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The Representation in Mediation

The aim of the article is, on the one hand, to make mediation popular as a new mechanism to resolve a dispute among practicing lawyers, and on the other hand, to emphasize the role of a representative in mediation by lawyers and explain that representation is a typical activity in the process of the new dispute settlement to prepare lawyers for dealing with the peculiarities of the process and develop the appropriate representational skills to perform their functions successfully.

Key Words: *Mediation, Legislative Regulation, Civil Procedure Law, Amicable Dispute Resolution Court Mandated Mediation, Preference for Mediation.*

1. Introduction

The development pace of the modern world requires society to evolve and implement all possible means and mechanisms for making peace and progress in the world not to lose more time and rational actions. Society should understand well that world peace, the introduction of social dialogue, and a culture of dialogue in society – will be achieved through the development and greater acceptance of each other in everyday life, which has been a great challenge for the last centuries however, all countries are trying to establish legislative branches at the state level to reduce disputes in courts and tension in society.¹

This reality is featured by frequent conflicts that separate the parties from each other, cut off the connections, and prompt to find a solution through navigating legal labyrinths, which is harmful to the interests of both parties. The already achieved result is less relevant² and causes further potential disputes because no one adapts to the status³ of the loser or the guilty due to the nature of a human.

The main way society can find⁴ is connected to the negotiations, mutual acceptance, and figuring out a reciprocally beneficial final decision⁵ which is convenient for everyone by legal regulations, however, several circumstances prevent the reality from transforming into everyday actual actions. The effective application of the negotiation platform should become the settlement conditions of local and global conflicts if legal mechanisms guarantee the result of the negotiations, the disputing

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¹ *Ware S.J.*, Principles of Alternative Dispute Resolution, 3rd Ed, West Academic Publishing, 2016, 393.

² *Feehily R.*, International Commercial Mediation, Cambridge University Press, 2022, 3.

³ *Vries T.*, Mediation als Verfahren konsensualer Streitbeilegung, Peter Lang Internationaler Verlag der Wissenschaften, 2012, 115.

⁴ *Palmeter D., Mavroidis P.C., Meagher N.*, Dispute Settlement in the World Trade Organization (practice and procedure), 3rd Edit, Cambridge University Press, 2022, 11.

⁵ *Campbell C.*, International Mediation, Wolters Kluwer, Special Issue, 2020, 32.

parties will try to avoid tension and maintain peaceful regulation, especially if they have the expectations that the decisions made by their engagement will be enforceable.

For this purpose, society has always been in search of effective ways to resolve the dispute, which would most satisfy their needs and match the real interests of the parties. This type of search and planning automatically leads to legal ways that determine the legal policy of the state which responds the interest and need of the society to the interest of the state – citizens have and need.

The occupancy of simple, effective, timely accessible forms of dispute resolution mechanisms for the disputing parties is a current need.⁶

The interests of a state have always been consistent with the necessity discussed above, because on the one hand, with the development of similar capabilities, the judiciary is allowed to relieve the accumulated and ongoing proceedings, and on the other hand, it fulfills a great social function when instead of the court trying to end the dispute by other legal means, the parties preserve the resources of their relations applying the alternative mechanisms. The parties do not get the syndrome of winning and losing which makes it easier for the representatives of society and business to continue living together, having a relationship, and doing business even in a conflict. In other words, it is the macro-level interest of a state as well as the micro-interest⁷ of each party to find a mechanism for getting an effective dispute resolution without a waste of time and finances that contribute to actually saving resources, and keeping social peace.

Taking into account the above-mentioned necessity and reality, it was completely logical and consequently predictable that alternative means of dispute resolution, which represent constructive mechanisms for the effective elimination of social tension⁸ and conflicts in society, would be widely applied and used by members of society. The political and legal associations of states have a strong desire to promote the introduction of alternative mechanisms to resolve disputes in everyday life.⁹ Almost all states have adopted alternative means of dispute resolution, a characteristic of mediation.¹⁰ In this regard, some countries historically have an experience of settling disputes with the mediation method or similar forms, which usually plays a positive role in integrating¹¹ this institution into the current legal system.

⁶ *Carvalho J.M., Carvalho C.*, Online Dispute Resolution Platform in Alberto de Franceschi (ed), *European Contract Law and the Digital Single Market –The Implications of the Digital Revolution*, Intersentia, 2016, 245,

⁷ *Steffek F.*, Mediation, in *The Max Planck Encyclopedia of European Private Law*, Volume II, *Basedow J., Hopt J.K., Zimmermann R., Stier A.*, Oxford University Press, Oxford, 2012, 1163.

⁸ *Steffek F.*, Mediation, in *The Max Planck Encyclopedia of European Private Law*, Vol. II, *Basedow J., Hopt J.K., Zimmermann R., Stier A.*, Oxford University Press, Oxford, 2012, 1162.

⁹ *Esplugues C., Marquis L.*, *New Developments in Civil and Commercial Mediation*, Springer, Vol. 6, 2015, 2.

