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Irakli Kandashvili*

Mediation - New Form of Alternative Dispute Resolution and the Prospect for Its Legal Regulation in Georgia

(Institutional Arrangement of Mediation)

Purpose of the Article is development of recommendations for improvement of legal regulations of new alternative dispute resolution form in Georgia, such as mediation. Based on the purposes of the issue of study, we review hereby existed legal regulation of mediation and emphasize such needs, as the necessity to develop framework - legal document – Law of Georgia on Mediation. Opinions of the author are represented in the thesis.

Key words: mediation, legal regulation, civil procedure code of Georgia, amicable settlement, mandatory judicial mediation, advantages of mediation.

1. Introduction

Mediation, as alternative mechanism of dispute resolution is innovation in Georgian legal system. Mediation is new institution of human right protection in Georgian legislation, application of which by will allow disputed parties to settle conflict more efficiently and rapidly¹, via amicable settlement.

Based on the statistics of application to court in Georgia and, on the other hand, lack of trust to each other is noted in Georgian society, when in the process of forming civil society people are important to take decision directed towards essential solution of issue, instead of extended legal proceedings, introduction of mediation shall play positive role, however, this will take place in case if the state, society and all actors involved in the process establish respective terms for development(vial legal settlement) of this new mechanism, though, in the first place, it is important to promote new legal institution and providing full information about such institution to the ordinary “users”, i.e. citizens and legal entities².

Different from other alternative means of dispute resolution, main purpose of mediation is elimination of disagreement between the parties by the Parties, with their involvement, when the Parties make decision itself and the mediator shall be the executor of their desires, only facilitator of the process, who, in his/her turn, is the person with special knowledge and skills, enclosing positions of the Parties to each other, showing positive sides of timely resolution of dispute to the Parties with less expenditures; saying in other words, mediation is assistance to the process of negotiations, its associated process³. On the other hand, based on the fact that mediation is not necessary to complete dispute by settlement, this mechanism shall be used before actual commencement of judicial dispute, as well as arbitration proceeding, to allow the Parties understand interests and genuine desires of each other, and if they still fail to reach agreement on the disputed issues, to initiate legal dispute at the

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¹ *Kandashvili I.*, Mediation As New Method of Alternative Means for Dispute Resolution, on the Example of Labor Mediation, Human Rights Protection and Legal Reform in Georgia, Collection of Articles; Tbilisi, 2014, 200-208.

² *Kandashvili I.*, Mediation – New Alternative Dispute Resolution Form in Georgia, The magazine of the Georgian Bar Association “Advokati”, №2-3, Tbilisi, 2016, 19-24.

³ *Stitt A. J.*, Mediation: a practical Guide, Cavendish Publishing, London/Sydney/Portland/Oregon/2004, 1.

court, when the decision maker is not the party in the form and content, allowed by the mediation process. It shall necessarily be noted that mediation is considered to be used in period⁴ before commencement of judicial and arbitration processes⁵.

Mediation is used in multiple judicial court disputes in modern world; there were times, when experts considered application of mediation inappropriate for solution of particular legal relation; however, during last years, mediation has been effectively used for completion almost all types of dispute by settlement, precondition to which is the advantages of mediation process; moreover, along with the fact that the positive sides of mediation is becoming available to the wide circle of people, this conditions wide application of mediation⁶. Mediation, as the mechanism for dispute resolution is one of the most ancient forms for completing dispute by settlement, when third neutral person assists others (disputed parties) in reaching agreement⁷., Mediation is the future oriented mechanism of dispute resolution⁸., within framework of which, third party is comprised of two disputed parties enclosing interests of the person participating in the negotiations and trying to agree common position⁹, based on mediation principles¹⁰.

Since January 1, 2012, one of the forms of mediation, as mandatory judicial mediation was validated de jure, by entering of respective amendments and additions to the Civil Procedure Code of Georgia, particularly, the Law was added with the Chapter XXI1, assuming resolution of civil dispute of particular category¹¹. It is noteworthy that at this stage no common legal act particular legal framework regulator of this institution has been established; however amendments to the Civil Procedure Code gave impulse to the introduction of mediation, including non-judicial mediation at germinal level in Georgia¹².

It is noteworthy that the Parties have never been prohibited to settle disagreement between themselves via amicable settlement of the issue, by application of respective procedures existing in current legislation; however, when said solutions were not legally regulated, we shall assume that the facts of application of such means was insignificantly identified. It is noteworthy that regulations of judicial mediation validated on January 1st 2012, automatically admitted extensive application of non-judicial mediation and in a parallel mode mediation mechanism was developed in notarial, enforcement, medical proceedings, and at the same time, Labor Code foresaw mediation to be one of the methods for resolution of collective labor disputes.

