Principles of Mediation as the Basis of this Process

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Abstract— **Mediation is an alternative way to resolve a dispute, and very effective way for that matter. Mediation is the process of resolving a conflict between parties, a process which has its own principles and certain rules. The principles of mediation constitute an integral part of this process and its basis..**

Index Terms— **mediation, principles, voluntariness, confidentiality, equality of the parties, neutrality, independency, impartiality, mediator, law.**

I. INTRODUCTION

Mediation, as well as any other institution is governed by its own principles. Principles of mediation should be considered as fundamental rules and its essential basics that regulate the interaction of the mediator with the parties, the parties between themselves, as well as with third parties. In countries which have adopted and implemented the law on mediation, these principles are embodied in legislation. In addition, the principles are also enshrined in international regulations.

Specialists in the field of mediation, law and conflictology distinguish various principles. However, there is a list of the most important and the most widely applicable principles in mediation. These principles are recorded not only in scientific sources, but also in legal acts.

The list includes:

- The principle of voluntariness;
- The principle of confidentiality;
- The principle of independency, neutrality and impartiality of the mediator;
- The principle of equality of the parties and cooperation between the parties.

Apart from the most commonly applicable principles, one can also distinguish the following:

- The principle of legality;
- The principle of the quick mediation process;
- The principle of the mediator's competence.

In mediation, the key person is the mediator, upon whom the success of the negotiations depends to the largest extent. The mediator must consistently solve a number of problems. In the beginning of negotiation process, the first task of the mediator is to check and apply the principles mentioned above (Allakhverdova, 2010).

II. THE PRINCIPLE OF VOLUNTARINESS

In the author's view, one of the basic principles of mediation is the principle of voluntariness. Voluntariness refers both to the parties and to the mediator. The manifestation of this principle is that each party, as well as the mediator, enters the process of mediation on an absolutely voluntary basis. They can also voluntarily leave the mediation. In this case, the parties may, but are not obliged to, indicate the reasons for refusing to continue the mediation. As for the mediator, in most cases, the mediator must explain to the parties the reason for the termination of the mediation on his/her initiative.

Unlike litigation, the entry of all disputing parties into the mediation process is voluntary and the mediator is elected on a free basis (in this respect, mediation is similar to arbitration court). Nobody can make the parties participate in mediation, if they do not want it for any reason. This principle is manifested in the fact that all decisions are taken only by mutual agreement of the parties and that each party can refuse mediation at any time and terminate the negotiations (Allakhverdova, 2010).

Voluntariness presupposes the absence of any coercion from outside, both when deciding to participate in mediation and regarding the decision-making process of the parties in relation to the dispute in question, as well as in the conclusion of a mediatory agreement between the parties after the mediation process is over.

It is also important to note the manifestation of the principle of voluntariness in the implementation of the mediation agreement between the parties. It means that the parties themselves decide whether to fulfil the terms and conditions of the mediatory agreement or not. Thus, one can say that the mediation agreement does not have the title of mandatory

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implementation and it is not possible to coerce the other party to its execution.

III. THE PRINCIPLE OF CONFIDENTIALITY

One of the important qualities of conciliation procedures is confidentiality. Many disputing parties feel more protected when they resort to extrajudicial dispute resolution, rather than to public courts (Pankratov and Pozinksaya, 2008, p. 132). Undoubtedly, this principle is important for mediation, thanks to which mediation has a significant advantage compared to other ways of dispute resolution.

The principle of confidentiality is manifested primarily in the fact that the information that has been obtained and became known in the mediation process remains only within this process and cannot be used by either the parties or the mediator for other purposes, with the exception of certain cases established by law. In a broad sense, confidentiality means the rule by virtue of which the fact of the mediation procedure, as well as information, including oral information, and documents used in the mediation process are not subject to disclosure, unless otherwise specified by agreement of the parties (Sukhova, 2013, p.156).

Any confidential information received by the mediator from one of the parties will not be disclosed to the other party without the permission of the former party, except where required by law (Sukhova, 2013). This principle is embodied both in the European Code of Conduct for Mediators and Directive No. 2008/52/EC of the European Parliament and the Council of Europe on certain aspects of mediation in civil and commercial matters, as well as in Articles 8 and 9 of the UNCITRAL Model Law. In some cases, the parties may additionally conclude an agreement on non-disclosure of information in the mediation process on the mediator's proposal.

The European Code of Conduct for Mediators defines the principle of confidentiality as follows: the mediator shall keep confidential all information, arising out of or in connection with the mediation, including the fact that the mediation is to take place or has taken place, unless compelled by law or public policy grounds. Any information disclosed in confidence to mediators by one of the parties shall not be disclosed to the other parties without permission or unless compelled by law (The European Code of Conduct for Mediators has been developed by a group of practicing mediators with the assistance of the European Commission and was adopted at a conference in Brussels on July 2, 2004).

Directive No. 2008/52/EC of the European Parliament and the Council of Europe on certain aspects of mediation in civil and commercial matters prescribes the following in relation to confidentiality: Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:

a. where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or
b. where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement (Directive of the European Parliament and the Council of Europe on certain aspects of mediation in civil and commercial matters).

