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BUSINESS DISPUTE MEDIATION AGREEMENTS

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Abstract

Purpose – to analyze agreements to mediate existing and future business disputes, their legal regulation, validity, forms, and objectives

Methodology – in this research paper, theoretical and empirical methods (the linguistic method, the document analysis method, and the systematic analysis method) are applied

Findings – business dispute mediation agreements are like other agreements, but with a specific subject matter (i.e., the parties involved in a business dispute mutually agree on a dispute resolution procedure rather than on the substantive issues of law). There are two types of mediation agreements: those which are concluded before the dispute arises and those which are concluded after the dispute between the parties has arisen. A mediation clause is a separate provision which is included in the main business contract. By including a mediation clause, both parties express their will to settle their future disputes which arise out of or in connection with the present business contract through mediation. A concluded mediation agreement does not prevent parties from initiating judicial proceedings or arbitration

Research limitations – the author of this research paper analyzes business dispute mediation agreements and their legal regulations. She limited her research to the legal provisions which regulate mediation agreement in Lithuania as well as the legal provisions of other civil law countries (e.g., Estonia, Latvia and Poland). The author also analyzes the legal practices of agreements to mediate business disputes in the United States and in the English Courts

Practical implications – this article can be useful for those studying Lithuanian mediation doctrine because there is currently a lack of legal literature on the subject. The findings can be applied in practice by the parties involved in a business dispute, by the contracting business parties if a dispute does not exist, as well as by mediation providers

Originality – this is the first time that an in depth study of business dispute meditation agreements was carried out in Lithuania

Keywords: business dispute mediation agreements, mediation clause, business contracts, business disputes

Research type: research paper

Introduction

Business dispute mediation is a flexible, voluntary and, most importantly, a non-judgmental method to resolve business disputes. It is oriented in an amicable dispute resolution, controlled by the parties to the mediation. Experienced participants of legal business relationships already recognize the benefits of the mediation process (e.g., its confidentiality, the free choice it affords to the mediator and the mediation procedure itself). Although the legislative basis to practice mediation in Lithuania has been created nearly a decade ago and despite its key advantages, it is rarely used to solve

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business disputes here. Before using business dispute mediation, it is important for all parties involved to understand that the mediation agreement predetermines that they must attempt to mediate before filing suit.

In the legal literature and in practice, the term "mediation agreement" is an ambiguous notion and appears to have two different meanings. First, "mediation agreement" can be used as a term signifying an agreement which *resulted* from a business dispute mediation in which parties agreed on the dispute merits. Such an agreement is a result of an amicable business dispute settlement and is intrinsic to the final stage of a mediation process. Thus, to avoid confusion, it would be more precise to entitle such mediation agreements as "mediated business dispute settlements" or "business dispute settlement agreements". Second, "mediation agreement" can be used as a term signifying the possible method of initiating a business dispute mediation *in the future*. The latter definition refers to an agreement to resolve business disputes via mediation. This second meaning is the object of the present research paper.

In the most general sense, business dispute mediation agreements are understood as the consent of the parties to resolve their business disputes through mediation. They are unique agreements wherein parties to a business dispute mutually agree to attempt mediation. However, an agreement to mediate business disputes has not been integrally analysed in Lithuanian jurisprudence.

This article is mostly based on the most recent works of Neil Andrews (2016, 2013), who performed a broad analysis of the content of mediation agreements and on Manon and Fred Schonewille (2014), who examined the legal regulation of mediation clauses and their consequences in multiple jurisdictions.

The analysis of various national legal acts shows that the legal regulations governing mediation agreements differ from country to country. In some countries (including Lithuania), mediation agreements are binding agreements which create legal consequences such as a parties must attempt mediation before filing suit or arbitration. In other countries (e.g. Poland and Estonia), mediation agreements do not create imperative consequences. Thus, an agreement to mediate has no effect on the admissibility of the case in court.

Another debated issue is whether mediation clauses should be considered as separable and autonomous provisions of the main contract. According to Jennifer Ralph (2005) and Gary Poon (2010), mediation agreements are considered to be contracts. The assumptions of the latter authors are used as a starting point for our insights that the validity of mediation clauses are not necessarily affected by the validity of the main business contract.

The aim of the present article is to analyze business dispute mediation agreements, their legal regulations, validity, forms, and objectives. Traditional jurisprudence methods, namely the linguistic method, the method of document analysis and the systematic analysis method, were applied in order to achieve the purpose of this research.

