuanian legal system.

2.2.2.2. Duties Of Mediator

Due to the fact that parties to the dispute have a prerogative not only to participate in framing of particular procedure of judicial mediation, but, essentially, even to take final decision when it comes to shaping thereof, the rights of mediator not only depend on the aim of this procedure and his (her) role therein, but also are, in a sense, conditional – their content and implementation depend on respective consent of the parties to a dispute. The same *mutatis mutandis* applies in respect of the duties of a court mediator: his (her) duties and the content thereof directly depend on the aim of the procedure, as well as the role of a court mediator therein, i.e. all duties of mediator are intended to create preconditions for him (her) to assist parties to the dispute in reaching amicable resolution of their dispute; the content and implementation of the duties also are linked, in a sense, to the rights and duties of the parties to a dispute. However, as judicial mediation is regulated in a more thorough manner (as compared to legal regulation of extrajudicial mediation) in the Lithuanian legal system, the duties of a court mediator are also regulated more comprehensively and rigorously. Nevertheless, the content thereof (of course within the limits set in legislation) still may slightly vary in the course of particular process of judicial mediation. In addition, some of the duties are analogical to, hence – directly linked, to the general principles of judicial mediation; they are also interrelated in the same way as the rights of a court mediator, i.e. some of them can be distinguished from the others with difficulty.

Although the duties of mediator are regulated in a way more rigorously, applicable legal provisions do not embody the exhaustive list thereof. The general rights of a court mediator in the Lithuanian legal system that may be derived from applicable legal provisions are presented below.

- *The duty to act in accordance with the European Code of Conduct for Mediators.*⁴⁸⁰ This duty results from the fact that European Code of Conduct for Mediators is one of the legal acts that regulate the performance of judicial mediation;⁴⁸¹ whereas

480 Although the requirement to act in accordance with legal provisions would not generally be distinguished here as a duty, the fact that this code is *per se* of recommendatory nature, presupposes the identification of this individual duty of a court mediator.

481 According Article 2 of Judicial Mediation Rules. It should be noted in this context that former wording of Judicial Mediation Rules actually directly required mediators to act in accordance with the said code. However, in the opinion of the author of this dissertation, such modifications of legal regulation

the need to distinguish the latter results from the fact that this act is, for the most part, not obligatory. Directive, as mentioned, requires from the Member State that mediators were only made aware of the existence of this code;⁴⁸² hence Lithuanian legislator has taken this requirement during the implementation of judicial mediation into legal system one step further and has determined the obligation of a court mediators to act in accordance with the said code. Therefore, every mediator before starting to mediate must become aware of the provisions of the European Code of Conduct for Mediators.⁴⁸³ The binding character of this obligation also has influence on the content of other duties (as well as, actually, on his (her) rights) of a court mediator: the latter must be implemented considering the requirements set by the European Code of Conduct for Mediators.

- *The duty to ensure the effective, expeditious and fair process and the equality of the parties in judicial mediation.*⁴⁸⁴ This duty (each of its integral parts) is at the core of the role of mediator as an assistant of the parties in judicial mediation. It is also directly related to such general principles of procedure of judicial mediation as fairness, equality of the parties, effectiveness. Mediator, as a front-and-center figure in judicial mediation, is obliged to guarantee the compliance with the said principles in the course of particular procedure of judicial mediation. According to the European Code of Conduct for Mediators mediator, hence, must conduct the proceedings in an appropriate manner, taking into account the circumstances of the case, including possible imbalances of power and any wishes the parties may express, the rule of law and the need for a prompt settlement of the dispute (Article 3.1); he (she) must ensure that all parties have adequate opportunities to be involved in the process (Article 3.2). Whereas the requirement to take into account the possible imbalances of power determines, presumably, the consequent obligation for mediator not only to explain the course of procedure to the parties together with their rights and duties, but also requires mediator to pay more attention to unrepresented parties willing to avoid the possible imbalances of the power.⁴⁸⁵ As the duty (duties) of mediator to ensure the effective, expeditious and fair process and the equality of the parties is at the very essence of judicial mediation, it directly relates to all other his (her) duties and determines their substance as well.
- *The duty to perform activity in a qualified manner.* Although this duty derives from the very essence of judicial mediation, as well as from the role of a court mediator, it is still *expressis verbis* embodied, though only in the form of one of the principles

should not be considered as the ones that reflect changing extent of recognition of the power to the said code.

482 According Recital 17 of Directive.

483 It was already mentioned, that, in the opinion of the author of this dissertation, the issues related to the application of the European Code of Conduct for Mediators should become an integral part of the curriculum when training persons willing to become mediators in judicial mediation in Lithuania.

484 Article 7 of Judicial Mediation Rules establishes that the procedure of judicial mediation must ensure the effectiveness, expedition, fairness of the process and the equality of the parties.

485 This is one of the reasons why, in the opinion of the author of this dissertation, the requirement for the parties to have representatives, as well as the state commitment to provide state-guaranteed legal aid should be expressly embodied by applicable legal provisions.

of judicial mediation, by applicable legal provisions.⁴⁸⁶ This duty implies, in the opinion of the author of this dissertation, not only the requirement to act in a certain way in the course of particular judicial mediation, but to continuously maintain and improve his (her) qualification, i.e. presupposes imperative of continuous education of court mediators. This duty, hence, is directly related to the duty to ensure the effective, expeditious and fair process and the equality of the parties in judicial mediation: a court mediator must be qualified enough to perform judicial mediation in accordance with the corresponding principles. This duty determines other respective requirements for a court mediator (such requirements are detailed by applicable legal provisions): to perform judicial mediation in such way that it would be terminated until the time limit set by the judge,⁴⁸⁷ i.e. in an expeditious manner; to sort out the interests of the parties to a dispute;⁴⁸⁸ to terminate judicial mediation if judicial mediation, in the opinion of a court mediator, could not be terminated by concluding the settlement agreement or the settlement would be unenforceable or illegal, etc.⁴⁸⁹ Such duty is inherent in the essence of ADR procedure under consideration; hence it must be determined (and accordingly – implementation of respective requirements for qualification of court mediators, as well as continuing education of the latter) by applicable legal provisions.

- *The duty to maintain impartiality and neutrality.* This duty is related to the requirement of neutrality⁴⁹⁰ of the third person who assists parties to the dispute in judicial mediation, i.e. to one of the most important aspects relevant to the role of mediator. Hence mediator must be a truly neutral person having no association with either of the parties, nor any interest in the outcome,⁴⁹¹ he (she) must treat the parties to a dispute equally, guarantee each of them opportunity to be heard. According to applicable legal provisions the existence of the circumstances that raise doubts as to the impartiality of mediator is the condition for the recusal of particular mediator.⁴⁹² Thus, impartiality and neutrality of mediator – participant of judicial medi-

486 According to Article 7.6 of Judicial Mediation Rules the principle of qualified activity of a court mediator is one of the main principles of this ADR procedure.

487 Under Article 22 of Judicial Mediation Rules.

488 Under Article 19 of Judicial Mediation Rules.

489 Under Article 25.3 of Judicial Mediation Rules. It should be noted that such actions of mediator may be performed both – within the range of relevant right or respective duty thereof. In other words, in some instances mediator would have the right, in others – obligation to terminate judicial mediation on the mentioned grounds.

490 It should be noted, however, that impartiality reflects only one instance of neutrality. Neutrality can cover various aspects: for example, that mediator should not know parties or have any prior association to them; the mediator should not use his (her) substantive expertise to influence the decision-making; the mediator should act even-handedly, fairly and without bias towards the parties; etc. Some legal authors make distinction between neutrality in the sense of disinterestedness and neutrality in the sense of fairness; hence the former may be referred to as neutrality and the latter as impartiality. Boule, L., Nescic, M., p. 17–19.

491 Goodman, A., Hammerton, A., p. xviii.

492 According to Article 13 of Judicial Mediation Rules a court mediator must recuse himself (herself) from conduction of judicial mediation if conditions for recusal set therein exist; it envisages *inter alia* such circumstances that would raise doubts as to the impartiality of mediator. In addition Paragraph

ation whose role is a key to success thereof – is of crucial importance in this ADR procedure; it is recognised by the applicable legal provisions in the Lithuanian legal system as well.

- *The duty to recuse oneself if the conditions for recusal exist.*⁴⁹³ This duty derives from mediator's duty to maintain impartiality and neutrality and it is, in a sense, at the same time its integral part and a mean for guaranteeing the implementation thereof. Hence, this duty is essential for application of judicial mediation, as well as for guaranteeing the implementation of mediator's duty to maintain impartiality and neutrality throughout this ADR procedure. Interestingly, until recently the particular grounds for recusal from conducting judicial mediation were embodied in the Code of Civil Procedure, i.e. the same grounds were applied as the ones applicable for recusal of a judge,⁴⁹⁴ thus, mediator in judicial mediation in this respect was, in a sense, assimilated to the judge in civil proceedings. Although the new wording of Judicial Mediation Rules enshrines the individual grounds for recusal of mediator, they are essentially identical to the ones of recusal of a judge. In other words, such situation only reaffirms the close relation between traditional adjudication (the court proceedings) and judicial mediation (ADR procedure) in the Lithuanian legal system. These grounds in general include such circumstances as any kind of prior or current relation to the parties to a dispute, any former participation in the case in question, interest (of his (her) or his (her) spouse (cohabitant), one of the close relatives) in the outcome of the dispute. However, there is no exhaustive list of conditions under which mediator has to recuse himself (herself) (or he (she) may be recused) from conducting judicial mediation, as recusal will also be referred to if any other circumstances that raise doubts as to the impartiality of mediator would arise.⁴⁹⁵ Thus, impartiality (together with neutrality) of mediator (mediator willing to perform particular judicial mediation) is considered to be one of the substantial elements of judicial mediation; whereas applicable legal provisions provide with the means necessary to guarantee that mediator carries out his duty to maintain impartiality and neutrality throughout the process of judicial mediation.

4 of Article 4 of Mediation Law requires mediator to act impartially and to continue mediation only after he (she) informs the parties to a dispute about the circumstances that may raise doubts as to his (her) impartiality. In the opinion of the author of this dissertation, this duty is also applicable in the stage of nomination of particular mediator.

493 This duty is embodied, as mentioned, in Article 13 of Judicial Mediation Rules.

494 It should be noted that the main aim of the institute of recusal in civil procedure is guaranteeing that only objective and impartial judge would hear the case; hence the person willing to recuse the judge must point out particular circumstances and present with evidence thereof which would confirm that there is sufficient ground to assume that the case may be examined in a biased manner. Ruling of the Supreme Court of Lithuania of 3 May 2012 adopted in civil case *V. G. v. AB "VST"*, case No. 3K-3-234/2012; ruling of the Supreme Court of Lithuania of 4 July 2014 adopted in civil case *G. K., R. K. K. v. A. P.*, case No. 3K-3-365/2014.

495 In the opinion of the author of this dissertation, these circumstances should definitely entail the cases when judge hearing the case became a court mediator in the same case; hence, suchlike situation, though applicable legal provisions render it possible, could not be conceivable at all.

- *The duty to maintain confidentiality.*⁴⁹⁶ The principle of confidentiality is one of the main principles of mediation in general, whereas in respect of judicial mediation it has gained even bigger importance. This principle should, actually, be especially important in the Lithuanian legal system where judge and even the one which is hearing the particular case may act as mediator in judicial mediation.⁴⁹⁷ Such duty involves not only the duty of mediator not to reveal certain information determined by legal provisions to the third persons, but also requires mediator to refrain from revealing information received during private sessions with separately one of the parties to another party. The breach of this duty, generally, should inflict responsibility of mediator, as it may also cast doubts on the process of particular judicial mediation and may even baffle the trust in this ADR procedure. This duty is not only determined by applicable legal provisions, but the importance thereof in the Lithuanian legal system is witnessed by the fact that the infringement of this duty is the only ground *expressis verbis* set by law for the liability of mediator:⁴⁹⁸ no other provisions directly regulate liability of person acting as a court mediator.

The distinguished duties, certainly, are broad-brush. They include many other specific duties that are requisite for guaranteeing the proper performance of judicial mediation, including duty to cooperate with the parties to a dispute, duty to provide the parties with all information necessary for engaging into judicial mediation, etc. The identified the most general duties are inherent in the role of a court mediator and are indispensable for the fulfillment thereof, hence – for reaching the aim of judicial mediation as well. Due to the importance of the role of a court mediator, as well as to the fact that judicial mediation is regulated to considerable extent in the Lithuanian legal system, his (her) duties, though, should be regulated with more clarity, i.e. the duties and their content should be clear without having recourse to several different legal acts. Therefore, the list of the duties of mediator, (although only the most general ones) should be embodied by applicable legal regulation. Nonetheless, applicable provisions establish the guarantees necessary for the execution of the role of a court mediator, i.e. “assistant” of the parties to a dispute in reaching amicable settlement.

In general it can be concluded, though, that mediator – the “assistant” of the parties to a dispute in judicial mediation – is provided with the rights and related duties necessary in order to be able to exercise his (her) role and to help the parties to a dispute in achieving the main goal of judicial mediation – amicable resolution of the dispute. Although legal provisions are not in all instances clear in respect of the rights and duties of mediator, they still should be considered as in general guaranteeing the necessary legal status for mediator, thus – enabling in this respect proper application of judicial mediation in Lithuania.

496 The content of the principle of confidentiality and the relative duties of the participants of judicial mediation are also analyzed separately in other subsections of this dissertation.

497 In the opinion of the author of this dissertation, there are considerable doubts as to whether in the case when judge hearing the case may act as a court mediator in the same case the principle of confidentiality could be implemented at least to a less significant extent. These issues related to the implementation of the principle of confidentiality are analyzed in other subsections of this dissertation.

498 According to Paragraph 3 of Article 7 of Mediation Law 3, in the event of nonfeasance or misfeasance of the obligations in respect of confidentiality detailed therein, mediators and administrators of conciliatory mediation services will be held liable under the law.

INTERMEDIATE CONCLUSIONS

To summarize, the main aspects related to the role of a court mediator in the context of judicial mediation in civil disputes in Lithuania should be noted:

- The development of judicial mediation after its introduction into the Lithuanian legal system is the most evident in respect of who may perform judicial mediation: although only judges and assistants to the judges could become a court mediator at the beginning of the implementation of judicial mediation, after the subsequent amendments of applicable legal regulation all other (only appropriately qualified) persons may also act as mediators in judicial mediation. However, only special subjects – persons who have acquired the status of a court mediator and, thereby, are enrolled in a special list – can assist the parties to a dispute in in this ADR procedure, i.e. can act as a court mediator.
- A court mediator may be defined as a special subject, who possesses appropriate qualification, has acquired the status of a court mediator thereby is enrolled in the List of Court Mediators, and whose aim is to assist the parties to a dispute (parties in civil proceedings) in reaching an amicable agreement of their dispute.
- The person, willing to become a court mediator, must meet the requirements set by law and undergo the special procedure for acquiring the status of a court mediator. Although the procedure of acquisition of status of a court mediator is more or less defined, as well as consistent with the nature of judicial mediation, the requirements for persons willing to become a court mediator are less precise: despite the fact that these requirements are currently regulated in a more detailed manner as compared to the former legal regulation, not all of them are specified. Hence a specially-formed body that is entitled to grant the status of a court mediator is essentially left to decide upon the relevance of qualification of particular person willing to become the latter. Since the requirements, as well as procedure for acquiring the status of a court mediator, are in some instances vague and misleading, relevant legal regulation could not be considered as being in conformity with the requirements of legal clarity, as well as utterly creating the necessary preconditions for guaranteeing that only the properly qualified persons become mediators in judicial mediation, therefore, should face further modifications.
- Mediator is provided with the rights and related duties necessary in order to be able to exercise his role and to help to achieve the main goal of judicial mediation – amicable resolution of the dispute. Although some mediator's rights, which are necessary for execution of his (her) role of an assistant to the parties, are not directly embodied in applicable legal provisions they may be deduced from the overall legal regulation. Thus, legal regulation in general guarantees necessary legal status for mediator and, accordingly, enables in this respect proper application of judicial mediation in Lithuania.

3. PROCEDURAL ASPECTS OF JUDICIAL MEDIATION

Although judicial mediation is implemented in different forms in various countries, the main features and principles of this ADR procedure are generally the same in all legal systems: including its alternative (to traditional litigation) character, voluntary, consensual and private nature thereof, the fact that it is always conducted by a third person and it is a flexible procedure, as well as the autonomy of the parties and the principle of their self-determination, the principle of confidentiality, the principles of neutrality and impartiality of mediator. As the content of these principles, as well as their procedural guarantees may differ in different legal systems, it is indispensable to identify the latter in particular legal system.

The general principles of judicial mediation are reflected through the analysis of the legal status of participants of judicial mediation, i.e. rights and duties of the parties to a dispute and mediator. However, judicial mediation is more-or-less thoroughly legally regulated because of its relation to court procedure. Therefore, due to the special relation of judicial mediation to the court procedure, the procedural aspects of judicial mediation should also be analyzed in order to identify whether the main principles of the latter are implemented.

Although the flexible character of the ADR procedure under consideration is still maintained by allowing participants of this ADR procedure to frame certain aspects of it,⁴⁹⁹ the parties to a dispute in general have fewer rights when shaping the procedure of judicial mediation, i.e. legal provisions are more stringent (as compared to legal regulation of extrajudicial mediation) when it comes to the determination of the whole process of judicial mediation. Consequently, *procedural aspects of judicial mediation must be analyzed in order to identify inter alia whether the main principles of judicial mediation are maintained not only by providing necessary rights and imposing duties on the participants of this procedure, but also by implementing certain procedural guarantees enabling application of the mentioned principles throughout the whole process of judicial mediation.*

Due to the particularities of implementation of judicial mediation into the Lithuanian legal system, this ADR procedure has individual outstanding features therein, *inter alia* its application, including the rules governing the whole process, is regulated rather rigorously in Lithuania (even compared to other civil law countries). Therefore, the analysis whether the main principles of judicial mediation are implemented therein should be performed jointly with the description of characteristics of *relevant aspects of procedure of judicial mediation*, i.e. including the *evaluation whether the latter generally satisfy the main principles of judicial mediation*. As the aim of judicial mediation should be reflected by the respective legal framework (i.e. *procedural aspects of judicial mediation should be regulated in such way that the possibility of amicable resolution of the dispute would become possible*), the relevant evaluation of the procedural aspects of judicial mediation should also be per-

499 There are opinions that the less formal process is not always an advantage, as there is always a risk for the resolution of the dispute in such process to end up in a dead-end; whereas proceedings in court are more measured and regulated, thus such dead-ends are less likely. *Report Ginčų sprendimas: arbitražas* [interactive], [accessed 2014-08-07]. <http://www.infolex.lt/portal/papildomiok/Arbitrazas_2007_sausis_fina2l.pdf>.

formed. Obviously, the said evaluation could only be performed, as well as peculiarities of the process of judicial mediation could be presented only together with the analysis of applicable legal provisions and relevant examples of its application in practice in the Lithuanian legal system.

Pursuant the aim to identify characteristics of this procedure⁵⁰⁰ in the Lithuanian legal system, *judicial mediation procedure within the framework of conducted research is divided into three stages: initial stage, process of judicial mediation and conclusion (termination) of judicial mediation.*⁵⁰¹ Such division, though conditional, is necessary for the comprehensive analysis of the procedural aspects of judicial mediation, i.e. for evaluation if the main principles of judicial mediation are implemented throughout the whole procedure thereof – in all stages of this ADR procedure; hence, *relevant peculiarities of the procedural aspects of judicial mediation must be analyzed separately in respect of its every stage.* Additionally the relevant procedural aspects concerning one of the main principles of judicial mediation – principle of confidentiality have to be distinguished, due to the particular importance of the said principle, for a proper display of the characteristics of the procedure of judicial mediation in the Lithuanian legal system.

Hence this chapter of dissertation is divided into four sections: the said peculiarities related to the initial stage of judicial mediation, i.e. its initiation and nomination of mediator, are analyzed in the first one, the second section deals with the analysis of outstanding aspects of process of judicial mediation, conclusion (termination) of judicial mediation is analyzed in the third section, the fourth section is dedicated to depict the main aspects relative to the principle of confidentiality in judicial mediation.

3.1. Initial stage Of Judicial Mediation

The initial stage of judicial mediation is generally not singled out as a specific stage of judicial mediation. However, in the purposes of the conducted research it is necessary to distinguish such stage – phase of the procedure in question which takes place prior to the commencement of the particular process of judicial mediation.

Thus, this section is aimed at analyzing, within the framework of this research, the initial stage of judicial mediation in Lithuania, its characteristics. It is divided into two subsections: the first one deals with the peculiarities of the initiation of judicial mediation and the second subsection is dedicated to the procedural aspects of nomination of particular mediator.

500 The notion “procedure” is applied here to identify the whole manifestation of judicial mediation – from its initiation to termination.

501 Such division is not proposed here as the applicable one in other instances and is applied here only in the purposes of the particular research in question. It should be noted that such division does not purport to be thorough. Other legal authors, for example, identify four stages of the process of mediation: preparation for mediation, introductory stage of mediation, the stage of main negotiations, the termination of mediation. Vėbraitė, V. *Šalių sutaikymas civiliniame procese*, p. 192–201. In addition, as it may derived from the overall legal regulation embodied in the new wording of Judicial Mediation Rules judicial mediation procedure is divided into three stages therein, i. e. initiation of judicial mediation and nomination of a court mediator (I), process (procedure) of judicial mediation (II), ending of judicial mediation (III).

3.1.1. Initiation Of Judicial Mediation

Initiation of judicial mediation is one of the aspects which is basically attributed to the parties to a dispute, i.e. parties may initiate referral of their dispute to judicial mediation while exercising their self-determination. However, this general principle may have some specific aspects in judicial mediation, as well as in particular legal system.

The applicable legal provisions in Lithuania distinguish two groups of subjects who are provided with the right to initiate the referral of particular dispute to judicial mediation – judge hearing the case and party to a dispute.⁵⁰² Hence this right is attributed to those, who are associated with the case: either a person, hearing the case and, accordingly, dealing with the particular dispute, or a person, who is involved directly in the dispute (part or all) that constitutes the subject matter of litigation.

It should be noted in this context that former legal regulation *expressis verbis* provided the right to initiate judicial mediation not only to the parties to a dispute, but to any person who participates in the case, i.e. any other person who has certain procedural rights and participate in litigation.⁵⁰³ The need to regulate the procedural aspects of judicial mediation in such way that the possibility of amicable resolution of the dispute would become possible, in the opinion of the author of this dissertation, requires to construe the said applicable provisions in such way that they would be understood as allowing any person who participates in the case to initiate the referral of particular dispute to judicial mediation, i.e. they should not be understood as *strictu sensu* providing the right of initiation of judicial mediation solely to the parties to a dispute in civil proceedings. This conclusion is *inter alia* based on the fact that party to a dispute in judicial mediation is understood as any person who has direct interest in the outcome of particular dispute, hence – not only claimant and defendant within the scope of civil procedure.

However, the right to initiate judicial mediation is still an exclusive right of the parties to a dispute, as the initiation of judicial mediation actually directly depends on the will of the parties. According to applicable legal provisions the dispute may be referred to judicial mediation only when the judge hearing the civil case is provided with either written agreement (obviously when the referral of the dispute to judicial mediation is initiated by the judge or other persons than parties to the dispute) or written request of the both parties to a dispute to refer their dispute to judicial mediation.⁵⁰⁴ In other words, *initiation of judicial*

502 Under Article 6 of Judicial Mediation Rules. It should be added, that although New Judicial Mediation Rules additionally distinguish panel of judges as the subject that may initiate recourse to judicial mediation, it is essentially the same subject as the judge hearing the case, i. e. the subject who is at the moment of initiation of judicial mediation hearing the particular case.

503 Such person may also be, for example, third person interested in the outcome of the case who participates in litigation with independent claims.

504 According to Article 10 of Judicial Mediation Rules the opinion of the parties to a dispute is assessed when nominating mediator; it was already mentioned, that their opinion is not compulsory for the subjects who may nominate particular mediator. It should be noted that parties have to fill in special form if they want to refer the dispute to judicial mediation – Request (Agreement) to Refer Dispute to Judicial Mediation; they may *inter alia* indicate therein the particular mediator from the List of Court Mediators who they want to be nominated to mediate their case. Request (Agreement) to Refer Dispute to Judicial Mediation [interactive], [accessed 2014-07-30]. <<http://www.teismai.lt/lt/mediacija/visuomenei/>>.

mediation is not possible without the expression of the will of the parties provided in written form. Thus, the parties remain the main decision-makers when it comes to the framing of particular procedure in this respect, i.e. such legal regulation reflects the principles of self-determination and autonomy of the parties.

It is not clear, though, what real effect the refusal of the parties or one party to refer dispute to judicial mediation upon the proposal of the judge may have on the further course of the litigation;⁵⁰⁵ hence, whether the proposal by judge hearing the case to refer particular dispute (part of it) to judicial mediation comprehends any kind of imperative element.⁵⁰⁶ Interestingly, it is every now and then alleged, that even in the situation when court merely inquires about the possibility of mediation, it becomes non-voluntary if the parties, or their lawyers, feel pressured into responding affirmatively to such request.⁵⁰⁷ However, the model of judicial mediation does not yet presuppose the implementation of non-voluntary element in respect of the initiation of judicial mediation – judicial mediation in this respect is entirely voluntary and directly dependent on the will of the parties to a dispute.

The applicable legal provisions embody additional guarantees that the said autonomy of the parties would be executed in the most beneficial way: the dispute may be referred to judicial mediation *only after the judge explains the essence of judicial mediation to the parties to a dispute*.⁵⁰⁸ Thus, if after the mentioned information was provided, parties decided not to have recourse to this ADR procedure, judicial mediation would not be initiated. In other words, the parties are provided with the right to decline the proposal to refer dispute to judicial mediation. Ideally, the implementation of such right should not have an effect on further litigation.⁵⁰⁹ One of the additional guarantees for the proper application of such right would be an appropriate training of the judges who may propose to refer the dispute to judicial mediation and who provide information relevant to this ADR procedure to the parties to a dispute.⁵¹⁰

Judicial Mediation Rules also set certain restrictions in respect of this right of the parties to a dispute: the dispute *may not be referred* to judicial mediation *without the consent of a court mediator*, i.e. although the parties to a dispute are the main decision makers in judicial mediation, the role of a court mediator is, as mentioned, of crucial importance in this ADR procedure. Hence particular mediator may not perform judicial mediation in

505 One may argue that such refusal could lead to the changes in behavior of the judge hearing the case, i.e. raise doubts as to possibility to maintain impartial behavior of the judge who suggested the recourse to judicial mediation.

506 Certainly, not as any kind of sanctions, but more of a “moral imperative” casted on the parties to a dispute by the judge hearing the case.

507 Boulle, L., Nestic, M., p. 15.

508 It is not clear, though, what kind of information should be provided to the parties in this context. In the opinion of the author of this dissertation, it apparently would have to entail the general information on judicial mediation: notion, its main principles, effect on the ongoing litigation, etc., that would enable parties to understand the main characteristics of this procedure and to distinguish it from adjudication process, as well as to decide on whether their dispute should become a subject matter of the said procedure.

509 There is no available official data on whether the refusal to have recourse to judicial mediation by one (or more) party to a dispute usually results in any negative outcome for such party (parties).

510 The question of training of the judges hearing the case is analyzed in Part 4 of this dissertation.

respect of particular dispute contrary to his (her) will. Otherwise, if a court mediator was not provided with the right to decide whether to conduct particular procedure, the doubts as to the possibility of reaching the aim of judicial mediation would arise: a court mediator's role as assistant of the parties to a dispute is essential for reaching amicable resolution of their dispute.

Hence, applicable legal provisions combine the mentioned two aspects together – the need of the will of the parties to a dispute to refer particular dispute to judicial mediation, as well as of consent of a court mediator to perform particular procedure. Although particular dispute could still be referred to judicial mediation even if particular mediator has refused to perform judicial mediation (it could still be performed by other court mediator), initiation of judicial mediation is still related to the consent of a court mediator.

Parties to the dispute are also provided with additional rights in respect of initiation of judicial mediation: they have not only the right either to request or to agree to refer dispute to judicial mediation, but they also may express their preference in respect of the particular mediator, as well as to the date and time the judicial mediation should be performed.⁵¹¹ The possible preferences of the parties to a dispute in this respect, though, do not oblige judge or a court mediator.⁵¹² Nonetheless, it would not be possible to refer dispute to judicial mediation if parties to the dispute would express their opposition to the nomination of particular mediator.⁵¹³

The recourse of particular dispute to judicial mediation *may be basically made at any stage of civil proceedings*: applicable legal provisions do not set the requirement as to when the request or the agreement to refer dispute to judicial mediation should be expressed, i.e. the expression of this request is not limited in respect of particular phase of court proceedings.⁵¹⁴ Hence, although legal provisions related to application of judicial mediation are embodied in the part of the Code of Civil Procedure that regulates the preparation for hearing civil cases in court,⁵¹⁵ this could not be interpreted as limiting (and, actually, should not limit) the possibility to express the request or the agreement to refer dispute to judicial mediation only to the stage of preparation for the hearing of civil case. Otherwise,

511 It should be noted, that although Judicial Mediation Rules do not expressly set the right of the parties to a dispute to identify the preferable date and time of judicial mediation, the course of judicial mediation, hence the said elements as well, may not be determined without the consent of the parties. In addition, the parties to a dispute are requested to identify the particular mediator from the List of Court Mediators and to mark the preferable date and time in the Request (Agreement) to Refer Dispute to Judicial Mediation.

512 However, it would definitely not contravene the general principles of judicial mediation if a court mediator chosen by the parties was nominated to mediate that particular dispute. This is especially true in the current situation when 102 out of 109 mediators are lawyers; hence the question that particular mediator is not appropriate to mediate the particular dispute due to the lack of legal knowledge, presumably, could not be raised.

513 In the opinion of the author of this dissertation judicial mediation, when the parties to a dispute do not agree to be assisted in reaching amicable settlement of their dispute by particular person, should not even be initiated.

514 This aspect is not an object of regulation neither in Judicial Mediation Rules, nor in the Code of Civil Procedure.

515 This legal regulation is embodied in the first section of the XIV Chapter (it embodies procedural provisions in respect of the court hearing) named "Preparation for Hearing of Civil Cases".

the aim of judicial mediation would not be reached and its application would be unreasonably restricted. This finding is also substantiated by the fact that the settlement agreements may be essentially concluded throughout the civil proceedings in court.⁵¹⁶ Thus, the request or the agreement of the parties to the dispute to refer their dispute to judicial mediation may be expressed at any stage of hearing of the case;⁵¹⁷ as well as at hearing of the case at any court instance.⁵¹⁸

The decision to refer dispute to judicial mediation is made in a form of the ruling of the judge hearing the case; the provisions in respect of the adjournment of case and the exact date and time of the next hearing must be included therein.⁵¹⁹ Such legal regulation that restricts the length of judicial mediation at its initiation, hence without the further evaluation of particular situation by a court mediator, in the opinion of the author of this dissertation, could raise doubts as limiting too stringently the process of judicial mediation, and hence – as to its suitability in our legal system. Therefore, the possibility of amending applicable legal provisions by eliminating the mentioned requirement to set the exact date and time of the next hearing should be considered. Otherwise, the judge hearing the case, as well as mediator mediating that case could feel pressured either respectively not to refer case to judicial mediation, or to perform mediation in a manner that would not contribute to the peaceful settlement of the dispute.

The right of the judge hearing the case not to adopt decision to refer particular dispute to judicial mediation (following the respective request of the parties to a dispute), though not set *expressis verbis*, may be derived from the very essence of judicial mediation. As not all disputes may be referred to judicial mediation,⁵²⁰ as well as not all disputes, although apt for conclusion of settlement agreement in the course of judicial mediation, still could be dealt with in judicial mediation (there might be certain disputes that are not suitable for judicial mediation due to their subject matter), judge should have possibility to exercise his (her) right to refuse to refer dispute to judicial mediation if this dispute could not be dealt with in the course of such procedure.⁵²¹ This right of a judge could not be seen as unreasonably limiting self-determination of the parties to a dispute, as it is exercised in the course of civil proceedings and, accordingly, distinguished in the best interest of the

516 According to Article 140 of the Code of Civil Procedure the parties may terminate case by concluding the settlement agreement at any stage of proceedings.

517 However, for example, in France the parties to a dispute are encouraged to better have recourse to judicial mediation at early stages of litigation. Nougéin, H-J., *et al.*, p. 160.

518 It is agreed, though, that parties are generally more often advised into judicial mediation when the case is heard in the court of the first instance and especially at the stage of preparation for court hearing. However it may also be performed when the decision in particular case is already adopted and the dispute is being dealt with in the appellate instance. Věbraité, V. *Šalių sutaikymas civiliniame procese*, p. 179.