IV. PRINCIPLE OF INDEPENDENCY, NEUTRALITY AND IMPARTIALITY OF THE MEDIATOR

This principle refers directly to the mediator himself/herself. Depending on whether the mediation is embodied at the legislative level or not, the concept of a mediator may slightly differ. If mediation is specified in the legislation of a country, the mediator is an individual who complies with the requirements of the law, participates in the mediation process and contributes to the dispute resolution between the parties.

If there is no law on mediation (for example in Ukraine), then the mediator is an individual who participates in the mediation process and contributes to the dispute resolution between the parties. In this case, no prescriptive requirements may be imposed on the mediator, e.g. age, education, work experience, etc.

In the author's view, if there is no law on mediation in a particular country, it negatively affects not only the conduct of the mediation process, but also its development, since the absence of requirements or prescriptions for the mediator may ultimately discredit the institution of mediation. In other words, if in this case mediation can be conducted by anyone, without a higher education diploma, without a certificate of completion of courses on mediation, without even reaching a certain age, for example at least 25 years, then it will not develop in the form in which it represents an established institution throughout the world.

The independence of the mediator is manifested primarily in the fact that during the mediation procedure, the mediator is entirely independent of the parties, or of third parties, or from any bodies.

The mediator does not perform the functions of a judge or an arbitrator, his/her task is to organise a dialogue between the conflicting parties in such a way that they cease to see each other as rivals and become partners working together on a common task – searching for ways of mutually beneficial conflict resolution (Principles of Mediation, 2013).

The impartiality of the mediator is also one of the most important guarantees for a fair, objective, constructive, comprehensive, and therefore, most effective dispute resolution procedure. The European Code of Conduct for Mediators states that the mediator must at all times act with impartiality towards the parties and be committed to serve all parties equally with respect to the process of mediation. Thus, the impartiality of mediators is viewed by the European Community as the basis for professional activities of the mediator (The Impartiality and

Independence of the Mediator as Principles of the Mediation Procedure, 2015).

The mediator must be impartial and treat both parties equally. The mediator must not put any pressure on the parties, either in the search for possible options in the dispute resolution, or when the parties make a decision. Even when the mediator has the slightest feeling of being able to take one or the other party, the mediator should stop the mediation process, since it can lead to a violation of the principle of impartiality and ultimately may negatively affect the decision that the parties can make. The same applies to the possibility or the desire of the mediator to propose certain variants of decisions to the parties. The mediator has no right to offer any solutions; the mediator only manages the process of mediation and coordinates this process, guiding the parties on the basis of their interests to adopt a mutually beneficial solution which would be acceptable for both of them.

When conducting the mediation procedure, the mediator must follow certain rules that prescribe the principle of impartiality. These rules are:

- the mediator must avoid the feeling that can give reason to feel impartial towards one or the other party at least to some extent;
- the mediator should beware of various prejudices or stereotypes based on personal characteristics of the parties, on their social, financial status or on their demeanour in the mediation process;
- the mediator should not apply to the mediation process his/her personal life experience or his/her views on this or that situation that has arisen between the parties to the dispute.

The correlation between the principles of independence and impartiality of the mediator is such that the more independence is ensured, the more significant the grounds for confidence in impartiality of the mediator are. If this correlation is violated, then this entails a violation of ethical norms of the mediator. Most domestic regulations which include ethical rules of behaviour for mediators underscore this aspect (The Impartiality and Independence of the Mediator as Principles of the Mediation Procedure, 2015).

As for neutrality of the mediator, it should be noted that the mediator must be neutral to both parties. Any bias should be ruled out. Nothing should make the mediator biased towards any of the participants. Neither personality, nor values, nor creed. Therefore, the mediator has no right to accept gifts or any other dubious benefits from the parties. If the mediator cannot stay neutral and objective, he/she should not conduct mediation (The Code of Ethics for the Mediator, 2017).

Thus, it should be noted that the preservation of the principle of independence, impartiality and neutrality of the mediator indicates his/her professionalism and his/her professional qualities, and, importantly, his/her reputation.

V. THE PRINCIPLE OF EQUALITY OF THE PARTIES AND COOPERATION BETWEEN THE PARTIES

Equality of the parties is manifested in their absolute equality, both in relation to them on the part of the mediator, and each party to each other. This equality lies also in the fact that neither party has any advantages, either procedural or moral. Each party is given an equal right to express their point of view, to put forward an agenda for negotiations, to put forward their proposals for resolving of the dispute. Each party is endowed with rights and duties.

Conscientiousness and cooperation encompass the willingness of the parties to participate and in negotiations honestly and openly, make the necessary efforts to develop options for resolving the dispute, respect the mediator and other participants in mediation, and conscientiously implement the agreements concluded (Principles of Mediation, 2013). Cooperation of the parties is clearly expressed in their desire to find a joint solution to the dispute, their joint desire to resolve the dispute and to commit themselves unambiguously to do so.

The private law components of the institution of mediation are expressed through the principle of cooperation. In its essence, it is close to such a principle of exercising civil rights and fulfilling duties as solidarity of interests and business cooperation (Civil Law. Textbook: In 2 volumes; Vol. 1, 2018).

VI. CONCLUSIONS

The principles of mediation such as voluntariness, confidentiality, independency neutrality, impartiality and equality form the basis of the mediator's practical activities in resolving disputes between the parties. The mediator must ensure that they are observed not only by him/her, but also by the parties. Therefore, this is the basis for conducting legitimate, fair and effective mediation

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