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Towards sustainable civil justice: Lessons from Ukraine and Austria

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Secção I

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Towards sustainable civil justice: Lessons from Ukraine and Austria

Rumo a uma justiça civil sustentável: Lições da Ucrânia e da Áustria

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ABSTRACT: The judiciary has always been a crucial part of rule of law states and open societies, guaranteeing the right to protection, if needed, to perform and establish justice in general. Today, we face many challenges that require a more flexible and more resilient judicial mechanism aimed at achieving fair and equal justice for all amid pandemics, armed conflicts, and crises. In this article, we explore the Ukrainian experience in civil justice development, which is worth attention for many reasons. Despite the soviet inheritance's wide-reaching impact on legal development, 30 years later, novel approaches have been realized in the new Civil Procedure Code of Ukraine. Therefore, in the first part of the article, particular attention will be devoted to the dichotomy of the right of protection vs dispute resolution as the main aim of civil justice evolution in a democratic state. In the second part, we will summarize how to ensure equal access to justice amid COVID-19. Comparing the examples of Ukraine and Austria provided a basis for the concluding remarks, which allow us to contribute to furthering civil justice evolution for the next generation.
KEYWORDS: Sustainable justice; Civil procedure; Alternative dispute resolution; European civil procedure; Harmonization of civil procedure; Ukrainian-Austrian relations; Strengthening of judicial cooperation.

RESUMO: O poder judicial tem sido sempre uma parte crucial do Estado de Direito e das sociedades abertas, garantindo o direito à proteção, se necessário, para realizar e estabelecer a justiça em geral. Hoje, enfrentamos muitos desafios que exigem um mecanismo judicial mais flexível e mais resistente, destinado a alcançar uma justiça justa e igualitária para todos no meio de pandemias, conflitos armados e crises. Neste artigo, exploramos a experiência ucraniana no desenvolvimento da justiça civil, que merece atenção por muitas razões. Apesar do amplo impacto da herança soviética no desenvolvimento jurídico, 30 anos mais tarde, foram realizadas abordagens inovadoras no novo Código de Processo Civil da Ucrânia. Por conseguinte, na primeira parte do artigo, será dedicada especial atenção à dicotomia entre o direito de proteção e a resolução de litígios como o principal objetivo da evolução da justiça civil num Estado democrático. Na segunda parte, resumiremos como assegurar a igualdade de acesso à justiça no meio da COVID-19. A comparação dos exemplos da Ucrânia e da

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Áustria forneceu uma base para as observações finais, que nos permitem contribuir para promover a evolução da justiça civil para a próxima geração.
PALAVRAS-CHAVE: Justiça sustentável; Processo civil; Resolução alternativa de litígios; Processo civil europeu; Harmonização do processo civil; Relações Ucrânia-Áustria; Reforço da cooperação judiciária.

1. Introductory Remarks

Nowadays, only safety reasons may limit humans from moving around the world, even though national states and even their unions have borders. The widespread globalisation, Europeanisation, and digitalisation of law bring us new challenges, but there are new possibilities too. Therefore, a single unified approach to social relations is sought, so that well-known and widely-recognised provisions of almost any kind of legal relations can be studied and shared to implement best practices. Even the most traditional institutions have been reconsidered in recent decades, including court power and procedural issues (see Storme's Report and the 28th procedural regime, ELI-Unidroit European Rules of Civil Procedure). The Goals of Sustainable Development were announced and give us a new and essential point of contact in the contemporary world.

How can we achieve the necessary level of trust in the judiciary and establish peace and strong institutions for the next generations? To answer this, our attention has been drawn to Ukraine and Austria for the following reasons. Ukraine is a UN[3] and CE Member; therefore, Ukrainian legislation and legal doctrine are influenced by the general harmonisation of civil procedure in Europe, but the country is not in the EU yet. There are claims to support the UN Goals of Sustainable Development.[4] Economically, Ukraine is one of the largest

[3] United Nations, 'Member States'. [viewed date: 2 May 2021]. Available from: <https://www.un.org/en/member-states/>.
[4] Verkhovna Rada Ukrainy. Decree of the President of Ukraine 'On the Sustainable Development Goals of Ukraine until 2030.' 2021. [viewed date: 2 May 2021]. Available from: <https://zakon.rada.gov.ua/laws/show/722/2019>.

countries in Europe in terms of territory and population[5] but is 64th (of 190) in terms of ease of doing business.[6]

Ukraine is currently seeking EU Membership, which necessarily requires a level of judicial trust and efficiency of proceedings. The signing of the EU–Ukraine *Association Agreement*[7] set forth the priority areas of cooperation and further plans for the harmonisation of the Ukrainian legislation with the EU laws. The Free and Comprehensive Trade Area was established in 2016 and was considered a basis for the further integration of Ukraine into the internal EU market.[8] Ensuring cooperation between the EU and Ukraine in the field of justice requires strengthening the judiciary, improving its efficiency, guaranteeing its independence and impartiality, and combating corruption.[9]

Austria is a good example of a state with an efficient judiciary, and it is a pioneer in the field of e-justice,[10] especially in facilitating the procedural processes that have proved to be extremely helpful during the pandemic. More than 100 years of civil procedural law development make this state an example for reforms.

Despite this, the judicial cooperation between Ukraine and Austria has witnessed gaps, leading to delays and high costs in procedure, and it may be necessary to rethink efficient judicial cooperation.

The main aim of this research is to share the Ukrainian and Austrian experience and examine the lessons we can learn about equal access to justice in a world full of new challenges to find novel solutions and achieve sustainable

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[5] European Union. Statistics on European Neighbourhood Policy Countries: East. 2018 edition. 2018. [viewed date: 2 May 2021]. Available from: <https://ec.europa.eu/eurostat/documents/3217494/9033104/KS-02-18-351-EN-N.pdf/d7ef566c-ba67-4bf4-9b68-5adda18043c3>.

[6] International Bank for Reconstruction and Development/The World Bank. Doing Business 2020 Ukraine. 2020. [viewed date: 2 May 2021]. Available from: <https://www.doingbusiness.org/content/dam/doingBusiness/country/u/ukraine/UKR.pdf>

[7] Eur-Lex. Access to European Union Law. Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part. 2021. [viewed date: 2 May 2021]. Available from: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22014A0529%2801%29>.

