Studies and Articles

Mediator's Personality in Specific Legal Disputes: Sports Related Disputes and Healthcare Related Disputes

Marina KAMENECKA-USOVA[1], Karina PALKOVA[2]

Abstract: Mediation is the most amicable alternative dispute resolution method, not mentioning such advantages as confidentiality, opportunity for the parties to find mutually beneficial solution by themselves and possibility for the parties to presume good relationships after reaching a consensus. In order to end up with consensus, mediation process has to be built on the skills and expertise of a mediator, a third party facilitating the communication and organizing the whole process. This article shall focus on the mediator's personality, i.e., skills and expertise, required to assist parties in rather specific legal disputes, such as sports related disputes and healthcare related disputes, where according to the authors "industry expertise" is needed in order to perform mediator's duties. Also article shall delve into defining sports related disputes and healthcare related disputes in order to show the reader the diversity of such legal conflicts and challenge the view that mediator shall only have good skills and knowledge of the mediation process, where substantial knowledge of the "dispute field" is not required.

Keywords: alternative dispute resolution, mediator's skills and expertise, reaching a consensus in sport and medicine

1. Introduction/Theoretical Background

The reports of the Program on Negotiation of the Harvard Law School and series of Norm Brand's articles on mediation were an illumination to do a research about the subject claimed in the title of this article. The importance of the alternative dispute resolution (hereinafter- ADR) methods today is incontestable. ADR answer the

[1] Mag.iur., LLM in Commercial Law, PhD student at Riga Stradins University & lawyer, Latvia, Address: Dzirciema 16, LV-1007 Riga, Latvia, Tel.: +371 29220814, Corresponding author: marina_k.usova@yahoo.com.
[2] Mag.iur., LLM in Commercial Law, PhD student at Riga Stradins University & lawyer, Latvia, Address: Dzirciema 16, LV-1007 Riga, Latvia, Tel.: +371 29890093, E-mail: karina.palkova@inbox.lv.

needs of nowadays business, as it can solve the conflict fast, confidentially and the costs are often cheaper. Authors believe that not only commercial disputes can benefit from ADR, but also such specific legal disputes as sports related disputes and healthcare related disputes can gain from extrajudicial dispute resolution. In this research authors shall delve into mediation as an ADR method and specifically shall work on investigating mediators personality and skills required to assist parties in resolving their sports related and healthcare related disputes. The quote from the Harvard Law School Special report on The New Conflict Management: Effective Dispute Resolution Strategies to Avoid Litigation clearly shows that success of the mediation largely depends on the mediator's skills: "Whenever a dispute flares up, the parties involved must ask themselves which course of action will yield the best outcome. Should they negotiate, litigate, or simply walk away and accept the status quo? <…> When communication with the opposing side is strained or difficult, consider bringing in a mutually trusted third party to serve as a go-between. Mediators can facilitate information exchange, vouch for good- faith efforts, and propose ways to resolve the dispute. Third parties can also help provide a reality check by reminding disputants of the costs and likely repercussions of litigation" (Malhotra, pp. 1-2).

Hence, the aim of this article is to find out whether specific legal disputes require specific mediator with the specific knowledge and skills, i.e., can a mediator without any substantive knowledge of medicine/healthcare system or sports assist the parties in reaching a consensus?

2. Mediation Types, Styles and Process

In this chapter authors are going to give a short information about mediation definition, types and process of mediation. In legal literature you can find plenty definitions of the mediation process. But the most often cited definition of mediation is: Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner, identify the disputed issue and consider alternatives to reach an agreement. The mediator is not an adviser, but a person, who helps parties in achieving the result or solution. (Spencer & Brogan 2007, p. 9)

There are many different styles of mediation. It means that mediator is not limited in his or her professional activities and can choose most proper style of mediation to achieve the consensus between the parties. Hence, not only is it important in mediation process to find the right dispute resolution practitioner (mediator), but it

is also very important to find the right mediation style. Usually mediators use more than one type or style of mediation, because each style of mediation is helpful to identify the uniqueness of each case.

Further specified styles of mediation are mentioned in legal literature and used in practise most often.

Facilitative mediation is widely used today. The process is structured in a way when the mediator assists the parties by asking questions. It should be noted that at this process, mediator always tries to normalize the points of view of the parties. Mediator does not make any recommendation to the parties, he is just facilitating a resolution process. The outcome of the mediation process completely depends on the parties (Carole J. Brown, 2004).

