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# THE IMPLEMENTATION OF CONSENSUAL TENET IN MODERN CIVIL PROCEDURE: AN EUROPEAN APPROACH OF COURT-RELATED AMICABLE DISPUTE RESOLUTION PROCEDURES

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***Keywords:*** *civil procedure, amicable dispute resolution, court settlement, conciliation, amicable conciliation process, mediation, court-related mediation*

## ABSTRACT

***Background****: This article explores the global changes in the orientation of civil procedure from competitive and adversarial towards more cooperative and consensual models. It aims to identify the reflection of mentioned tendencies in the valid legal regulation and practice of modern civil procedure. The consensual tenet in the civil process is analysed from the perspective of civil procedure goals, settlement principle, and case management as an effective tool for implementing the latter in practice. The authors explore the court-related amicable dispute resolution procedures to see the similarities and differences.*

***Methods:*** *Research commenced with a review of the existing scientific literature, a brief historical analysis, and a document analysis concerning changes in civil procedure orientation towards less competitive and more cooperation-grounded resolution of civil disputes. This research was followed by the comparative study of court-related amicable dispute resolution procedures with examples in particular legal jurisdictions like Austria, Lithuania, and Ukraine.*

***Results and Conclusions:*** *Vital changes in the perception of civil procedure regarding the widely accepted need to foster settlements in civil disputes, and an analysis of the most commonly used procedures as court conciliation and court mediation, were presented in this paper. The authors distinguish and analyse three court-related amicable dispute resolution procedures – conciliation, mediation, and the amicable conciliation process, emphasising their peculiarities and features. This research assists dispute resolution practitioners and researchers interested in better understanding how different court-related amicable dispute resolution procedures can be implemented in legal regulation and practice.*

## INTRODUCTION

Today, there is no considerable doubt that amicable settlement of various disputes is essentially more effective, sustainable, less expensive, and less time-consuming than formal adversarial third-person decision-making processes like litigation processes in court. Over the years, the necessity to promote amicable solutions-oriented methods has been widely recognised and is already reflected in legal science and practice.

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In the second half of the 20th century, the success of the access to justice movement in Europe[1] and the ADR movement in the USA[2] caused a shift from the 'legal centralistic' approach, which identifies a court as the 'centre of dispute resolution',[3] to the more 'legal pluralistic approach', according to which the variety of the alternative (amicable, appropriate) dispute resolution procedures, as well as courts, are recognised as parts of a single dispute resolution system.[4] At the core of the trend are rethinking of the goals of civil justice and more practical consideration of the efficiency of the civil justice system and rational usage of judicial resources.

For many years, an adversarial model of civil justice with an independent and impartial judge, who trials the case and makes a decision, was considered a dispute resolution paradigm. It was misleadingly hyped as a 'fight for justice'.[5] Till the second half of the 20th century, this approach caused such negative tendencies as too costly, timely, and complicated civil proceedings.[6] Under these circumstances, it seems evident that the only classical adversarial principle, which is at the heart of civil justice, cannot solely provide the effectiveness of the judiciary, and new approaches and concepts should be found for the justice sector.

With time, the strict 'trial versus settlement' trope[7] in civil justice turned out to be more of a hindrance than a help. In this regard, one of the more recent trends in civil procedure is the strengthening of the consensual tenet, which can be seen at different levels: the general one – that appears in the transformation of the goals of civil procedure, its principles, and tasks of a judge, and the more concrete one – resulting in the integration of the amicable dispute resolution methods to the proceedings (sometimes even in a mandatory form) and the extension of the judicial case management powers, connected with the facilitating of the amicable dispute resolution and taking some measures for those parties, who do not want to cooperate, etc. From a more global perspective, these tendencies can be explained not only by the inefficiency of civil procedure but also by the success of access to justice movements within its ADR component. The latter shows that consensual tenets in civil procedure can produce satisfactory results both from the parties' and society's perspectives, reducing the costs of litigation (financial and emotional),[8] guaranteeing the reasonable time of a trial, providing the practical usage of the judicial resources, and foster the trust into the legal system and finally into the market.[9]

1 M Cappelletti and B Garth, 'Access to Justice: The Worldwide Movement to Make Rights Effective' (1978) 27 (2) Buffalo Law Review 181; M Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement' (1993) 56 (3) The Modern Law Review 282.

2 F Sander, 'Varieties of Dispute Processing' in AL Levin and RR Wheeler (eds) *The Pound Conference: Perspectives on Justice in the Future (Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 7-9 April 1976, St. Paul, Minn)* 111; F Sander and M Hernandez Crespo, 'A Dialogue Between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the Evolution of the Multi-Door Courthouse' (2008) 5 (3) University of St Thomas Law Journal 665.

3 J Lande, 'Getting the Faith: Why Business Lawyers and Executives Believe in Mediation' (2000) 5 (137) Harvard Negotiation Law Review 147.

4 M Galanter, 'Justice in Many Rooms: Courts, Private Ordering and Indigenous Law' (1981) 13 (19) Journal of Legal Pluralism 1.

5 R von Jhering, *Der Kampf ums Recht* (18 aufl, Manz 1913).

6 A Zuckerman, 'Justice in Crisis: Comparative Dimensions of Civil Justice' In A Zukerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (OUP 1999) 2, doi: 10.1093/acprof:oso/9780198298335.003.0001.

7 JJ Prescott and KE Spier 'A Comprehensive Theory of Civil Settlement' (2016) 91 (1) New York University Law Review 59.

8 TF Bathurst 'The Role of The Courts in the Changing Dispute Resolution Landscape' (2012) 35 (3) UNSW Law Journal 871.

9 Recital 4, 5, 8 of the Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR) [2013] OJ L 165 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0011> accessed 1 December 2022.

What impact did such changes in the general understanding of civil procedure orientation bring into the court halls? Nowadays, in most countries, general rules of litigation are widely supplemented with specific regulations in regard to settlements. In some jurisdictions, parties to a dispute are encouraged to search for mutually acceptable solutions out of court; in others, the legal regulation of civil procedure provides an opportunity to use settlement-oriented procedures within a court system. The most popular and widely used court-connected options are conciliation and mediation. Even though these procedures are common and known to legal practitioners, a deeper look into the concepts, procedure, and role of the assisting party for a better understanding and a self-evident use is necessary and timely.

Court-related amicable dispute resolution procedures, which are implemented in the civil procedure as a sign of putting into practice the principles of cooperation and settlement, provide the object of the research. This research aims to explore the practice of implementing the social and civil procedure ideas regarding court assistance in settling. The article comprises two main parts, which develop the topic coherently and logically. In the first part of the research, the authors precisely analyse the main trends related to the promotion of parties' cooperation and settlements in civil procedure. The second part of the article is devoted to disclosing the theoretical background for the particular forms of court-related amicable dispute resolution procedures – conciliation, mediation, and the amicable conciliation process.

## 2 MODERN CIVIL PROCEDURE: FURTHER STEPS TOWARDS PROMOTION OF COOPERATION AND CONSENSUALITY

### 2.1 Goals of Civil Justice in a Contemporary World: Problem Solving v. Case Proceeding

The vision of the goals of civil justice varies in different jurisdictions and has a lot to do with the roots of civil justice in national legal cultures. At the same time, we can see some convergence processes in this direction, at least in the European region, caused by the relatedness of the international standards of access to justice and fair trial10 and the tendency of the approximation of the national civil justice, at least in some aspects in the EU area.[11] In a broad sense, the two main goals of civil justice are the following: individual dispute resolution (dispute resolution goal) and the implementation of social goals, functions, and policies (policy implementation goal).12 These two goals co-exist and are enshrined in different ways in the national civil procedural legislation.

Despite the classical view, we can also find other approaches and nuances in defining the goals of civil procedure. One such approach is trying to explain whether and to what extent courts should be understood as places of complex problem solving or they only need to focus on the procedural issues of conducting a trial and making the judgment within the most

10 Art 6 of the Council of Europe, *European Convention of Human Rights* (ECtHR 2013) <https://www.echr.coe.int/Pages/home.aspx?p=basictexts/convention> accessed 1 December 2022; Art 47 of the European Union, Charter of Fundamental Rights (CFR) [2000] OJ C 326/02 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT> accessed 1 December 2022.

11 M Storme (ed), *Approximation of Judiciary Law in the European Union* (Kluwer Law International 1994); M Storme, 'A Single Civil Procedure for Europe: A Cathedral Builders' Dream' (2005) 22 Ritsumeikan Law Review 87.

12 A Uzelac, 'Goals of Civil Justice and Civil Procedure in the Contemporary World: Global Developments – Towards Harmonisation (and Back)' in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer 2014) 6.

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appropriate spending of time and costs.[13] For this purpose, two goals – problem-solving and case proceeding – are opposed. According to the first approach, the goal of civil procedure is understood as solving a conflict (dispute) in the most appropriate way. It means that a judge should try to facilitate the settlement and help parties solve their problem in the most effective and appropriate way. The second approach, which is, for instance, defined primarily in the CPC of Ukraine, is connected with the view that a judge should, first of all, manage the case, protect the violated right, and resolve a dispute instead of trying to solve a problem which is an essence of a dispute.

