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Advantages of Resolution of Civil Disputes through Judicial Mediation over Litigation

Dispute resolution of civil cases is compelling matter as for society as legal scholars and judiciary. Existing conditions and statistics analysis reveals that commonly the judges of Tbilisi City Court consider more than thousand cases. Every doubt which is connected to quality of the decisions taken by trial jurisdiction in legit. Accordingly, this paper represents the opinion that the reasonable mean to solve the abovementioned problem is to pass the disputes to the judicial mediation, which includes, shares the most of the advantages and disadvantages of mediation, including its own specifications. The Paper characterizes the institutional parts of mediation and it is compared to the provisions of Civil Procedural Code of Georgia, regulating the terms, expenses and other issues. The object of the paper is launching scholarly dispute about how the resolution of civil disputes through judicial mediation is preferential and what are the disadvantages of current judicial system. Also, the target of the article is to represent the judicial mediation as one of the best ways for the parties to resolve a dispute, maintain relations or terminated it a civilized manner with lesser costs, in a comfortable, informal environment, by their own efforts, quickly, excluding publicity, avoiding the creation of judicial precedents, judicial approval of mediated agreement.

Key words: *Mediation, judicial mediation, court, confidentiality, expenses, time, informality, Code, legal, mediator, agreement.*

1. Introduction

This paper investigates the advantages of resolution of civil disputes through judicial mediationover litigation. The paper aims at demonstration of institutional advantages and disadvantages of mediation, their examination in the light of court-based (court-sponsored) mediation, launching scholarly dispute about the above issues and identification of the problem: resolution of civil disputes through judicial mediationwithin Georgian judicial system;mediation as annex to justice; presence of institutional signs of classic mediation in judicial mediation process; specific aspects of judicial mediation is dispute resolution.

The efficiency of justice in the field of civil law cannot be improved without the introduction of new methods and implementation of respective projects. It should be admitted, that without judiciary the application of mediation and alternative dispute resolution (ADR)is doomed to be unsuccessful. The essence, meaning and purpose of respective forms and should first be well-comprehended by the corpse of judges, for them to ensure the awareness of the parties and promotion of mediation.[1]

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1 *Tsertsvadze G.*, Mediation, "Meridiani", Tbilisi, 2010, 216.

Court-based ADR is often called *Court-ordered.*[2]This demonstrates the essential distinctive feature of judicial mediation. Judicial mediation became an integral part of judicial proceedings and thus acquired certain public-law shading; however, in the event of mediation the court is not entitled to compel the parties to agree to some condition. Hence mediation still remains to be mediation, however in this case public administration supports mediation in the person of judiciary.[3]

The part of Association Agenda between the European Union and Georgia concerning the reformation of judiciary directly provides for the development of ADR mechanisms, and mediation amongst them.[4] Respectively, encouragement of mediation and its forms is not only a necessity, but also the international commitment of the country subject to fulfillment within specified timelines.

The Tbilisi City Court has been implementing the pilot mediation program since 2014[5] under the participation of 16mediators.[6]

The problem investigated in this paper may be compelling for practicing or theoretician lawyer, also for any person whose area of interests covers: ADR mechanisms, advantages and disadvantages of mediation, disadvantages of dispute resolution judicially. The discussed issues may be relevant for any citizen interested in judicial reform and administration, who wants for the court to guarantee the interest in expedient and efficientjustice.

The paper is based on the method of comparative, critical and historical analysis.The article containsstatistic data. The paper will be summarizedby the conclusion, that judicial mediation is one of the best ways for the parties to resolve their dispute with less expense, in a comfortable, informal environment, with their own efforts, quickly, excluding publicity, avoiding the creation of judicial precedent, by approving of their agreement by court, maintaining relationship or terminating it in a civilized manner.

2. Advantages and Disadvantages of Mediation

2.1. General Overview

The use of mediation is appropriate in so many different and varied contexts; attempting to describe all of them would be nearly impossible. At one time there were certain types of experts who stated that there were some disputes which are inappropriate for mediation. Over the last several years, however, mediation has been used effectively in nearly all types of cases and matters. This widespread acceptance of mediation is due in large part to the numerous advantages of the process. As information

2 *Berger K.P.,* Private Dispute Resolution in International Business, Negotiation, Mediation, Arbitration, Vol. 1, Case Study, Kluwer Law International, Alphen aan den Rijn, 2006, 161 in: *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 165.

3 *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 165.

4 Association Agenda between the European Union and Georgia, Judiciary, 2014, 5.

5 <http://tcc.gov.ge/index.php?m=587>.

6 <http://tcc.gov.ge/index.php?m=586>.

about mediation is disseminated and the general public becomes more familiar with the process, knowledge of fundamental advantages can be beneficial to expanded use.[7]

The advantages ofmediation, first of all, imply the high probability to come to an agreement, relatively lesser expenses as compared with arbitration and judicial proceedings, ability to act quickly, confidentiality, specialization of mediators in specific fields, promoting the resolution of a dispute amicably, possibility for the results to be controlled by the parties, etc.[8]Mediation may prove useful even before the origin of a dispute. When both parties understand that the situation tends to be complicated, they mayfind the reasons of complications together through the initiation of mediation and undertake joint efforts to remove these reasons. Such an approach fully excludes the origin of a dispute.[9]Mediation is an annex of justice and not its alternative, it can only promote the settlement of disputes, but cannot take a full lead on it.[10] It is noteworthy, that mediation is regarded as time and money saving mechanism not only for the parties, by for the rule-of-law state as well,[11] which is induced to allocated rather large resources for long proceedings to settle a dispute.[12] Not all the disputes can be resolved through mediation. ADR is not a panacea and universal mechanism for the solution of all types of conflicts. Based on the foregoing it is logical to ask, whether what kind of disputes can be "subject" to mediation and in which cases the application of this mechanism of dispute resolution may turn successful. As stated in the doctrine, three main characteristics can be identified: a) the dispute between disputing parties is not yet finally resolved; b) In principle, the parties are ready and well aware that they can better resolve the problems by themselves; 3) For the moment, the parties are not able to fully restore the communication without assistance of a third party. Overall, none of the parties should be willing to maintain the conflict. Then it comes to the situation, when they want to settle the dispute amicable, but are not able to do so independently due to some reasons.[13]

In order to have a fully picture, it will be reasonable to speak about the disadvantages of mediation as well.

There is an opinion in German legal literature, that mediation process is not so cheap as it is often stated. For instance, in principle, it is not cheaper than arbitration proceedings.[14]

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7 *Kovach K.K.*, Mediation in a Nutshell, Thomson West, University of Texas, 2003, 34.

8 *Schiffer K.J. (Hrsg).,* MandatspraxisSciedsverfahrenunda Mediation 2. Neubearbeitete und erweiterte Auflage, "Carl Heymann," Koln, Berlin, Munchen, 2005, 257-262 in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 54.

9 *Guillemin J.F.*, Reasons for Choosing Alternative Dispute Resolution, in *Goldsmith J.C., Ingen-Housz A., Pointon G.H.(eds.),* ADR in Business, Practice and Issues across Countries and Cultures, "Kluwer Law International", New-York, 2006, 37, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 54.