Transformative Mediation is a concept in the field of mediation and is a form of facilitative mediation. Transformative mediation is structured in a way that the parties are controlled by the mediator, who is a facilitator to the conclusion. The main goal of transformative mediation is creating a process in which parties may undergo some personal transformation because of going through this mediation process. Most of transformative mediation starts with a storytelling in a non-directive manner (Hope, 2014).

Evaluative mediation is a process that is patterned after the typical settlements held by the judges. It means that in an evaluative mediation, the mediator mostly focuses on the legal rights of the parties rather than on their interests or needs (Pollack, 2012).

Directive mediation relies on a person bringing expertise in a particular field. The expert collects facts and arguments, at the same time he gives information and opinion to the parties. (Schneider & Honeyman, 2006, p. 596)

Quality of the mediation process is very important. Mediation process has to be an informal and voluntary dispute resolution process. The mediator's role in mediation process is to guide the parties to reach their own resolution. Through the sessions and separate caucuses, the mediator helps the parties in dispute to define the problem, understand each other’s position and to find a resolution. There are a lot of mediation types, for instance commercial mediation, family mediation, business mediation, community mediation, building and construction mediation, healthcare mediation and sport mediation etc. (Spencer & Brogan, 2007) Mediation types mentioned above are very specific. Hence, the question is: what kind of skills mediators shall have in order to provide a qualitative mediation process.

3. Mediators Skills and Expertise

According to the Article 3 (b) of the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, 'mediator' means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation. Hence, only the ability to conduct mediation qualitatively is asked for.

In its turn Article 1.1. of the European Code of Conduct for Mediators proclaims that 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. Hence, here we also see that only knowledge and competence in the mediation process is required and nothing is said about any attainments in the sphere where conflict has originated, i.e., 'industry expertise' (Brand, 1999).

However, if we go through the Model Standards of Conduct for Mediators (2005) by American Bar Association & American Arbitration Association & Association for Conflict Resolution, we may find some reference to other competence and knowledge required besides the attainments in the mediation process. Section IV on Competence states:

"**A.** A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively." (American Bar Association & American Arbitration Association & Association for Conflict Resolution, 2005).

Therefore, parties of the mediation are free to decide on whether a mediator is enough qualified to assist the parties in reaching a consensus, whether his skills, industry expertise and other understandings are enough to understand problem and delve into the core of the dispute. Hence, it would be logical to assume that parties of the sports related dispute shall choose a mediator that understands what sports

dispute is, knows something about sports industry, sports law and maybe even has a working experience in some sports body such as federation, association etc., the same principle applies to healthcare related conflicts.

Brand in his article "Choosing the "expert" mediator" states that mediators bring different approaches, which emphasize different process skills, to the mediation. Their training, or experience in resolving certain types of disputes, may predict the specific skills they bring to mediation. For example, some family mediators avoid caucuses and may be skilled in mediating with the parties face-to-face. Community mediators may emphasize a transformative approach and be skilled at helping parties see their dispute in a larger context. Labor-management mediators may be skilled in group dynamics, while retired judges may bring persuasive skills they developed in settlement conferences. Knowing the general approach and process skills of different types of mediators is useful in selecting an appropriate mediator for your case. (Brand, 1999) This paragraph implies that author based on this own dispute resolution experience divides mediators by law sectors. Although it should be mentioned that Brand's vast experience is amassed in the United States of America where mediation is a very popular and often used alternative dispute resolution method.

Consequently, based on the written above, we can presume that a successful mediator should have good process skills and have a substantive knowledge, i.e., 'industry expertise'.

Brand states that one form of expertise often thought to be important is substantive knowledge about specific areas of the law where legal expertise involves knowledge about current verdicts, settlements, and jury trial results in a specific trial court venue, for a specific type of case. He also notes that most sophisticated users of ADR already consider whether their case requires a mediator with specific legal expertise. Later he suggests parties also to consider other kinds of expertise, such as industry, scientific or technical expertise, which can make a difference in the outcome of a mediation. (Brand, 1999)

Authors find very compelling the following words of Brand: "A mediator with industry expertise brings an intellectual framework for understanding whether the reliance that is alleged in a complaint comports with industry reality. As a result of this expertise, the mediator may be able to help the parties develop a creative solution that works because of industry-specific considerations." (Brand, 1999)

To sum up the Brand's idea, the following conclusion can be made: a successful

mediation depends on the mediator's personality that consists of the process skills, i.e., "knowledge about the process of mediation, and the ability to use that knowledge to affect behavior" (Brand, 1999) and a substantive knowledge that can be divided into specific legal expertise and industry expertise.