These two approaches have their pros and cons. While the first one seems to be more people-oriented, it is evident that it requires more time and the unique skills of a judge who facilitates the settlement. Also, it may face a resource problem (financial, human resources, etc.) and presupposes good communication between courts and professional peacemakers (mediators, conciliators, etc.). At the same time, it can bring better 'win-win' results if it works in practice. From this perspective, amicable dispute resolution in courts can be seen as a way to find an adequate and comprehensive solution to a problem within the most appropriate procedure. Lord T. Bingham wrote in his essential book about the rule of law in this regard that the justice system refers not only to the judicial guarantees of a fair trial but also to alternative ways of dispute resolution, which are better to call 'appropriate' (additional) ways of resolving disputes, because they allow choosing the most optimal way to resolve a dispute, considering the specifics of the latter, whereas courts should be associated with the last institution to apply when the other mechanisms do not bring the desired results.[14]

The second approach is more classical and connected with the needs of a court to hear the case providing minimal fair trial standards. In this case, the attention is focused on the minimal standards of procedural justice rather than on the results of the trial: if all the procedural requirements are met, the goal of civil justice, which is the effective protection of rights and freedoms, is reached. Thus, a judge focuses on the process rather than on the results of the trial and problem-solving. On the one hand, this approach is more utilitarian because it allows a judge to focus on some rules of civil procedure and to give a certain quality to the civil process, especially considering the fact that not all the parties of a dispute in a court have it as a goal to find a way to resolve a problem amicably. On the other hand, such an approach is geared towards an adversarial and 'win-lose' solution. For this reason, in many cases, we can observe the dissatisfaction of both parties with the court judgment in spite of providing high-quality procedural standards, which causes appeals and increases the spending of the parties' resources (time, money, psychological, etc.).

In the civil procedural literature, it is emphasised that the case proceeding approach has prevailed in national civil procedure systems.[15] This is obvious because the mere essence of civil justice, the goal of which is primarily to protect the rights and freedoms of individuals, presupposes an effective management approach that can provide everybody with access to justice and fair trial standards. At the same time, scientists highlighted that both ideas are worth attention and that civil justice should balance between these two goals.[16] However, the recent research and reforms of civil justice in the European region show a drift from the

13 Ibid 25.

14 T Bingham, *Rule of Law* (Penguin 2011) 85-6; See V Komarov and T Tsuvina, 'International Standard of Access to Justice and Subject of Civil Procedural Law' (2021) 28 (3) Journal of the National Academy of Legal Sciences of Ukraine 200, doi: 10.37635/jnalsu.28(3).2021.197-208.

15 See in context of different countries: A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer 2014) 53-4, 74, 119, 218, 161, 180.

16 Uzelac (n 16) 25-6; Ch Koller, 'Civil Justice in Austrian-German Tradition: The Franz Klein Heritage and Beyond' in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer 2014) 53.

case proceeding to the problem-solving approach in civil procedure as a global tendency. It seems like settlement and amicable dispute resolution are considered a 'proper concern for civil justice'[17] in many jurisdictions.

The originator of the Austrian CPC, Franz Klein, emphasised in the 19th century that civil procedure is supposed to be a quick, simple, and inexpensive way of dealing with a social evil that affects the parties involved and also the general public, costs the parties time, money, and nerves, and harms the economy and burdens the legal community.[18] Though there is no specific article in the CPC of Austria dedicated to the goals of civil procedure, 'restoration and preservation of legal peace' are considered to be an essential task of civil procedure in literature.[19] Thus, the CPC of Austria considers the court trial as the *ultima ratio*. Before that, an out-of-court settlement could be reached, above all, by reaching a settlement agreement within the meaning of Art. 1380 ff ABGB.[20] It looks like the approach is a balanced one.[21]

> Art. 2 of the CPC of Lithuania has a direct notion of the consensual tenet, identifying the goal of civil procedure. It states that
>
> [t]he purposes of civil procedure are to defend the interests of those persons, whose material subject rights or interests protected by laws are violated or contestable, to properly apply laws upon court hearing of civil cases, passing and enforcing judgments, as well as to restore juridical peace between or among the parties of a dispute, to clarify and develop law.

However, in Lithuanian legal science, the concept of judicial peace differs from the concept of social peace. Judicial peace refers to the final court decision that obtained legal force and is no longer an object of the appeal.[22] Judicial peace is not the same as social peace, which covers the restoration and sometimes even further development of the relations between the parties to the dispute.[23] In spite of these facts, judges can take an active part in facilitating dispute settlement. It should be added that both court-approved settlement agreements and court decisions on the matter potentially mean the restoration of judicial peace between the parties. In the case of court approve ment, settlement agreements gain *res judicata* effect and, after the designated time for appeal, can never be challenged again. After all, there are two ways to protect the rights of individuals and interests protected by law and restore legal peace. Undoubtedly, the rights of the person will be protected, and judicial peace will be restored both when the case is decided in court and when a settlement agreement is concluded.[24] Thus, social peace, based on mutual agreements rather than on an imposed decision, is, in fact, almost impossible in litigation, as the judge fulfilling his primary duty (passing a

17 T Allen, *Mediation Law and civil Practice* (2nd edn, Bloomsbury Professional 2018) 1; I Izarova, 'Civil Procedure Reform During the Period of Ukraine's Independence: New Goals and Principles' in Yu Prytika and I Izarova (eds) *Access to Justice in Conditions of Sustainable Development: to the 30th Anniversary of Ukraine's Independence* (Dakor 2021) 43-4, 55.

18 GE Kodek and PG Mayr, *Zivilprozessrecht* (5th edn, Facultas 2021) 34.

19 WH Rechberger and D-A Simotta, *Grundriss des österreichischen Zivilprozessrechts: Erkenntnisverfahren* (9 aufl, Manz 2017) 9; HW Fasching, *Lehrbuch des österreichischen Zivilprozeßrechts: Lehr- und Handbuch für Studium und Praxis* (2 aufl, Manz 1990) 36.

20 Rechberger and Simotta (n 23) 11.

21 Koller (n 20) 53.

22 V Vėbraitė, 'Šalių sutaikymas civiliniame procese' (Daktaro disertacija, Vilnius University 2009) 94; R Simaitis, 'Teisminis sutaikymas' (2004) 52 Teisė 92.

23 A Tvaronaviciene and N Kaminskiene, 'Teisminės mediacijos taikymas administracinėje justicijoje' in V Sinkevičius and L Jakulevičienė (eds), *Lietuvos teisė 2019: esminiai pokyčiai* (Mykolo Romerio universitetas 2019) 33. doi: 10.13165/LT-19-01-04.

24 V Nekrošius, 'Civilinio proceso tikslai: nustatyti tiesą ar sutaikyti šalis?' in *Civilinio proceso pirmosios instancijos teisme reforma Baltijos jūros regiono valstybėse ir centrinėje Europoje, 2004 m rugsėjo 16-19 d* (Vilnius universiteto leidykla 2005) 14, cited from: Vėbraitė (n 26) 94.

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legally binding decision) is more concerned with finding the material truth than with finding a balance between the different interests of the parties. Still, the systemic analysis of legal norms of the CPC of Lithuania proves that there are many signs that settlement of the case by mutual agreements between the parties is an important goal, although established implicitly.

Taking into account the above-mentioned considerations, in our opinion, the judicial policy should perceive the problem-solving approach identifying the litigation as only an '*ultimum remedium*'.[25] It does not mean that the primary goal of a court should be problem-solving instead of case proceedings. This means that these two goals should be balanced, and the judicial policy should be built in a two-step approach, according to which parties should try to use all possibilities for an amicable dispute resolution before filing a suit. Only if these fail can parties litigate as a last resort.

## 2.2 Principle of Settlement in Civil Procedure

The problem-solving approach cannot be implemented without modifying the catalogue of principles of civil procedure, where the settlement principle should take a prominent place. The ELI/UNIDROIT Model European Rules of Civil Procedure (ELI/UNIDROIT Rules, 2019) proposes an interesting approach in this regard.[26] The document unified the best European practices in the civil justice area and is meant to be used as a tool for further national reforms of civil justice.[27] This document identifies proportionality, cooperation, and settlement as the new principles of modern civil justice.

The settlement principle is set out in Rules 9-10. Its essence can be summarised as follows: parties, their lawyers, and judges should cooperate in seeking the parties' consensual dispute resolution during a trial. The ELI/UNIDROIT Rules distinguish the role of the parties from their lawyers (Rule 9) and the court's role (Rule 10) in bringing this maxim to life. The parties must 'cooperate in seeking to resolve their dispute consensually, both before and after proceedings begin'. Besides this, parties should work on reducing the number of contested issues before the adjudication, even if a settlement cannot be reached for the dispute as a whole. It is interesting that the ELI/UNIDROIT Rules obliges the lawyers to inform parties about the consensual dispute resolution opportunities and help the parties choose the most appropriate one, as well as to ensure the usage of mandatory ADR methods (if any were prescribed by national law). This notion emphasises the active role of lawyers in the promotion of consensual dispute resolution as a part of legal advice and legal aid. It symbolises the shift from the pure 'struggle' approach of civil litigation to the client-oriented approach, concentrating on the best clients' interests, which can be reached within the 'win-win' solution during the consensual dispute resolution procedures. In this regard, we agree with T. Allen that 'a settlement mindset developed within the culture which accepts that settlement processes are a proper integral part of civil justice will make major changes to the practice of law and judging, which will upset the traditionally minded, but may well be welcomed by those who seek redress to civil claims'.[28]

Courts also play a significant role in the realisation of this principle. A judge is obliged to facilitate the settlement during the period of the trial, especially but not only during the pre-

25 Uzelac (n 16) 12.

26 European Law Institute (ELI) and International Institute for the Unification of Private Law (UNIDROIT), ELI/UNIDROIT Model European Rules of Civil Procedure: From Transnational Principles to European Rules of Civil Procedure (OUP 2021) doi: 10.1093/oso/9780198866589.001.0001.