[8] European Commission. 'Deep and Comprehensive Free Trade Area between Ukraine and the EU.' 2021. <http://ec.europa.eu/trade/policy/countries-and-regions/countries/ukraine/>. See also Eurostat. 'EU-Ukraine international trade in goods statistics.' 2021. [viewed date: 2 May 2021]. Available from: <https://ec.europa.eu/eurostat/statistics-explained/index.php/Ukraine-EU_-_international_trade_in_goods_statistics>.

[9] See the provisions of Art. 24 of the Agreement.

[10] Boscheinen-Duursma, H. C.; Khanyk-Pospolitak, R. Austria and Ukraine Comparative Study of E-Justice: Towards Confidence of Judicial Rights Protection. *AJEE – Access to Justice in Eastern Europe.* 2019, Issue 4, pp. 42-59.

justice. For this, we are going to analyse the national legislation of Ukraine and the EU, generalize the Ukrainian case law, define the new approaches to dispute resolution development in practice, and propose solutions to achieve equal access to justice for all. In addition, analysing the Ukrainian and Austrian experience in judicial cooperation gives us grounds to define new approaches to strengthening the judicial cooperation between the EU and Ukraine based on the example of both these states' relations.

2. General Overview of the Austrian and Ukrainian Judiciary

In the following section, we will discuss the constitutional guarantees for judges demanded in the EU and especially in national Austrian and German law. In doing so, we will indicate which aspects should be models for the Ukrainian judicial system. But first, it is useful to compare the court structure in Austria and Ukraine regarding the differences and similarities in terms of subject-matter and local jurisdiction, court structure, court staffing, and relevant procedural principles.

In both states, the judiciary is one of the three branches of government, along with the administration (executive) and the legislature (legislative). The idea of separation of powers is particularly evident in Austrian constitutional law in the organisational separation of legislative and executive bodies, as well as in the fundamental separation of the judiciary and the administration, enshrined in Art. 94 of the Federal Constitutional Law (B-VG). The judiciary (ordinary jurisdiction in civil and criminal matters) is separated from the administration in all instances. As of 1 January, the organs of the judiciary are the judges, the contributors from the people (lay judges), the judicial officers, and the auxiliary judicial organs. Pursuant to Art. 90a para. 1 of the Federal Constitutional Act (B-VG), the public prosecutors are also organs of ordinary jurisdiction.[11] In Ukraine, the judiciary consists of a system of courts of general jurisdiction, specialized jurisdiction, and Constitutional Court of Ukraine. The enforcement bodies – private and public – have existed since 2016.

Judicial independence, as a constitutional guarantee, is a crucial component of the system of separation of powers. Judges are therefore

[11] Gewaltenteilung [viewed date: 2 May 2021]. Available from: <https://www.oesterreich.gv.at/themen/leben_in_oesterreich/demokratie/1/Seite.320130.html>.

permanently appointed, not bound by instructions, not removable, and not transferable. In Austria, judges are assigned individual cases based on the fixed distribution of business. This allocation of business is determined in advance one year at a time; for example, all plaintiff parties whose surname begins with "A" are assigned to a specific judge. This ensures that each case is handled by the respective judge according to objective criteria and without any influences.[12] In Ukraine, in contrast, an automatic system functions and distributes the cases between judges.

In addition to the constitutional separation of powers and judicial independence, some procedural principles in Austria are also based on constitutional laws or constitutional, international conventions (e.g., the Convention for the Protection of Human Rights and Fundamental Freedoms). These include, in particular, the right to a lawful judge (Art. 94 B-VG; see the prerequisite for the admissibility of the legal action) and the right to a fair trial (Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms). The latter ensures the right to be heard, the principle of equality of arms, the publicity of proceedings, the right to inspect files, and the oral nature of proceedings. Similarly, Ukraine has ratified the European Convention[13] and recognised ECtHR jurisdiction.[14] Therefore, procedural principles and key elements of a right to a fair trial guaranteed by the Convention exist.

Austrian law also provides for a clear distribution of jurisdiction in civil procedure law. This results from the Jurisdiction Norm (JN) and – as far as

[12] Richter [viewed date: 2 May 2021]. Available from: <https://www.oesterreich.gv.at/themen/dokumente_und_recht/strafrecht/3/Seite.2460204.html>.

[13] Verkhovna Rada Ukrainy. The Law of Ukraine 'On the Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the First Protocol and Protocols No. 2, 4, 7 and 11 to the Convention.' 2021. [viewed date: 2 May 2021]. Available from: <https://zakon.rada.gov.ua/laws/show/475/97-вр>. Later, the Verkhovna Rada ratified Protokol No. 6 by the Law of Ukraine 'On the Ratification of Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms' concerning the abolition of the death penalty. [viewed date: 2 May 2021]. Available from: <https://zakon.rada.gov.ua/laws/show/1484-14> and Protocols No. 15 and 16 by the Law 'On the Ratification of Protocols No. 15 and No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms.' [viewed date: 2 May 2021]. Available from: <https://zakon.rada.gov.ua/laws/show/2156-19>.

[14] See Verkhovna Rada Ukrainy.'The Law of Ukraine 'On the Enforcement of Decisions and the Application of the Case Law of the European Court of Human Rights'.' 2021. [viewed date: 2 May 2021]. Available from: <https://zakon.rada.gov.ua/laws/show/3477-15>. See also the general case-law overview of the Ukraine at the European Court of Human Rights. 'Ukraine.' [viewed date: 2 May 2021]. Available from: <https://www.echr.coe.int/Documents/CP_Ukraine_ENG.pdf>.

international jurisdiction is concerned – additionally from section 27a JN from the relevant European regulations or international conventions.[15] In Austrian civil proceedings, the principle of the three-tier court system applies, as it has in Ukraine since 2017.

