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Virtual Mediation in the Field of Intellectual Property

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Abstract

The work aims to analyze the theoretical aspects of the use of information technologies in the mediation process, as well as the aspects of its implementation. The purpose of the investigation is online mediation as a form of resolution of intellectual property disputes. In addition, the topic of study is the social relationships that arise when using information technologies and mediation to resolve civil conflicts in the field of intellectual property. The research methods used in this case are the dialectical method, the generalization method, the comparison method, the analysis method, the synthesis method, the method in administration and the deduction method, the modeling method, and the abstraction method. As a result of the study, conclusions are drawn on the state of online mediation in the real world, the benefits and potential problems of introducing virtual mediation for disputed parties, the need for support for special applications, along with the need for the introduction of online mediation at the state level to a state policy.

Keywords: chatbots; information technologies; intellectual property; online mediation; legal informatics.

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Mediación virtual en el ámbito de la propiedad intelectual

Resumen

El trabajo tiene como objetivo analizar los aspectos teóricos del uso de las tecnologías de la información en el proceso de mediación, así como estudiar los aspectos problemáticos de su implementación. El objeto de la investigación es la mediación online como forma de resolver disputas de propiedad intelectual. Además, el tema de estudio son las relaciones sociales que surgen al utilizar las tecnologías de la información y la mediación como vía para resolver conflictos civiles en el campo de la propiedad intelectual. Los métodos de investigación empleados en este caso fueron el método dialéctico, el método de generalización, el método de comparación, el método de análisis, el método de síntesis, el método de inducción y el método de deducción, el método de modelado y el método de abstracción. Como resultado del estudio, se obtuvieron conclusiones sobre el estado de la mediación en línea en el mundo actual, los beneficios y posibles problemas de la introducción de la mediación virtual para las partes en disputa, la necesidad de soporte de aplicaciones especiales, junto a la necesidad de la introducción de la mediación en línea a nivel estatal como una política de estado.

Palabras clave: chatbots; tecnologías de la información; propiedad intelectual; mediación online; informática jurídica.

Introduction

The 2020 pandemic (COVID-19) has significantly changed our lives. The coronavirus has become a trigger for the transition of processes to the virtual world. Mediation has become part of the global informatization process, which began at the end of 1990 and intensified at times into a pandemic. The new task is the adaptation of private law to the realities of today, namely — expanding the scope of private law, reforming civil law to take into account the emergence of new social relations, development of private law instruments to regulate relations, etc. (Tkalych *et al.*, 2019).

At this time, several notions are used for mediation, which has transferred into the virtual world, and other names are online mediation, virtual mediation, and IT mediation. In this article, all three notions will be used interchangeably. Thus, virtual mediation is an alternative non-judicial method of dispute resolution with a high level of efficiency, which reaches 90% worldwide. COVID-19 has brought the peaceful settlement of

disputes through mediation to the Internet. The virus forced mediators to provide their services online (IQ Decision, 2020). To ensure the efficiency of conflict resolution, the speed of internet communication in different conditions plays an important role. Ensuring the speed of the internet communication without personal participation is possible with the help of online technologies and chatbots. Given this issue, online mediation to resolve conflicts.

The mediation procedure due to its economy and efficiency, the ability to preserve the confidentiality of the conflict, the protection of the reputation of the parties, the ability to preserve the relationship between the parties for the future is becoming more common. Those with the greatest mediation are civil and commercial disputes: family disputes, disputes related to the implementation of contracts, corporate conflicts, and so on. With the development of relations in the field of information technology, intellectual property (hereinafter – IP) and the emergence of new IT-objects, the issues of their effective regulation and protection become relevant.

The specificity of the intellectual property institution and the peculiarity of intellectual property objects is their immateriality, and therefore the use of virtual mediation in such disputes is quite effective, as it allows the mediator to choose solutions without limiting the list of ways to protect the infringed right. Development of information technologies and new opportunities for dispute resolution through mediation online, through chatbots, Zoom, etc. allows to quickly resolve this type of dispute.

Thus, it is important to analyze the theoretical and problematic aspects of online mediation (IT-mediation, virtual mediation) as a way to resolve civil disputes in the field of IP, pay attention to the peculiarities of its application and analyze international experience on this issue to theoretically distinguish the positive and negative aspects of the use of mediation and the development of proposals to improve the use of mediation institutions.