27 Ibid 1.

28 Allen (n 21) 21.

trial procedure and possibly the case management conferences, and provide the parties with information about different consensual ADR methods. Moreover, the function of a court can vary: judges can participate in the settlement procedure and help with reaching settlement agreements and drafting them or even mediate the dispute.[29]

As we can see, a correlation can be found between the three-dimensional obligation of the three main actors in the courtroom:

- the obligation of the parties to cooperate with each other to reach a settlement;
- the obligation of the lawyers to inform parties about the opportunities for such a settlement;
- the obligation of the court to facilitate the settlement during the trial.

The principle of settlement or its interpretations, promoting a dialogical interaction between judges and parties,[30] is also recognised in some jurisdictions. For example, in Belgium, there is a principle of consensualism.[31] The principle of promoting consensual conflict resolution (*Förderung einer einvernehmlichen Lösung*) is identified in the Austrian civil procedural literature as well. Examples of this principle can be found *ibidem* in the attempt at reconciliation provided for in matrimonial proceedings (Art. 460 para. 7 CPC of Austria) and in the various provisions on court settlement (Art. 204 CPC of Austria) with reference to suitable institutions for out-of-court conflict resolution, in particular, mediation. The civil process is also intended to help resolve private conflicts in order to avoid further litigation. Therefore, the opportunity for dialogue and rational discourse should also be given. The legislator has thus provided for oral proceedings between the parties and an attempt at settlement in the preparatory hearings (Art. 258 para. 1.4 CPC).[32] In Lithuania, the principle of settlement is very important but not explicitly established in legal regulation. Even though the principle of settlement is not listed in Chapter II of the Code of Civil Process 'Principles of civil process', a systematic analysis of the content of the whole code shows that the possibility to settle is an integral part of civil justice. In addition, it is widely promoted by various procedural incentives, including a partial refund of paid stamp duty (Art. 80 para. 8) or free assistance in settling by the conciliator or mediator (Art. 231 para. 1). In Ukraine, the principle of settlement is not recognised in the national legislation (Art. 3 of the CPC of Ukraine), but, as we will see further, judges have powers to strengthen amicable dispute resolution in particular cases.

In summary, taking into account strengthening the consensual tenet in civil procedure, the settlement principle should be recognised as one of the prominent aspects of modern civil procedure. The settlement principle is closely related to the court's duty to attempt a reconciliation between the parties. Thus, in national legal regulation, these principles rarely are listed together with such classical principles of civil procedure as competitiveness, dispositiveness, publicity, etc. However, the principle of settlement is established implicitly by determining the duty of the judges to reconcile parties or attempt to do so, the obligation to provide information, and additional procedural incentives promoting the idea of settlements.[33]

29 ELI/UNIDROIT Model (n 30) 38-9.

30 Ibid 39.

31 CH van Rhee, 'Introduction' in CH van Rhee (ed), *Judicial Case Management and Efficiency in Civil Litigation* (Intersentia 2007) 5.

32 Kodek and Mayr (n 22) 73.

33 See further ELI/UNIDROIT Model (n 30) 38-9.

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## 2.3 Judicial Case Management and Amicable Dispute Resolution

The implementation of the problem-solving approach and settlement principle in civil procedure needs effective practical instruments. One such instrument is active judicial case management, which is a widely known concept aimed at ensuring an optimal correlation between the parties' and the court's activity in civil procedure.[34] In the literature, two types of judicial case management are distinguished: *procedural (organisational)*, which is connected with the procedural standards of the trial and covers the powers of a court within an effective organisation of court proceedings, and *substantive (material)*, which deals with the powers of a court on the merits of the case.[35] We will focus on the procedural part of judicial case management, which is correlated with the idea of an active or 'managerial'[36] judge, recognised in Recommendation No. 84/5 of the Committee of Ministers of the Council of Europe on the principles of civil procedure designed to improve the functioning of justice (Principle 3).[37]

In the European civil procedure tradition, the roots of judicial case management are connected with the reform of civil procedure conducted by Franz Klein and the adoption of the CPC of Austria (*Zivilprozessordnung*, 1895),[38] even though this term was not mentioned in its text. The Austrian model of civil procedure at that time shifted the focus from the autonomy of the parties to the authority of a judge to effectively manage the court proceedings and oblige the parties to use civil justice resources with due care and diligence. Such a view was caused by the recognition of the fact that civil procedure serves not only the parties of the particular case but also 'the public good', executing the public goal (*Wohlfahrtsfunktion*) of civil procedure.[39]

The modern understanding of judicial case management was introduced in the English Civil Procedural Rules (CPR, 1998) adopted as a result of Lord Woolf's reform of civil procedure in England.[40] After enshrining this concept in the CPR, judicial case management became a trend in many other European jurisdictions, having become a distinctive feature of the convergence between the English civil procedure and civil law countries' civil procedure.[41] According to N. Andrews, the essence of case management in civil litigation in England is that the court system in general and the judges in each particular case regulate the content and course of proceedings;[42] that is, they are responsible for the efficient organisation of the civil process. Rule 1.4 of the CPR obliges a court to further the overriding objective by

34 CH van Rhee (n 35) 2; CH van Rhee, 'The Development of Civil Procedural Law in Twentieth Century Europe: From Party Autonomy to Judicial Case Management and Efficiency' in CH van Rhee (ed), *Judicial Case Management and Efficiency in Civil Litigation* (Intersentia 2007) 13; J Lande, 'Shifting the Focus from the Myth of "The Vanishing Trial" to Complex Conflict Management Systems, or I Learned Almost Everything I Need to Know About Conflict Resolution from Marc Galanter' (2005) 6 Cardozo Journal of Conflict Resolution 191.

35 B Allemeersch, 'The Belgian Perspective on Case Management in Civil Litigation' in CH van Rhee (ed), *Judicial Case Management and Efficiency in Civil Litigation* (Intersentia 2007) 82; ELI/UNIDROIT Model (n 30) 91-2.

36 D Menashe, 'The Manager-Judge and the Judge-Manager: towards Managerial Jurisprudence in Civil Procedure' (2019) 94 (2) North Dakota Law Review 440.

37 Committee of Ministers of the Council of Europe, Recommendation No R (84) 5 On the Principles of Civil Procedure Designed to Improve the Functioning of Justice (28 February 1984) <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804e19b1> accessed 1 December 2022.

38 CH van Rhee (n 35) 2.

39 Ibid 3, 11, 13.

40 H Woolf, *Access to justice: interim report to the Lord Chancellor on the civil justice system in England and Wales* (Lord Chancellor's Department 1995).

41 CH van Rhee (n 38) 20.

42 N Andrews, *English Civil Procedure. Fundamentals of the New Civil Justice System* (OUP 2003) 333; CH van Rhee (n 35) 2.

actively managing cases, which includes: (a) encouraging the parties to cooperate with each other in the conduct of the proceedings; (b) identifying the issues at an early stage; (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others; (d) deciding the order in which issues are to be resolved; (e) encouraging the parties to use an alternative dispute resolution procedure if a court considers that appropriate and facilitating the use of such procedure; (f) helping the parties to settle the whole or part of the case; (g) fixing timetables or otherwise controlling the progress of the case; (h) considering whether the likely benefits of taking a particular step justify the cost of taking it; (i) dealing with as many aspects of the case as it can on the same occasion; (j) dealing with the case without the parties needing to attend at court; (k) making use of technology; and (l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.[43]

Furthermore, according to the ELI/UNIDROIT Rules, the court's general active case management duty is the main task within the principles of proportionality, cooperation, and settlement.[44] In this regard, Rule 4 states that a court is responsible for active and effective case management, ensuring that parties enjoy equal treatment and monitoring whether parties and their lawyers comply with their responsibilities.[45] A more detailed description of judicial case management can be found in Rules 47-49, which enshrine, on the one hand, the obligation of the parties to conduct carefully during the litigation in order to secure procedural expedition,[46] and, on the other hand, judges' duty to control the court proceedings at all stages and monitor the fulfilment of the obligations by the parties using the active powers of a court, including the possibility to make case management orders.[47] Rule 49 of the ELI/UNIDROIT Rules identifies as one of the case management powers the power of the court to encourage parties to take active steps to settle their dispute or parts of their dispute and, where appropriate, to use alternative dispute resolution methods.

By its virtue, judicial case management determines the set of the court's discretionary powers during the proceedings on managing the time and process of trial according to principles of proportionality and cooperation aimed at the implementation of the goals of civil justice and ensuring effective dispute resolution. In the structure of case management, different groups of powers can be distinguished. They can be summarised as follows: (a) judicial time management (organisation of the case management conferences, providing the procedural calendar); (b) powers, connected with the selection of the particular type of proceedings (forms, tracks) according to which the case should be trialled; (c) powers, connected with the consolidation and separation of the claims and identifying issues of the case; (d) powers, which help to establish the facts of the case (making different orders, connected with the evidence, requiring the participators of the trial to appear in person, etc.); (e) powers, connected with the facilitation of an amicable dispute resolution, including the usage of ADR methods; (f) powers on the management of the court costs; (g) powers to take different measures for violation of the procedural rules or procedural abuses.[48]

The drift to the conciliatory approach in modern civil procedure can be seen in the implementation of the particular judicial case management powers connected with the

43 Civil Procedure Rules, pt 1 Overriding Objective <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part01> accessed 1 December 2022.

44 ELI/UNIDROIT Model (n 30) 43.

45 Ibid.

46 ELI/UNIDROIT Model (n 30) 128.

47 ELI/UNIDROIT Model (n 30) 130-5.

48 See: T Tsuvina, 'Case Management Concept: Foreign Experience and Prospects for Implementation in Ukraine' (2020) 1 Juridical Scientific and Electronic Journal 75 <https://doi.org/10.32782/2524-0374/2020-1/18> accessed 1 December 2022; T Tsuvina, 'The Rule of Law Principle in Civil Procedure: Theoretical-Practical Approach' (DPhil (Law) thesis, Yaroslav Mudryi National Law University 2021) 381-408.