¹⁰ Jeong S., Critical consideration of court mediation in Korea, in *Brinkmann M., Effer-Uhe D.O., Völmann-Stickelbrock B., Wesser S., Weth S.*, *Festschrift for Hanns Prütting, Dogmatics in the Service of Justice, Legal Certainty and Legal Development*, Carl Heymanns Verlag, Cologne, 2018, 831.

¹¹ *Creutzfeldt N.*, Trust in out-of-court dispute resolution, *Journal for Conflict Management*, Verlag Otto Schmidt, Cologne, issue 1/2016, 15.

Mediation is defined as a process¹² that helps the parties involved in the conflict to resolve the dispute through negotiations. Mediation is a negotiation when a professional negotiator – a mediator assists the parties in communicating with each other. Unlike typical negotiation, this is a negotiation process with the involvement of a third neutral person that is a new and effective possibility to settle the dispute between the parties.

The main goal of establishing mediation is to enable the parties to terminate the dispute with the best solution to their interests and to eliminate¹³ the conflict. They do not end the dispute with the other party, but create a condition for keeping the business or personal relationship with the party in civil forms in the future. Mediation does not construe the events that occurred in the past, it helps the parties¹⁴ find the best solution from the current impasse to continue the future relationship by their interests;¹⁵ The parties achieve results by conducting negotiations with each other, therefore, the substantive part of the mediation process includes negotiation, and these two concepts should be considered synonymous with the difference that the negotiations between the parties in mediation are facilitated by a third neutral entity – the mediator, and the function of a negotiator lies in the organization of effective negotiations.

Negotiations conducted in mediation help the parties in self-determination, in recognizing the real reasons and approach¹⁶ of the disputing parties to their demands. In the legal literature mediation is referred¹⁷ to as a “future-oriented process”;¹⁸ Mediation allows the parties to achieve a long-term result¹⁹ if the process is successfully conducted and completed, especially, since the parties in conflict can apply mediation at any stage of the dispute however, the earlier²⁰ mediation is initiated, the parties are enabled to start the formal negotiation process and make the agreement on the dispute.²¹ In the negotiation process, the parties try to agree upon the truth²² because the rules of law do not decide what they believe to be right, it is well known to everyone that in some cases justice and legality are not compatible theses with each other, therefore, applying the negotiation mechanism within the

¹² *Trossen A.*, Mediation (un)gerecht, Win-Management Verlag, Mühlberg, 2014, 37, 49.

¹³ *Greger R., Unberath H.*, MediationsG: Recht der Alternativen Konfliktlösung, Kommentar, C.H.BECK, München, 2012, 97.

¹⁴ *Jones G., Pexton P.*, ADR and Trusts: An International Guide to Arbitration and Mediation of Trust Disputes, Spiramus Press, 2015, 33.

¹⁵ *Wode M., Rabe C.S.*, Mediation, Springer, Berlin, 2014, 27.

¹⁶ *Alexander N.*, Global Trends in Mediation, 2nd Ed, Kluwer Law International, the Netherlands, 2006, 10.

¹⁷ *Trossen A.*, Mediation (un)gerecht, Win-Management Verlag, Mühlberg, 2014, 470.

¹⁸ *Deixler-Hübner A., Schauer M.*, (Hrsg) Alternative Formen der Konfliktbereinigung, MANZ'sche Verlags- und Universitätsbuchhandlung, Wien, 2016, 188.

¹⁹ *Kaiser P., Gabler A.M.*, Prozessqualität und Langzeiteffekte in der Mediation, Zeitschrift für Konflikt-Management, Verlag Otto Schmidt, Köln, Heft 6/2014, 180.

²⁰ *Fenn P.*, Commercial Conflict Management and Dispute Resolution, Routledge, New York, 2017, 68.

²¹ *Roberts M.M.*, Mediation in Family Disputes, Ashgate Publishing Ltd, Burlington, 2014, 180.

²² *Wendland M.*, Mediation und Zivilprozess, Mohr Siebeck, Tübingen, 2017, 216, 217. See also, Chitashvili N., Fair Settlement as Basis for Ethical Integrity of Mediation, “Alternative Dispute Resolution Yearbook”, 2016, 12, ff. <<https://adryearbook.tsu.ge/index.php/ADR/article/view/3025>> [21.09.2023].

mediation, the parties make an effort to establish the truth through an agreement, and how fair²³ it is for both parties, it should be decided by them. In general, fairness is a characteristic standard of the concept of mediation.²⁴

For the very perception of mediation, the parties need to understand well that they always benefit from mediation. They may not be able to terminate²⁵ the negotiations in mediation with a specific agreement however, they will be more aware of the causes of the conflict and the dispute than before the mediation, which may later become a prerequisite for the dispute. Therefore, participation in the mediation process always brings positive results for the parties if the party understands the content of the mediation and knows how to use the information that this process gives him.²⁶ It is common in the literature when mediation can be depicted as a profitable process²⁷ for both parties because, with the correct and effective use of mediation, both parties can reach an agreement beneficial to their interests.²⁸ While both parties are affected by the human or financial costs incurred on court proceedings or arbitration proceedings, and the victory achieved by one of the parties is illusory.²⁹

The process of negotiation in mediation is confidential, in which the parties, voluntarily,³⁰ with the involvement of a third independent and impartial mediator,³¹ who does not have any authority to make a decision, try to reach an agreement suitable to their interests³² without court, find the terms of an agreement acceptable³³ to both parties by negotiation considering their goals.³⁴

This process has its specific component which must appear to give mediation, as an experienced neutral third party³⁵ provided with special skills, the negotiation process³⁶ between the parties, a really

²³ *Windisch K.*, Fair und/oder gerecht? Fairnesskriterien in der Mediation, *Zeitschrift für Konflikt-Management*, Verlag Otto Schmidt, Köln, Heft 2/2015, 55.

