ISSN 2409-2665
Journal of Logistics, Informatics and Service Science
Vol. 9 (2022) No.2, pp. 161-182
DOI:10.33168/LISS.2022.0210

Mediation like the Opportunity in Bailiffs' Work

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Abstract. There are a lot of reasons making disputes among different parties. But in many cases, it is not an easy way to find the solution. One of the opportunities for dispute resolution is mediation. This alternative is hardly making way to recognition in Lithuania. The author of this article analyses the new opportunities for using mediation like dispute resolution alternatives in bailiff's work. Mediation is not a substitute for the formal judicial process but is widely used as an alternative for negotiation and arbitration. In this research, the authors present mediation as a social phenomenon, intended for the effective and sustainable settlement of various social disputes. Applying the mediation unequivocally helps keep friendly relations, eliminate anger, and agree on mutually acceptable conditions. In this article, the author proposes to use mediation at the bailiffs' work. This suggestion is based on bailiffs' experience and available resources. Expand the confines of private bailiffs' competence and enable them to provide more services appropriate to public expectations.

Keywords: bailiffs, mediation, dispute resolution, practical implementation.

1. Introduction

The business environment is an exclusively dynamic and global phenomenon; therefore, when developing this environment, it is necessary always to evaluate the potential risk of possible disputes. When a dispute between business partners arises, people tend to fight to the finish in court rather than seek conciliation. Bailiffs are often charged with executing the decision resulting from consideration of disputes in the course of litigation proceedings. The wide range of disputable situations predetermines the specialization of bailiffs and bailiff offices. Generally, a bailiff is defined as the profession of a bailiff who plays a huge role in the judiciary system since stable enforcement of judicial decisions guarantees economic stability. Efficient enforcement of judicial decisions, especially those pertaining to business activity, is a warranty of economic safety, but most of all, a warranty of the state under the rule of law because a bailiff's work implements decisions contained in a verdict of a court (Law in transition 2014).

The bailiff's work pertains to different conflict situations, while the methods of the bailiff's work often are treated as unacceptable and cause a response of dissatisfaction. E. g., in England and Wales, bailiffs are to be banned from entering homes at night and from using physical force against debtors (The Guardian 2014). An increasing number of people apply to lawyers asking for help in determining whether bailiffs do not exceed their authority when enforcing court decisions (DELFI 2013). When implementing the court decisions, bailiffs sometimes avoid communicating with debtors. Though bailiffs should not be biased, they often have an inner opposition to debtors, do not consider their financial standing and spare no efforts only for satisfaction and protection of the plaintiffs' interests (DELFI 2013).

The Constitution of the Republic of Lithuania provides for that justice in the Republic of Lithuania is administered only by courts. However, the litigation process is not the sole way to resolve a dispute between parties. Menkel-Meadow C.J. (2015) defines and describes modern processes of dispute resolution beyond court adjudication, including negotiation, mediation (facilitated negotiation), arbitration (decisions by party chosen private dispute resolvers), and a variety of new hybrid forms of dispute resolution (e.g., med-arb, summary jury trials, public policy consensus building) that are used in both public and private disputes. Lester E.I.A. et al. (2014) describe and explain the fundamental differences between more formal dispute resolution procedures such as conciliation, mediation, adjudication, arbitration, and litigation as a last resort. Galtsman M. et al. (2009) compare three common dispute resolution processes – negotiation, mediation, and arbitration.

Different authors think that mediation rather than court proceedings is a more efficient and sustainable way to the resolution of disputes. It is suggested that mediation should be applied in different fields. McKenzie D.M. (2015) examined the role and effectiveness of mediation, as the most common method of Alternative Dispute Resolution, in resolving workplace relationship conflict. Mediation is one

of the political-diplomatic ways which are the most frequently regulated but also used for resolving the international conflicts between states (Guna D.A. 2014). Since sustainability and conflict descalation is of great significance in political disputes, mediation is an effective way to reach an agreement if regular negotiations don't work and the parties of the conflict need a third party to mediate the dispute resolution process. Hence mediation could be described as an assisted negotiation (Kazansky & Andrassy 2019). Cheung S.O. and Yiu K.T.W (2007) developed taxonomies of construction dispute sources, mediator tactics, and outcomes and regarded mediation as a flexible, cost-effective, and non-threatening way to construction dispute resolution. Due to those reasons, mediation has good prospects in resolving construction disputes, helping construction projects to reach completion on time and within budget, and with minimal interruption and aggravation (Trinkūnas, Quapp, Banaitienė, Holschemacher, Trinkūnienė & Banaitis 2021). Also, exactly these properties of flexibility, cost-effectiveness, and mediation is a non-threatening conflict-solving method make this dispute resolution method sustainable. Such an effect is achieved by facilitating prolonged prosperity of a firm by taking into account the three major aspects of sustainability: social, which includes social surroundings, environmental, consisting of natural surroundings, and economic. Mediation helps achieve a mutual agreement and decreases the negative social effects of having a conflict. It can as well effectively diminish the environmental effects of company operations if the dispute concerns damage done to the environment by the company. Mediation is also much better at enhancing the economic performance of the organization than a traditional court procedings since it focuses not on punishing but on facilitating a mutually satisfactory agreement. (Saunila, M., Nasiri, M., Ukko, J., & Rantala, T. 2019)

In business, a conflict is the indivisible component part of the public relationship. When a dispute arises in business, the major goal is to resolve it quickly, efficiently and cost-effectively which makes mediation an attractive candidate for a dispute resolution method since it is able to make conflict resolution more sustainable. It is widely accepted that strategies and operations of companies will be and are highly materially impacted by sustainability (Jurkevicius & Bubliene 2017) hence why mediation should become a more and more popular dispute resolution method.

In his paper, Runesson (M. E. Runesson 2007) showed that applying mediation inside a company may increase its value.