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facilitation of amicable dispute resolution in the national civil procedure rules.[49] These can differ in practice depending on the national traditions and the development of the ADR in the particular state. For example, the managerial function of a court can be executed within Sander's model of the 'multi-door courthouse',[50] where a court administers an effective usage of the ADR out of and within the court procedure. Under these circumstances, we can see what M. Galanter identified as 'the strategic pursuit of a settlement through mobilizing the court process',[51] which in practice can bring the settlement principle and the consensual tenet in civil procedure into life. The most common functions of a court in this regard can be summarised depending on the degree of interference of a judge as follows: a) the right or the duty of a court to ask the parties whether they wanted to use any ADR methods (mediation, conciliation, etc.) at the pre-trial conference, preparatory hearing, or during the whole period of the trial; b) the right of a court to direct the parties to mediation (conciliation or other means of consensual ADR) with the parties' right to decline this proposal or without such right; c) the judge's power to apply certain procedural sanctions for refusing to use consensual ADR methods or its abuse; d) the judge's power to conduct the conciliation procedure; e) the judge's power to conduct the mediation procedure.

These court powers can be seen in different variations in the national civil procedural legislation. In particular, in Austrian civil procedure, judicial case management is connected primarily with the principle *ex officio* (*Offizialmaxime/Amtsbetrieb,* Art. 178 of the CPC of Austria) and the principle of cooperation (*Kooperationsgrundsatz*, Arts. 178, 182, 183, 371 of the CPC of Austria). As to the specific case management powers connected with amicable dispute resolution, the CPC of Austria requires a judge to take measures for the settlement of a dispute (Art. 204 para. 1 of the CPC of Austria) and try to facilitate (*ex officio*) an amicable dispute resolution or particular issues of the case at any stage of oral hearing with the possibility to record the content of the settlement in the minutes of the hearing on the request of the parties (Art. 204 para. 1 of the CPC of Austria). The special provisions in terms of case management can be seen within the context of the proceedings in matrimonial matters. In particular, in divorce proceedings, a court shall attempt reconciliation at the beginning of the oral hearing as well as at the other stages (Art. 460 para. 7 of the CPC of Austria). Special norms about the cooperation principle and/or conciliatory function of a judge within the case management are also enshrined in the Non-Contentious Proceedings Act, which states that if there is a possibility of an amicable settlement agreement, a court may pause the proceedings if it does not violate the parties of public interests (Art. 29 (1) of the Non-Contentious Proceedings Act). Special procedural provisions allow the court to take measures to participate in an initial discussion on mediation or conciliation procedure in order to safeguard the best interests of the child, provided that this does not endanger the interests of a party whose protection the proceedings serve or unreasonably prejudice the interests of the other parties (Art. 107 of the Non-Contentious Proceedings Act).

In the Lithuanian CPC, there is no direct notion of case management, but the principle of cooperation is recognised, as in Austria, as one of the principles of civil procedure, according to which a court should cooperate with the participators of the trial, taking measures for examination of the case (Art. 8). Regarding the special conciliatory powers of the judge, they

49 See for example Art 80 para 8, Art 231 para 1, Art 228 para 1, Art 376 para 2 of the CPC of Lithuania; Art 12 para 5.1, Art 197 para 2.2, Art 201-205, Art 211 para 5 CPC of Ukraine, but ediator (Art. 231 para 1). Code of Civil Procedure of the Republic of Lithuania No IX-743 'Civilinio proceso kodeksas' of 28 February 2002 <https://e-seimas.lrs.lt/portal/legalActEditions/lt/TAD/TAIS.162435> accessed 1 December 2022; Code of Civil Procedure of Ukraine No 1618-IV of 18 March 2004 <https://zakon.rada.gov.ua/laws/show/1618-15#Text> accessed 1 December 2022.

50 Sander (n 6) 111.

51 M Galanter, 'World of Deals: Using Negotiation to Teach About Legal Process' (1984) 34 (2) Journal of Legal Education 268.

are identified in a general manner as a duty of a court to hold a preparatory hearing (if it considers that a settlement can be reached in the case or if the law obliges a court to take steps to reconcile the parties) (Art. 228 para. 1) and the duty of the chairman of a court session to take conciliation measures during the hearing of the case (Art. 159 para. 1). The judge also can recommend that parties enter court mediation (Art. 231 para. 1) or even impose mandatory court mediation (Art. 231 para. 1). The judge can always conduct conciliation. In this case, the judges are mediators – they can also mediate even in cases in which they were commissioned as a judge (Art. 231 para. 1). As was mentioned earlier, judges have a right to imply mandatory mediation, and this decision is left purely to their discretion and belief that such a move may be effective and lead to settlement. In family cases, a court is obliged to be even more active. For this purpose, 'a court must undertake measures to reconcile the parties, stream to protect rights and interests of the children' (Art. 376 para. 2). In divorce proceedings, a court shall take measures to reconcile the spouses and shall have the power to set a time limit for the spouses to reconcile (Art. 384), but in these cases, a judge should be passive and not take any active steps, merely providing time for the parties to reconcile.

Even though the CPC of Ukraine does not contain special notions about judicial case management, it incurs the court's duty to manage the course of the trial, maintaining objectivity and impartiality (para. 5.1 Art. 12 of the CPC of Ukraine). At the same time, in Ukrainian literature, this duty remains poorly researched because the publications devoted to judicial case management have appeared only in recent years.[52] The duty to facilitate the settlement of a dispute by reaching an agreement between the parties is recognised as a separate obligation of a court but not as a part of the general duty to manage the case (para. 5.1 Art. 12 of the CPC of Ukraine). This duty is detailed by the concrete powers at different stages of the trial. In particular, during the pre-trial session, a judge should find out whether the parties wish to conclude a settlement agreement, conduct an out-of-court settlement of the dispute through mediation, refer the case to arbitration, or apply to a court for settlement of the dispute with the participation of a judge (para. 2.2 Art. 197 of the CPC of Ukraine). This last option is a special kind of conciliation during the pre-trial procedure held by a judge who trials the case (Arts. 201-205 of the CPC of Ukraine). During the consideration of the case on the merits, a court has an obligation to facilitate the reconciliation of the parties (para. 5 Art. 211 CPC of Ukraine). The peaceful settlement agreement can take place at any stage of the trial and during the enforcement procedure (Art. 207 of the CPC of Ukraine). Also, the Ukrainian CPC *de facto* emphasises the role of the parties in the consensual dispute resolution in civil procedure, stating that the parties shall take measures for the pre-trial settlement of the dispute by mutual agreement or in cases where such measures are mandatory according to the law (para. 1 Art. 16 of the CPC of Ukraine). But, in fact, there are no cases in which the pre-trial settlement procedure is mandatory, and there are no effective measures to react to the parties' non-cooperative behaviour except to take into account such behaviour when distributing the court costs between the parties (para. 3.4 Art. 141 of the CPC of Ukraine). That is why *de facto*, the settlement principle looks more like an obligation of a court to facilitate the settlement of a dispute than an obligation for parties and their lawyers to cooperate on the amicable dispute resolution.

As we can see, judicial case management power can be used differently in connection with amicable dispute resolution. At the same time, the most interesting and prominent of them is the power of a judge to conduct special consensual procedures, like mediation

52 See I Izarova, V Vibrate and R Flejszar, 'Case Management in the Civil Court Procedure: a Comparative Study of the Legislation of Lithuania, Poland and Ukraine' (2018) 10 Law of Ukraine 131-4, doi: 10.33498/louu-2018-10-129; Tsuvina (n 52) 75; Tsuvina (n 52, thesis) 381-408; I Izarova, Yu Prytyca, T Tsuvina and B Karnaukh, 'Case Management in Ukrainian Civil Justice: First Steps Ahead: Gestión de casos en la justicia civil de Ucrania: primeros pasos a seguir' (2022) 40 (72) Political Questions 927, doi: 10.46398/cuestpol.4072.56 etc.

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or conciliation, which opens a set of questions: Can judges provide an amicable dispute resolution for the parties? What are the forms of such a resolution? Do judges need to have a proper qualifications to conduct conciliation or mediation?

## 3 COURT-RELATED AMICABLE DISPUTE RESOLUTION PROCEDURES: THEORETICAL BACKGROUND

If the parties do not resolve their conflict themselves and thus without third-party support, professional dispute resolution can take place on both a state and a private level and must ensure an adequate response to the different types of conflict. At the state level, judges take up the juridified conflict, placing the legal dispute in a direct context with the relevant rights. The view of the conflict thus becomes rights-based, and conflict resolution is channelled toward a decision[53] and tied to the norms generally developed for the functioning of society. The situation is different at the private level, which forms the basis for amicable dispute resolution. At this level, the respective interests of the parties are paramount. The case-specific norms are not binding, but they provide orientation and indicate the limitations within which conflict resolution may permissibly move. The two levels outlined above are not mutually exclusive, however; instead, a conflict can pass through both levels before it is resolved in the best case.[54] What position do third parties take in the course of the conflict management delegated to them? What assistance can they provide, and how do they differ?[55] In any case, in contrast to the allies in the conflict, independent third parties must be assumed here, whose involvement can be voluntary or coerced and who are themselves equipped with the state means of coercion or whose decisions can be compulsorily enforced. In general, some serve as advisory third parties, while others play a mediating role. According to T. Raiser, the form of third parties acting in conflict can be understood in many different ways, although a tiered typology of the various activities of third parties can be identified concerning the range of conflict termination options. We are talking about consultation, mediation, conciliation, and adjudication in the sense of arbitration and litigation.[56]

The purpose of a consultation is, for example, to obtain information that can reduce substantive misunderstandings and revise gross misconceptions (for example, an external opinion from the consumer advice service, an expert opinion, legal information from a lawyer, or consultation days at court).