519 Under Article 10 of Judicial Mediation Rules.

520 In addition, Article 9 of Judicial Mediation Rules states that only dispute that the parties could, based on the law, conclude settlement agreement whereon may be referred to judicial mediation.

521 Such right of a judge is related to his (her) active role in respect of mediation; thus it is believed that judge has to have a possibility to refuse the recourse to judicial mediation if, for example, this could result in the imbalances of the powers of the parties to a dispute. Nougéin, H-J., *et al.*, p. 162.

parties – for creating preconditions to choose the best-fitting procedure to deal with the dispute.⁵²²

In conclusion, applicable legal provisions attribute the right to initiate judicial mediation at any stage of court proceedings to the judge hearing the particular case, as well as to other participants in litigation. However, only the parties to a dispute may, by exercising their self-determination and autonomy, finally decide whether they want their dispute to be dealt with in judicial mediation; they may also express their preferences as to who should act as mediator and when judicial mediation should be performed. Nevertheless, the said rights of the parties to a dispute are not absolute and depend of various aspects, including the existence of the consent of particular person to act as mediator in dealing with the particular dispute in the course of judicial mediation; the judge hearing the case may also refuse to refer dispute to judicial mediation.

3.1.2. Nomination Of Mediator

As mediator is a core figure in judicial mediation – assistant that helps parties to the dispute to amicably settle their dispute, the nomination thereof constitutes an important aspect of the initial stage of judicial mediation. Although the parties to a dispute are generally provided with the right to choose particular mediators in extrajudicial mediation, the nomination of mediator in judicial mediation differs immensely in this respect as this aspect is essentially regulated in a much more comprehensive manner.

There are two conditions that must be observed when choosing and, accordingly, nominating particular mediator for judicial mediation in particular dispute in the Lithuanian legal system.

I. The mediator must be chosen from the List of Court Mediators.

The particular mediator must be chosen from the special list, as only special subjects possessing appropriate qualification, who are enrolled to the said list, may be nominated and act as a court mediator. Hence, there is no possibility to choose any other, though qualified, person to assist the parties to a dispute in reaching amicable settlement in the scope of judicial mediation. In other words, the referral judicial mediation, when dispute is referred to be mediated by any other private person not included in the special list is not possible.⁵²³

II. There must be no grounds for recusal of particular court mediator.⁵²⁴

Applicable legal provisions embody the grounds for recusal of a court mediator that are, actually, identical to the provisions of the Code of Civil Procedure on recusal of judges, i.e. the grounds for the recusal of mediator are the same as for the recusal of a judge; such legal regulation reflects the already mentioned characteristic of judicial mediation in the Lithuanian legal system – the interrelation and close bond between court proceedings

522 Therefore, the need for special training for all judges is necessary; this training should entail the main aspects that would allow distinguishing between the dispute suitable for judicial mediation and the one that is better left within the frames of traditional adjudication.

523 The particularity of the Lithuanian legal system is that although private persons may act as mediators in judicial mediation, they must be enrolled to the List of Court Mediators.

524 The existence of this ground is also the basis for mediator to aloof himself from conducting judicial mediation.

and judicial mediation.⁵²⁵ The general rule set out in the Code of Civil Procedure,⁵²⁶ which is applicable in this respect, is that the existence of the circumstances that raise doubts as to the impartiality of a court mediator is the condition for the recusal of particular mediator. In other words, any circumstances that may cast at least a slight doubt as to the impartiality of particular mediator are the ground for his (her) recusal. Hence, applicable legal provisions provide guarantees for the implementation of one of the main principles of judicial mediation – principles of neutrality and impartiality of a court mediator.

Particular grounds for recusal may be classified into three groups:

- circumstances reflecting certain relation of mediator to the dispute in question, i.e. the interest (direct or indirect) in the outcome of the dispute⁵²⁷ or the possibility of the effect of the outcome of the dispute onto his (her) rights or duties;
- circumstances reflecting certain relation of mediator to the participants of the dispute (the parties to a dispute or other participants), i.e. kinship, relationship by marriage, spousal relationship, custody and guardianship relationship;
- circumstances reflecting prior participation in the dispute⁵²⁸ of the person nominated as mediator, i.e. as representative of the participants or as a judge, witness, expert, public prosecutor, representative of state or municipal institution.

These grounds generally may be related to the application of objective and subjective test as to the impartiality of particular person which is intended to be removed, i.e. verification that enables identifying whether the particular person has prejudice in respect of the dispute (subjective aspect), as well as whether the objective preconditions for incompatibility with the requirement of impartiality exist (objective aspect).⁵²⁹

Hence, *only mediator enrolled to the List of Court Mediators if no doubts as to his (her) impartiality arise, i.e. in respect of whom no grounds for recusal are identified, may be nominated as mediator in particular procedure of judicial mediation.*

It should be particularly stressed that until recently only the judge who is not hearing the particular case and is enrolled in the List of Court Mediators was considered to be eligible to be nominated as a mediator. Hence, judge hearing the case was considered not to be able to act as mediator in the same case if it was transmitted to judicial mediation. While in some other countries judges were (and still are) given the right to mediate their own cases⁵³⁰ and after the mediation they are not even always required to transmit the case

525 This proves that mediator is required to be impartial to the same extent as a judge, i. e. the impartiality of mediator is seen as crucial for the execution of judicial mediation.

526 Articles 65 and 66 of the Code of Civil Procedure, that are indicated in the provisions of Judicial Mediation Rules related to the recusal of mediator, regulate the grounds for recusal of the judge.

527 It may be attributed not only to mediator but to his (her) spouse and other close relatives as well.

528 Such ground for recusal of a court mediator, presumably, would also involve his (her) prior participation as private mediator in the same dispute.

529 The objective and subjective tests in respect of the identification of impartiality of the judge are determined in the case law of the Supreme Court of Lithuania: for example, ruling of the Supreme Court of Lithuania of 7 November 2007 adopted in civil case *Klaipėdos rajono apylinkės prokuratūra v. draudimo UAB "Baltijos garantas"*, case No. 3K-3-675/2007; ruling of 3 May 2012 adopted in civil case *V. G. v. AB "VST"*, case No. 3K-3-234/2012.

530 For example, in Spain until recently the judge before whom the proceedings have been introduced acted as mediator in that case. De Palo, G., Carmeli, S. *Mediation in Continental Europe: a Meandering Path Toward Efficient Regulation*, p. 343.

for hearing to another judge.⁵³¹ However, recent regulatory changes, namely adoption of the new wording of Judicial Mediation Rules, envisaged the substantial changes in this respect: the judge hearing the case was provided with the right to act as a court mediator in the case he (she) is hearing, whereas in the case if mediation is successful – he (she) is entitled to approve settlement agreement as he (she) may act again as a judge.

The provision of the right for judge hearing the case to act as a court mediator in that case and afterwards – to approve settlement agreement, in the opinion of the author of this dissertation, raises doubts as to his (her) impartiality as mediator, as well as to the *idem* of a judge. Certainly applicable legal provisions eliminate from the curricula of judicial mediation the possible problems if this ADR procedure fails: a court mediator may not act as a judge in the same case after the failure of judicial mediation. Nevertheless, the possibility for the same person to act as a judge and as a mediator in respect of the settlement of the same dispute is inconsistent with the mentioned grounds for recusal of a court mediator (which are the same for the recusal of a judge), as well as, in a sense, not in accordance with the requirements of civil procedure, especially when the same person prepares draft settlement agreement and approves the latter. Therefore, despite the fact that the provision of such right for judge hearing the case, presumably, may contribute to facilitating the process of nomination of particular mediator, it could not be justified in the light of existing legal framework of judicial mediation and may even cast doubts on the credibility of the ADR procedure under consideration. In the opinion of the author of this dissertation, it should be eliminated from the legal framework of judicial mediation.

Although initiation of judicial mediation in the Lithuanian legal system depends to certain extent on the will of the parties to the dispute – without the consent of the latter the dispute may not be referred to judicial mediation – and the parties to a dispute may express their preferences as to particular mediator from the List of Court Mediators, their intention and preferences, as mentioned, do not oblige the subject, that is entitled to adopt the respective decision – judge (panel of judges) hearing the case.

Hence, despite the flexibility and the consensual nature of mediation, the procedure of judicial mediation in general must unroll in accordance with applicable legal provisions, therefore, the self-determination and autonomy of the parties to a dispute in respect of nomination of a court mediator in judicial mediation may only be effectuated with regard to particular powers of judge hearing the case: he (she) is entitled to nominate (accordingly – to refuse to nominate) particular court mediator for performing judicial mediation. However, in spite of such appropriate legal provisions, the provision of the right to judge hearing the case to act as a court mediator in the case he (she) was hearing and, accordingly, to approve settlement agreement in the case if it is concluded in the course of judicial mediation, may cast doubts on the credibility of this ADR, hence – should be eliminated from the Lithuanian legal system.

Nevertheless, the applicable legal provisions regulating the initial stage of judicial mediation (initiation of judicial mediation and nomination of a court mediator) not only in

531 Swapping of the cases with another judge after the failure in mediation is seen as one of the solution to the problems of trial mediation which have arisen in the course of its application in practice in some parts of the United States. Longan, P. E., p. 745.

general implement the main principles of this ADR procedure, but also provide guarantees for the proper application of the latter.

3.2. Process Of Judicial Mediation

Process of judicial mediation, as mentioned, is the second of three conditionally distinguished stages of judicial mediation procedure – the main phase which takes part after the initiation of judicial mediation and continues until the conclusion (termination) of this ADR procedure. Actually namely the process of judicial mediation is a stage of this procedure which is the least legally regulated in our legal system, i.e. *participants of this ADR procedure are provided with the most extensive discretion in framing the course of particular process*. That is to say, the process of judicial mediation is generally left to be determined with respect to the circumstances of each case. Hereby the flexibility of this ADR procedure, as well as, in a sense, implementation of one of the main principles of mediation in general, as well as of judicial mediation in particular – the principle of self-determination of the parties are guaranteed. However, only the analysis of particular legal regulation may reflect the characteristics related to the procedural guarantees of implementation of the said principles.

Generally the course of the process of judicial mediation *may vary dependent on the particularities of the dispute, the will of the parties to the dispute, as well as due to the specificity of the methods and means chosen by particular mediator*. Nevertheless, the applicable legal provisions regulate certain specific aspects of the process of judicial mediation; such aspects may be divided into four main groups.

I. *The general principles that must be respected in the process of judicial mediation.*

The applicable provisions imply general requirements for the procedure of judicial mediation: *effectiveness, promptness, fairness and equality of the parties*.⁵³² The principles that would ensure the achievement of the latter are additionally determined by legal regulation, i.e. *the principle of voluntarism of the parties to a dispute, principle of confidentiality, principle of mutual respect and tolerance, principle of neutrality and impartiality of a court mediator, principle of cooperation, principle of qualified activity of a court mediator, principle of good faith*. These principles are common to judicial mediation in general; they reflect the very essence of this alternative to traditional adjudication and must be implemented throughout the process of judicial mediation. Although it may seem that these principles primarily oblige mediator, parties to the dispute, certainly, must observe (in order to achieve the aim of judicial mediation – amicable settlement of their dispute) the latter as well. In addition, parties are required to cooperate with each other and mediator; hence, they must *inter alia* contribute to the implementation of the mentioned principles in practice. Thereby every aspect of the process of judicial mediation is governed by the mentioned principles. Such *principles*, though, could not be considered to have effect only on the process of judicial mediation; they reflect the very nature of the latter and *must be, actually, respected throughout the whole procedure* – when initiating judicial mediation, during the process of the latter and when terminating this ADR procedure.

532 Under Article 7 of Judicial Mediation Rules.

II. *The specific procedural aspects that may be identified by mediator with approval of the parties to the dispute.*

The process of every particular judicial mediation procedure may vary due to the specific features of particular dispute, including its subject matter, relations between the parties to a dispute, etc. Hence, the procedural aspects of particular judicial mediation are left to be decided to mediator – the person that frames the procedure with regard to the specificities of the issue in question. The provision of such right to mediator is of crucial importance, as he (she) is the best aware of the situation and may frame procedure in the most appropriate manner. This right generally covers the whole process of judicial mediation; hence mediator may, of course with the consent of the parties (if necessary), shape requisite aspects of the process⁵³³ of this ADR procedure.

The applicable provisions, though, additionally indicate certain specific procedural aspects that may be determined by mediator; in other words, a court mediator is provided with the right to shape those procedural aspects which he (she) finds necessary to determine for achievement of the aim of judicial mediation in respect of particular dispute. The examples of such procedural aspects are provided below.

- A court mediator may (with the consent of the parties) decide upon the location of performance of judicial mediation. It should be noted in this context that until recently judicial mediation could only be performed in the premises of the court, i.e. the in-court-mediation was chosen to be implemented into the Lithuanian legal system. The determined place of performance of judicial mediation is an issue that allows determining which type of judicial mediation is implemented in particular legal system.⁵³⁴ Hence, the subsequent modifications of applicable legal provisions that allowed performing judicial mediation in other (than the court premises) places as well, signify the shift of model of judicial mediation implemented in the Lithuanian legal system: from in-court-mediation to so-called court-related mediation in this respect.
- A court mediator is provided with the right to choose particular means apt for settling amicably individual dispute. For example, he (she) may decide whether to use caucusing, i.e. if private meetings with just one of the parties without the participation of other party should be held;⁵³⁵ it should be noted in this context that this aspect is extremely important for the success of mediation, as mediator is considered to be able to help the parties achieve a creative settlement that recognises the interests of each (i.e. attain the principal goal of mediation) through the private caucus sessions with the parties.⁵³⁶ Although it is not expressly indicated, a court mediator may definitely also decide on the number of sessions required for peaceful settlement of the dispute, as well as decide on other procedural aspects requisite for achieving the aim of judicial mediation.

533 This conclusion channels again the need for proper qualification of mediator in judicial mediation.

534 Judicial mediation may be divided into types according to its appearance; for example, into in-court-mediation (takes place in the premises of the court) and court related mediation (procedure that is already pending before a court, is advised by the judge into a mediation taking place outside the court). De Vries, T., p. 211.

535 Under Article 19 of Judicial Mediation Rules.

536 Hutchinson, C. C., p. 89.

- A court mediator may participate in determining the length of the procedure: judicial mediation is essentially a timely-restricted procedure in the Lithuanian legal system.⁵³⁷ Although applicable legal provisions do not set the imperative requirement of particular length of judicial mediation anymore,⁵³⁸ judge hearing the case is required to determine the particular length of judicial mediation in his (her) procedural decision to refer dispute to judicial mediation. Hence the length of this procedure must be indicated precisely by the judge hearing the case at the moment of the referral of the dispute to judicial mediation; a court mediator is not provided with special right to prolong the length of judicial mediation; nonetheless, he (she) has a right to ask to prolong the length of this procedure.⁵³⁹ It should be noted in this context, that the restrictions related to the duration of judicial mediation may unreasonably limit the parties to a dispute in reaching amicable resolution of their dispute, as well as mediator, thus having negative effect on the procedure in general. In fact, although one may attempt to justify the limitation of the length of judicial mediation by the need of promptness of the procedure, such justification, in the opinion of the author of this dissertation, lacks methodological ground, especially in the context of poor application of this procedure, as well as lack of trust therein. It should be stressed, that the duration of judicial mediation is not necessarily rigorously regulated and defined in other legal systems,⁵⁴⁰ whereas such restrictions as in Lithuania may be even considered to be burden for the application of this procedure:⁵⁴¹ such model may put a pressure on mediator and,

537 It should be noted that Directive does not preclude the possibility of restricting the length of mediation; however such possibility is related to the role of the court and not to the one of the legislator of particular legal act regulating mediation processes. According to Recital 13 of Directive it is possible under national law for the courts to set time-limits for a mediation process.

538 According to Article 18 of former wording of Judicial Mediation Rules the total duration of sessions of judicial mediation could not exceed 4 hours. The establishment of such legal regulation could hardly be justified, as there was no justification for the time limit of 4 hours. It should be noted in this context, that the observation from practice of application of judicial mediation prove that judicial mediation may take 4 hours only in special circumstances when particular process is extremely successful (according to the data provided in the interview with dr. N. Kaminskienė in the website of the Court of Appeal of Lithuania). Therefore, the consequent modification that eliminated suchlike precisely defined time-limit for performance of judicial mediation should only be seen as beneficial for implementation of this ADR procedure in the Lithuanian legal system.

539 The execution of this right is restricted as it may be executed only with the participation of the parties to a dispute: they must either request for or agree with the extension of the length of judicial mediation; in addition, this right may be executed only if it would create the conditions for reaching peaceful settlement and there will be no undue delay of the hearing of the case.

540 For example, in France the duration of judicial mediation was not regulated, however, it was required that this procedure was brief. Nougéin, H-J., *et al.*, p. 172.

541 It should be noted, however, that it is generally agreed that judges who mediate operate under different time constraints than private mediators; judges naturally can devote less time to mediation than private mediators. The mediations conducted by judges are even sometimes called “one-shot events” with little or no chance to follow-up meetings; judicial mediation is considered to be a time-restricted product. Brunet, E., p. 238, 249. Hence the problematic aspect of rigorous regulation of the length of judicial mediation may be, presumably, less evident in respect of procedure of judicial mediation performed by certain types of court mediators.

in a sense, parties to terminate judicial mediation as soon as possible. Hence, the conclusion that should be made in the framework of this research: legal regulation should be modified in this respect at least by instituting *expressis verbis* mediator's right to submit proposals for judge hearing the case in respect of the exact time-limit for judicial mediation. In other words, even if the requirement to set the exact date of the next court hearing remains, a court mediator should be able to have a real impact on setting the time-limit (initial one and not only the right to ask for prolongation of such time-limit).

III. *The specific procedural aspects that may be decided only with the participation of the parties to a dispute.*

Parties to the dispute, as mentioned, are the main decision-makers in this procedure, they exercise their self-determination therein; however, the framing of the process of particular judicial mediation procedure, as mentioned, is left to the mediator – a person assisting the parties in reaching amicable settling of their dispute. Therefore, the parties to a dispute are generally not the subjects who exercise their discretion by framing the particular process of judicial mediation; however, most procedural aspects cannot be executed without their consent. For example, the parties may require a court mediator to include other persons whose participation may help settling the dispute into judicial mediation, they may participate in deciding on the time of mediation sessions, etc.

IV. *Other binding procedural aspects of judicial mediation.*

Judicial Mediation Rules also regulate some other aspects of the process of judicial mediation that are, in the eyes of the legislator of this legal regulation, necessary to determine for proper application of judicial mediation. Neither the parties to a dispute, nor mediator may decide upon such aspects – they are regulated imperatively.

Such binding procedural aspects include, *inter alia*:

- The recording of the process of judicial mediation: the process of judicial mediation is not recorded. This principle is usually related to the confidentiality of this process, i.e. the principle of confidentiality requires leaving the issues discussed in mediation behind the closed door.⁵⁴² It is sometimes suggested, though, that recording of the procedure of judicial mediation would be reasonable and even desirable when mediator is a judge in order to avoid the possibility of initiation of disciplinary case.⁵⁴³ However, the principle of confidentiality in judicial mediation in Lithuania is maintained in this respect, hence the recording of the sessions of judicial mediation, as well as participation of other persons that are not the ones whose participation could help settling the dispute, is not permitted.
- The handover of the civil case material: the material of the civil case in question is handed over to mediator for the performance of judicial mediation and must be

542 The principle of confidentiality is analyzed in further section of this chapter of the dissertation.

543 Some legal authors suggest that if judges are to mediate (as opposed to the proposition not to confide judicial mediation to judges as mediators), it would be prudent for judges to conduct mediation only with a court officer and a judge's associate present; it would also be wise to record proceedings in mediation. Warren, M., p. 84.

given back to the judge hearing the case when judicial mediation is terminated.⁵⁴⁴ This issue is essential for a proper conduct of judicial mediation; hence, it derives from the very essence of this ADR procedure.

Thus, although the process of judicial mediation is generally left to be determined with respect to the circumstances of each case, various procedural aspects are still more or less stringently, though in general – not imperatively, regulated in the Lithuanian legal system. Judicial mediation, however, remains a flexible procedure: legal regulation of judicial mediation in the Lithuanian legal system guarantees the flexibility of this ADR procedure by providing participants of the latter with certain right to frame the process. Hence, applicable legal regulation creates the preconditions for implementation of the principle of self-determination of the parties, as well as for the implementation of the role of a court mediator (sometimes together with the participation of the parties to a dispute) by providing him (her) with the means to guarantee that particular dispute will be solved, in the words of the Directive, through process tailored to the needs of the parties. It should be noticed in this context, that overregulation of the process of judicial mediation should not become an intention of Lithuanian legislator, i.e. legal regulation should not be too formalised in this respect, as otherwise the application of this ADR procedure may be unreasonably restricted and the essence of judicial mediation may be contradicted.

3.3. Conclusion (Termination) Of Judicial Mediation

Conclusion (termination) of judicial mediation is, in the framework of the conducted research, a final stage of the procedure of judicial mediation. The aim of judicial mediation, as well as of mediation in general – the amicable settlement of the dispute, determines the desirable outcome of this procedure – the conclusion of settlement agreement, in other words – the conclusion (termination) of judicial mediation by concluding the settlement agreement. However, the said aim is not always reached, i.e. judicial mediation may also be terminated in other ways – without concluding the settlement agreement. Hence, the evaluation whether the main principles of judicial mediation are implemented and their application is respectively guaranteed in the final stage of judicial mediation – the conclusion (termination) of this procedure – should be made separately in respect of the said two general ways of conclusion (termination) of judicial mediation.

Thus this section, dedicated to the analysis of conclusion (termination) of judicial mediation, is divided into two subsections: the first one is designed to analyze the conclusion (termination) of judicial mediation by concluding the settlement agreement and the second one – without concluding this agreement.

3.3.1. Conclusion (Termination) Of Judicial Mediation By Concluding the Settlement Agreement

Mediation in general, as well as judicial mediation in particular, is commonly understood as procedure whereby the parties to a dispute attempt to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator. Hence when the

⁵⁴⁴ Under Articles 14 and 27 of Judicial Mediation Rules.

principal aim of judicial mediation is attained, i.e. judicial mediation is successful, it is terminated by concluding the settlement agreement.⁵⁴⁵

Despite the flexibility of judicial mediation, conclusion (termination) of judicial mediation by concluding the settlement agreement, actually, ought to be (and is) legally regulated in the most thorough manner (as compared to other procedural aspects of judicial mediation). This is due to the fact that necessity to comply with imperative legal requirements is inherent in the essence of concluding the settlement agreement – this step could not be properly effectuated without having recourse to legal provisions. Hence, the analysis of the peculiarities of this stage of judicial mediation in the Lithuanian legal system, together with the study of principles of this ADR procedure reflected thereof could be made only with the recourse to legal regulation related to concluding the settlement agreements, as well as relevant judicial practice.

It should be noted in this context, that the Directive required the Member States to ensure that the parties to a written agreement resulting from mediation could have the content of their agreement made enforceable,⁵⁴⁶ i.e. the principles of the Directive into national legal systems had to be transposed (the deadline for the transposition was 21 May 2011) in such manner that the mechanisms for making the settlement agreements, concluded as a result of mediation, enforceable were set.

Such obligation of Member States embodied in the Directive was essentially fulfilled by Lithuanian legislature: the applicable legal provisions set the general principle that the settlement agreement⁵⁴⁷ is approved by the judge hearing the case after it is signed by the parties to a dispute.⁵⁴⁸ When the judge approves settlement agreement decision to dismiss the case is adopted *ipso facto*.⁵⁴⁹ Judicial mediation is a specific procedure in respect of court proceedings and it has its special features as compared to the ones of traditional litigation. Nonetheless, the fact that it is performed when particular case is already pending before the court, as well as the need for the approval of the settlement agreement concluded in the course of judicial mediation by the judge hearing the case, necessitate application of norms of civil procedure and presuppose the need for the analysis thereof.

Judicial mediation is essentially terminated after the conclusion of the settlement agreement and the approval of the latter *strictu sensu* falls out of the scope of this ADR procedure, i.e. falls within the scope of court proceedings. However, the close relations

545 However, settlement is often considered to be only one possibility of many valuable outcomes; others involve the ability to speak, to be heard, and talk about what may be irrelevant in the litigation process; narrowing of important issues; clarity about what is the most important to participants; better understanding of those involved and their situations; good faith restored; reputation and stature strengthened; agreements based on genuine terms created by the participants, both pecuniary and non-monetary. Senft, L. P., Savage, C. A., p. 334.

546 Under Recital 18 of Directive.

547 The phrase “settlement agreement” is applied in Mediation Law; it is used here as a common notion to describe agreement to solve dispute amicably reached in the course of judicial mediation, as well as a notion to describe the peaceful agreement concluded in the course of civil proceedings in court (though the Civil Code applies the notions “compromise agreement” and “peaceful settlement agreement”).

548 Under Article 26 of Judicial Mediation Rules.

549 Under Item 5 of Article 293 of the Code of Civil Procedure the court dismisses the case if parties have concluded the settlement agreement and the court has approved it.

between judicial mediation and court proceedings, as well as the procedure of approval of settlement agreement do not presuppose the delimitation of mentioned procedures in this respect. In other words, the termination of judicial mediation by conclusion of the settlement agreement should be analyzed together with the procedure of approval of the said agreement.

Generally the settlement agreement is understood as an agreement between the parties to a dispute therein they determine mutually acceptable terms of the settlement of their dispute by waiving certain opposing arguments;⁵⁵⁰ the parties to a dispute hence determine their substantive rights and duties therein.⁵⁵¹ The procedural right to conclude settlement agreement and hereby terminate the litigation is considered to be one of the manifestations of the principle of disposition of the parties⁵⁵² –the principle that presupposed the right to dispose of both subject matter of the dispute (claims of material legal nature) and procedural measures.⁵⁵³ Despite the fact that it is regulated by both – substantive and procedural law the settlement agreement, which is approved by the court,⁵⁵⁴ is a civil contract. Thus, the legal value of the settlement agreement approved by the court and its substantive legal consequences are regulated by the Civil Code – substantive law, whereas procedural legal consequences for the parties of such agreement – by procedural law (i.e. Code of Civil Procedure).⁵⁵⁵

Certain aspects relevant to the conclusion of the settlement agreement and its form, as well as other requirements applicable in respect of the latter should be pointed out in the purposes of the conducted research.

550 This definition is formulated in the case law of the Supreme Court of Lithuania; for example: Ruling of 5 March 2014 adopted in civil case *Bankrupt UAB "Eurobūstas" v. A. Z.*, case No. 3K-3-62/2014; Ruling of 28 December 2010 adopted in civil case *AB "Gubernija" v. UAB "Kalnapilio-Tauro grupė" et al.*, case No. 3K-3-571/2010; Ruling of 15 March 2014 adopted in civil case *J. S. v. Z. J. et al.*, case No. 3K-3-108/2010; Ruling of 4 July 2008 adopted in civil case *M. O. v. K. J. M., T. M.*, case No. 3K-3-354/2008.

551 Mikuckienė, V. Taikos sutarties sudarymo galimybės bankroto procese. *Jurisprudencija: mokslo darbai*. 2007, 5(95): 57–63, p. 58.

552 Interestingly, the execution of the principle of disposition of the parties in civil proceedings by concluding the settlement agreement is also titled by some authors as having recourse to method of alternative dispute resolution. Paužaitė-Kulvinskienė, J. Taikos sutarties sudarymo problemos ir perspektyvos Lietuvos administraciniame procese. *Nepriklausomos Lietuvos teisė: praeitis, dabartis ir ateitis*. Vilnius, 2012: 292–308, p. 295.

553 Ruling of the Supreme Court of Lithuania of 20 June 2014 adopted in civil case initiated following the request of the *bailiff G. J.*, case No. 3K-3-361/2014.

554 The approval of the settlement agreement is identified as the right of the court in the Code of Civil Procedure, whereas according Judicial Mediation Rules the settlement agreement is approved by the judge hearing the case. However, this situation solely signifies certain insignificant “differences” of terminology applied.

555 Ruling of the Supreme Court of Lithuania of 4 October 2014 adopted in civil case *UAB "Kapitalo valdymo grupė" v. UAB "Penki kontinentai" et al.*, case No. 3K-3-372/2014.

- The settlement agreement must be concluded in written form;⁵⁵⁶ the non-compliance with such requirement renders the settlement agreement null and void.⁵⁵⁷
- The settlement agreement may be concluded and, accordingly, the litigation may be terminated at any stage of the proceedings.⁵⁵⁸
- There are certain types of subject matter in respect of which the settlement agreement could not be concluded, i.e. agreements regarding the legal status or legal capacity of persons, the matters regulated by the imperative norms of law, as well as the matters related to public order.⁵⁵⁹ Under legal provisions applicable to judicial mediation, the civil disputes that originate from such civil rights and duties in respect of which the parties to a dispute could not conclude settlement agreements, as it would be considered void under law, cannot be referred to judicial mediation; thus, the identified civil law principles were also transposed in this respects to legal regulation of judicial mediation.
- The conclusion of the settlement agreement, as well as the content of the latter, is governed by the civil law institutes, i.e. the Civil Code is applied when concluding it and identifying its content (Code of Civil Procedure, as mentioned, governs the procedural consequences of the conclusion of the settlement agreement). The principle *pacta sunt servanda* (agreements must be kept) is also applied in respect of the settlement agreement; hence the party may not unilaterally withdraw from the settlement agreement.
- The content of the settlement agreement does not necessarily have to match the content of the procedural documents provided to the court and the claims expressed therein, as the parties may settle dispute between them by individually framing the settlement agreement. In such case when the settlement agreement is approved, the process, started in respect of the action lodged by the claimant, is considered to be modified and adjusted by the means of separate agreement of the parties wherein their rights are duties are determined.⁵⁶⁰ This rule, however, is not absolute: the questions that were not addressed to the court could not be settled by the settlement agreement.⁵⁶¹ Thus if the parties concluded settlement agreement the

556 Following the requirement to conclude settlement agreement in written form, the will of the parties must be embodied in certain document. Written form may be either simple or notarial; the settlement agreement must be concluded in a simple written form, i. e. it is not required to be approved by the notary. Mizaras, V., *et al. Civilinė teisė. Bendroji dalis*. Vilnius: Justitia, 2009, p. 331–334.

557 Under Paragraph 3 of Article 6.983 of the Civil Code.

558 Under Paragraph 3 of Article 140 of the Code of Civil Procedure.

559 Under Article 6.984 of the Civil Code.

560 Ruling of the Supreme Court of Lithuania of 27 July 2010 adopted in civil case *J. Ž. v. AB „Stumbras“*, case No. 3K-3-347/2010. It should be noted that the principle *pacta sunt servanda* is particularly important in respect of extrajudicial mediation, when the settlement agreement concluded therein is not indispensably produced to the judge for approval; whereas in judicial mediation such approval is mandatory and the approved settlement agreement has the effect of the final judgment (*res judicata*).

561 In other words, the settlement agreement could only be concluded on the issues addressed to the court in the claims and counter-claims. Laužikas, E., *et al. Civilinio proceso teisė*. II tomas. Vilnius: Justitia, 2005, p. 86.

content of which exceeded the scope of claims addressed to the court, such settlement agreement could not be approved by the court.⁵⁶²

- Due to the fact that the main feature of the peaceful settlement agreement is finding the compromise by mutual allowances, the provisions of the settlement agreement do not have the significance of the statement of facts; however it is significant for identifying the subjective rights and duties of the parties.⁵⁶³ In other words, the settlement agreement is intended to set the rights and the duties of the parties and not state facts, the facts stated therein would not be considered as legally defined.

Thus, although conclusion of the settlement agreement in judicial mediation is discretion of the parties to the dispute (with the help of a court mediator), i.e. they may frame the content of such agreement depending on the special features of their dispute, it must be in conformity with certain requirements set by the law and elaborated in the relevant jurisprudence of courts of general jurisdiction.⁵⁶⁴ Furthermore, the principle of the disposition of the parties (which determines one of its manifestations – the procedural right of the parties to conclude settlement agreement) – principle allowing parties to dispose of the subject matter of the dispute, as well as procedural means – is not absolute: the relevant actions of the parties are controlled by the court.⁵⁶⁵ Accordingly, the right of the parties to agree on the terms of the settlement agreement is not an absolute as well.⁵⁶⁶

In addition, since the court administers the justice, it has the *ex officio* obligation to guarantee that the laws are not infringed in respect of the legal relations that are in the scope of judicial review. In other words, the court is obliged to ensure that the decisions of the court would not be unlawful.⁵⁶⁷ This definitely comprehends the decision of approval of settlement agreement concluded in the course of judicial mediation as well. Therefore, the discretion of the parties to agree on terms of the settlement agreement in judicial mediation is limited in the sense that the judge may decide not to approve the concluded

562 Ruling of the Supreme Court of Lithuania of 23 November 2012 adopted in civil case *G. G. v. B. G.*, case No. 3K-3-522/2012.