The Concept of Agreements to Mediate Business Disputes

Mediation is a voluntary process initiated by an advance mutual agreement of the parties involved in a dispute. Occasionally, the agreement to start the mediation process may not exist in cases of mandatory mediation. Therefore, agreements to

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mediate are more relevant when the mediation process is initiated voluntarily. It is worthwhile mentioning that a general principal declares that business dispute mediation is a non-mandatory process. Therefore, if the disputants wish to resolve their business disputes through mediation then first they have to agree on this.

Neither Lithuanian doctrine nor case law indicate a particular definition of business dispute mediation agreements. On the other hand, the Law on Conciliatory Mediation in Civil Disputes of the Republic of Lithuania adopted on 15 July 2008 (hereinafter the Mediation Law)[1] can help us understand the meaning of mediation agreements. At present, it is the only national legal act which regulates its concept in general. According to Paragraph 1 of Article 3 of the Mediation Law, mediation is applied with a written agreement by the parties to a dispute. The Mediation Law does not provide the definition of the mediation agreement. Nevertheless, we may conclude that according to the this legislation, mediation agreements must meet the following criteria. They:

– shall be formed between the parties to a dispute;
– shall be in writing;
– and shall cause the mediation application to be a legal consequence.

The Draft Law on Mediation[2] proposes to amend Paragraph 1 of Article 3 of Mediation Law by adding that parties may agree to enter a mediation process only in disputes that legally can be solved through an amicable settlement. The general criteria of cases which cannot be referred to mediation are currently spelled out in Paragraph 2 of Article 1 of Mediation Law, which restricts mediation to certain cases.

In considering the form of mediation agreements, it should be emphasized that the Directive on Certain Aspects of Mediation in Civil and Commercial Matters adopted in 2008[3] (hereinafter the Directive) regulates, that:

> "in the absence of a written agreement, the parties should be deemed to agree to use mediation at the point in time when they take specific action to start the mediation process"

Specifically, a created mediation agreement means that the parties involved in a dispute have an obligation to resolve their dispute through mediation. This obligation is clearly regulated in Paragraph 2 of Article 3 of the Mediation Law: "when the parties agree to settle their dispute through mediation, before applying to court or arbitration, they have to try to attempt mediation".

If the parties are willing to resolve their disputes with the help of neutral third party (the mediator) and they both have agreed on this, then a valid agreement to mediate gives the parties the right to settle their disputes through mediation. When creating a mediation agreement, parties design a dispute settlement procedure which will be applied to their disputes. One of the key advantages of such a procedure is that the entire control of the dispute resolution process relies on the parties themselves rather than on mediator. Intriguingly, forms of business dispute resolution other than mediation are be even considered by some experts to be inherently unjust (Richbel, 2008).

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[1] Law on Conciliatory Mediation in Civil Disputes of the Republic of Lithuania. *Official Gazette*. 2008, 87-3462.
[2] The Draft Law on Mediation of the Republic of Lithuania. *Official Gazette*. 2016, XIIP-4439.
[3] 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. 2008 O.J. (L 136).

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Business dispute mediation agreements can be understood similarly as indicated above. They have the same mediation agreement with the same legal outcome. However, the parties of such an agreement will be specifically the participants of a business relationship.

Mediation agreements can be enacted only if all the parties to a business dispute agree to settle their dispute through mediation. It is important to note that the parties' agreement should be expressed independently, avoiding the factors that can create a defect of their consent. The main feature of business dispute mediation is voluntariness. It is clearly stipulated in the Directive that parties to a dispute should attempt mediation on a voluntary basis[1]. Thus, a refusal to mediate made by one of the parties to a dispute may cause inability to apply mediation procedure.

A free-will mediation agreement is absent only when a judge or legislation makes mediation compulsory. In mandatory mediation cases, however, the mediation agreements does not have high practical value for several reasons. First, an obligation to enter into a mandatory mediation process may arise to the parties *de jure,* regardless of whether or not they have signed an agreement to mediate (e.g., when the duty to use mediation before applying a lawsuit is indicated in a court order or in legal acts (Kaminskienė, 2013)). Second, when participation in mediation is encouraged by a number of procedural penalties this creates what we call "the defect of the consent to mediate". Even though mediation agreements in latter cases are usually signed, such agreements may be considered to be with defective consent because the parties' free will is violated. According to Kaminskienė (2013), despite the fact that mediation initiation remains within the parties' discretion, the promotion with various procedural sanctions is rather a compulsion to participate in mediation and is considered to be the feature of a mandatory mediation.