Mediation is an assistance to the parties to a dispute in reaching conciliation; it is a way when people, with assistance of a mediator arrive at a common decision that is acceptable for both parties. Both courts and judges are able to help the parties to close a bargain. However, the parties to a conflict lose a possibility to control the outcome of a dispute and are bound by stronger procedural rules. Such opportunities are available even without recourse to court. However, to this end a disagreement

should be postponed already at an initial stage avoiding its development and overgrowth with emotions. As a matter of fact, mediation is even more efficient means than court proceedings. Nevertheless, the possible application of mediation depends on the fairness of the parties to a dispute. Hence, first of all, a businessman should understand that even a court case in the victory of which he is absolutely sure has quite a strong risk of losing the case. When he understands this, he begins to consider alternatives, possible ways for conciliation and search for an optimal decision. Mediation focuses on the satisfaction of needs and interests. Therefore, for business, it is a more acceptable and understandable way for dispute resolution. Humanly, if this method is successful, it is always more attractive than court victories.

Since mediation is conceptually really close to negotiation, and, moreover, negotiation is one of 5 structural parts of the mediation process (Trinkuniene & Trinkunas 2022), we can consider the following example to further demonstrate what the potential benefits of mediation could be. A major nickel mining project next to Voisey's Bay on the north coast of Labrador was a subject of serious concerns in terms of its contribution to local and regional sustainability. Over the series of years, the agreement couldn't be reached between Inco Ltd., the project proponent, and four government authorities e the Canadian federal government, the province of Newfoundland and Labrador, the Innu Nation and the Labrador Inuit Association. The negotiations often stalled, and the court ruling wasn't entirely satisfactory. However, despite how unlikely it seemed, the five key parties reached a surprisingly amicable agreement in June 2002 and the impact and benefit agreements with the Innu and Inuit in exchange for permission to proceed on traditional lands were signed by the company, and so an environmental comanagement agreement was reached. The way those negotiations were conducted with the help of so-called "Contribution to Sustainability" test took the focus away from mitigation of negative environmental effects occurring during the lifetime of the mine to net gains received over the long term. The newfound importance of net gains meant shifting attention to trade-offs and compensations. Since at least minimal long lasting ecological damage was unavoidable, so a plausible "Contribution to Sustainability" could be achieved only if strong environmental stewardship was created and steps to lengthen and strengthen socioeconomic benefits were taken (Gibson 2006). This example perfectly demonstrates a case where measures to preserve all three dimensions of sustainability (social, environmental, and economic) were taken to achieve long lasting positive results.

Like in all other fields, the bailiff's work should be regularly supervised. In addition to this, measures for upgrading the efficiency of the bailiff's activity should be periodically revised. The application of mediation in the bailiff's activity is a way for upgrading the transparency and credibility of the bailiff's work. This paper

summarizes the principles of mediation and opportunities for application of these principles in the bailiff's activity.

2. Mediation Experience in Lithuania

In Lithuania, the first steps for application of mediation started on 20 May 2005 when the Court Council adopted the probation project for conciliatory mediation in courts. This project sought to form for the parties to a dispute condition in a civil process that would upgrade and accelerate the achievement of a social peace and enhance the dispute resolution efficiency. Nevertheless, in our country, which has very strong court traditions, mediation with difficulty paved its way in a community. On 15 July 2008, the Law on Conciliatory Mediation in Civil Cases of the Republic of Lithuania (hereinafter – "the R.L.") was adopted. From this moment mediation acquired a legal basis for the application and development of an alternative way for dispute resolution in Lithuania. From 2008 to 2009, merely 6 cases were brought for mediation, among them conciliation was reached in one case only (Kaminskienė 2010). In 2010 to 2012, in court mediation was applied in 45 cases, while conciliation was achieved in 13 cases (Kaminskienė 2013). In 2014, 53 cases were brought for mediation in courts, 20 cases resulted in conciliation. In 2015, already 114 cases were brought for mediation, while 36 cases were finished by entering into an amicable agreement. In 2016, over 200 cases were brought for mediation. The European Commission seeks to assure as strong efficiency of the system of justice as possible. Therefore, the mediation process should be encouraged in Lithuania. It is difficult to expect the success of mediation when the parties do not comprehensively understand the mediation process and the subject matter of being involved in this process (Czwartosz 2011.)

Looking at European countries, e. g., in Norway, the National Mediation Service, which has 22 regional mediation centres that mostly are engaged in the consideration of criminal cases (Flack 1991), was established. E. g., in 2010, regional mediation centres examined 8,684 cases; among them, 88.1% of cases resulted in amicable agreements.

Lithuania decided to undertake drastic actions that would help to consolidate in Lithuania the mediation institute, which is popular in western countries.

In Lithuania, a draft law was prepared in 2020 (Lietuvos Respublikos mediacijos įstatymo Nr. X-1702 pakeitimo įstatymas 2020) and amendments to the law were submitted to the Seimas for consideration, which would reduce the workload of administrative courts by almost a third. It is also envisaged that administrative offense cases will no longer be heard by a district court but by other authorities out of court. This would reduce administrative misconduct in district courts by almost two-thirds, and almost one-third of judges would be exempted from investigating these cases.

In 2021 it was implemented. According to the data of LITEKO reports, the district courts of general jurisdiction transferred mostly civil cases to judicial mediation - 497 civil cases. The district courts of general jurisdiction referred 77 civil cases to judicial mediation. Thus, 87 percent of the number of cases transferred to judicial mediation consists of civil cases transferred by the district courts of the first instance, while the courts of general jurisdiction - 13 percent. The Vilnius Regional Administrative Court referred 4 administrative cases for judicial mediation, the Regional Regional Administrative Court - 2 administrative cases, and the Supreme Administrative Court of Lithuania - 1 administrative case.

As expected, a draft law should come into force in 2017 (from 2020, a regulation-making mediation mandatory in family disputes came into power) has been prepared. It is suggested that the civil disputes of certain categories before they are brought to court as lawsuits should be subjected to mandatory mediation. The draft law provides for that mandatory mediation should be applied to family disputes that are considered in the manner of adversary proceedings, e. g., disputes re: minor child support, allocation of a place of residence for a minor child and disputes re: small sums of money no more than EUR 1.500 (Bernatonis 2015, Tvaronavičienė & Kaminskienė 2019).