563 *Ibid.*

564 In general there are four main conditions for any agreement to be valid: such agreement must be concluded by a legally capable persons, the content of the agreement must be in compliance with the requirements set out by law, the content of the settlement agreement must express the true intentions of the parties, the form of the agreement must be the one required by the law. Vasarienė, D. *Civilinė teisė* (Paskaitų ciklas). Vilnius: Vilniaus vadybos kolegija, 2002, p. 56.

565 Ruling of the Supreme Court of Lithuania of 16 November 2010 adopted in civil case *A. B. Š. V UAB “Nefrologų pagalba” et al.*, case No. 3K-3-456/2010.

566 Ruling of the Supreme Court of Lithuania of 20 June 2014 adopted in civil case initiated following the request of the *bailiff G. J.*, case No. 3K-3-361/2014.

567 Ruling of the Supreme Court of Lithuania of 23 November 2012 adopted in civil case *G. G. v. B. G.*, case No. 3K-3-522/2012. It should be noted in this context that general conditions of validity of settlement agreements (which essentially constitute the integral part of the decisions of the court) include: legal capacity of persons, compliance of the content thereof with legal requirements, compliance with the requirements to the form of such agreements, expression of the true intentions of the parties. Simaitis, R. *Taikos sutartis Lietuvos privatinėje teisėje. Justitia*. 2004, 1(49): 8–22, p. 12. Hence these general conditions also have influence on the limits of the control performed by the court in the scope of approval procedure of the settlement agreement.

agreement.⁵⁶⁸ Consequently, the respective settlement agreement could not be treated as a final judgment. Hence, despite the flexibility of judicial mediation, as well as the autonomy of the parties that is maintained throughout this ADR procedure, the right of the parties to shape the solution of their dispute, as well as relevant rights and duties of a court mediator are restricted by legal requirements for the conclusion and consequent approval of such agreement concluded.

The settlement agreement is not approved if the grounds determined by the Code of Civil Procedure exist: if the approval of the said agreement would be contrary to the imperative provisions of the law or the public interest.⁵⁶⁹ It should be stressed, that the evaluation of settlement agreement conducted by the judge hearing the case should not be considered as a pure formality.⁵⁷⁰

The approval of settlement agreement by the judge is a complex process, which entails, in a sense, dual evaluation of the settlement agreement: evaluation of its form and, accordingly – content thereof. Hence, in the scope of the procedure of approval of the settlement agreement the judge primarily evaluates the *compliance with the formal requirements – mainly, the ones set for the form of the settlement agreement*, i.e. determines if this agreement is written and signed by the parties to a dispute. The subsequent evaluation of the content of the settlement agreement entails the identification of the existence of the grounds for the court to refuse approval of the particular settlement agreement, i.e.

568 Interestingly, for example in Sweden, when the settlement is reached after court-annexed mediation schemes the court must confirm the settlement in a judgment if requested to do so by both parties; however, the court should confirm the settlement even if the agreement clearly is contrary to the law and only when requested to confirm the content of the agreement, the court may refuse to confirm it on some occasions. Ficks, E. Sweden. *EU Mediation: Law and Practice* (ed. De Palo, G., Trevor, M. B.). Oxford University Press, 2012: 341–357, p. 347. Thus the division between the confirmation of the settlement and confirmation of the agreement is made. Whereas, for example in Portugal, though confirmation by the court of the settlement agreement is not obligatory, the court might refuse to give the agreement the power of a court decision if the court deems it to be contrary to legislation in force. Gonçalves, A. M. M., Gaultier, T. Portugal. *EU Mediation: Law and Practice* (ed. De Palo, G., Trevor, M. B.). Oxford University Press, 2012: 273–289, p. 278. Under the applicable legal provisions in Denmark if settlement agreement is made before the court, it is automatically enforceable. Flagstad, M., Monberg, T., Pedersen, C. K. Denmark. *EU Mediation: Law and Practice* (ed. De Palo, G., Trevor, M. B.). Oxford University Press, 2012: 73–84, p. 78.

569 Under Paragraph 2 of Article 2 of the Code of Civil Procedure.

570 According to Summary of Application of Conciliatory Mediation Procedures, Judicial Mediation in Courts During the Period of 2012–2013 54 cases were dealt with the application of judicial mediation in Lithuania, only 6 of them were terminated by conclusion of the settlement agreement (11,11 per cent), whereas 43 resulted in termination without the conclusion of the settlement agreement (79,63 per cent) (judicial mediation in 5 cases was not yet terminated). It should be noted that in 2 cases the settlement agreement concluded in the course of judicial mediation was not approved by the court; additionally in 2 cases out of 54 judicial mediation was terminated without the conclusion of the settlement agreement, however it was afterwards concluded in civil proceedings. Thus, although the numbers are not significant, given data proves that the approval procedure of the settlement agreement concluded in judicial mediation is not a pure formality: settlement agreements are occasionally not approved by the judge hearing the case. For statistical data on the termination of judicial mediation by conclusion of settlement agreement see also Chart 2 and Chart 3 in the Appendix.

identification if it is not contrary to the imperative provisions and public interest.⁵⁷¹ Hence there are two substantial aspects that must be evaluated before the settlement agreement could be approved; these two aspects in this context should be analyzed separately.

- I. The first aspect – *compliance with the imperative provisions of the law* – is more or less evident. It should be noted, however, that it involves only imperative legal norms – the court does not have the right to refuse to approve settlement agreement if the rights of the parties are not limited by material law and such agreement would not infringe the rights of the third persons. It also should be noted that the scope of the principle of disposition of the parties and the extent of the respective judicial review depend on the nature of the case: the principle of disposition of the parties is not characteristic of the family law cases, cases related to labor relations, defense of human rights, unfair competition, bankruptcy, determination of the legal status of person.⁵⁷² In other words, the disputes that arose in the specified fields are governed by the imperative legal norms, hence parties to the dispute are provided with little “room for maneuver” when settling thereof; whereas the judicial evaluation is of a greater degree in this respect.⁵⁷³
- II. The second aspect – *compliance with the public interest* – is less manifest. It should be noted that legal provisions do not expressly define the content of such requirement; the jurisprudence of courts of general jurisdiction, hence, is of crucial importance in this respect. Several dimensions of this requirement could be distinguished:
 - The public interest requires that no illegal transactions were concluded. Transactions are recognised as illegal if they were concluded under the influence of mistake, threat, fraud or other influence on the will of the person. Therefore, before the approval of the settlement agreement the judge must ascertain that the agreement expresses the true intentions of both parties and that the terms of the agreement are understandable and accepted by the parties.⁵⁷⁴ The judge in this respect also determines if the expression of the will of the parties is not

571 Hence the court may refuse to approve settlement agreement if at least one of the mentioned grounds exists; however it is not allowed refuse the approval if the right of the parties to a dispute to agree this way is not restricted in substantive law an such agreement does not infringe the right of the third persons. According to the Ruling of the Supreme Court of Lithuania of 9 February 2009 adopted in civil case *Vilniaus apskrities viršininko administracija v. R. P. et al.*, case No. 3K-3-72/2009; Ruling of the Supreme Court of Lithuania of 1 June 2010 adopted in civil case *AB “FlyLAL-Lithuanian Airlines” et al. v. VĮ Tarptautinis Vilniaus oro uostas*, case No. 3K-3-247/2010.

572 Ruling of the Supreme Court of Lithuania of 5 March 2014 adopted in civil case *Bankrupt UAB “Eurobūstas” v. A. Z.*, case No. 3K-3-62/2014.

573 This is considered to be correct only if such disputes do not entirely fall out of the scope of application of judicial mediation.

574 Ruling of the Supreme Court of Lithuania of 16 November 2010 adopted in civil case *A. B. Š. v. UAB “Nefrologų pagalba”*, case No. 3K-3-456/2010. The court should not approve the settlement agreement which includes unfavorable or manifestly economically not beneficial conditions for one of the parties. Mikuckienė, V. *Taikos sutarties sudarymo galimybės bankroto procese. Jurisprudencija: mokslo darbai*. 2007. 5(95): 57–63, p. 58.

deficient.⁵⁷⁵ Such evaluation also entails identification whether the parties are aware of the procedural consequences of the approval of the settlement agreement and consequent dismissal of the case, i.e. that the settlement agreement, if approved, has an effect of a final judgment (*res judicata*) for the parties and its execution may be enforced, whereas after the dismissal of the case the same parties to the dispute are not allowed to address the court on the same subject matter and on the same basis.⁵⁷⁶

- The evaluation if the conclusion of the settlement agreement is in compliance with the public interest must be effectuated with regard to the fact that subjects of civil legal relations must act according to the principles of justice, reasonableness and good faith⁵⁷⁷ when exercising their rights and performing their duties. The principle of justice requires executing one's rights without infringing the rights and legitimate interests of other persons. Therefore, if the settlement agreement infringed the rights of other persons, the defense of such rights would be in the public interest and the settlement agreement could not be approved.⁵⁷⁸ For example, if the settlement agreement in divorce proceedings substantially impaired the rights of underage children of the spouses or one of the spouses, as well as the right or legitimate interests of the creditors of one or both spouses, the settlement agreement would not be approved.⁵⁷⁹ It also should be noted in this context that bankruptcy cases are considered to be related *per se* to public interest.⁵⁸⁰

Hence only after the evaluation of the form and content of the settlement agreement, this agreement, if it is in conformity with the requirements set by law or deriving thereof, is approved by the judge hearing the case. After the approval it, as mentioned, acquires the

575 It should be noted in this context that if further dispute on whether the true intentions of the parties is reflected in the settlement agreement is raised, the court assesses the existence of the true intentions by applying the common rules on the evaluation of evidence: by invoking the rule of the sufficiency of the evidence and making of the conclusions with respect to the inner conviction of the judge based on a thorough and objective examination of all the relevant circumstances of the case. Ruling of the Supreme Court of Lithuania of 10 May 2010 adopted in civil case *daugiabučių namų savininkų bendrija "Eglutė" v. E. R.*, case No. 3K-3-206/2010; Ruling of the Supreme Court of Lithuania of 8 April 2010 adopted in civil case *UAB „Interbolis“ v. VĮ Registrų centras*, case No. 3K-3-155/2010; Ruling of the Supreme Court of Lithuania of 24 November 2009 adopted in civil case *Panevėžio miesto savivaldybė v. UAB "Panevėžio miestprojektas"*, case No. 3K-3-526/2009; Ruling of the Supreme Court of Lithuania of 6 October 2009 adopted in civil case *D. Š. v. Kauno miesto savivaldybė*, case No. 3K-3-381/2009.

576 Ruling of the Supreme Court of Lithuania of 29 May 2013 adopted in civil case *UAB „BIS“ v. E. B.*, case No. 3K-3-300/2013.

577 Under Paragraph 1 of Article 1.5 of the Civil Code.

578 Ruling of the Supreme Court of Lithuania of 5 March 2014 adopted in the case *Bankrupt UAB "Eurobūstas" v. A. Z.*, case No. 3K-3-62/2014; ruling of the Supreme Court of Lithuania of 4 November 2008 adopted in the case *BUAB "Elkara" v. V. O.*, case No. 3K-3-552/2008.

579 Ruling of the Supreme Court of Lithuania of 21 February 2014 adopted in civil case *I. N. v. V. N.*, case No. 3K-3-39/2014.

580 Ruling of the Supreme Court of Lithuania of 4 June 2007 adopted in civil case *T. Ž. v. A. Ž.*, case No. 3K-7-192/2007.

effect of a final judgment for the parties to a dispute (*res judicata*) and its execution may be enforced.⁵⁸¹

The scope and the character of evaluation of the settlement agreement conducted by the judge hearing the case in essence determines the requirements for the settlement agreement in judicial mediation. In other words, the settlement agreement must comply *inter alia* with the mentioned requirements for the form and for the content thereof. Otherwise, it could not be approved by the judge hearing the case, i.e. judicial mediation could not be terminated by the conclusion of settlement agreement.

It should be stressed in this context that the complexity of the requirements for a settlement agreement concluded in the course of judicial mediation to be approved by the judge hearing the case makes the role of a court mediator of crucial importance. Hence, it is also related to the issue of mediator's qualification. Obviously, mediator without the qualification that would allow drafting the settlement agreement in compliance with the law or requirements that derive thereof could not act effectively as demanded by Judicial Mediation Rules and European Code of Conduct for Mediators. In addition, such complex legal framework relevant to the requirements for settlement agreements, and consequently – to the approval of the such agreement concluded in the course of judicial mediation, also affirms the already drawn conclusion that participation of lawyer-mediator is essential for the success of judicial mediation as if the settlement agreement was not in conformity with the legal requirements, it could not be approved and judicial mediation would be unsuccessful.

To sum up, despite the flexibility of judicial mediation, as alternative to traditional adjudication, termination of judicial mediation by conclusion of the settlement agreement, due to its undeniable relation to legal aspects, is quite stringently and comprehensively legally regulated. Legal provisions ensure that the written agreement resulting from judicial mediation is enforceable in the Lithuanian legal system, whereas the mechanism for making the latter enforceable is sufficiently clear and comprehensible. However due to the significance of compliance of the settlement agreement with legal requirements, their complexity and the fact that the relevant jurisprudence of courts of general jurisdiction must be analyzed in order to clarify them, as well as the obvious close relation between the success rate of judicial mediation and the popularity thereof, the requirements for settlement agreements concluded in the course of judicial mediation should be elaborated with more clarity. In addition court mediators should be acquainted with the latter in the course of special training for court mediators.

3.3.2. Termination Of Judicial Mediation Without the conclusion Of the Settlement Agreement

Although termination of judicial mediation by conclusion of the settlement agreement is the principal aim of this ADR procedure, judicial mediation may be terminated on other grounds as well, i.e. without reaching the main aim of this procedure. Actually,

581 It should be noted in this context that, for example, in Netherlands the settlement agreement may be confirmed by the court if mediation resulted from a court referral to a mediator; however, it is not obligatory. Albers, P. The Netherlands. *EU Mediation: Law and Practice* (ed. De Palo, G., Trevor, M. B.). Oxford University Press, 2012: 358–373, p. 363.

according to recent statistics 76,92 per cent of the cases referred to judicial mediation in Lithuania are terminated without the amicable settling the dispute.⁵⁸² Hence, the termination of judicial mediation without the conclusion of the settlement agreement is, actually, the most common instance of termination of judicial mediation in The Lithuanian legal system. Nonetheless, the possibility to terminate judicial mediation without concluding the settlement agreement is inherent in the voluntary nature of this ADR procedure, and essentially is directly linked to the principles of self-determination and autonomy of the parties to a dispute, as well as to the requirement for a court mediator to act in the most qualified manner.

There are three main grounds for termination of judicial mediation, apart from the conclusion of the settlement agreement, *expressis verbis* set by applicable legal provisions.

I. *Decision of one or both of the parties to withdraw themselves from judicial mediation.*

This is the one of the most evident manifestations of self-determination of the parties to a dispute: parties may decide at any stage of judicial mediation not to settle their dispute amicably, i.e. to end up judicial mediation. Although applicable legal provisions do not expressly embody such right at all,⁵⁸³ the termination of judicial mediation not only obviously depends on the will of the parties, but legal grounds for such termination are embodied in Mediation Law.⁵⁸⁴ Nevertheless, Judicial Mediation Rules, in the opinion of the author of this dissertation, should be modified for the sake of legal clarity by expressly implementing such ground for termination of judicial mediation. As judicial mediation is an alternative to traditional adjudication and may be performed only with the free will of the parties to a dispute, parties may not be and are not required identifying the reasons for their withdrawal from this ADR procedure.

II. *The end of the specified time limit set for judicial mediation procedure.*

Judicial mediation procedure in Lithuania is time-restricted: although there are possibilities to prolong the length of judicial mediation, it must still be defined accurately. Hence, if the set time limit elapses without the conclusion of the settlement agreement and it is not prolonged, judicial mediation will be terminated.⁵⁸⁵ This ground for termination of judicial mediation especially reflects one of the main requirements for judicial mediation – the promptness of this ADR procedure. Nonetheless, the existing restrictions in this respect could be seen, as mentioned, as a burden to this procedure.

III. *Decision of a court mediator to terminate judicial mediation.*

A court mediator, as an assistant to the parties to a dispute – person that is the best aware of the background of the dispute, as well as the course of judicial mediation, is provided with the right to terminate the procedure; such right is inherent in the role of a court mediator. However, this right is not unlimited as applicable legal provisions specify the particular grounds for such termination of judicial mediation.

582 Statistical data relevant to the quantity of cases referred to judicial mediation and number of successful judicial mediation procedures is reflected in the Chart 2 in Appendix.

583 Judicial Mediation Rules do not directly envisage the adoption of the decision to quit judicial mediation by both or one of the parties to a dispute as one of the grounds of termination of this ADR Procedure.

584 Items 3, 4 of Article 9.

585 Under Article 25.2 of Judicial Mediation Rules.

- A court mediator may terminate judicial mediation if he (she) assumes that the settlement agreement (if concluded) would be unenforceable or illegal under law. Hence, court mediator must possess legal knowledge in order to invoke this ground: the mentioned evaluation of the situation requires the understanding of issue from the legal perspective.
- A court mediator may terminate judicial mediation if he (she) acknowledges that judicial mediation is unlikely to result in conclusion of the settlement agreement. In other words, a court mediator may decide to terminate judicial mediation after assessing the situation and finding that amicable settlement of the dispute could not be possible.

In the opinion of the author of this dissertation, the latter ground comprehends also a court mediator's right to terminate judicial mediation due to the dishonest behavior of the parties to a dispute.⁵⁸⁶ Fairness, as mentioned, is one of the essential principles of the process of judicial mediation, whereas mediator is the subject which is provided with the means to guard the observance of this principle. Therefore, in the case if the instances of unfair behavior of one or both of parties to the dispute appear, mediator should take actions and terminate such procedure: it might be terminated on this ground if any of the dishonest actions of the parties to a dispute emerge: if the request to refer dispute to judicial mediation was produced in unfair manner; if judicial mediation is used for unfair purposes; if unfair requests are expressed in the course of judicial mediation.

Hence, applicable legal provisions guarantee *inter alia* voluntary nature of judicial mediation, as well as principles of self-determination, fairness, promptness, by identifying the grounds for the termination of judicial mediation without the conclusion of the settlement agreement in a, more or less, explicit and comprehensive manner.

3.4. Confidentiality In Judicial Mediation

Confidentiality is a principle inherent in the concept of ADR in general. It is also one of the main principles of mediation, including its judicial form. The implementation of this principle is directly related to the success of this ADR procedure. As the principle of confidentiality constitutes an integral part of the procedure of judicial mediation, in the framework of this research it is analyzed together with the peculiarities of the procedure of judicial mediation in the Lithuanian legal system.⁵⁸⁷

The entire efficacy of mediation is believed to rest on confidentiality of the proceedings as without confidentiality, frank exchanges of ideas and the climate of trust necessary for fruitful negotiations both are impossible.⁵⁸⁸ The principle of confidentiality is generally

586 Such ground was *expressis verbis* embodied in the former wording of Judicial Mediation Rules, however, after the subsequent modification it was eliminated from the applicable legal provisions.

587 It should be noticed in this context that the principle of confidentiality is a complex issue, while the practice of its application may determine the success of judicial mediation in particular legal system, therefore, the thorough analysis of the implementation of the said principle should be made and it should also involve analysis of the relevant instances from the practice; however due to the limited scope and volume of the this research, the principle of confidentiality here is analyzed basically solely in the light of relevant legal regulation.

588 Otis, L., Reiter, E. H. Mediation by Judges: A New Phenomenon in the Transformation of Justice.

related to the private nature of mediation. It indicates that the parties to a dispute may act freely in the course of mediation, may reveal information, express their opinions, put forward proposals or propose mutual allowances, while knowing that they are safe in this respect and that any of their action would not limit their possibilities if the dispute was to reach the court, i.e. parties would be able to maintain even different position as compared to the one expressed in the course of judicial mediation.⁵⁸⁹ The confidential nature of mediation essentially is an opposite to the characteristics of litigation.⁵⁹⁰ Therefore, due to the close relation of judicial mediation to the court proceedings, the content and application of the principle of confidentiality have specificities in this form of mediation, especially when mediator is a judge. It should be agreed in this context with the statement that although mediation carries a presumption of confidentiality and privacy, mediation confidentiality protections are never absolute and the boundaries of confidentiality are sometimes unclear, especially when mediation intersects with the court system.⁵⁹¹

Although confidentiality, as a general principle which covers the whole process of judicial mediation, may have different dimensions,⁵⁹² confidentiality is inherent in the concept of judicial mediation, hence participants of judicial mediation have a *general obligation* to maintain confidentiality in respect of this process, the information acquired in the course of it.⁵⁹³

The importance of the principle of confidentiality was also acknowledged by the Directive. It embodies the minimum requirements in respect of confidentiality in mediation.⁵⁹⁴ The principles of the Directive, as mentioned, had to be transposed into the legal systems of the Member States, hence – the Lithuanian legal system as well.

Mediator's obligation to maintain confidentiality is also embedded in the European Code of Conduct for Mediators (compulsory act in respect of judicial mediation in Lithuania),⁵⁹⁵ which sets general obligations of mediator in respect of the principle of con-

589 Goodman, A., Hammerton; p. xviii.

590 Kaminskienė, N., *et al. Mediacija. Vadovėlis*, p. 244.

591 Kovach, K. K. Mediation, p. 312.

592 For example, some legal authors distinguish internal confidentiality ("confidentiality within confidentiality") which is related to the caucus sessions or *ex parte* meetings with parties individually; the principle of confidentiality in this respect requires mediator not to reveal any information received from one party during their private meetings to another party. Otis, L., Reiter, E. H. Mediation by Judges: A New Phenomenon in the Transformation of Justice.

593 It should be noted that such obligation does not necessarily have to be directly determined by legal provisions; it is, as mentioned, inherent in the very essence of judicial mediation, which, as a dispute resolution procedure, is essentially based on a trust of the parties. Hence the parties to a dispute are generally willing to maintain confidentiality themselves without any additional incentives. On the contrary, the mediator's obligation to maintain confidentiality throughout the process and afterwards is usually legally regulated.

594 Recital 16 of Directive underlines importance of training for mediators in respect of ensuring the necessary mutual trust with respect to confidentiality; according to section 23 thereof confidentiality in the mediation process is important and therefore the minimum degree of compatibility of civil procedural rules with regard to how to protect the confidentiality of mediation in any subsequent civil proceedings or arbitration is provided in Directive; Article 7 of Directive regulates the mentioned minimum requirements in respect of confidentiality in mediation.

595 It was already mentioned, that the European Code of Conduct for Mediators constitutes an integral part of legal regulation of judicial mediation in Lithuania; hence mediators are required to comply with the provisions embodied therein.

fidentiality, i.e. the mediator must keep confidential all information arising out of or in connection with the mediation unless compelled by law or grounds of public policy to disclose it; any information disclosed in confidence to mediators by one of the parties must not be disclosed to the other parties without permission, unless compelled by law.⁵⁹⁶

The principle of confidentiality, accordingly, has been legally acknowledged as one of the core principles of judicial mediation since the beginning of implementation of this ADR procedure into the Lithuanian legal system: the original edition of Judicial Mediation Rules had already set provisions on what information acquired in judicial mediation could not be submitted as evidence in civil proceedings. The provisions relative to the confidential information in respect of judicial mediation process were later embodied in Mediation Law as well. However, the most important in this respect was modification of the provisions of Code of Civil Procedure: the provisions thereof related to what information could not be submitted as evidence, as well as to who may not be questioned as witnesses in civil proceedings were supplemented with respect, accordingly, to information acquired in the course of judicial mediation and to the role of mediator.⁵⁹⁷ Following the subsequent developments of legal regulation of mediation in Lithuania, mediator's obligation to maintain confidentiality was also embedded in Mediation Law.⁵⁹⁸

Hence the general obligations of the participants of judicial mediation in respect of the principle of confidentiality, as well as the types of information that cannot be revealed to third persons were legally regulated from the beginning of introduction of this ADR procedure into the Lithuanian legal system. Although legal provisions during the years were subsequently modified, the essential requirement for the participants of judicial mediation to maintain confidentiality has remained.

However, the relevant legal regulation has become, in a sense, complicated following the constant modifications. Currently the confidentiality issues, namely what information must remain confidential and when mediator may not be questioned as witness in civil proceedings, are regulated in three different legal acts:

- Code of Civil Procedure: sets the general rule that information received in the course of judicial mediation may not be submitted as evidence in civil proceedings with the exceptions of the cases provided for in Mediation Law (Paragraph 5 of Article 177), as well as the general rule that mediator may not be questioned as witness about the circumstances he (she) became aware of in the course of judicial mediation (Paragraph 2 of Article 189);

596 According to Article 4. In other words, mediator has an obligation to maintain “confidentiality within confidentiality”, as well as in general confidentiality in respect of the information received in the course of judicial mediation.

597 On purpose that applicable legal regulation was in accordance with the requirements of Directive these modifications were made by altering and supplementing the Code of Civil Procedure on 21 June, 2011 Law of the Republic of Lithuania on the Amendment and Supplement of the Code of Civil Procedure.

598 According to Article 7 of Mediation Law the general principle that requires to maintain confidential all information received in the course of judicial mediation (with the exceptions provided therein) is applied in respect of mediators, mediator is also forbidden to disclose any confidential information provided to him (her) by one party to the dispute to the other party to the dispute without the consent of the party that has submitted the information.

- Mediation Law: sets general requirement to observe confidentiality in respect of judicial mediation and expands its field of application from civil proceedings to arbitration and other dispute settlement procedures, either related or unrelated to the dispute which was settled through conciliatory mediation; it also identifies which information received in the course of judicial mediation may be submitted as evidence in civil proceedings;
- Judicial Mediation Rules: determine which information may not be submitted as evidence in civil proceedings, as well as exception to this principle, i.e. on which occasions such information may be considered to be admissible evidence.⁵⁹⁹

There is no clarification as to which legal provisions should be applied when identifying the regulatory content of the principle of confidentiality the Lithuanian legal system: the Code of Civil Procedure embodies the main general principles *inter alia* as to what information may not be submitted as evidence in civil proceedings and refers to the exceptions of this general principle to Mediation Law which determines particular exceptions; despite the fact that the Code of Civil Procedure sets general principle that all information received in the course of judicial mediation is confidential (with the exceptions set by Mediation Law), Judicial Mediation Rules, however, specify which types of information constitute confidential information and provide for the exceptions of this rule. Therefore, it is not evident which provisions should be applied when identifying the regulatory content of the principle of confidentiality implemented in the Lithuanian legal system. However, due to the fact that legal act regulating the civil procedure, including the submission of evidence in civil proceedings, is the Code of Civil Procedure (in this sense – special legal regulation) which refers to Mediation Law for the exceptions of the mentioned general principle, the provisions of Judicial Mediation Rules should not be applied in this context, the provisions of Mediation Law which do not determine any of the mentioned exceptions should be applicable in this respect. Therefore, in the opinion of the author of this dissertation, in order to avoid any possible misunderstandings legal provisions in this respect should be amended: Mediation Law should at least include reference to Judicial Mediation Rules for the exceptions to the general principle in respect of confidentiality set in the Code of Civil Procedure.

Thus, the *general principle applied in our legal system, is that the participants (the parties to a dispute, mediator and other participants) must maintain confidentiality in respect of the information received in the course of judicial mediation: data received in the course of judicial mediation may not be submitted as evidence in civil proceedings.*⁶⁰⁰ The exceptions to this general principle are embodied in Mediation Law; it should be noted in this context that these exceptions are essentially identical to the ones embodied in Judicial Mediation

599 As mentioned, according to the Code of Civil Procedure (Paragraph 5 of Article 177) namely Mediation Law embodies exceptions to the general principle that information received in the course of judicial mediation may not be submitted as evidence in civil proceedings.

600 Under Paragraph 5 of Article 177 of the Code of Civil Procedure. It should be noted in this context that legal regulation in this respect is essentially the direct translation of the provisions of the Directive to national legislation. It should be noted, however, that essentially the same general principles are embodied, for example, in the legal system of Belgium as well. Verougstraete, I. Belgium. *EU Mediation: Law and Practice* (ed. De Palo, G., Trevor, M. B.). Oxford University Press, 2012: 19–32, p. 22–24.

Rules.⁶⁰¹ Hence, information received in the course of judicial mediation may not be submitted as evidence in civil proceedings except if:⁶⁰²

- the parties agree otherwise on the basis of mutual agreement;⁶⁰³ this is the manifestation of autonomy and self-determination of the parties to a dispute, i.e. they may freely decide to reveal or give a consent for other participants of judicial mediation to reveal in civil proceedings any information provided in judicial mediation;⁶⁰⁴
- the disclosure of the information is required for the approval or execution of a settlement agreement concluded in the course of judicial mediation;⁶⁰⁵
- the particular information is of such character that failure to disclose whereof would contravene the public interest (particularly where a child's interests need to be safeguarded or where a risk of damage to a natural person's health or life needs to be prevented);⁶⁰⁶ in other words, the public interest may require to disclose certain information obtained in the course of judicial mediation.

Any other information, which does not fall under the mentioned criteria, could not be disclosed and submitted as evidence in civil proceedings; otherwise the principle of confidentiality would be infringed. However, despite the establishment of the mentioned general rule, as well as particular criteria under which such rule is not applied, the implementation of the principle of confidentiality in the Lithuanian legal system could not be considered as proper if no procedural guarantees in respect of application of this principle would be set or if such guarantees were to be considered inadequate in this respect.

601 Article 30 of Judicial Mediation Rules.

602 Under Article 7 of Mediation Law.

603 It is not clear, though, if such agreement should be concluded in any specific form. However, due to the possible delicacy of such information and the specificity of judicial mediation, the parties to a dispute should be required to produce written agreement in respect of the mentioned issue. It also should be noted that, for example in Austria the guarantees in respect of the principle of confidentiality are more stringent: the duty of mediator to keep all facts confided by the parties secret is absolute; hence it may not be waived by the parties and the infringement of this duty renders mediator liable to prosecution. 65) Leon, C., Rohracher, I., p. 13.

604 For example, in France the Code of Civil Procedure set the obligation of confidentiality for mediator: according to it mediator must keep a secret in respect of the third parties, whereas conclusions and statements may not be produced to the judge except on the basis of mutual agreement of both parties. Nougéin, H-J., *et al.*, p. 155.

605 Such exception is essentially embodied in Paragraph 1 of Article 7 of Directive as well; it states that neither mediators nor those involved in the administration of the mediation process should be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process except where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

606 It is actually almost the direct transfer of the principles of the Directive into national legal system. It should be noted in this context, however, that the transposition of the principles of directives by directly copying the provisions of the latter into national legal system is, in a sense, a distinctive feature of the Lithuanian legal system, hence it is characteristic not only in the light of implementation of mediation therein. According to Mesonis, G. The Relation Between National Law and EU Law: the Lithuanian Case. *Acta Universitatis Carolinae Iuridica*. Univerzita Karlova v Praze. 2013, 4: 301–314; 311.

The law provides with particular guarantees (procedural and those related to professional responsibility)⁶⁰⁷ for ensuring the respect of the principle of confidentiality:

- judge hearing the case will not be able to consider as admissible evidence that does not fall within the exceptions to the mentioned general principle, i.e. the information obtained in the course of judicial mediation (with the mentioned exceptions) will not be invoked to decide the case;
- judge hearing the case will not be able to question a court mediator as witness in respect of the circumstances that the latter found out in the course of judicial mediation;⁶⁰⁸ however it is inexplicably not *expressis verbis* set as applicable (though, definitely applicable) to other participants of judicial mediation;⁶⁰⁹
- a court mediator has, as mentioned, an obligation to maintain confidentiality throughout the procedure of judicial mediation, as well as afterwards; otherwise he (she) may be subject to liability under Mediation Law.⁶¹⁰ However, it is not clear what kind of liability it would entail and whether it would result in any kind of disciplinary responsibility.⁶¹¹ It should be noted in this context, that the observance of the principle of confidentiality and the execution of the relative obligation are far more complicated if mediator is a judge or assistant of the judge;⁶¹² hence, the training of the mentioned subjects should also entail the issues relative to the principle of confidentiality.

Thus, legal provisions, though occasionally misleading, set procedural guarantees necessary to ensure the observance of the principle of confidentiality in judicial mediation in the Lithuanian legal system.

Although legal regulation sets mentioned procedural guarantees for observance of the principle of confidentiality in judicial mediation, it does not precondition the real compliance with the requirements of confidentiality – the core requirement in the light of success and, actually, popularity of judicial mediation. One of the safeguards which would presumably create preconditions for guaranteeing the compliance with such principle is the

607 It should be noted that, for example, in Czech Republic infringement of mediator's obligation of confidentiality is an administrative offence, hence it inflicts administrative liability. Heynincq, B., Vanišová. *Czech Republic. EU Mediation: Law and Practice* (ed. De Palo, G., Trevor, M. B.). Oxford University Press, 2012: 59–72, p. 62–63.