In contrast, business dispute mediations in Lithuania are non-mandatory and agreements to initiate such processes are strictly autonomic and voluntary. Mediation is possible only if parties to a business dispute are willing to examine their issues in good faith (Andrews, 2012). Hence, legal agreements to mediate business disputes should be determined both mutually and autonomously.

Returning to the main legal consequences of business dispute mediation agreements it should be stressed that in Lithuania, it is a general principle that case is not admissible in court with an unattempted mediation clause. This is not the general principal in every country.

In contrast to Lithuanian national legal regulation, the Conciliation Act of Estonia adopted on 18 November 2009[2] stipulates that a mediation clause in a binding contract does not create an imperative to solve the dispute through mediation. Similar legal regulations are valid in Poland, where a case is also admissible in court with mediation clause (Schonewille, 2014).

In Latvia, the parties who signed a mediation clause must implement their contractual agreement to refer future disputes to mediation. An exception is if the parties themselves both mutually refuse to comply with an agreement to resolve their dispute through mediation.[3] Similarly in France, a dispute can be referred to mediation only with the prior consent of the parties. If parties have concluded a

[1] The Section 10 of the preambles of the Directive.
[2] Conciliation Act of the Republic of Estonia. *Official Gazette*. 2009, 59-385.
[3] The Decree on The Development of Conciliatory Mediation System and Endorsement of its Conception authorized by the Minister of Justice of the Republic of Lithuania. *Official Gazette*. 2015, 1R-268.

mediation clause, they must attempt mediation before initiating court proceedings[1]. In Austria, there are no legal consequences for noncompliance with a mediation clause. Parties are required to determine the consent and willingness to mediate at the point in time when they are willing to start mediation process (Roth and Stenger, 2013).

In such United States of America's[2] (hereinafter US) jurisdictions as, for example, California, Florida, and New York, the courts require the parties to mediate before pursuing a court action (Schonewille, 2014). In accordance with US case law analysis, courts tend to enforce pre-existing obligations to participate in mediation. The Court of Appeals of the State of Kansas in one of their cases (*Santana v. Olguin*, 2009) has noted that:

> "the signed agreement to mediate is binding, and parties must submit the dispute to mediation. The agreement to mediate does not bind the parties to results that might be achieved during mediation, and parties retain the right to go to court in the event that mediation is unsuccessful."

Mediation can be considered as a failure when the parties do not reach a mediated business dispute settlement. Additionally, mediation is unsuccessful when the legal or contractual term within which to attempt mediation has expired. The Legal term to use mediation according to Lithuanian law is one month and is stipulated in Paragraph 2 of Article 3 of Mediation Law.

Since mediation in Lithuania is a voluntary process, parties may terminate it at any time.[3] Thus, the requirement to attempt to settle the dispute through mediation before pursuing a court action does not violate the principle of mediation voluntariness. In considering parties' lawful right to go to court, it should be underlined that the parties entering into a mediation agreement do not eliminate their business disputes out of court and arbitral competence.[4] Moreover, the Directive ensures that parties retain the right to initiate judicial proceedings even if limitation or prescription periods expire during the mediation process[5].

We may conclude that mediation is not considered to be a substitute for the judicial process or any other alternative dispute resolution procedures. In contrast to the arbitration agreement, which creates an alternative arbitration jurisdiction (Dominas, Mikelėnas, 1995), mediation agreements do not exclude the jurisdiction of national courts. As a result, the legal consequences of a agreements to mediate business disputes completely differ from the negative effects caused by an arbitration agreements[6].

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[1] *Ibid.*

[2] The United States of America's Court system not only tend to enforce pre-existing obligations to participate in mediation but also directly encourages disputants to pursue mediation after court proceedings have begun. Often times, litigants are required to attempt mediation before the court will proceed further with the case.

[3] The right to terminate the mediation process at any time is laid down in Paragraph 5 of Article 5 of the Mediation Law; Section 13 of the Directive.

[4] According to the Paragraph 2 of Article 3 of the Mediation Law, parties to a dispute have the right to initiate court or arbitration proceedings after they attempt mediation.

[5] The Paragraph 1 of Article 8 of the Directive.

[6] More information about the effects caused by an arbitration agreements can be found in the previous article (Atutienė, E. 2013. Notaro funkcija arbitraže ir jo vaidmuo šalims sudarant arbitražinį susitarimą. *Notariatas*. 15:(61-64)).