In Austria, in the first instance, either a regional court or a district court has subject-matter jurisdiction (section 49 – 64 JN). The principle applies that for amounts in dispute of more than 15,000.00 EUR, the regional courts have subject-matter jurisdiction at first instance (see section 50 JN), whereas for amounts in dispute of up to 15,000.00 EUR, the district courts have subject-matter jurisdiction (section 49 para. 1 JN; so-called value jurisdiction, "Wertzuständigkeit"). The cases of so-called own jurisdiction ("Eigenzuständigkeit") make an exception to this principle (section 49 para. 2 JN). In the case of personal jurisdiction, it is not the amount in dispute that determines the type of court responsible but the specific nature of the dispute. Thus, for example, proceedings to disturb possession, matrimonial proceedings, or inventory disputes belong before the district courts, regardless of the amount in dispute. In contrast, disputes under company law or competition cases are decided by the regional courts as commercial courts (section 51 JN; causal jurisdiction, "Kausalgerichtsbarkeit").

If a district court decides in the first instance, the appeal is directed to the regional court. If a regional court has ruled at first instance, the appeal is directed to the competent higher regional court. The Supreme Court always decides on the appeal as the third and final instance.

The local jurisdiction (section 65 - 104 JN) determines which of several courts of the same kind must settle a certain case (place of jurisdiction). Austrian law distinguishes between general jurisdiction (section 65 - 75 JN), which exists in case of doubt for all actions against a person located in Austria, and special jurisdiction (section 76 - 104 JN). In the case of special jurisdictions, a distinction is again made between elective jurisdictions, which exist in addition to the ordinary jurisdiction, and exclusive jurisdictions, which supersede the

[15] E.g., Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

ordinary jurisdiction. The general place of jurisdiction is the domicile, seat, or habitual residence of the defendant (section 66 JN).

In Ukraine, since 2017, two action proceedings were introduced – the general procedure for action and the simplified procedure.[16] Despite this, the criteria for case consideration in one or other procedure are very complicated. These include not only amount limits of the case but a set of rules concerning, in particular, the meaning of the case for the claimant. The principle of proportionality in Ukrainian legislation makes it very difficult. Proceedings for issuing court orders and specific proceedings for rights protection exist. In particular, child adoption and capacity matters are considered in separate proceedings in Ukraine. Generally, the principle of competitiveness is not applied to these trials. Nevertheless, the difficulties with the enforcement of decisions in Ukraine seems make null and void all the reforms of judiciary.

Finally, it should be mentioned that Austrian civil procedure law distinguishes between contentious civil proceedings, which are governed by the Austrian Code of Civil Procedure, and non-contentious proceedings, which are governed by the Non-Contentious Proceedings Act (Außerstreitgesetz).[17] Pursuant to section 1 para. 1 of the Non-Contentious Proceedings Act (Außerstreitgesetz), the non-contentious proceedings (Außerstreitverfahren) are applied in those civil law cases for which this is ordered by law. Unless otherwise ordered, the General Provisions of this Federal Act also apply to non-contentious proceedings governed by other statutory provisions (section 1 para. 2 of the Non-Contentious Proceedings Act). Pursuant to section 104a JN, unless otherwise provided, the district courts have subject-matter jurisdiction at first instance in non-contentious matters. Non-contentious proceedings do not have a plaintiff and a defendant, but only an applicant and persons, who have interest in the case. In some proceedings, such as divorce by mutual consent, two applicants are also possible. While civil litigation follows a formal concept of parties, the substantive concept of parties applies in non-contentious proceedings. Anyone who has a purely legal interest in the non-contentious

[16] See Izarova. I. Reform of Civil Justice in Ukraine: A Differentiation of Action Proceedings and Review of Court Decisions. *Teise (Law)*. 2019, Vol. 111, pp. 234-245. <https://doi.org/10.15388/Teise.2019.111.14>.

[17] Bundesgesetz über das gerichtliche Verfahren in Rechtsangelegenheiten außer Streitsachen (Außerstreitgesetz – AußStrG), BGBl. I Nr. 111/2003, NR: GP XXII RV 224 AB 268 S. 38., BR: AB 6895 S. 703.

proceedings is a party. In civil proceedings, decisions on the merits are always made in the form of a judgement. In non-contentious proceedings, decisions are made in the form of orders. Judicial officers are involved in many areas in non-contentious proceedings, especially at first instance. Other procedural principles apply in non-contentious proceedings, in particular the official maxim and the principle of investigation.

3. Dispute Resolution: Achieving Peace and Strong Institutions by Changing Civil Justice

In recent years, dispute resolution in civil procedure law has been steadily gaining importance. Thus, dispute resolution was established in the ELI-Unidroit Model Rules of Civil Procedure as the main goal of civil procedure.[18] The same was done in the modern Code of Civil Procedure of Quebec 2016.[19]

Therefore, the focus is shifting from a case approach, or legal protection, to dispute resolution. A similar development can be seen in Austrian civil procedure law. Although the Austrian judicial system is very efficient, it can take years before a legal dispute is concluded by a judgement, and the asserted claim can be enforced by executive action. It is precisely the uncertainty about the outcome of the proceedings, the costs of the proceedings, and the expected duration of the proceedings that poses a problem for parties that cannot be remedied, even through legal adjustments to the procedural law. In addition, a judicial settlement can permanently impair the resulting climate of discussion for the parties to the dispute. This can lead to lasting tensions, especially if the parties to the dispute must maintain further contact in the future (e.g., disputes within the family or with neighbours). Therefore, it makes sense to consider amicable ways of settlement before initiating court proceedings.