Authors are in solidarity with the opinion stated above, but with a small condition, that specific legal expertise should not require a mediator to be an attorney-at-law, as habits and proficiency in fighting in the court room of the latter run counter to the peaceful functions of the mediator.

4. Mediation in Specific Legal Disputes

In this chapter authors shall inquire the applicability of mediation for resolving sports related disputes and medicine related disputes by defining what are such disputes and analyzing already existing practice.

4.1. Mediation in Sports related disputes

In legal literature you can find plenty definitions of what sports related dispute is, but according to the authors the broadest definitions are made by Russian scholars. For example, Pogosan under the sports related dispute understands the disagreements between the subjects participating in sport relations regarding the mutual rights and obligations, as well as disputes arising out of the non-sport relationship, but which have an impact on the rights and responsibilities of athletes as the subjects of sports relations. (Погосян, 2011, p. 43-44) Alekseev in its turn adds that such disagreements are to be "transferred" to the jurisdictional authority or shall be solved in the alternative way. (Алексеев, 2012, p. 967)

According to Yurlov, sports related disputes- depending on the nature of the interrelations that have arisen within the sports relations- can be divided into the following types:

- disputes arising from the competitions: disqualification, contesting results of the competitions, violation of the technical rules of the specific sport etc.;
- disputes related to the membership in sport federation;
- doping related disputes;
- disciplinary conflicts, arising from the breach of conduct code by an athlete / coach / other member of the federation;

- ethical, that arise out of unethical sayings, pranks, inappropriate behavior on public;
- contractual or civil legal disputes arising from the breach of an agreement. (Юрлов, 2015, p. 19)

As it can be seen, the concept "sports related dispute" is rather 'capacious' and includes in itself a lot of disputed relationship types. Not all types of sports disputes should or may be resolved with the mediation, for clarity, authors propose to look through the mediation provided by the Court of Arbitration for Sports (hereinafter-CAS).

4.1.1. Mediation by CAS

According to the definition given at the official website of CAS www.tas-cas.org, CAS is an institution independent of any sports organization which provides for services in order to facilitate the settlement of sports-related disputes through arbitration or mediation by means of procedural rules adapted to the specific needs of the sports world.

Any disputes directly or indirectly linked to sport may be submitted to the CAS. These may be disputes of a commercial nature (e.g. a sponsorship contract), or of a disciplinary nature following a decision by a sports organization (e.g. a doping case).

There exist four CAS procedures: an (1) *ordinary arbitration procedure* and (2) *mediation*, that are applicable for disputes resulting from contractual relations or torts; (3) *the appeals arbitration procedure* for disputes resulting from decisions taken by the internal bodies of sports organizations; (4) *a consultation procedure* which allows certain organizations to request an advisory opinion from the CAS, in the absence of any dispute, on any legal issue concerning the practice or development of sport or any activity relating to sport. The advisory opinion does not constitute an award and is not binding.[1]

The Article 1 of CAS Mediation rules states that CAS mediation is a non binding and informal procedure, based on an agreement to mediate in which each party undertakes to attempt in good faith to negotiate with the other party with a view to settling a sports-related dispute. The parties are assisted in their negotiations by a CAS mediator.

[1] Information on CAS. http://www.tas-cas.org/en/general-information/frequently-asked-questions.html

In principle, CAS mediation is provided for the resolution of disputes submitted to the CAS ordinary arbitration procedure, i.e., resulting from contractual relations or torts. And the second limitation states that disputes related to disciplinary matters, such as doping issues, match-fixing and corruption, are excluded from CAS mediation. However, in certain cases, where the circumstances so require and the parties expressly agree, disputes related to other disciplinary matters may be submitted to CAS mediation. Hence, CAS mediation is not meant for all sports-related disputes.

According to Articles 5 and 6, CAS has a list of mediators parties shall choose from, mediators appear in a list for four-year period and can be reselected. Unless the parties have jointly selected a mediator from the list of CAS mediators, he shall be chosen by the CAS President from the list of CAS mediators and appointed after consultation with the parties. The mediator shall be and must remain impartial, and independent of the parties, and is bound to disclose any circumstances likely to compromise his independence with respect to any of the parties.