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In a nutshell, business dispute mediation agreements are like any other agreements but with a specific subject matter. The parties to a business dispute mutually agree on a dispute resolution procedure rather than on substantive issues of law. According to Lithuanian national legal regulation, an agreement to mediate business disputes is binding. The parties to a business dispute must attempt mediation before filing a lawsuit. This contrasts or differs slightly to the law in other countries like Estonia and the US. In the event that mediation is unsuccessful, the parties retain the right either to go to court or settle their business disputes through any other alternative or traditional dispute resolution procedures.

Types of Mediation Agreements

Mediation agreements can be generally divided into two types: the ones created before the dispute arises (pre-dispute mediation agreements) and the other ones which are created after the dispute between the parties has arisen (post-dispute mediation agreements, also known as mediation clauses). The parties may enter into a mediation agreement regarding existing disputes as well as disputes which may arise between them in the future. This provision is clearly laid down in Paragraph 1 of Article 3 of the Mediation Law. Hence, we may first distinguish, mediation agreements in which the parties enter in the absence of a particular business dispute. Such mediation agreements are usually drawn up as mediation clauses. Alternatively, the agreement can be concluded to mediate a particular existing business dispute which, in most cases, will be concluded as a separate agreement between the parties.

The term "post-dispute mediation agreements" is not widely used in the legal sources of mediation law. Post-dispute agreements to mediate are usually simply called mediation agreements. Such agreements are concluded after the particular dispute has arisen and tend to be longer than pre-dispute mediation agreements. As far as the dispute between the parties already exists, a mediation agreement will usually contain details of the subject matter of a dispute, the place of mediation, the governing law, the complete mediation procedure, the nomination of mediator, the number of mediators, the confidentiality clause, and will clearly identify that the dispute is being referred to mediation. These type of mediation agreements are usually prepared by a mediator or mediation provider and are delivered to the parties to a dispute before the mediation proceedings begin. The agreement to mediate is usually signed on the day of mediation (Richbell, 2015).

Richbell (2015), in his book, gives an example of the typical mediation agreement. The author states that he favors simple and brief rather than a complex multi-page form of mediation agreement. There is no regulation on the length of mediation agreements. It mostly depends on the document compiler. However, there are main provisions that exist in all mediation agreements. It is important to set down essential principles such as confidentiality, authority to settle, without prejudice and the requirement to negotiate in good faith. The agreement should be sent out early so that parties have time to acquaint themselves with its content (Richbell, 2008).

Many commercial contracts in recent years tend to have an embedded dispute resolution clause. Therefore, another type of mediation agreement is often used to carry out legal business relationships and it is known as a mediation clause. Mediation clauses are pre-dispute mediation agreements because they dictate that if a dispute should arise, it will be resolved through mediation. According to Poon (2010),

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it is almost a common practice in the US to include in every business contract a mediation clause. Andrews (2013) defines mediation clauses as "agreements which require both parties to pursue mediation with a view to settling or terminating their existing or future disputes". The most basic mediation clause generally provides that the parties shall apply mediation to their dispute which arises out of or relates to a contractual or other legal relationship.

In summary, there are two types of mediation agreements. The first one is signed after the dispute between the parties has arisen and usually is prepared by a mediation services provider. The second type of mediation agreement is a mediation clause which proposes that future disputes will be resolved through mediation and is included into the main business contract a dispute resolution clause.

Mediation Clauses in Business Contracts

A mediation clause is normally one of the substantive clauses of the main business contract. Many business relationships are governed by contracts between the parties. Therefore, it is beneficial to use this type of mediation agreement for several reasons. In particular because the subject matter of mediation clauses are disputes which may arise in the future. Most business entities are interested in resolving their disputes rapidly and cost efficiently, however, it is challenging to reach any agreement after a dispute has arisen. It may be even more difficult for conflicting parties to reach an agreement on their dispute resolution method in the moment. As a result, the dispute between the parties prolongs, the business relationship gets worse and businesses may end up in losing their profit. Hence, the ability to arrange a business dispute settlement in advance helps parties to save money and time. Pre-dispute mediation agreements enable parties to not waste time trying to draw up a dispute resolution agreement but to start dealing with a business dispute at its earliest stage before their dispute is over-developed.

Since mediation clauses are provisions included in the main business contract, the parties may agree in a single document not only on their mutual contractual rights and obligations but also on their future disputes resolution method. However, the insertion of such dispute resolution clauses into legal business contracts raises the question of the separability of mediation clauses. In other words, does the invalidation of some sections or provisions in the business contract affect the validity of the mediation clause? According to Ralph (2005), mediation clauses are contracts, author states that:

> "ultimately, mediation clauses are considered to be contracts, and thus fall under generally applicable contract doctrine."