For more than 100 years, section 433 of the Austrian Code of Civil Procedure (ZPO[20]) has provided for the possibility of a so-called “pre-trial (praetorian) settlement’ (“prätorischen Vergleich”): *“Any person intending to*

[18] ELI-Unidroit Model Rules of Civil Procedure [viewed date: 2 May 2021]. Available from: <https://www.unidroit.org/instruments/civil-procedure/eli-unidroit-rules>.
[19] Code of Civil Procedure [viewed date: 2 May 2021]. Available from: <http://legisquebec.gouv.qc.ca/en/showDoc/cs/C-25.01?&digest=>.
[20] Gesetz vom 1. August 1895, über das gerichtliche Verfahren in bürgerlichen Rechtsstreitigkeiten (Zivilprozessordnung – ZPO), RGBl. Nr. 113/1895

bring an action shall be entitled, before bringing the action, to apply to the district court of the opponent's place of residence for a summons to that court for the purpose of an attempt to reach a settlement. In places where there are several district courts, such a summons may also be issued to all persons who have their domicile in that place, although outside the jurisdiction of the competent district court." Through the praetorian settlement, an agreement can be reached between the parties without the dispute being treated as an action before the court. However, the court is already involved in the process. The praetorian settlement attempt can be applied for at the office of the district court ("Amtstag") before the actual action. The opponent then receives a summons to a settlement attempt at court. However, the opponent does not have to comply with this summons. If the summoned party does not appear for the settlement attempt or if the parties cannot reach an agreement, a lawsuit can be filed. However, if the summoned person appears at court and the parties reach an agreement, the dispute is settled. The filing fee with the court for a pre-trial settlement is only half of the filing fee for a lawsuit. The fee depends on the amount in dispute (the higher the amount in dispute, the higher the fee).[21]

The objective of dispute resolution was further upgraded and anchored in the law in the course of the amendment to the Austrian Civil Procedure Act (Zivilverfahrens-Novelle - "ZVN") 2002.[22] In the course of this, section 258 para. 1 subpara. 4 of the Austrian Code of Civil Procedure (ZPO)[23] stipulates that an attempt to reach a settlement must be made at the preparatory hearing – the first date of the oral proceedings – in every civil case. That means that even if a legal dispute is already pending, Austrian civil procedural law makes it mandatory for the judge to discuss the possibility of a settlement with the parties at the first hearing of the oral dispute.[24] At the beginning of the legal dispute, when the costs of the proceedings are still manageable, a settlement can be a quick and advantageous solution for both parties, especially since it makes the

[21] Prätorischer Vergleich (Vergleich vor dem Bezirksgericht) [viewed date: 2 May 2021]. Available from: <https://www.oesterreich.gv.at/themen/dokumente_und_recht/zivilrecht/1/Seite.1010160.html>.
[22] Zivilverfahrens-Novelle 2002 [viewed date: 2 May 2021]. Available from: <https://www.parlament.gv.at/PAKT/VHG/XXI/I/I_00962/index.shtml>.
[23] *"…the making of an attempt at settlement and, in the event of its failure, the discussion of the further progress of the process and the announcement of the process programme…"*
[24] Section 258 para. 1 No. 4 Zivilprozessordnung (ZPO; Austrian Civil Procedure Code), RGBl. Nr. 113/1895.

litigation risk calculable. However, a settlement is also possible at a later stage of the proceedings, although it is less attractive due to the costs involved. A quick settlement is also preferable for the judiciary, as judicial resources are not tied up for months or even years by court proceedings.

The Federal Act on Mediation in Civil Matters (Zivilrechts-Mediations-Gesetz - ZivMediatG) represents a further step in the direction of dispute resolution.[25] Mediation (amicable settlement) is a procedure for the out-of-court resolution of conflicts in the private, professional, economic, and ecological spheres. The parties work out optimal solutions together on their own responsibility.[26] Mediation thus serves to avoid civil litigation. If the parties find a common solution in the course of a successfully conducted mediation, the mediation ends with an out-of-court settlement. Otherwise, the parties can still take legal action.

According to section 1 para. 1 ZivMediatG, mediation is an activity based on the voluntary participation of the parties, in which a professionally trained, neutral mediator systematically promotes communication between the parties using recognised methods with the aim of facilitating a solution to their conflict for which the parties themselves are responsible. Mediation in civil law cases is mediation for the resolution of conflicts for which the ordinary civil courts have jurisdiction as such.[27]The all-party mediators lead the talks and are responsible for the framework and the course of the mediation. They ensure that fairness and the mediation rules are observed. They are obliged to maintain confidentiality about the facts that have been entrusted to them or otherwise become known to them in the course of the mediation. The mediators are selected by the parties themselves. Anyone who is or has been a party, party representative, advisor, or decision-making body in a conflict between the parties may not act as a mediator in that conflict.[28] The list of registered mediators is kept by the Federal Ministry of Justice. In addition to a corresponding application and a minimum age of 28 years, the prerequisite for

[25] BGBl. I Nr. 29/2003, NR: GP XXII RV 24 AB 47 S. 12., BR: AB 6780 S. 696

[26] Rechtsgrundlagen [viewed date: 2 May 2021]. Available from: <https://www.oesterreich.gv.at/themen/familie_und_partnerschaft/scheidung/Seite.100800.html #Rechtsgrundlagen>.

[27] Section 1 para. 2 ZivMediatG.

[28] Rechtsgrundlagen [viewed date: 2 May 2021]. Available from: <https://www.oesterreich.gv.at/themen/familie_und_partnerschaft/scheidung/Seite.100800.html #Rechtsgrundlagen>.

entry in this list is proof of professional qualification, proof of trustworthiness (criminal record certificate), liability insurance for the mediator, and information on where the mediator will exercise his/her activity. Furthermore, registered mediators must complete training.[29]

Mediation takes place in several phases.[30] In the preliminary phase, the mediator endeavours to create a basis for discussion, explains the objectives, process, and rules of mediation, and concludes a mediation agreement with all parties. This also agrees on costs, cost-sharing, any conditions, deadlines (if applicable), dates, and rules of discussion. In the first phase, the mediator creates a trust-building atmosphere for the discussion, and each party is given the opportunity to present their point of view. The mediator works out the different views of the conflict without evaluating them and draws up a list of issues. In the second phase, conflict management begins. Here, the parties express their feelings. The underlying interests, needs, and goals of the parties are concretised. In the third phase, all possible, conceivable solutions are sought on the basis of the wishes and goals of the parties involved, and all ideas and variants are collected without evaluation. The aim of the fourth phase is for all options found to be evaluated jointly by the participants and to be checked for their feasibility and durability. The result is to select from the remaining options the one that brings the greatest benefit or profit to all and meets with everyone's approval. After a possible additional external review by experts, a mediation contract is drawn up in writing in the fifth phase, which is signed by all participants. It is also possible to agree on an evaluation (follow-up) to see whether the results meet or have met the goals and expectations or to improve details.[31]

Mediation has advantages over civil litigation. It is usually a less expensive alternative. It also saves time because the result is usually achieved more quickly than in civil proceedings. Mediation is always a voluntary process on

[29] Rechtsgrundlagen [viewed date: 2 May 2021]. Available from: <https://www.oesterreich.gv.at/themen/familie_und_partnerschaft/scheidung/Seite.100800.html #Rechtsgrundlagen>.