²⁴ *Steffek F., Unberath H., (eds), Genn H., Greger R., Menkel-Meadow C.*, *Regulating Dispute Resolution ADR and Access to Justice at the Crossroads*, Hart Publishing, Oxford and Portland Oregon, 2013, 17.

²⁵ *Teply L.L.*, *Legal Negotiation in a Nutshell*, 4th Ed, West Academic Publishing, 2023, 22.

²⁶ *Ahmed M.*, An Investigation into the Nature and Role of Non-Settled ADR in *International Journal of Procedural Law*, Vol. 7, intersentia, Cambridge-Antwerp-Portland, 2017, 216-217.

²⁷ *Deixler-Hübner A., Schauer M.*, (Hrsg) *Alternative Formen der Konfliktbereinigung*, MANZ'sche Verlags- und Universitätsbuchhandlung, Wien, 2016, 21.

²⁸ *Tsuladze A.*, *Comparative Analysis of Georgian Court Mediation*, publishing house "World of Lawyers", Tbilisi, 2017, 14 (in Georgian).

²⁹ *Bevan A.*, *Alternative Dispute Resolution*, Sweet & Maxwell, London, 1992, 1.

³⁰ *Hirsch G.*, *Alternative Streitbeilegung: ein neuer Zugang zum Recht*, *Honorati C., Ohly A., Padovini F., Hirsch G., Picotti L., Knauer C.*, *Patentrecht ADR Wirtschaftsstrafrecht*, Müller Verlag, Heidelberg, 2017, 64.

³¹ *Steffek F.*, *Mediation*, in *The Max Planck Encyclopedia of European Private Law*, Volume II, *Basedow J., Hopt J.K., Zimmermann R., Stier A.*, Oxford University Press, Oxford, 2012, 1162.

³² *Hirsch G.*, *Alternative Streitbeilegung: ein neuer Zugang zum Recht*, *Honorati C., Ohly A., Padovini F.*

³² *Hirsch G.*, *Alternative Streitbeilegung: ein neuer Zugang zum Recht*, *Honorati C., Ohly A., Padovini F., Hirsch G., Picotti L., Knauer C.*, *Patentrecht ADR Wirtschaftsstrafrecht*, Müller Verlag, Heidelberg, 2017, 69.

³³ *Bäumerich M.*, *Güterichter und Mediatoren im Wettbewerb*, Duncker&Humblot, Berlin, 2015, 23.

³⁴ *Feehily R.*, *International Commercial Mediation*, Cambridge University Press, 2022, 99.

³⁵ *Hale T.*, *Between Interests and Law*, Cambridge University Press, Cambridge, 2015, 54.

wide area of self-establishment and practical application³⁷: getting the public completely informed that mediation is the negotiation process and the parties in this process should be involved for a specific purpose: it is to end the dispute through negotiation, in which the parties directly or through their representatives try to reach an agreement.³⁸

2. The Parties and Their Representatives in the Negotiation Process within the Mediation

The negotiation process, unlike other resolution mechanisms of dispute, capacitates the parties to manage the process, to get directly involved in the process of clarifying the issues or to use representatives. Most importantly, the parties have the opportunity to obtain the final result by eliminating the misunderstanding between them and terminating the dispute with an agreement. Negotiation is a kind of “temporary educational” process when parties with different views exchange ideas and interests from their perspective driven by the interest of agreement.³⁹ Negotiation is the art of compromise,⁴⁰ during which the parties have to make concessions, that is, the parties involved in this process should understand that by initiating negotiations, they indicate their willingness to make certain concessions. The approach that “concession is weakness” and “cannot” make concessions in negotiations contradicts the essence of this process.

The approach that negotiation is a “learned skill”⁴¹ is increasingly becoming established in the modern developed world. Negotiation skills are already taught in higher educational institutions or professional associations, it is especially recommended for lawyers to learn this art because having communication with two parties with different interests, the technique of negotiation is vital for doing their professional activity.⁴²

A lawyer should be able to distinguish the type of case when the parties can try to settle, and the cases that exclude achieving an agreement and the parties have to get the justice system to solve legal problems. The representative involved in the process shall recognize that not all disputes are subject to settlement, however, this does not exclude the involvement of the party and its representative in trying to terminate the dispute. Taking into account personal or business needs or approaches, a settlement cannot be reached,⁴³ because in some cases the specific circumstances of the dispute do not allow the parties any other option. Therefore, the parties and their representatives allow for a possible settlement and then take consistent steps, and after exhausting all means of resolving, they always remain assured of access to justice. Accordingly, considering the mentioned important reservation, when the time and

³⁶ *Willis T., Wood W.*, *Alternative Dispute Resolution in Golden J., Lamm C., International Financial Disputes Arbitration and Mediation*, Oxford University Press, Oxford, 2015, 72.