From such a standpoint, a mediation clause is a contract inserted into the main contract. It is a separate provision despite the fact it is included in the main business contract.

As far as the validity of mediation clauses, it is worthwhile to mention a US court decision in the *Auchter Company v. Zagloul case* (2007). In this dispute, the validity of the mediation agreement was in question. Parties to the dispute in this particular case had terminated their business contract. The terminated contract included mediation prior to the arbitration clause. The Florida District Court of Appeals determined that the mediation prior to arbitration clause survived the termination of the main

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contract. The Court held that:

> "the dispute resolution provisions of the contract are intended to survive purported termination of the contract by a party."

Consequently, the Court ordered parties to attempt mediation. In case of unsuccessful mediation, parties were ordered to proceed to binding arbitration since it was required by the written agreement of both parties (*Auchter Company v. Zagloul*, 2007).

It is interesting to observe that the full or partial termination of a main business contract does not necessarily affect the validity of the mediation clause. Regrettably, the national sources of law do not provide any regulations regarding the separability of mediation clauses. There is no legislative basis for enforcing mediation clauses if the underlying contract is pronounced invalid for any reason. It would be advisable for national legal amendments to be made which regulate the separability of mediation clauses from the underlying agreements.

Mediation clauses are usually rather short since the subject matter of a mediation clause are business disputes that may arise between the parties in the future. Hence, the nature of a dispute, the most appropriate tools for solving it, as well as whether such dispute will arise at all in the future are unknown. In addition, while parties are signing the mediation clause they often naively expect that disputes will not arise and that they will not have to apply the mediation agreement in the future. However, disputes in business relationship occur very often. Therefore, it is useful to draft an effective mediation clause.

The vast majority of permanent national mediation institutions provide model mediation clauses. For example, in Lithuania, the Vilnius Court of Commercial Arbitration provides a model mediation clause which may be included in a business contract. It states:

> "Any dispute, disagreement or claim arising out of or related to this contract shall be settled by mediation at the Vilnius Court of Commercial Arbitration following the Rules of Mediation of this court. In case of failure by the parties to settle the dispute amicably within three months after the commencement of the mediation, the relevant dispute may be referred for final resolution on the initiative of any of the parties under the procedure prescribed by legal acts."[1]

Parties who choose to include into their business contract such a mediation clause are obliged to mediate their dispute at the Vilnius Court of Commercial Arbitration following the rules of mediation adopted by this particular court.

International model mediation clauses are formulated similarly but they include different rules which will be followed in the mediation. For instance, the International Chamber of Commerce's (hereinafter ICC) model mediation clause suggesting an obligation to consider the ICC Mediation Rules is as follows:

> "In the event of any dispute arising out of or in connection with the present contract, the parties agree in the first instance to discuss and consider

[1] The model mediation clause provided by the Vilnius Court of Commercial Arbitration. [interactive], [accessed 2016-05-07]. <http://www.arbitrazas.lt>.

referring the dispute to the ICC Mediation Rules."[1]

It is obvious that both national and international model mediation clauses are very similar. Both recommend the broad definition of mediation clause by regulating that any dispute arising out of or in connection with a contract will be a subject matter of mediation. This formulation is important to ensure the autonomy of mediation clauses.

It is also now common to draft multi-tiered dispute resolution clauses[2] (e.g., med-arb clauses), particularly in complex business contracts (Tevendale, C., et al, 2015). Med-arb clauses can optionally provide that the referral of future disputes to mediation prior to arbitration will be:

– discussed and considered, or
– mandatory.

Dispute resolution clauses providing mediation as a condition precedent to arbitration require even more care in drafting. It is worth mentioning *International Research Corp. PLC v. Lufthansa Systems Asia Pacific Pte Ltd.,* (2013) case. Parties to a dispute had entered in an agreement which contained dispute resolution mechanism. It prescribed that any dispute shall first be resolved by a specified mediation procedure, failing which, the dispute shall be resolved by arbitration. It was argued that the preconditions for arbitration were unenforceable due to uncertainty. However, The Singapore Court of Appeal held that preconditions for arbitration were not uncertain and were enforceable because they were clear – set out in a mandatory manner and provided a specific set of procedures to resolve disputes as a precondition to arbitration (Tevendale, C., et al, 2015 and *International Research Corp. PLC v. Lufthansa Systems Asia Pacific Pte Ltd.,* 2013).