608 Under Paragraph 2 of Article 189 of the Code of Civil Procedure.

609 For example, in Belgium testimony may not be also given by a party of mediation, any third person, or those involved in the administration of mediation proceedings. Verougstraete, I., p. 22–24.

610 Under Paragraph 3 of Article 7 of Mediation Law in the event of nonfeasance or misfeasance of the obligations resulting from the principle of confidentiality *inter alia* court mediators are held liable under the law. This is the only provision, which *expressis verbis* determines liability of mediator; hence the principle of confidentiality is considered to be crucial for mediation, including its judicial form. Court mediators would certainly be subject in this respect to professional responsibility as well.

611 Mediation Law mentions only liability of mediator; however, a court mediator as mentioned, may lose his status of a court mediator in judicial mediation if he (she) discredits the title of a court mediator by his (her) behavior; this would happen presumably in the case of the breach of the obligation of confidentiality.

612 It is sometimes believed that the principle of confidentiality is better protected if mediators are not in a day-to-day working relationship with the trial judge to who the case has been assigned for litigation. According to Babić, D.

institution of clear liability of court mediators and other persons participating in judicial mediation. The relevant provisions lack clarity in this respect. Therefore, in the opinion of the author of this dissertation, one of the possible additional guarantees in this respect could be implementation of provisions that would expressly link the already mentioned notion “discredit of the title of a court mediator” with the failure to maintain the principle of confidentiality, i.e. a court mediator should be considered as having discredited his (her) title if he (she) had failed to maintain confidentiality.⁶¹³ Consequently, the elaboration of the clear system of liability if the principle of confidentiality is breached could have a positive effect on the trust in judicial mediation, thus – to the growth of popularity of this ADR procedure as well.

In conclusion, the principle of confidentiality constitutes an integral part of legal framework of judicial mediation in the Lithuanian legal system, in addition, procedural guarantees for application of the latter are also set. However, the latter could not be considered as entirely sufficient: legal regulation should be modified in this respect by inserting additional guarantees for the implementation of this principle, *inter alia* by determining the liability of mediator and other participants of judicial mediation if the principle of confidentiality was breached.⁶¹⁴ Hence, in spite of already performed modifications of legal regulation of judicial mediation, one of the most important problematic issues of the system in question remains the question of liability when ensuring the observance of the principle of confidentiality; the subsequent modifications of legal regulation in this respect are inevitable, otherwise, the trust in this alternative to traditional adjudication may be guaranteed with difficulty.

INTERMEDIATE CONCLUSIONS

To summarize the main procedural aspects of judicial mediation in respect of legal framework of this ADR procedure in the Lithuanian legal system:

- Although procedure of judicial mediation is regulated rather rigorously in the Lithuanian legal system, this ADR procedure still remains flexible; the applicable legal provisions guarantee that the main principles of judicial mediation are maintained throughout the procedure of this alternative to traditional litigation, i.e. the principles of judicial mediation must be observed in all stages of judicial mediation – its initiation, throughout its process, as well as in respect of its conclusion (termination).
- Despite the fact that the right to initiate judicial mediation at any stage of court proceedings is attributed to the judge hearing particular case, as well as to other participants in litigation, only the parties to a dispute may finally decide on the referral of particular dispute to this ADR procedure; they may also participate in

613 The evaluation if the infringement is sufficient to state the discredit of the title of a court mediator which may inflict the removal of particular court mediator from the List of Court Mediators should still remain within the authority of Commission of Judicial Mediation.

614 It should be noted in this context that, in the opinion of the author of this dissertation, the identification of particular modifications in this respect must envisage thorough analysis of the existent systems of liability of persons of particular professions, as well as analysis of the systems in force in other countries, hence it did not constitute the subject matter of this research.

nomination of particular mediator, as well as when determining some other aspects of judicial mediation.

- The process of judicial mediation is the least regulated stage of this ADR procedure, as many instances are left to be determined by mediator with regard to particular circumstances of individual dispute. However, applicable legal provisions limit the length of judicial mediation rather stringently; such legal regulation may be considered as, in a sense, an overregulation of judicial mediation, and, hence, the shortcoming of legal regulation that may have negative influence on the application of judicial mediation in Lithuania.
- The applicable legal provisions identify in an exhaustive manner the grounds for the conclusion (termination) of judicial mediation both – with and without the concluding the settlement agreement. The procedure for making the settlement agreement enforceable (which was required to be instituted by the provision of the Directive) is also set in the Lithuanian legal system. Although this procedure is sufficiently clear and comprehensible, its application, *inter alia* in respect of the requirements for the content of the settlement agreement resulting thereof, demands special knowledge, namely legal, from a court mediator.
- In general, although legal provisions regulate certain procedural aspects of this ADR procedure, its flexibility, of course with respect to specificity of its relation to court procedure, is essentially maintained and legal regulation should not be more formalised in this respect. Whereas a court mediator (sometimes together with the participation of the parties to a dispute) is provided with the means to guarantee that particular dispute will be solved, in the words of the Directive, through process tailored to the needs of the parties.
- The principle of confidentiality – one of the main components for the successful application of judicial mediation – constitutes an integral part of legal framework of judicial mediation in the Lithuanian legal system. In addition, procedural guarantees for application of the latter, although to be modified, are also set.

4. THE FUTURE DEVELOPMENT OF JUDICIAL MEDIATION

Model of judicial mediation implemented in the Lithuanian legal system, as mentioned, is unique and has its own specific features. It was also mentioned, that the introduction of mediation into the Lithuanian legal system was, in a sense, different from the common practice of other countries of civil law tradition: mediation was introduced through the launch of judicial mediation, i.e. from the practical perspective. However, judicial mediation was, and actually is regulated quite comprehensively, though not over-regulated, and it is still more promoted by the government and legal practitioners, than recognised and applied in practice by the parties to a dispute.⁶¹⁵ Hence the current status of application of judicial mediation could be considered as still being insignificant.

Various reasons for resistance to application of judicial mediation could be identified,⁶¹⁶ however, the identification of all of those reasons is not an intention of the current research. Nevertheless, the lack of application of judicial mediation in practice, the will of authorities to promote this ADR, as well as the shortcomings of applicable legal provisions identified in the scope of this research, will presumably lead to developments of the existing legal framework, and accordingly – model, of judicial mediation. Certain indispensable modifications of legal framework of judicial mediation were already identified. However, an extra insight into possible instances of future modification of this ADR procedure in the Lithuanian legal system should be made within the scope of this research. It should be added in this context that the need, as well as, actually, the possibility of implementation of the latter is also witnessed by the elaboration of already-mentioned draft Conception of Development of System of Conciliatory Mediation (Mediation), that is supposed to have an important effect on the model, as well as legal framework of judicial mediation.⁶¹⁷

Thus, the last chapter of the dissertation provides only brief insight into those developments of the model of judicial mediation that are likely to appear in the near future of the application of this alternative to traditional litigation in Lithuania⁶¹⁸ and that, presumably, in the words of N. Alexander, would allow mediation to reposition itself from the academic to practitioner-focused political arena.⁶¹⁹

This chapter of the dissertation, which gives, in the framework of the conducted research, only a glimpse into the possible instances of future development of this ADR pro-

615 However, some legal authors assert that the experience of implementation of mediation in Lithuania witnesses the abandonment of stereotypical attitude in respect of the court as the only institution for the resolution of the disputes. Petrauskas, F. *Alternatyvaus ginčų nagrinėjimo raida, teisinė padėtis ir reglamentavimas. Jurisprudence: research papers.* 2011, No. 18(2): 631–658; p. 646.

616 Varying from the lack of knowledge related to judicial mediation to the effects of long-standing tradition of litigation.

617 The draft Conception of Development of System of Conciliatory Mediation (Mediation) did not constitute a subject-matter of this research; hence it is not thoroughly examined in this dissertation.

618 It should be noted that some of the possible developments envisaged in this chapter of the dissertation are more likely to emerge due to the promotion thereof by academics and practitioners, whereas others are seen as a prerequisite of the model of judicial mediation in Lithuania by the author of this dissertation.

619 Alexander, N. *What's Law Got To Do With It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions*, p. 7.

cedure, is divided into three parts: the possibility of the implementation of mandatory element in the model of judicial mediation is presented in the first section, the second section deals with the possible evolution of this model in respect of guarantees for the quality of judicial mediation and the third section introduces other possible instances of development of this ADR procedure.

4.1. Mandatory Judicial Mediation

One of the most important instances of future development of the model of judicial mediation should be the modification of its voluntary character into more imperative one.⁶²⁰ It should be noted in this context that the initiatives for introduction of mandatory judicial mediation in the Lithuanian legal system have been ongoing almost since the very beginning of the introduction of judicial mediation and have not only become even more active recently,⁶²¹ but were also scheduled to be effectuated in the near future.⁶²²

It should be noted that although ideally mediation should be strictly voluntary and not mandated by statute or courts, in the cases when mediation is only at its initial stage of implementation into legal system it is usually being appreciated by attorneys and judges only when the process is routinely being used. Hence, mandatory mediation is considered to be necessary for the better acceptance of this ADR procedure in practice.⁶²³ According to the observations of prof. Frank E. A. Sander parties find mediation process satisfying, regardless of whether they reached an agreement, however, for the reasons not entirely clear, parties do not voluntarily choose to go to mediation in large numbers.⁶²⁴

In the opinion of the author of this dissertation, despite certain possible resistance to such modifications, the application of judicial mediation should presumably become more imperative in certain instances as the need for more mandatory nature of application for this ADR procedure is more than obvious in the Lithuanian legal system. It must be agreed in this context with the opinion of dr. N. Kaminskienė, who believes that making media-

620 It should be noted that the author of this dissertation does not generally maintain the already-mentioned opinion of some legal authors, that judicial mediation is *per se* not purely voluntary, as it is suggested by a judge hearing the case – the person having an undeniable authority in the eyes of the parties to a dispute, i. e. persons who decide upon the recourse to judicial mediation.

621 They were started being expressed more actively even before the Pilot Project was extended to all courts in 2011. For example, Kaminskienė, N. Teisminė mediacija Lietuvoje. Quo vadis? The idea of making judicial mediation mandatory at least in some types of disputes has currently become constant issue on the agenda. For example, Kaminskienė, N. Privaloma mediacija: galimybės ir iššūkiai.

622 According to the draft Conception of Development of System of Conciliatory Mediation (Mediation).

623 It is believed that when mediation is at its “infancy”, the process is unfamiliar to and often misunderstood by many lawyers; such misunderstanding leads to mistrust, which leads to avoidance. Only when the process is being used routinely its value is being appreciated. Hutchinson, C. C., p. 90. It should be added, that studies of application of mediation in other countries have suggested that most parties involved in mandatory mediation express greater satisfaction than do those involved in adjudication. Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes. *Harvard Law Review*. 1990, 103(5): 1086–1104, p. 1093.

624 Prof. F. E. A. Sander also underlines that the fact that parties are compelled to mediate does not result in fewer settlements. Sander, F. E. A. Another View of Mandatory Mediation. *Dispute Resolution Magazine*. 2007, 13: 16.

tion mandatory at least in particular types of disputes is much needed for the promotion of this ADR procedure.⁶²⁵ In the framework of the conducted research approval for such opinion is especially evident from the perspective of current practical application of judicial mediation.

It should be noted in this context that the practice of application of mediation in foreign countries witnesses the common shift from voluntary to mandatory mediation (although to divergent extent), including its judicial form. For example, in the United States courts in every jurisdiction have initiated programs that require litigants to participate in mediation at some stage (sometimes during several stages) prior to trials;⁶²⁶ hence in some parts thereof low voluntary usage of mediation has resulted in a gradual shift to mandatory mediation.⁶²⁷ The same may be observed in different parts of Australia, Canada.

However, the implementation and application of mediation in the EU has taken a bit different path. The tradition of a voluntary approach to mediation is deeply integrated at both the practitioner and government level therein.⁶²⁸ Therefore, only one country – Italy – has mandated participation in mediation as a prerequisite to litigation in a fairly broadly range of disputes. However, the Constitutional Court of Italy shortly recognised the particular legal provisions that instituted mandatory mediation in the big part of civil and commercial disputes invalid.⁶²⁹ Nevertheless, for example, the will to promote alternatives to traditional litigation in the United Kingdom led to the provision of the power to penalize a party through an award of legal costs (i.e. the party that refused to apply mediation if, objectively viewed, it had any real prospect of success could be ordered to pay the legal costs of another party) to courts.⁶³⁰ Meanwhile in Germany legal regulation left the option for all States to introduce mandatory court-related ADR with respect to a certain number of disputes (“experimentation clause”) at the initial stage of implementation of mediation in Germany; following it mandatory mediation provisions were introduced in eight States.⁶³¹ Thus, the practice of countries of different legal tradition, as well as those belonging to the same legal tradition differs immensely when it comes to the mandatory aspect of judicial mediation; such differences are predetermined by the specific features of particular legal system.

Hence, there may be diverse manifestations of the mandatory aspect in judicial mediation: mediation may be mandated by the court or by the statute; parties may have the obligation to participate at the initial stage of mediation or also at other stages of this ADR procedure; parties may have an obligation to take all appropriate measures to settle their dispute amicably and the judge may be provided with the right to impose sanctions on the

625 Kaminskienė, N. Privaloma mediacija: galimybės ir iššūkiai, p. 698.

626 Mosten, F. S. Institutionalization of Mediation. *Family Court Review*. 2004, 42(2): 292–303, p. 296.

627 Nolan-Haley, J. M., p. 59–61.

628 *EU Mediation: Law and Practice* (ed. De Palo, G., Trevor, M. B.). Oxford University Press, 2012, p. 3. It should be noted, however, that there are certain exceptions to this general principle in some EU countries as well.

629 This situation is explained as the reflection of resistance to mandatory application of mediation in this country. Kaminskienė, N. Privaloma mediacija: galimybės ir iššūkiai, p. 697.

630 According to Newmark, C.

631 Hoffmann, A., p. 522. Whereas currently mediation in Germany is applied in all courts of general jurisdiction (not only in family cases), as well as administrative courts. Šaltauskienė, S. Mediacija: pasaulio patirtis ir Lietuvos perspektyvos. *Notariatas*. 2012, No. 13/2012: 62–69; p. 62.

party that executed such obligation in an unduly manner; the initiation of mediation may be made mandatory in all kinds of disputes or just in some of them; etc.⁶³² The particular characteristics of mandatory nature of mediation, as mentioned, may depend solely on the specificity of particular legal system.

It was already assumed, that mandatory mediation will soon become reality in the Lithuanian legal system as well.⁶³³ However, the most appropriate model of mandatory judicial mediation in our system, as well as the types of disputes that would be most fit for its application,⁶³⁴ are still to be determined taking into considerations not only the practice of other countries, but also having in mind the peculiarities of our legal system, as well as the model of judicial mediation applied therein.

In the opinion of the author of this dissertation, the determination and subsequent implementation of particular model should not be effectuated without paying the exclusive attention to:

- the need for special training not only for court mediators, but also for all judges in order to form a common understanding of ADR procedures and, particularly, judicial mediation; such training could envisage the concept and main principles of ADR in general, as well as of mediation and, especially, its judicial form in particular; the aim of such training would be the formation of general understanding of ADR procedures, as well as judicial mediation, its role in the dispute resolution system, the content of the main principles of latter, including principle of confidentiality;
- the need for dissemination of information relevant to the advantages of judicial mediation, as well as its peculiarities in our legal system in respect of the lawyers and other representatives of legal profession;
- the need for a better dissemination of information in general public in respect of the general principles of judicial mediation, its aims, advantages, as well as procedural aspects.⁶³⁵

632 Despite the mandatory nature of mediation, it remains purely voluntary in respect of the settlement of particular dispute; i. e. the parties to a dispute remain the main decision-makers in this ADR procedure and may not be obliged to settle their dispute.

633 It should be noted in this context that the will to promote peaceful settlement (including its resolution within the scope of judicial mediation) is also obvious from the fact that under Paragraph 2 of Article 87 of the Code of Civil Procedure the parties are returned certain amount of the paid stamp duty if they have concluded settlement agreement.

634 In the opinion of the author of this dissertation, judicial mediation should not be made mandatory in all types of the disputes. It is necessary to agree in this respect with dr. N. Kaminskienė that mandatory judicial mediation should be primarily introduced in family cases where the interests of underage children are at the stake. Kaminskienė, N. Privaloma mediacija: galimybės ir iššūkiai, p. 699. Hence it should also be agreed with assoc. prof. dr. V. Vėbraitė, that attention should be paid to socially sensitive civil cases – cases that arose from family and labor legal relations. Vėbraitė, V. Šalių sutaikymas kaip civilinio proceso tikslas ir jo galimybės Lietuvoje. *Teisė*. 2008, 69: 106–116; p.113. However, it also should be noted, that, for example in some parts of the United States mandatory mediation has been authorised in practice in the disputes in other areas: medical malpractice, agricultural property. *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, p. I090.

635 Although the initiatives of, *inter alia*, the Ministry of Justice of the Republic of Lithuania (for example, the informational leaflet on judicial mediation <http://www.tm.lt/dok/6_2014%2008%2008.pdf>), as

In conclusion, although mandatory judicial mediation, whatever form it may obtain, in the opinion of the author of this dissertation, will definitely become an integral part of our legal system, the forecasting of its particular manifestations is yet premature: until the thorough analysis of all of the relevant aspects in this respect, including the upcoming regulatory modifications, the model of mandatory judicial mediation which would be the best fit in the Lithuanian legal system could not be determined.⁶³⁶

4.2. Implementation Of Guarantees Of Quality Of Judicial Mediation

The objective that judicial mediation becomes an integral part of dispute resolution system in Lithuania would presumably lead to another modification of existing model of judicial mediation – introduction of necessary amendments that would ensure the demanded quality of mediation.⁶³⁷

Mediators, as mentioned, are at the core of judicial mediation. It is generally agreed that the quality of activity of a mediator is the most significant factor in the success of mediation and that mediators should therefore have high qualifications (it may include higher education, mediation training, and mediation experience); accreditation requirements for mediators play a significant role in ensuring the quality of mediation.⁶³⁸ Hence the quality of mediation is indistinguishable from the quality of the activity of a mediator and it envisages not only the requirements for persons willing to become mediators, but also the issues relative to the continuing training of mediators and monitoring the quality of judicial mediation.

Lithuanian legislature from the beginning of implementation of judicial mediation into the Lithuanian legal system has chosen, as mentioned, so-called approach of “soft regulation” not only in respect of the requirements for professional qualification of mediators, but also for accreditation of mediators and monitoring of mediation services.⁶³⁹ Although legal basis for application of judicial mediation were different from the ones of general mediation regulation and judicial mediation was started being implemented earlier than the adoption of the mentioned “soft regulation”, the said aspects of judicial mediation were also not regulated to the required extent. Qualification of the persons willing to become mediators, as mentioned, are not sufficiently regulated currently as well; whereas, issues

well as of the National Courts Administration could not be considered as scarce, the general public is still not well aware of this ADR procedure.

636 It should be noted in this context that due to the limited amount of the research such analysis did not fall under the scope thereof.

637 The quality of mediation is synonymous here to the quality of mediators' activity and qualification of mediators. It involves in this respect the issues related to the qualification of mediators, i. e. qualification requirements and special training of those who want to become a court mediator and continuing training for already court mediators, as well as the issues related to the aspects of monitoring of quality of judicial mediation.

638 Gmurzyńska, E., Morek, R., p. 264.

639 Valančius, V., p. 232.

relative to the continuing training of court mediators⁶⁴⁰ or other means for guaranteeing their appropriate qualification, as well as the system of monitoring of the quality of judicial mediation are not established at all.

Such situation, in the opinion of the author of this dissertation, especially having in mind the peculiarities of the model of judicial mediation in Lithuania, should be considered as being far from required in order to guarantee proper implementation thereof in our legal system.⁶⁴¹ Although overregulation of mediation, as of a vocational direction, in general should not be encouraged⁶⁴² (*inter alia* due to the flexible nature of this ADR procedure) the peculiarities of the model of judicial mediation in Lithuania (including its specific features in respect of who may act as a court mediator, as well as the fact that mediation is applied in Lithuania is mainly applied only in its judicial form) require establishing more thorough system in respect of the quality of mediation.⁶⁴³ In addition, although the elaboration of more comprehensive requirements for persons willing to become a court mediator in Schedule of Procedure of Assignment and Removal of Status of a Court Mediator should be considered as a positive modification in this respect, the said requirements, as mentioned, could not yet be considered as ultimate and best apt in the Lithuanian legal system as well.

The practice of countries of different legal tradition, as well as those belonging to the same legal tradition, as mentioned, differs noticeably in respect of the particular model of judicial mediation and its implementation, including the aspect of the quality of this procedure.

640 The only provisions related to the question of continuing training of judges and other participants of judicial mediation may be found in a Measures Plan for Development of Conciliatory Mediation (Mediation) and Promotion of Peaceful Settlement of Disputes, approved on 23 November 2010 by the Order No. 1R-256 “On the Approval of Measures Plan for Development of Conciliatory Mediation (Mediation) and Promotion of Peaceful Settlement of Disputes” of Minister of Justice of the Republic of Lithuania (hereinafter also referred to as “Plan for Promotion of Mediation”). Under the Article 1.7 of the Plan for Promotion of Mediation one of the organizational means entails training of judges and other participants of judicial mediation in civil disputes; the frequency of these trainings is linked to the phrase “taking into account the needs”.

641 Hence, although occasionally organised three-four days intense mediator training courses offering development of basic knowledge and skills, as well as short (2-4 academic hours) seminars with overview of mediation principles and techniques corresponded the needs in 2007 (European Commission for the Efficiency of Justice Working Group on Mediation, *Analysis on assessment of the impact of Council of Europe recommendations concerning mediation* [interactive]. Strasbourg, 3 May 2007, p. 42 [accessed 2010-08-06]. <<https://wcd.coe.int/com.intranet.InstraServlet?command=com.intranet.CmdBlobGet&IntranetImage=274087&SecMode=1&DocId=1129304&Usage=2>>.), this is not relevant anymore.

642 It is believed to be true especially due to the novelty of such profession, the need to guarantee the right of the parties to a dispute to decide upon the nomination of particular mediator, as well as the will to avoid the rise of “professional elite” in this respect. Mosten, F. S., p. 294.

643 In addition, it is said that the public interest in supporting regulation of mediation also exists as it allows *inter alia* promoting mediation by encouraging its practice only by the competent mediators. Weckstein, D. T. Mediator Certification: Why and How. University of San Francisco Law Review [interactive]. 1996, 30, [accessed 2013-11-04]. <http://www.lexisnexis.com/lvacui2api/results/docview/docview.do?docLinkInd=true&risb=21_T18538463747&format=GNBFI&sort=RELEVANCE&startDocNo=1&resultsUrlKey=29_T18538463736&cisb=22_T18538463749&treeMax=true&treeWidth=0&csi=145276&docNo=9>.

For a long time the most common practice in common law jurisdictions was leaving the forces of a free market to regulate the practice of mediation,⁶⁴⁴ hence – not implementing the general regulation of the issues related to the qualification of mediation. The introduction of special court mediation programs, as mentioned, changed the landscape of mediation, including the issues of its quality. However, legal framework in this respect remained fragmented, consisting of various different practices.⁶⁴⁵

In a sense the same could be said about the practice of EU Member States that belong to civil law tradition: it is diverse and fragmented. It should be noted that the most commonly the system of registration of mediators is instituted. However, this system is in some countries considered to be merely a public recognition of the fact that mediators have received formal training,⁶⁴⁶ whereas in others – the system guaranteeing the appropriate qualification of mediators.⁶⁴⁷ While, for example, the requirement to be trained is set in Finland, no particular system of registration or accreditation is instituted,⁶⁴⁸ all mediators may be either “simple” or certified in Latvia: the Mediation Council (association subordinated to the Ministry of Justice) is responsible *inter alia* for the certification thereof;⁶⁴⁹ whereas in Ireland no statutory basis for general training or accreditation of mediators exists: there are, however, various individuals and organizations using different standards for training and accrediting mediators.⁶⁵⁰ In addition, when it comes to the training of mediators and outside controls, some states, similarly to Lithuania, have not determined any requirements at all.⁶⁵¹

644 For example, in Australia regulation was for a long time imposed by service-provider organizations and industry groups, and therefore varied from provider to provider and industry to industry. Alexander, N. What’s Law Got To Do With It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions, p. 15.

645 For example, in many states of the United States the system of certification of mediators as a compromise between no regulation and licensing was instituted; certification though generally does not bar noncertified mediators from practicing in the marketplace – it rather accentuates the competence and credibility of certified mediators and gives them an advantage in the marketplace by allowing them to call themselves “certified”. Mosten, F. S., p. 295.

646 According to Babić, D. The system of registration of mediators in Cyprus is considered to be unsuitable, as there is no equivalent length of service requirement for inclusion in the professional registers. Georgiades, A. Cyprus. *EU Mediation: Law and Practice* (ed. De Palo, G., Trevor, M. B.). Oxford University Press, 2012: 47–58., p. 57–58.

647 The system of registration in the List of Registered Mediators of the Federal Ministry of Justice exists in Austria; this system is not considered as pure formality therein, it guarantees the necessary threshold in order to become mediator. Leon, C., Rohracher, I., p. 15. Mediators are registered into the Uniform Register of Mediators once their qualifications have been established in Bulgaria as well. Aleksandrova, S. Bulgaria. *EU Mediation: Law and Practice* (ed. De Palo, G., Trevor, M. B.). Oxford University Press, 2012: 33–46., p. 39–40.

648 Judges who act as mediators are simply required to undertake the mediation training provided by the Ministry of Justice; the purpose of this training – to guarantee the quality of mediation, and to ensure that the mediation is efficient, unbiased and skilled. Taivalkoski, P. Finland. *EU Mediation: Law and Practice* (ed. De Palo, G., Trevor, M. B.). Oxford University Press, 2012: 97–111., p. 105.

649 Bertaitis, S., Matjusina, R., Olevska, I. Latvia. *EU Mediation: Law and Practice* (ed. De Palo, G., Trevor, M. B.). Oxford University Press, 2012: 204–219, p. 211–213.

650 White, N. Ireland. *EU Mediation: Law and Practice* (ed. De Palo, G., Trevor, M. B.). Oxford University Press, 2012: 172–186, p. 182–183.

651 The example of such country would be Czech Republic, which has no existing regulation in regard to the training of mediators and no outside controls. Feasley, A., p. 346. However, for example in Latvia,

Such structural fragmentation in mediation training and qualifications even provoked the discussion as to the need of common EU regulation of mediators' qualifications and lawyers' participation in mediation.⁶⁵² Although the need of common EU regulation concerns of course only the cross-border disputes, such discussions signify another aspect – the problem when it comes to the adequateness of regulation of mediators' qualification is a common one.

It is important to stress once more, that although qualified mediator is in general prerequisite for successful mediation, mediations during court procedure are more complicated, the degree of escalation of the underlying conflicts is higher, and this places extra demands on mediators.⁶⁵³ Hence, the quality of judicial mediation (including the qualification requirements for a court mediator) is even of the greater importance as compared to the private form of mediation.

It should be noted in the framework of the conducted research that the specificity of judicial mediation in Lithuania, in particular the fact that the persons willing to become a court mediator must attain the status of a court mediator and must be enrolled in the List of Court Mediators, as well as the circumstance that judicial mediation may be and, actually very often – is, conducted by court mediators who are judges, whereas the implementation of mediation into legal system is effectuated through the application of judicial mediation, which is not very successful yet, predetermines the special requirements for the system for guaranteeing qualification of judicial mediation and specific features thereof as well. In other words, quality of judicial mediation, presumably, could not be guaranteed by simply introducing the system similar to the one of any other country. Hence the requirement of the Directive to ensure the quality of mediation⁶⁵⁴ in Lithuania must be executed having in mind the specificities of the model of judicial mediation in place, as well as the practice of foreign countries.⁶⁵⁵

In the opinion of the author of this dissertation, the determination and subsequent implementation of particular legal regulation for guaranteeing the quality of judicial mediation should not be effectuated without paying the exclusive attention to:

- the need to determine the entity empowered to organise special training for persons willing to become mediators in judicial mediation and to determine the scope and length of this training: either National Courts Administration could be authorised to organise identified training not only for the judges and assistants of judges, but also for other persons acting as a court mediator, or other entities (that meet the requirements identified by legal regulation) could be entitled to organise such training;

the community of professional mediators is not only growing by itself, but the necessary training programs for mediators, including regular continuing education, have been established as well. Kronis, I. *Integration of Mediation into Latvian Legal Culture* [interactive], [accessed 2014-08-23]. <http://www.tf.vu.lt/dokumentai/Admin/Doktorant%C5%B3_konferencija/Kronis.pdf>.

652 Feasley, A., p. 345.

653 According to Niemeijer, B., Pel, M.

654 Under Article 4 of Directive.

655 Due to the limited volume of this research such analysis and the determination of the exhaustive model for guaranteeing the quality of mediation in Lithuania did not fall under the scope thereof.

- the importance of continuing training of court mediators, whether they are judges or not, and the need to determine the length, scope, and frequency of such training, as well as entity entitled to organise this training;
- the need to introduce the system for monitoring the quality of judicial mediation, i.e. to identify particular subjects authorised to control the qualification of court mediators, and to determine the scope of this outside control of the quality of judicial mediation.

In conclusion, although special system in respect of attaining and maintaining the status of a court mediator is set in the Lithuanian legal system, it is not only incomprehensible when it comes to determining the particular qualification requirements for a court mediator, but it also does not envisage the important aspects related to continuing education of court mediators, as well as outside control of the quality of judicial mediation. Thus, these aspects will presumably become the subject matter of the future modifications of the model of judicial mediation.

4.3. Other Possible Instances Of Development Of Judicial Mediation

The development of judicial mediation in Lithuania may also have effect on other modifications of the existing model of this ADR procedure.⁶⁵⁶ In the opinion of the author of this dissertation, the future development of judicial mediation will, presumably, cover the issues indicated below.

- Introduction of judicial mediation in other types of disputes (not only civil disputes), for example, administrative disputes. It is admitted by legal researchers that administrative disputes may be settled peacefully, i.e. by making compromises, agreeing on mutually-acceptable decision, whereas mediation is considered to be one of the possible means for achieving peaceful settlement of the said disputes.⁶⁵⁷ Moreover, peaceful settlement of administrative dispute by the means of judicial mediation is even considered to be a necessity by some legal authors due to shortages of the model of administrative litigation and continuing social changes.⁶⁵⁸ Furthermore, the conclusion of peaceful settlement agreement and its approval by the court was a relatively long-standing practice of administrative courts even at the moment when the law that regulates administrative proceedings did not entail pro-

656 It is not to mention the possible development of other forms of mediation as well. For example, the development of victim-offender mediation, which is highly promoted in legal literature. Uscila, R. Nusikaltimo aukos ir kaltininko mediacijos įdiegimo galimybės Lietuvoje. *Teisės problemos*. 2006/2 (52): 84–99. It may also, for instance, primarily entail the specific form of victim-offender mediation – victim-offender mediation when offender is a minor person. Michailovič, I. Nepilnamečio kaltininko ir nukentėjusiojo mediacijos galimybės Lietuvoje. *Teisė*. 2000. 35: 69–79. It should be noted, however, that in general victim-offender mediation is considered to be one of the most progressive alternative means which entails the agreement between victim and offender on the compensation for grievances and damage. Michailovič, I. Atkuriamasis teisingumas: genezė ir raida. *Teisės problemos*. 2001/4: 50–62, p. 52.

657 Trumpulis, U. Teorinės ir praktinės mediacijos taikymo prielaidos sprendžiant administracinius ginčus Lietuvoje. *Jurisprudence: Research Papers*. 2012, No. 19(4): 1423–1437.

658 Meškys, L., Gerdvila, M. Ar galima mediacija administraciniame procese Lietuvos Respublikoje? *Law Review*. No. 1(12), 2015: 130–158, p. 135–136.

visions related to the conclusion of peaceful settlement agreement, as well as approval thereof by the court;⁶⁵⁹ this ensured the execution of one of the aims of administrative proceedings – restoration of social peace.⁶⁶⁰ Whereas after the relatively recent legislative modifications the possibility to conclude settlement agreement in administrative disputes has become integral part of administrative proceedings.⁶⁶¹ Hence application of judicial mediation in administrative disputes has become an even more possible direction of development of judicial mediation due to the will to achieve the mentioned aim – restoration of social peace.