³⁷ *Moore C.W.*, *The Mediation Process*, 3rd Ed, Jossey-Bass Publishing, San Francisco, 2003, 467.

³⁸ *Feehily R.*, *International Commercial Mediation*, Cambridge University Press, 2022, 11.

³⁹ *Feehily R.*, *International Commercial Mediation*, Cambridge University Press, 2022, 11.

⁴⁰ *Wenke A.R.*, *The Art of Negotiation for Lawyers*, Richter Publications, 1985, 3.

⁴¹ *Frasogna X.M., Hetherington L. H.*, *The Lawyer’s Guide to Negotiation*, 2nd Ed, American Bar Association, 2009, 3.

⁴² *Teply L.L.*, *Legal Negotiation in a Nutshell*, 4th Ed, West Academic Publishing, 2023, 1.

⁴³ *Wenke A.R.*, *The Art of Negotiation for Lawyers*, Richter Publications, 1985, 3

financial costs are minimal, and the statute of limitations is guaranteed by procedural standards, either party has no loss. Simultaneously, the parties and their representatives should realize that failure to reach an agreement during the negotiation process does not mean having wasted time⁴⁴ because their direct involvement in the negotiation process enables the parties to get valuable information, to discern the approach of another party to the issue or recognize their weak and strong sides if the dispute continues.

To successfully terminate the negotiation it is necessary to arrange a structured process,⁴⁵ which is led by a third neutral negotiator – a mediator, who is an independent and impartial figure from the parties and is driven by the sole function – to help the parties to make a decision, while he/she does is not a subject provided with similar powers. It is the format that mediation offers to the negotiating parties, and therefore, it is common when in the literature mediation is referred to as negotiation with the involvement of a third neutral person.

Negotiations in mediation are conducted by the parties, however, the involvement of lawyers in this process is convenient and justified because they have relevant knowledge⁴⁶ and experience to arrange negotiations in mediation,⁴⁷ provide the parties with convenient pieces of advice, and make a final, legally risk-free decision, so, to the subjects, participating in the process, mediation should be “a piece of cake”.⁴⁸

3. The Role of a Representative in the Negotiation and the Scope of Involvement in Participation

Discussing alternative means of dispute resolution, some believe that applying to a lawyer in the negotiation process of mediation is not necessary because the parties can protect their interests in a non-competitive and legal process which will save money; There is also an opinion that lawyers considering their nature, are focused on the interests of a client and cannot contribute to the successful conduct of the negotiation process, however, analyzing the issue, it is concluded that the lawyer is only a creator of additional value in such a process because he/she has to use the information obtained during the negotiation process, asses expected legal risks considering the actual circumstances, which helps the attorney⁴⁹ to form the right position and finally end the dispute by agreement if there is a possible settlement resource. In the ongoing negotiations in the mediation process, the representative should perform the function of a “peacemaker”.⁵⁰

⁴⁴ *Ibid.*, 5.

⁴⁵ *Feehily R.*, *International Commercial Mediation*, Cambridge University Press, 2022, 12.

⁴⁶ *Wenke A.R.*, *The Art of Negotiation for Lawyers*, Richter Publications, 1985, 5.

⁴⁷ *Teply L.L.*, *Legal Negotiation in a Nutshell*, 4th Ed, West Academic Publishing, 2023, 8.

⁴⁸ *Elkington A., Greene J., Morgan G., Shield G., Simmonds T.*, *Skills for Lawyers*, Jordan Publishing Limited, 2003, 97.

⁴⁹ *Menkel-Meadow J.C., Love P.L., Schneider A.K., Sternlight R.J.*, *Dispute Resolution Beyond the Adversarial Model*, Wolters Kluwer Law & Business, Aspen Publishers Inc, 2011, 53.

⁵⁰ *Walker S., Smith D.*, *Advising and Representing Clients at Mediation*, Wildy, Simmonds & Hill Publishing, London, 2013, 3.

Today, many lawyers are involved in mediation as mediators or representatives⁵¹ of the parties, the latter playing an important role⁵² in legal practice. The involvement of lawyers in the process of ongoing negotiations in mediation is of fundamental importance⁵³ because lawyers can provide the attorneys with the right perception of mediation and make their effective involvement in the negotiation process.⁵⁴ On the other hand, lawyers represent the primary source for the parties regarding the negotiations to be held within mediation and emerge trust in the mentioned alternative means of dispute resolution. Although a certain part of the public has a misconception⁵⁵ about the function and results of mediation, this new institution is becoming more popular every day.