It shall be noted that mediation is not new for Georgian gene, it has deep historic roots in Georgia; particularly, mediation court was the part of Georgian legal culture at the initial stage of social development¹³.

⁴ *Tsertsvadze G.*, Mediation, Publishing House “Meridiani”, Tbilisi, 2010,34.

⁵ *Goldsmith J., Ingen-Housz C., Pointon A., Gerald H.*, (eds.), ADR in Business, Practice and Issues across Countries and Cultures, Kluwer Law International, New-York, 2006.

⁶ *Kovach K.K.*, Mediation in a nut shell, 2nd ed., Thomson West, United States of America, 2010, 38-39.

⁷ *Ibid.*, 19.

⁸ *Tsertsvadze G.*, Mediation, Publishing House “Meridiani”, Tbilisi, 2010, 156.

⁹ *Kelly D., Holmes A., Hayward R.*, Business Law, 5th ed., Cavendish Publishing Limited, London, 2005,95.

¹⁰ *Uzelac A.*, Paths of Mediation in Bosnia and Herzegovina, International Finance Corporation, Sarajevo, 2009, 24.

¹¹ Subject to the Article 1871 of the Civil Procedure Code of Georgia, after a claim has been filed with the court, a case that falls within the jurisdiction of a judicial mediation may be transferred to a mediator (a natural or legal person) in order to conclude the dispute by a settlement between the parties, and according to the Article 187iii, A judicial mediation may apply to:

- a) matrimonial disputes, except adoption, annulment of adoption, restriction and deprivation of parental rights;
- b) inheritance disputes;
- c) neighborhood disputes;
- d) any dispute – with the consent of the parties.

¹² Paragraph “d” of the First Section of the Article 187iii of Civil Procedure Code of Georgia assumed Mediation for the dispute of any category, if the Parties reach agreement on it; in such case, subject to the Section two of the same Article the dispute will be possible to transfer to the mediator at any stage of proceeding.

¹³ *Tkemaladze S.*, Mediation in Georgia, Tbilisi, 2016, 13.

Today, mediation institute faces huge challenges in legal terms, the need for adoption of the unified legal act regulating mediation is on the agenda, which shall determine future of mediation in Georgia.

2. Advantages of Mediation

Mediation is characterized with several advantages, which shall be comprehensively communicated to the society in particular form, based on the fact that it is difficult to develop alternative dispute resolution judicial mechanism in the country, which is not distinguished in high level of trust to the government by the court, if, on the one hand, it is not characterized with the preferences different from the proceedings, herewith, on the other hand, potential parties of the disputes, i.e. each member of society, as representatives of business have no comprehensively information¹⁴ about the mediation. It is very important that the representatives of the parties of the dispute, who are as usual lawyers, themselves have knowledge about the alternative dispute resolution form such as mediation, as only if they have full knowledge of this form they can advice to clients about the advantages of mediation¹⁵.

In favor of mediation, it shall be noted that it is absolutely informal “process” different from the judicial process, which is not bound with procedure and is oriented towards interests of the parties, to identify mutually beneficial positions for proactive actions of the parties and reach agreement, i.e. different from the judicial process and arbitration, where, correspondingly, mandatory decisions are made by judge and arbitrator, it is not necessary to reach final agreement, and in case of doing this, this outcome shall meet interests of both parties and it shall be the decision made by both parties, continuing trust to decision made with mutual agreement to the parties; the parties are devoted to the outcome created with own forces¹⁶and they are interested in continuance of amicable and future business relation.

Mediation is completely confidential. Mediator and parties are illegible to divulge the information, which became known to them in course of mediation. Herewith, the information disclosed under the term of confidentiality within mediation and the documents represent inadmissible evidence in the court. It shall be noted that mediator, performing facilitating all above and assisting the parties in dispute resolution by means of settlement, according to the Subparagraph “d” of the Article 141 of the Civil Code of Georgia, persons may not be called and examined with respect to such circumstances of which they became aware in their capacity as mediator; parties are important to feel themselves comfortable when disclosing confidential information in the process of negotiation¹⁷and be confident with mediator and second party¹⁸.