Looking from the time perspective, in the future mediation should become a very efficient and viable procedure in courts. Many countries all over the world travel the same way. The Court of Appeal of Quebec, Canada implemented a mediation project that is considered one of the most successful projects of court mediation in the world and is often illustrated as an example.

On 1 January 2021, the new wording of the Law on Mediation of the Republic of Lithuania entered into force, which enshrined two types of mediation in administrative disputes in Lithuanian administrative law: judicial and extrajudicial mediation (Lietuvos Respublikos mediacijos įstatymo Nr. X-1702 pakeitimo įstatymas 2020). The application of out-of-court mediation in administrative disputes is relevant because the public is not informed about the possibilities and benefits of a peaceful solution. That is, in contrast to the preparation for the mandatory application of mediation in family disputes, bailiffs do not yet pay attention to the promotion of mediation. This resulted in the fact that after the entry into force in 2017 (Lietuvos Respublikos antstolių įstatymas 2002), virtually no changes took place. Out-of-court mediation in Lithuania has also become difficult due to the insufficiently favorable attitude of lawyers, especially the bailiff, towards peaceful agreements. The goals of mediation remained unfulfilled due to a simple lack of information and active, positive communication on mediation. The situation is also aggravated by the tendency of Lithuanian society to litigate, which is reflected in the growing number of cases in the courts. It should be noted that Lithuania was classified by the European Commission for the Efficiency of Justice

(CEPEJ) as one of the European Union countries with the highest number of court cases (European Judicial Systems. Efficiency and Quality of Justice 2018).

The concept of a sustainable business should focus on long-term solutions, especially in difficult cases such as taking children out of the family. In many cases, ignorant regulation simply leads to bureaucratic procedures and the sustainability of human relations is forgotten. 8 thousand are handed over to Lithuanian bailiffs every year. for the enforcement of pending child custody disputes. It is known in advance that one of the parties to the dispute will be dissatisfied with the bailiff's work and the bailiff's actions. Without this situation, its activities would focus on sustainable long-term solutions through mediation. Making sustainable decisions requires more cooperation and demands all stakeholders to unite for sustainability.

3. Relationship of Mediation with other Dispute Resolution Opportunities

It should be noted that a conflict is the consequence of the inconsistency of positions of the parties. The causes of conflicts between the parties differ and include the different understanding and attitudes of the parties to certain situations. Namely, when managing businesses, different conflicts regarding the strategy of the business activity and routine affairs may arise between shareholders, the members of the board of directors, a hired director as well as between the board of directors and other subjects engaged in business management. Every such conflict arising out of business management disturbs the business activity and development, may postpone the business activity, and in the worst scenario – may even cause the business bankruptcy. Nevertheless, to align opposite positions and to learn the true attitude to a conflicting situation, the parties select the dispute resolution option relying on their personal experience and emotional condition (e. g. see Fig. 1).

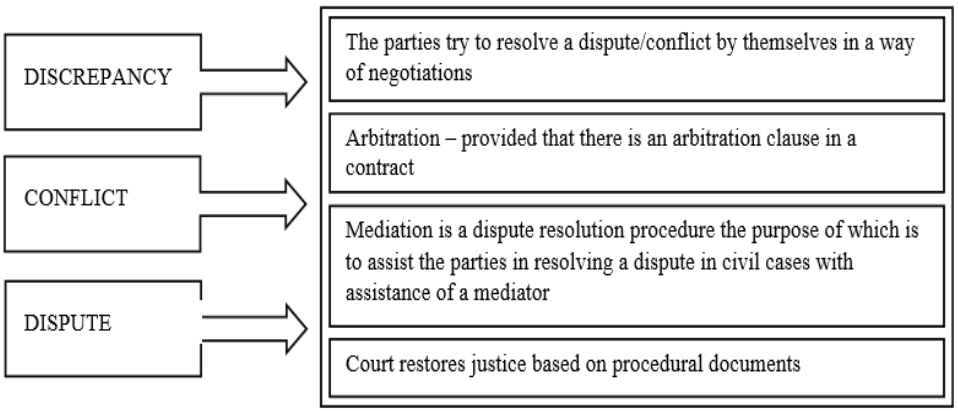

Fig. 1: Alternative dispute resolution ways (created by author)

Undoubtedly, the parties to a dispute have the opportunity to resolve disputes without recourse to court proceedings, e. g., in the way of negotiations. To a wide extent, negotiations mean the information swapping procedure seeking to achieve conciliation between the parties in the situation when some actions for the adoption of a decision are supported while other actions are opposed. The parties try to conduct negotiations in good faith. Nevertheless, the parties often feel disappointed by the outcome of negotiations. The parties engaged in negotiations do everything they can so that the answer to the problem would be "yes." However, quite often, they fail to reach a consensus. The trouble is that people are not born negotiators but are able to become them. Therefore, the negotiating skills of the parties engaged in negotiations often differ too much, and this may result in an outcome that is not favourable to both parties. At first sight, it is difficult to understand how a synergic relationship between the parties can be achieved when each party fights out the best results for itself. The subject matter of communication plays a crucial role during negotiations because even the most efficient form of negotiations cannot bring the results expected if the subject matter of negotiations is senseless and meaningless. On the other hand, the incorrect and inadequate form of communication may turn even a very meaningful conversation into a cinder and a memory.

