

Magdalena Broszkiewicz

Wrocław University of Economics
e-mail: magdalena.broszkiewicz@ue.wroc.pl

MEDIATION IN INTERNATIONAL ECONOMIC RELATIONS – DIFFERENT APPROACHES AND CULTURAL BACKGROUND

MEDIACJA W MIĘDZYNARODOWYCH STOSUNKACH GOSPODARCZYCH – ZRÓŻNICOWANE PODEJŚCIA I UWARUNKOWANIA KULTUROWE

DOI: 10.15611/e21.2018.3.07

JEL Classification: G28

Summary: In the globalising world, similar phenomena are spreading in the world economy, politics, demography, social life and culture, regardless of the geographical context and the level of economic development of a given region. There are disputes over economic, political or social background that concern citizens of different countries. Also the mediation procedure is popularized, which facilitates the diffusion of a new approach to conflicts. The subject of this article is to present a contemporary image of mediation, with particular emphasis on cross-border mediation, as well as their history and indication of the most-important functions in societies and their potentially high significance in the future. The main purpose of the article is to present cross-border mediation as the best way to resolve conflicts between representatives of different countries, nations, cultures, etc., as well as to draw attention to the barriers related to their application.

Keywords: mediation, international economic relations, cultural background of economy.

Streszczenie: W globalizującym się świecie dochodzi do rozprzestrzeniania się analogicznych zjawisk w światowej ekonomii, polityce, demografii, życiu społecznym i kulturze, niezależnie od kontekstu geograficznego i stopnia gospodarczego zaawansowania danego regionu. Do głosu dochodzą spory na tle gospodarczym, politycznym czy społecznym, które dotyczą obywateli różnych państw. Również procedura mediacji ulega popularyzacji, co ułatwia dyfuzję nowego podejścia do konfliktów. Przedmiotem artykułu jest przedstawienie współczesnego obrazu mediacji, ze szczególnym zwróceniem uwagi na mediacje transgraniczne, jak również ich historii, oraz wskazanie najczęściej doniosłych funkcji w społeczeństwach i ich potencjalnie dużego znaczenia w przyszłości. Głównym celem jest przedstawienie mediacji transgranicznych jako najlepszego sposobu rozwiązywania konfliktów pomiędzy przedstawicielami różnych państw, narodów, kultur itd., jak również zwrócenie uwagi na bariery związane z ich zastosowaniem.

Słowa kluczowe: mediacja, międzynarodowe stosunki gospodarcze, uwarunkowania kulturowe.

1. Introduction

Over the centuries, mediation has evolved in some cultures as a phenomenon of unprofessional, informal support for conflict resolution. Often, individuals with a public trust for formal or informal authority have fulfilled their duties as mediators. The 20th century saw the beginning of sanctioning and recognizing mediation as a profession and a mediator as a trained specialist. Experience shows that the tendency of increasing the importance of this path of seeking agreement will remain.

Respect for human rights, the democratic systems of states, the individual's belief in the rights granted to it and the ability to self-determine and growing tolerance of diversity is the cause of interest in using mediation in solving people-to-people disputes in a manner that is convenient for their participants. It is also worth noting that mediation is present as a way of resolving both institutional and interpersonal disputes, giving a wide scope for action.

In the globalizing world, similar phenomena in world economy, politics, demography, social life and culture are spreading, regardless of the geographic context and economic progress of the region. There are economic, political or social disputes that affect citizens of different countries. The mediation procedure is also popular, which facilitates the diffusion of a new approach to conflicts (rather than a win-lose approach). For this reason cross-border mediation is becoming more and more common, which allows for finding satisfactory solutions for people of different nationalities and even cultures, connected by an inconvenient, conflicting situation. Often, the problem of understanding is not only the subject of the dispute, but also the cultural differences between the parties (which often intensifies misunderstandings and aggravates a dispute).

The research thesis on which the construction of the work is based proclaims that:

- mediation is the best way to resolve disputes,
- cross-border mediation is applicable to conflicts between people of different nationalities, citizenship and culture,
- cultural barriers make it difficult to reach agreement in the mediation process.

2. Theoretical background of mediation in economy

Mediation is historically and practically the first and most important alternative dispute resolution, collectively called ADR (Alternative / Reasonable Dispute Resolution) and as such is sometimes referred to as the “queen of ADR”; is practically a synonym of this institution. So far there has been no uniform normative definition in international law and national legislation. The doctrine and practice of mediation define mediation as a method of dispute settlement in a special kind of negotiations conducted by the parties – the dispute with neutral third party – a mediator.