Therefore, the importance of the article lies in analyzing the theoretical and problematic aspects of online mediation (computer mediation, virtual mediation) as a way to resolve civil disputes in the field of IP, pay attention to the peculiarities of its application and analyze the international experience in this regard. subject to theoretically distinguish the positive and negative aspects of the use of mediation and the development of proposals to improve the use of mediation institutions.

1. The material and method

1.1. Methodology

To study the theoretical and problematic questions of online mediation (IT-mediation) used research methods such as: the dialectical method, the generalization method, the comparison method, the analysis method, the synthesis method, the induction method and the deduction method, the modeling method, and the abstraction method.

Firstly, the generalization method allowed to combine the general theoretical aspects of the use of online mediation and the problematic aspects that the parties face during this process. Besides, the dialectical method is used to analyze the institution of mediation in its relationship and mutual development, as well as to investigate how this institution developed in resolving civil disputes in the field of IP. Furthermore, the method of comparison made it possible to compare mediation in resolving disputes in the IP field in Ukraine and abroad, highlight the features and draw attention to the positive experience of foreign countries in using online mediation in resolving IP disputes for use in Ukraine.

What is more, the method of analysis became a key method that allowed to distinguish general theoretical aspects and problematic issues of online mediation. This allowed to conduct a comprehensive study and achieve the goal of the article. Using the method of induction, conclusions were drawn on the problematic issues of the use of information technology in mediation in resolving disputes in various areas of law and clarified with the help of general problems of the problem of using online mediation in resolving disputes in the field of IP.

Also, the method of analogy allowed to analyze alternative dispute resolution and the place of online mediation, as well as the use of online mediation in different areas of law, to understand the difficulties that arise in the same conditions when resolving disputes using a mediator. Thus, an analogy was made regarding the use of online mediation in resolving labor disputes, commercial disputes, and IP disputes. Nevertheless, the modeling method helps to simulate disputes that would be appropriate in Ukraine to resolve through online mediation and to draw conclusions about what is necessary for the successful implementation of the mediation procedure.

Using the method of abstraction, online mediation was studied as an opportunity for alternative dispute resolution without considering the Ukrainian conditions of its operation. This method allowed to divert attention from the Ukrainian conditions and allowed to reveal general inconsistencies that arise during the resolution of civil disputes in the field

of IP. The methods were used both individually and together. The methods were complementary, which made it possible to study virtual mediation in the field of intellectual property from different angles.

1.2. Analysis of the Research and Findings

Mediation as a way of resolving civil disputes in the field of IP has been studied by many scholars. However, research on the aspects and problems of online mediation (IT-mediation) has not been conducted so far.

To study the selected topic, the works of the following scientists were analyzed: Kataeva (2013), Kodynets (2018), Rozhentsova (2019), Trotsyuk (2016).

Kataeva (2013) analyzed the national features of the online mediation procedure, taking into account foreign experience. This allowed the author to highlight the prospects for the development of mediation and focus on its strengths. This work helped to identify common features of mediation in Ukraine and to understand what problems the legislator, mediator, and participants in the process will face during the introduction of information technology in the mediation procedure.

Moreover, A. Kodynets (2018) analyzed the protection of intellectual property rights in the context of judicial reform. The author explores in his article the features of protection of intellectual property rights in view of the formation in Ukraine of a specialized judicial institution for consideration and resolution of disputes in this area – the High Court of IP; the problems and contradictions of the current legislation of Ukraine regulating the relations of intellectual activity are analyzed, the conclusions on the improvement of the national system of the legal protection of intellectual property are formulated. Thus, the scholar concluded that in Ukraine the necessary legal framework has been formed to ensure the implementation and guarantee of observance of the rights to creative activity, but the complexity of disputes in the field of IP, their duration, lack of common judicial approaches to resolving this category of disputes – these factors negatively affect the level of the legal protection of intellectual property. The author's work also made it possible to conclude the imperfect dispute settlement procedure in Ukraine and the need to use more expeditious methods of conflict resolution.

Rozhentsova (2019) analyzed the trends of social marketing in 2019 from chatbots to Shopping Tags, which made it possible to understand how important it is to use information technology in processes such as mediation and the need for online mediation in modern conditions.