A similar purpose applies to mediation, even though the tasks are different. Thus, the focus is not on the advice provided by the mediator but on the mediator's expertise in shaping the proceedings. The primary task of this neutral person is to re-establish communication between the disputants so that they are subsequently enabled to resolve their private conflict through their own responsibility. Its informal nature, flexibility, including parties behind the parties, and interest-driven negotiation structure provide sufficient space to enable future-oriented distributions.

Unlike mediators, certain restrictions bind conciliators. They act according to rules that still give them more or less procedural leeway but prevent them from considering arbitrary particularities of the case. If necessary, they also make a decision, but in most cases, this is a non-binding one.

53 To capture conflicts, see N Luhmann, *Legitimation durch Verfahren* (Suhrkamp Verlag 1983) 102.

54 M Birner, *Das Multi-Door Courthouse: Ein Ansatz zur multidimensionalen Konfliktbehandlung* (Dr Otto Schmidt KG 2003) 9.

55 T Raiser, *Grundlagen der Rechtssoziologie* (6 aufl, Mohr Siebeck 2013) 305 ff.

56 Ibid 306.

The transition from conciliation to arbitration is complete when the impartial third party reaches a decision that is binding on the parties. This form of conflict resolution, therefore, ultimately belongs to the fourth possibility of orderly dispute resolution, namely adjudication.[57] The focus here is on dispute resolution before state courts,[58] which are best suited to resolving conflicts in formalised and institutionalised proceedings by – as already indicated – focusing on and analysing the primarily material rules to which the dispute relates.[59] The central instrument of dispute resolution is judgment, which as a procedural endpoint, regularly reflects an evaluation of the past. Since courts in the continental European legal area are bound to comply with the law, there is hardly any room for overstretching decisions.[60] Along the way, however, it is up to the judges to lead the parties in a kind of conciliation hearing to a settlement.[61] If this does not succeed, the state court decision in the sense of a verdict should end the conflict.

## 3.1 What are Conciliation and Mediation?

The term 'conciliation' is often used to refer to various processes in different contexts. It is therefore not sharply delineated in common usage.[62] It can be considered an umbrella term for any facilitative, consensual, amicable dispute resolution process.[63] However, in international literature, conciliation is regarded as a voluntary, out-of-court dispute resolution method based on a party agreement and generally follows the same procedural principles worldwide.[64] It is a communicative process not conducted in public (principle of non-publicity) led by an independent, neutral third party, the conciliator,[65] to reach an amicable agreement between two parties to a dispute as soon as possible. Resolving the conflict at its root is, therefore, not the focus of the procedure.[66]

The process is initiated based on an agreement between the parties or by appealing to conciliation boards (e.g., Board for Consumer Protection; Office of Ombudsperson).[67] Some of these institutions follow internal conciliation rules prescribing fundamentals[68] of the conciliation procedure.[69] Concerning the subject matter of the proceedings, conciliators

57 See also V Gessner, *Recht und Konflikt: Eine soziologische Untersuchung privatrechtlicher Konflikte in Mexiko* (Mohr Siebeck 1976) 102.

58 Arbitration as private jurisdiction remains unconsidered.

59 Gessner (n 61) 179.

60 Birner (n 58) 12.

61 See chapter 2.2.

62 JM von Bargen, *Gerichtsinterne Mediation – Eine Kernaufgabe der rechtssprechenden Gewalt* (Mohr Siebeck 2008) 54.

63 Concerning this for instance T Sourdin, *Alternative Dispute Resolution* (6th edn, Thomson Reuters 2020) 193 ff.

64 J Fischer and AM Schneuwly, *Alternative Dispute Resolution* (Dike 2021) 27 f.

65 Ibid.

66 K Sonnleitner, *Wege aus dem Konflikt. Mediation – Schlichtung – Gericht* (Uni-Press Graz 2015) 55.

67 Directive 2013/11/EU (n 13) Art 4 para 1 lit h.

68 About the access to the entity to a fair, effective, and transparent ADR procedure, see for instance Art 7 ff Directive 2013/11/EU (n 13).

69 E.g., in Austria each conciliation institution shall establish rules for the procedure according to Art 6 of the Alternative Dispute Resolution Act (AStG) See: Alternative Dispute Resolution Act of the Republic of Austria (AStG) 'Bundesgesetz, mit dem ein Bundesgesetz über alternative Streitbeilegung in Verbraucherangelegenheiten erlassen wird und das Konsumentenschutzgesetz, das Gebührengesetz 1957 und das Verbraucherbehörden-Kooperationsgesetz geändert werden' of 13 August 2015 <https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2015_I_105/BGBLA_2015_I_105.pdfsig> accessed 1 December 2022.

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act similarly to judges,[70] which means that they enable both parties to present their points of view fairly[71] and concentrate on evaluating the facts presented to them. At this level, the conciliators then attempt to intervene in a conciliatory way to achieve a deviation of the parties from their initial positions, in other words, a compromise, and thus open up the possibility for them to reach an amicable agreement themselves.[72]

If the parties do not succeed in finding a solution themselves, the conciliators take charge of this.[73] They form their own opinion on the factual and legal issues[74] and may submit a legally non-binding proposed solution for amicable dispute resolution, that is, in the best case, as well thought out as a court's judgement.[75] The United Nations Commission on International Trade Law (UNCITRAL) assumes in its former conciliation rules that the conciliator formulates the terms of a possible solution and presents them to the parties, who then also have the opportunity to comment on them. If necessary, the conciliator reformulates the settlement in light of these comments.[76] However, whether the proposed solution ends the conflict depends entirely on the parties.[77] They are ultimately free to accept or reject it.[78] At this point, it must be mentioned that although the parties have this freedom concerning the non-binding conciliator's decision, the authority of the conciliator and the publication of the award can create a certain pressure on the parties to reach or even force an agreement.[79] Ultimately, the conciliators, like judges, want to convince the parties of the correctness of their legal opinion.[80]

If the parties, therefore, accept the conciliator's result, it is recorded in an out-of-court settlement. This contract is usually, however, not a directly enforceable execution title, but further steps, such as preparing an enforceable notarial deed, can be taken.[81] If the parties reject the conciliator's proposal, the standard legal process is still open to them. In this respect, conciliation is a procedure that is usually 'upstream' of civil proceedings.[82] The costs of conciliation are either borne equally by the two parties or institutions like conciliation boards, regardless of the outcome of the proceedings.[83]

There is a wide range of definitions of mediation. However, common principles can be derived from these.[84] Generally, mediation is a voluntary future-oriented process in which an impartial third party, the mediator, facilitates the negotiation between two or more disputing parties concerning their needs and interests to find an amicable agreement to

70 Bargen (n 66) 56.

71 Fischer and Schneuwly (n 68) 28.

72 Bargen (n 66) 55; D Girsberger and JT Peter, *Außergerichtliche Konfliktlösung* (Schulthess Verlag 2019) 6.

73 Fischer and Schneuwly (n 68) 28.

74 H Eidenmüller and G Wagner, *Mediationsrecht* (Dr Otto Schmidt KG 2015) 16.

75 Ibid; Raiser (n 59) 308.

76 Art 13 UNCITRAL Conciliation Rules (adopted 4 December 1980 UNGA Res 35/52) Art 13 <https://uncitral.un.org/en/texts/mediation/contractualtexts/conciliation> accessed 1 December 2022.

77 Raiser (n 59) 308; Eidenmüller and Wagner (n 78) 16.

78 A Meisinger and H Salicites, 'Alternative Formen der Streitbeilegung', in A Deixler-Hübner and M Schauer (eds), *Alternative Formen der Konfliktbereinigung: ADR-Richtlinie, Schlichtungswesen, Mediation und Einigungsverfahren* (Manz 2016) 11; Girsberger and Peter (n 76) 6.

79 Bargen (n 66) 55.

80 OC Ruppel, *Interdisziplinäre Schlüsselqualifikation Mediation* (Verlag Dr Kovac 2007) 10.

81 A Meisinger, *System Der Konfliktbereinigung: Alternative, komplementäre und angemessene Streitbeilegung* (Manz 2021) 34 ff.