Arbitrary and conciliatory forms of conflict management were known in many ancient cultures (eg, the Far East – especially where Buddhism was the dominant religion but also in Jewish, Christian, Confucian and Islamic culture). As for the “roots” of Europe, as in the case of the whole legal culture, they should be sought in ancient Greece and, above all, in Roman law [Barrett, Barrett 2004, pp. 1-18].

In Greece some roots of philosophical concepts of mediation are apparent in the writings of Plato and Aristotle. In practice it was called institution. The arbitrator could be a Greek citizen over 60 years of age. In each particular case, the judge was chosen by the parties to the dispute and his task was to reach a settlement of the parties, and if the agreement could not be reached, the matter was referred to the jury. According to the cursory description above, the institution had such attributes as modern mediation, such as the voluntary choice of a mediator, the autonomy of the conflict, and the possibility of appealing to court in the absence of agreement.

In the legal system of ancient Rome, the amicable institutions were so advanced that their Latin names are the etymological origin of modern forms of alternative dispute resolution and related terminology. The oldest and most widespread was providing (as opposed to the intense court proceedings) the confidentiality of the arbitration, and the arbitration award obtained by the arbitrator, also known as the compromise, was subject to enforcement of Justinian’s Digest of the 6th century. Also known was the institution of the settlement (*transacto*) as a “way of eliminating processes in the bud” and the concept of *transacta res*.

According to Donald Peters, “mediation is best understood as aided negotiations, and negotiations are the most commonly used procedure in building legal relationships and resolving disputes” [Peters 2010, p. 7]. EU Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters in Art. 3 point a defines mediation as follows: “mediation” means organized voluntary proceedings, irrespective of its name, or a term in which at least two parties to the dispute attempt to reach agreement themselves in order to resolve their dispute using mediator assistance [Directive 2008/52/EC].

The basic distinctive features of mediation are:

- of consensual (voluntary) nature of the procedure and its outcome (settlement),
- the autonomy of the parties,
- the impartiality of the mediator who is the spokesperson of both parties, elected and dismissed by the parties and subject to their instructions.

In theory and practice, there are two types of mediation:

1. Traditional mediation, i.e. mediation initiated by the parties on the basis of an earlier mediation agreement or incidental agreement or so-called compromise during a dispute (mediation agreement).
2. Mediation during court proceedings, i.e. mediation initiated by the court (referral court mediation).

Mediation, apart from the obvious advantages (reduction of time, costs and tensions in the process of reaching an agreement), is sometimes criticized for

its faults, which include possible imbalance of parties / asymmetry of potentials (economic, intellectual) posing the risk of abuse of advantage by the stronger side. This is undoubtedly a serious potential problem, whose solution should be sought in the systemic guarantees of the rule of law resulting from the established standards of mediation, mediation selection mechanisms, mediator's ethics code and professional preparation, and the active role of the court approving the mediation agreement in terms of legality and fair trading principles (principles of social coexistence). One has to pay attention to the risk of the court reacting to the substantive "revision" of the mediation agreement – which is inadmissible.

It is also alleged that mediation raises the costs of resolving a dispute, since the parties in the case of unsuccessful mediation have still to apply to the court or arbitration. In general, the charge is inadequate. With regard to out-of-court mediation, the chance of a quick and final settlement of the dispute, accepted by the parties in the course of a few or more mediation sessions in a substantive sense, but also in the sense of the costs of proceedings, has a huge advantage over traditional proceedings before a common court or even an arbitration court.

Mediation and arbitration are an excellent alternative to common court proceedings, but although they both show similarities, they are quite different civil law institutions. In Polish law, these methods have been regulated in the civil code of Art. 183 to Art. 186 and Art. 1154 to Art. 1217. The features that we recognize as common to both mediation and arbitration include the fact that both proceedings are full of volunteering. It manifests itself in the fact that both parties have to express their willingness to settle their dispute through arbitration or mediation. Another common feature of the two proceedings is the short time to settle the dispute and lower costs in relation to the proceedings before the common courts. The very important feature of both proceedings is confidentiality, which manifests itself in two aspects. In the first aspect it should be understood as the confidentiality of the procedure itself, i.e. the exclusion of the transparency of the procedure for third parties. In the other – as a duty of secrecy about the details of proceedings by the mediator and the arbitrators. Such confidentiality is often beneficial to both contractors as it avoids undesirable publicity that they are in dispute [Practical issues... 2009, p. 14].