Arbitration is a dispute resolution method when a dispute is resolved by an independent arbitrator assigned by the parties to a dispute relying on the unbiased decision rather than on a court acting on behalf of the state. This allows for bringing a dispute to the professionals in a specific field who have far wider qualification and experience not only in the legal field but also in a specific professional area, which enables them to more properly resolve the dispute. It is worth to notice that a dispute in arbitration may be resolved provided only that both parties give their consent thereto. Usually this is done by providing for an arbitration clause in a contract. In this event a specific court of arbitration and other provisions are indicated. Furthermore, the wording of an arbitration clause should be set clearly and explicitly because if it has some ambiguity, grammar mistakes or an incorrect reference to the court of arbitration, the consideration of issues regarding the assignment of a dispute to a specific arbitration is postponed in this way predetermining the duration of consideration of the dispute. The parties to commercial arbitration often are the entities of different countries while the place of arbitration and arbitrators are selected from the third country to avoid the influence of local law on the arbitration decision. The consideration of a dispute the sum of which is from several hundred to several thousand euro in court of arbitration would not be cost-effective. The advantage of arbitration is confidentiality. This condition is very important for parties who seek to keep the dispute arisen and the business relationship related thereto secret. Public courts usually are subject to the principle of a public proceeding, which means that every person may participate in a court proceeding and later on it is possible to look at all the material of a case and to learn

all the details of the case. In arbitration, cases are resolved out of a public view, this significantly reduces the risk that information that has a prospective commercial value is disclosed during the proceeding, or any damage is made to the goodwill of business due to messaging the fact of origin of a dispute. The dispute resolution procedure in arbitration is more expensive than in public court. However, a quicker adjudication of a dispute for the parties to a dispute often is the most important reason for selecting arbitration.

In each instance, when the interests and lawful expectation of the parties to a dispute are violated, they have the right to defend their breached interests and ambitions in a way of litigation. Advantages and disadvantages of litigation are presented in Fig. 2.

In court, decisions are adopted in the name and on behalf the state, in accordance with the prescribed procedural order, collected witnesses and the practice of courts. The decision of a court always is executed by enforcement, causes psychological problems, pressure and suspicions as for bad legal acts, unfit evidences and lack of fairness of judges and is generally lacking in sustainability practices. A defeated party always suffers bitter humiliation and is ready to seek a victory at any costs by appealing against the decisions adopted by court. Hence it is really improbable that the parties of the conflict will retain good relations after the court proceedings which destroy any possible future collaboration which is a key to social sustainability.

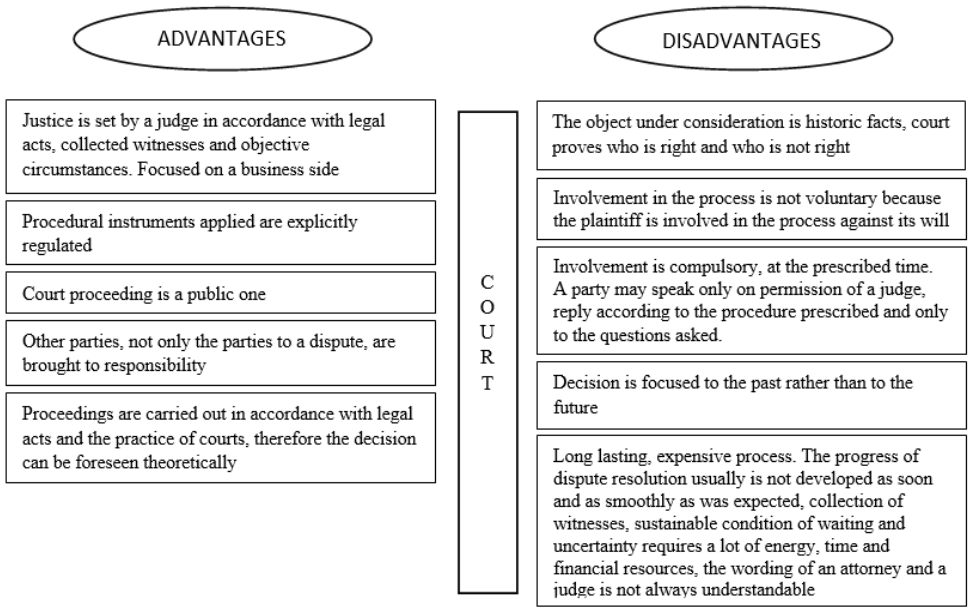

Fig. 2: Advantages and disadvantages of resolution of a dispute in court (created by author)

There are three court instances. If an action is lost in first instance court, a court decision may be appealed on appeal; when the case is lost in court of appeal instance, it may be appealed under a cassation procedure (to the Supreme Court). The other party also has the right to appeal. A stamp duty is collected for each repeated appeal. Thus, the litigation process turns into a long lasting and expensive procedure. This makes both parties worse off in economic sustainability terms. At the same time the initiated litigation often means the termination of cooperation between the former business partners. Though according to mass media, confidence in courts has declined, the parties to a dispute usually begin to compete who of them applies to court the first already at the initial stage of a dispute, try proving their truth at any cost and forget about the existence of alternative dispute resolution ways.

Mediation is a dispute resolution method that differs from negotiations, arbitration or litigation. The advantages and disadvantages of mediation are presented in Fig. 3.

Mediation originally is quite similar to negotiations and differs from them by the fact that apart from the parties to a dispute there is the third party involved in the dispute resolution procedure – a mediator. However, differently from litigation, the mediator is not a host of a dispute resolution and does not adopt a decision in a case according to his inner conviction based on comprehensive and unbiased circumstances that have been proved on the grounds of law according to a procedural order. During mediation, a decision is adopted by the parties themselves, while the mediator is a guide whose major function is to help the parties to listen to each other and to find the cause of their discrepancy and possible versions for dispute resolution. When applying mediation, the current situation and the future is taken into consideration in order to preserve a good relationship with a business partner in the way of granting respective concessions. One of reasons why large foreign companies select mediation is the preservation of a commercial secret and goodwill. If after the occurrence of a dispute inside a company, the parties apply to the court, information that was treated as confidential often cannot be kept secret because to prove the truth, the causes of a dispute should be disclosed, the facts and reasons should be presented, important documents should be submitted and etc. When an internal dispute becomes a public one, the goodwill of the company's employees and the company's attractiveness declines. A dispute that is resolved in the way of mediation requires less financial costs and diminishes the duration of the dispute resolution procedure, which contributes to economic sustainability. As time and money are an integral part of business, the time saved during the dispute resolution procedure may be efficiently contributed to the business activity of the parties to a dispute. Such a dispute resolution way is less formalized and is significantly shorter compared to the litigation process. Though many Lithuanian companies could resolve their internal disputes in the way of mediation, they still do

not employ this legal dispute resolution instrument. Both employees and shareholders have a skeptic attitude to new dispute resolution methods.