Trotsyuk (2016) studied mediation as an alternative way of resolving disputes in the field of intellectual property is analyzed. Thus, the article explores the general principles of mediation as an alternative way to resolve disputes over intellectual property in Ukraine, identifies the goals, concepts, features and types of mediation, as well as analyzes the current state of legal regulation of mediation in Ukraine and mediation procedures in national legislation – United Nations (EU) members and the possibility of introducing information technology into the mediation procedure.

Also for writing this article, the Code of Ethics of the NAMU Mediator (2017) and the Code of Ethics of the Mediator of the Ukrainian Mediation Center (2004) and International Standards in the Field of Justice (2010), and decisions in the field of mediation (Roshen VS Kyiv Bakery and Confectionery Plant) (Liga net, 2019) and various sites where online mediator services are provided and statistical information posted on the website newjustice.org.ua.

Moreover, a deep analysis of the foreign experience was conducted by Volkova *et al.*, (2019) in their article “General characteristics of the claim in the countries of the anglo-saxon and continental law”. The authors analyzed the legal acts on civil procedure of the USA, Germany, the United Kingdom, the Netherlands, Sweden, France, and the Netherlands.

As can be seen from the analysis of the studied literature on the research topic, mediation as a way to resolve civil disputes in the field of IP is of interest to many domestic scholars, but research on online mediation (IT-mediation) is almost non-existent. This indicates the need for a comprehensive study of theoretical aspects and problematic issues of using online mediation as a way to resolve civil disputes in the field of IP.

2. Results and discussion

Before considering virtual mediation as a way of resolving civil disputes in the field of IP online, it is important to define the concept of “mediation” and the objects of IP that may be disputed.

The term “mediation” comes from the Greek term “medos”, which means neutral, independent of the party and from the Latin terms “mediatio” - mediation, and “mediare” - to be a mediator in a dispute. In modern literature, the term mediation is defined as a procedure, method, form, process, means of resolving a conflict. For alternative dispute resolution, the term is a generalized term used to describe a set of approaches and methods aimed at resolving disputes in a non-conflict manner, ranging from negotiations between the two parties, multilateral negotiations, mediation, consensus building and arbitration. In most European countries, the rules

of mediation are enshrined in a separate law (IMI MEDIATION. EU-EEA, 2019).

Mediation can be used, in particular, in the field of intellectual property. Regarding the objects of IP rights, they include literary and artistic works, computer programs, data compilations (databases), performances, phonograms, videograms, transfers (programs) of broadcasting organizations, scientific discoveries, inventions, utility models, industrial samples, arrangement of semiconductor products, innovation proposals, plant varieties, animal breeds, commercial (brand) names, trademarks (marks for goods and services), geographical indications, trade secrets (Civil Code of Ukraine, 2003).

Mediation disputes can be used to resolve IP disputes, both contractual and non-contractual:

- Disputes arising between the subjects of IP rights and users in connection with the non-performance or improper performance of agreements on the disposal of IP rights.
- Disputes arising regarding the granting of permission by the right holder to third parties to use IP (also compulsorily by court decision), and;
- disputes arising in connection with the use of the IP without the consent of the right holder.

In such disputes, mediation makes it possible to stop the offense by resolving the conflict quickly (which cannot be done in court). Objects of IP rights need a quick response to violations to stop illegal alienation (copying, distribution, reproduction, plagiarism, etc.), because time in such cases is not in favor of the subject of IP rights, whose rights have been violated.

A clear example of an alternative dispute resolution in the field of intellectual property is the settlement of a dispute between ROSHEN and Kyiv Bakery and Confectionery Plant on the right of the previous user to the image for packaging goods of the 30th class of the ICCP (cakes) - cake "Kyiv" (Liga net, 2019).

Although the procedure is not legally established, mediation in the field of IP includes:

- Signing an agreement on conducting mediation.
- A statement of the claims of the parties and possible ways of resolving the dispute.
- Search for the cause of the dispute.
- Elaboration of methods of reaching consensus, and;

- signing by the parties of the agreement on the results of mediation (Fig. 1).