Along with the above positive sides, mediation¹⁹is the most preferential form of dispute resolution; particularly, in case of mediation, legislation foresees important benefits from the point of state court fee. Particularly, according to the First Section of the Article 39 of the Civil Procedure Code of Georgia, instead of 3% paid by a party in case of hearing of the dispute at the court (only at the court of original jurisdiction), in case of mediation, the party is to pay only 1% as the court fee, and 70% of which (of 1%) shall be refunded to the plaintiff, if the dispute in the process of judicial mediation is completed by settlement, subject to the Article 49 of the Civil Procedure Code of Georgia.

It shall also be noted that the agreement reached in mediation may be approved by the court and thus become subject to enforcement; and, in case of disagreement, the party shall loose constitutional right for ap-

¹⁴ *Kandashvili I.*, Mediation – New Alternative Dispute Resolution Form in Georgia, The magazine of the Georgian Bar Association “Advokati”, №2-3, Tbilisi, 2016, 19-24.

¹⁵ *Kovach K.K.*, Mediation in a Nutshell, 2nd ed., Thomson West, United States of America, 2010, 2.

¹⁶ *Kelly D., Holmes A.*, Hayward R. Business Law, 5th ed, Cavendish Publishing Limited, London, 2005, 99.

¹⁷ *Tsertsvadze G.*, Mediation, Publishing House “Meridiani”, Tbilisi, 2010, 321.

¹⁸ *Ibid.*, 322.

¹⁹ The term Mediation (in this particular case) means mandatory judicial mediation.

pealing court by complying to the general rule; for the purpose of increasing efficiency of mediation, regulatory framework regulating mediation does not lose actuality, thus giving rise to the mediation agreement, including, opportunity for effective mechanism of enforcement of the cases of non-judicial mediation²⁰.

And finally, it shall be noted that in case of completing dispute by mediation, disputing parties shall maintain better opportunity for continuing existed business and personal relations²¹, in other words, by using mediation, the Parties have opportunities and desires to have positive relation with each other in the future.

3. Prospects of legal regulation of Mediation in Georgia

Adoption of legal framework regulatory document represents necessary precondition to further introduction of mediation and its development in Georgian legal system from institutional point of view, which will make warranty for judicial, and non-judicial commercial mediation in Georgia.

Currently, no regulation of enforcement procedures of agreement achieved in the format of non-judicial mediation exists, preventing business sector to use such informal, though – profitable process to them as mediation, in case of dispute. At the same time, actually there is no unified register of mediators, and the standards who the mediator is or shall be; actually there are no regulatory norms of accreditation, training and responsibilities of mediator, making preventing preconditions for wide application of this institute and it requires respective attention, as from the actors concerned in the subject, so, in the first place, from the representatives of the government.

It is ideal environment for the purpose of supporting mediation currently in Georgia. Particularly, adoption of the framework document regulating mediation represents one of the main issues of the agenda for EU association of Georgia; on the other hand, public awareness and interest in mediation is being increased day by day²², on the third hand, the fact that there is no alternative to the mediation mechanism as judicial system discharging and precondition to the perspectives for completing dispute by settlement has become evident, making warranty for 2017 to become the year of mediation in Georgia, which mostly depends on the common position of the legislative branch of government of Georgia and the institutions operating in the field of mediation²³.

With already existed practical and theoretical experience in the field of mediation, we may consider extension of jurisdiction of mediation, legislative basis, while practically several years ago, cautious and moderate approach towards this new institution was justified, when planning of application of judicial mediation throughout entire Georgia and its implementation would be the decision embodying risk²⁴. It is noteworthy that new notarial act is necessary “to recognize court-independent²⁵” process of mediation, planned and organized by disputed parties and provide procedural and legal warranties of the process.

For the purposes of further development of mediation in Georgia, it is purposeful to apply institutional regulation of the mediation; particular there shall be specific institution, union, organization, regulating mediation

²⁰ *Kandashvili I.*, Mediation – New Alternative Dispute Resolution Form in Georgia, The magazine of the Georgian Bar Association “Advokati”, №2-3, Tbilisi, 2016, 19-24.

²¹ *Kovach K.K.*, Mediation in a nutshell, 2nd ed., Thomson West, United States of America, 2010, 42-43.

²² On November 21-22, 2016, the first international conference “Mediation Day 2016” was held in Georgia for the first time in Georgia, where they reviewed the content of the draft law of Georgia on mediation, and reports of the international experts working in the field of mediation were heard. These event was organized by the European project, UNDP, USAID project with the financial support of PROLOG and German Foundation FIZ.

²³ Author. I mean, in the first place, the organizations functioning in mediation direction, particularly, non-profit organization “Judicial Mediators Association”, non-profit organization “Georgian Mediators Association”, and, on the other hand, parties participating in mediation, especially Lawyers’ Corps.