The larger is a company the larger is the number and variety of disputes, therefore the interest to mediation should grow up with increase of the business sector; conflicting parties should be fairer and change their attitude to a conflict, stop being so categorical so that they could preserve a good relationship on the global scale.

Mediation in courts would be useful for business in three aspects:

- During the process, the parties to a dispute are active, and can understand the problems and concerns of each other.
- Decisions adopted by the parties to a dispute are strong; therefore, there is a strong probability that the parties will follow them in the future. This, in turn, creates social sustainability.
- This process is quite cheap, while the mediator's work is paid out of the state budget 75% savings on stamp duty.
- Lower time expenditures: from 3 weeks to 3 months. The average duration of litigation is 2 years; for this period, a business contributes a share of its capacities to proving its rightness rather than directing business activity and creating the future relationship, all of which negatively impacts economic sustainability.

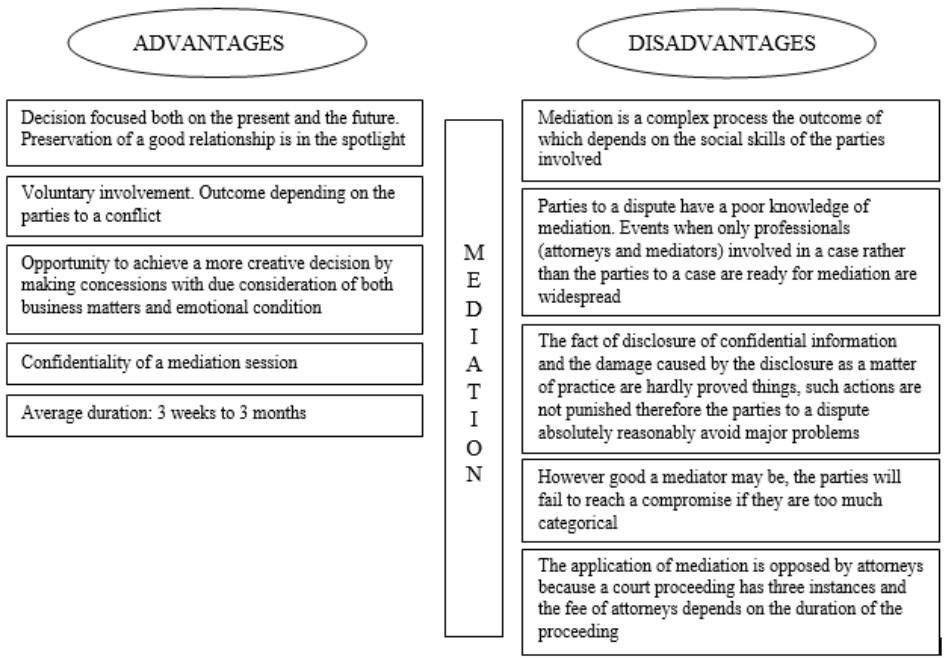

Fig. 3: Advantages and disadvantages of resolution of a dispute by the mediation method (created by author)

4. Principles of Mediation

Mediation is treated as one of the most informal dispute resolution methods with the involvement of third parties. Mediation is a dispute resolution procedure the goal of which is to help the parties to resolve a dispute in civil cases amicably with involvement of one or more than one mediator. The principles of mediation shown in Fig. 4 are versatile ones, they are enacted in respective legal acts and form the background for the qualitative and correct application of mediation. The progress and quality of application of these principles depends not only on a mediator but also on the parties to a dispute. A party to a dispute should comprehensively understand the principles of mediation, their subject matter and importance (The European Code of Conduct for Mediators). Judges who practice mediation admit that they once and more encountered situations when only the professionals (attorneys and a mediator) involved in a case rather than the parties themselves were ready for the mediation process (Saudargaitė 2011).

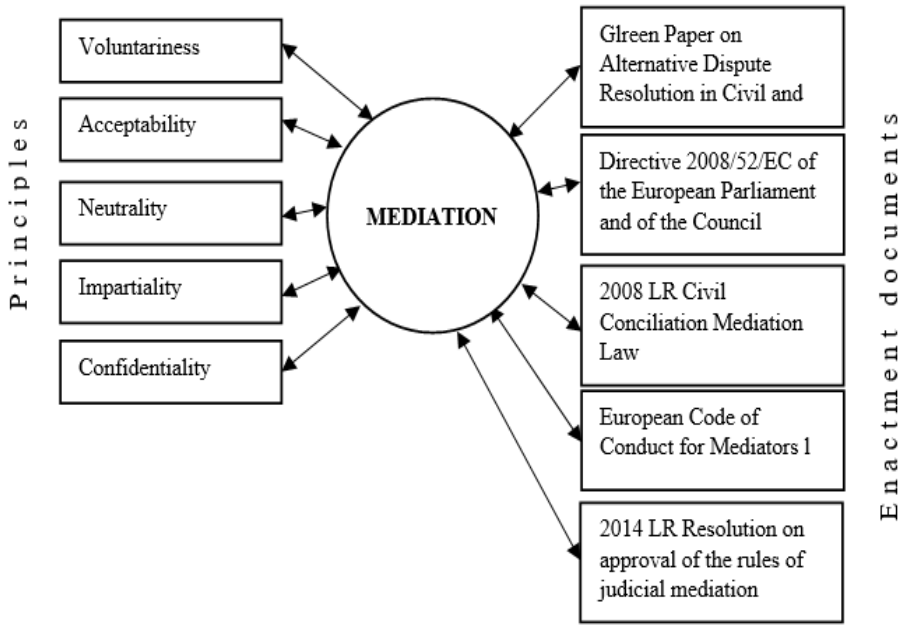

Fig. 4: Legal acts and legal principles regulating mediation (created by author)

The principle of voluntariness shows that the parties by themselves without any pressure shall initiate a mediation process without any compulsion (The Decision of the Republic of Lithuania on Adoption of Regulations for Mediation in Courts of 2014). The parties may withdraw from mediation at any time without giving any justification (The Code of Conduct for Mediators). As a matter of fact, the decisions reached in a way of mediation are followed voluntarily, and they better assist in preserving amicable and strong relationships (Directive 2008/52/E.C.). This

principle has a psychological origin. It is generally thought that parties who without any compulsion are involved in the conciliation process and adopt the decision by themselves in the future will better follow the decision adopted by them rather than the decision adopted on behalf of a third party. Thus, the parties should be fair and should want to conciliate rather than to be only involved in the process. In this way mediation proves to retain and foster the communication between disputing parties which implies that if using this alternative dispute resolution method rather than court proceedings social sustainability is on a much higher level.