82 Ibid.

83 Fischer and Schneuwly (n 68) 28.

84 Meisinger and Salicites (n 82) 18.

the conflict.[85] The costs of the mediation are generally equally borne by the two parties.[86] And finally, such a process can be placed upstream or alongside traditional court and public authority proceedings.[87]

The ultimate goal of the mediation process is the autonomous and joint search for creative solutions to the conflict, which should ultimately be satisfactory and sustainable for all parties involved (the so-called 'win-win-solution').[88] The outcome is to be found autonomously in a conflict management procedure primarily determined by the parties themselves and based on the principles of the Harvard concept. The process must adhere to a fixed basic structure, reflected in a phase model. The number and arrangement of the phases in the process may vary.[89] However, essentially, there are three primary phases – preliminary negotiation, actual negotiation, and implementation (review/monitoring).[90] It is not a question of the exact adherence to each phase of the proceeding but of the individual procedural steps that provide a methodologically justified, specific logic for finding a consensus. When selecting the procedural model, the conflict's nature and the parties' needs must be considered. Therefore, the process is intended to be flexible, open, and essentially free of strict formalisms and prescribed standards to react to the individual case depending on the situation.[91]

The mediators who conduct the mediation must be accepted by all parties to the dispute, be neutral, and assume responsibility for the progress of the negotiation. They do the latter, for example, by trying to eliminate prejudices and pointing out dangers and aspects that need to be regulated and might form the basis for a possible agreement acceptable to all parties. Under no circumstances, however, should the mediators pursue their interests and make decisions on a matter in dispute. According to the understanding within the EU, they have no coercive power[92] and may not make any concrete proposals for solutions to the factual and legal situation, especially not in the form of settlement proposals, as in conciliation proceedings.[93]

The mediator's role is to guide the parties through the process to recognise each other's interests and needs behind the conflict to shift away from their rigid positions and standpoints and move toward a common goal.[94] Therefore, their main tasks are result-oriented process management, structuring, and building trust. To create the conditions for a successful mediation that will enable the parties to resolve their conflict effectively, mediators act according to certain principles.[95] The main principles of mediation are: 'impartiality, self-determination, confidentiality, and participation of all'.[96] Accordingly, mediators must approach all parties openly, without prejudice, and impartially, and secure an even balance between them in the

85 N Alexander, 'Global Trends in Mediation: Riding the Third Wave' in N Alexander (ed), Global Trends in Mediation (2nd edn, Kluwer Law International 2006) 2 f.

86 Fischer and Schneuwly (n 68) 28.

87 G Falk, 'Die Entwicklung der Mediation' in E Töpel and A Pritz (eds), *Mediation in Österreich* (LexisNexis ARD Orac 2000) 41 ff.

88 Meisinger and Salicites (n 82) 18.

89 Bargen (n 66) 15.

90 M Hehn, *Nicht gleich vor den Richter: Mediation und rechtsförmliche Konfliktregelung* (Brockmeyer 1996) 20 ff; H Zilleßen, 'Mediation im Spannungsfeld von Umweltpolitik und Umweltrecht' (1998) 1 (1) Konsens 26.

91 HJ Fietkau, *Leitfaden Umweltmediation: Hinweise für Verfahrensbeteiligte und Mediatoren* (Wissenschaftszentrum Berlin für Sozialforschung 1994) 11, 14 f.

92 Meisinger and Salicites (n 82) 18.

93 Fischer and Schneuwly (n 68) 24 f.

94 Eidenmüller and Wagner (n 78) 16; S Ferz, 'Amicable Dispute Resolution at court: Conciliation Hearings, The Austrian and German Perspectives' (2022) 8 (1) International Comparative Jurisprudence 106, doi: 10.13165/j.icj.2022.06.008.

95 Bargen (n 66) 17.

96 S Proksch, *Conflict Management* (Springer Cham 2016) 32, doi: 10.1007/978-3-319-31885-1.

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proceedings. Therefore, mediators must not have any personal or institutional relationship with them.[97] Furthermore, the mediator must ensure that all information and communication flows are transparent to the participants and that all information that emerges within the course of mediation is treated confidentially[98] and not communicated to the public.[99]

The parties control the content and outcome of the process.[100] The solution to the conflict is to be found and developed by themselves in the sense of practiced self-responsibility.[101] Following this approach, there are as many possible solutions to the conflict as can be considered by the parties. However, this presupposes that the parties break away from their entrenched expectations and create space for a mutually agreeable solution.[102] The solution is recorded if a consensus is reached at the end of the mediation process. Both parties possibly sign the agreement, making it legally binding,[103] but this decision is also voluntary.[104] Mediation can, therefore, only lead to a legally binding solution if both parties agree to this outcome[105] and also have the autonomy to decide.[106]

The line of demarcation between mediation and conciliation often does not seem so apparent at first glance. In both procedures, an independent, neutral third party is consulted to provide mediatory support to the parties on the way to an agreement but is not allowed to make binding decisions.[107] Furthermore, the two procedures can be placed upstream of formal court proceedings,[108] and their costs are usually borne equally by the two parties.[109] Conciliation and mediation can be similar in many ways. However, mediation and conciliation can be differentiated according to the role and the powers of disposition of the neutral, independent third party,[110] as well as their procedures and desired outcome.

A concise difference between the procedures is that conciliation procedures, like court proceedings, are past-oriented. Concrete facts from the past are dealt with, and conciliators form their opinion around factual and legal issues. The mediation process, on the contrary, focuses on the future. The aim is to find a satisfactory and sustainable solution to the conflict considering the relationship level and to restore the estranged relationship and the broken connection for the future.[111]

Another difference is found in the aspect that conciliation proceedings, when they are carried out by specific institutions, occasionally follow internal conciliation rules that prescribe

97 Meisinger and Salicites (n 82) 18.

98 In a recent international survey about international commercial disputes done by SIDRA, fewer respondents found confidentiality 'absolutely crucial' or 'important' in litigation (26%) compared to arbitration (81%) and mediation (89%). The authors explain this with the fact that litigation is a generally more public process compared to mediation, and users selecting litigation would generally be less concerned about a confidential dispute resolution forum. NM Alexander and others, *International Dispute Resolution: 2022 Final Report of 28 July 2022* (Singapore International Dispute Resolution Academy at Singapore Management University 2022) 7 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4174678> accessed 1 December 2022.

99 Fischer and Schneuwly (n 68) 25.

100 H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edn, LexisNexis Butterworths 2002) 146.

101 Meisinger and Salicites (n 82) 18; Fischer and Schneuwly (n 68) 26; Bargen (n 66) 26.

102 Fischer and Schneuwly (n 68) 26.

103 Proksch (n 100) 50 ff.

104 Girsberger and Peter (n 76) 6.

105 SJ Ware, *Principles of Alternative Dispute Resolution* (3rd edn, West Academic Publishing 2016) 389.

106 Ruppel (n 84) 23.

107 Bargen (n 66) 54.

108 Meisinger (n 85) 34 ff; Falk (n 91) 41 ff.

109 Fischer and Schneuwly (n 68) 28.

110 Ibid 238.

111 Ibid 239.

fundamentals of the conciliation procedure.[112] This factor distinguishes conciliation from mediation, which is typically informal, albeit following a phase model.[113]

Furthermore, conciliators deal with legally relevant issues and may or should provide the parties with legal information. This approach is by no means the case with interest-based mediators.[114] Mediators do not comment on the content of the conflict and do not evaluate it on the basis of legal or factual criteria.[115] Therefore, mediators do not take a position on the dispute and its legal dimension itself but only try to support the conflicting parties in working out their interests behind the conflict and focusing on the relevant personal aspects.[116] This approach is necessary, as the conflicts dealt with in mediation are often highly emotional and relationship-based. For this reason, compared to mediation, conciliation is more suitable for situations in which the parties involved want to deal with a 'one-time' or fact-bounded resolvable conflict in an unemotional manner and clarification at the relationship level is not proper or is not in the foreground but rather the reappraisal of the concrete facts from the past.[117] In addition, the conciliator can make non-binding proposals for solutions to the parties if they are unable to reach an agreement themselves, whereas, in mediation, the mediator does not propose any options for a solution.[118] Therefore, the conciliator has a more active role in the process concerning the content of a possible settlement and can be much more direct and interventionist than mediators.[119] This fact leads to the main difference between the two conflict resolution processes regarding the result. The main task of conciliators is to reach an amicable agreement between two parties to a dispute as soon as possible by achieving a deviation from their original positions, i.e., a compromise. Mediation, on the contrary, is not just about moving the parties away from their initial demands and finding an accepted solution in the middle.[120] The ultimate goal of the mediation process is the autonomous and joint search for creative outcomes to reach a future-oriented and so-called 'win-win solution',[121] in other words, consensus. Therefore, the resolution process of the conflict in mediation does not remain on a factual level. It already starts at its roots, the trigger of the conflict, but without taking on therapeutic tasks, and ends by negotiating options created by the parties after discovering their needs.[122]

## 3.2 Conciliation and Mediation in Court: Concepts and Comparison

The question now arises whether conciliation and mediation are used both out of court and in legal proceedings. Thus, it must be assessed whether the elements of compensation or, rather, a settlement also find their place in the context of judicial disputes. It, therefore, seems essential to place conciliation and mediation in a procedural environment that is characterised by a sense of entitlement. Admittedly, as parties enter the judicial environment, the *modus operandi* and the assumptions change to a legal one. The basic assumptions are

112 As an example, see Art 5 and 7 Directive on consumer ADR, 2013/11/EU (n 13).

113 Bargen (n 66) 56.

114 Alexander (n 89) 2; Fischer and Schneuwly (n 68) 28.

115 Bargen (n 66) 55; Girsberger and Peter (n 76) 6 f.

116 Bargen (n 66) 56.

117 Fischer and Schneuwly (n 68) 239.

118 M Paleker, 'Mediation in South Africa: Here but Not All There' in N Alexander (ed), *Global Trends in Mediation* (2nd edn, Kluwer Law International 2006) 356; Fischer and Schneuwly (n 68) 28.

119 Girsberger and Peter (n 76) 6 f; Alexander (n 89) 2; Paleker (n 122) 363.

120 Bargen (n 66) 55; Girsberger and Peter (n 76) 6.

121 Meisinger and Salicites (n 82) 18.

122 Sonnleitner (n 70) 55.

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that there is no right without entitlement, that entitlement reasoning lies in the past, that the truth represented and filtered out in each case is absolute, and that decisions are made on individual issues and not in the overall view of the delegates. Finally, this means too that this requires conflict resolution characterised by winning and losing.[123] Consequently, how can conciliation and mediation take their place as amicable procedures in this environment without losing their DNA and their self-conception?