Each party shall cooperate in good faith with the mediator and shall guarantee him the freedom to perform his mandate to advance the mediation as expeditiously as possible.

In order to achieve a settlement and reach a consensus, Article 9 of the CAS Mediation Rules lists three functions of the mediator:

1. identify the issues in dispute;
2. facilitate discussion of the issues by the parties;
3. propose solutions.

However, the mediator may not impose a solution of the dispute on either party. And that is an important advantage of the mediation comparing to arbitration or litigation, as, quoting the often-cited expression, mediation does not “cut the pie” in pieces, it “expands” the pie.

It is said that one of the main reasons why parties opt for mediation is because they want to avoid publicity that is typical for litigation, which makes confidentiality a very essential element of mediation. (Kamenecka-Usova, 2015) Hence, Article 10 of CAS Mediation Rules very explicitly describes the confidentiality rule, covering both “mediation privilege” and “without prejudice rule”, i.e., the mediator, the parties, their representatives and advisers, and any other persons present during the meetings between the parties shall sign a confidentiality agreement and shall not

disclose to any third party any information given to them during the mediation, unless required by law to do so. Unless required to do so by applicable law and in the absence of any agreement of the parties to the contrary, a party shall not compel the mediator to divulge records, reports or other documents, or to testify in regard to the mediation in any arbitral or judicial proceedings. Any information given by one party may be disclosed by the mediator to the other party only with the consent of the former. No record of any kind shall be made of the meetings.

Article 10 also has a specification of documents and facts obtained during the mediation that parties shall not rely on, or introduce as evidence in any arbitral or judicial proceedings.

In fine, CAS Mediation Rules is a very qualitative and well-thought-out instrument of sport mediation. (Kamenecka-Usova, 2015)

Regarding the mediators, CAS offers 58 mediators from all over the world with quite impressive CVs, among which 39[1] are involved in sports industry being former judges, sport federation members, national Olympic committee members, sport managers, sport lawyers etc. The majority of 39 mediators also has legal expertise.

4.2. Mediation in Healthcare related disputes

Healthcare related disputes is a particular law industry with the purpose to regulate the relationships among healthcare professionals, healthcare providers and patients with respect to the provision, organization, and financing of health care. (Jost, 2004, p. 9)

Healthcare related disputes are at the same time unique and complicated from the legal framework point of view. The disputes are based on the most important human rights – rights to health and rights to life. Article 3 of the Universal Declaration of Human Rights states that everyone has the right to life, liberty and security of person. Article 25 of the Universal declaration of Human rights also provides that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including medical care.[2] It shows that the healthcare related disputes are based on the protection of the fundamental human rights.

When analyzing the reasons for occurrence of disputes in the health-care system, between the patients and healthcare professionals, it is important to understand that

[1] The data as of February 10, 2017.

[2] Universal Declaration of Human Rights, *www.un.org*, Retrieved from http://www.un.org/en/universal-declaration-human-rights/index.html

all these kinds of disputes are social and they must be examined from the point of view of a social system.There are two completely different social parties or groups involved. On the one hand, there are patients, who act very emotionally about healthcare related issues. Obviously, that in most cases, patients are not professionals in the healthcare. Therefore, patient's perception of a healthcare-related dispute is mostly emotional, not professional. On the other hand, there are medical professionals, who act according to their professional experience and knowledge-based skills.

It shall be noted, that both parties involved in such a conflict or dispute are not equal. They represent different social groups with completely different value systems.

Patients see the healthcare related problem not in the same way as medical professionals do. There is a big distance between the two parties and bringing the healthcare related dispute to the court only increases the distance between the parties.

Mostly, the healthcare related disputes can be divided into the following types of patients' claims against the healthcare provider:

- issues concerning patients' rights (information, communication, privacy, consent etc.);[1]
- insurance coverage involving issues;
- medical professionals' responsibility for patient injuries;
- commercial claims (for instance, relating to payment disputes);
- incorrect reporting of diagnoses or procedures;
- corruption issues;
- false or unnecessary issuance of prescription drugs, etc.

To settle the healthcare related disputes, both parties usually use the courts of general jurisdiction. But, as the practice shows, the market of the healthcare grows. At the same time, also the number of healthcare related disputes is increasing. (Willem et al., 2011, p.431) Hence, there occurs a problem with court congestion. Besides, many disputes in healthcare system are unique and often require a special approach.