There are also differences between the two types of proceedings. The first significant difference is the goal to achieve by both of them. While mediation is intended only to fix disputable issues and work together by the positions of the parties, which later have to be approved by the court, arbitration in its substance is to issue a ruling on the subject matter. The other difference is the mediator and the arbitrator role in the proceedings. The mediator performs mediocre role in the mediation procedure to the pages and they fully affect the start, run and end of the whole mediation process. In case of arbitration the situation looks a bit different. The parties' impact on the mileage and completion is limited since the initiation of the proceeding. It is true that it follows the rules that were previously agreed, but the court becomes the arbitration court while discussing the issue of the role of mediator and arbitrator at the end of proceedings.

One should pay attention to the very important difference, namely the fulfilment by the arbitrators of the function of the authority of the parties. The mediator will not fulfil its role fully if the parties fail to agree and do not agree on a common position in the form of an agreement, but the non-conformity of the consensus satisfactory to both parties is not a prerequisite for the arbitrator to deliver the judgment.

Another difference is the extent of the competence to settle a particular type of case by the mediator and the arbitrator. It is important to note that mediation is more universal because no limitation is placed on the category of cases in which mediation cannot be conducted. The situation is quite different in the case of arbitration, which has the power to rule out family and criminal cases, and when the dispute cannot be the subject of a court settlement.

The effects of concluding a mediation and arbitration agreement are also different. In the case of conclusion of a contract in the case of referring the parties to mediation by the court, failure to settle the settlement within 30 days results in the appointment of the hearing. Thus, in the mediation procedure we cannot talk about the complete exclusion of the jurisdiction of the common court to settle the dispute.

A cross-border dispute occurs if at least one of the parties is domiciled or habitually resident in a Member State other than the State of residence or normal residence of any of the other parties.

3. Mediation in international law

The promotion and dissemination of alternative dispute resolution methods has been adopted by the European Union. At its meeting in Tampere on 15-16.10.1999, the Council defined a new objective of creating and harmonizing legal instruments for the development of the area of freedom, security and justice, and Member States were called upon to establish alternative, out-of-court procedures with a view to better access justice in Europe.

The consequence of the above findings was the adoption by the European Commission in 2002 of a consultative act – the Green Paper on Alternative Dispute Resolution in Civil and Commercial Matters. It should be added that it included 21 questions. The replies to them were a boost to further legislative action. The European Parliament adopted the Green Paper on 12.12.2003, while also deciding on a draft mediation directive in civil matters.

The reference in the Green Paper to mediating only in matters belonging to the former pillar of the EU and hence in disputes, generally speaking, of economic law was justified both by the highest degree of integration of Member States in this area and by the need to remedy the Community freedoms and the ever-growing number of cross-border economic disputes in the internal market, including on-line dispute resolution.

The discussion on the Green Paper resulted in the preparation by the Commission in October 2004 of a separate soft law – the European Code of Conduct for Mediators. It

is worth emphasizing that it sets forth non-binding standards of conduct and standards for mediators and organizations that provide services for mediation, focussed around such fundamental principles as independence, impartiality, neutrality, mediating competence or confidentiality, informality and voluntary mediation. It was primarily designed for the purposes of civil and economic mediation, although there is in principle no obstacle to being considered as a universal determinant of mediating standards.

Following extensive consultations with the Member States on the basis of the Green Paper, the Commission also prepared a proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters in October 2004, which, after some modifications, was adopted by the European Parliament and the Council on 21 May 2008 (Directive 2008/52/EC) and entered into force on 13 June 2008.

Although the scope of the Directive is limited to cross-border disputes (as defined in Article 2 of the Directive), as a result of the principle of subsidiarity binding the Union, the preamble explicitly underlines the applicability of its provisions to intra-national mediation. On the other hand, the framework nature of the provisions of the directive is intended to contribute to the creation of a predictable legal framework on the essential aspects of civil proceedings in the Member States by harmonizing the provisions in force on the coexistence of mediation and civil proceedings. Existing discrepancies in national legal procedures or the absence of such regulations, particularly in cross-border situations, significantly diminish the popularity of alternative dispute resolution, precisely because of the accompanying litigants feeling uncertain of their legal situation not only in time but also after mediation.