[30] Rechtsgrundlagen [viewed date: 2 May 2021]. Available from: <https://www.oesterreich.gv.at/themen/familie_und_partnerschaft/scheidung/Seite.100800.html #Rechtsgrundlagen>.

[31] Rechtsgrundlagen [viewed date: 2 May 2021]. Available from: <https://www.oesterreich.gv.at/themen/familie_und_partnerschaft/scheidung/Seite.100800.html #Rechtsgrundlagen>.

both sides. The solution itself comes from the parties involved themselves, which is why they usually perceive this solution as fair and justified. Mediation also offers the possibility of re-establishing a constructive climate of discussion characterised by mutual respect. It impresses with its clearly structured conflict analysis and involves the rapid recognition, correct action towards, and resolution of conflicts. By means of optimal solution strategies, it is possible to resolve a conflict quickly and satisfactorily for both parties. The sustainability of the problem-solving process results in a situation from which all parties benefit. The advantages of mediation have also been recognised by the legislator and have already been integrated into many areas (family, neighbourhood, labour, etc.).[32] Of course, mediation cannot completely replace civil proceedings, as it presupposes that both parties participate in mediation voluntarily. In the case of completely antagonistic litigants or cases which, according to the parties' knowledge, depend on purely legal issues, civil proceedings remain the most suitable procedure. As already mentioned in the introduction, however, the possibility of a court settlement still exists at any time.

In Austrian law, in addition to mediation, there is also the possibility to turn to a conciliation board in many areas.[33] Since 9 January 2016, consumers can turn to eight state-recognized dispute resolution bodies in almost all contractual consumer disputes with an Austrian company.[34] These eight bodies offer out-of-court dispute resolution procedures in Austria under the Alternative Dispute Resolution Act. This ensures that these procedures are subject to high legal quality criteria. In particular, it is guaranteed that the out-of-court proceedings of a conciliation body are conducted before an impartial and independent conciliator, usually free of charge, quickly (within 90 days), and confidentially. Participation in the procedure is always voluntary for consumers and usually

[32] Rechtsgrundlagen [viewed date: 2 May 2021]. Available from: <https://www.oesterreich.gv.at/themen/familie_und_partnerschaft/scheidung/Seite.100800.html#Rechtsgrundlagen>.

[33] Pursuant to Section 4(1) of the Alternative Dispute Resolution Act (AStG), Federal Law Gazette No. 105/2015, the following eight bodies exist for out-of-court settlement of disputes: the Arbitration Board of Energie-Control Austria; the Telecommunications conciliation board of Rundfunk und Telekom Regulierungs-GmbH; the Postal conciliation board of Rundfunk und Telekom Regulierungs-GmbH; the Passenger Rights Agency; the Joint Conciliation Board of the Austrian Banking Industry; the Internet Ombudsman; the Ombudsman's Office for Prefabricated Houses and Arbitration for consumer transactions.

[34] Federal Act on Alternative Dispute Resolution in Consumer Matters (Alternative Dispute Resolution Act, AStG).

voluntary for businesses. The aim of proceedings before such a conciliation board is to settle disputes amicably. The conciliation board itself does not make any binding decision.[35] In summary, it should be noted that Austrian law both provides procedures for out-of-court dispute resolution and, in a pending civil case, attaches great importance to dispute resolution by forcing a court settlement.

We now shift the attention to the new Code of Civil Procedure of Ukraine, in which an attempt to reconsider the object of the judicial activity was made; that is, the procedure of dispute resolution with a judge was introduced.[36] Therefore, new possibilities of peaceful dispute resolution without the decision of a judge appeared and transformed the traditional aim of civil procedure – the protection of rights – which had been in place in Ukrainian legislative acts for the last century. Nevertheless, in Ukraine, we still have no out-of-court or any other obligatory procedure for dispute resolution like a "pre-trial (praetorian) settlement." It is worth noting that in Ukraine, we have a long tradition of peaceful settlement of disputes,[37] which should return to wider usage.

The Constitution of Ukraine was amended in 2016 by provisions about the obligatory dispute settlement prescribed by law, but still, there are no laws adopted with such provisions. The failure to adopt these laws has led to a less efficient system of dispute resolution. The only exception is preparatory hearings when a judge is obliged to ask parties if they wish to settle their dispute or to shift to the proceeding of the dispute resolution with a judge's participation. Today, in Ukraine, there is no legal regulation of mediation, even though at least 30 private and public organisations of mediators function on completely voluntary grounds. Links between the court and mediators have not been established yet. Family mediation is the only exception and appears in the

[35] Außergerichtliche Streitschlichtung für Verbraucher [viewed date: 2 May 2021]. Available from: <https://www.oesterreich.gv.at/themen/dokumente_und_recht/zivilrecht/1/1/Seite.1010144.html>.

[36] Izarova, I. Reform of Civil Justice in Ukraine: A Differentiation of Action Proceedings and Review of Court Decisions. *Teise (Law).* 2019, Vol. 111, pp. 234-245. <https://doi.org/10.15388/Teise.2019.111.14>.

[37] See Izarova, I.; Nekrošius, V.; Vėbraitė, V.; Prytyka, Yu. Legal, Social and Cultural Prerequisites for the Development of ADR Forms in Lithuania and Ukraine. *Teise (Law)*. 2020, Vol. 116, pp. 8-23. <https://doi.org/10.15388/Teise.2020.116.1>.

new version of the Law of Ukraine "On Social Services" 2019.[38] According to this, mediation is a basic social service available for persons. The content, scope, conditions, and procedure for providing social mediation and indicators of its quality for entities of various forms of ownership and management that provide such a service are defined by the State Standard of Social Mediation Service (mediation). It bears witness to the social request for peaceful dispute resolution.