²⁴ *Tsertsvadze G.*, Mediation, Publishing House “Meridiani”, Tbilisi, 2010, 216.

²⁵ *Ibid.*, 123.

process²⁶ and the profession of mediation; it is about management of elementary process of the category, such as hiring a person to mediate, granting status of mediator to him/her, development of continuous professional education program of mediators and its management, prescribing rules of conduct of mediator and their monitoring. Organization of such category shall be the institution established on legal basis (there is several such examples in Georgia, for example: Georgian Bar Association), which, on the one hand shall be the manager of the said process, however, on the other hand, it shall provide absolute independence and non-interference of the profession. It is important for improvement on the legislative level of the principle regarding enforcement of the agreement reached within the bounds of mediation to be equalized to the enforcement standard for the decision made within the bounds of judicial proceedings²⁷.

3.1. The Procedure for Granting the Status of Mediator

Granting the status of mediator is an important process and this shall take place in compliance with the standard prescribed by applicable legislation; particularly, there shall be specific rule according to which granting of the status of mediator shall be provided and regulated by the particular institution. I consider it to be expedient, as if the said issue will be the subject to management of simultaneously several institutions, in such case, there is high risk of decreasing effectiveness of the standards prescribed for the profession; The professional trainings of mediators, as well as all needs associated with the profession should be carried out by the regulatory body, in our case – the institution that will be established on legal basis, and will as well provide verification of past process and making decision to each particular person (mediator) based on it.

3.2. The Mandatory Continuous Education Program for Mediators and Monitoring of the Rules of Professional Conduct of Mediators

Mandatory continuous education of mediator should be the subject of legal regulation in new law and mediator should be liable complete minimal requirements foreseen with continuous professional educational program, as well as the mandatory need of standard of rules of conduct of mediators shall be prescribed on legislative basis; however, it shall be noted that particular standard and content of mandatory education and code of conduct rules shall represent internal decision of professional union of mediators²⁸, and therefore amendment and adjustment of which will not be related with the amendment of legislation, thus simplifying the process and, on the other hand, provide its conformity to the current challenges and needs. It is obvious and undisputed that on the stage of introduction and institutional establishment of mediation, existence of the standards of ethic is important, according to which future mediators will act; it shall be taken into account that self-regulating professions are in need of subordination to the rules of ethic by their representatives²⁹; though, in this direction, we shall be cautious, especially at the embryonic stage of institutional introduction of mediation, to prevent losing of efficiency and flexibilities of mediators by extremely strict ethic regulations³⁰, which is based on the informal nature of the process itself.

²⁶ Author. I speak about legal entity of public law or noncommercial legal entities founded on law, which shall be professional union of mediation.

²⁷ *Austermiller S.*, Paths of Mediation in Bosnia and Herzegovina, International Finance Corporation, Sarajevo, 2009, 98.

²⁸ See *Tanski M.*, Way to Mediation, 2013, 56, (citation: except mediation organizations and higher institutions, mediation trainings are also conducted by professional organizations of lawyers. For example, National Board of Lawyer-Advisors, Association of Notaries of the Republic of Poland, Mediation Center Existed with the Main Board of Lawyers – all these organizations conduct mediation trainings for own members).

²⁹ *Kovach K.K.*, Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 395.

³⁰ *Ibid.*, 400.

4. Conclusion

Mediation, as alternative mechanism for dispute resolution, is particular innovation in the Georgian legislative system, however its positive role and efficiency may be considered to be already confirmed and its outcomes are clear to the society; though, for more effective operation of this institute and its becoming strong instrument of public, from the point of dispute resolution by settlement, this institution is necessary to have respective environment for proper development, in the first place, by the government and, on the other hand, primary beneficiaries of this institution, in person of the representatives of society and legal profession.

Inclusion of mediation in the unified legal regulatory framework shall take place on particular stage; that is establishment of regulated normative act of mediation, giving accurate information on the essence of this institution and features of its already widely developed forms and kinds; herewith, for establishment of higher level of trust and benevolence to this institution, it is necessary to promote this institution, which shall be undertaken by the representatives of legal profession, especially Lawyers' Corps³¹ before legal formalization of the union of the persons concerned in this field takes place in the organizational legal form.