Cross-border relationships are all contacts and relationships between individuals / entities from two different countries, and thus also different cultures. The frequency of such relationships is related to the processes of globalization that occurs in modern society. We can translate the concept of globalization as the tendency of spreading analogous phenomena in the world economy, politics, demography, social life and culture, regardless of the geographic context and economic stage of the region. It is also a complex, multidimensional process of deepening international division of labour, increasing international trade, the flow of capital, people, technology and goods, the penetration of cultures, and the rise of relations between countries. Globally, it is a historical process that ends the industrial era of social organization, characterized by the transnational diffusion of financial capital and cultural patterns, based on the development of the latest technologies [Starosta 2001, p. 44].

The problems arising from the intensification of human relations on a global scale are related to insufficient knowledge of the partner cultures and impediments to communication. They concern all spheres of human life. Among the cross-border relationships we can distinguish among others:

- economic (the so-called international business),
- social (including family),

- political,
- religious,
- diplomatic.

Each of these relationships can create conflict situations and each of them can be the subject of transnational mediation / negotiation.

The issue of international business is inherent in the notion of international management, which is more difficult than managing a domestic business. In addition to obvious differences between countries (geographic, political, economic, legal), there are issues that make it difficult to navigate the market of another country – the needs of a different culture. The ability to exploit the opportunities that come with it and avoid “shoveling” shapes the organizational culture of every business.

Negotiations make it possible to function not only in business, so it is very important to know the nuances associated with this process in a diverse cultural environment. Pages do not have an easy task, because they want to come to an agreement despite different views on the subject of their interest, but also in spite of the differences in cultural factors. No mediation or negotiation, and especially those that take place in intercultural space, should be approached without preparation.

4. Cultural background of mediation

One of the basic barriers, the most obvious and therefore rarely discussed, is the knowledge of the mother tongue (language) of the parties in which they will communicate in the course of cross-border mediation proceedings. However, as already mentioned above, the mere understanding of the meaning of words does not necessarily indicate communication success. Mediators, working at the contact of cultures, should have the knowledge and experience of the characteristics of particular cultures.

Culture as a multidimensional concept can be defined by its constituents: world views, beliefs, assumptions and behaviors specific to particular societies. For this reason, mediation strategies and processes have to be diversified and adapted to the needs of the parties, often from different cultural backgrounds. They are different because they perceive and reason. Either party cannot be induced to adopt the other’s perspective also because of different thinking, for example, about core values [Hofstede, Hofstede, Minkov 2010, p. 89].

For the representatives of the parties, advocates and the mediator, cultural differences are of paramount importance in the preparation and conduct of the mediation process. Cultural differences determine the success and difficulties that occur in the search for a common solution, because through their knowledge they can eliminate misunderstandings and communicate effectively. It is worth remembering that the indigenous culture decides the way of looking at the world of every person, so it is worth getting acquainted with the different perspective.

Cultural differences are especially evident at the first stage of mediation, when the parties meet for the first time in a new situation, and the mediator has to “unload” the negative tension between them so that they can focus on the essence of the problem. Cultural differences can make it more difficult to build trust between the parties. Although the culture of every person can change under the influence of meetings with different nationalities, its basic values are passed on from generation to generation. Even the perception of seemingly simple things or phenomena may differ according to history or religion (for example, for a Hindu a cow is a holy animal, for Masai is a sign of prosperity, while for an American – a component of a meal).

The mediator may be based on similarities, not differences between cultures, but he/she should not allow the so-called “ a dominant culture between two parties (e.g. the predominance of individualist culture – e.g. in the United States, over the collective – Guatemala, Ecuador, Egypt, Nepal or male over female).

Cultural differences cause different ways of finding solutions to problems. The mediator may choose between focusing on the problem directly and discussing differences between the parties. In Figure 1 there are various issues that differentiate between parties in intercultural mediation.