For the negotiation process in mediation as a new institution to have practical results, on the one hand, it means the statistics of actual settlement of disputes by agreement, which on the other hand is automatically related to the goal of relieving the congestion of the court, all parties need to get involved in the process and accurately fulfill their obligations. However, the decisive role in this process is assigned to the representatives of the parties as the lawyer is the person who determines the successful course of the mediation therefore, the parties should concentrate on choosing a lawyer for mediation. On the one hand, the lawyer must comprehend the essence of mediation and negotiations, and on the other hand, have relevant experience of representation in mediation negotiations in a practical way, because even if one inappropriate word and approach of the lawyer to the other party, the negotiation can fail.⁵⁶ The lawyer prepares his client for mediation and selects the right negotiation strategy for his attorney.⁵⁷ In mediation negotiations, a person equipped to the function of a representative, who is a lawyer in many cases, must make the party discern the difference⁵⁸ between his real interests and the legal requirements set by him/her that get the party focused on the real interests and can develop options with the representative to reach an agreement.

At the initial stage of the negotiations, the attorney takes counsel from the lawyer about the extent to which mediation is a positive event for the dispute. In Georgia where negotiations in mediation are not a traditional alternative mechanism for resolving disputes and the awareness of the public about mediation is quite low, the role of a lawyer is more important. If the party does not have a recommendation⁵⁹ from a lawyer to initiate mediation, it will refrain⁶⁰ from applying for mediation. Mediation is the best way for a lawyer to practice negotiation and serve the client's interests, as it allows them to decide their fate.⁶¹

⁵¹ *Haft F., von Schlieffen K.G.*, Handbuch Mediation, C.H.BECK, Munchen, 3 Auflage, 2016, 107, 108.

⁵² *Reuben C.R.*, The Lawyer Turns Peacemaker, A.B.A.J, 1996, 54, 55.

⁵³ *Margaret S.H.*, The Blackwell Handbook of Mediation, Blackwell Publishing, Great Britain, Oxford, 2006, 89.

⁵⁴ *Dingle J., Kelbie J.*, The Mediation Handbook, 2nd ed, Unity Press, 2014, 114.

⁵⁵ *Leung E.*, Mediation: A Cultural Change, Asian Pacific Law Review, 2009, 17.

⁵⁶ Ibid.

⁵⁷ *Eidenmuller H.*, Alternative Streitbeilegung, Verlag C.H.Beck Munchen, 2011, 147.

⁵⁸ *von Maik B.*, Guterichter und Mediatoren im Wettbewerb, Duncker & Humblot, Berlin, 2015, 23.

⁵⁹ *Goodman A.*, Mediation Advocacy, 2nd ed, Nova, 2010, 5.

⁶⁰ *McLaren H.R., Sanderson J.*, Innovative Dispute Resolution: The Alternative, Thomson Carswell, 2006,4-2

⁶¹ *Hollander J.*, Mediation for Civil Litigators, Irwin Law Inc, 2013, xviii.

Many lawyers participate⁶² in mediation, either as a representative of a party or as a mediator,⁶³ and their involvement in the process provides for further popularization of mediation and increases awareness in society. Lawyers who are involved in the negotiation as representatives in the mediation process assume the obligation of their constructive involvement⁶⁴ to assist the parties in the negotiations and not hinder the prospects of settling the dispute by putting their role forward. However, this does not diminish the role of the institution of the representative, on the contrary, it is a protected and guaranteed right, a kind of expression of “representative democracy” that is ensured in the process of negotiation in mediation.⁶⁵

Along with the introduction of mediation in all jurisdictions, the lawyer must provide⁶⁶ the party with complete and comprehensive information about the mentioned alternative means of resolving the dispute. Although the final decision on applying the mentioned mechanism is the privilege⁶⁷ of the party, however, the lawyer is obliged to inform about the means and advise the mediator about the advantages and drawbacks of a specific dispute. The lawyer must also clearly explain to the attorney that during the negotiation, the party should focus on its interests and not on legal grounds, as well as determine the content of the mediation and make the final decision but full responsibility for the outcome rests with the party. Representation in mediation, including by a lawyer, involves providing the attorney with full information about the process, correct advice on the necessity of mediation for a specific dispute, and selecting a mediator with appropriate knowledge, experience, and skills depending on the content of the dispute.

Following the amendments to the Code of Ethics of the Bar Association on December 8, 2012, the abovementioned ethical obligation appeared in the Code of Ethics of the Bar Association of Georgia.⁶⁸

Mediation is not a panacea.⁶⁹ Regardless of mediation, the parties can still reach the jurisdiction of the court.⁷⁰ However, the people involved in the process of the dispute, especially lawyers should be aware of the place and role of mediation in the legal system, and their roles and functions in the process of mediation negotiations not to miss the opportunity to enjoy new opportunities. Mediation

⁶² *Englert K., Franke H., Grieger W.*, Streitlösung ohne Gericht – Schlichtung, Schiedsgericht und Mediation in Bausachen, Werner Verlag, 2006, 253.

⁶³ **Chitashvili N., Specificity of Some Ethical Duties of Lawyer Mediators and Necessity of Regulation, TSU Journal of Law, #2, 2016, 23-40.**

⁶⁴ *Pruckner M.*, Recht der Mediation, Linde Verlag Wien, Wien, 2003, 32.