- Broader promotion of judicial mediation, primarily by more intensive dissemination of information related to the application of judicial mediation in society. According to the Plan for Promotion of Mediation dissemination of information relative to the implementation of the Pilot Project is one of the organizational means for the promotion of peaceful settlement of the disputes, as well as development of mediation in general. In the opinion of the author of this dissertation, despite the essentially rather active communication of the results of Pilot Project to the wider society, the dissemination of information should also envisage communication of data related to the application of judicial mediation in practice (of course with the respect to requirements of principle of confidentiality), as well as general principles of mediation, advantages and possibilities of application of judicial mediation. Presumably the newly founded institution – the Commission of Judicial Mediation will contribute to this objective.
- Organization of special courses for judges in courts of general jurisdiction (as long as judicial mediation is not yet an integral part of administrative proceedings it does not necessarily has to involve judges hearing administrative cases in administrative courts) – the persons who may provide the parties to a dispute with all information necessary for referral of the dispute to judicial mediation. The education of the latter is crucial for the success of judicial mediation, as judges hearing particular cases may determine which disputes are more suitable and which, accordingly, – less for judicial mediation and encourage recourse to this ADR procedure by providing relative information for the parties to the dispute.⁶⁶² This could, presumably, have effect on the consequential growth of the application of this ADR procedure.

659 These actions were performed under Code of Civil Procedure and Civil Code, i. e. generally more or less the same provisions that are applied in respect of the conclusion and approval of settlement agreement in judicial mediation.

660 Saudargaitė, I., Sutkevičius, A. Taikos sutartis administracinių teismų praktikoje. *Human rights, the rule of law and administrative justice: an overview of the European approach*. Vilnius: Lietuvos vyriausiasis administracinis teismas, 2012: 578–598.

661 Seimas adopted on 30 May 2013 the Law of the Republic of Lithuania on the Amendment and Supplement of the Articles 37, 42, 44, 46, 50, 53, 68, 80, 82, 97, 101 of the Law on Administrative Proceedings and Supplement of the Law by Article 52¹. *Valstybės žinios*. 2013, No. 62-3060. These modifications came into force on 1 August 2013.

662 It should be noted in this context that according to the Survey of the Courts during the period 2010–2012 36 courts out of 44 that provided the answers to the questionnaire (in general there are 67 court in Lithuania) did not refer any civil cases to judicial mediation. Although such situation may depend on the unwillingness of the parties to refer their disputes to judicial mediation, it, presumably, is also influenced by the resistance to application of judicial mediation by the judges hearing the cases.

- Mediation course – one of the components of university curricula. As mediation course or any other analogous course on the ADR procedures has already become an integral part of legal education in some foreign countries, such changes, whatever form they may acquire, could probably be envisaged in our educational system as well.

In conclusion, the development and consequential modifications of the model of judicial mediation are inevitable in the Lithuanian legal system – system where this ADR procedure is only taking its, more or less, initial steps towards the recognition. Due to the fact that there is a strong will of the authorities to encourage peaceful settlement of disputes within the scope of judicial mediation, the future development of yet infrequently applied judicial mediation is on the agenda of legislature.

Hence, special courses for judges hearing the cases, as well as additional information related to ADR in general and judicial mediation in particular, may have a positive effect on the application of this alternative to traditional adjudication.

CONCLUSIONS

1. Judicial mediation constitutes an integral part of the dispute resolution framework in the Lithuanian legal system. Nevertheless, this ADR procedure has not yet become a true alternative to traditional litigation, *inter alia*, due to its poor application in practice. A variety of relevant reasons may be distinguished in this respect; they lie, among others, in the long-standing litigation traditions, which are characteristic of Lithuania, as a country of civil law tradition. The will (*inter alia* of the authorities, legal practitioners) to promote judicial mediation in order it becomes a real alternative to litigation, still determines the further development of this ADR procedure.
2. In the Lithuanian legal system, judicial mediation may be generally defined as a dispute settlement procedure aimed at helping (after the initiation of a civil case in court) the parties to a dispute to resolve amicably their civil dispute (as it is defined by the Code of Civil Procedure) by concluding a legally valid settlement agreement with the assistance of one or several mediators – special subjects enrolled in the List of Court Mediators. Judicial mediation is closely linked with court proceedings – it may be applied only after the initiation of a civil case in a court of general jurisdiction.

The content of the main principles of judicial mediation (the principles of the voluntarism of the parties to a dispute, confidentiality, mutual respect and tolerance, the neutrality and impartiality of a court mediator, cooperation, the qualified activity of a court mediator, good faith, communication, the exemplarity of behavior, the credibility of a court mediator, lawfulness), which are enshrined by or may be derived from the applicable legal regulation, as well as the guarantees for the implementation of these principles, are reflected through the legal status and the role of the parties to a dispute and a court mediator – the participants of judicial mediation, who may have influence on the application and, consequently – the content, of the aforesaid principles.

It may be concluded (on the basis of the conducted research) that the legal status and the role of the participants of judicial mediation – the parties to a dispute and a court mediator – under the applicable legal regulation are such that are necessary for reaching the aim of judicial mediation, i.e. for solving a dispute peacefully within the scope of this ADR procedure. The guarantees for implementing the general principles of judicial mediation are also essentially established by the applicable legal provisions: the general principles of judicial mediation must be observed in all stages of judicial mediation – in the course of its initiation, throughout its process, as well as during its conclusion (termination).

- 2.1. The parties to a dispute are essentially provided with the rights inherent in their role as that of the main decision-makers in respect of a particular dispute: *inter alia*, the right to engage in judicial mediation, the right to settle and, accordingly, the right not to settle the dispute within the scope of this ADR procedure, the right to choose a mediator, the right to participate in framing the procedure of judicial mediation, the right to terminate judicial mediation. They are also subject to the required duties (which coincide with some of the general principles of judicial mediation) that create preconditions for the proper application

of this ADR procedure: *inter alia*, the duty of cooperation, the duty to act in good faith and the duty of confidentiality.

The applicable legal regulation, though, may be considered as deficient inasmuch as the duty of participation in judicial mediation (already initiated) – the duty that is inherent in the very essence of this ADR procedure and that envisages the participation of the parties to a dispute in a particular procedure as *conditio sine qua non* – is not taken into account when legally regulating the procedure of judicial mediation. Therefore, it has been suggested that the existing legal framework of judicial mediation needs to be amended in this respect by taking into account, when possible, the need for the participation in judicial mediation of the parties to a dispute (by establishing the relevant duty for the parties to a dispute, as well as by setting the possibility to terminate judicial mediation if the parties to a dispute (or one party to a dispute) do not participate in this ADR procedure).

In addition, the requirement to be represented by a lawyer has been suggested to be set as a guarantee, so that the parties to a dispute are aware of their rights and the essence of this ADR procedure.

- 2.2. A court mediator is essentially provided with the rights necessary for him (her) to be able to exercise his (her) role and to help the parties to a dispute to achieve the main goal of judicial mediation – the amicable resolution of their dispute: *inter alia*, the right to decide upon the performance of judicial mediation in a particular dispute, the right to frame the procedure of judicial mediation, the right to have influence on the settlement of the dispute by offering the parties proposals for the settlement of their dispute, as well as the right to terminate judicial mediation. A court mediator is also subject to the duties that guarantee the proper application of judicial mediation: *inter alia*, the duty to act in accordance with the European Code of Conduct for Mediators, the duty to ensure the effective, expeditious and fair process and the equality of the parties in judicial mediation, the duty to perform activity in a qualified manner, the duty to maintain impartiality and neutrality, the duty to recuse themselves if the conditions for recusal exist, and the duty to maintain confidentiality.

However, the existing legal regulation does not provide for any necessary guarantees for the application of the principle of the qualified activity of a court mediator: although all willing persons who meet the established requirements may become a court mediator, the applicable legal provisions remain ambiguous as to the exact requirements – the discretion to decide whether the qualification and characteristics of a particular person make him (her) eligible to acquire the status of a court mediator is left within the scope of the competence of a specially-formed body. It has been argued, that such a system is suitable only as a transitional one, i.e. it should be modified in the near future by identifying the particular requirements for persons willing to become a court mediator.

In addition, although the principles of neutrality, the impartiality of a court mediator, as well as the principle of confidentiality, are determined as the principles of judicial mediation, the applicable legal provisions do not provide for any necessary guarantees for their application where a judge hearing the case

may also act as a court mediator in the same instance and even approve the settlement agreement. Therefore, it has been suggested that the possibility for the same person to act both as a judge and a court mediator should be removed.

3. The model of judicial mediation introduced into Lithuanian legal system is a particular model that has its salient features, which are distinctive *inter alia* from the respective models in other continental legal systems.

3.1. The peculiarities of the model of judicial mediation have been determined in the course of introduction and development of this ADR procedure in the Lithuanian legal system. The identified aspects (the main, though not the only ones) of introduction and development of this procedure still influence legal regulation of judicial mediation.

3.1.1. The existing inseparable link between the resolution of disputes and the competence of courts, accordingly – the role of judges, has made an impact on the introduction of this ADR procedure. Judicial mediation was introduced into the Lithuanian legal system by applying a mixed approach (a different approach as compared to the one adopted in most countries of civil tradition): it was implemented by attempting to apply it from court-to-court (so-called “pragmatic approach”) jointly with the adoption of the legal regulation of this ADR procedure (so-called “legislative approach”). Such implementation of judicial mediation has preconditioned a very close relation of this ADR procedure to the system of courts and proceedings in courts, and, accordingly, has had an impact on the further development of judicial mediation itself.

In spite of the consequent modifications of the model of judicial mediation, this ADR procedure still remains in close connection to the court system: the Judicial Council – one of the bodies of the self-governance of courts – participates in the formation of the Commission of Judicial Mediation – a special body that decides upon the assignment and removal of the status of a court mediator, as well as considers related appeals; judges must meet the special requirements (as compared to other subjects willing to become a court mediator) in order to become a court mediator; the legal provisions regulating the procedure of judicial mediation are adopted by the Judicial Council, etc.

The further modifications of the legal framework of judicial mediation, thus, must be also made considering this inextricable link of judicial mediation to the system of courts.

3.1.2. The introduction and development of judicial mediation in the Lithuanian legal system have also been influenced by the regulatory initiatives and the acts of the EU, particularly, the Directive, as well as the consequent trend of mediation in all the Member States.

It should be noted in this context (on the basis of the conducted research) that the legislator has duly implemented the duty of Lithuania, as a Member State, to transpose the rights and duties determined by the Directive into the Lithuanian legal system. Furthermore, the application of the general principles of the Directive has been extended to domestic

disputes, as well as not only to the private, but also to judicial mediation. In this way, legislator has actively promoted implementation of judicial mediation.

- 3.2. The salient features of the model of judicial mediation introduced into the Lithuanian legal system (the features that must be also taken into account when drafting legal regulation of judicial mediation) include, among others, the following:
- this ADR procedure is, as mentioned, very closely related to the system of courts (*inter alia* in respect of the procedure of assignment and removal of the status of a court mediator; the special requirements for persons willing to acquire the status of a court mediator; the subject entitled to legally regulate the procedure of judicial mediation, etc.) and court proceedings (the initiation of judicial mediation is possible only if the civil case is already initiated in court; civil proceedings are suspended while judicial mediation is performed; the judge hearing the case has an influence on the length of particular judicial mediation procedure; the judge hearing the case is given the right to act as court mediator in the case he (she) is hearing, etc.);
 - judicial mediation is entirely voluntary, i.e. the parties to a dispute are free to decide whether to refer their dispute to be settled in the scope of this ADR procedure (this characteristic has been set to be modified following the scheduled amendments of the relevant legal regulation);
 - although all private persons who meet the requirements set by the law may attempt becoming a court mediator, only special subjects who possess the appropriate qualification, have acquired the special status of a court mediator and, ultimately, have been enrolled in the List of Court Mediators may act as a court mediator; the assignment of the status of a court mediator for a particular person is left within the discretion of the Commission of Judicial Mediation – a special body formed by the Judicial Council; such procedure is rather rigorous, thus, the establishment of such procedure, contrary to what is believed, reflect the transition of this judicial mediation to market-based model only partially;
 - in spite of the establishment of the principle of the qualified activity of a court mediator and the possibility of removing the status of a court mediator if the professional characteristics indispensable for a court mediator are not possessed, the characteristics, that are required, as well as the requirements for the continuing training of mediators are not set; the aspects related to the qualification requirements for a court mediator are left to be determined in individual cases by the same body that decides on the removal of the status of a court mediator – the Commission of Judicial Mediation;
 - the procedure of judicial mediation has been regulated rather stringently, i.e. some of the procedural aspects are imperatively defined by the applicable legal provisions, hence, not entirely left to be determined in the course

- of a particular procedure and, thus, cannot be on all occasions tailored to the needs of a particular dispute;
- although legal regulation of certain aspects of judicial mediation (such as, for example, of determination of the duration of judicial mediation) is rather comprehensive, so-called “transitional” legal regulation, i.e. legal regulation which should be considered as suitable only in such a relatively early stage of application of judicial mediation and should be later modified, is entrenched in many cases; in this respect “transitional” legal regulation comprises legal provisions that give discretion to decide to a particular subject without indicating the criteria for the adoption of decision (for example, legal regulation which implies that Commission of Judicial Mediation is entitled to determine qualification requirements for particular person willing to become a court mediator, as well as the ones for a person who already has acquired the status of a court mediator), as well as legal provisions which have been framed in a generalised manner (for example, legal provisions that require to attend special courses on mediation without identifying the subject matter or the subjects which are entitled to organize such courses).

PROPOSALS FOR MODIFICATION OF LEGAL REGULATION OF JUDICIAL MEDIATION

The conducted research enabled framing several specific proposals for modification of applicable legal provisions which could contribute to the improvement of legal framework for application of judicial mediation.

1. The reference to the Code of Civil Procedure should be made in Judicial Mediation Rules in order to clarify what disputes may be dealt with in the scope of judicial mediation.

Hence, Article 1 of Judicial Mediation Rules should be amended and state as follows:

“1. Judicial Mediation Rules determine the cases and procedure of performance of judicial mediation (conciliatory mediation in civil disputes) in civil cases (**as determined by the Paragraph 1 of Article 22 of the Code of Civil Procedure**) heard in courts of general jurisdiction.”

2. The requirement for the parties to a dispute to participate in person in judicial mediation, as well as for their representatives to participate therein should be embodied in Judicial Mediation Rules.

Hence, Article 18 of Judicial Mediation Rules should be amended and state as follows:

“18. The parties to a dispute, as well as their representatives **must** participate in person in the course of judicial mediation. <...>”

3. The possibility of provision of the state-guaranteed legal aid to the parties to a dispute in judicial mediation should be expressly set in the Law on the State-Guaranteed Legal Aid.

Hence, Paragraph 1 of Article 2 of the Law on the State-Guaranteed Legal Aid should be amended and state *inter alia* as follows:

“1. State-guaranteed secondary legal aid – drafting of documents, defense and representation in court, including the process of execution, representation in the event of preliminary extrajudicial consideration of a dispute, where such a procedure has been laid down by laws or by a court decision, **representation in judicial mediation**. <...>”

4. The requirement for all judges willing to acquire the status of a court mediator to attend special courses in the framework of judges’ training program should be set.

Hence, Article 8 of Schedule of Procedure of Assignment and Removal of Status of a Court Mediator should be amended and state as follows:

“8. Requirement to attend training on mediation set in Article 6.3 is not applied to judges; the latter **must attend** special courses in the framework of judges’ training program. Such requirement is also not applied to legal scholars who have at least 3 years of pedagogical experience in the field of mediation, as it is understood under Article 69 of the Law on Courts of the Republic of Lithuania”.

5. The structure of Commission of Judicial Mediation should be regulated in such way, that it was composed of 6 judges and of 3 other professionals in the sphere of judicial mediation.

Hence, Article 6 of Regulations of Commission of Judicial Mediation should be amended and state as follows:

“6. Commission is composed for the term of office of the Judicial Council from nine members, six of them must be judges, **others – specialists in the sphere of judicial mediation**. <...>”.

6. Members of Commission of Judicial Mediation should be provided with the right to elect the chairman of this commission.

Hence, Article 7 of Regulations of Commission of Judicial Mediation should be amended and state, *inter alia*, as follows:

“7. The members of the Commission are appointed by the Judicial Council. **The appointed members of the Commission elect the Chairman of the Commission among themselves**”.

7. The time-limit for adoption of the decision on assignment of the status of a court mediator should be reduced from 60 up to 20 working days.

Hence, Article 5 of Schedule of Procedure of Assignment and Removal of Status of a Court Mediator should be amended and state as follows:

“5. The request of a person to provide him (her) with the status of a court mediator must be examined by the Commission in no longer than **20** working days from receipt of the documents determined in the Article 3 of this Schedule”.

8. The requirement that the date of the next court hearing would be set only after consultation with court mediator assigned to mediate particular case should be set.

Hence, Article 10 of Judicial Mediation Rules should be amended and state, *inter alia*, as follows:

“10. <...> Hearing of the case is postponed by the same ruling whilst determining the exact date of the next court hearing **after the consultation with court mediator** (expiration of term of judicial mediation)”.

9. The decision of one party to a dispute to terminate judicial mediation should be expressly implemented as a ground for termination of this ADR procedure.

Hence, Article 25 of Judicial Mediation Rules should be supplemented as follows:

“The process of judicial mediation is terminated: <...>

25.2. by the decision **of one or** both of the parties to a dispute to withdraw themselves from judicial mediation.”

10. The reference to the provisions of Judicial Mediation Rules implementing the exceptions of what information received in the course of judicial mediation may not be submitted as evidence in civil cases must be set in Mediation Law.

Hence, Paragraph 2 of Article 7 of Mediation Law must be supplemented as follows:

“2. <...> **Particular exceptions to the prohibition for court mediator and the parties to a dispute to reveal confidential information received in the course of judicial mediation are defined in Judicial Mediation Rules**”.

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APPENDIX

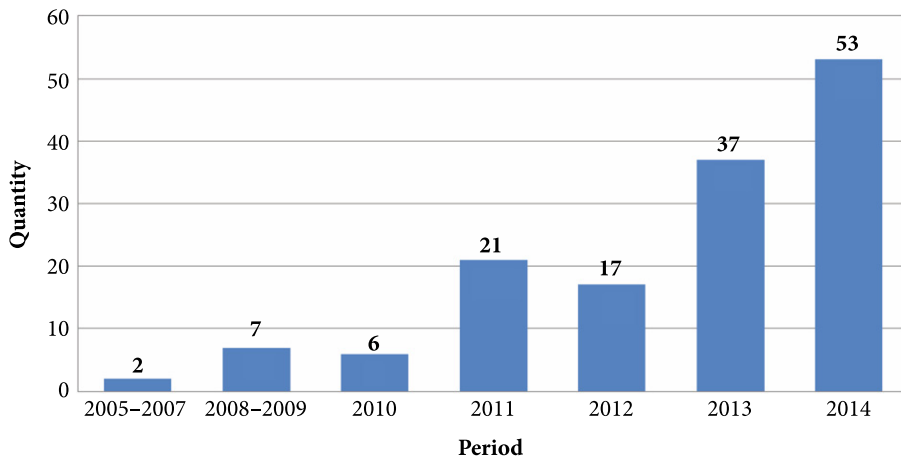


Chart 1. Cases referred to judicial mediation

Chart 1 reflects the number of cases that have been referred to judicial mediation since the launch of the Pilot Project⁶⁶³. As it may be seen from the provided data⁶⁶⁴ though the number of the cases referred to judicial mediation has considerably grown, this number still remains rather insignificant (especially in comparison to the number of civil cases heard, for example, by courts of first instance⁶⁶⁵). The application of judicial mediation obviously is currently the most active as the number of cases referred to judicial mediation was the biggest in 2014.

663 Due to the lack of information about application of judicial mediation in the early stages of the Pilot Project, there is no possibility to provide comprehensive statistical data in respect of every year of its application. Therefore, until 2010 (whereof more or less complete statistics in respect of application of this ADR procedure is available) the data of application of judicial mediation could not be provided separately for each year.

664 It should be noted in this context that the statistical data is in some respect inconsistent, as the data provided in the official website of National Courts Administration in some instances differs (though insignificantly) from the data provided by this institution in the framework of this research.

665 For example, the courts of first instance received 198639 civil cases, 196723 of which were heard by the courts of during the year 2014. According to *Report on civil cases heard by the courts of first instance in 2014* provided in the official website of the National Courts Administration [interactive] [accessed 2015-06-13]. <<http://www.teismai.lt/lt/visuomenei-ir-ziniasklaidai/statistika/106>>.

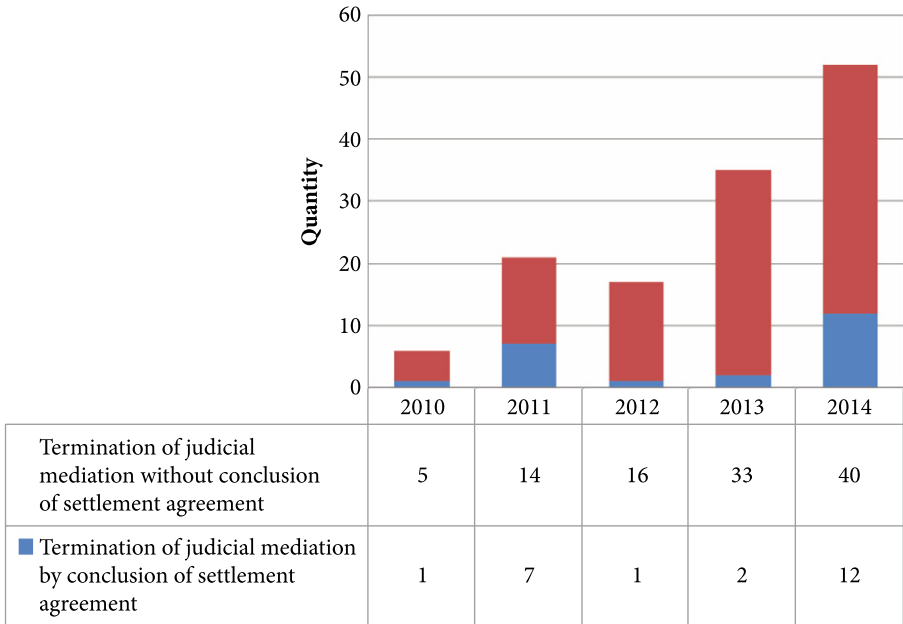


Chart 2. Cases referred to judicial mediation during the period of 2010–2014 and number of successful judicial mediation procedures

Chart 2 reflects the number of cases which have been referred to judicial mediation during the period of 2010–2014 and the number of the cases referred to judicial mediation in particular year that were terminated by conclusion of the settlement agreement which was approved by the court⁶⁶⁶. Provided statistical data proves that despite the relevant growth of the amount of the cases referred to judicial mediation the number thereof which were terminated by the conclusion of settlement agreement remains fractional (though the percentage of judicial mediation procedures terminated by the conclusion of settlement agreement has obviously increased⁶⁶⁷).

⁶⁶⁶ The cases that were referred to judicial mediation and judicial mediation was terminated by the conclusion of settlement agreement, which was not approved by the court, are not included in the number of successful judicial mediation procedures.

⁶⁶⁷ The percentage of judicial mediation procedures terminated by the conclusion of settlement agreement has grown from 5,71 per cent in 2013 to 28,57 per cent in 2014.



Chart 3. Cases referred to judicial mediation in the period of 2010–2014

Chart 3 graphically represents what part of the overall cases referred to judicial mediation during the defined period⁶⁶⁸ constitutes successful (*strictu sensu*)⁶⁶⁹ judicial mediation procedures, i.e. part of referred cases thereof judicial mediation was terminated by conclusion of settlement agreement. This chart also showcases the part, as well as the number of overall cases referred to judicial mediation during the defined period which were not terminated by the conclusion of settlement agreement. As it may be seen from the provided data, the so-called success rate of judicial mediation in Lithuania is yet unpromising.

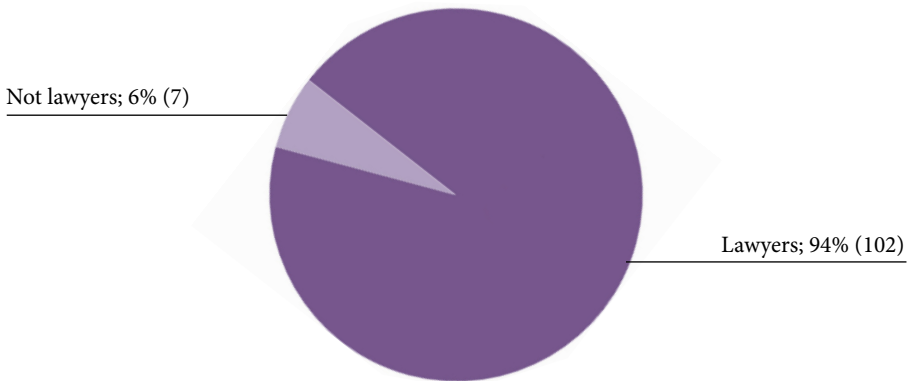


Chart 4. Court mediators by education

Chart 4 reflects which part of mediators enrolled in the List of Court Mediators is comprised of the lawyers and which consists of not lawyers. As it may be seen from the chart vast majority of persons who have acquired the status of a court mediator in Lithuania are lawyers.

668 Due to the fact that available statistical data is inconsistent in this respect, Chart 3 was produced in accordance with the data provided in the Survey of the Courts, as well as Statistical Data of 2012–2013 and Summary of Judicial Mediation Process of the Year 2014. *Summary of Judicial Mediation Process of the Year 2014* of 10 March 2015 No. 3R-812-(6.20) prepared by the Legal Division of National Courts Administration [interactive], [accessed 2015-06-13]. < <http://www.teismai.lt/data/public/uploads/2015/03/scan.pdf>>.

669 Notion “successful mediation” is applied here with the full awareness and acceptance of the opinion that success of judicial mediation does not necessarily always has to entail the conclusion of the settlement agreement.

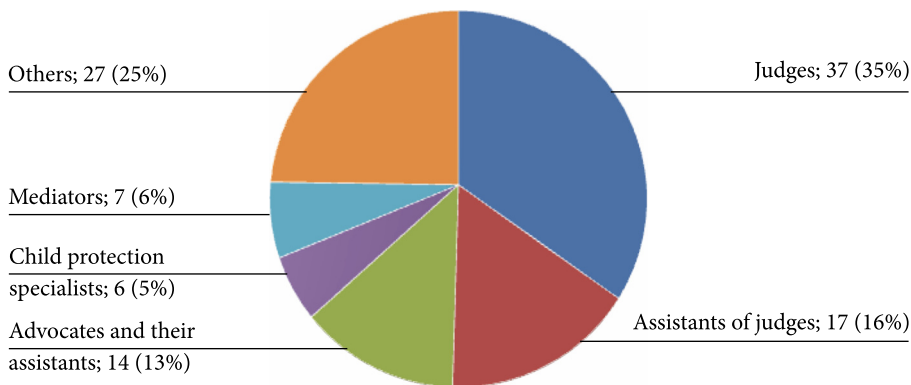


Chart 5. Court Mediators by working title

Chart 5 showcases distribution of court mediators by working title that they hold⁶⁷⁰. Provided statistical data indicates that judges and assistants of judges constitute the biggest part of court mediators⁶⁷¹.

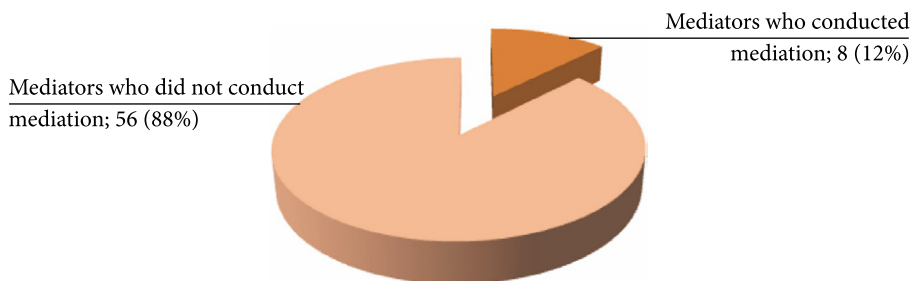


Chart 6. Quantity of court mediators who conducted judicial mediation in 2012–2013

Chart 6 reflects the quantity of mediators who have conducted judicial mediation in 2012–2013. Statistical data proves that only small amount of mediators did perform judicial mediation⁶⁷².

⁶⁷⁰ According to the List of Court Mediators updates of 17 January 2015.

⁶⁷¹ The working title here is used in accordance to the working title inscribed in the List of Court Mediators.

⁶⁷² The statistical data related to the number of mediators who have conducted judicial mediation in 2014, as well as to the judicial mediation conducted by judges and other mediators is not available. However, according to the Summary of Judicial Mediation Process of the Year 2014 the successful judicial mediation (in the sense that the settlement agreements were concluded) was conducted by 8 mediators, interestingly 7 of them were either judges, or assistants of judges.

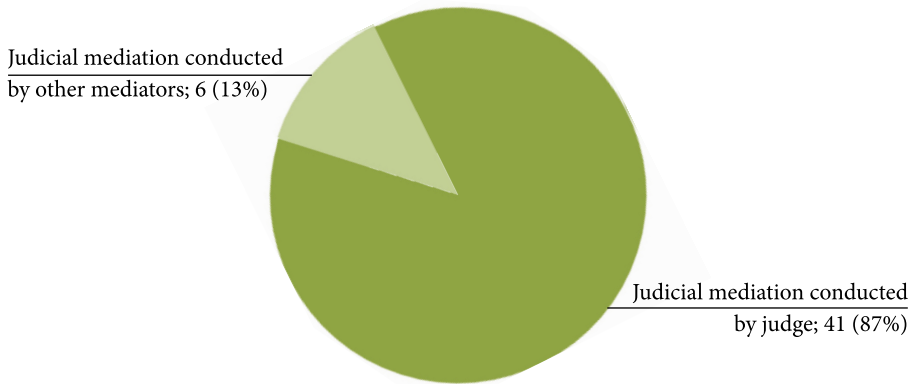


Chart 7. Judicial mediation in 2012–2013 by the type of court mediator

Chart 7 reflects the part (as well as the number) of judicial mediation procedures in 2012–2013 which were conducted by judges. As it may be seen from the provided statistical data judicial mediation was mainly conducted by judges-mediators.

MYKOLAS ROMERIS UNIVERSITY

Ieva Saudargaitė

JUDICIAL MEDIATION IN CIVIL DISPUTES
IN LITHUANIA

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The Doctoral Dissertation is available at Martynas Mažvydas National Library of Lithuania (Gedimino ave. 51, LT-01504 Vilnius) and the libraries of Mykolas Romeris University (Ateities str. 20, LT-08303 and Valakupių str. 5, LT-10101 Vilnius; V. Putvinskio str. 70, LT-44211 Kaunas).

JUDICIAL MEDIATION IN CIVIL DISPUTES IN LITHUANIA

Summary

The Research problem

Although judicial mediation has been introduced into the Lithuanian legal system by adopting a related legal regulation in the framework of the launch of a pilot project in courts in the year 2005,⁶⁷³ and though legal regulation is considered to be “the most important framework for the application of mediation”,⁶⁷⁴ judicial mediation in civil disputes⁶⁷⁵ has not yet become a true alternative to litigation in the Lithuanian legal system and is rarely applied in practice⁶⁷⁶ despite the legislative initiatives, as well as the active promotion of this alternative dispute resolution (hereinafter also referred to as “ADR”) procedure by authorities. Nevertheless, in spite of the relatively recent implementation of judicial mediation in civil disputes, the legal regulation of this ADR procedure has been modified more than once during past years.⁶⁷⁷ Moreover, the further modification of the legal regulation of mediation, including its judicial form, is considered to be necessary for this ADR procedure to find its place and be applied in the Lithuanian legal system.⁶⁷⁸

673 The Council of Courts (later – the Judicial Council) adopted Resolution No. 13P-348 on the Pilot Project of Judicial Mediation on 20 May 2005, which constitutes the legal basis for the launch of the Pilot Project of Judicial Mediation (hereinafter “Pilot Project”). Resolution of 20 May 2005 No. 13P-348 on the Pilot Project of Judicial Mediation of the Council of Courts [interactive], [accessed 2014-03-31]. <<http://www.teismai.lt/teismu-savivalda/nutarimai/?nr=&f=331&tipas=1&metai=2005&menuo=05&diena=20&metai1=2005&menuo1=05&diena1=21&pavadinimas=&criteria1=all&q=&criteria=all&type=0&search=1>>.

674 Kaminskienė, N., et al. *Mediacija. Vadovėlis*. Vilnius: Mykolo Romerio universitetas, 2013; p. 196.

675 The legal regulation in force creates preconditions for the application of judicial mediation solely in civil disputes.