When considering how to formulate an effective mediation regime it should be underlined that the mediation clause should neither be too short nor too long nor too complicated. In order for it to be effective, the mediation clause must be accurate and perspicuous. Parties entering into a mediation agreement should avoid ambiguity and imprecision. Any mediation clause should be comprehensible and simple, but not too simplistic. According to Andrews (2016), no problem of certainty should arise if parties create a mediation clause which adheres closely to the institutional set of mediation rules.

If parties decide not to model their mediation clause on a well established institutional set of rules, they should avoid these mistakes:

– *The absence of an agreement to mediate*. An agreement to mediate is the essential basis of referring the dispute to mediation. Parties must express their will to mediate freely, without any influence that may cause a defect of their consent.

– *Exaggerated complexity*. Complex mediation clauses which lack clarity (e. g., have too many supporting explanatory notes) should be avoided.

– *Providing too much specificity.* Nonessential details should not be included because they become unnecessarily burdensome. For example, the education or

[1] The model mediation clause provided by the International Chamber of Commerce's [interactive], [accessed 2016-05-07]. < http://www.iccwbo.org/>.

[2] Multi-tier dispute resolution clauses (can also be called multi-step or executive escalation clauses) are clauses that comprise different steps, each incorporating a form of alternative dispute resolution process (Tevendale, C., et al, 2015). According to DeGroote (2010), multi-step clause *is a "contractual provision that requires the parties to an agreement to escalate a dispute through varying levels of management or other processes, such as mediation, using agreed-upon procedures before litigation or arbitration may proceed*".

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capabilities of mediator do not need to be included.

– *Providing an ineffective mediation provider*. The mediation services supplier should be identified correctly and accurately (e.g., "Vilnius Court of Commercial Arbitration", "International Chamber of Commerce's"). When naming a particular mediator, parties should make certain that the mediator is not deceased or retired.

The leading English decision concerning mediation clauses is *Sulamerica cia national de seguros S.A. and others v. Enesa Engenharia S.A.* (2012). In this case, the English Court of Appeal set down minimum requirements for the validity of mediation clauses. According to it, mediation clauses should provide:

1) clear, definable minimum duties to participate in a mediation that is capable of having legal effect;

2) the nomination of the mediator or an agreement on a process for his or her selection;

3) a defined *ad-hoc* mediation process or reference to the procedure of a specific mediation provider.

In practice, it often happens that mediation clauses have flaws, are inaccurate or are incomplete. Hence, it is interesting to discuss the *Garrett v. Hooters-Toledo* (2003) case as an illustrating example of a "pathological clause"[1]. The US District Court, in this case, found that the mediation agreement established by the parties was illegal in two aspects: procedural and substantive. For the first time in US case law history, the District Court of United States invalidated a mediation requirement on these grounds. *Garrett v. Hooters-Toledo* (2003) was a gender discrimination case in which the plaintiff alleged that her former employer unlawfully discharged her after she disclosed that she was pregnant. The plaintiff alleged that she was compelled to sign the "Agreement to Mediate and Arbitrate Employment-Related Disputes" (hereinafter ADR Agreement), or she could not lay claim to extra income and other bonuses. Thus, the plaintiff signed the agreement. After the dispute between the parties arose, the plaintiff argued that the ADR Agreement was unconscionable.

The Court analyzed the disputable provisions of the ADR Agreement and considered three provisions presented hereafter as a substantive unconscionability.

– *Cost splitting provision.* The plaintiff argued that the expenses she would incur would deter her from pursuing her claim. Hence, the cost-splitting provision of the ADR Agreement was discussed as a provision preventing the plaintiff from vindicating her statutory rights.

– *Time limit for filing a claim provision*. The ADR Agreement stated that all

[1] The term "pathological clauses" is owned by author Frédéric Eisemann who proposed a term "pathological arbitration clauses", which refers to defective arbitration clauses. Such defective clauses Eisemann called "pearls" pulled out from the dark arbitration museum. They have four criteria. The first, which is common to all agreements, is to produce mandatory consequences for the parties. The second is to exclude the intervention of state courts in the settlement of the disputes, at least before the issuance of the award. The third is to give powers to the arbitrators to resolve the disputes likely to arise between the parties. The fourth is putt in place an efficient and rapid procedure which leads to the rendering of an award that is judicial enforcement. Arbitration clauses which do not comply with these four criteria are considered to be pathological clauses. According to Davis B. G. (Pathological Clauses: Frédéric Eisemann's Still Vital Criteria). Arbitration International, 1991(4). P. 365. Since these criteria were created in the light of arbitration clauses, not all four of them may be applied to mediation clauses. However, in our opinion, the first and the fourth criteria are common to mediation clauses as well. Even the third one could be considered as relevant to mediation clauses if it was formulated as the prerogative of mediators to help the parties solve their dispute through mediation in an amicable manner. The pathological mediation clauses are not a subject matter of present article but are an object of the author's further research.