⁶⁵ *Fischer E.*, Sozialwissenschaftliche Theoriebildung und das Problem der Mediation, Peter Lang Verlag, Frankfurt, 2006, 17.

⁶⁶ *Steffek F.*, Mediation und Justiz in Das Neue Mediationsgesetz, Fischer Christian., Unberath Hannes., Verlag C.H.Beck, München, 2013, 35

⁶⁷ *Schmidt F., Lapp T., Monßen H.G.*, Mediation in der Praxis des Anwalts, Verlag C.H.Beck, München, 2012, 22.

⁶⁸ The Code of Ethics of the Georgian Bar Association, <www.gba.ge/uploads/files/regulaciebi/eTikis_kodexi.pdf> [21.09.2023] (in Georgian).

⁶⁹ *Brand J., Steadman F., Todd C.*, Commercial Mediation, Iuta&Company, 2nd Ed, 2016, v.

⁷⁰ *Niedostadek A.*, Mediation bei Arbeitsplatzkonflikten und der Grundsatz der Freiwilligkeit, Zeitschrift für Konflikt-Management, 17 Jahrgang, Heft 2/2014, Januar/Februar, Seiten 1-32, PVSt 47561, 55. (in Georgian).

can become a cure, a “conflict screening”⁷¹ if a correct analysis of the current dispute takes place which will lead to at least, determining the correct ways of resolution.

During the representation in mediation negotiations, lawyers have to transform the legal approach and temporarily change the previous attitudes developed over the years, in particular, the issue of the legal proceedings, who asks somebody for something, who is asked, and on what basis is being asked,⁷² is temporarily leveled during the negotiations. In mediation, the parties have to make some compromises if accommodation of an agreement and utterly exhausting the issue is the main priority for them. The parties of the process⁷³ best know what is possible to reach an agreement and what they are ready to agree on. In mediation, the issue is not resolved according to legal correctness, but the parties agree on the conflict, confrontation, and dispute.⁷⁴ Accordingly, the main question expressed in this section- who asks somebody for something, who is asked, and on what basis is being asked, is unlikely to be the main priority for one or another party. This question is constructed by the lawyer backing the attorney taking into account the main interests.

To be a successful representative in mediation, a lawyer needs special training, because the skills acquired by a lawyer for the implementation of advocacy activities are not sufficient for full-fledged representation in mediation.⁷⁵ In mediation, the lawyer must have complete information about the mediators, their activities, how to choose the right and necessary mediator⁷⁶ for the case, and what to expect, otherwise, he will harm the interests of the client. It should be considered that law schools do not train future lawyers in practical mediation skills⁷⁷ which raises a logical question: how can a lawyer be successful in mediation?

It is common for lawyers to perceive the case of mediation as their case, while this case is of a specific client and he/she wins or loses the dispute.⁷⁸ Therefore, clients always prefer to resolve the conflict by spending less time and money, and if the lawyer is capable of tracking client satisfaction, it is double valued by a client. Accordingly, the correct perception and application of mediation by the lawyer is a mutually beneficial process during the deliberation.⁷⁹

lawyers should believe in the effectiveness of mediation. They ought not to have the feeling of being a competitor or taking hold of the activities. In this direction, the Bar Association has a vital role in developing mediation into a powerful institution and establishing it in Georgia.

⁷¹ *Ponschab R.*, Verhandlungsführung: Mutter aller Konfliktlösungen, ADR-Verfahren im Vergleich –Teil 9, Zeitschrift für Konflikt-Management, 17 Jahrgang, Heft 1/2014, Januar/Februar, Seiten 1-32, PVSt 47561, 7.

⁷² *Ibid.* 4.

⁷³ *Wendenburg F.*, Mediation –flexible Gestaltung innerhalb fester Strukturen, Zeitschrift für Konflikt-Management, 17 Jahrgang, Heft 2/2014, Januar/Februar, Seiten 1-32, PVSt 47561, 36.

⁷⁴ *Ponschab R.*, Verhandlungsführung: Mutter aller Konfliktlösungen, ADR-Verfahren im Vergleich –Teil 9, Zeitschrift für Konflikt-Management, 17 Jahrgang, Heft 1/2014, Januar/Februar, Seiten 1-32, PVSt 47561, 4.

⁷⁵ *Goodman A.*, Mediation Advocacy, 2nd ed, Nova, 2010, 1.

⁷⁶ *Ibid.* 6.

⁷⁷ *Hollander J.*, Mediation for Civil Litigators, Irwin Law Inc, 2013, xix.

⁷⁸ *Ibid.*, 1.

⁷⁹ *Stephen W.J.*, Principles of Alternative Dispute Resolution, West Academic Publishing, 2016, 391.