676 For example, during the period of 2010–2012, there were 45 cases referred to judicial mediation, in 2013 – 35 cases, and in 2014 – 53 cases. According to the *Summary of the Survey of Courts on the Civil Cases Dealt with the Help of Judicial Mediation and on the Settlement Agreements Concluded in Court Hearings During the Period of 2010–2012* (No. 3R) of 15 October 2012, prepared by the National Courts Administration; the *Statistical Data on the Application of Judicial Mediation in Civil Cases and Settlement Agreements Concluded in Court Hearings in 2012–2013*, provided for the purposes of this research by the National Courts Administration; the *Summary of Judicial Mediation Process of the Year 2014* (No. 3R-812-(6.20)) of 10 March 2015, prepared by the Legal Division of the National Courts Administration.

677 For example, the legal act that regulates the procedure of judicial mediation – the Judicial Mediation Rules (adopted by the aforementioned Resolution No. 13P-348 of the Council of Courts) has already been modified twice (by Resolution No. 13 P-15 of 26 January 2007 and Resolution No. 13P-53-(7.1.2.) of 29 April 2011) and, on 26 September 2014, a new wording of these rules was adopted (Resolution No. 13P-123-(7.1.2)).

678 Kaminskienė, N., et al. *Mediacija. Vadovėlis*, p. 218. In addition, the Ministry of Justice of the Republic of Lithuania has recently worked out the draft Conception of the Development of the System of Conciliatory Mediation (Mediation) (hereinafter also “the Conception of the Development of Mediation”), which envisages the prospective modifications of, among others, the model of judicial mediation.

It should be noted in this context that the existence of the universal principles of mediation, which create the basis for the qualitative and proper application of judicial mediation, is generally acknowledged; these principles are established by the rules that are requisite for the parties to a dispute to trust this ADR procedure; the compliance with such rules constitutes the very foundation of this ADR procedure.⁶⁷⁹ Thus, the rules that embody the universal principles of mediation, including its judicial form, *inter alia*, create preconditions for the application of this ADR procedure.

Therefore, before further elaborating on amendments essential to the framework for the application of judicial mediation, the existing legal regulation of this ADR procedure, as well as its relevance, must be thoroughly analyzed, *inter alia*, from the point of view whether it embodies the rules that consolidate the universal principles of, *inter alia*, judicial mediation, i.e. the rules that are required in order this ADR procedure can be trusted and applied in practice. Consequently, the legal regulation that constitutes the framework for the application of judicial mediation in civil disputes in Lithuania is examined in this research, *inter alia*, in terms of whether the main principles of this ADR procedure are embodied and whether the preconditions for their application are created therein, in order to evaluate the suitability of such a legal regulation, to determine its shortcomings and provide insights into its possible modifications and development.

The relevance and novelty of the dissertation and the significance of the research results

Alternative dispute resolution has become a world-widely applied alternative or even supplement to traditional adjudication during the past decade essentially in all countries, and one of its forms – mediation – has gained considerable significance in almost every legal system. In the course of its introduction, mediation has been adapted to the individual features of a particular legal system and, thus, has eventually obtained a salient structure and content in every legal system, while the flexibility of mediation has determined the constant development of this procedure even after its implementation in the particular legal system. The implementation of mediation, *inter alia*, in civil disputes, has been placed high on the agenda of the European Union, as well.

At the same time, the development of modern society, as well as the growing range of the relations of legal nature, has gradually influenced the quantitative augmentation of legal conflicts almost in every state, hence, in Lithuania, as well.⁶⁸⁰ Such conflicts were and still are most frequently⁶⁸¹ placed before courts in exercise of the right to apply to court un-

679 *Ibid.*, pp. 76–77.

680 Kavalnė, S., Saudargaitė, I. Mediation in Disputes Between Public Authorities and Private Parties: Comparative Aspects. *Jurisprudence: Research Papers*. 2011, No. 18(1): 251–265; p. 260.

681 For example, in 2013, the courts of general jurisdiction heard 183,062 civil cases as opposed to 181,877 in 2012. The *Review of the Activity of the Courts in 2013* (hereinafter “Review of the Activity of the Courts in 2013”) [interactive], [accessed 2014-08-15]. <http://www.teismai.lt/dokumentai/teismu%20ataskaita_2013_po%20pristatymo.pdf>. Whereas, in 2014, the courts of general jurisdiction heard even more civil cases – 196,723. The *Review of the Activity of the Courts in 2014* [interactive], [accessed 2015-06-14]. <http://www.teismai.lt/data/public/uploads/2015/03/2014_teismu_veiklos_apzvalga_.pdf>.

der Paragraph 1 of Article 30 of the Constitution of the Republic of Lithuania;⁶⁸² however, alternative dispute resolution, namely mediation, has, though relatively recently, become an integral part of the Lithuanian legal system, as well. In addition, despite the early initiatives for the implementation of extrajudicial mediation⁶⁸³ and the introduction of the legal basis for its application in 2008,⁶⁸⁴ the growth of interest in its application among different legal practitioners⁶⁸⁵ lead to the dispersal of the providers of extrajudicial mediation services, i.e. there is no common system or practice of the application of extrajudicial mediation.⁶⁸⁶ Furthermore, though the more active introduction of extrajudicial mediation into the Lithuanian legal system is definitely on the agenda of national authorities, judicial mediation, which was first to be introduced into the Lithuanian legal system (which has the long-lasting traditions of litigation) through the Pilot Project in 2005, is the type of mediation that is very actively promoted by the Government, *inter alia*, due its relation to the system of courts.

However, despite the relevantly recent introduction of judicial mediation into the Lithuanian legal system, i.e. the recent adoption of the legal regulation of judicial mediation, applicable legal provisions have subsequently been modified more than once and, as mentioned, will be subject to additional future amendments. Hence, judicial mediation is still adapting to particular features of the Lithuanian legal system and, though this ADR procedure is not widely applied in practice, the introduced model of judicial mediation is considered to be in need of further amendments. It should be added that the subsequent development of judicial mediation in the Lithuanian legal system, i.e. *inter alia*, the need

682 Constitution of the Republic of Lithuania. *Valstybės žinios*. 1992, No. 33-1014.

683 For example, in 1993, the Lithuanian Conflict Solving Center was founded; the following year featured the establishment of the Lithuanian Conflict Prevention Association. This association, with two other non-governmental organizations, carried out the joint project “Development of Mediation Services in Lithuania”.

684 Introduction of extrajudicial mediation was intended through the adoption of the Mediation Law.

685 For example, mediation services are provided by arbitration institutions (such as the Vilnius Court of Commercial Arbitration (<<http://www.arbitrazas.lt/?lid=6>>), the Lithuanian Court of Arbitration (<<http://www.arbitrazoteismas.lt/en/>>)), as well as entities that specialise in dealing with family conflicts (such as the non-governmental organization Children Support Center (together with Professional Law Partnership Vaičiūnas & Vaičiūnas) (<<http://www.seimosmediacija.lt/>>)), the Institute for Family Relations (<<http://www.ssinstitut.lt/en/for-everyone/>>), other private entities usually providing legal (including advocate), financial, communication or other services (such as UAB “Justicija” (<<http://justicija.eu/asmeninis-teisininkas/mediacija-taikinamasis-tarpininkavimas/>>)), the Communication agency MB “Mama ir vaikas” (<<http://www.komunikacijaverslui.lt/mediacija-taikus-gincosprendimas/>>)), private mediators (such as Šarūnas Mačiulis, (<<http://www.mediator.lt/>>)), etc.

686 General statistical data regarding the application of private (extrajudicial) mediation is not publicly presented. Juškaitė-Vizbarienė, J. Ar mediatoriumi kyla civilinė atsakomybė už ydingą vadovavimą mediacijos procesui? *Teisės apžvalga*. No. 1(11), 2014, pp. 99-138: 101. It should be noted, however, that extrajudicial (private) mediation (legal provisions regulating its application, as well as the relevant practical aspects of its application) does not (do not) constitute the subject-matter of this research; in addition, the author of this dissertation does not assert that any kind of common practice or anything similar to it is necessary for application of this type of mediation. It should also be noted that the mentioned lack of summarized statistical data on the application of private mediation (i.e. general statistics and not the relevant data in respect of application of extrajudicial mediation by one legal entity or in a certain area of relations) does not allow to identify more-favored (by disputing parties) type of mediation in Lithuania.

for legislative amendments, is envisaged as not only the future of this ADR procedure by legal scholars,⁶⁸⁷ but as one of the objectives of the legislature, as well.⁶⁸⁸

Therefore, the analysis of the legal framework for the application of judicial mediation in civil disputes, i.e. the legal regulation of this ADR procedure in the Lithuanian legal system, must be performed in order to identify the existing shortcomings and to provide certain insights into possible difficulties in the application of judicial mediation, as well as to envision requisite modification of the framework for the application, as well as possible development, of this ADR procedure.

Judicial mediation is a relatively new dispute resolution procedure in the Lithuanian legal system; its application in practice has been poor.⁶⁸⁹ Judicial mediation in civil disputes, thus, is also a fairly new subject matter in Lithuanian jurisprudence: any systematic analysis of the legal regulation of judicial mediation in civil disputes, *inter alia*, in respect of the introduction of the main principles of this ADR procedure, as well as of the guarantees for their implementation, has not been performed yet. The complementary analysis of the research object in the light of the relevant international legal context also reflects the novelty of the performed research.

The need for the development of judicial mediation in Lithuania, among others, requires, as mentioned, a thorough analysis of the legal framework for application of this ADR procedure in order to identify the existing shortcomings, provide insights into the possible difficulties in the application of judicial mediation and identify requisite future modifications of the framework of this ADR procedure. Consequently, the results of this research could be beneficial for drafting the amendments to the legal provisions regulating the application of judicial mediation, as well as for the practical application of legal regulation; the results could also contribute to the development of the relevant legal doctrine. The preconditioned amendments of the existing legal framework for the application of judicial mediation can influence the more successful application of this ADR procedure in Lithuania.

687 For example, Kaminskienė, N. Privaloma mediacija: galimybės ir iššūkiai. *Jurisprudence: Research Papers*. 2013, No. 20(2): 683–705; Kaminskienė, N. Teisminė mediacija Lietuvoje. Quo vadis? *Social Work: Academic Papers*. 2010, No. 9(1): pp. 54–63.

688 The most evident instances of the possible prospective development of judicial mediation may be determined taking into account, for example, the Plan of Measures for the Development of Conciliatory Mediation (Mediation) and the Promotion of Peaceful Settlement of Disputes, approved on 23 November 2010 by Order No. 1R-256 “On the Approval of the Plan of Measures for the Development of Conciliatory Mediation (Mediation) and the Promotion of Peaceful Settlement of Disputes” of the Minister of Justice of the Republic of Lithuania, as well as the aforementioned draft Conception of the Development of Mediation.

689 Kaminskienė, N. Privaloma mediacija: galimybės ir iššūkiai, p. 684.

The research object of the dissertation

The research object of this dissertation is the legal regulation of judicial mediation⁶⁹⁰ in civil disputes⁶⁹¹ in Lithuania.⁶⁹²

Meanwhile certain aspects relevant to the application of judicial mediation in practice, such as the specific examples of cases referred to judicial mediation, the opinions of judicial mediation participants in respect of the application of this ADR procedure, do not constitute the object of this research and are referred to, where appropriate, only for the illustration of the provided statements.⁶⁹³

690 Judicial mediation is understood in this research as it is defined in the Lithuanian legal system; therefore, the research does not entail a thorough analysis of other types of court mediation applied in foreign countries.

691 Due to the fact that only the legal regulation of judicial mediation in civil disputes, as it is understood in the Lithuanian legal system, constitutes the subject matter of this research, the possibility of the application of judicial mediation in other types of disputes is not thoroughly analysed within the scope of this research.

692 The legal regulation of judicial mediation within the scope of this research involves all relevant legal provisions that were in force up to the 1 January 2015.

693 Such a choice was conditioned by the following circumstances:

1) judicial mediation in civil disputes has been up to the present applied in Lithuania, more or less, only fragmentarily: there were only 131 cases referred to judicial mediation during the period of 2010–2014, and only 23 of them resulted in the conclusion of the settlement agreement (see Chart 3 in the Appendix); according to the available data, only 141 cases were referred to judicial mediation from the moment of the launch of the Pilot Project (see Chart 1 in the Appendix); in other words, the application of judicial mediation could be considered as yet being too insignificant in order to create preconditions for making summarized conclusions in respect of the problematic aspects of the legal regulation of judicial mediation that were revealed in the course of its application in practice;

2) the opinion of mediators in respect of the problematic aspects that have already arisen or may arise in the course of the application of the legal regulation of judicial mediation were thoroughly investigated (within the range of capability) by the legal authorities before drafting the new wording of the Judicial Mediation Rules (and other relevant acts), which came into the force on 1 January 2015; hence, the relevant *travaux préparatoires* (i.e. including relevant opinions provided by the courts in respect of the shortages of then valid legal regulation of judicial mediation – the problematic aspects of its application in practice) were analyzed when performing this research;

3) during the period of 2012–2013 (the period of the increased application of judicial mediation) only 12 per cent of the mediators from the List of Court Mediators (at that time, it comprised 8 mediators) conducted judicial mediation (see Chart 6 in the Appendix); therefore, the inquiry into the opinion of only a minor part of mediators in respect of the problematic aspects of the legal regulation of judicial mediation arising in the course of its application could not have preconditioned the relevant generalised conclusions;

4) on the basis of the principle of confidentiality, the examples of the particular cases referred to judicial mediation, as well as the opinion of the participants of judicial mediation remain publicly unavailable.

Therefore, the analysis of the identified practical aspects could not have been made and, if made, could not have conditioned the production of generalised conclusions and could not have constituted any useful source (especially in the context of the aforementioned analysis of opinions, *inter alia*, of mediators, conducted by the National Courts Administration) of information within the scope of this research.

The aim and tasks of the research

The dissertation aims at (i) *identifying* whether the legal regulation of judicial mediation in civil disputes is adequate for the peaceful settlement of disputes, *inter alia*, whether it consolidates the rules that consolidate the universal principles of judicial mediation – rules that are required in order this ADR procedure can be trusted and applied in practice, and whether it creates preconditions for their application, also (ii) *establishing* relevant proposals for the legislator on the modification of the applicable legal regulation of judicial mediation in civil disputes, and (iii) *indicating* the peculiarities of the framework for the application of judicial mediation in civil disputes in the Lithuanian legal system.

This research, however, is not aimed at indicating or suggesting the single and the most appropriate for the Lithuanian legal system model of judicial mediation for the purposes of dealing with civil disputes.

The tasks of the research:

- 1) to present the evolution of the model of judicial mediation in civil disputes in Lithuania and identify the main factors that have influenced the implementation and development of this ADR procedure;
- 2) to provide a definition of judicial mediation in the Lithuanian legal system and identify the main principles of this ADR procedure;
- 3) to identify whether the participants of judicial mediation are provided with the legal status necessary to guarantee the implementation of the main principles of judicial mediation, including rights and duties requisite for the amicable resolution of the dispute;
- 4) to identify the peculiarities of the procedure of judicial mediation and determine whether the main principles of the latter are implemented throughout the procedure;
- 5) to characterise the main aspects of the possible future development of the legal framework for the application of judicial mediation in the Lithuanian legal system;
- 6) to formulate the proposals for the modification of the applicable legal provisions regulating judicial mediation in civil disputes in Lithuania.

The statements to be defended

1. The general principles of judicial mediation constitute an integral part of the legal framework for the application of judicial mediation in the Lithuanian legal system; the applicable legal provisions also establish, though not in all cases, guarantees for the implementation.
2. The rights and duties indispensable for the amicable resolution of the dispute within the scope of judicial mediation are provided for the main participants of this ADR procedure – the parties to a dispute and mediator, and the legal regulation creates preconditions for the application of such rights and duties.
3. The model of judicial mediation introduced in the Lithuanian legal system has its salient features (*inter alia* as compared to the relevant models introduced in other civil law countries) acquired in the course of its development.

The Overview of the research

Although judicial mediation in civil disputes was introduced into the Lithuanian legal system almost a decade ago, it has not been analysed in an integral manner in national jurisprudence. However, certain aspects of judicial mediation constituted the subject matter of the articles by assoc. prof. dr. N. Kaminskienė,⁶⁹⁴ and the legal regulation of judicial mediation was also partially analysed by prof. dr. V. Valančius.⁶⁹⁵

Whereas all other researches in the area of ADR and, namely, mediation have been either only partially related to judicial mediation, or judicial mediation has not constituted a subject matter of these researches at all. Researches in ADR field included the studies on general aspects of ADR (studies of this nature were performed by assoc. prof. dr. N. Kaminskienė and dr. F. Petrauskas; assoc. prof. dr. V. Vėbraitė; prof. dr. J. Lakis), the studies on ADR in particular areas of law (researches related to restorative justice were performed by assoc. prof. dr. R. Uscila and prof. dr. R. Ažubalytė; researches on ADR in civil law were conducted by assoc. prof. dr. N. Kaminskienė and assoc. prof. dr. R. Simaitis; analysis of ADR in consumer disputes was performed by dr. F. Petrauskas), the studies on the general aspects of mediation and mediation in particular areas of law (suchlike studies were performed by T. Milašius, assoc. prof. dr. N. Kaminskienė, prof. dr. I. Žalėnienė and A. Tvaronavičienė; researches on victim-offender mediation were conducted by assoc. prof. dr. R. Uscila and assoc. prof. dr. I. Michailovič; studies on mediation in administrative disputes were conducted by dr. U. Trumpulis and A. Banys, the analysis in the light of comparative aspects in respect of mediation in disputes between public authorities and private parties was conducted by assoc. prof. dr. S. Kavalnė and I. Saudargaitė; studies on mediation in the activities of notaries were performed by G. Štaraitė-Barsulienė; issues related to divorce mediation were investigated by prof. dr. R. Mienkowska-Norkienė). It should also be noted that mediation from a psychological perspective has been the research interest taken by assoc. prof. dr. J. Sondaitė. However, despite the obvious academic interest in ADR and one of its forms – mediation, judicial mediation in civil disputes in Lithuania has not up till now constituted the subject matter of the systemic research in Lithuanian jurisprudence.

It should be mentioned, that various aspects and forms of ADR, as well as the principles, types and diverse aspects of mediation, including one of its forms – judicial mediation, constitute an integral part of jurisprudence in foreign countries: different aspects have been thoroughly analyzed by legal scholars and still constitute the current research interest. F. E. A. Sander, L. Riskin, C. Menkel-Meadow, J. Nolan-Haley, K. K. Kovach, M. Moffitt, E. Brunet, L. Boule, F. Mosten, N. A. Welsh, M. B. Trevor (the United States), N. Alexander, D. Spencer (Australia), A. Goodman, A. Hammerton (the United Kingdom), L. Otis (Canada), G. de Palo (Italy), and H. Eidenmüller (Germany) should be outlined as several of the most famous and representative scholars in this sphere. However, despite the manifest scientific interest in mediation, as well as in one of the types of media-

694 Kaminskienė, N. Teisminė mediacija Lietuvoje. Quo vadis?; Kaminskienė, N. Teisminė mediacija kaip socialinė inovacija įgyvendinant teisingumą Lietuvoje. *SOCIN 2012: 1st international interdisciplinary conference on social innovations: abstracts' book of Mykolas Romeris University research days 2012 "Social innovations: theoretical and practical insights"*. Vilnius: Mykolas Romeris University, 2012.

695 Valančius, V. Lithuania, *EU Mediation: Law and Practice* (ed. De Palo, G., Trevor, M. B.). Oxford University Press, 2012: 220–238.

tion – judicial mediation, judicial mediation in civil disputes in Lithuania has not constituted a subject matter of systemic research by foreign legal scholars.

The Methodology of the research

In view of the object of this research, the following traditional jurisprudence methods have been applied in order to achieve the aim of this research and to draw the conclusions: document analysis, systematic analysis, also linguistic, teleological, logical-analytical, and historical methods. With the aim of achieving comprehensive results of this research, these methods have been applied in combination with each other throughout the research, and the choice of the particular methods and (or) their combination was determined by the particular issue and its features. *The method of document analysis* has been applied in analyzing the legal provisions regulating judicial mediation in Lithuania, as well as the legal acts of the European Union, the studies of Lithuanian and foreign legal scholars, and other material relevant for this research. The method of data analysis has also been applied in this research for analysing the statistical data relevant to the application of judicial mediation in civil disputes in Lithuania. *The linguistic method* has been applied when examining the definitions (of judicial mediation, mediator in judicial mediation, etc.) provided by the applicable legal acts, as well as when analysing the wording of the particular legal provisions of Lithuanian legal acts and the provisions of European Union law. *The teleological method* has been applied for determining the true intentions of the legislator, i.e. the aims that were pursued by establishing particular legal provisions regulating judicial mediation. *The method of systematic analysis* has been applied, *inter alia*, when examining the legal regulation of judicial mediation in the light of its application in practice, taking into account the insights provided in the special legal literature, generalizing it and providing systematic approach in respect of the subject matter of the research. *The logical-analytical method* has been applied throughout the research, *inter alia*, for the analysis of the possible difficulties in the application of judicial mediation, for framing the proposals for the improvements of the respective legal regulation, for providing the conclusions, as well as for verifying the results of the research and their logical connection. *The historical method* has been applied for the analysis of the evolution and development of judicial mediation in general, as well as for the analysis of the introduction and development of judicial mediation in the Lithuanian legal system in particular.

The Structure of the dissertation

The dissertation consists of the introduction, the overview/outline of the research, the presentation of the methodology of the research, the main part, the conclusions, the appendix, and the bibliography. The object, the aim and the course of the research predetermined the structure of the main part of the dissertation; hence, it consists of four chapters.

As judicial mediation is defined distinctively in every legal system, *inter alia*, due to the particularities of the development of this ADR procedure in the specific legal system, the factors that have influenced the evolution and still, to a greater or smaller extent, influence the development of the legal framework of judicial mediation in the Lithuanian legal

system have had to be primarily analysed before defining the notion of judicial mediation and the one of a civil dispute. Hence, the Chapter One *The Evolution and Notion of Judicial Mediation* of the dissertation primarily deals with the main aspects of the development of judicial mediation, as the ADR procedure, in general and the peculiarities of its development in different legal traditions, as well as its development in the European Union – some of the key aspects that have had influence on the concept of judicial mediation in Lithuania, as well as the impact on the substance of the legal regulation of this ADR procedure and its application. Consequently, after the analysis of the general notion of judicial mediation, which has an influence on the definition of this ADR procedure in each particular legal system, the notion of judicial mediation in the Lithuanian legal system, as well as the one of a civil dispute, is formulated.

Following the findings of the Chapter One of the dissertation that the specific role of the participants of judicial mediation, namely the mediator and the parties to a dispute, is considered to be one of the substantial aspects that characterise and define this ADR procedure, *inter alia*, in the Lithuanian legal system, as well as that the principles of judicial mediation (*inter alia*, the consensual nature of the process itself and the self-determination of the parties) primarily relate to and may be reflected to a maximum extent through the aspects relevant to the role and legal status of the participants of judicial mediation, as they may influence the content and scope of the application of the general principles, the Chapter Two *Participants of Judicial Mediation* of the dissertation focuses on the role and legal status, namely the rights and duties, of the parties to a dispute and the mediator in judicial mediation. Accordingly, an analysis is performed as to whether the participants of judicial mediation are provided with the rights and duties necessary to achieve the amicable settlement of the disputes.

Due to the fact that judicial mediation, in spite of the flexible nature of this ADR procedure, has been regulated rather rigorously in the Lithuanian legal system, the Chapter Three *Procedural Aspects of Judicial Mediation* of the dissertation deals with the analysis of the special features of the legal regulation of the procedure of judicial mediation. In order to identify, *inter alia*, whether the main principles of judicial mediation are maintained not only in terms of providing the necessary rights and imposing duties on the participants of this procedure, but also in terms of guaranteeing their application throughout the whole procedure of judicial mediation in the Lithuanian legal system, this chapter focuses on this issue separately in respect of every stage of judicial mediation: its initial stage, the process itself, and its conclusion (termination); special attention is also given to one of the main principles of judicial mediation – the principle of confidentiality and its manifestations in the Lithuanian legal system.

The Chapter Four *The Future Development of Judicial Mediation* of the dissertation provides, taking into account findings of the previous chapters, brief insights into those instances of the development of the model of judicial mediation that are likely to appear in the near future of the application of this alternative to traditional litigation in Lithuania and that, presumably, would also help increasing the application of this ADR procedure. Hence, this chapter of the dissertation focuses on the possibility of the implementation of some kind of a mandatory element in the model of judicial mediation, as well as some possible development of the system that would guarantee the quality of judicial mediation, and other possible developments.

Conclusions

1. Judicial mediation constitutes an integral part of the dispute resolution framework in the Lithuanian legal system. Nevertheless, this ADR procedure has not yet become a true alternative to traditional litigation, *inter alia*, due to its poor application in practice. A variety of relevant reasons may be distinguished in this respect; they lie, among others, in the long-standing litigation traditions, which are characteristic of Lithuania, as a country of civil law tradition. The will (*inter alia* of the authorities, legal practitioners) to promote judicial mediation in order it becomes a real alternative to litigation, still determines the further development of this ADR procedure.
2. In the Lithuanian legal system, judicial mediation may be generally defined as a dispute settlement procedure aimed at helping (after the initiation of a civil case in court) the parties to a dispute to resolve amicably their civil dispute (as it is defined by the Code of Civil Procedure) by concluding a legally valid settlement agreement with the assistance of one or several mediators – special subjects enrolled in the List of Court Mediators. Judicial mediation is closely linked with court proceedings – it may be applied only after the initiation of a civil case in a court of general jurisdiction.

The content of the main principles of judicial mediation (the principles of the voluntarism of the parties to a dispute, confidentiality, mutual respect and tolerance, the neutrality and impartiality of a court mediator, cooperation, the qualified activity of a court mediator, good faith, communication, the exemplarity of behavior, the credibility of a court mediator, lawfulness), which are enshrined by or may be derived from the applicable legal regulation, as well as the guarantees for the implementation of these principles, are reflected through the legal status and the role of the parties to a dispute and a court mediator – the participants of judicial mediation, who may have influence on the application and, consequently – the content, of the aforesaid principles.

It may be concluded (on the basis of the conducted research) that the legal status and the role of the participants of judicial mediation – the parties to a dispute and a court mediator – under the applicable legal regulation are such that are necessary for reaching the aim of judicial mediation, i.e. for solving a dispute peacefully within the scope of this ADR procedure. The guarantees for implementing the general principles of judicial mediation are also essentially established by the applicable legal provisions: the general principles of judicial mediation must be observed in all stages of judicial mediation – in the course of its initiation, throughout its process, as well as during its conclusion (termination).

- 2.1. The parties to a dispute are essentially provided with the rights inherent in their role as that of the main decision-makers in respect of a particular dispute: *inter alia*, the right to engage in judicial mediation, the right to settle and, accordingly, the right not to settle the dispute within the scope of this ADR procedure, the right to choose a mediator, the right to participate in framing the procedure of judicial mediation, the right to terminate judicial mediation. They are also subject to the required duties (which coincide with some of the general principles of judicial mediation) that create preconditions for the

proper application of this ADR procedure: *inter alia*, the duty of cooperation, the duty to act in good faith and the duty of confidentiality.

The applicable legal regulation, though, may be considered as deficient inasmuch as the duty of participation in judicial mediation (already initiated) – the duty that is inherent in the very essence of this ADR procedure and that envisages the participation of the parties to a dispute in a particular procedure as *conditio sine qua non* – is not taken into account when legally regulating the procedure of judicial mediation. Therefore, it has been suggested that the existing legal framework of judicial mediation needs to be amended in this respect by taking into account, when possible, the need for the participation in judicial mediation of the parties to a dispute (by establishing the relevant duty for the parties to a dispute, as well as by setting the possibility to terminate judicial mediation if the parties to a dispute (or one party to a dispute) do not participate in this ADR procedure).

In addition, the requirement to be represented by a lawyer has been suggested to be set as a guarantee, so that the parties to a dispute are aware of their rights and the essence of this ADR procedure.

- 2.2. A court mediator is essentially provided with the rights necessary for him (her) to be able to exercise his (her) role and to help the parties to a dispute to achieve the main goal of judicial mediation – the amicable resolution of their dispute: *inter alia*, the right to decide upon the performance of judicial mediation in a particular dispute, the right to frame the procedure of judicial mediation, the right to have influence on the settlement of the dispute by offering the parties proposals for the settlement of their dispute, as well as the right to terminate judicial mediation. A court mediator is also subject to the duties that guarantee the proper application of judicial mediation: *inter alia*, the duty to act in accordance with the European Code of Conduct for Mediators, the duty to ensure the effective, expeditious and fair process and the equality of the parties in judicial mediation, the duty to perform activity in a qualified manner, the duty to maintain impartiality and neutrality, the duty to recuse themselves if the conditions for recusal exist, and the duty to maintain confidentiality.

However, the existing legal regulation does not provide for any necessary guarantees for the application of the principle of the qualified activity of a court mediator: although all willing persons who meet the established requirements may become a court mediator, the applicable legal provisions remain ambiguous as to the exact requirements – the discretion to decide whether the qualification and characteristics of a particular person make him (her) eligible to acquire the status of a court mediator is left within the scope of the competence of a specially-formed body. It has been argued, that such a system is suitable only as a transitional one, i.e. it should be modified in the near future by identifying the particular requirements for persons willing to become a court mediator.

In addition, although the principles of neutrality, the impartiality of a court mediator, as well as the principle of confidentiality, are determined as the principles of judicial mediation, the applicable legal provisions do not provide for any necessary guarantees for their application where a judge hearing the case

may also act as a court mediator in the same instance and even approve the settlement agreement. Therefore, it has been suggested that the possibility for the same person to act both as a judge and a court mediator should be removed.

3. The model of judicial mediation introduced into Lithuanian legal system is a particular model that has its salient features, which are distinctive *inter alia* from the respective models in other continental legal systems.

3.1. The peculiarities of the model of judicial mediation have been determined in the course of introduction and development of this ADR procedure in the Lithuanian legal system. The identified aspects (the main, though not the only ones) of introduction and development of this procedure still influence legal regulation of judicial mediation.

3.1.1. The existing inseparable link between the resolution of disputes and the competence of courts, accordingly – the role of judges, has made an impact on the introduction of this ADR procedure. Judicial mediation was introduced into the Lithuanian legal system by applying a mixed approach (a different approach as compared to the one adopted in most countries of civil tradition): it was implemented by attempting to apply it from court-to-court (so-called “pragmatic approach”) jointly with the adoption of the legal regulation of this ADR procedure (so-called “legislative approach”). Such implementation of judicial mediation has preconditioned a very close relation of this ADR procedure to the system of courts and proceedings in courts, and, accordingly, has had an impact on the further development of judicial mediation itself.

In spite of the consequent modifications of the model of judicial mediation, this ADR procedure still remains in close connection to the court system: the Judicial Council – one of the bodies of the self-governance of courts – participates in the formation of the Commission of Judicial Mediation – a special body that decides upon the assignment and removal of the status of a court mediator, as well as considers related appeals; judges must meet the special requirements (as compared to other subjects willing to become a court mediator) in order to become a court mediator; the legal provisions regulating the procedure of judicial mediation are adopted by the Judicial Council, etc.

The further modifications of the legal framework of judicial mediation, thus, must be also made considering this inextricable link of judicial mediation to the system of courts.

3.1.2. The introduction and development of judicial mediation in the Lithuanian legal system have also been influenced by the regulatory initiatives and the acts of the EU, particularly, the Directive, as well as the consequent trend of mediation in all the Member States.

It should be noted in this context (on the basis of the conducted research) that the legislator has duly implemented the duty of Lithuania, as a Member State, to transpose the rights and duties determined by the Directive into the Lithuanian legal system. Furthermore, the application of the general principles of the Directive has been extended to domestic

disputes, as well as not only to the private, but also to judicial mediation. In this way, legislator has actively promoted implementation of judicial mediation.