The principle of acceptability is understood so that the parties to a dispute shall follow bargained regulations and shall respect each other. The parties to a dispute shall agree with regard to the character and procedure of mediation, indicate the set of regulations selected by them or introduce the individual applicable mediation regulations approved by both parties (the Law on Conciliatory Mediation in Civil Disputes).

The principle of neutrality is understood so that a mediator shall be unbiased, shall not fall under any influence and shall not impose his personal opinion on the parties to a dispute. He shall find out the cause of the origin of a conflict and shall simulate for the parties to a conflict a possible outcome of the dispute with due consideration of the needs of the parties and the court practice. The mediator shall not seek conciliation at any cost, he shall remember that the parties themselves in the future shall implement the conciliation achieved, while the implementation of the decision imposed by the third party becomes complex. Both parties shall give their consent to the candidature of a mediator, shall pay up the fee due to the mediator in equal parts unless the fee due to the mediator is paid up out of the state budget provided that the mediator is assigned by court. Meanwhile, in a litigation process, each party hires its attorney and pays for his legal services.

The principle of impartiality provides for that the mediator equally treats both parties. The mediator shall not support any party in any way on the grounds of his personal experience, beliefs or social skills. The mediator shall equally respect the positions of both parties and shall assure that neither party is in a worse position. Notwithstanding that one of the parties to a dispute is in a worse position and has suffered too much, the mediator shall not support a victim by humiliating the other party to a dispute too much.

The principle of confidentiality imposes on both parties to a conflict and the mediator an obligation not to disseminate, not to tell and not to publish (not to use), directly and indirectly, information that was submitted, collected or learnt during the mediation process. To identify the cause of a conflict, the mediator shall apply mediation instruments, form a feeling of security and encourage the parties to the conflict fairly and openly discuss the subject matter of the conflict. The mediator shall remember that the parties value their goodwill very much. In addition to this, the parties to a dispute shall by themselves select which and to which extent

confidential information is to be disclosed. There often is a fear that if the parties fail to reach an amicable agreement in the mediation process, the other party shall use confidential information that was disclosed in the litigation process and in this way shall acquire an advantage.

Mediation is considered as one of the most informal dispute resolution ways to assist in sustaining a good relationship between the parties to a conflict in the future. The success of mediation depends on the intention of the parties to a conflict to conciliate, the social skills of the parties and their capability of ridding of their habits and weaknesses. The application of mediation principles assists in the riding of weaknesses of the parties to a conflict and the mediator, which obstruct the progress of mediation and further conciliation. To promote mediation in Lithuania, the public should be widely informed and provided with social skills. In addition to this, public institutions such as bailiffs should execute court decisions by employing not only the enforcement instruments and the cult of force but also should act as mediators and should apply an amicable dispute decision way – mediation. The public will understand the advantages of mediation provided that public institutions act with due consideration of this dispute resolution method.

5. Application of Mediation in the Activity of Bailiffs

The activity of a bailiff in a capacity of the person authorized by the government is strongly regulated. His status, functions and the requirements applied to the implementation of this status and functions are set by law. The profession of a bailiff is supervised by governmental institutions, the activity of bailiffs' means the implementation of functions securing the public interest by the natural entities involved in the private professional activity for remuneration, while the government which charged them with the implementation of functions supervises the due discharge of these functions. Private Bailiffs should extend the scope of their competencies and search for the opportunity to provide increasing number of services meeting the expectations of citizens. In a large number of countries all over the world, mediation is applied for dispute resolution in different business fields. Stokoe E. and Sikveland R. (2016) examine the work done by formulations in the service of pursuing solutions to disputes between neighbours in a community mediation setting. Camina E. and Porteiro N. (2009) developed a model of bargaining that provides a rationale for the difference in the method of negotiation, depending on the nature of the conflict. They studied the role of a mediator who tries to achieve a certain balance between the efficiency of the agreement and the equality of the final sharing. Sipe N.G. and Stiftel B. (1995) examined mediated environmental enforcement cases and the results show that mediation is an effective method for settling environmental enforcement disputes — more than 70% of the cases were resolved; participants indicated that they were very satisfied with the

mediation process, the final agreement, and the mediator; and that they saved money by using mediation rather than litigation to resolve their disputes

With due consideration of and in accordance with the experience of foreign countries, we should study conciliatory dispute resolution methods during which the result is achieved without application of enforcement measures. We should not only play a role of preventive discipline in our field but also seek to be closer to people and be their assistant.

When implementing the court decisions, bailiffs sometimes avoid communicating with debtors and abuse their position of authority. According to the current court practice, an arrest may be imposed on assets at any time if the implementation of the future court decision is under threat. When deciding to impose an arrest, a court does not evaluate whether the requirements indicated in a lawsuit are reasonable, these measures are applied seeking to secure. Usually a significant circumstance – the sum claimed for awarding is too large for a defendant, is taken into consideration, this means that after imposing the arrest assets will be safe and the defendant will not be able to avoid the execution of the court decision after the completion of court proceedings.