10 *Von Schlieffen K.,* Perspektiven der Mediation, in *Haft F., von Schlieffen K.*(Hrsg), Handbuch Mediation, 2. Auflage, "Beck", Munchen, 2009, 209, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 56.

11 *Falk G., Koren G., Gernot., Zivisrechts-Mediations-Gesetz., Kommentar., zum Zivmediat G.,* "Osterreich", Wien, 2005, s.35 in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 55.

12 *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 55.

13 *Ferz S.,Lison A., WolfartE.M. (Hrsg),* Zivilgerichte und Mediation, Widerspruch, Erganzung, Symbiose? "WUV Universitatsverlad, Wien, 2004, 182, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 57.

14 *Alexander M.,* Gerisctsstand und Schiedsvereinbarungenim E-Commerce sowie aussergerichtliche Streitbeileging "Dr. Kovac," Hamburg, 2006, 9-10, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 58.

The major disadvantage of mediation is its limited scope of coverage and lack of public awareness. As skeptics would say, the number of mediators is greater for now than the cases of mediation itself.[15] This opinion definitely has the right to exist in Georgian reality. As private associations of mediators do not maintain the database of reviewed cases, we should rely on statistic data retrieved from the Tbilisi City Court[16], which reinforces the presumption of skeptics. According to data of the Civil Chamber of the Tbilisi City Court, total 53 disputes were reviewed by mediators with the framework of judicial mediation and 17 disputes ended up with an agreement. Although 16 acting mediators are working at the Tbilisi City Court,[17] according to official data of the official web page of the court, it is evident that they are not "loaded with cases".

2.2 Time and Expenses in Mediation Process

The legal system can be an appropriate and effective method of dispute resolution, but it is also time and cost consuming. This focus, the cost and delay of litigation, has stimulated court reform, at least in civil cases. In most instances, mediation may provide a more timely resolution. Because mediation is informal and flexible, strict procedures which draw out litigation matters are avoided. Where time is of the essence, particularly in cases where a lawsuit has not been filed, a mediation court take place in a matter of days or even hours. In most instances, a speedy resolution also results in a monetary savings. Parties save the expense for extensive litigation, including costs for experts, depositions, and attorneys' fees. By reaching a prompt resolution, much of the emotional drain from engagement in continual conflict is also avoided.[18]It should be mentioned that there are arguments against the above opinion. There is an opinion in German legal literature, that mediation is not as cheap as it is often said to be. For instance, in principle it is not cheaper than arbitration proceedings.[19]Discernible cost benefits for parties may vary wildly of course depending on context. Mediation fees may deviated hugely from in-court services provided on a *gratis* basis to the extravagant hourly rates charged at the higher echelons of the commercial market. Add to such outlays, the costs of attendance and preparation of lawyers (perhaps including Counsel) and potentially, the fees of other experts. Mediation thus does not always represent a cheap option for disputing parties. One particular difficulty in proving the cost-effectiveness of mediation in many contexts is the issue of what to compare the costs of mediation to. While it may be tempting to compare costs in mediation to parties' potential costs at trial, very often in the course of on-going litigation cases will settle anyway absent mediation. When parties mediate, it may be very difficult

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15 *Einfuhrung G., Reinhard U., H.*(*Hrsg.),* Die Zukunft der Mediation in Deutschland, “Beck” Munchen, 2008, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 59.

16 Tbilisi City Court Letter №1-180, 22.12.2016.

17 <http://tcc.gov.ge/index.php?m=586>.

18 *Kovach K.K.,* Mediation in a Nutshell, Thomson West, University of Texas, 2003, 35.

19 *Alexander M.,* Gerisctsstand und Schiedsvereinbarungenim E-Commerce sowie aussergerichtliche Streitbeileging “Dr. Kovac,” Hamburg, 2006, 9-10, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 58.

to ascertain at what point such settlement might taken place. Nevertheless, evidence that mediation generally leads to earlier settlement than non-mediation settlement suggests that costs saving may occur as a result.[20]

2.3 Mediation as a Controlled Process

The dispute resolution mechanisms can be decided into two groups: formal and informal. The formal ways include the court and arbitrage and informal - negotiation, mediation, avoidance, etc.[21]When parties participate in an adjudicative procedure such as trial, arbitration, or administrative hearing, a third party takes the decision for them. A ruling is issued with which they must comply. In mediation, on the other hand, the parties are the final decision makers, which is a core feature of mediation including whether they wish to ultimately resolve the matter, as well as the terms of any resolution. This is part of the empowerment ethic inherent in mediation, and it is emphasized in several applications of the process. Because off personal involvement in the process and the resolution, the parties possess a psychological ownership, making it more likely that they will comply with any agreement reached. Most definitions of mediation carefully state that the mediator should not substitute his judgment for that of the parties. Mediator standards, such as ethics, want against coercion from the mediator and emphasize the need and importance of party self-determination.[22]

When individuals engage in conflict, whether it be personal or professional, frequently strong emotions and feelings surface. Legal proceedings do not focus on emotion, but instead look at most conflicts through the prism of relevance, admissibility and procedure. Mediation, however values the expression, understanding and release of emotions. Mediation also values basic human expressions, such as an apology or act of forgiveness.[23]

2.4 Informal Nature of the Process

Mediation, by design, is flexible. Relatively few rules guide the actions of the mediator with regard to how the process might unfold. As such, mediation is a more informal process. In mediation, parties are encouraged to discuss any issue and to express themselves freely. Few rules direct the specific conduct of the mediator, particularly with regard to tasks, responsibilities and actions.[24]

Unlike judicial and arbitration proceedings mediation has no general or mandatory rules or procedures. Some mediators ask the parties to present short written description of their positions about

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20 Wissler R (2204b) "Barriers to attorneys' discussions and use of ADR". Ohio State J Dispute Resolut. 19:459-508 in *Clark B.,* Lawyers and Mediation, Springer, University of Strathclyde, Law School, Glasgow, United Kingdom, 2012, 59.

21 *Chaladze G.,* Training and Lecture Course: Alternative Resolution of Disputes and Conflicts, Ivane Javakhishvili Tbilisi State University, 2012-2013 Academic Year.

22 *Kovach K.K.*, Mediation in a Nutshell, Thomson West, University of Texas, 2003, 36-37.