There is an interesting international-level discussion about whether the lawyer must be involved in the mediation or not.⁸⁰ A large part of the legal community agreed that it is up to the domestic legislator of a country to consider its needs and reality.⁸¹

However, it has been established for years at the international level that if a lawyer is representative, the process has an additional advantage, especially during the mediation of complex commercial disputes, because the parties consider the mediation performed by a specialist lawyer⁸² to be a precondition for the achievement of success however, the lawyer in mediation mainly conducts a dialogue focused on the interests of the parties, and not on legal norms.⁸³ The lawyer is centered on legal evaluations, which in turn, makes it easier for the attorneys to clarify the issue and actively participate in the process. Moreover, some non-lawyer representatives confirm that mediation with the engrossment of a lawyer mediator or lawyer representatives is a more effective process.⁸⁴

The involvement of lawyers as representatives in mediation is of fundamental importance⁸⁵ because lawyers have an opportunity to create the correct perception of mediation to clients and make their functional engrossment in the mediation process. On the other hand, lawyers are the primary source of mediation for the parties and a causal factor in the emergence of trust in this alternative means of dispute resolution. In addition, lawyers apply the ethical rules and standards stipulated by the code⁸⁶ in a country, however, as a non-lawyer is allowed to perform the function of a representative, it is recommended to set the minimum standards for mediation that the participants involved in the mediation follow. But every type of representative has the same obligation, which is the main function of the representative in mediation:

- They shall evaluate the case and advise the attorney if the dispute is appropriate for mediation;⁸⁷

- to explain the advantages and disadvantages of mediation and its purpose;

- Following the interests of the attorney, the function of “fighter” should be replaced by the function of “sage advisor” to help the attorney reach an agreement.⁸⁸

- To advise the attorney to introduce mediation at the right time,⁸⁹ because the parties are not often ready for mediation, and it does not result in success, therefore, the lawyer should carefully assess and counsel his/her client about the right time and the stage for initiating mediation.

⁸⁰ *Goodman A.*, *Mediation Advocacy*, 2nd Ed, Nova, 2010, 25.

⁸¹ §1 Abs. 1 RBerg; zur Frage der Erlaubnispflicht im Falle ‘gerichtsnaher’ Mediation ausführlich Volkmann, *SchiedsVZ*, 2004, S.245 ff.

⁸² *Goodman A.*, *Mediation Advocacy*, 2nd ed, Nova, 2010, 1.

⁸³ *Greger R., Unberath H.*, *Die Zukunft der Mediation in Deutschland*, 2008, Verlag C.H.Beck München 2008, 5.

⁸⁴ *Walker S., Smith D.*, *Advising and Representing Clients at Mediation*, Wildy, Simmonds & Hill Publishing London, 2013, 55.

⁸⁵ *Margaret S.H.*, *The Blackwell Handbook of Mediation*, Blackwell Publishing, Great Britain, Oxford, 2006, 89.

⁸⁶ *Chern C.*, *International Commercial Mediation*, Informa London, 2008, 122.

⁸⁷ *Eberhardt H.*, *Rechtsschutzversicherung und außergerichtliche Konfliktlösung*, *Zeitschrift für Konflikt-Management*, Verlag Otto Schmidt, Köln, Heft 3/2014, 85.

⁸⁸ *Pramhofer K.*, *Gerichtsnaher Mediation beim Handelsgericht Wien-ein Erfolgsprojekt*, *Zeitschrift für Konflikt-Management*, Verlag Otto Schmidt, Köln, Heft 3/2014, 82.

- to make a correct analysis of the issue, in particular, if another party aims at exploring the weaknesses of the party through initiating the mediation process,⁹⁰ and mediation does not strive to reach an agreement at all, or the contrary, in case of necessity, to take a similar procedural step, in agreement and consent with the client (the “principle of fly fishing”)⁹¹

- to select the right mediator for the case;
- to determine the circle of persons who are required to be involved in mediation;
- provide complete control at all stages of mediation;
- to work on the terms of the agreement announced during the mediation process;
- to select and agree the best conditions for the client with the party;

- Legal advisers in mediation should realize that the advice provided for the parties before the start of the mediation may be changed⁹² several times because the exchanged position statements to reach an agreement often require the transformation of the legal position. Therefore, legal representatives must be ready for the mentioned, but the attorney should also be warned about the similar features of mediation so as not to lose the client's faith in his qualifications.

- to draw up the contract act and correctness as against the addressees of the laws;
- To make timely identification of the futility of continuing mediation and stopping it;

Taking into account that admitting any person as a representative in civil disputes in the first instance remains a challenge for justice today, which is one of the obstacles to the implementation of quality justice. Considering the position, which is, on the one hand, the open position of the Bar Association, as well as a large part of the legal community, that it should become mandatory to have a lawyer in the courts of first instance, it becomes clear that shortly even conducting the mediation process without a lawyer may become inconceivable, which additionally increases the role and importance of lawyers in the successful use of mediation as an alternative means of dispute in the Georgian reality.

A lot can be said and written about the mentioned, however, I have to say about the non-alternative issue, a characteristic feature for a lawyer involved in mediation,⁹³ which will help them, as representatives in mediation, to bring the process to an amicable end to the current dispute, because mediation is a kind of challenge for lawyers, following their main function has always been to fight for the client's interests and demands to be fully satisfied. In the mediation negotiation, they should look at reality in a different way, which requires a certain psychologically⁹⁴ correct approach and analysis which is new for active, even more experienced, lawyers.