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claims against the defendant should be filed within ten days from the last day on which the claim arose. The Court held that the ten-day time limit for bringing a claim was unreasonable and unfair.

– *Mediation requirement provision*. The plaintiff alleged that she was compelled to sign the agreement which was excessively preferential to the defendant. Accordingly, the agreement was considered to be unreasonable and unfair because it required the claimant to participate in a process which was exceptionally favorable to only one of the parties.

In determining procedural unconscionability, the United States District Court held that there was unequal bargaining power between the parties. The Court stated that the pressure on the plantiff to accept the ADR Agreement was obvious. The court also ascertained a lack of the plaintiff's autonomous will to accept the ADR Agreement.

Ultimately, the ADR Agreement was acknowledged as illegally, unjustly and unjustifiably favoring one of the parties to the dispute. From the Court's perspective, the agreement between the parties had striking power imbalances since one of the parties' free-will to accept the agreement was violated. Hence, the Court stated that the agreement was both substantively and procedurally unconscionable, violated US common law and was considered to be unenforceable (*Garret v. Hooters-Toledo*, 2003).

The latter case analysis shows that a mediation clause signed by the parties may become a subject matter of their dispute. Thus, it is very important to respect the most general principles of contract law. According to Poon (2010), mediation agreements are considered to be valid only if they are determined by the contract principles governing the formation of contracts.

Ralph (2005), who analyzed aspects of unconscionable mediation clauses, states that the *Garret v. Hooters-Toledo* (2003) case may greatly influence the practice of how mediation agreements are formulated and concluded. In accordance with the *Garrett v. Hooters-Toledo* case and Ralph's (2005) insights, there are several more aspects which parties should take into account when drafting mediation clauses.

– They should not give a limited choice of mediators from a list of mediators who are specifically pre-authorized by one of the contracting parties. It is especially dangerous when there is a power imbalance between the contractors (e.g., employer and employee). To accomplish knowledgeable choices it is more useful to use the assistance of a neutral third party or representatives.

– They should always mutually agree on a *forum selection clause*. The decision regarding the place of mediation should be negotiated autonomously by both parties. It is also advisable to avoid forum selection clauses that have little justification for stipulating a particular forum.

– They should make sure that the time limits for filing a claim if the mediation fails are definitely and correctly delineated (e.g., Paragraph 2 of Article 3 of Mediation Law, suggests that the minimum should be at least one month).

Parties to international business contracts should also consider indicating a mediation style in the mediation agreements. The various institutional model sets of mediation rules generally permit the mediators to conduct any style of mediation. However, some authors suggest that parties of an international business relationship should clarify the style of mediation in order to avoid cross-cultural confusions (Abramson, 1998 and Kolkey et al, 2012).

Indeed, the formulation effective mediation clauses are very challenging.

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Therefore, it is recommended to design mediation clauses which are similar to a well-established institutional model or at least follow the doctrine of certainty and provide minimum requirements for the validity of the mediation clause.

Conclusions

Business dispute mediation agreements are binding and require parties to engage in mediation. An agreement to mediate business disputes should be determined both mutually and autonomously. According to Lithuanian legal regulation, a case is not admissible in court with a mediation clause. This contrasts or differs slightly to the law in other countries like Estonia and the US. Nevertheless, parties entering into a mediation agreement do not eliminate their business disputes out of national court and arbitral competence. If parties have tried to settle through mediation then they can implement their lawful right to go to court.

There are two types of mediation agreements: those which are concluded before and those which are concluded after a dispute has arisen. Both mediation agreements create the same legal consequences.

Mediation clauses are considered to be contracts and are included in underlying business contracts as separate provisions. Effective mediation clauses should provide minimum requirements to be valid. These include: the commitment to mediate, the mediator and the complete mediation procedure. To be enforceable they should not violate the fundamental principles governed by contract law. To avoid the clauses being deemed "pathological", it is recommended that parties make a reference to a institutional model set of mediation rules or at least draft a mediation clause which adheres closely to the recommended model mediation clauses.