23 Ibid, 37.

24 Ibid, 39.

the subject matter of the dispute, some are against the foregoing and are of the opinion, that it is not necessary to know about the positions of the parties about the subject matter of the dispute in advance, as the creativity of the mediator is restricted in this case.[25] It should not be presumed that informal nature of various ADR mechanisms mean that they operate without any rules.[26]Mediation is an informal medium of dispute resolution. Hence there is no uniform, strictly defined procedure, according to which the mediation should be conducted, nut this does not mean that mediation does not consist of certain stages and it is only a chaotic process, when mediator tries to resolve a dispute between the parties based on just his/her own impartiality and authority.[27]The mediation is divided into stages. Division of mediation in stages (phases) and raising awareness of the parties thereof increases the efficiency of this process.[28] Mediation should follow this scheme; however, it will be irrational to strictly abide by it. For instance, if some new information becomes available with regard to dispute, a mediator should not refuse the familiarization with its details and their discussion with the parties just because the "information phase"has already been passed and it is not correct to hear the new information upon presenting arguments. Such exaggerated "procedure-law" approach will only be detrimental for the proceedings. A party, who knows that he can say everything, whatever he/she wants to say and that mediation is his/her process and not that of the mediator, it will be impossible to explain, why he/she should abide by the theory of phases and stages, when he/she believes, that information is important for the clarification of the essence of the conflict.[29]

One of the advantages of the process is the option of the parties to avoid court judgmentin certain disputes, and respectively, the creation of a precedent for a similar case.

In some cases, lawsuits are brought to change the law or right a wrong. In those types of lawsuits, it is essential that the court make a ruling and set a precedent. In the majority of lawsuits, however, precedent is not the primary focus. As a resultmediation is often appropriate. In fact, parties may desire to settle a particular dispute in order to avoid setting what may be a negative precedent. The desire for precedent should not be confused with a "matter of principle."A party may be involved in a conflict because his or her specific principles are involved. A mediator may deal effectively with those personal principles, which are different than a desire to change a body of law or public policy.[30]

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25 *Berger K.P.,* Private Dispute Resolution in International Business, Negotiation, Mediation, Arbitration, Vol. 2, Case Study, Kluwer Law International, Alphen aan den Rijn, 2006, 145, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 334-335.

26 *Jarrosson Ch.,* Legal Issues Raised by ADR, in *Goldsmith J.C./Ingen-Housz., Arnold,/,Pointon., Gerald H. (eds.),* ADR in Business, Practice and Issues across Countries and Cultures, Kluwer Law International, New-York, 2006, 111, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 335.

27 *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 336.

28 *Berger K.P.,* Private Dispute Resolution in International Business, Negotiation, Mediation, Arbitration, Vol. 2, Case Study, Kluwer Law International, Alphen aan den Rijn, 2006, 161, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 337.

29 Ibid, 339.

30 *Kovach K.K.,* Mediation in a Nutshell, Thomson West, University of Texas, 2003, 40.

2.5 Confidentiality Principle in Mediation Process

Confidentiality is the essential and one of the most crucial principles of mediation,[31]that's why it should be discussed separately. The obligation of a mediator to keep silent about mediation stems from contractual relations existing between the parties and the mediators. This obligation will seize to exist only if both parties exempt a mediator from this obligation. Such exemption does not require some special form and can be accomplished through an implicative action.[32]

Over the last twenty-five years, a basic assumption of mediation practice has been that everything occurring within the mediation room was absolutely confidential. In most instances, mediators and participants both viewed the entire proceedings as one cloaked in secrecy. Yet, as experience with the process has expanded, and in particular, as mediation has merged with the litigation system a number of difficult issues relating to confidentiality have surfaced. Some of the more critical matters concern the duty to disclose and the court's need for evidence or additional information.[33]

When opting for mediationthe parties rely on confidentiality and participate in this process only because that disclosed facts will not become public. It is not the victory that is of particular focus here - a party may win a court,however the disclosure of the fact that some individual or company had dealings with the court, participated in a dispute, may "dishonor" him. Disclosure of some information may become particularly detrimental for a well-know or growth company.[34]

When confidentiality is guaranteed, the parties and the attorneys are more willing to discuss all the matters and propose alternatives. Confidentiality is the privilege to waiver the disclosure of a fact and is created for the "maintenance of the purity" of the relations, which is based on trust and requires protection.[35]

Disclosure of important matters and personal interests is more acceptable for the parties to a mediation process when they trust the mediator. The foregoing is conditioned by the nature of the dispute. The parties to mediation process may not trust each other and may not be willing to disclose some information. The only way to create confidence in mediation and convenient environment for the parties is to assure them of the confidentiality of the mediation process. In the course of mediation a mediator holds negotiations as an independent, impartial third person. As a generally, confidentiality protects the parties to mediation process, however the principle of confidentiality protects the mediator

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31 *Sanders P.,* The Work of UNCITRAL on Arbitration and Conciliation, 2nd d and expanded ed., Kluwer Law International, The Hague, 2004, 220, *Tsertsvadze G.(ed.),* Perspectives of Legal Regulation of Mediation in Georgia, National Centre for Alternative Dispute Resolution, Tbilisi, 2013, 48.

32 *Hiber M.,* Die sicherung der Vertraurlichkeit des Medationsverfahrens, "Dr. Kovac." Hamburg. 2006, 193, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 48.

33 *Kovach K.K.,* „Mediation in a Nutshell", Thomson West, University of Texas, 2003, 173.

34 *Tsertsvadze G.(ed.),* Perspectives of Legal Regulation of Mediation in Georgia, National Centre for Alternative Dispute Resolution, Tbilisi, 2013, 25.

35 *Kimberlee K.K.,* Mediation Principles and Practice, 3rd ed., "Thompson West", 2004, 263-264. In *Tsertsvadze G.(ed.),* Perspectives of Legal Regulation of Mediation in Georgia, National Centre for Alternative Dispute Resolution, Tbilisi, 2013, 24.

as well. The mediators work not for obstructing parties from coming to an agreement, but rather to assist them in that. Most of the mediators do not want during the court to examine their impartiality, and thus, they support the principle of confidentiality and impartiality (and to a certain extent they are obliged to do so).[36]

There are different types of confidentiality: a) Prejudice Privilege - in Anglo-American law the court of law guarantees the right of the parties to waiver various mechanisms of dispute resolution and to opt for mediation. It is necessary to guarantee confidentiality both when referring to mediation and after its successful or unsuccessful accomplishment; b) Legal Professional Privilege - means the protection of confidentiality stemming from the relationship between an attorney and a client; c) Statutory Confidentiality - is established by the Parliament and protects both "private" and "public" (court-supported) mediation; and finally d) Contractual Confidentiality - the content and scope of which can be determined by an agreement executed between the mediators and the parties.[37]

Most of the practitioners agree that confidentiality is one of the essential and important principles for mediation process. As defined by Uniform Mediation Act (UMA)this frank exchange can be achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.[38]

The Georgian law contains stipulations regarding the protection of confidentiality. For instance, as per Parts 1 and 2 of Article $187^{8}$of the Code of Civil Procedure of Georgia (CCPG) the process of judicial mediation is confidential. A mediator is not entitled to disclose the information that became known to him/her when discharging the duties of a mediator, unless otherwise prescribed by the agreement of the parties. A party (representative) is not entitled to disclose the information that became known to him/her in the course of mediation on confidentiality condition, unless otherwise prescribed by the agreement of the parties.[39] According to Paragraph 9 of Article $48^{1}$of the Organic Law of Georgia - Labor Code, a dispute mediator is required not to disclose the information or document, that became known to him/her.[40] The principle of mediation confidentiality is further guaranteed by Paragraph "d" of Article 141 of the Code of Civil Procedure of Georgia, according to which Paragraph not in all cases can be a mediator summoned and questioned as a witness with regard to circumstances, which became known to him/her while discharging the duties of a mediator.