A brief look back, however, makes it clear that this is not a peculiarity. For instance, the origin of conciliation can be traced back to Roman law and the idea that the judge should lead the parties to an amicable settlement. After the French Revolution, this idea was carried forward in Western Europe, with amicable conciliation proceedings before so-called 'justices of the peace' preceding court proceedings.[124] However, most of them were abolished over time.[125]

The central element in the course of any conflict settlement is negotiation. As long as the decision-making power is not finally handed over to the neutral third party, there remains the possibility of an amicable settlement of the conflict by the parties themselves (e.g., in the form of a private-law settlement). The resolution of the conflict can therefore be limited to negotiation or combined with other forms of conflict management. An example of this is the settlement hearing.[126] It can be scheduled immediately before the initiation of or during civil proceedings[127] and thus becomes a judicial activity. Institutionalised court proceedings are the *ultima ratio*,[128] usually serving to resolve disputes, but not only that, as the process is also intended to contribute to the resolution of private conflicts. In any case, there is a danger that another legal dispute will soon follow due to not dealing with the actual cause of the conflict. Also, as a rule, the way to the court must not be blocked either.[129] Therefore, civil court proceedings should also offer the opportunity for dialogue and rational discourse.[130] Possibilities that can be summarised in the procedural principle of promoting an amicable solution arise,[131] for example, if a party submits an application to summon the opposing party to appear before the court for the purpose of an attempted settlement even before civil proceedings have been initiated. Above all, however, the opportunity for amicable intervention appears to be given during the oral proceedings, in that not only do the parties find their way back into a conversation, but also the judges can attempt an amicable settlement of the dispute at every stage of the proceedings and thus ensure the implementation of the purpose of the process, 'legal peace'.[132] However, since the court is often not the appropriate forum for resolving these conflicts, it may be incumbent on judges to refer the parties to other institutions that are more suitable in individual cases (conciliation and mediation).[133]

123 Ruppel (n 84) 5.

124 S Ferz, 'Mediation. Das Recht auf dem Weg zurück in die Gesellschaft?', in G Dohle (ed), *Bericht über den 23. Österreichischen Historikertag in Salzburg veranstaltet vom Verband Österreichischer Geschichtsvereine in der Zeit vom 24. bis 27. September 2002* (Verband Österreichischer Historiker und Geschichtsvereine 2003) 280.

125 Meisinger and Salicites (n 82) 11 f.

126 About case management power of the judge in ADR areas see 2.3.

127 K Röhl, *Rechtssoziologie : ein Lehrbuch* (Heymann 1987) 473; M Roth, *Zivilprozessrecht* (3 aufl, Manz 2020) 2.

128 Rechberger and Simotta (n 23) 11.

129 R Greger, H Unberath and F Steffek, *Recht der alternativen Konfliktlösung: Mediationsgesetz, VSBG: Kommentar (*2 aufl, CH Beck 2016) 382 f.

130 Kodek and Mayr (n 22) 34.

131 Ibid 73.

132 H Prütting, § 278 in W Krüger and T Rauscher (eds), *Münchener Kommentar zur Zivilprozessordnung*, Bd 1, §§ 1-354 (6 aufl, CH Beck 2020) 1-5.

133 Kodek and Mayr (n 22) 34.

The content of what has just been described becomes even more tangible when one realises that judges have to decide a dispute according to norms and values that are recognised by the larger social group to which the disputants and the judges themselves belong. The idea that judges decide a dispute according to 'justice' in an individual case is not only legal doctrine but also social reality, as the judge may also perform other functions on the side, such as conciliation.[134] However, for the conflict to be made accessible to a third person and decided upon as a judge, the dispute must first be transformed or legalised into a conflict of values. The reformulation of the conflict matter and thus the reduction to the legally relevant points, though, cause selective processing of reality. In this process stage, the more complex causes of the dispute and the underlying personal and social tensions are lost and make the original dispute appear as a meta-conflict.[135] In this way, the dispute becomes one about truth and justice, which is accompanied by the idea of an objectively correct and, thus, all-binding solution of an individual aspect. Ultimately, it follows that judges who know the law and have mastered the process of determining the material truth are granted the competence of a decision in the conflict.

Since, on the contrary, a conflict of interest cannot be decided by a third party, the delegation of decision-making power first requires the legal process of encoding. This has to do with the fact that conflicts of interest describe a dispute based on exchangeable objects of desire. However, in those cases where an exchange is not possible, there is no basis for decision-making. Where an exchange would be possible, there is no objective standard for the valuation of the service to be exchanged. This addresses the 'problem of the fair price'. In resolving conflicts of interest, the third parties can therefore only be helpful as mediators, but not as judges. In this respect, they can contribute to clarifying the self-interests of the parties through communication and point out possibilities of agreement that both parties prefer to the continuation of the conflict.[136]

The deeper the amicable settlement of disputes is to be implemented in the judicial procedure itself, the clearer must be the guidelines for the judicial activity and, likewise, the demarcation from it. This means that it can make sense to allow the trial judges to use cooperative, interest-oriented negotiation methods in principle. However, the same person cannot hold decision-making authority and also be able to act as a mediator in the same proceedings. Conversely, this means that in the event of a personnel separation of judicial conciliation hearing and decision-making competence, the use of mediation in judicial proceedings cannot be ruled out.[137]

The degree to which amicable dispute resolution can be intertwined within existing legal systems is particularly evident in the context of 'court-related' programmes.[138] Mediating and conciliatory elements exist in and on the margins of legal schemes.[139] Thus, the efforts to reach an amicable settlement between the disputing parties do not end with resorting to legal action.[140]

Court-related amicable dispute resolution comprises processes with institutional links to the judiciary[141] and exists in different models.[142] On the one hand, within the courts, judges could undertake conciliatory or mediating efforts themselves or refer the parties to an in-court amicable dispute resolution proceeding, including conciliation or mediation, led by

134 Röhl (n 131) 480 f.
135 Raiser (n 59) 318.
136 Röhl (n 131) 463, 481.
137 Greger, Unberath and Steffek (n 133) 384 f.
138 Alexander (n 89) 6.
139 Ibid 21.
140 Greger, Unberath and Steffek (n 133) 394.
141 Girsberger and Peter (n 76) 191; Fischer and Schneuwly (n 68) 240.
142 Alexander (n 89) 7.

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another judge; on the other hand, they could refer the parties to external organisations with mediation and conciliation services for out-of-court dispute resolution processes.[143] These procedures may either be mandatory or offered by the courts at their discretion.[144] Thus, court-related amicable conflict resolution procedures are alternatively or cumulatively approved, proposed, or even offered itself by judges.[145]

Judges must examine the possibilities of consensual conflict resolution of the parties and discuss these with them.[146] Following this approach, judges act as so-called 'case managers' or 'managerial judges'.[147] In this role, they assist the parties in finding the most appropriate procedure for their conflict.[148] To fulfil this task, the judge may encourage or help the parties to identify or narrow down their issues in dispute, identify strengths and weaknesses, and, as said before, refer them to the appropriate dispute resolution procedure,[149] like conciliation, mediation, or another amicable dispute resolution proceeding.

a) *Standard Conciliation as an in-court settlement procedure*

Conciliatory elements can particularly be found in the in-court settlement function of the trial judge in court proceedings.[150] This kind of settlement role is exercised by the same judge who will decide on the matter if the parties cannot reach an agreement. They adopt a 'facilitative role' and act within the courtroom in a legalistic and interventionist way. Private sessions are not permitted, as the rules of justice require that the parties must have the opportunity to hear and respond to all allegations made against them. The goal is to lead the parties to a resolution of their conflict. In doing so, judges, even when exercising their settlement role, are required to ensure that these solutions also comply with the relevant legal norms.[151] In some states, judges have a statutory obligation to attempt to reach a settlement before hearing a case. Such statutory obligations are, however, not found in common law jurisdictions. Judicial attempts to encourage parties to settle are a matter of case management practice rather than law in these jurisdictions.[152]

It may also be added that the structure of court conciliation is usually not procedurally regulated. Judges are granted wide discretion to act according to their perception, experience, knowledge, and skills. In most jurisdictions, court conciliation is not confidential as it is part of the preparatory hearing. But this means conversely that in some countries, it is permitted to conduct the preparatory hearing and the conciliation in a non-public manner if there is an inclination to settle.[153]

143 Alexander (n 89) 22f; Greger, Unberath and Steffek (n 133) 394; Council of Europe, *The early settlement of disputes and the role of judges: 1st European Conference of Judges* (24-25 November 2003, Strasbourg): proceedings (CoE 2005) 62.

144 Council of Europe (n 147) 62.

145 Girsberger and Peter (n 76) 191.

146 Greger, Unberath and Steffek (n 133) 394.

147 Eidenmüller and Wagner (n 78) 295.

148 In Germany Art 278a Code of Civil Procedure of the Federal Republic of Germany (ZPO) 'Zivilprozessordnung (ZPO)' [2005] Bundesgesetzblatt 1/72 <https://dejure.org/gesetze/ZPO> accessed 1 December 2022.

149 Astor and Chinkin (n 104) 242.

150 In Switzerland civil actions usually start with conciliation conferences, to encourage the parties to settle. There are even special conciliation courts for some cases (Art 274a Swiss Code of Obligations '22 Obligationenrecht' of 30 March 1911 <https://www.fedlex.admin.ch/de/cc/internal-law/22#22> accessed 1 December 2022); I Meier, 'Mediation and Conciliation in Switzerland' in N Alexander (ed), *Global Trends in Mediation* (2nd edn, Kluwer Law International 2006) 373.