A random situation when information about the arrest of assets is learned from a bailiff only is the most unpleasant, the procedure of withdrawal from the arrest requires large time expenditures and is not sustainable economically because it is difficult to make court change its mind. A bailiff may impose the arrest on a property or a bank account without notice to a debtor. This is done in this way because the legal intention of the imposition of the arrest on assets is to secure the enforcement of a debt rather than give a notice to a debtor. When discharging such actions, bailiffs have in mind that otherwise they have no assets subject to enforcement because debtors mainly are unfair and as a matter of fact undertake measures to withdraw cash from their bank accounts prior to the moment of the arrest or to transfer their property to the ownership of other persons. When starting the debt enforcement procedure, the bailiff shall send to a debtor a notice encouraging to implement the court decision in good faith in accordance with art. 655 of the Civil Procedure Code, the notice of encouragement is served after receiving a writ of execution and indicates that if the actions required are not executed within the time limits indicated by the bailiff, the enforcement recovery procedure will be applied. The law also provides for several exceptions: in accordance with art. 661 of the Civil Procedure Code, the notice encouraging to execute the court decision shall not be served if the time limits for the implementation of a court decision are indicated in-laws or in the writ of execution. To avoid the inconveniences caused by the arrest of a bank account, after receiving the bailiff's notice of encouragement, the debtor shall settle accounts within the time limits indicated in the notice. However, the fact that a debtor who cannot settle accounts with a creditor, usually due to his bad financial standing, finds himself in a

complex situation, and if the property or cash owned by him is arrested, the discharge of obligations will be worsened, even more, is not taken into consideration. In the event of assets arrest, the largest damages are sustained by business entities rather than natural persons. When developing different business activities, companies enter into different contracts and assume obligations to business entities in this way, considering the risk of suffering from the non-fulfillment of contractual obligations of the other entity and at the same time assuming responsibility for the fulfillment of their obligations and for reimbursement of damages if a company fails to fulfill its obligations. When liabilities to creditors are large, and assets are arrested, the debtor encounters the problem of settlement of accounts with creditors and the problem of further development of business, settlement of accounts with employees, and the threat of bankruptcy.

In his turn, the bailiff adheres to the position that the debtor's non-cooperation and avoidance of execution of decisions of a court or any other institution often turn into the cause of generation of additional losses. Therefore, the bailiff has to tackle the problem of realizing the debtor's property and take additional enforcement actions to implement the decision. This causes additional expenses for the debtor.

Hence, the arrest of assets may be imposed without giving a notice to the defendant. Appeal of imposition of the arrest does not postpone the enforcement of the arrest, while the duration of examination of a notice of appeal lasts at least for 4 months. On request of the defendant, the arrest may be withdrawn by a court that imposed this arrest. However, such an action is possible unless the plaintiff appeals this decision or only after completion of consideration of a complaint. These actions also usually last for over 4 months.

Debtors wonder and are angry with the fact that the bailiff usually chooses the easiest path for arresting cash on their bank accounts. People believe that the bailiff could arrest other assets and enforce a debt in any other less painful way. Cases regarding the value of blocked funds are among the most frequent in courts. Debtors think that the value of assets blocked by the bailiff in the course of execution of the court decision on recovery of debt exceeds the value of enforcement, and this unreasonably and non-proportionally restricts the rights of the plaintiff as the party (the debtor) to an enforcement process. Bailiffs reply that in this event, the arrest is imposed as the actual and effective action required to secure the process of enforcement during which there is no need to determine the exact market value of assets under arrest, while the goal is to impose an arrest on assets the value of which is sufficient to enforce the fulfillment of obligations of the debtor. The provision of the law sets forth that, when imposing the arrest on assets of the debtor, the bailiff shall evaluate these assets at market prices with due consideration of the tear and wear of the assets and the opinion of the plaintiff and the debtor who are involved in the procedure of the arrest, has been taken into consideration (case 2s-222-

227/2014). To protect their assets against an arrest, defendants usually try to prove that the requirements of plaintiffs are unreasonable. However, they are not always capable of proving the most important circumstance, namely, that a sum that is subject to recovery is not too large for them. To prove this, some witnesses should be submitted, e. g., high-cost assets and the income received. Small companies can hardly do this.

For unfair entities laws provide a large number of opportunities to use the fact of arrest of their assets as an instrument for bringing pressure on other entities. Meanwhile, the court practice regarding the abuse seeking the imposition of the arrest on assets has not yet been formulated. Often, courts do not even consider the issue of implied abuse seeking the imposition of the arrest on assets. It is evident that the defensibility of defendants is limited, and the risk of damages often becomes just their headache.

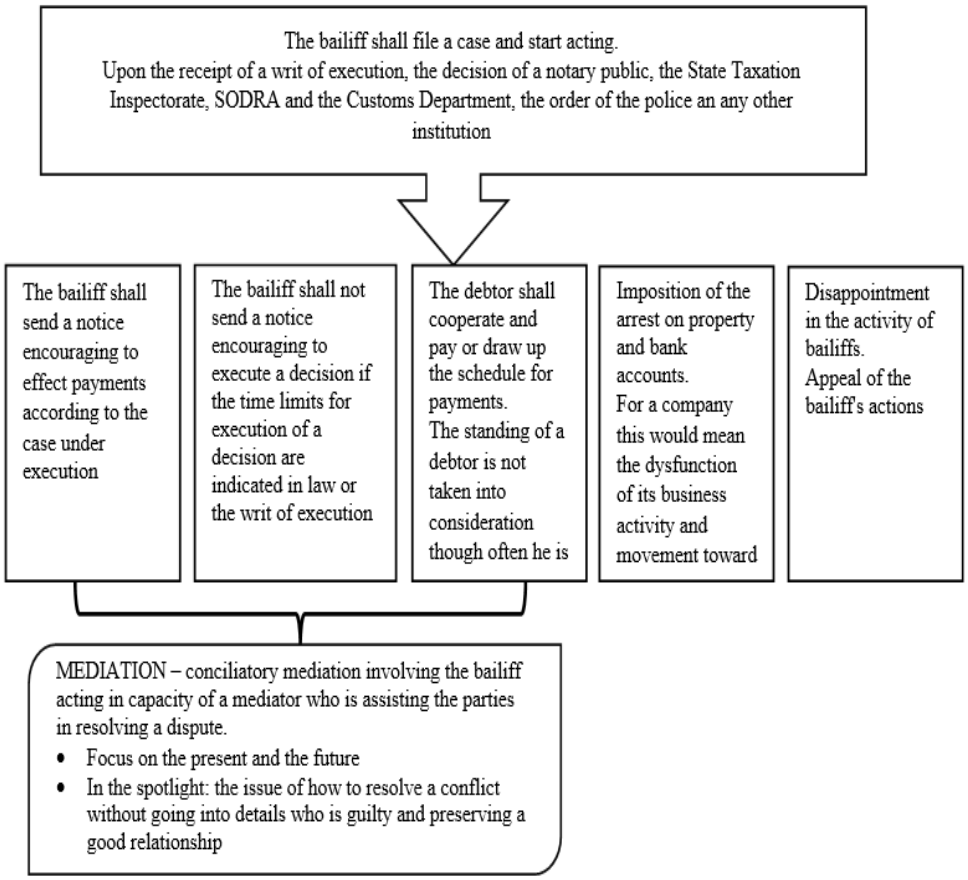

Fig. 5: Bailiffs' activity - alternative dispute resolution procedures (created by author)