For instance, in Austria Article 18 of the Mediation Act establishes the registered mediator's absolute duty of confidentiality. A registered mediator must keep confidential all facts revealed by the

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36 *Tsertsvadze G.(ed.),* Perspectives of Legal Regulation of Mediation in Georgia, National Centre for Alternative Dispute Resolution, Tbilisi, 2013, 26.

37 *Spencer D., Brogan M.,* Mediation Law and Practice, Cambridge University Press, New York, 2006, 313, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 52-53.

38 *Casandra F.,* Mediation Confidentiality Controversy, <http://www. Dailyjournal.com/cle/cfm? show= C:EDisplayArticle&VersionID=80&eid=872569&evid=1>, *Tsertsvadze G.(ed.),* Perspectives of Legal Regulation of Mediation in Georgia, National Centre for Alternative Dispute Resolution, Tbilisi, 2013, 24.

39 CCPG, adopted by the Parliament of Georgia on 14.11. 1997, published in Sakartvelos Parlamentis Utskebani (Georgian Parliament Reports), date of publication: 31.12.1997.

40 Organic Law of Georgia - Labour Code, adopted by the Parliament of Georgia on 17.12.2010. published in Sakartvelos Parlamentis Utskebani (Georgian Parliament Reports), date of publication: 27.12.2010.

parties, and may be subject to prosecution if this duty is breached.The EU Mediation Act also adopted Article 7 of the Directive to establish that mediators cannot be compelled to give evidence regarding information arising out of or in connection with a mediation process in either civil and commercial judicialproceedings or in arbitrations.[41]

Worth mentioning is the regulation of German legislator regarding the confidentiality of mediation. Mediator maintenance of confidentiality is required by Section 4 of the Mediation Act, but the requirement is subject to a few exceptions. For example, it may be necessary for the mediator to disclose the content of the mediation proceeding to enable the implementation or enforcement of the settlement agreement, or due to overriding considerations of public policy, such as ensuring the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person. Also, if the disclosure contains obvious information, then it is not necessary for it to remain confidential. In contrast, the legislation does not require the parties or others involved in the mediation proceeding to maintain confidentiality. Such confidentiality must be discussed and agreed to by the parties prior to the mediation in order to have effect. The consequences of disclosure of confidential information by these individuals depend on the confidentiality provisions in their agreement. In addition, all mediators are exempt from the obligation to give evidence in court proceedings or in arbitration. The parties, however, can release the mediator from this exemption for civil cases, allowing the mediator to testify.[42]

3. Judicial Mediation

3.1 General Overview

"Judicial mediation" is a conventional name of ADR mechanism, which is applied under the consent and active participation of the court. The quality and intensity of interference of judicial authorities in the conduct of mediation process is different in various jurisdictions.[43]

It should be mentioned, that judicial mediation includes, shares and is characterized with most of the advantages and disadvantages of mediation, discussed in the first chapter of this paper;of course, with due consideration of specific features typical for judicial mediation.

Disagreements arising from a legal relationship between the parties may be the subject-matter of court mediation. The disagreement must be by nature such that it could be dealt with as a civil dispute in regular adjudicative proceedings. Thus, mediation is possible in all types of civil cases, including family law cases. That being said, mediation cannot be used in all situations. Mediation can be declined e.g.

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41 *De Palo G., D' Uros L., Trevor M., Branon B., Canessa R.., Cawyer B., Florence R.,* European Parliament, Brussels, "Rebooting" The Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediation in The EU, 2014, 17.

42 *De Palo G., D' Uros L., Trevor M., Branon B., Canessa R.., Cawyer B., Florence R.,* European Parliament, Brussels, "Rebooting" The Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediation in The EU, 2014, 32.

43 *Tsertsvadze G.*, Mediation, "Meridiani", Tbilisi, 2010, 163.

when the parties are not equal, as this could lead to a situation where a party is incapable of pursuing his or her interests in an appropriate manner.[44]This approach of Finnish legislators gives rise to a question whether what is meant under inequality- this is economic, procedural or any other type of inequality, which may be discovered by judge in the course of the proceedings.

The court decides whether mediation is to be undertaken. If the case is pending also as a regular adjudicative matter, the court proceedings are interrupted for the duration of the mediation.[45]This opinion has the right to exist, however, is any case, no matter how clear is a court decision, one should not forget that there exist the appellate and cassation courts, a loser party may apply to just to protract time or to postpone the enforcement of court decision for the opponent party to maximum practicable extent. In certain cases the manipulation with time factor may turn particularly detrimental for entrepreneurial activities and not only for that.

The history of judicial mediation (court-annexed mediation) in the USA dates back to 1970s. This was the time, when federal courts first started to support mediation and implement the projects related thereto.[46]

There is no universal approach for supporting mediation by judiciary. A member of German Federal Constitutional Court *Winfried Hassemer* wrote, that traditional judicial institutions should not be maintained only just because they are traditional. If it is necessary, the justice should not avoid experiments.[47] Participation of judges in mediation processes is necessary for the promotion and raising of awareness of general society. But this is a "transitional task" of judges, as owing to its legal nature and essence, mediation is not the duty of sitting judges, respectively it cannot become an integral part of their routine activities.[48]

Sitting judges can commonly be found acting as mediators in different contexts. They perhaps remain most prominent in civil law jurisdictions in which judges have traditionally enjoyed a 'settlements-master' role, within an inquisitorial system of civil justice. It may thus seem a natural progression from this starting point, that on the development of modern mediation schemes within their courts, judges may covet the mediation role.[49] Indeed court-connected mediation in civil law countries often follows what can termed a "justice model"[50] in which the court provides litigants with a judge to

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44 *Ervasti K.,* Conflicts Before the Courts and Court - Annexed Mediation in Finland, Scandinavian Studies in Law, 2012, 196.

45 Ibid, 196.

46 *Hiber M.,* Die Sicherung der Vertraurlichkeit des Medationsverfahrens, "Dr. Kovac," Hamburg, 2006, 154, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 163.

47 *Gootwals W.,* Gerichtsnahe Mediation- erfahrung und lehrenausdemModellprojekt in Niedersachsen, in *Haft F von Schlieffen., Katherina.(Hrsg.),* Handbuch Mediation, 2. Auflage, "Beck", Munchen, 2009, 964, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 163.

48 *Von Barge J.,* Der Richter als Mediator, in *Haft F., von SchlieffenK.(Hrsg.),* Handbuch Mediation, 2. Auf.,, "Beck", Munchen, 2009, 945, in *Tsertsvadze G.,* Mediation, "Meridiani", Tbilisi, 2010, 164.

49 *Clark B.,* Lawyers and Mediation, Springer, University of Strathclyde, Law School, Glasgow, United Kingdom, 2012, 128.