References

Abramson, H., I. 1998. Time to Try Mediation of International Commercial Disputes. *ILSA Journal of International & Comparative Law*. Vol. 4, Issue 2:(323-328).

Andrews, N. 2016. *Arbitration and Contract Law: Common law Perspectives*. Switzerland: Springer International Publishing.

Andrews, N. 2013. Mediation Agreements: Time for a More Creative Approach by the English Courts. *Uniform Law Review*. 18(1): 6-16.

Andrews, N. 2012. Mediation in England: Organic Growth and Stately Progress. [interactive], [accessed 2016-05-15]. <http://www.e-publicacoes.uerj.br/index.php/redp/issue/view/597>. Vol. 9. P. 571-589.

Atutienė, E. 2013. Notaro funkcija arbitraže ir jo vaidmuo šalims sudarant arbitražinį susitarimą. *Notariatas*. 15:(61-64).

Auchter Company v. Zagloul, No.1D06-2817 (2007), District Court of Appeal of Florida, First District [interactive], [accessed 2016-03-07]. <http://caselaw.findlaw.com/fl-district-court-of-appeal/1143517.html>.

Conciliation Act of the Republic of Estonia. *Official Gazette*. 2009, 59-385.

DeGroote, J. 2010. Multi-Step Dispute Resolution Clauses: 7 Reasons They Work. [interactive], [accessed 2016-05-10]. <http://www.mediate.com/articles/DeGrooteJbl20100322a.cfm>.

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. 2008 O.J. (L 136).

Dominas, G., Mikelėnas, V. 1995. *Tarptautinis komercinis arbitražas*. Vilnius: Justitia.

Garrett v. Hooters-Toledo, 295 F.Supp.2d 774 (2003) United States District Court, N.D. Ohio.

International Research Corp. PLC v. Lufthansa Systems Asia Pacific Pte Ltd. SGCA 55 (2013) Singapore Court of Appeal.

Kaminskienė, N. 2013. Privaloma mediacija: galimybės ir iššūkiai. *Jurisprudencija*. 20(2): 683–705.

Kolkey, D., M., *et al.* 2012. *Practitioner's Handbook on International Mediation and Arbitration*. Third edition. US: JurisNet, 2012.

Law on Conciliatory Mediation in Civil Disputes of the Republic of Lithuania. *Official Gazette*. 2008, 87-3462.

Poon, G., P. 2010. *The Corporate Counsel's Guide to Mediation.* USA: ABA Publishing.

Ralph, J., M. 2005. Unconscionable Mediation Clauses: Garrett v. Hooters-Toledo. *Harvard Negotiation Law Review.*, Vol. 10, p. 383-400.

Richbell, D., et. Special Contributors. 2015. *How to Master Commercial Mediation: an Essential Three-Part Manual for Business Mediators*. United Kingdom: Bloomsbury.

Richbell, D. 2008. *Mediation of Construction Disputes.* UK: Blackwell Publishing.

Roth, M., Stenger, M. 2013. Mediation in Austria. *Yearbook on International Arbitration*. Vol. 3, p. 367-378.

Santana v. Olguin, 942 P.2d 643 (Kan. App. 2d 76, 2009) The Court of Appeals of the State of Kansas [interactive], [accessed 2016-01-11]. <http://www.kscourts.org/cases-and-opinions/opinions/ctapp/2009/20090529/99767.htm>.

Schonewille, M., Schonewille, F. 2014. T*he Variegated Landscape of Mediation: a Comparative Study of Mediation Regulation and Practices in Europe and the World*. Netherlands: *Eleven* International *Publishing*.

Sulamerica cia National de Seguros S.A. and others v. Enesa Engenharia S.A. EWCA Civ 638, Case No: A3/2012/0249 (2012) English Court of Appeal (Civil Division).

Tevendale, C., et al. 2015. Multi-Tier Dispute Resolution Clauses and Arbitration. *Turkish Commercial Law Review*. Vol. 1(1): 31-40.

The Decree on The Development of Conciliatory Mediation System and Endorsement of its Conception authorized by the Minister of Justice of the Republic of Lithuania. *Official Gazette*. 2015, 1R-268.

The Draft Law on Mediation of the Republic of Lithuania. *Official Gazette*. 2016, XIIP-4439.

Website of the International Chamber of Commerce's [interactive], [accessed 2016-05-07]. <http://www.iccwbo.org/>.

Website of the Vilnius Court of Commercial Arbitration. [interactive], [accessed 2016-05-07]. <http://www.arbitrazas.lt>.