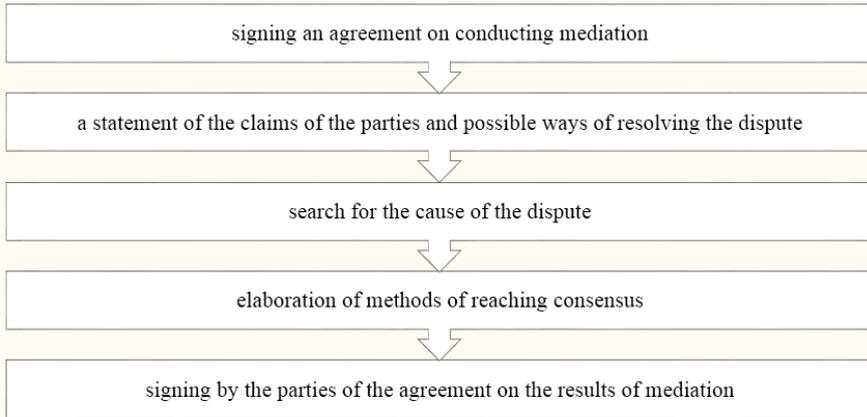


Fig. 1. The procedure of mediation in the field of IP. (own authorship)

Regarding online mediation in dispute resolution, the following should be noted.

Online mediator services are a safe way to resolve conflicts. Online mediator services are a reliable response to today’s threats. Under the quarantine due to the COVID-19 pandemic, people’s problems have not disappeared. Therefore, it is definitely necessary to solve problems and conflicts, and it should be done as quickly as possible, then there is a chance to save the most valuable thing – health and time. Online mediation helps.

The term online dispute resolution is not a separate way of resolving disputes but is associated with the transition of classic methods of dispute resolution (negotiation, mediation, arbitration, etc.) to the online space (LEGAL SUPPORT, 2020).

The development of online mediation in foreign countries is associated primarily with the promotion of e-commerce and, consequently, an increase in the number of disputes in this area, which could not be effectively resolved through classical litigation, because the parties to such disputes were usually at a considerable distance and the disputes were insignificant in order to spend money and time on litigation. In such circumstances, online mediation was an inexpensive, convenient, and affordable alternative to the courts.

This has spurred the emergence of online platforms such as the online dispute resolution platform on eBay and the Internet Corporation for

Assigned Names and Numbers, which offer mechanisms for resolving online disputes arising from cross-border transactions.

To successfully use online mediation based on textual communication technologies, a mediator must have four groups of skills in areas such as written competence, message management, relationship management, and content management.

Country	Number of civil mediations	Number of resolved mediations	Success rate, %	Number of civil cases in court	Balanced ratio index, %
Albania	790	n/d	-	15944	4,95
Armenia	6	5	83,30	n/d	-
Bosnia and Herzegovina	1931	1877	97,20	158046	1,22
Croatia	531	n/d	-	165741	0,32
Denmark	718	312	43,50	41717	1,72
Finland	1870	1209	64,70	10677	17,51
Georgia	24	11	45,80	34309	0,07
Greece	150	120	80,00	241418	0,06
Hungary	919	500	54,40	180382	0,51
Italy	183977	21397	42,20	1585740	11,60
Latvia	135	108	80,00	45127	0,30
Republic of Moldova	149	93	62,40	74562	0,20

Table 1. Success in Dealing with Civil Cases Through Mediation, data provided by <https://newjustice.org.ua/> (2019).

A virtual mediation is a process by which parties can resolve business disputes online without the need for a personal presence. Meetings are conducted via video or teleconferencing, and any form of filing is facilitated through an encrypted cloud platform accessible over the Internet. On this day, virtual mediation takes place via Zoom. The Zoom (an American platform providing remote conferencing services) is not a solely legal platform and was designed to facilitate access to hearings. Thus, several confidentiality issues arise (IQ Decision, 2020).

There are some problematic issues in the use of online mediation in legal disputes. Firstly, the question arises of verifying the authenticity of the parties and the powers of the representatives of legal entities so that agreements concluded as a result of mediation can have legal force. There is also a problem with access to technology, which is that to use online mediation, a person must have sufficient skills to work with and access the relevant software, which is not always possible. But one of the biggest challenges for online mediation is ensuring privacy.

The first developments of online dispute resolution platforms are already appearing in Ukraine, but such mediation does not prevent the resolution of disputes in the field of IP. Nevertheless, we are sure that shortly this category of disputes will be resolved online.