50 *Alexander N.(ed),* Global Trends in Mediation, 2nd ed., Kluwer International, Alphen aan den Rijn, 2006, 23, in *Clark B.,* Lawyers and Mediation, Springer, University of Strathclyde, Law School, Glasgow, United Kingdom, 2012, 128.

mediate in-court at no cost. The common law world of court-connected mediation has by contract been traditionally frames as a 'market model'[51] in which courts refer parties to mediation (with or without their consent), and direct them to an external mediator, perhaps drawn from a list of accredited professionals approved by the court or simply from the market, often at the parties' own cost. In more recent rimes, however, sitting judges have taken on the mediation role in the common law world too, particularly as initiatives in mediation within the central domain of their courtroom have begun to take root.[52]

Making mandatory the organization of mediation process (it is called a mediation paradox as the main principle of application of ADR mechanisms is arbitrariness) provides for different consequences in different jurisdictions. If, for instance, the projects organized in Great Britain in this field where not particularly successful, the mandatory mediationbrings about the best consequences in the USA, as a general rule.[53]

While mediation is touted as a flexible, non-legal process, unfettered by rigid procedures and rules, it is perhaps inevitable that we would witness a burgeoning case law on the mediation process as mediation has become more "institutionalized." With the widespread establishment of state and federal courts-sponsored mediation programs, and mediation's more frequent use by legal professionals generally, the mediation process increasingly has been subjected to the searching inquiry of trial and appellate courts. This burgeoning case law is due, in no small measure, to the fact that litigated cases are being sent to mediation in ever increasing numbers, particularly in states with well established mandatory mediation programs.[54]

Prior to the advent of institutionalized, court-sponsored mediation programs, mediation process issues that came before courts generally centered on the confidentiality of mediationcommunications. While confidentiality issues are also present in mediations conducted "in the shadow" of the courts,[55] other mediation process issues have begun to arise with great frequency. Two of the most frequently litigated issues have to do with "mediation in good faith" requirements and the enforceability of mediated agreements.[56]

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51 *Alexander N.(ed),* Global Trends in Mediation, 2nd ed., Kluwer International, Alphen aan den Rijn, 2006, 23, in *Clark B.,* Lawyers and Mediation, Springer, University of Strathclyde, Law School, Glasgow, United Kingdom, 2012, 128.

52 *Alexander N.(ed),* Global trends in mediation, 2nd ed., Kluwer International, Alphen aan den Rijn, chap 3. fn 13 in *Clark B.,* Lawyers and Mediation, Springer, University of Strathclyde, Law School, Glasgow, United Kingdom, 2012, 128.

53 *Hopt K.J., Steffek F.,* Mediation: Rechtsvergleich, Regelungsmodele, Grundsatzprobleme in *Hopt.*, *Klaus., J., Steffek F.,* Mediation, Rechtstatsachen, Rechtsvergleich, Regelungen, "Mohr Siebeck", Tubingen, 2008, 88, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 165.

54 *Alfini J.J., Mccabe G., Catherina G.,* Mediating in the Shadow of the Courts: A survey of Emerging Case Law, Arkansas Law Review and Bar Association Journal, USA, 2001-2002, 171-172.

55 Nat' l Labor Relation Board v. Joseph Macaluso, Inc., 618 F.2d 51 (9th Cir. 1980); Fenton v. Howard, 575 P. 2d 318 (Ariz. 1978); People v. Snyder, 492 N.Y.S. 2d 890 (N.Y. Sup. Ct. 1985.), in *Alfini J.J., Mccabe G., Catherina G.,* Mediating in the Shadow of the Courts: A survey of Emerging Case Law, Arkansas Law Review and Bar Association Journal, USA, 2001-2002, 172.

56 *Mnookin R.H., Kornhauser L.,* Bargaining in the Shadow of the Law: The Case for Divorce, 88 YALE L.J. 950 (1979), in *Alfini J., James, Mccabe, Catherina G*., Mediating in the Shadow of the Courts: A survey of Emerging Case Law, Arkansas Law Review and Bar Association Journal, USA, 2001-2002, 172.

Legal commentators have worried that mediation's core principles will be compromised as this consensual, flexible and informal process is integrated into the legal system.[57]Professor Nancy Welsh is concerned that trends in court-sponsored mediation seem to be eroding the traditional model of mediation that requires a firm commitment to party self-determination.[58]

Court-sponsored mandatory mediation programs generally are promoted and established, however, for reasons of judicial economy, with little attention given to mediation's core values.[59]

It has become rather a hackneyed comparison but it still holds true that court produces a win-lose result, mediation a win-win outcome.[60]

Mediation offers the consumer another alternative — more freedom of choice. It will not remove the court from the dispute scene, nor will it make lawyers redundant. Some cases cannot be settled or mediated. It has not been put forward as a cure-all, but as a worthwhile idea that can save people time and money and a portion of the emotional turmoil that often accompanies adversarial proceedings. The spread of mediation could do much to improve the quality of life in our society, not only because of the savings it brings but because it fosters interaction among people, and empowers them to control their own lives.[61]

3.2. Judicial Mediation in National and Foreign Legislations

Under the legislative amendments of December 20, 2011 the new ChapterXXI[1] was added to the CCPG containing the provisions regulating judicial mediation. Georgia's aspiration to join the EU can be presumed as a reason of these amendments, due to which reason the country tries to approximate domestic legislation with the standard set by the EU for its Members-States.

ADR methods have been a topic of discourse in many nations for over thirty years, at least in the field of civil and commercial disputes. In the EU, the increasing focus on mediation was a consequence of years of mounting concern about court costs and congestion, and other obstacles to cross-border dispute resolution in the single market. During this period, the use of alternatives to litigating civil and commercial disputes was almost entirely voluntary, and subject only to limited legislative encouragement throughout the Member States. Consequently, very few litigants used mediation to resolve these disputes.[62]

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57 *Alfini J.J., Mccabe G., Catherina G.,* Mediating in the Shadow of the Courts: A survey of Emerging Case Law, Arkansas Law Review and Bar Association Journal, USA, 2001-2002, 173.

58 Ibid.

59 Ibid.

60 *Clarke G., Davies R., Iyla T.,* ADR- Argument for and Against Use of Mediation Process Particularly in Family and Neighborhood Disputes, QLD. University of Technology Law Journal, 1991, 81, <https://lr.law.qut.edu.au/article/viewFile/343/335>.

61 *Clarke G., Davies R., Iyla T.,* ADR- Argument for and Against Use of Mediation Process Particularly in Family and Neighborhood Disputes, QLD. University of Technology Law Journal, 1991, 95, <https://lr.law.qut.edu.au/article/viewFile/343/335>.

62 *De Palo G.,* European Parliament, Brussels, "Rebooting" The mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediation in the EU, 2014, 12.

The EU efforts spanned nearly a decade and resulted in the adoption of the Mediation Directive.[63] The aforementioned Directive was adopted in 2008. No wonder that in 2011 Georgia decided to fill up its legal space with the regulation of court-based and medical mediation[64].

The quality of regulation of Chapter XXI[1] of the CCPG may not be ideal, but it still sets minimal standard in the context of legislative institutionalism for a judge to extend judicial mediation to a dispute.

