

Kluwer Arbitration Blog

Ukrainian Mediation Law Was Adopted And Entered Into Force. Will Arbitration Benefit?

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The draft of this blog post was prepared before the war in Ukraine began.

On 16 November 2021, the Law on Mediation was adopted in Ukraine (the “**Mediation Law**”). It introduced mediation as an alternative dispute resolution mechanism and allows parties to civil, commercial, labour, administrative and even some criminal disputes to resort to mediation at any stage of court or arbitral proceedings. The Mediation Law governs general procedure for conducting mediation, introduces requirements to mediator, rights and obligations of mediator and parties to mediation.

Procedures resembling mediation and out-of-court conciliation have long existed in Ukraine and were often used for commercial disputes. Lack of regulation, however, limited the practical significance of mediation in cases where a combination of meditation and other types of dispute resolution – both conventional and alternative – was necessary: it remained unclear whether the mediator may be part of the tribunal considering the case between the parties; how the court/tribunal should treat evidence obtained during mediation, etc. Moreover, enforcement of an agreement concluded following a mediation was dependent on the wording/form of the agreement and its direct coercive enforcement was virtually unavailable.

The [Mediation Law](#) does not necessarily provide answers to all these practical issues. It rather governs basic principles of mediation in Ukraine, as already discussed on the Kluwer Mediation Blog ([here](#) and [here](#)). At the same time, it provides the legal foundation Ukraine was lacking for so long.

Status of the mediator for the purposes of arbitration

One of the most promising developments Ukraine will be facing relates to the synergy between mediation and arbitration.

The process of combining mediation with arbitration as a hybrid ADR mechanism for international commercial disputes is the third most used dispute resolution mechanism according to the [2020 SIDRA survey](#). It allows parties to design a dispute

resolution process in line with the needs of the dispute and the parties involved. It gives the prospects of early settlement in the mediation stage as well as a binding nature in the later arbitration stage. These combinations differ across the world and depend vastly on the legal tradition:

- single Med-Arb, where the same neutral party is both the mediator and arbitrator is inherent in CIETAC - [between 20 to 30 percent of its caseload](#) is resolved by Med-Arb each year; and
- duo Med-Arb, where the mediator and arbitrator are two different parties appointed at different stages, unless parties agree otherwise, is suggested by, among others, the ICC ([Article 10.3 of the ICC Mediation Rules](#)).

More sophisticated versions of the second include the so-called Arb-Med-Arb, where the parties agree, after due initiation of the arbitration, to conduct mediation and then request the arbitral tribunal to render an award on agreed mediated terms. This option is introduced, among others, by SIAC ([SIAC Model Arb-Med-Arb Clause](#)) and VIAC ([VIAC Model Arbitration Clause including Arb-Med-Arb](#)). If mediation is unsuccessful, the dispute may be continued and resolved in arbitration. It remains at the discretion of the parties whether the arbitrator and the mediator are different neutral parties or the same.

It remains still to be seen which options will be made available to business in Ukraine - the Mediation Law establishes very broad margins to this end. Among others, it provides that mediation shall be available to the parties at every step of the dispute resolution - starting from the pre-trial/pre-arbitration stage and ending at the coercive execution of the judgement/award that is already in force (Article 3(2) of the Mediation Law). In terms of the same neutral body being both an arbitrator and a mediator, the Mediation Law avoided the wording of Article 13 of the [2018 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation](#) and does not have a direct prohibition for the mediator to act as an arbitrator. The Mediation Law stipulates instead that "the mediator shall not make a decision on the merits of the conflict (dispute) between the parties to the mediation" (Article 7(2)(3) of the Mediation Law). Such wording of the Mediation Law is yet to be clarified in related regulatory acts in Ukraine, however the [working papers of the Parliament](#) prior to the adoption of the Mediation Law suggest that a prohibition for a mediator to act as an arbitrator in the same dispute was consciously avoided.

With the foundation set by the Mediation Law, relevant changes are being developed by Ukraine's arbitration institution, the [International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry](#) (the "ICAC"). While draft mediation rules of the ICAC have not yet been published, the ICAC claims to be working on flexible options for the business within the existing legal framework.

Admissibility of evidence obtained in arbitration

Similarly, the Mediation Law is very broad in regulating the use of evidence obtained

through the mediation in an arbitration proceeding. The Mediation Law deals with these matters in one article governing confidentiality. The obligation is aimed at the mediator, who is required to keep all the information he/she obtained in the course of or regarding the mediation confidential and may not be questioned as a witness on the matters he/she became aware of in connection with the mediation (Article 6(1) and 6(5) of the Mediation Law).

As to the parties to the mediation, the Mediation Law only obliges them to keep confidential all information they received within the mediation, including facts and circumstances voiced by the other party (Article 6(1) of the Mediation Law). The Mediation Law thus avoids direct prohibition for the parties to rely upon the facts and circumstances they received from the opposing party in arbitration or court proceedings. The Mediation Law likewise does not govern admissibility of evidence. Changes to this end are planned for the procedural codes and are among the most awaited ones for the future.

Enforcement of a mediation agreement

Ultimately, the adoption of the Mediation Law opens a way for Ukraine to ratify the [United Nations Convention on International Settlement Agreements Resulting from Mediation](#), signed by Ukraine in August 2019. This Convention will create the framework for enforcement of mediated settlement agreements related to international commercial matters without court consideration of the dispute and the corresponding agreement on the merits.

Concluding remarks

With the adoption of the Mediation Law, Ukraine laid a vital foundation for a qualitative boost of mediation mechanisms in Ukraine. Without this foundation, further development was impossible. Whether until now, mediation was used mostly in circumstances of complete trust among the parties, the foundation by the Mediation Law will allow for mediation where such trust does not necessarily exist.

Now Ukraine has substantial work to do and regulation to be adopted to ensure dynamic and intensive growth of mediation that will inevitably result in better dispute resolution. It is yet to be clarified, among others, which status of the mediator in the subsequent or pending arbitration proceedings is; what the scope of confidentiality obligation is; and whether evidence obtained in mediation may be used in litigation/arbitration. Nevertheless, with the Mediation Law in place relevant clarifications became possible in the law and arbitration rules in Ukraine and are underway. Once they are in place - dispute resolution will become more flexible and versatile for business.

ICAC is working actively to enact these changes in the nearest future, while changes to the domestic law will still be developed. In practical terms it may prove that users of arbitration will be first in Ukraine to benefit from new mediation related changes in

legislation, boosting the use of arbitration in Ukraine even further.

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