All these factors minimise the efficiency of the Ukrainian civil procedure compared to the results of the Austrian model of dispute resolution. In contrary, facilitating the peaceful settlement give us additional fruits, because it means absence of enforcement. This leads to transforming the post-soviet judicial system in a more resilient way.

4. Judicial Cooperation of Ukraine and Austria

Ukraine and Austria are parties to the 1954 Convention on Civil Procedure,[39] with Austria being a signatory to the Convention. At the same time, Ukraine has also been a party to the Convention on the Service of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 1965[40] since 2001, while Austria signed it only on 22 November 2019 (ratified on 14 July 2020). The Convention on the Transfer of Evidence Abroad in Civil or Commercial Matters of 1970[41] has not been signed by Austria, while Ukraine has applied it since 2001.[42]

[38] Law of Ukraine. 'On Social Services' dated 17 January 2019 No. 2671-VIIIY. [viewed date: 2 May 2021]. Available from: <https://zakon.rada.gov.ua/laws/show/2671-19#Text> and state standard of social mediation service, approved by the Order of the Ministry of Social Policy of Ukraine dated 17 August 2016 under No. 892 (as amended from 07.08.2017). [viewed date: 2 May 2021]. Available from: <https://zakon.rada.gov.ua/laws/show/z1243-16#Text>.

[39] Status Table Convention of 1 March 1954 on civil procedure [viewed date: 2 May 2021]. Available from: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=33>.

[40] Conventions, protocols and principles [viewed date: 2 May 2021]. Available from: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=17)>.

[41] Conventions, protocols and principles [viewed date: 2 May 2021]. Available from: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=82)>.

[42] See more about Ukraine and the EU member states judicial cooperation here: Izarova, I. Enhancing judicial cooperation in civil matters between the EU and Ukraine: first steps ahead. In: A. Trunk and N. Hatzimihail, eds. *EU Civil Procedure Law and Third Countries: Which Way Forward?* Germany: Hart Publishing, 2021, pp. 191-212.

The Agreement on Civil Procedure of 1970[43] is in force between Ukraine and Austria and is applied by way of succession in accordance with the Law of Ukraine 'On Succession of Ukraine, 1991' and the provisions of the Vienna Convention on the Succession of States to Treaties, 1978.[44] According to this Agreement, judicial and extrajudicial documents in civil cases, as well as receipts of service, are sent through diplomatic channels (Art. 2).

The generalization of Ukrainian case law related to the Republic of Austria includes an analysis of more than 36 court decisions and court orders. The list of cases with a foreign element related to the Republic of Austria considered by the courts of Ukraine includes the following: 1) on divorce with citizens of Austria, on determining the child's habitual residence, on deprivation of parental rights;[45] 2) on the recognition and granting of permission to enforce the decision of a foreign court;[46] 3) decisions on the service of documents on the territory of Austria and the collection of evidence (more details below).

In some cases, lawyers are involved in the interests of Austrian citizens.[47] The decision does not specify whether the Austrian citizen, in the interests of which the lawyer applied, had been notified according to judicial procedure.

In a case on recognition and granting permission to enforce the decision of a foreign court, namely, the Commercial Court of Vienna on debt collection,[48] the Ministry of Foreign Affairs of Ukraine sent to the court the confirmation of service of documents, copies of summons, a copy of court resolution, and other

[43] The Agreement on Civil Procedure of 1970 [viewed date: 2 May 2021]. Available from: <https://zakon.rada.gov.ua/laws/show/040_013#Text>.
[44] Austria. Ministry of Justice of Ukraine [viewed date: 2 May 2021]. Available from: <https://minjust.gov.ua/m/avstriya>.
[45] Decision of the Amur-Nyzhniodnistrovskyi District Court of Dnipropetrovsk on divorce [viewed date: 2 May 2021]. Available from: <https://reyestr.court.gov.ua/Review/72941304>; decision of the Prymorskyi District court of Odesa on divorce and determination of the child's habitual residence [viewed date: 2 May 2021]. Available from: <https://reyestr.court.gov.ua/Review/70772349>, later in the same case the defendant was deprived of parental rights by the decision of the Prymorskyi District court of Odesa [viewed date: 2 May 2021]. Available from: <https://reyestr.court.gov.ua / Review / 76483970>.
[46] Decision of the City of Vienna on debt collection [viewed date: 2 May 2021]. Available from: <https://opendatabot.ua/court/89304954-7bd00e05e9dd2ad81339e6d50ef7ff8d>, and the decision of the appellate court, which left the decision unchanged [viewed date: 2 May 2021]. Available from: <https://reyestr.court.gov.ua/Review/92492968>.
[47] Decision of the Zhovtnevyi District Court of Zaporizhia on the recovery of unreasonably acquired funds [viewed date: 2 May 2021]. Available from: <https://reyestr.court.gov.ua/Review/79741330>.
[48] Judgment of the court, case No. 711/9628/19 [viewed date: 2 May 2021]. Available from: <https://opendatabot.ua/court/89304954-7bd00e05e9dd2ad81339e6d50ef7ff8d>, as well as the decision of the appellate court, which left the decision unchanged [viewed date: 2 May 2021]. Available from: <https://reyestr.court.gov.ua/Review/92492968>.

documents.[49] It is worth noting that the decision of the Vienna court was passed on 19 December 2014, and the decision of the Ukrainian court on its implementation was still unchanged on 27 October 2020 (five years and ten months later), with the Ukrainian court dismissing the debtor's representative's application for adjournment due to the quarantine, stating that the court had duly organised a video conference at which the debtor or his representative – a professional lawyer – could have appeared.