According to Chapter XXI[1] of the Code of Civil Procedure of Georgia, once a lawsuit is filed with the court, a case subject to judicial mediation may be referred to a mediator by a court ruling and this ruling is final and is not subject to appeal. Judicial mediation may apply to family disputes, except for adoption, annulment of adoption, restriction and deprivation of parental rights; inheritance disputes; neighborhood disputes; any dispute - under the consent of the parties. The Law contains a stipulation onbroad application of judicial mediation - that a case may be referred to a mediator at any stage of trial when there is a consent of the parties. The Georgian legislation also provides for grounds for challenging a mediator, for which Part 1 of Article 31 of the Code of Civil Procedure isapplied. The period of judicial mediationcovers 45 day, but at least 2 meetings, this period can be extended for the same period of time. The legislator provides for the consequences of non-appearance of the parties for participation in the mediation process - for a fine, meaning full covering the litigation expenses and fine in amount of 150 GEL. If a dispute is resolved amicably a ruling on amicable settlement between the parties is delivered, which is final and not subject to appeal. Failure to amicably settle a dispute does not deprive the party of the Constitution right to bring a lawsuit before the court of law according to general procedure. The process of judicial mediation is confidential both for the parties and the mediator, unless otherwise prescribed by the agreement.[65]

As already mentioned, according to Part 1 of Article 187[1] of the CCPG after filing a lawsuit with the court the case subject to mediation may be referred to a mediator for its amicable settlement and according to Part 2 of the same Article the ruling on referral of the dispute to a mediator is not subject to appeal[66]. The content of the provision make it obvious that the CCPG offers the so-called mandatory mediation model. The very first article clearly demonstrates that a case is referred to a mediator on the basis of the sole discretion of a judge. This approach encourages a judge to refer as much disputes to mediation, as possible, in order to develop the institute in the first place and then to relieve the disputes from court judgments.

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63 *De Palo G.,* European Parliament, Brussels, "Rebooting" The mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediation in the EU, 2014, 12.

64 Legal Entity of Public Law - Medical Mediation Service was subordinated to the Ministry of Health, Labor and Social Affairs of Georgia. The process of liquidation of the LEPL has been accomplished by now and its legal successor with regard to certain matters is the Ministry of Health, Labor and Social Affairs of Georgia by virtue of Resolution №316 of the Government of Georgia of 6 July, 2015.

65 Code of Civil Procedure of Georgia, adopted by the Parliament of Georgia on 14.11.1997, published in Sakartvelos Parlamentis Utskebani (Georgian Parliament Reports), date of publication: 31.12.1997.

66 Ibid, Article 187[1] .

The regulations of Italy and the State of California (USA) also follow the above approach. In Italy Pursuant to Law Decree 69, mediations are mandatory for those subject matters listed therein[67], and Paragraph 15.4 of Article 16 Local Rules – Central District of California, United States Court District of California offers three alternative dispute resolution mechanisms: 1) settlement proceedings under the participation of a district judge or magistrate judge, assigned to the case; 2) mediation under the participation of a neutral mediator, selected from the Court's Mediation Panel; 3) Private mediation[68] without involvement of the judge assigned to the case, the parties are required to participate in any of these three procedure on every civil case.[69]

In France judicial mediation procedures have existed since the law of 8 February 1995. But while various legal instruments have been available for mediation, the last 15 years or so have shown that mediation is not a particularly popular dispute resolution mechanism, especially in commercial matters.[70] Despite the limited success of judicial mediation, it has nevertheless been in the spotlight in France over the last few years.On 16 November 2011 the French Government enacted a Decree (Ordinance No. 2011 – 1540, 2011), whichimplemented the provisions of the Directive. The 2011 Decree followed years of consultations and studies carried out by public entities, courts and legal practitioners. The provisions of the 2011 Decree were partially codified in the Code of Civil Procedure through another Decree dated 20 January 2012. The 2011 Decree furthered the French Government's objectives to facilitate and encourage mediation use for domestic civil and commercial disputes as well as cross-border ones.[71]

Magendie Report[72] included various recommendations to facilitate recourse to mediation in civil and commercial courts.[73]It concluded that four preparatory steps are necessary: (I) inform professionals and potential mediation users; II) develop protocols with local professionals; (III) formalize the principles for intervention by mediators; (IV) integrate mediation into the court routine. Finally, the Report ser out protocol, which provides a useful guideline for courts.[74]

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67 *De Palo G.,* European Parliament, Brussels, "Rebooting" The Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediation in the EU, 2014, 41.

68 Local Rules – Central District of California, United States District Court Central District of California Pretrial Conferences, scheduling, Management, L.R. 16-15, Policy Resettlement & ADR.

69 Ibid.

70 *De Palo G.,Trevor M.B.,* EU Mediation Law and Practice, Oxford University Press, 2012,113.

71 *De Palo G.,* European Parliament, Brussels, "Rebooting" The Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediation in The EU, 2014, 26.

72 Report of the working group on mediation, led by former first president of the Paris Court of Appeal, Mr. Magendie, Report "Speed and Quality of Justice System – Mediation: another way", October 2008, Annex II in *De Palo G.,Trevor M.B.,* EU Mediation Law and Practice, Oxford University Press, 2012, 128.

73 Report of the Working Group on Mediation, October 2008, 77-78, in *De Palo G.,Trevor M.B.,* EU Mediation Law and Practice, Oxford University Press, 2012, 128.

74 Ibid.

Mediation in France is currently in a transitional phase. Various measures have been taken to bring some uniformity between judicial and conventional mediation, to simplify the procedures which apply to the enforcement of mediation agreements and clarify the mediator duties.[75]

There is no court-annexed schemes available in Germany, because Germany has developed a specific type of court-based mediation, where the mediation is conducted by a judge who does not have jurisdiction over the case.[76]

Like Germany Finnish Law on Mediation provides for court-sponsored mediation. It enabled judges to be directly involved in mediation procedures, or instruct the parties to engage in mediation under the assistance of a mediator or some other organization, also this Law regulates the procedural rules of holding mediation at courts of law.[77]

Like Germany and Finland, Hungarian courts are entitled to invite parties to mediation and personally lead the process.[78]

The official web-page of the Supreme Court of New South Wales gives the following definition of court-based mediation: There are numerous benefits that can arise from mediation, including: early resolution, less costs to parties, greater flexibility in resolving the dispute, finality, privacy.[79]

4. Specific Aspects of Settlement of a Civil DisputeJudicially

When the most heated and emotional stage of a dispute/conflict is already passed, the parties begin to think how to resolve the dispute/conflict. A lawyer, the principals (clients) apply to, should be able to offer several ways of dispute/conflict resolution to the parties. These ways can be: negotiations, arbitration, judicial proceedings and even surrender, if it is apparent according to factual circumstances of the case. Judicial proceedings and arbitration are formal ways and it is characteristic of them that they cannot be controlled, unlike negotiations and mediation.[80] Apart from controlled nature of the process, many other things are typical of judicial review of a case that makes it an inefficient mechanism in Georgian and not only Georgian reality.