4.2.1 Healthcare: Mediation vs Litigation

Currently, in several countries there is a trend of improving mutual relations between

[1] Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare (2014) *eur-lex.europa.eu,* Retrieved from (http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011L0024).

a doctor and a patient and making them constructive.

Authors believe it's important to find an alternative platform for the successful resolution of the conflicts between the healthcare professionals and patients. This mechanism should be an alternative to the arbitration procedures and courts of general jurisdiction. For example in the United States of America mediation is widely used in healthcare. (Sybblis, 2006) The majority of conflicts arising between the patients and healthcare professionals may be solved by means of the mediation.

Mediation in the healthcare provides a new individual approach for resolving conflicts what can not only relieve the courts, but also become an extrajudicial mechanism that is frequently and successfully used.

However, it should be admitted that it is quite difficult to reach a settlement in the healthcare related disputes because patients' emotional condition plays a big role (Bobinski & Hall, 2008 p. 433).

At the same time authors presume that special attention shall be paid to the fact that the examinations and opinions made by the professionals should underlay every dispute resulting from the healthcare cases.

It should be noted, that Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matter states, that mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from the mediation are more likely to be complied with voluntarily. At the same time, Article l 4 of the Directive 2011/24/EU states, that the Member States must provide transparent complaints procedures and mechanisms in place for patients, in order for them to seek remedies in accordance with the legislation of the Member State of treatment if they suffer harm arising from the healthcare they receive. National legislation gives opportunity to apply a mediation procedure in particular fields, but mediation can't be mandatory.

By its nature, the healthcare system is quite conservative as well as the court system. This fact could explain the low development rates of application of the mediation in the healthcare related disputes. There is a risk that the society is not ready to trust such important matters as health and life to it yet. Therefore, the change of public opinion as to the application of medication process and its advantages is crucial.

The advantages of the mediation in the healthcare over the judicial proceedings in

the courts of general jurisdiction are quite significant. In courts, matters resulting from the healthcare related disputes are mainly being heard for the time period of 2 to7 years (Litvins, 2014). It is obvious that this is a very long period, especially taking into consideration that the matters affect mainly unstable health conditions and life of a person – patient. Thus, mediation in the healthcare could unburden the courts and patients could have a possibility to agree much quicker in the result of a successful mediation.

It is also important to emphasize the significance of the confidentiality in the healthcare related disputes. Confidentiality is deemed to be one of the most important advantages that mediation in the healthcare related disputes may offer. The fact that the mediation process is cost-saving must also be noted as an advantage. Mediation process in the healthcare disputes is not limited in time and in order to reach a successful result, it is possible to extend it. When resolving the disputes in the healthcare by applying the mediation, the parties find themselves in emotionally neutral and more comfortable area. Mediation process also is not limited in space. It can take place anywhere what, according to the authors, is an advantage especially from the aspect of psychological condition of the parties.

Considering the specificity of the mediation process in the healthcare related dispute, a question arises about the skills, education and experience of the mediator. Previously the authors stated that inadequate informing of patients, mutual misunderstandings between the healthcare professionals and patients, including explanation of diagnosis and determination of treatment process underlay the majority of healthcare related disputes. (Palkova, 2015)

Authors presume that mediator with a legal degree or, for example, degree in psychology won't be able to qualitatively assist parties in reaching a consensus in the healthcare related disputes. When settling such disputes, the parties frequently are focusing on the specific criteria by going deep into the diagnosis. In order to hold a qualitative process, a mediator should not only have an understanding about the process in general, but also have to have some specific knowledge. Thus, in the opinion of the authors, for the positive outcome it is important to attract a mediator with a specific knowledge, i.e. in medicine, in order to reach the most important task of the mediation process and achieve mutual understanding.

5. Conclusion

Authors expect that information stated above in the previous four chapters managed to convince the reader that mediation, although largely depending on the will of the parties in dispute to resolve their conflict and reach a consensus, still relies on the mediator's personality. Therefore three main conclusions arise:

1. Mediation is an appropriate and amicable extra-judicial dispute resolution method to resolve specific legal disputes such as sports related disputes and healthcare related disputes;
2. Mediation process has to be built on the skills and expertise of a mediator;
3. A successful mediation depends on the mediator's personality that consists of the process skills, i.e., "knowledge about the process of mediation, and the ability to use that knowledge to affect behavior," (Brand N., 1999) and a substantive knowledge that can be divided into specific legal expertise and industry expertise.

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