Quite often during the consideration of cases, the courts of Ukraine accept as evidence written documents issued by various authorities of Austria to the parties to the case and their copies, in particular a decision of a primary school, a reference letter from a school, a decision of the Head of a primary school of the Republic of Austria; a certificate from the central population register of the municipality of the Republic of Austria on registration at the place of residence; a certificate of the Medical Clinic of the Republic of Austria; a marriage certificate issued by the Registry Office for citizenship of the Republic of Austria; certificates (reference letters) from places of work in Austria;[50] records of the Vienna Regional Registry Office;[51] a death certificate issued by the Registry Office of the city community of the Republic of Austria during the treatment; a copy of an extract from the church book of one of the cities of the Republic of Austria.[52]

In one case, the court of Ukraine took into account the testimony of a witness, officially approved by a lawyer.[53]

The courts of Ukraine have applied to Austrian bodies with instructions to take procedural actions, in particular, in the following cases:

1) The Korosten City District Court of Zhytomyr region, in its decision, requested the authorised court of the Republic of Austria at the place of residence of the defendant to serve him a copy of the statement

[49] Judgment of the court, case No. 711/9628/19 [viewed date: 2 May 2021]. Available from: <https://opendatabot.ua/court/92492967-4f40a37a0f0ce9fad8962937cbb3ce80>.
[50] In particular, see the decision of the Zhovtnevyi District Court of Zaporizhia [viewed date: 2 May 2021]. Available from: <https://reyestr.court.gov.ua/Review/93690741>.
[51] See the decision of the Vynohradiv District Court of the Zakarpattia Region [viewed date: 2 May 2021]. Available from: <https://reyestr.court.gov.ua/Review/79642880> and also <https://reyestr.court.gov.ua/Review/21520730>.
[52] Decision of Kremenchutskyi court of Poltava Region [viewed date: 2 May 2021]. Available from: <https://reyestr.court.gov.ua/Review/25399474>.
[53] See the decision of the Zhovtnevyi District Court of Zaporizhia [viewed date: 2 May 2021]. Available from: <https://reyestr.court.gov.ua/Review/93690741>.

of claim and a copy of the decision to initiate proceedings, as well as to acquire from the defendant explanations on the following issues: whether he admits the claims or if not, in which part and why; what he can explain regarding the essence of the claims; whether he agrees that the case can be heard in his absence or wishes to participate in the trial (with a specified date and place), or on another day and time determined by the court.[54]

2) The Mykolayiv District Court of the Lviv Region, in its decision, applied to the Competent Authority of the Republic of Austria with a request to obtain information on the location, stay, and residence of the defendant in the case.[55]

3) The Shevchenkivskyi District Court of Kyiv,[56] in its decision, states that on 2 July 2019, the court received a response to its request to a banking institution of the Republic of Austria – UniCredit Bank Austria AG – for receipts and their copies with a notarized signature of the translator. The request was sent on 28 May 2019 to the banking institution to find out the status of the bank account, as well as the purpose and the beneficiary of incoming payments.[57]

These requests to the courts and authorised bodies of the Republic of Austria contain both instructions for the service of court documents and instructions for the transfer of evidence (the collection of explanations from the parties).

There is no single approach in the case law of the courts of Ukraine to determine the procedure for translating court documents into the official language of the Republic of Austria. In particular, some courts of Ukraine oblige the parties by their rulings to provide a certain number of duly notarised copies (one for each of the defendants) of the translation in the official language of the Republic of Austria (German) of the statement of claim with appendices,

[54] Korosten City District Court of Zhytomyr region's decision [viewed date: 2 May 2021]. Available from: <https://reyestr.court.gov.ua/Review/82384714>.
[55] Mykolayiv District Court of the Lviv Region's decision [viewed date: 2 May 2021]. Available from: <https://reyestr.court.gov.ua/Review/77891127>.
[56] Shevchenkivskyi District Court of Kyiv's decision [viewed date: 2 May 2021]. Available from: <(https://reyestr.court.gov.ua/Review/86432716>.
[57] Shevchenkivskyi District Court of Kyiv's order [viewed date: 2 May 2021]. Available from: <https://reyestr.court.gov.ua/Review/69219830>.

applications on changing the subject of the claim, and the decision to open proceedings in the case, with apostille.[58]

Some courts instruct the Territorial Department of the State Judicial Administration (TDSJA) in their area to ensure the translation into German of copies of the decision to open proceedings, summons, power of attorney of service of documents, notice of the day of the hearing, confirmation of service of documents, or instructions for the implementation of certain procedural actions in a particular case. This may be done by the conclusion of an agreement with the translator at the discretion of the TDSJA, etc.[59]

In some cases, the courts oblige the Ministry of Justice of Ukraine to ensure the diplomatic transfer of documents of a company registered and located in Austria.[60] There are also cases in which the courts allow procedural documents certified by the Consul of Ukraine in the Republic of Austria – in particular, the written application for consideration of the case in the absence of a person, stating that the defendant acknowledges the claims and does not object to their satisfaction.[61]

The e-Codex (https://www.e-codex.eu/faq-e-codex) is also starting to function in the EU, which will significantly speed up the exchange of judicial and extrajudicial documents between the courts of the EU Member States, as well as provide significant cost savings for cross-border litigation.[62] It will be worth trying to apply it to relations with third states, especially to the relations of

[58] See the decision of the Rivne District Court of Rivne region [viewed date: 2 May 2021]. Available from: <https://reyestr.court.gov.ua/Review/63930918>, as well as the decision of the Kyiv District Court of Odesa [viewed date: 2 May 2021]. Available from: <https: //reyestr.court.gov.ua/Review/80886654>.

[59] See the decision of the Leninskyi district court of Mykolayiv [viewed date: 2 May 2021]. Available from: <https://reyestr.court.gov.ua/Review/46774690>.

[60] Decision of the Kyiv District Court of Odesa [viewed date: 2 May 2021]. Available from: <https://reyestr.court.gov.ua/Review/80886654>.

[61] Local court decision [viewed date: 2 May 2021]. Available from: < https://reyestr.court.gov.ua/Review/88558574>.