Analysis of the practice of regulation and application of online mediation in the field of IP in foreign countries suggests that the effective functioning of mediation is possible in the presence of legislation that regulates mediation, rights, and obligations of litigants and mediators, requirements for mediators, responsibilities mediation participants, etc.

Statistics on resolving conflicts in the civilian sphere through mediation will clearly show the size of the potential market for online mediation (Table 1).

After analyzing the indicators of countries in terms of the number of civil mediations, the number of resolved mediations, and the number of civil cases submitted to the court, the following was done. Dividing the number of mediation cases by the number of incoming cases, we obtain the “Balanced Ratio Index” (Fig. 4) between mediation and litigation. This indicator was used to assess the effectiveness of a successful mediation model in a given jurisdiction.

Further, with the help of diagrams it is possible to present the results and compare and evaluate the number of civil mediations, resolved mediations, as well as incoming cases (Fig. 2), as well as the level of the success rate in resolving disputes (Fig. 4) in the civil sphere through mediation.

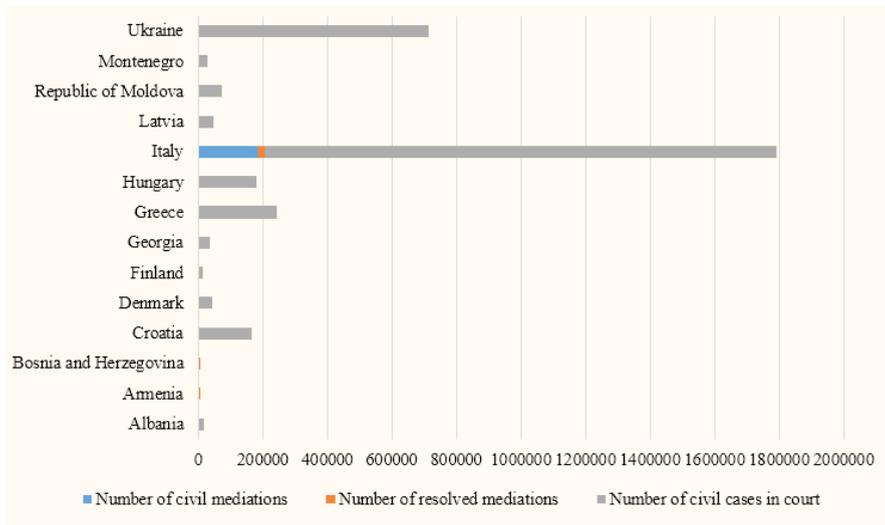


Fig. 2 The number of civil mediations, resolved mediations, as well as incoming cases, data provided by <https://newjustice.org.ua/> (2019). (prepared by the authors)

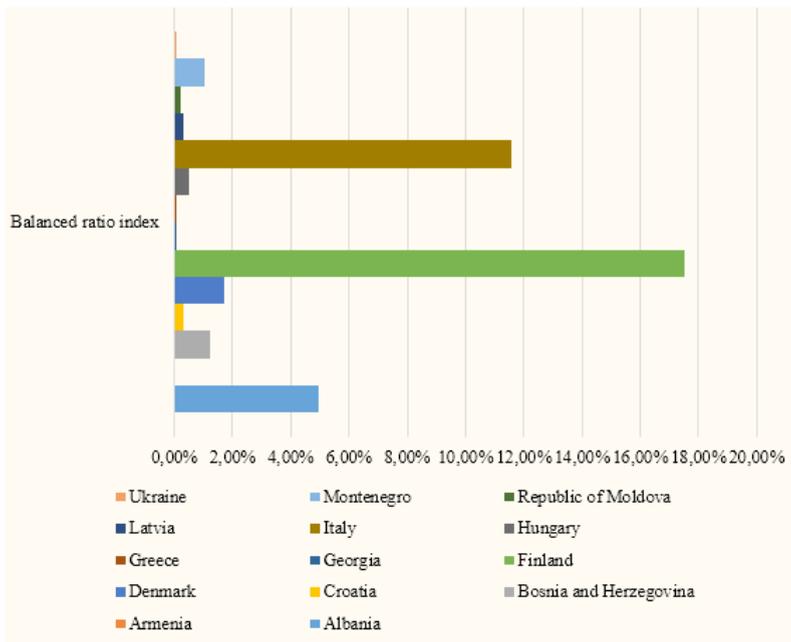


Fig. 3 Balanced Ratio Index (%), data provided by <https://newjustice.org.ua/> (2019). (prepared by the authors)

Thus, mediation as a type of alternative protection of IP in Ukraine begins its development and for further development, it is necessary to have a willingness to compromise on the part of participants and the good faith of such participants.