In the future, courts should give sufficient attention not only to the urgent application of an action that affects the business activity to a great extent – the

imposition of the arrest on assets but also to the protection of interests of related opponents in cases. This is to be done because the absolute right of the plaintiff to apply to court can also be implemented with regard to a fair entity that has not committed any illegal actions.

In the future, bailiffs should not only carry out enforcement actions but also gradually cross over to the services of legal advice, mediation and other services assisting in out-of-court financial dispute resolution. Alternatives for enforceable execution of decisions are based on mediation, which means meaningful mediation involving a bailiff and a court official who assist the parties to a dispute in searching for a decision that is acceptable for both parties and avoiding litigation. Such a dispute regulation method is quite popular in foreign countries (Stokoe, Sikveland 2016, Sipe, Stiftel 1995). However, in Lithuania, this method still is a novelty and is not applicable. This new activity of bailiffs also requires brand new professional skills applicable to alternative dispute resolution procedures (see Fig. 5).

Bailiffs have a lot of untapped opportunities for assisting in resolving business conflicts regarding the non-repayment of debts. They can render useful legal consultations and advise companies on different asset management issues.

The services of bailiffs based on mediation should reduce anticipatory public anger concerning the institution of bailiffs, which is mainly predetermined by the "unpopular "enforceable execution of the functions performed by bailiffs.

However, the mediation performed by bailiffs does not encompass the genuine mediation in the real sense of this word – first of all, bailiffs represent an institution that executes court decisions through psychology and the ability to convince a debtor to fulfill an obligation in good faith accounts for approx. For sixty percent of their work when discharging their duties, bailiffs should be able to act so that both parties to a dispute (both the debtor and the creditor) would be satisfied. At his disposition, the bailiff has large resources and strong retaliatory measures; therefore, if the bailiff acquires other professional skills such as psychology, this would assist the parties in conciliating with due consideration of their financial standing. Anyway, recovering the share of a loan when a good relationship is preserved is better than involvement in the bankruptcy procedure and placing it on the satisfaction list of creditor's claims.

Mediation provides bailiffs with fair prospects for acting as mediators in the execution of debt liabilities. By employing this bailiff service, a company has an opportunity for out-of-court dispute resolution, which, in all events, brings benefits to both parties without losing opportunities to continue cooperation. An amicable agreement assists in avoiding litigation costs and saving precious time (economic sustainability), preserves a good relationship and diminishes hostility, stress and bad emotions (social sustainability) that are so frequently entailed by the enforcement execution procedures.

6. Conclusions

To make the public have a positive opinion toward the work of bailiffs, in his activity, the bailiff should employ conciliatory dispute resolution mediation so that the bailiff would have an intention to cooperate. This would extend the limits of competency of bailiffs and provide them with an opportunity to increase the number of services meeting the expectations of citizens rather than only applying state enforcement measures. The services of bailiffs based on mediation and advice on assets management issues should reduce anticipatory public anger concerning the institution of bailiffs, which is mainly predetermined by the "unpopular "enforceable execution functions performed by bailiffs.

Mediation offers a shorter, cheaper, easier, more efficient, and most importantly, more socially, environmentally, and economically sustainable dispute resolution method with due consideration of the wider interests of the parties to a dispute by adopting an agreement that is beneficial for both parties and is not subject to any state enforcement. However, the poor promotion of mediation in Lithuania is predetermined by insufficient information from the public and the lack of negotiation traditions and skills.

The introduction and promotion of mediation are opposed by attorneys because the litigation process in which they are involved lasts for a long period of time; there are three court instances, while the attorney's fee depends on the time spent during proceedings. Courts also do not know how mediation will affect the workload of courts. In the event of a conflict, the public tends to do or die and at any cost to reach a victory in court – to receive everything or to lose and have no regard for how their actions will impact various dimensions of sustainability.

When applying mediation, the parties to a dispute should act in good faith and intend to conciliate so that in the future, they could cooperate and be socially sustainable, rather than only be involved in the process. The fairness of the public should be brought up; this is done fragmentarily, e. g., the Mykolas Romeris University confers the title of M.A. in mediation, and attorneys who graduated from 32 academic hours courses may receive this title. The mediation expert working group of the Council of Europe suggests that mediation training should be integrated into the Lithuanian high school curriculum.

The actions performed by bailiffs do not cover genuine mediation as bailiffs, first of all, represent an institution enforcing court decisions. However, the success of their work depends on cooperation between the debtor and the plaintiff. Psychology and the art of negotiations constitute a larger share of works of bailiffs; this means the capability of convincing a debtor to discharge his obligation in good faith. Mediation provides bailiffs with fair prospects for acting as mediators in the execution of debt liabilities. Companies using this bailiff service will be provided with an opportunity for out-of-court dispute resolution without losing the opportunity for further cooperation. An amicable agreement assists in avoiding the

costs of litigation and financial hardship leading to bankruptcy enabling parties to remain economically sustainable, preserve a good relationship, save a lot of time, and cause less hostility, stress, and bad emotions that so frequently are entailed by the enforcement execution procedures, and in turn leads to social sustainability. Finally, if a conflict involves environmental issues, mediation can help solve them in a way that the contribution to sustainability would be maximized.

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