[62] Proposal for a Regulation of the European Parliament and of the Council on a computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system) and amending Regulation (EU) 2018/1726 (Text with EEA relevance) {SEC(2020) 408 final} - {SWD(2020) 541 final} - {SWD(2020) 542 final} [viewed date: 2 May 2021]. Available from: <https://ec.europa.eu/info/sites/default/files/law/contribute_to_law-making/documents/e-codex-main-act-en.pdf> and Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) {COM(2018) 379 final} - {SEC(2018) 272 final} - {SWD(2018) 286 final} [viewed date: 2 May 2021]. Available from: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2018:0287:FIN:EN:PDF>.

judicial bodies of third states and EU member states. Legal regulation of relations between Ukraine and the EU in the context of the functioning of the free trade area necessitates the strengthening of judicial cooperation and ensuring the effective provision of international judicial assistance. Information and communication technologies make it possible to respond flexibly to the needs of society and, in particular, to provide for the possibility of applying the e-Codex to judicial assistance relations (service of documents and transfer of evidence) with third states.

The example of the relations between Ukraine and Austria clearly shows that outdated methods and mechanisms significantly complicate the procedures for providing judicial assistance and lead to increased costs and time for litigants. In our opinion, the application of modern digital technologies and the e-Codex to relations with third states, in particular, Ukraine, will make it possible to implement the provisions of the Association Agreement on strengthening judicial cooperation and significantly contribute to the development of judicial assistance in cross-border cases.

5. Protecting Civil Rights amid the Pandemic

Amid the COVID-19 pandemic in Ukraine, three approaches have been used: the specific legislation for the regulation of relations, compulsory in nature; local acts adopted by the authorities, which are recommendations (for example, the Order of Ministry); orders of collegial bodies or organisations (for instance, the Council of Justice adopted rules about courts' work amid pandemic). It is noteworthy that during the quarantine, not one court out of more than 600 was closed in Ukraine.[63]

The most complex questions to answer are those about how to ensure the best and safest access to justice for people during the current situation. Here, too, it seems appropriate to turn to Austrian civil procedure law. Austria is a

[63] See more in the collection of papers in Izarova I. About the Issue 2-3/2020 'Justice Under Covid-19' *AJEE – Access to Justice in Eastern Europe*. 2020, Issue 2-3 (7), pp. 4-5; Prylutskyi S.; Strieltsova O. The Ukrainian Judiciary under 21st-Century Challenges. *AJEE – Access to Justice in Eastern Europe*. 2020, Issue 2-3 (7), pp. 78-99; Rozhnov O. Towards Timely Justice in Civil Matters Amid the COVID-19 Pandemic. *AJEE – Access to Justice in Eastern Europe*. 2020, Issue 2-3 (7), pp. 100-114.

pioneer state in the field of e-justice,[64] especially in facilitating the procedural processes that have proved to be extremely helpful during the pandemic. Furthermore, in response to the COVID-19 situation, the Austrian legislator has allowed for even more possibilities of using new communication technologies in court proceedings.[65] These primarily concern the use of video hearings. In civil proceedings, it is at the discretion of the judge to schedule video hearings (usually via Zoom) to protect all parties from COVID-19; this possibility exists until the end of June 2021. However, in principle, the parties to the proceedings must also consent. Consent is deemed to have been given if the parties do not object within a reasonable period of time set by the court. There are exceptions to this rule in accommodation, homestay, and adult protection cases. In proceedings under the Tuberculosis Act and the Epidemics Act, hearings may also be held via video conference without the consent of the parties, provided that the hearing would have to be held outside the court, i.e., on-site. During enforcement and insolvency proceedings, the consent of the parties is not required. However, a video hearing is not possible if a person to be heard or a person entitled to participate certifies within one week from service of the summons that he or she does not have the technical means of communication for a video conference.

In Austrian court practice, the possibility during the COVID-19 pandemic to hold individual hearings via videoconference (usually via Zoom) was received positively by judges, lawyers, and parties. Of course, this possibility cannot and should not restrict the principle of immediacy in the taking of evidence. Direct questioning in court is difficult to replace, especially when assessing the probative value of witness testimony. In this respect, Zoom hearings are regularly limited to the preparatory hearing or hearings in which no adversarial hearing is to take place (e.g., when an acknowledgement is made and a judgement of acknowledgement is subsequently passed).

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[64] Boscheinen-Duursma, H. C.; Khanyk-Pospolitak, R. Austria and Ukraine Comparative Study of E-Justice: Towards Confidence of Judicial Rights Protection. *AJEE – Access to Justice in Eastern Europe*. 2019, Issue 4, pp. 42-59.

[65] A COVID-19 legislative package, which amends 39 laws and adds five new laws. After being dealt with by the Budget Committee, this package was passed by the National Council on 20 March 2020 and by the Federal Council on 21 March 2020 and was published in the Federal Law Gazette (BGBl I 16/2020) on the same day. The provisions thus entered into force on 22 March 2020 (but also retroactively in some cases) and expired at the end of 31 December 2020.

Despite these limitations, the possibility of using modern technologies in civil procedure has proven to be expedient and useful. Therefore, consideration should be given to maintaining these measures in the post-COVID-19 pandemic period. When recommending the adoption of such measures in Ukrainian civil procedure law, it should, of course, be borne in mind that the use of modern information technologies requires a correspondingly well-developed infrastructure on the part of the courts and the other parties to the proceedings. In addition, it should not be overlooked that there is also the danger of unintentional data loss and interference by unauthorised persons in the transfer of data. Conversely, the video conference could be used to exclude the public from oral proceedings, which would contradict the rule of law.

6. Conclusions

The core idea of sustainable development is to preserve our planet so that it can the needs of the present and future generations. This idea should be spread to legal practice and cover judicial procedures, an idea that has always seemed contradictory. If we seek to achieve equal justice for all with peace and strong institutions, we should first reconsider the main aim of civil justice.

Sustainable development requires more safety and less waste and loss of life and resources. In performing justice, we should also try to find the most peaceful ways of protecting rights with fewer expenses. Dispute prevention and resolution without enforcement but with the facilitation of a judge and other bodies will be the most effective way to perform justice sustainably and reduce costs for parties and the state as well. It allows the justice system to be more resilient and flexible regarding time and fees, as well as prepares it for and makes it resilient to challenges – from conflicts to pandemics.

By using digital tools for changing previous methods of judicial cooperation, we might greatly reduce costs and time. This will lead to stronger cooperation between the judiciaries of states not only inside the EU, but outside, too.

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