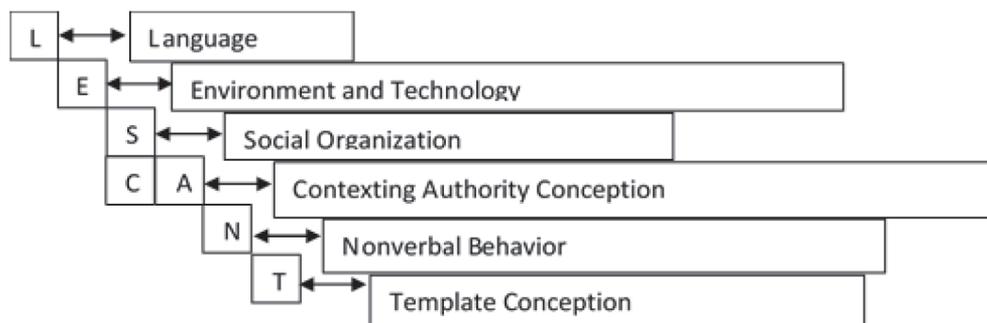


Figure 1. Cultural issues that differentiate the parties in cross-border mediation

Source: own study based on: [Victor 1992, pp. 76-78].

In terms of culture one should also mention the notion of gender. It affects, for example, behaviour in a disagreement or perception of the world by people of different sexes, approaches to negotiation, styles, behaviour or level of effectiveness (e.g. most studies indicate women as more likely to interact).

The cultural conditioning of emotions, perceptions and stereotypes and the ways to deal with them is so great that it is impossible to list all barriers to transnational mediation. Emotions are defined not only by the psychophysical characteristics of every person but also by the environment. For this reason, different matters may be relevant even in a seemingly trivial conflict. When conducting intercultural mediation, it is necessary to focus on the answers to key questions:

- Do the cultures from which the parties originate come into direct (“face to face”) or indirect (procedural) conflict?
- Are the parties emotionally expressive or withdrawn, introverted?
- Do the parties prefer direct cooperation, feel free, or fear direct confrontation?

It may also be unacceptable in some cultures to express the emotions of fear or sadness by men (this is considered a sign of surrender, weakness). Stereotypes are also used against women in which the image of the sex is devoid of signs of anger or lack of control. It is also difficult to cooperate in situations of varying levels of acceptance for the other party’s behaviour. In some cultures, a declaration is sufficient, and the only correct way is to write an agreement.

The most common communication disparities close in terms of [Moore 2014, p. 211]:

1. Preferences of the parties to engage in direct discussions.
2. Area of common assumptions.
3. Willingness to discuss direct problems.
4. Monochromatic speech (respect for the order of speakers, for the other side such mediation may be too dynamic) or polychromatic (many people speaking at the same time can be read as disrespect, inattentive listening, rudeness).
5. Way of reaching the solution – linear or with digressions.
6. Different meanings of phrases: yes, no, maybe, it is difficult to do (in Asian cultures this means impossible solution).

In order to cope with the above difficulty, it is necessary to use more face-to-face meetings, to lower confrontational attitudes, to clarify statements, to define the meaning of words, and first of all to develop common, acceptable procedures.

In cultures where social mediation is popular, the mediator may be able to initiate an informal conversation that aims to create a bond between the parties (it may even involve joint meals, e.g. in Iran, Pakistan, India, China, Japan, Indonesia). In cases where the relationship between the parties is vertical, formal procedures are proposed (respect of posts, also mediator). The culture that predominates in a given case for mediation determines the adoption of the procedure and establishes a plan for its implementation (taking into account the norms that determine the security of participants in a given culture).

Mediators who work at the contact of cultures should:

- learn how to communicate in the cultures from which the parties originate,
- interpret and explain further provisions and plans to the parties,
- listen diligently, respect the media’s image and respect their cultural differences (of course, to the extent of disrespect for each other and the other side),
- capture meaningful content, but hidden in the statements of the pages,
- create a joint, creative discussion.

In many cultures, the basis of people-to-people contacts, and thus reaching agreement through mediation, can only be achieved by building personal relationships with the other party. The sphere of conflict is in the background when it is necessary

to tackle the knot of knowledge, agreement (building trust will be necessary to reach consensus). In other cases (Indonesia) the key issue is to observe the rituals in force. Objectively oriented cultures will want to focus only on the substance of the dispute and they will waste time on interpersonal contacts. The task of the mediator is to coordinate these different orientations by:

- facilitating understanding by showing different approaches to business interests,
- education about the preferred way of reaching the target in a given culture (e.g. during a private meeting),
- strengthening the sense of trust, security, openness,
- deliberate slowdown of negotiations,
- showing more direct or indirect ways of presenting interests (depending on the preferences of the parties).