As per Part 1 of Article 1 of the CCPG, the Georgian courts review civil cases in accordance with the rules, prescribed by this Code. Even a brief overview of the route a person has to take for the resolution of a dispute only within first instance court and then for the enforcement of the decision, it will become apparent that institutional advantages of judicial mediationare far greater than traditional way of dispute resolution. E.g. according to the CCPG for a person to initiate a dispute against an

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75 *De Palo G.,Trevor M.B.,* EU Mediation Law and Practice, Oxford University Press, 2012, 129.

76 Ibid, 146.

77 Ibid, 111.

78 Ibid,170.

79 <http://www.supremecourt.justice.nsw.gov.au/Pages/sco2_practiceprocedure/sco2_ mediatio nin thesc/ sco2_mediationinthesc.aspx#mediation_costs> .

80 *Chaladze G.,* Training and Lecture Course: Alternative Resolution of Disputes and Conflicts, Ivane Javakhishvili Tbilisi State University, 2012-2013 Academic Year.

opponent party it is necessary for the former to file a with the court (Article 177). Upondrafting alawsuit the following should be defined: jurisdiction (Article 11), competent court (Chapter 3), subject matter of the dispute (Article 178), factual circumstances, accompanying evidences (sometimes the provision of evidences (Chapter 14) or an expert opinion (Chapter 20) may become necessary), testimonies of witnesses(Chapter 18), question of provisional remedy (Chapter 23), legal grounds of the claim (Article 178), value of the claim (Articles 40-41), amount of state duty (Articles 38-39). Also the party often requires the assistance of a professional lawyer as the CCPG provides for the grounds for dismissal of an action (Article 186), the parties present their motions at the preparatory session, and at the main session they have to listen to the explanations, ask questions, examine the evidences, engage in pleadings,[81] what is not an easy thing to do and respectively requires the involvement of professionals, what is also associated with costs and expenses.

UnderCCPG within a period of 5 days after filing a lawsuit the judge decides upon the admissibility of an action, forwards the lawsuitto the defendant together with accompanying documents and sets a period of time (which should not exceed 14 days and for hard cases - 21 days) for the latter to file a defense.[82]According to Article 59 of the CCPG the court shall review the case not later than 2 months following the admission of the application, in the case of particularly hard cases these timeline may be extended to maximum 5 months by decision of the reviewing court, except for claims for charging alimonies, compensation of damages inflicted through maiming or other injury or death of a bread-winner, claims stemming from employment relations, Law of Georgia on Relations Originating from Using Dwelling Places and cases on claiming the revindication of a thing from illegal possession, which should be reviewed within a period of maximum 1 month. In cases, envisaged by Article 184 of the CCPG the civil cases are reviewed within maximum 45 days following the submission of the document certifying the serving of the documents, sent to the defendant or providing a public notice to the dependant, and in the case of particularly hard cases this period can be extended up to maximum 60 days.[83]

In reality it deems impossible for the courts of first instance to try cases even within timelines set by law for hard cases, not to mention 2 months period, even of cases, which should be tried within a period of 1 months through expedited court procedure. The foregoing can be asserted on the basis of the latter of 15 December, 2016 of the Tbilisi City Court officer, responsible for the issuance of public information, according to which letter the court does not maintain statistic data about the average number of disputes reviewed by a judge of Civil Chamber, also about the average period of time it takes a judge to review a case. However the officer concerned confirms that as of 9 December 2016 total 37628 civil cases were addressed to the Civil Chamber[84]. Based only on this data it is easy to image what amount of work is to be done by judges of the Civil Chamber of the Tbilisi City Court, who are 33 in all.[85] It should

81 CCPG Chapter 25.
82 Ibid, Articles 184 and 186.
83 Ibid, Article 59.
84 Tbilisi City Court Letter №2-04236/69, 15.12.2016,
85 See <http://tcc.gov.ge/index.php?m=502>.

as well be mentioned, that retrieved information evidences the necessity of reformation of judicial administration, and improvement of procession of statistic data amongst them.

Furthermore, in addition to the foregoing the decisions of the courts of first instance are appealed with the appeals court. The latter also reviews private complaints, which should be tried within a period of 2 months. According to CCPG, once a party is served the duly-justified decision within timelines set by law, the latter becomes entitled to draft an appeal, and the court examines the admissibility of the appeal within a period of 10 days following its filing (Article 374). Further to the above said, the account should be taken of the timelines, necessary for the appeals court to made a decision, and one should not forget the period of trial of a case within cassation court, which takes up to 6 months.[86]

Respectively it is easy to presume that based on statutory and actual statistic , it takes a party and judiciary, at least, 18 months to review a single case at all instances.And fee of the representative and other costs automaticallyincases according to the number of involved instances. Here a question arises - is it possible for the interest of either party to be satisfied in this situation? moreover if one takes account of the fact, that the CCPG allows for filing a counter action[87] and also the enforcement of a court judgment requires certain period of time. It can easily be presumed, that almost probably a party will lose interest in the outcome of the dispute owing to never-ending "dashing" to courts, and also will lose the chance to amicably negotiate with the opponent party, save expenses and time because ofgoing from one instancecourt to another.

After the description of negative aspects of judicial system, discussed in this Chapter, it would have been reasonable to offer the arguments against judicial mediation as well.

Models of mediation in its institutional setting have developed in ways that diverge significantly from the grassroots origins of the process. Evidence suggest that court-connected mediation is particular has become infiltrated to a significant extent by the dominant culture of litigation, leading to a settlement focus and narrow, lawyerly approach to dispute resolution. It will be recalled that many aspects of typical mediation models in the court-connected setting have been caused by the increasing role of judges and lawyers in the process, and more specifically, by such rules as mandating that mediators be lawyers, lawyer preferences for evaluative mediators, lawyer 'shopping' for lawyer-mediators, lawyer attendance as party representatives in mediation with at times clients excluded from participation, and systems requiring the *ex post* approval by the courts of the any mediated settlements reached.[88]

Quite a number of Lawyers believe, that judicial mediation is conducted in informal environment, what is characteristic of mediation in general, however it is still influenced by judiciary and, respective procedural formalism.[89]

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86 CCPG Article 391.

87 Ibid, Chapter 22.

88 *Clark B.,* Lawyers and Mediation, Springer, University of Strathclyde, Law School, Glasgow, United Kingdom, 2012, 164.

89 *McEwen C.,* Examining Mediation in Context: Toward Understanding Variations in Mediation Programs, in *Herrmann, M.S.,* The Blackwell Handbook of Mediation, Bridging Theory, Research and Practice, "Blackwell Publishing", Oxford, 2006, 90, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 166.