- 3.2. The salient features of the model of judicial mediation introduced into the Lithuanian legal system (the features that must be also taken into account when drafting legal regulation of judicial mediation) include, among others, the following:
- this ADR procedure is, as mentioned, very closely related to the system of courts (*inter alia* in respect of the procedure of assignment and removal of the status of a court mediator; the special requirements for persons willing to acquire the status of a court mediator; the subject entitled to legally regulate the procedure of judicial mediation, etc.) and court proceedings (the initiation of judicial mediation is possible only if the civil case is already initiated in court; civil proceedings are suspended while judicial mediation is performed; the judge hearing the case has an influence on the length of particular judicial mediation procedure; the judge hearing the case is given the right to act as court mediator in the case he (she) is hearing, etc.);
 - judicial mediation is entirely voluntary, i.e. the parties to a dispute are free to decide whether to refer their dispute to be settled in the scope of this ADR procedure (this characteristic has been set to be modified following the scheduled amendments of the relevant legal regulation);
 - although all private persons who meet the requirements set by the law may attempt becoming a court mediator, only special subjects who possess the appropriate qualification, have acquired the special status of a court mediator and, ultimately, have been enrolled in the List of Court Mediators may act as a court mediator; the assignment of the status of a court mediator for a particular person is left within the discretion of the Commission of Judicial Mediation – a special body formed by the Judicial Council; such procedure is rather rigorous, thus, the establishment of such procedure, contrary to what is believed, reflect the transition of this judicial mediation to market-based model only partially;
 - in spite of the establishment of the principle of the qualified activity of a court mediator and the possibility of removing the status of a court mediator if the professional characteristics indispensable for a court mediator are not possessed, the characteristics, that are required, as well as the requirements for the continuing training of mediators are not set; the aspects related to the qualification requirements for a court mediator are left to be determined in individual cases by the same body that decides on the removal of the status of a court mediator – the Commission of Judicial Mediation;
 - the procedure of judicial mediation has been regulated rather stringently, i.e. some of the procedural aspects are imperatively defined by the applicable legal provisions, hence, not entirely left to be determined in the course of a particular procedure and, thus, cannot be on all occasions tailored to the needs of a particular dispute;

- although legal regulation of certain aspects of judicial mediation (such as, for example, of determination of the duration of judicial mediation) is rather comprehensive, so-called “transitional” legal regulation, i.e. legal regulation which should be considered as suitable only in such a relatively early stage of application of judicial mediation and should be later modified, is entrenched in many cases; in this respect “transitional” legal regulation comprises legal provisions that give discretion to decide to a particular subject without indicating the criteria for the adoption of decision (for example, legal regulation which implies that Commission of Judicial Mediation is entitled to determine qualification requirements for particular person willing to become a court mediator, as well as the ones for a person who already has acquired the status of a court mediator), as well as legal provisions which have been framed in a generalised manner (for example, legal provisions that require to attend special courses on mediation without identifying the subject matter or the subjects which are entitles to organize such courses).

Proposals for Modification of Legal Regulation of Judicial Mediation

The conducted research enabled framing several specific proposals for modification of applicable legal provisions which could contribute to the improvement of legal framework for application of judicial mediation.

1. The reference to the Code of Civil Procedure should be made in Judicial Mediation Rules in order to clarify what disputes may be dealt with in the scope of judicial mediation.

Hence, Article 1 of Judicial Mediation Rules should be amended and state as follows:

“1. Judicial Mediation Rules determine the cases and procedure of performance of judicial mediation (conciliatory mediation in civil disputes) in civil cases (**as determined by the Paragraph 1 of Article 22 of the Code of Civil Procedure**) heard in courts of general jurisdiction.”

2. The requirement for the parties to a dispute to participate in person in judicial mediation, as well as for their representatives to participate therein should be embodied in Judicial Mediation Rules.

Hence, Article 18 of Judicial Mediation Rules should be amended and state as follows:

“18. The parties to a dispute, as well as their representatives **must** participate in person in the course of judicial mediation. <...>”

3. The possibility of provision of the state-guaranteed legal aid to the parties to a dispute in judicial mediation should be expressly set in the Law on the State-Guaranteed Legal Aid.

Hence, Paragraph 1 of Article 2 of the Law on the State-Guaranteed Legal Aid should be amended and state *inter alia* as follows:

“1. State-guaranteed secondary legal aid – drafting of documents, defense and representation in court, including the process of execution, representation in the event of preliminary extrajudicial consideration of a dispute, where such a procedure has been laid down by laws or by a court decision, **representation in judicial mediation**. <...>”

4. The requirement for all judges willing to acquire the status of a court mediator to attend special courses in the framework of judges’ training program should be set.

Hence, Article 8 of Schedule of Procedure of Assignment and Removal of the Status of a Court Mediator should be amended and state as follows:

“8. Requirement to attend training on mediation set in Article 6.3 is not applied to judges; the latter **must attend** special courses in the framework of judges’ training program. Suchlike requirement is also not applied to legal scholars who have at least 3 years of pedagogical experience in the field of mediation, as it is understood under Article 69 of the Law on Courts of the Republic of Lithuania”.

5. The structure of Commission of Judicial Mediation should be regulated in such way, that it was composed of 6 judges and of 3 other professionals in the sphere of judicial mediation.

Hence, Article 6 of Regulations of Commission of Judicial Mediation should be amended and state as follows:

“6. Commission is composed for the term of office of the Judicial Council from nine members, six of them must be judges, **others – specialists in the sphere of judicial mediation.** <...>”.

6. Members of Commission of Judicial Mediation should be provided with the right to elect the chairman of this commission.

Hence, Article 7 of Regulations of Commission of Judicial Mediation should be amended and state, *inter alia*, as follows:

“7. The members of the Commission are appointed by the Judicial Council. **The appointed members of the Commission elect the Chairman of the Commission among themselves**”.

7. The time-limit for adoption of the decision on assignment of the status of a court mediator should be reduced from 60 up to 20 working days.

Hence, Article 5 of Schedule of Procedure of Assignment and Removal of Status of a Court Mediator should be amended and state as follows:

“5. The request of a person to provide him (her) with the status of a court mediator must be examined by the Commission in no longer than **20** working days from receipt of the documents determined in the Article 3 of this Schedule”.

8. The requirement that the date of the next court hearing would be set only after consultation with a court mediator assigned to mediate particular case should be set.

Hence, Article 10 of Judicial Mediation Rules should be amended and state, *inter alia*, as follows:

“10. <...> Hearing of the case is postponed by the same ruling whilst determining the exact date of the next court hearing **after the consultation with a court mediator** (expiration of term of judicial mediation)”.

9. The decision of one party to a dispute to terminate judicial mediation should be expressly implemented as a ground for termination of this ADR procedure.

Hence, Article 25 of Judicial Mediation Rules should be supplemented as follows:

“The process of judicial mediation is terminated: <...>

25.2. by the decision **of one or** both of the parties to a dispute to withdraw themselves from judicial mediation.”

10. The reference to the provisions of Judicial Mediation Rules implementing the exceptions of what information received in the course of judicial mediation may not be submitted as evidence in civil cases must be set in Mediation Law.

Hence, Paragraph 2 of Article 7 of Mediation Law must be supplemented as follows:

“2. <...> Particular exceptions to the prohibition for a court mediator and the parties to a dispute to reveal confidential information received in the course of judicial mediation are defined in Judicial Mediation Rules”.

SCIENTIFIC PUBLICATIONS OF THE AUTHOR OF THE DOCTORAL DISSERTATION

Scientific publications on the topic of doctoral dissertation

1. Saudargaitė, I., Kavalnė, S. Mediation in Disputes Between Public Authorities and Private Parties: Comparative Aspects. *Jurisprudence: Research Papers*. 2011, No. 18(1): 251–265.
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TEISMINĖ MEDIACIJA CIVILINIUOSE GINČUOSE
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TEISMINĖ MEDIACIJA CIVILIUOSE GINČUOSE LIETUVOJE

Santrauka

Tiriamoji problema

Nors teisminė mediacija, kaip alternatyvus ginčų sprendimo procedūra, Lietuvoje buvo teisiškai sureguliuota 2005 metais⁶⁹⁶ priėmus atitinkamą teisinį reguliavimą Bandomojo teisminės medicijos projekto kontekste, ir nors „svarbiausiu medicijos taikymo pagrindu“ pripažįstamas būtent jos teisinis reguliavimas⁶⁹⁷, teisminė mediacija civiliniuose ginčiuose⁶⁹⁸, nepaisant susijusių teisėkūros iniciatyvų bei aktyvių valdžios institucijų veiksmų skatinant šios alternatyvus ginčų sprendimo procedūros taikymą, kol kas netapo tikra alternatyva teisminiam nagrinėjimui ir praktikoje yra taikoma pakankamai retai⁶⁹⁹. Tačiau nors teisminė mediacija civiliniuose ginčiuose Lietuvos teisinėje sistemoje buvo įtvirtinta sąlyginai neseniai⁷⁰⁰, jos teisinis reguliavimas per pastaruosius metus buvo jau ne kartą pakeistas⁷⁰¹. Be to, tolesni teisminės medicijos teisinio reguliavimo pakeitimai vertinami kaip būtini tam, kad ši alternatyvus ginčų sprendimo procedūra įsitvirtintų ir būtų taikoma Lietuvoje⁷⁰².

696 Teismų taryba (vėliau – Teisėjų taryba) 2005 m. gegužės 20 d. priėmė nutarimą Nr. 13P-348 dėl bandomojo teisminės medicijos projekto – bandomojo teisminės medicijos projekto įgyvendinimo teisinį pagrindą. Teismų tarybos 2005 m. gegužės 20 d. nutarimas Nr. 13P-348 „Dėl bandomojo teisminės medicijos projekto“ [interaktyvus], [žiūrėtas 2014-03-31]. <<http://www.teismai.lt/teismu-savivalda/nutarimai/?nr=&f=331&tipas=1&metai=2005&menuo=05&diena=20&metai1=2005&menuo1=05&diena1=21&pavadinimas=&criteria1=all&q=&criteria=all&type=0&search=1>>.

697 Kaminskienė, N., *et al. Mediacija. Vadovėlis*. Vilnius: Mykolo Romerio universitetas, 2013, p. 196.

698 Galiojantis teisinis reguliavimas sudaro pagrindą taikyti teisminę mediaciją išimtinai tik civiliniuose ginčiuose.

699 Pavyzdžiui, 2010–2012 metais 45 bylos buvo perduotos nagrinėti teisminės medicijos būdu; 2013 metais – 35 bylos; 2014 metais – 53 bylos. Remiantis Nacionalinės teismų administracijos 2012 m. spalio 15 d. Teismų apklausos dėl 2010 – 2012 m. nagrinėtų civilinių bylų teisminės medicijos būdu ir posėdžių metu sudarytų taikos sutarčių apibendrinimu Nr. 3R; taip pat Nacionalinės teismų administracijos pateiktais 2012-2013 m. Statistiniais duomenimis apie medicijos procedūros taikymą civilinėse bylose ir posėdžio metu sudarytas taikos sutartis; Nacionalinės teismų administracijos 2015 m. kovo 10 d. patvirtintu Teisminės medicijos procesų 2014 m. apibendrinimu Nr. 3R-812-(6.20).

700 Teismų taryba (vėliau – Teisėjų taryba) 2005 m. gegužės 20 d. priėmė nutarimą Nr. 13P-348 dėl bandomojo teisminės medicijos projekto – Bandomojo teisminės medicijos projekto įgyvendinimo teisinį pagrindą. Teismų tarybos 2005 m. gegužės 20 d. nutarimas Nr. 13P-348 „Dėl bandomojo teisminės medicijos projekto“ [interaktyvus], [žiūrėtas 2014-03-31]. <<http://www.teismai.lt/teismu-savivalda/nutarimai/?nr=&f=331&tipas=1&metai=2005&menuo=05&diena=20&metai1=2005&menuo1=05&diena1=21&pavadinimas=&criteria1=all&q=&criteria=all&type=0&search=1>>.

701 Pavyzdžiui, vien teisminės medicijos procesą reguliuojančios Teisėjų tarybos 2005 m. gegužės 20 d. nutarimu Nr. 13P-348 patvirtintos Teisminės medicijos taisyklės jau buvo pakeistos 2 kartus (2007 m. sausio 26 d. nutarimu Nr. 13 P-15, 2011 m. balandžio 29 d. nutarimu Nr. 13P-53-(7.1.2)), o 2014 m. rugsėjo 26 d. apskritai buvo priimta nauja šių taisyklių redakcija (Nutarimas Nr. 13P-123-(7.1.2)).

702 Kaminskienė, N., *et al. Mediacija. Vadovėlis*, p. 218. Be to, Lietuvos Respublikos teisingumo ministerija parengė Taikinamojo tarpininkavimo (mediacijos) sistemos raidos koncepciją, kurioje numatomi, be kita ko, tolesni teisminės medicijos modelio pakeitimai.

Šiame kontekste pažymėtina, kad pripažįstama, jog egzistuoja teisės aktuose įtvirtinti universalūs mediacijos principai, kurie sudaro kokybiško bei teisingo mediacijos taikymo pagrindą; juos įtvirtina taisyklės, kurios yra būtinos tam, kad ginčo šalys pasitikėtų šia alternatyvaus ginčų sprendimo procedūra, o minėtų principų laikymasis sudaro pačios mediacijos pagrindą⁷⁰³. Taigi tokios universalios mediacijos, įskaitant ir teisminę jos rūšį, principus įtvirtinančios taisyklės, be kita ko, sukuria prielaidas šios alternatyvaus ginčų sprendimo procedūros kokybiškam taikymui.

Vadinasi, prieš atliekant tolesnius esminius teisminės mediacijos taikymo pagrindą sudarančio teisinio reguliavimo pakeitimus, turėtų būti įvertintas galiojantis šios alternatyvaus ginčų sprendimo procedūros teisinis reguliavimas, jo tinkamumas, atsižvelgiant ir į tai, ar juo įtvirtintos taisyklės, nustatančios universalios *inter alia* teisminės mediacijos principus, t. y. tos taisyklės, kurios yra būtinos tam, kad šia alternatyvaus ginčų sprendimo procedūra būtų pasitikima ir ji būtų kokybiškai taikoma.

Taigi šiame disertaciniame tyrime teisminės mediacijos civiliniuose ginčiuose Lietuvoje taikymo pagrindu esantis teisinis reguliavimas tiriamas, be kita ko, analizuojant, ar juo įtvirtinti pagrindiniai šios alternatyvaus ginčų sprendimo procedūros principai ir sudarytos prielaidos juos taikyti, siekiant įvertinti tokio teisinio reguliavimo tinkamumą, nustatyti jo trūkumus bei pateikti išvagas dėl galimų jo pakeitimų.

Darbo aktualumas, naujumas, reikšmė

Alternatyvaus ginčų sprendimo procedūros per praėjusį dešimtmetį tapo visame pasaulyje plačiai taikoma tradicinio bylinėjimosi alternatyva ar netgi jo substitutu iš esmės visose valstybėse, o viena iš rūšių – mediacija – įgavo ypatingą vaidmenį beveik kiekvienoje teisinėje sistemoje. Mediacija, ją įtvirtinus, prisitaikė prie individualių konkrečios teisinės sistemos bruožų, todėl galiausiai kiekvienoje teisinėje sistemoje įgijo išskirtinę struktūrą ir turinį; tuo tarpu šios procedūros lankstumas lėmė tolesnį nuolatinį jos vystymąsi net ją įtvirtinus konkrečioje teisinėje sistemoje. Mediacijos, įskaitant ir mediaciją civiliniuose ginčiuose, įtvirtinimas ir plėtra taip pat tapo svarbia Europos Sąjungos veiklos kryptimi.

Modernios visuomenės raida, teisinių santykių plėtra kartu lėmė ir teisinių konfliktų skaičiaus augimą beveik kiekvienoje valstybėje, įskaitant ir Lietuvą. Tokie konfliktai, įgyvendinant Lietuvos Respublikos Konstitucijos 30 straipsnio 1 dalyje įtvirtintą asmens, kurio konstitucinės teisės ar laisvės pažeidžiamos, teisę kreiptis į teismą, dažniausiai buvo ir vis dar yra⁷⁰⁴ perduodami teismui; vis dėlto alternatyvaus ginčų sprendimo procedūros, būtent – mediacija, taip pat tapo, nors ir palyginti neseniai, integralia Lietuvos teisinės sistemos dalimi. Be to, nors ankstyvosiomis iniciatyvomis buvo siekiama skatinti neteisminės mediacijos taikymą, o 2008 metais buvo priimtas *inter alia* neteisminės mediacijos teisinis reguliavimas, didelis įvairių teisės praktikų susidomėjimas šia procedūra lėmė neteisminės mediacijos paslaugas teikiančių subjektų ir pačios jos taikymo praktikos įvairovę, todėl neegzistuoja bendra neteisminės mediacijos sistema ar vieninga jos taikymo praktika. Tad nors valdžios institucijos siekia dar aktyviau skatinti neteisminės mediacijos

703 Kaminskienė, N., *et al. Mediacija. Vadovėlis*, p. 76–77.

704 Pavyzdžiui, 2013 metais bendrosios kompetencijos teismuose pirmąja instancija buvo išnagrinėtos 183 062 civilinės bylos, 2012 metais šiek tiek mažiau – 181 877; tuo tarpu 2014 metais bendrosios kompetencijose teismuose pirmąja instancija buvo išnagrinėta dar daugiau civilinių bylų – 196 723.

diegimą Lietuvos teisinėje sistemoje, būtent teisminė mediacija, kuri pirmoji buvo pradėta taikyti (2005 metais pradėjus įgyvendinti Bandomąjį teisminės medicijos projektą) šioje giliai bylinėjimosi tradicijas turinčioje teisinėje sistemoje, yra pristatoma (be kita ko, dėl jos ryšio su teismu) kaip itin patraukli alternatyva tradiciniam bylinėjimuisi.

Nors teisminė mediacija Lietuvos teisinėje sistemoje buvo įtvirtinta sąlyginai neseniai – neseniai buvo priimtas teisminės medicijos teisinis reguliavimas, taikytinos teisės normos jau buvo ne kartą pakeistos, numatoma jas dar keisti ir netolimoje ateityje. Taigi teisminė mediacija iš esmės dar tik prisitaiko prie Lietuvos teisinės sistemos ypatumų ir nors ši alternatyvaus ginčų sprendimo procedūra nėra dažnai taikoma praktikoje, manoma, kad egzistuojantis teisminės medicijos modelis turi būti modifikuotas. Pastebėtina, kad tolesnis teisminės medicijos Lietuvos teisinėje sistemoje vystymasis yra aptariamas ne tik teisinėje literatūroje, jos teisinio reguliavimo modifikavimas yra ir vienu iš įstatymų leidėjo tikslų. Todėl siekiant nustatyti egzistuojančio teisminės medicijos civiliniuose ginčiuose modelio trūkumus bei galimas teisminės medicijos taikymo problemas, taip pat siekiant suformuluoti išvagas dėl galimos tolesnės šios alternatyvaus ginčų sprendimo procedūros raidos Lietuvos teisinėje sistemoje, būtina iširti teisminės medicijos civiliniuose ginčiuose taikymo pagrindą, būtent – šios alternatyvaus ginčų sprendimo procedūros teisinį reguliavimą.

Teisminė mediacija civiliniuose ginčiuose yra ir pakankamai naujas tyrimo dalykas Lietuvos teisės moksle: sisteminis teisminės medicijos civiliniuose ginčiuose teisinio reguliavimo Lietuvoje tyrimas, be kita ko, pagrindinių jos principų ir jų įgyvendinimo garantijų įtvirtinimo aspektu, dar nebuvo atliktas. Tyrimo naujumą atspindi ir tai, kad pasirinktas tyrimo objektas tiriamas atsižvelgiant ir į tarptautinį kontekstą.

Teisminės medicijos raidos Lietuvoje poreikis, be kita ko, lemia būtinybę įvertinti galiojantį šios alternatyvaus ginčų sprendimo procedūros teisinį reguliavimą, siekiant nustatyti jo trūkumus, suformuluoti išvagas dėl galimų jo taikymo problemų ir būtinų teisminės medicijos taikymo pagrindą sudarančio teisinio reguliavimo pakeitimų. Taigi šio tyrimo rezultatai gali būti naudingi tiek rengiant tolesnius teisminės medicijos teisinio reguliavimo pakeitimus, tiek ir taikant konkrečias šią alternatyvaus ginčų sprendimo procedūrą reguliuojančias teisės normas praktikoje, taip pat jie galimai gali būti naudingi teisės mokslo, be kita ko, alternatyvaus ginčų sprendimo srityje vystymuisi. Šio tyrimo rezultatai gali sudaryti prielaidas egzistuojančio teisminės medicijos modelio pakeitimams, galimai turėsiantiems įtakos ir sėkmingesniai šios alternatyvaus ginčų sprendimo procedūros taikymui.

Disertacinio tyrimo objektas

Disertacinio tyrimo objektas yra teisminės medicijos⁷⁰⁵ civiliniuose ginčiuose⁷⁰⁶ teisinis reguliavimas Lietuvoje⁷⁰⁷.

705 Teisminė mediacija šiame tyrime suprantama taip, kaip ji apibrėžta Lietuvoje galiojančiomis teisės normomis; taigi šio tyrimo kontekste nuodugnai neanalizuojami užsienio valstybėse įtvirtinti teisminės medicijos modeliai.

706 Šiame tyrime analizuojamas tik teisminės medicijos civiliniuose ginčiuose, taip kaip jie suprantami Lietuvos teisinėje sistemoje, teisinis reguliavimas, todėl teisminės medicijos taikymo kitos rūšies ginčams spręsti galimybė tyrime nėra išsamiai nagrinėjama.

707 Teisminės medicijos civiliniuose ginčiuose teisinis reguliavimas atlikto tyrimo kontekste reiškia aktualias galiojančias teisės normas (2015 m. sausio 1 d.), taip pat, kur būtina, teisės aktų projektų nuostatas.

Taigi įvairūs teisminės mediacijos taikymo praktikoje aspektai, kaip antai – konkrečių teisminei mediacijai perduotų bylų pavyzdžiai, teisminės mediacijos dalyvių nuomonė dėl šios alternatyvaus ginčų sprendimo procedūros taikymo perspektyvų ir kokybės, nesudaro šio disertacinio tyrimo objekto; jais tam tikrais atvejais remiamasi tik siekiant papildomai pagrįsti pateiktus teiginius⁷⁰⁸.

Darbo tikslas ir uždaviniai

Disertacinio darbo *tikslas* – *atskleisti*, ar teisminės mediacijos civiliniuose ginčiuose teisinis reguliavimas Lietuvoje yra tinkamas siekiant taikiai spręsti ginčus, *inter alia* ar juo įtvirtintos taisyklės, nustatančios universalius teisminės mediacijos principus – taisyklės, būtinos tam, kad šia procedūra būtų pasitikima ir ji būtų kokybiškai taikoma praktikoje, ir sudarytos prielaidos juos taikyti (i), taip pat *pateikti* įstatymų leidėjui pasiūlymus dėl teisminės mediacijos civiliniuose ginčiuose teisinio reguliavimo pakeitimų (ii) ir *identifikuoti* Lietuvos teisinėje sistemoje įtvirtinto teisminės mediacijos civiliniuose ginčiuose modelio ypatumus (iii).

Šio tyrimo tikslas nėra nustatyti ir pasiūlyti vienintelį Lietuvoje tinkamiausią teisminės mediacijos modelį civiliniams ginčams spręsti.

Disertacinio darbo *uždaviniai*:

- 1) pristatyti teisminės mediacijos civiliniuose ginčiuose modelio Lietuvoje raidą ir atskleisti pagrindinius veiksnius, paskatiniusius šios alternatyvaus ginčų sprendimo procedūros atsiradimą ir vystymąsi;

708 Tokį pasirinkimą lėmė tai, kad:

1) teisminė mediacija kol kas Lietuvoje taikoma iš esmės pakankamai nežymiai: tik 131 byla buvo perduota spręsti teisminės mediacijos būdu 2010–2014 metais ir tik 23 iš jų buvo sudaryta taikos sutartis (Priedas, 3 lentelė); remiantis pateiktais statistiniais duomenimis nuo Bandomojo teisminės mediacijos projekto pradžios tik 141 byla buvo perduota spręsti taikant teisminę mediaciją (Priedas, 1 lentelė); kitaip tariant – teisminės mediacijos taikymas galėtų būti vertinamas kaip vis dar nepakankamai gausus tam, kad būtų sudarytos prielaidos, ištyrus praktinio taikymo aspektus, padaryti apibendrintas išvadas apie probleminius aspektus, išryškėjusius praktikoje taikant teisminės mediacijos teisinį reguliavimą;

2) mediatorių nuomonė apie taikant teisminę mediaciją jau kilusius arba dar tik galimai kilsiančius probleminius aspektus, susijusius su šios alternatyvaus ginčų sprendimo procedūros teisiniu reguliavimu, jau buvo išsamiai įgaliotų subjektų įvertinta prieš parengiant ir priimant nuo 2015 m. sausio 1 d. įsigaliojusią Teisminės mediacijos taisyklių redakciją (ir kitus susijusius teisės aktus); susijusiais *travaux préparatoires* (įskaitant teismų pateiktas nuomones dėl tuo metu galiojusio teisminės mediacijos teisinio reguliavimo trūkumų, kartu ir – apie probleminius jo taikymo praktikoje aspektus) buvo remiamasi ir atliekant šį tyrimą;

3) 2012–2013 metais (laikotarpiu, kai teisminės mediacijos taikymas išaugo) tik 12 procentų mediatorių iš Teismo mediatorių sąrašo (tuo metu 12 procentų sudarė 8 mediatoriai) taikė teisminę mediaciją (Priedas, 6 lentelė); todėl tik nedidelės dalies mediatorių nuomonės dėl teisminės mediacijos teisinio reguliavimo probleminių aspektų, išylančių jį taikant praktikoje, ištyrimas negalėtų sudaryti prielaidų atitinkamoms apibendrinančioms išvadoms;

4) dėl konfidencialumo principo konkrečių bylų, kuriose buvo taikoma teisminė mediacija, pavyzdžiai, kaip ir kitų teisminės mediacijos proceso dalyvių nuomonė yra viešai neprieinami.

Taigi nurodytų praktinių aspektų analizė negalėjo būti atlikta, o tuo atveju, jeigu ji būtų buvusi atlikta, ji nebūtų sudariusi prielaidų daryti apibendrintas išvadas ir būtų negalėjusi būti naudinga tyrimo šaltiniu (ypač atsižvelgiant į tai, kad atitinkamą analizę, į kurią atsižvelgta ir atliekant šį tyrimą, jau yra atlikusi Nacionalinė teismų administracija).

- 2) pateikti teisminės mediacijos apibrėžimą Lietuvos teisinėje sistemoje ir nustatyti pagrindinius šios alternatyvaus ginčų sprendimo procedūros principus;
- 3) nustatyti, ar teisminės mediacijos dalyviams yra suteiktas toks teisinis statusas, kuris būtinas užtikrinti pagrindinių teisminės mediacijos principų įgyvendinimą, įskaitant teises ir pareigas, būtinas taikiai išspręsti ginčą;
- 4) atskleisti teisminės mediacijos proceso ypatumus ir nustatyti, ar šiame kontekste yra įtvirtinti pagrindiniai šios alternatyvaus ginčų sprendimo procedūros principai;
- 5) atskleisti pagrindines galimas tolesnio teisminės mediacijos modelio raidos Lietuvos teisinėje sistemoje kryptis;
- 6) pateikti pasiūlymus dėl galiojančių teisės normų, reguliuojančių teisminės mediacijos civiliniuose ginčiuose taikymą Lietuvoje, pakeitimo.

Ginamieji disertacijos teiginiai

1. Pagrindiniai teisminės mediacijos principai yra integrali teisminės mediacijos teisinio reguliavimo Lietuvos teisinėje sistemoje dalis; galiojantis teisinis reguliavimas taip pat įtvirtina, nors ir ne visais atvejais, šių principų įgyvendinimo garantijas.
2. Pagrindiniams teisminės mediacijos dalyviams – ginčo šalims ir mediatoriumi – yra suteiktos teisės bei nustatytos pareigos, būtinos siekiant taikiai išspręsti ginčą taikant šią alternatyvaus ginčų sprendimo procedūrą, o teisinis reguliavimas sudaro prielaidas jų įgyvendinimui.
3. Lietuvos teisinėje sistemoje įtvirtintas išskirtinių bruožų, palyginti, be kita ko, su kitose civilinės teisės tradicijos valstybėse įtvirtintais, jo raidos metu įgijęs teisminės mediacijos modelis.

Tyrimų apžvalga

Nors teisminė mediacija civiliniuose ginčiuose buvo įtvirtinta Lietuvos teisinėje sistemoje beveik prieš dešimtmetį, ji nebuvo kompleksiskai tiriama Lietuvos teisės moksle. Vis dėlto tam tikri teisminės mediacijos aspektai buvo tyrinėjami doc. dr. N. Kaminskienės straipsniuose, teisminė mediacija taip pat patenka į prof. dr. V. Valančiaus mokslinių interesų sritį.

Tuo tarpu kiti atlikti tyrimai su alternatyviu ginčų sprendimu ir būtent su viena iš jo formų – mediacija susijusiose srityse yra arba tik iš dalies susiję su teismine mediacija, arba teisminė mediacija juose iš viso nebuvo nagrinėjama. Alternatyvaus ginčų sprendimo srityje atlikti tyrimai apėmė tyrimus, susijusius su bendraisiais alternatyvaus ginčų sprendimo aspektais (tokio pobūdžio tyrimus atliko doc. dr. N. Kaminskienė, dr. F. Petrauskas, doc. dr. V. Vėbraitė, prof. dr. J. Lakis), tyrimus, susijusius su alternatyviu ginčų sprendimu tam tikrose teisės srityse (pavyzdžiui, atkuriamasis teisingumas patenka į doc. dr. R. Uscilos, prof. dr. R. Ažubalytės mokslinių tyrimų interesų sritis, alternatyvų ginčų sprendimą civilinėje teisėje įvairiais aspektais nagrinėjo doc. dr. N. Kaminskienė, doc. dr. R. Simaitis, alternatyvų vartotojų ginčų sprendimą – dr. F. Petrauskas), tyrimus, susijusius su bendraisiais mediacijos aspektais bei mediacija tam tikrose teisės srityse (tokio pobūdžio tyrimus atliko T. Mīlašius, doc. dr. N. Kaminskienė, prof. dr. I. Žalėnienė ir dr. A. Tvaronavičienė, tyrimus, susijusius su nusikaltėlio–aukos mediacija atliko doc. dr. R. Uscila, doc. dr. I. Michailovič, su mediacija administraciniuose ginčiuose – dr. U. Trumpulis, A. Banyš, doc. dr. S. Kavalnė ir I. Saudargaitė, su mediacija notaro veikloje – G. Štaraitė-

Barsulienė, su mediacija skyrybų bylose – prof. dr. R. Mienkowska-Norkienė). Mediacija iš psichologijos mokslo perspektyvų nagrinėja doc. dr. J. Sondaitė. Vis dėlto, nepaisant akivaizdaus Lietuvos teisės mokslininkų susidomėjimo alternatyviu ginčų sprendimu ir viena jo formų – mediacija, teisminė mediacija civiliniuose ginčiuose Lietuvoje kol kas nebuvo sisteminio tyrimo dalyku.

Pažymėtina, kad įvairūs alternatyvaus ginčų sprendimo aspektai, formos, taip pat principai, tipai bei skirtingi mediacijos, įskaitant vieną iš jos rūšių – teisminę mediaciją, aspektai yra neatskiriama teisės mokslo užsienio valstybėse dalis: įvairūs nurodyti aspektai buvo išsamiai ištirti teisės mokslininkų, jie taip pat yra šiuo metu atliekamų mokslinių tyrimų dalyku. F. E. A. Sander, L. Riskin, C. Menkel-Meadow, J. Nolan-Haley, K. K. Kovach, M. Moffitt, E. Brunet, L. Boulle, F. Mosten, N. A. Welsh, M. B. Trevor (JAV), N. Alexander, D. Spencer (Australija), A. Goodman, A. Hammerton (Jungtinė Karalystė), L. Otis (Kanada), G. de Palo (Italija), H. Eidenmüller (Vokietija) turėtų būti paminėti kaip keletas žinomiausių ir reprezentyviausių mokslininkų šioje srityje. Vis dėlto nepaisant akivaizdaus mokslinio susidomėjimo mediacija, taip pat viena jos rūšių – teismine mediacija, teisminė mediacija civiliniuose ginčiuose Lietuvoje nebuvo kompleksiskai ištirta ir užsienio teisės mokslininkų.