In the European Union, mediation is seen as the voluntary expression of the will of the parties to involve an independent party to resolve the dispute independently, during which the mediator maintains his or her impartiality and confidentiality of information. When considering the relationship between litigation and mediation, there are three types of mediation:

- Private – completely independent of the trial and is applied without further litigation.
- Accompanying the trial – initiated by the court itself, but without further judicial involvement in the resolution of the conflict, and;
- judicial mediation – is conducted during the trial and includes advice and assistance of legal advisers and lawyers but excludes the participation of a judge with legal powers.

In the field of IP, mediation can be used to:

- Resolve disputes over the protection of IP rights.
- Transfer of IP rights.
- Establishment of ownership of the invention (object of IP rights);
- copyright for the invention, etc.

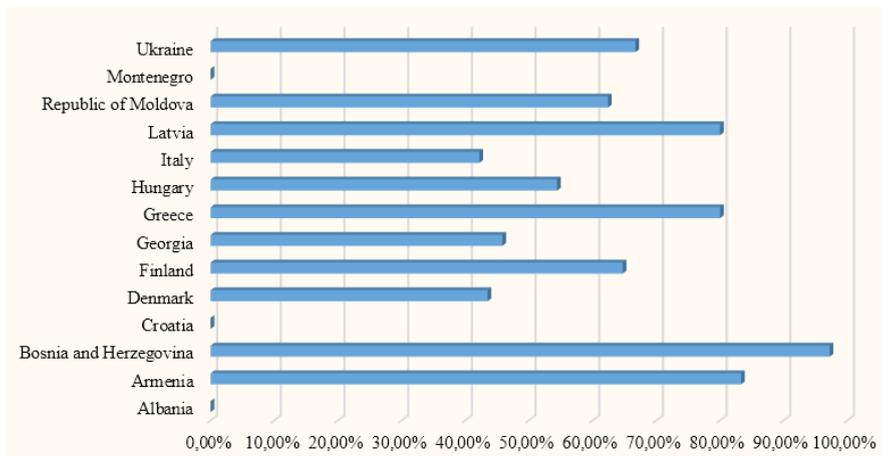


Fig. 4 The success rate in resolving disputes (%), data provided by <https://newjustice.org.ua/> (2019). (prepared by the authors).

Mediation is often preferred by large companies and enterprises, as this method of resolving disputes is beneficial to their reputation, as mediation is a private procedure that provides efficient, flexible, and cost-effective dispute resolution, which allows them to maintain commercial relations.

To comprehensively study mediation as a way of resolving IP disputes, it is important to analyze its application in foreign countries.

Mediation is an effective way to resolve disputes between the subjects of the process of clarifying the issue of illegal use of the IP that is actively used in leading countries, including the United States, Great Britain, and Australia.

The experience of the United States and the United Kingdom confirms the effectiveness of mediation in resolving disputes concerning the protection of IP rights. The United States has the Mediation Act of 2001, the National Dispute Resolution Centre (2020), and the American Arbitration Association (2020), and there are many mediation agencies. Private mediators are usually former lawyers and judges or lawyers who combine their work with that of a mediator. In the United States, in addition to a voluntary agreement, the parties are required to resolve disputes through mediation by law, court decision, or administrative authority. As for the mediation process itself in the United States, the parties are housed in separate rooms, and this allows the mediator to speak openly with each party in turn as they try to find a solution. The process begins with a preparatory (introductory) meeting, in which both parties can participate independently or with their lawyer. This stage is an extremely important part of the process, during which the parties have the opportunity to hear and assess the position of the other party before the mediation begins.