Domination of lawyers, what is unequivocally connected with the purpose of dispute resolution - what is almost inevitable in judicial context, driven by efficiency and which may shelter time-restricted mediation sessions and the purpose of trial of the case - may result in the experience of discontent party in mediation.[90]

Based on the example of family disputes, some would argue that, in the family law area, there is no need for separate mediator services because Registrars, Court Counsellors, lawyers, psychologists and community health workers already provide sufficient assistance to separating and divorcing couples to negotiate agreements.[91] No-one is saying that mediation is the only answer in the dispute resolution spectrum. It is not meant to be a cure-all.[92]

The courts will never be removed from the divorce process. It is accepted that some cases cannot be settled or mediated.[93]

As has already been observed, it is quite an irony that often the advantages of mediation also contribute to the disadvantages.[94]

Arguably, the most serious criticism of mediation relates to the fairness of the process. Critics say that mediation represents secondary justice – that only the courts provide first class justice..[95]

Owen Fiss[96]for example, said that the thrust of mediation is towards a surrender of legal rights. "I do not believe that settlement as a generic practice is preferable to judgment.. . justice may not be done . . . settlement is capitulation to the conditions of mass society and should be neither encouraged nor praised.97

Requiring parties to mediate in good faith and enforcing mediated agreements are intertwined with a critical concept in the law of mediation-confidentiality. Although confidentiality is considered essential to the mediation process, the requirement of good faith participation and the ability of the courts to enforce mediated agreements may infringe on the confidentiality of mediation communications. A good faith participation requirement

becomes pointless if a party's conduct in a mediation is deemedbeyond the investigation of the court because of confidentialityconcerns. Similarly, a court may not be able to determinewhether an

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90 *McEwen C.,* Examining Mediation in Context: Toward Understanding Variations in Mediation Programs, in *Herrmann, M.S.,* The Blackwell Handbook of Mediation, Bridging Theory, Research and Practice, "Blackwell Publishing", Oxford, 2006, 90, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 128.

91 *Clarke G., Davies R., Iyla T*., ADR- Argument for and Against Use of Mediation Process Particularly in Family and Neighborhood Disputes, QLD. University of Technology Law Journal, 1991, 84, <https://lr.law.qut.edu.au/article/viewFile/343/335>.

92 Ibid.

93 Ibid.

94 Ibid, 88.

95 Ibid, 89.

96 *Owen M.,* Fiss is a Sterling Professor at Yale Law School.

97 *Fiss O.M.,* Against Settlement, (1984) Yale Law Journal at 1073, in *Clarke G., Davies R., Iyla T.,* ADR Argument for and against Use of Mediation Process Particularly in Family and Neighborhood Disputes, QLD, University of Technology Law Journal, 1991, 89, <https://lr.law.qut.edu.au/article/viewFile/343/335>.

agreement was reached in mediation, or what itsterms were, if all evidence of what occurred in the mediation isconfidential and thus outside the court's purview.[98]

It is also mentioned in legal literature, that endorsement and enforcement of mediated agreements by judiciary is contrary to mediation principles. Generally, the enforceability of a mediated agreement usually raises a number of legal and policy issues. In some states, the judiciary or the legislature has decided that mediated agreements should be enforced in the same manner as a contract or as a non-mediated settlement agreement.[99]In these jurisdictions, ordinary contract law defenses will normally apply to mediated agreements.[100]Regardless of the overall approach to enforcement, however, the enforceability issue is complicated by the fact that there may be other relevant laws that contradict the mediation enforcement provisions. Enforceability may also implicate confidentiality concerns. If the parties are fighting over whether an agreement was reached or over the interpretation of certain terms in the mediation agreement, relevant evidence over whether the parties reached an agreement or what the parties intended may be excluded because of confidentiality requirements.[101]

5. Conclusion

Based on the above discussion, critical analysis, and comparative law and statistic research it can be said that judicial mediation, as an institute, has major advantage over the settlement of civil disputes through judicial proceedings.

As already mentioned, judicial mediation is one of the models of mediations, having all the advantages and disadvantages described in this paper; of course, one should not forget the specificity of judicial mediation which acquired public law (civil procedure law)nature in certain aspects through practice and approaches established in various jurisdictions.

Judicial mediation allows for saving the time and costs. The concomitant result of the fotrgoing is the saving of human resources and energy, also the emotional connection with the dispute is associated with less time. A party is also enabled to less formalize the dispute. As said in the paper, it is very difficult to say, whether when would have the parties come to an agreement in the court when the parties are engaged in mediation. Despite the foregoing, it is a fact that resolution of mediation takes less time in the case of mediation than in the case of non-mediation process, and this may result in cost-saving.[102]

In judicial mediation it is the partywho decides the faith of his dispute, he relies on his own potential and negotiation skills. No one else determines the outcome of the dispute, the result of the

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98 *Alfini J.J., Mccabe G., Catherina G.,* Mediating in the Shadow of the Courts: A survey of Emerging Case Law, Arkansas Law Review and Bar Association Journal, USA, 2001-2002, 174.

99 Ibid, 196.

100 Ibid.

101 Ibid.

102 *Wissler R.,* (2204b) Barriers to attorneys' discussions and use of ADR, Ohio State J Dispute Resolut., 19:459-508 in *Clark B.,* Lawyers and Mediation, Springer, University of Strathclyde, Law School, Glasgow, United Kingdom, 2012, 59.

dispute does not depend on eloquent, oratorical speeches and tens of volumes of evidences. This is a part of the empowerment ethic inherent in mediation and it is emphasized in several applications of the process. Because of personal involvement in the process and the resolution, the parties possess a psychological ownership, making it more likely that they will comply with any agreement reached.[103]

The party is empowered to define rules and laws, which will regulate the process. The party is given the possibility to enjoy informal, comfortable and free environment. The party is also entitled to terminate the process at any stage of mediation. One of the advantages of the informality of the process is the ability of the parties to avoid court rulings in various disputes and respectively, not to create a precedent for a similar case.

When opting for mediation the parties rely on confidentiality and participate in this process only because that disclosed facts will not become public. It is not the victory that is of particular focus here - a party may win a process, however the disclosure of the fact that some individual or company had dealings with the court of law, participated in a dispute, may "dishonor" him.[104]

Despite the observations, offered in this paper about the shortcomings of judicial mediation and advantages of dispute resolution through judicial proceedings, like: expensiveness of mediation as compared with arbitration; limited scope of application of mediation; integration of essential principles of mediation, like consensus, flexibility and informal process, into judicial system; confidentiality as possible discomfiture for the parties to mediation; negative influence of lawyers upon mediation process and monopoly of legal professions in mediation; the question of enforcement of mediated agreement and intersection with confidentiality principle, judicial mediation is one of the best ways for the parties to resolve a dispute, maintain relations or terminated it a civilizedmanger with lesser costs, in a comfortable, informal environment, by their own efforts, quickly, excluding publicity, avoiding the creation of judicial precedents, judicial approval of mediated agreement (judicial approval of a mediated agreement excludes a) such agreement, which is explicitly contrary to law as in Georgian legal system the rules of judicial agreement extend to mediated agreement; 2) polemics about the presumption that the absence of the mechanism of enforcement of mediated agreement is a shortcoming of mediation).

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103 *Kovach K.K.,* Mediation in a Nutshell, Thomson West, University of Texas, 2003, 36-37.

104 *Tsertsvadze G.(ed.),* Perspectives of Legal Regulation of Mediation in Georgia, National Centre for Alternative Dispute Resolution, Tbilisi, 2013, 25.

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