Role and functions of Georgian Bar Association in regards to the introduction of mediation in the country, is one of the main issue; referring to the examples of different US states³², we may say that organized assistance of mediation institution by the bar associations, including its teaching in the continuous legal education programs for lawyers, had its outcomes and it made multiple lawyers and judges, who did not believe in mediation, change their mind regarding this institution during their career.³³

Mediation cannot be developed in the country if it does not have full and unequivocal assistance of bar association, as the lawyers are the persons, who have special functions for protection of their clients' rights and the disputed parties make decision based on their selection, including from the point of holding proactive position in the process of mediation. Correspondingly, to give a client correct advice for trusting mediation, in the first place, a lawyer shall believe in positive sides and success of mediation.

It is noteworthy that, when speaking about promotion of mediation, as institution, it shall be comprised of introduction of its advantages to the direct customers, i.e. citizens, legal entities, as well as detailed information of the representatives of different directions of legal profession involved in this process, which shall become strong instrument for effective, timely and successful resolution of multiple future legal disputes in their hands. This is grounded on the first labor mediation case³⁴, which showed to Georgian society, including legal circles that, involvement of the third neutral person in dispute resolution process, notwithstanding the extent of disagreement of disputed parties, is always able to bring advantages, based on the fact that mediator is necessary to express common interests of the parties and show mutual advantages of settlement to them.

And finally, if taking into account "traditional inclination of Georgian society to the social institute of alternative dispute resolution"³⁵, this latest shall make precondition to wider introduction of mediation in our reality

³¹ *Kandashvili I.*, Mediation – New Alternative Dispute Resolution Form in Georgia, The magazine of the Georgian Bar Association "Advokati", N2-3, Tbilisi, 2016, 19-24.

³² *Kovach K.K.*, Mediation in a nut shell, 2nd ed., Thomson West, United States of America, 2010, 34-35. [American Bar Association (ABA) played great role in promotion and development of mediation of the United States of America, as well as bar associations of different states; for example: in Texas, Huston Bar Association established committee for alternative dispute resolution, giving impulse to establishment of the so-called Neighborhood Justice Center, to serve for development of dispute resolution by agreement in the region)

³³ *Kovach K.K.*, Mediation in a nut shell, 2nd ed., Thomson West, United States of America, 2010, 33.

³⁴ The first labor mediation in Georgian legal domain was concluded on March 10-23, 2014 between employees of village Kazreti Fold Deposit and the employer RMG Gold, RMG Copper.

³⁵ *Tsertsvadze G.*, Mediation, Publishing House "Meridiani", Tbilisi, 2010, 217.

Bibliography

1. Civil Procedure Code of Georgia, art. 39, art. 49, 14/11/1997.
2. Law on Advocates of Georgia, art. 5, 20/06/2011.
3. Juvenile Justice Code of Georgia, art. 20, 12/06/2015.
4. *Austermiller S.*, Paths of Mediation in Bosnia and Herzegovina, International Finance Corporation, Sarajevo, 2009, 98.
5. *Goldsmith J., Ingen-Housz C., Pointon A., Gerald H.* (eds), ADR in Business, Practice and Issues across Countries and Cultures, 'Kluwer Law International', New-York, 2006.
6. *Kandashvili I.*, Mediation As New Method of Alternative Means for Dispute Resolution, on the Example of Labor Mediation, Human Rights Protection and Legal Reform in Georgia, collection of articles; Tbilisi, 2014, 200-208 (in Georgian).
7. *Kandashvili I.*, Mediation – New Alternative Dispute Resolution Form in Georgia, The magazine of the Georgian Bar Association “Advokati”, №2-3, Tbilisi, 2016, 19-24 (in Georgian).
8. *Kovach K.K.*, Mediation in a Nut Shell, 2nd ed., Thomson West, United States of America, 2010, 2, 19, 33-35, 38-39, 42-43.
9. *Kovach K.K.*, Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 395, 400.
10. *Kelly D., Holmes A., Hayward R.*, Business Law, 5th ed, Cavendish Publishing Limited, London, 2005, 95, 99.
11. *Stitt A.J.*, Mediation: a practical Guide, Cavendish Publishing, London/Sydney/Portland/Oregon/2004, 1.
12. *Tanski M.*, Way to Mediation, 2013, 56.
13. *Tkemaladze S.*, Mediation in Georgia, Tbilisi., 2016, 13, (in Georgian).
14. *Tsertsvadze G.*, Mediation, Publishing House “Meridiani”, Tbilisi, 2010, 34 (in Georgian).
15. *Tsertsvadze G.*, Mediation, Publishing House Meridiani, Tbilisi, 2010, 321-123, 156, 216-217 (in Georgian).
16. *Uzelac A.*, Paths of Mediation in Bosnia and Herzegovina, International Finance Corporation, Sarajevo, 2009, 24.