One of the parts of mediation, most susceptible to cultural influences, is to come up with possible solutions, generating options out of a deadlock – a conflict. The preferences of the parties may affect not only their ethnic, regional, national or class culture, but also professional, legal, business, educational, organizational (corporate, governmental or non-governmental). It also depends on the type of culture to use the methods of reaching agreement and fulfilment. The positioning approach applies, for example, to the Chinese or to the Russians. Europeans seek joint solutions, in the process of negotiating concessions at the negotiating table, as opposed to the Japanese who are willing to agree on informal meetings. Americans and Germans often use brainstorming. The intercultural mediator should seek solutions that are both satisfying and comfortable for both sides.

Culture also influences the evaluation of the parties' option of agreement. Culture determines the way of thinking, values, the sense of justice or the effectiveness of the solution. Some are based on individual feelings, practices (e.g. repetitiveness of the past) and standards, while others rely on legal regulations and only depend on the assessment of mediation.

Assessing the course of the mediation process and its results is related to the level of psychological satisfaction achieved as a result of reaching an agreement. In many societies, it is of marginal importance, and the relevance of the solution to the procedures and the law is attributed to a greater degree. This is a great simplification, because the letter of the law does not always guarantee a successful relationship between the parties in the future. Psychological satisfaction is of particular note in the following situations:

- when the parties are in contact, remain in the relationship: family, neighbour, employee, prison, married, parent,
- in African, Asian, Latin American communities, where collectivism is predominant,
- when individual needs give way to group harmony and the relevance of interpersonal relationships,
- when reconciliation or forgiveness are fundamental cultural values.

Different perceptions of mediation due to cultural differences may also be a source of problems for both the parties and the mediator himself/herself.

In some jurisdictions the focus is on applying different dispute resolution methods. This is due to the history and application of civil law or so-called common law. These differences are mainly due to the role of experts, regulations, costs, experience, results.

In this comparison, the following stands out:

- conciliation procedure in which the expert has the right to cross out the area of proposed solutions, can make proposals for the proposals themselves, so in reality it is more active than subjective,
- mediation in which the mediator is completely neutral and impartial,
- arbitration, in which the role of the judge is played by experts selected by both parties to the dispute.

Even in the context of the adoption of clear definitions of mediation (e.g. in the European Union Directive), this term is understood differently in different countries. The Anglo-Saxon model is characterized by efficiency, the emphasis is on time savings, and the ability to use arbitrage. In the German model there is no pressure on time, but there is a commitment to finding the best possible solution. The French model focuses on creativity, while Danish on pragmatism (considered to be most effective) [Practical issues... 2009, p. 3]. However, the best global model cannot be determined.

5. Conclusions

In the age of globalization, the question of how to deal with an unstable environment, especially when dealing with transnational issues and problems, is becoming increasingly important. The answer to such doubts may be the fact of using the achievements of countries where mediation is at a higher level of development and adaptation of the solutions to their capabilities.

The future of the subject is largely based on the acquisition of patterns from countries where the mediation process has a strong, sometimes even fundamental, role in the functioning of justice. This is not just a matter of adjusting the rules for the functioning of mediation or mediators. The basic issue seems to be that changes are necessary in the mentality of society. Without proper reforms that promote the use of mediation in dispute resolution, it will be difficult to expect stability to grow in importance.

References

- Barrett J.T., Barrett J.P., 2004, *A History of Alternative Dispute Resolution*, John Wiley & Sons, New York.
- Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF> (access: 19.09.2017).
- Handbook on the Peaceful Settlement of Disputes between States*, 1992, UNO, New York.
- Hofstede G., Hofstede G.J., Minkov M., 2010, *Cultures and Organizations: Software of the Mind. Intercultural Cooperation and Its Importance for Survival*, The McGraw-Hill Companies, New York.
- Moore C.W., 2014, *The Mediation Process: Practical Strategies for Resolving Conflict*, John Wiley & Sons, Inc., New Jersey.
- Peters D., 2010, *It Takes Two to Tango, and to Mediate: Legal Cultural and Other Factors Influencing United States and Latin American Lawyers' Resistance to Mediating Commercial Disputes*, http://works.bepress.com/don_peters/3 (access: 18.09.2017)
- Practical issues of cross-border mediation*, 2009, Academy of European Law, May.
- Starosta P., 2001, *Spoleczne skutki globalizacji*, [in:] J. Klich (ed.), *Globalizacja*, ISS, Cracow.
- Victor D.A., 1992, *International Business Communication*, Harper Collins, New York.