151 N Alexander, W Gottwald and T Trenczek, 'Mediation in Germany: The Long and Winding' in N Alexander (ed), *Global Trends in Mediation* (2nd edn, Kluwer Law International 2006) 250.

152 Art 278 German Code of Civil Procedure (ZPO) (n 79); Alexander (n 89) 22.

153 Vėbraitė (n 26) 52.

Considering in regard to court conciliation, even if the settlement is not reached, the same judge continues to settle the dispute in question in the court hall, it should be stated that judges as conciliators may not be considered as impartial third parties in a conventional sense. This statement does not challenge the impartiality of that third assisting party as a judge. It is instead a question of whether it should be noted that the judges' and mediators' impartiality is to be treated as different. Judges are impartial regarding the parties to a dispute and their interests but cannot be impartial regarding the dispute's judicial outcome. Finally, they face a need to evaluate and decide the dispute. In the case of court mediation or in-court amicable conciliation process, assisting third parties do not face such a threat and may be considered impartial concerning both the process and the outcome of a mediation.

b) *Mediation*

In addition to the amicable-oriented function of judges in court proceedings in the context of judicial settlement, there are also court-related models of mediation. One is an in-court mediation procedure that takes place at the request of the parties as part of the court proceedings. A judge who acts as mediator will not be the judge in the main trial if the mediation does not lead to an agreement.[154] The case will be referred from the trial judge (case managerial judge) to another judge who serves as a mediator in the same court.[155] The courts thus integrate mediation into their system and support the proceedings in terms of personnel and funding. The mediators are trained, supervised, and approved by the court.[156] The parties do not bear any additional costs for such a procedure, as they are generally borne by the justice system and cannot choose the judicial mediator themselves.[157] During the process, the judicial mediators give the disputing parties the opportunity to look at their conflict from all sides and to identify the underlying and often unspoken interests that should lead to the resolution of the conflict. They are furthermore responsible for keeping the mediation process on track but must never interfere in the decision-making of the parties. The essence of mediation is to transfer decision-making power from the state to the parties.[158]

c) *Amicable conciliation process*

Some other civil procedures deploy an in-court conflict resolution proceeding that follows the principles of an amicable conciliation process led by a so-called conciliation judge, who can choose any method of conflict resolution (not only mediation).[159] Such proceedings come about by means of a referral by the trial judge and are based on the voluntariness of the parties. Such conciliation hearings at court bring movement into deadlocked conflicts by the conciliation judge gathering facts together with the parties and trying to shed light on the underlying interests to facilitate comprehensive conflict management tailored to the parties involved, thus finally solving the overall conflict. Judges take on this role of a conciliation judge in addition to their in-court settlement work in standard proceedings as judicial

154 Alexander (n 89) 22.

155 Alexander, Gottwald and Trenczek (n 155) 254.

156 E.g., in Slovenia, mediation is offered as such a court service; Council of Europe (n 147) 62.

157 Alexander (n 89) 22. In France, the judge must obtain the consent of the parties for a referral to mediation (Art 21 Law No 95-125 On the Organization of Courts and of Civil, Criminal and Administrative Procedure 'Loi relative à l'organisation des juridictions et à la procédure civile, pénale et administrative' of 8 February 1995 <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000350926> accessed 1 December 2022); D Macfarlane, 'Mediation in France' in N Alexander (ed), *Global Trends in Mediation* (2nd edn, Kluwer Law International 2006) 198.

158 L Otis and EH Reiter, 'Judicial Mediation in Quebec' in N Alexander (ed), *Global Trends in Mediation* (2nd edn, Kluwer Law International 2006) 115 f.

159 E.g., in Austria and Germany. The initiative in Germany is already legally enshrined (ZPO (n 79) Art 278), whereas in Austria, it is still assumed to be a project. In Austria, the judges work on a voluntary capacity; in Germany, they function as organs of the administration of justice. Furthermore, the conciliation judges in Germany can give legal advice and propose solutions. This is not provided for in Austria.

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bodies.[160] However, they do not act within the framework of the court administration, nor do they act like extrajudicial mediators.[161] In addition, it may be provided that the conciliation judges give legal advice and propose solutions, but they have no decision-making authority. This competence remains to the trial judge.

The conciliation judges have to be professionals in ADR in order to be allowed to act as conciliation judges. They must be trained mediators or complete appropriate training.[162] The main differences between conciliation hearings at court and out-of-court amicable dispute resolution procedures lie mainly in the motivation of the parties and the higher degree of the escalation of the conflict. In contrast to out-of-court procedures, the stronger presence of the law, the freedom to choose any method of conflict resolution, the narrower time frame (average duration is around half a day), and the cost-free nature are particularly characteristic of conciliation proceedings at court. Furthermore, it is not possible to freely choose the conciliation judge,[163] representation by a lawyer is not required, and there is a greater responsibility on the part of the conciliation judge to ensure that the overriding principles of law are upheld.[164] If the parties reach an agreement at the end, it must be clarified whether it should be written down. This depends solely on the parties' will. The conciliation judge can then notarise the final agreement within the framework of an in-court settlement. If the parties do not reach a result, the proceedings before the conciliation judge are terminated, and the trial judge continues the process.[165]

It is to be mentioned that this procedural model was not introduced to shift an out-of-court procedure to the judiciary. The aim is to enable a consensual solution still in court proceedings instead of a contentious one and to offer amicable conflict resolution methods even if this was missed in the pre-judicial period. Moreover, this procedure is useful if the referral back to out-of-court procedures would be unfeasible, such as for reasons of proportionality.[166]

From the in-court conflict resolution proceedings, judicial referrals to out-of-court mediative and conciliatory processes are to be distinguished. This model provides for mediation or conciliation referred by judges and external to courts.[167] The referral can be obligatory or may require the consent of the disputing parties.[168] These are usually free to select the mediator from a group of mediative certified professionals. Mediators are usually paid directly by the parties but may also be publicly funded in certain circumstances. This court-related model of mediation extends the arm of the court into the private sector.[169] Accordingly, the judiciary occupies an important, influential position as referrers of amicable dispute resolution procedures.[170] The advantage of out-of-court dispute procedures is that the professionals have more time and bring more experience with them. This is especially useful when dealing with difficult conflicts, such as profound divorce conflicts or corporate restructuring.[171]

160 Ferz (n 98) 104.
161 Greger, Unberath and Steffek (n 133) 408.
162 Ferz (n 98) 106; Fischer and Schneuwly (n 68) 241.
163 Alexander (n 89) 23; Greger, Unberath and Steffek (n 133) 408.
164 Greger, Unberath and Steffek (n 133) 408.
165 Ferz (n 98) 109.
166 Greger, Unberath and Steffek (n 133) 408.
167 Alexander (n 89) 23; Paleker (n 122) 367 f.
168 In France, the judge must obtain the consent of the parties for a referral to mediation (Law No 95-125 (n 161) Art 21); Macfarlane (n 161) 198.
169 This model is frequently found in common law jurisdictions. Alexander (n 89) 23.
170 Alexander (n 89) 23;
171 Greger, Unberath and Steffek (n 133) 399.

## 4 CONCLUSIONS

Different national practices show that amicable dispute resolution has become a current trend in the civil procedure policies of European countries. This has an integrative effect. The drift towards a consensual tenet in the civil procedure may be observed at the most general level. This is reflected in the idea of problem-solving as one of the aims of civil justice, the strengthening of the cooperative approach at the different stages of the trial, and the recognition of the settlement principle as a fundamental principle of modern civil procedure.

The latter can be seen at both international and national levels. The ELI/UNIDROIT Rules recognise the settlement principle and interpret it as a three-dimensional obligation of the civil procedure participators: a) obligation of the parties to cooperate with each other for reaching the settlement; b) obligation of the lawyers to inform parties about the opportunities of such a settlement; c) obligation of a court to facilitate the settlement during the trial. At the national level, this principle can be enshrined in the legislation directly (Belgium) or derived implicitly from the requirements of other principles (Austria) or particular rules of civil procedure (Lithuania).

At the same time, such doctrinal provisions seem to run the risk of remaining in books without practical tools for their implementation. Such tools should be present within the framework of effective case management in national civil procedures. Case management should give the judges a wide range of powers in different areas, inter alia, to ensure amicable dispute resolution for parties. It may cover various court activities – from the right to propose amicable dispute resolution to the right to conduct special court-related amicable dispute resolution procedures on their own.

The theoretical model of the court-related amicable dispute resolution procedures can differ from state to state, but in the most general sense, it covers in-court and out-of-court schemes. For this purpose, national legislators usually use the two most popular amicable dispute resolution procedures with the participation of the third neutral person – conciliation and mediation. The difference between them is reflected in the powers of the third neutral person, the structure of the procedure, its principles, the outcome orientation, and the main style of conduct – consensus v. cooperation. On the one hand, integration of these procedures into the court proceedings allows them to retain their main features. On the other hand, the need to ensure the effectiveness of civil justice stimulates the legislator and the practice of searching for new forms and policy decisions in the justice sector. This is how modern forms of court-related amicable dispute resolution proceedings appear.

The different designs and practices observed in the different states can be summarised as in-court conciliation, in-court and court-connected mediation, and amicable conciliation processes. However, the models shown are intended to represent an attempt to structure or simplify the classification of the different amicable court-related procedures applied in civil cases. In global terms, answers are certainly not that simple. All over the world, 'court-connected' programs and their mediation and conciliation elements differ. For this reason, it is essential to look into individual national regulations, analyse the empirical data, and assess the criteria for evaluating the most appropriate form of dispute resolution in a particular case.

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