Many scholars, both from the adversaries and from the supporters of Western civilization, pay attention to the problems with which it faced at the present stage of its development (Kharytonov *et al.*, 2019). Thus, the peculiarity of mediation in the field of IP in the UK is that the courts actively encourage the parties to resolve disputes through mediation. For example, if a party refuses to mediate in court, it is obliged to pay court costs, as set out in the Rules of Civil Procedure adopted as a result of the 1998 civil justice reform.

Most IP disputes in Australia are heard in the Federal Court. The Australian Federal Court Act 1976 and the Federal Court Rules (2011) provide for the possibility of resolving disputes in the field of IP through mediation.

Regarding the legal consolidation of mediation, it should be noted that in Norway a special law on the mediation procedure was adopted in 1991, in Sweden in 2002, in the Russian Federation in 2010, and in the Republic of Belarus, the law came into force only on January 24, 2014. Even the World

IP Organization has noted the positive results of the mediation procedure in IP disputes. Within this organization, the Center for Arbitration and Mediation (2020) was established, which deals with dispute resolution through the use of alternative dispute resolution (in particular, mediation).

Thus, as a result of the analysis of theoretical aspects and problematic issues of online mediation as a way of resolving civil disputes in the field of IP, it is concluded that disputes over IP are quite complex and cover not only material but also moral aspects. An effective way to resolve disputes arising in this area is mediation. Online mediation also ensures that disputes are resolved quickly, without the obligatory personal involvement of the parties. This out-of-court way of resolving conflicts allows the parties not only to avoid financial losses but also to save their time.

As a result of researching the theoretical aspects and problematic issues of online mediation as a way of resolving disputes in the field of IP, we can conclude that the number of disputes in the field of IP increases every year and many of the controversial issues could be resolved quickly at the stage of identifying the conflict as such with the help of information technology. Thus, online mediation as an alternative type of dispute resolution can serve as an effective mechanism for regulating this category of disputes.

The coronavirus pandemic (COVID-19) has forced the transition to virtual simple and online mediation – this is something that should be used today not only at the level of private entities but also at the state level.

Conclusions

As a result of the study, the following conclusion were made.

1. Ukraine is far behind developed countries in the sphere of mediation, and especially virtual mediation. The initial steps regarding the enshrinement of the institute of mediation in Ukraine at the legislative level are connected with the adoption of the draft Law of Ukraine “On Mediation” as a basis. The adoption of this project as a law will lead to the formation in Ukraine of a European balanced system for resolving conflicts (disputes).

The effectiveness of the judicial system in Ukraine, in particular, depends on the functioning at the level of the law on alternative litigation. But the next important step should be the revision of this Law to consolidate the possibility of online mediation and provide a procedure for such settlement, services on which such settlement is possible, etc.

2. On the positive aspects of using online mediation:
 - The possibility of maintaining normal relations in the future.
 - Maintaining confidentiality (in the case of using a special app for online mediation).
 - Making a decision.
 - Save time and effort, compared to litigation.
 - The ability of the parties to the dispute to influence the outcome.
 - Privacy, as only the conflicting parties and their representatives, can be present during the mediation process.
 - Balance of interests – the interests of both parties are recognized as equal in importance.
 - Voluntary decisions.
 - Mutual benefit and interest of the parties in the implementation of the decision as a guarantee of implementation of the decision.
 - An agreement reached by the parties through online mediation has the same force as any other agreement between the parties, and;
 - ability to resolve the conflict without personal contact (especially important in quarantine).

3. The problematic issues of using online mediation:
 - Lack of proper support for the development of judicial and out-of-court online mediation.
 - Long-term implementation of the Specialized Court of Intellectual Property (in Ukraine).
 - Low level of legal regulation of the online mediation.
 - The problem of ensuring confidentiality through the introduction of online platforms.
 - The lack of legal awareness of the population about online mediation procedure, and;
 - the lack of proper technical support for all participants in the process.

4. Virtual mediation, the procedure of which is enshrined at the state level, is what the realities of today need. For example, the existing

Zoom platform does not cover all the requirements for an effective mediation process. Therefore, there is a need to create a specialized platform for the mediation procedure.

Regarding further research in the research topic, it is important to study the implementation of the Law of Ukraine “On Mediation” (with the chapter considering online mediation), to analyze the application of the above law in practice, as well as to explore the practice of online mediation as a way to resolve civil disputes in the field of IP cases.

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