Darbo metodologija

Atsižvelgiant į disertacinio tyrimo objektą, siekiant disertacinio darbo tikslo bei formuluojant išvadas, buvo pritaikyti tradiciniai teisės mokslo metodai: dokumentų analizės, lingvistinis, teleologinis, sisteminės analizės, loginis-analitinis ir istorinis. Siekiant išsamių, visapusiškų tyrimo rezultatų, šie metodai buvo derinami tarpusavyje ir taikomi kartu, konkretaus metodo ir (ar) jų derinio pasirinkimą nulėmė konkretus nagrinėjamas klausimas, jo ypatumai. *Dokumentų analizės metodas* buvo taikomas analizuojant teisės aktus, reguliuojančius teisminę mediaciją Lietuvoje, taip pat Europos Sąjungos teisės aktus, Lietuvos ir užsienio mokslininkų tyrimų teisės srityje rezultatus, kitą atliktam tyrimui aktualią medžiagą. *Duomenų analizės metodas* buvo taikomas nagrinėjant teisminės mediacijos civiliniuose ginčiuose taikymo statistiką. *Lingvistinis metodas* buvo taikomas, be kita ko, tiriant taikytinuose teisės aktuose įtvirtintas sąvokas (teisminės mediacijos, mediatoriaus ir kt.), analizuojant konkrečių teisės normų formuluotes, Europos Sąjungos teisės aktų nuostatas. *Teleologinis metodas* buvo taikomas siekiant nustatyti tikruosius įstatymų leidėjo ketinimus, t. y. kokių tikslų buvo siekiama nustatant atitinkamą teisminės mediacijos teisinį reguliavimą. *Sisteminės analizės metodas* buvo taikomas, be kita ko, analizuojant teisminės mediacijos teisinį reguliavimą kartu su jo taikymo praktikoje aspektais, taip pat atsižvelgiant į specialiojoje teisės literatūroje pateiktas išvagas, apibendrinant ir pateikiant sisteminį požiūrį į tyrimo dalyką. *Loginis-analitinis metodas* buvo taikomas nustatant galimas mediacijos taikymo ir praktinio funkcionavimo problemas, formuluojant pasiūlymus teisinio reguliavimo pakeitimams, taip pat tikrinant atlikto tyrimo rezultatus ir jų loginį ryšį. *Istorinis metodas* buvo taikomas atskleidžiant bendrai teisminės mediacijos atsiradimą ir vystymąsi, taip pat šios alternatyvaus ginčų sprendimo procedūros atsiradimą ir raidą Lietuvoje.

Disertacijos struktūra

Disertacija susideda iš įvado, tyrimų apžvalgos, darbo metodologijos, dėstomosios dalies, išvadų, priedo ir literatūros sąrašo. Disertacinio tyrimo objektas, tikslai ir tyrimo

eiga nulėmė dėstomosios disertacijos dalies struktūrą; disertacijos dėstomąją dalį sudaro keturi skyriai.

Kadangi teisminė mediacija apibrėžiama iš esmės skirtingai kiekvienoje teisinėje sistemoje, be kita ko, dėl šios alternatyvaus ginčų sprendimo procedūros raidos konkrečioje teisinėje sistemoje ypatumų, pirmiausia, prieš pateikiant teisminės mediacijos ir civilinio ginčo apibrėžimus, pristatomi veiksniai, kurie turėjo įtakos ir vis dar, daugiau ar mažiau, turi įtakos teisminės mediacijos modeliui Lietuvos teisinėje sistemoje. Taigi, pirmajame disertacijos skyriuje „*Teisminės mediacijos raida ir samprata*“ visų pirma atskleidžiami pagrindiniai bendrai teisminės mediacijos, kaip alternatyvaus ginčų sprendimo procedūros, raidos, taip pat jos vystymosi skirtingai teisės tradicijai priklausančiose valstybėse, jos raidos Europos Sąjungoje ypatumai, t. y. kai kurie aspektai, turėję įtakos teisminės mediacijos sampratos susiformavimui, taip pat šios alternatyvaus ginčų sprendimo procedūros teisiniui reguliavimui bei jo taikymui Lietuvoje. Atskleidus bendrus teisminės mediacijos sampratos požymius, turinčius įtakos šios alternatyvaus ginčų sprendimo procedūros sampratai konkrečioje teisinėje sistemoje, toliau tiriama teisminės mediacijos samprata Lietuvos teisinėje sistemoje.

Pirmajame disertacijos skyriuje padarius išvadą, kad teisminės mediacijos dalyvių, būtent – ginčo šalių ir mediatoriaus, vaidmuo yra vienas iš esminių aspektų, charakterizuojančių ir apibrėžiančių šią alternatyvaus ginčų sprendimo procedūrą *inter alia* Lietuvos teisinėje sistemoje, o teisminės mediacijos principai (įskaitant ginčo šalių apsisprendimo (autonomijos) principą ir sutartinį teisminės mediacijos pobūdį) yra tiesiogiai susiję su šių dalyvių, kurie gali lemti bendrųjų principų turinį ir jų taikymo ypatumus, vaidmeniu ir teisiniu statusu bei geriausiai atsispindi būtent juos analizuojant, antrasis disertacijos skyrius „*Teisminės mediacijos dalyviai*“ yra skirtas ginčo šalių ir mediatoriaus vaidmens ir teisinio statuso, būtent jų teisių ir pareigų, teisminėje mediacijoje analizei; jame atitinkamai tiriama ir tai, ar teisminės mediacijos dalyviams yra suteiktos teisės ir nustatytos pareigos, būtinos taikiai išspręsti ginčą.

Atsižvelgiant į tai, kad teisminė mediacija, nepaisant šiai alternatyvaus ginčų sprendimo procedūrai būdingo lankstumo, Lietuvos teisinėje sistemoje yra gana išsamiai reguliuojama, trečiajame disertacijos skyriuje „*Teisminės mediacijos proceso ypatumai*“ analizuojami specifiniai teisminės mediacijos proceso teisinio reguliavimo bruožai. Siekiant nustatyti, ar pagrindiniai teisminės mediacijos principai Lietuvos teisinėje sistemoje yra įtvirtinti ne tik suteikiant atitinkamas teises bei nustatant pareigas šios procedūros dalyviams, bet jų taikymas taip pat yra užtikrinamas viso proceso metu, nurodytas aspektas šiame disertacijos skyriuje tiriamas atskirai kiekvienos iš teisminės mediacijos stadijų atžvilgiu: atskirai jos pradinės stadijos, pagrindinės stadijos ir pabaigos kontekste; dėmesys taip pat yra skiriamas vienam iš pagrindinių teisminės mediacijos principų – konfidencialumo principui.

Ketvirtajame disertacijos skyriuje „*Teisminės mediacijos vystymosi kryptys*“, atsižvelgiant ir į ankstesniuose disertacijos skyriuose padarytas išvadas, pateikiamos įžvalgos dėl teisminės mediacijos modelio raidos Lietuvoje, galimai galinčios turėti įtakos ir aktyvesniam teisminės mediacijos taikymui. Taigi šiame skyriuje pateikiamos įžvalgos dėl galimybės įtvirtinti tam tikrą privalomumo elementą teisminės mediacijos kontekste, taip pat sukurti teisminės mediacijos kokybės užtikrinimo sistemą, atskleidžiamos kitos galimos teisminės mediacijos modelio raidos kryptys.

Išvados

1. Teisminė mediacija Lietuvos teisinėje sistemoje yra integrali ginčų sprendimo sistemos dalis, vis dėlto ši procedūra dėl sąlyginai nedažno jos taikymo dar netapo tikra alternatyva tradiciniam bylinėjimuisi teisme. Tokia situacija yra nulemta keleto priežasčių, įskaitant, be kita ko, ir tai, kad Lietuvoje, kaip civilinės teisės tradicijos valstybėje, egzistuoja ilgalaikės ginčų sprendimo teisme tradicijos. Tačiau, be kita ko, valdžios institucijų ir teisės praktikų noras skatinti teisminės mediacijos taikymą tam, kad ši procedūra taptų alternatyva bylinėjimuisi teisme, visgi lemia tolesnę šios alternatyvaus ginčų sprendimo procedūros raidą.
2. Teisminė mediacija Lietuvos teisinėje sistemoje bendrai gali būti apibrėžta kaip ginčų sureguliuojimo procedūra, kurios paskirtis – padėti (po civilinės bylos teisme iškėlimo) šalims išspręsti taikiai jų civilinį ginčą (kaip jis apibrėžtas Lietuvos Respublikos civilinio proceso kodekse) sudarant taikos sutartį, kuri pagal įstatymus būtų laikoma galiojančia, tarpininkaujant vienam ar keliems mediatoriams – specialioms subjektams, įtrauktiems į Teismo mediatorių sąrašą. Teisminė mediacija yra neatšiejamai susijusi su teismo procesu – ši alternatyvaus ginčų sprendimo procedūra gali būti pradėta tik tada, kai bendrosios kompetencijos teisme yra iškelta civilinė byla.

Pagrindinių teisminės mediacijos principų (ginčo šalių savanoriškumo, konfidencialumo, abipusės pagarbos ir tolerancijos, teismo mediatoriaus neutralumo ir nešališkumo, bendradarbiavimo, teismo mediatoriaus kvalifikuotos veiklos, sąžiningumo, bendravimo, teismo mediatoriaus pavyzdingo elgesio, patikimumo, teisėtumo principai), kurie yra tiesiogiai įtvirtinti arba gali būti išvesti iš visuminio teisinio reguliavimo, turinys, taip pat šių principų įgyvendinimo garantijos geriausiai gali būti atskleisti ginčo šalių ir teismo mediatoriaus – teisminės mediacijos dalyvių, galinčių turėti įtakos šių principų taikymui, kartu ir jų turinui – vaidmens kontekste. Atlikto tyrimo pagrindu darytina išvada, kad galiojančiomis teisės normomis yra nustatytas toks teisminės mediacijos dalyvių – ginčo šalių ir mediatoriaus – vaidmuo (ir suteiktas toks teisinis statusas), kuris yra būtinas siekiant teisminės mediacijos tikslo – siekiant taikiai išspręsti ginčą taikant. Galiojančiu teisiniu reguliavimu taip pat iš esmės yra įtvirtintos bendrųjų mediacijos principų įgyvendinimo garantijos: tokių principų turi būti laikomasi visų šios alternatyvaus ginčų sprendimo procedūros stadijų metu – inicijuojant teisminę mediaciją, jos metu, pabaigiant šią alternatyvaus ginčų sprendimo procedūrą.

- 2.1. Ginčo šalims yra suteiktos iš jų vaidmens teisminėje mediacijoje (t. y. iš jų kaip pagrindinių sprendimo priėmėjų konkretaus ginčo atžvilgiu vaidmens) kylančios teisės: be kita ko, teisė nuspręsti dalyvauti teisminėje mediacijoje, teisė išspręsti ir atitinkamai teisė atsakyti išspręsti kilusį ginčą šios alternatyvaus ginčų sprendimo procedūros rėmuose, teisė pasirinkti mediatorių, teisė dalyvauti nustatant teisminės mediacijos procesinius aspektus, teisė pabaigti teisminę mediaciją. Šalims taip pat yra nustatytos būtinos pareigos (kurios sutampa su kai kuriais bendraisiais teisminės mediacijos principais), kurios sudaro prielaidas tinkamam šios alternatyvaus ginčų sprendimo procedūros taikymui: be kita ko, bendradarbiavimo pareiga, reikalavimas veikti sąžiningai, konfidencialumo pareiga.

Vis dėlto teisminės mediacijos teisinis reguliavimas yra netinkamas tiek, kiek jį nustatant nėra atsižvelgta į būtinybę, kad ginčo šalys dalyvautų jau pradėtoje teisminės mediacijos procedūroje – iš pačios šios alternatyvaus ginčų sprendimo procedūros esmės kylančią pareigą dalyvauti teisminėje mediacijoje, atsižvelgiant į tai, kad ginčo šalių dalyvavimas šioje alternatyvaus ginčų sprendimo procedūroje yra būtina šios alternatyvaus jos įgyvendinimo sąlyga. Todėl siūloma galiojančią teisinį reguliavimą atitinkamai pakeisti, užtikrinant, kiek įmanoma, ginčo šalių dalyvavimą (nustatant, kad ginčo šalių dalyvavimas būtinas ir sudarant galimybę nutraukti teisminę mediaciją ginčo šalims (šaliai) nedalyvaujant).

Be to, siūloma nustatyti garantija, kad ginčo šalys bus tinkamai supažindintos su savo teisėmis bei teisminės mediacijos procedūros esme, esantį reikalavimą joms būti atstovaujamos teisininko.

- 2.2. Teismo mediatoriumi iš esmės yra suteiktos teisės, būtinos tam, kad jis (ji) galėtų tinkamai įgyvendinti savo vaidmenį padėdamas (padėdama) ginčo šalims pasiekti pagrindinį teisminės mediacijos tikslą – taikų jų ginčo sprendimą: be kita ko, teisė nuspręsti, ar vykdyti teisminę mediaciją konkrečiame ginče, teisė nustatyti teisminės mediacijos procesinius aspektus, teisė daryti įtaką konkrečiam ginčo sprendimui pateikiant ginčo šalims pasiūlymus, kaip jį išspręsti, teisė pabaigti teisminę mediaciją. Nustatytos ir teismo mediatoriaus pareigos, padedančios užtikrinti tinkamą teisminės mediacijos taikymą: be kita ko, pareiga veikti atsižvelgiant į Europos mediatorių elgesio kodekso nuostatas, pareiga užtikrinti efektyvų, operatyvų ir sąžiningą procesą bei šalių lygybę, reikalavimas savo pareigas atlikti kvalifikuotai, pareiga būti nešališkam ir neutraliam, pareiga nusišalinti, atsiradus nustatytoms aplinkybėms, pareiga išlaikyti konfidencialumą.

Tačiau teisinis reguliavimas neįtvirtina būtinųjų teismo mediatoriaus kvalifikuotos veiklos principo įgyvendinimo garantijų: nors visi asmenys gali tapti teismo mediatoriais, jeigu jie atitinka nustatytus reikalavimus, taikytinos teisės normos nenustato tokių konkrečių reikalavimų – diskreција nuspręsti, ar atitinkamo asmens turima kvalifikacija ir asmeninės savybės yra tinkami tam, kad jis įgytų teismo mediatoriaus statusą, yra suteikta specialiam organui. Teigtina, kad tokia sistema yra tinkama tik kaip laikina, t. y. ji turi būti ateityje pakeista nustatant konkrečius reikalavimus asmenims, norintiems tapti teismo mediatoriais.

Be to, nors teismo mediatoriaus neutralumo, nešališkumo, taip pat konfidencialumo principai yra nustatyti kaip teisminės mediacijos principai, teisiniu reguliavimu nėra įtvirtintos būtinosios šių principų įgyvendinimo garantijos tais atvejais, kai bylą nagrinėjantis teisėjas toje byloje kartu veikia ir kaip teismo mediatorius bei, pasibaigus teisminei mediacijai, tvirtina taikos sutartį. Siūloma atsakyti teisiniu reguliavimu įtvirtintos teisės tam pačiam asmeniui būti tiek teisėju, tiek teismo mediatoriumi toje pačioje byloje.

3. Lietuvos teismine sistemoje įtvirtintas teisminės mediacijos modelis yra specifinis modelis, turintis ypatingų bruožų, besiskiriančių ir nuo kitose kontinentinės teisės valstybėse įtvirtintų šios alternatyvaus ginčų sprendimo procedūros modelių.

- 3.1. Teisminės mediacijos modelio ypatumus lėmė šios alternatyvaus ginčų sprendimo procedūros įtvirtinimo ir raidos ypatumai Lietuvos teisinėje sistemoje. Nurodyti (svarbiausi, tačiau ne vieninteliai) šios procedūros įtvirtinimo ir raidos ypatumai vis dar daro įtaką nustatant teisminės mediacijos teisinį reguliavimą.
- 3.1.1. Šios alternatyvaus ginčų sprendimo procedūros įtvirtinimui įtakos turėjo egzistuojantis neatsiejamas ryšys tarp ginčų sprendimo ir teismų kompetencijos, kartu ir – teisėjų vaidmens. Teisminė mediacija buvo įtvirtinta Lietuvos teisinėje sistemoje taikant mišrų metodą (skirtingą metodą nei tas, kuris buvo taikytas daugelyje civilinės teisės tradicijos valstybių): teisminė mediacija įtvirtinta bandant ją taikyti teismuose (taikant ją „iš teismo į teismą“ būdu) (vadinamasis „pragmatinis“ metodas) ir kartu teisiškai sureguliuojant šią alternatyvaus ginčų sprendimo procedūrą (vadinamasis „legislatyvinis“ metodas). Toks teisminės mediacijos įtvirtinimo metodas lėmė ir itin glaudų teisminės mediacijos ir teismų sistemos bei teismo proceso ryšį, kartu turėjo įtakos ir tolesniam teisminės mediacijos vystymuisi.
- Nepaisant tolesnių teisminės mediacijos modelio modifikacijų, ši alternatyvaus ginčų sprendimo procedūra išlieka glaudžiai susijusi su teismų sistema: Teisėjų taryba – viena iš teismų savivaldos institucijų – dalyvauja formuojant Teisminės mediacijos komisiją – specialų organą, kuris sprendžia dėl teismo mediatoriaus statuso suteikimo ir panaikinimo, taip pat ši taryba nagrinėja apeliacijas dėl atitinkamu komisijos sprendimų; Teisėjų taryba taip pat tvirtina teisminės mediacijos procedūrą reglamentuojančias nuostatas ir kt.
- Tolesni teisminės mediacijos taikymo pagrindu esančio teisinio reguliavimo pakeitimai taip pat darytini atsižvelgiant į tokių neatsiejamą šios alternatyvaus ginčų sprendimo procedūros ryšį su teismų sistema.
- 3.1.2. Teisminės mediacijos įtvirtinimui ir raidai Lietuvos teisinėje sistemoje įtakos turėjo ir Europos Sąjungos teisėkūros iniciatyvos bei jos priimti teisės aktai, ypač – Direktyva 2008/52/EB dėl tam tikrų mediacijos civilinėse ir komercinėse bylose aspektų ir dėl jos priėmimo atsiradusios mediacijos taikymo tendencijos visose Europos Sąjungos valstybėse narėse. Šiame kontekste pažymėtina, jog atliktas tyrimas sudaro prielaidas išvada, kad įstatymų leidėjas tinkamai įgyvendino Lietuvai, kaip Europos Sąjungos valstybei narei, tenkančią pareigą perkelti Direktyvos 2008/52/EB nuostatas į Lietuvos teisinę sistemą. Be to, nurodytoje direktyvoje įtvirtintų bendrųjų principų taikymo sritis buvo išplėsta – šie principai taikomi ir sprendžiant nacionalinius ginčus, taip pat taikant ne tik privačią, bet ir teisminę mediaciją; taip įstatymų leidėjas paskatino teisminės mediacijos įtvirtinimą.
- 3.2. Lietuvos teisinėje sistemoje įtvirtintas teisminės mediacijos modelis turi ypatingų bruožų (požymių, kurie turi būti įvertinti ir rengiant teisminės mediacijos teisinio reguliavimo pakeitimus), įskaitant toliau nurodytus:
- ši alternatyvaus ginčų sprendimo procedūra yra itin glaudžiai susijusi su teismų sistema (be kita ko, tiek, kiek tai susiję su teismo mediatoriaus sta-

tuso suteikimu ir panaikinimu; su specialiais reikalavimais asmenims, siekiantiems tapti teismo mediatoriais; su subjektu, įgalintu nustatyti teisminės mediacijos teisinį reguliavimą ir kt.) ir teismo procesu (teisminės mediacijos inicijavimas galimas tik iškelus civilinę bylą teisme; civilinis procesas sustabdomas tol, kol atliekama teisminė mediacija; bylą nagrinėjantis teisėjas nustato konkrečią teisminės mediacijos proceso trukmę; bylą nagrinėjantis teisėjas turi teisę būti ir teismo mediatoriumi jo (jos) nagrinėjamoje byloje ir kt.);

- teisminė mediacija yra pasirenkama savanoriškai, t. y. ginčo šalys gali laisvai apsispręsti, ar perduoti jų ginčą spręsti taikant šią alternatyvaus ginčų sprendimo procedūrą (numatoma teisinį reguliavimą pakeisti įtvirtinant tam tikrą teisminės mediacijos privalomumo elementą);
- nors visi fiziniai asmenys, atitinkantys teisės aktuose nustatytus reikalavimus, gali siekti tapti teismo mediatoriais, tik tie konkretūs asmenys, kurie turi reikiamą kvalifikaciją, įgijo teismo mediatoriaus statusą ir atitinkamai yra įrašyti į Teismo mediatorių sąrašą gali veikti kaip teismo mediatoriai; teismo mediatoriaus statuso suteikimas konkrečiam asmeniui yra priskirtas Teisminės mediacijos komisijos – specialaus Teisėjų tarybos sudaryto organo diskrecijai; nustatytoji procedūra yra pakankamai griežtai sureguliuota, taigi, priešingai nei manoma, tokios procedūros įtvirtinimas tik iš dalies atspindi teisminės mediacijos modelio pasikeitimą į vadinamąjį „rinkos teisminės mediacijos modelį“;
- nepaisant to, kad yra įtvirtintas mediatoriaus kvalifikuotos veiklos principas (reikalavimas) bei sudaryta galimybė panaikinti teismo mediatoriaus statusą tais atvejais, kai asmuo neturi tų profesinių savybių, kurios būtinos teismo mediatoriumi, nėra nustatyta, kokios konkrečios savybės yra būtinos, taip pat nėra nustatyti reikalavimai tęstiniam teismo mediatorių mokymuisi; įgalinimai kiekvienu konkrečiu atveju nuspręsti, ar teismo mediatoriaus savybės yra tinkamos, yra suteikti subjektui, sprendžiančiam dėl teismo mediatoriaus statuso panaikinimo – Teisminės mediacijos komisijai;
- teisminės mediacijos procedūra yra sureguliuota gana griežtai – kai kurie procedūriniai aspektai yra imperatyviai reguliuojami galiojančiomis teisės normomis, taigi – ne visais atvejais sudaryta galimybė juos apibrėžti konkrečios procedūros metu, todėl jie ne visada gali būti priderinti prie konkretaus ginčo kontekste egzistuojančių poreikių;
- nors kai kurių teisminės mediacijos aspektų teisinis reguliavimas yra pakankamai visapusiškas (pavyzdžiui, teisminės mediacijos trukmės nustatymą reguliuojančios teisės normos), daugeliu atveju nustatytas ir vadinamasis „pereinamojo laikotarpio“ teisinis reguliavimas, t. y. tas teisinis reguliavimas, kuris yra tinkamas tik tokioje santykinai ankstyvoje teisminės mediacijos taikymo stadijoje ir kuris turi būti vėliau atitinkamai pakeistas; šiame kontekste vadinamasis „pereinamojo laikotarpio“ teisinis reguliavimas apima tas teisės normas, kuriomis suteikiama diskrecijos teisė priimti sprendimą tam tikram subjektui, nenustatant jokių kriterijų, kuriais remiantis toks sprendimas galėtų būti priimtas (pavyzdžiui, teisinis regu-

liavimas, kuris implikuoja Teisminės mediacijos komisijos teisę nustatyti reikalavimus konkretaus asmens, siekiančio tapti teismo mediatoriumi, kvalifikacijai arba atitinkamus reikalavimus teismo mediatoriaus statusą jau įgijusiam asmeniui), taip pat bendro pobūdžio teisės normas (kaip antai teisės normas, kuriomis reikalaujama išklausti teisminės mediacijos kursus, tačiau neapibrėžiamas tokių kursų dalykas, subjektai, galintys organizuoti tokius kursus).

Pasiūlymai dėl teisminės mediacijos teisinio reguliavimo pakeitimų

Atliktas tyrimas įgalino suformuluoti keletą pasiūlymų, kaip galėtų būti keičiamos galiojančios teisės normos; šie pakeitimai galimai prisidėtų prie teisminės mediacijos taikymo pagrindu esančio teisinio reguliavimo tobulinimo.

1. Teisminės mediacijos taisyklėse įtvirtintina nuoroda į Civilinio proceso kodeksą, siekiant aiškiau reguliuoti, kokie ginčai gali būti sprendžiami taikant teisminę mediaciją.

Taigi Teisminės mediacijos taisyklių 1 punktą turėtų būti pakeistas ir jame turėtų būti nustatyta:

„1. Teisminės mediacijos taisyklės (toliau – Taisyklės) nustato teisminės mediacijos (civilinių ginčų teismo taikinamojo tarpininkavimo) vykdymo bendrosios kompetencijos teismuose nagrinėjamos civilinėse bylose (**kaip jos apibrėžtos Civilinio proceso kodekso 22 straipsnyje**) atvejus bei tvarką“.

2. Teisminės mediacijos taisyklėse nustatytinas reikalavimas ginčo šalims asmeniškai dalyvauti, taip pat reikalavimas dalyvauti jų atstovams teisminės mediacijos procese.

Taigi Teisminės mediacijos taisyklių 18 punktą turėtų būti pakeistas ir jame turėtų būti nustatyta:

„18. Teisminės mediacijos metu ginčo šalys **privalo** dalyvauti pačios, taip pat dalyvauja jų atstovai. <...>“.

3. Galimybė teikti antrinę valstybės garantuojamą teisinę pagalbą šalims teisminės mediacijos metu eksplacitiškai įtvirtintina Valstybės garantuojamos teisinės pagalbos įstatyme.

Valstybės garantuojamos teisinės pagalbos įstatymo 2 straipsnio 1 dalis turėtų būti pakeista ir joje turėtų būti nustatyta:

„1. Antrinė valstybės garantuojama teisinė pagalba (toliau – antrinė teisinė pagalba) – dokumentų rengimas, gynyba ir atstovavimas bylose, įskaitant vykdymo procesą, atstovavimas išankstinio ginčų sprendimo ne teisme atvejais, jeigu tokią tvarką nustato įstatymai ar teismo sprendimas, **atstovavimas teisminės mediacijos procedūroje**. <...>“.

4. Visiems teisėjams, siekiantiems tapti teismo mediatoriais, nustatytinas reikalavimas lankyti atitinkamus specialius kursus teisėjų kvalifikacijos kėlimo programos kontekste.

Taigi Teismo mediatoriaus statuso suteikimo ir jo panaikinimo asmenims tvarkos aprašo 8 punktą turėtų būti pakeistas ir jame turėtų būti nustatyta:

„8. Šio Aprašo 6.3 papunktyje nustatytas reikalavimas dėl mokymų mediacijos tema netaikomas teisėjams, nes jie **turi** išklausti mokymus mediacijos tema pagal teisėjų kvalifikacijos kėlimo programą, bei asmenims, kurie turi ne mažesnę kaip 3 metų teisinio pedagoginio darbo stažą, kaip jis suprantamas pagal Lietuvos Respublikos teismų įstatymo 69 straipsnį, mediacijos srityje“.

5. Teisminės mediacijos komisija turėtų būti sudaryta iš 6 teisėjų ir 3 specialistų teisminės mediacijos srityje (o ne iš privalomai 6 teisėjų, neapibrėžiant reikalavimų kitiems asmenims, norintiems tapti komisijos nariais).

Taigi Teisminės mediacijos komisijos nuostatų 6 punktas turėtų būti pakeistas ir jame turėtų būti nustatyta:

„6. Komisija sudaroma Teisėjų tarybos įgaliojimų laikui iš devynių narių, šeši iš jų turi būti teisėjai, **likę trys – specialistai teisminės mediacijos srityje.** <...>“.

6. Teisminės mediacijos komisijos nariams suteiktina teisė išsirinkti iš jų tarpo komisijos pirmininką (vietoje Teisėjų tarybai suteiktos teisės skirti pirmininką iš komisijos narių paskirtų teisėjų).

Taigi Teisminės mediacijos komisijos nuostatų 7 punktas turėtų būti pakeistas ir jame turėtų būti nustatyta:

„7. Komisijos narius skiria Teisėjų taryba. Paskirti Komisijos nariai **išsirenka** Komisijos pirmininką“.

7. Laikotarpis, per kurį turi būti priimtas sprendimas dėl teismo mediatoriaus statuso suteikimo, sutrumpintinas nuo 60 iki 20 darbo dienų.

Taigi Teismo mediatoriaus statuso suteikimo ir jo panaikinimo asmenims tvarkos aprašo 5 punktas turėtų būti pakeistas ir jame turėtų būti nustatyta:

„5. Asmens prašymas suteikti teismo mediatoriaus statusą Komisijos turi būti išnagrinėtas ne vėliau kaip per **dvidešimt** darbo dienų nuo visų šio Aprašo 3 punkte nurodytų dokumentų gavimo Administracijoje dienos“.

8. Nustatyta, jog tik pasitarus su konkretų ginčą, taikant teisminę mediaciją, padedančiu spręsti teismo mediatoriumi, galėtų būti nustatytas kito teismo posėdžio laikas.

Taigi Teisminės mediacijos taisyklių 10 punktas turėtų būti pakeistas ir jame turėtų būti nustatyta:

„10. <...> Ta pačia nutartimi bylos nagrinėjimas atidedamas, nustatomas tikslus kito posėdžio laikas **pasitarus su teismo mediatoriumi** (teisminės mediacijos termino pabaiga)“.

9. Vienos ginčo šalies sprendimas nutraukti teisminę mediaciją eksplicitiškai įtvirtintinas kaip šios alternatyvaus ginčų sprendimo procedūros pabaigos pagrindas.

Taigi Teisminės mediacijos taisyklių 25 punktas turėtų būti pakeistas ir jame turėtų būti nustatyta:

„25. Teisminės mediacijos procesas baigiamas: <...>

25.2. **abiems** ginčo šalims **arba vienai ginčo šaliai** pasitraukus iš teisminės mediacijos proceso; <...>“.

10. Civilinių ginčų taikinamojo tarpininkavimo įstatyme įtvirtintina nuoroda į Teisminės mediacijos taisykles tiek, kiek jomis reguliuojamos draudimo teisminės mediacijos metu gautą informaciją pateikti kaip įrodymus civilinėse bylose išimtis.

Civilinių ginčų taikinamojo tarpininkavimo įstatymo 7 straipsnio 2 dalis turėtų būti pakeista ir joje turėtų būti nustatyta:

„2. Taikinimo tarpininkas negali vienos ginčo šalies jam patikėtos konfidencialios informacijos atskleisti kitai ginčo šaliai, jeigu nėra informaciją patikėjusios ginčo šalies leidimo. **Konkrečios draudimo ginčo šalims ir teismo mediatoriumi atskleisti teisminės mediacijos metu gautą konfidencialią informaciją išimtis yra nustatytos Teisminės mediacijos taisyklėse.**“.

DISERTACIJOS AUTORĖS MOKSLINĖS PUBLIKACIJOS

Mokslinės publikacijos disertacijos tema

1. Saudargaitė, I., Kavalnė, S. Mediation in Disputes Between Public Authorities and Private Parties: Comparative Aspects. *Jurisprudence: Research Papers*. 2011, Nr. 18(1): 251–265.
2. Saudargaitė, I., Sutkevičius, A. Taikos sutartis administracinių teismų praktikoje. *Human rights, the rule of law and administrative justice: an overview of the European approach*. Vilnius: Lietuvos vyriausiasis administracinis teismas, 2012: 578–598.

Kitos mokslinės publikacijos

3. Kaminskienė, N., et al. *Mediacija. Vadovėlis*. Vilnius: Mykolo Romerio universitetas, 2013. (Vadovėlio skyriai „Mediacijos rūšys: teisminė mediacija“, „Mokestinių ginčų mediacija“).

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TEISMINĖ MEDIACIJA CIVILIUOSE GINČUOSE LIETUVOJE: daktaro disertacija. – Vilnius: Mykolo Romerio universitetas, 2015. 236 p.

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Disertacinio tyrimo objektas yra teisminės mediacijos civiliniuose ginčiuose teisinis reguliavimas Lietuvoje. Nurodytas objektas tiriamas pagrindinių teisminės mediacijos principų ir jų įgyvendinimo garantijų įtvirtinimo aspektu, siekiant, be kita ko, atskleisti, ar teisminės mediacijos civiliniuose ginčiuose teisinis reguliavimas yra tinkamas ginčams taikiai spręsti, inter alia ar juo įtvirtintos taisyklės, nustatančios universalius teisminės mediacijos principus – taisyklės, būtinos tam, kad šia procedūra būtų pasitikima ir ji būtų kokybiškai taikoma praktikoje, taip pat ar sudarytos prielaidos taikyti tokius principus. Disertacijoje pasirinkta problematika nagrinėjama ir tarptautiniame kontekste – atsižvelgiant į susijusių Europos Sąjungos bei užsienio valstybių patirtį. Atlikto tyrimo pagrindu, be kita ko, identifikuojami ir Lietuvos teisinėje sistemoje įtvirtinto teisminės mediacijos civiliniuose ginčiuose modelio ypatumai.

The research object of the dissertation is the legal regulation of judicial mediation in civil disputes in Lithuania. The identified object is approached from the perspective of consolidation of the main principals of judicial mediation and the guarantees for their application; the conducted research aims inter alia at identifying whether the legal regulation of judicial mediation in civil disputes is adequate for the peaceful settlement of disputes, inter alia, whether it entrenches the rules that consolidate the universal principles of judicial mediation – rules that are required in order this ADR procedure can be trusted and applied in practice, and whether it creates preconditions for their application. The selected problematic is analysed in the dissertation also from the international perspective, i.e. with respect to the relevant experience of foreign countries and of the European Union. The peculiarities of the model of judicial mediation in civil disputes introduced into the Lithuanian legal system are also identified on the basis of the conducted research.

Ieva Saudargaitė

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IN LITHUANIA**

Doctoral Dissertation

Maketavo Jelena Babachina

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