⁸⁹ *McLaren H.R., Sanderson J.*, Innovative Dispute Resolution: The Alternative, Thomson Carswell, 2006, 4-2.

⁹⁰ *Genn H.*, Judging Civil Justice, The Hamlyn Lectures 59th series, Cambridge University Press, Cambridge, 2010, 113.

⁹¹ *Kwan Lun M.I.*, Alternative Dispute Resolution of Shareholder Disputes in Hong Kong, Cambridge University Press., Cambridge, 2017, 95.

⁹² *Arthur W.R.*, Contemporary Issues in International Arbitration and Mediation, Martinus Nijhoff Publishers Netherlands/Leiden, 2013, 349

⁹³ *Dingle J., Kelbie J.*, The Mediation Handbook, 2nd Ed, Unity Press, 2014, 113.

⁹⁴ *Goodman A.*, Mediation Advocacy, 2nd ed, Nova, 2010, 17.

Such skills and techniques of producing mediation are difficult to be exhaustive, however, several main issues can be touched on, which are among them recognized in international practice:⁹⁵

a) Taking into account that the function of the mediator in mediation is to facilitate the ongoing process, during which the main case is carried out by the parties and their representatives, it is self-evident that the lawyer and his communication skills are given decisive importance because the correct and timely communication of the lawyer with his client can lead to the ultimate end of mediation. But in mediation, the mediator has limited capability to give any kind of legal advice or assessment to the parties, therefore, the party is fully dependent on the advice and analysis skill of its representative, which requires well-timed communication between the lawyers and the client, including the mediator, and of course, with the other party and his lawyer.

b) A lawyer participating in mediation must be well-versed in negotiation techniques to use them for the client's interests. Also, a lawyer should have the ability to receive and process information, because the correct analysis of information enables the party to reach an agreement taking into account their interests.⁹⁶

c) It is important for a lawyer to possess the technique of asking questions⁹⁷ to analyze the information that he must first receive from the mediator and then the other party during the process. In the mediation process, the mediator usually has complete information from both parties but the mediator is not allowed to disclose it. Therefore, the lawyer needs to ask the mediator the right question to get the information and analyze it to make certain conclusions in terms of further planning of the process.

d) It is also essential for the lawyer to be an “active listener”⁹⁸ because a lot of information is collected during the mediation process coming from the other party and the mediator that needs to be fully received and analyzed. According to the practice, the representative gets tired of obtaining information or believes that he is hearing irrelevant information but he must have the ability to listen completely, and then find out the differences between primary and secondary sources of information.

e) Following the above-mentioned, a lawyer needs to have the same ability of analytical thinking as a representative has in the mediation process because the heard and accumulated information requires a correct analysis from the party. The emotionally charged party cannot evaluate the information, and this function is performed by the lawyer. In the mediation process, the lawyer analyzes the ample terms of the agreement offered by the other party and selects the best one for his attorney.

f) A sense of creative thinking is also important for a lawyer because in some cases the mediation does not provide a legal solution to the issue, and the parties agree on alternative terms to the existing legal requirements. The lawyer needs to develop the mentioned options, taking into

⁹⁵ *Eidenmuller H., Wagner G., Mediationsrecht, Verlag Otto Schmidt, Köln, 2015, 35*

⁹⁶ *Abramson H., Ingen-Housz A., ADR in Business, Vol. II, Wolters Kluwer Law & Business, the Netherlands. 2011, 312.*

⁹⁷ *Picker B., Mediation Practice Guide: A Handbook for Resolving Business Disputes, American Bar Association, 2nd ED, Washington, 2003, 91.*

⁹⁸ *Eidenmuller H., Wagner G., Mediationsrecht, ottoschmidt, 2015, 36.*

account the legal goal of the party, which requires an innovative approach to the issue, and not to solve the issue with legal templates.

g) In addition, the lawyer has to visualize the information that alters during the mediation process. By applying visual means, the attorney perceives changing conditions and their contents during the process of the agreement which plays a decisive role in terminating the process.

h) In mediation, along with all other functions, the lawyer conducts negotiations with the other party and its representative. He applies to a mediator to arrange the negotiation but the main planner, strategist, and direct actor of the negotiation is the lawyer. The involvement of a mediator in the process is also planned by the lawyer and agreed with the client accordingly. In court, he formulates the demands and positions of the parties in the legal framework and justifies them in the process. As the lawyer has to navigate a lot of issues simultaneously, his legal professional preparation should be sufficient. Being a representative is even more difficult in mediation because he should realize the type of negotiation dispute,⁹⁹ the interests of the other party, and even the skills of the representative of the other party in the negotiation. Also, the representative has to consider the interests of an attorney to agree upon the mediation and the further activities of his lawyer to achieve the planned result. Besides, the representative should consider the factual circumstances of the particular dispute to persuade and cajole the other party and figure out the weak points of his plan.¹⁰⁰

To achieve success, lawyers involved in mediation should pay attention to several additional issues:

a) Lawyers must preside over the vocabulary used in mediation, moreover, sentences and phrases with accusatory remarks can cause a negative attitude from the other party, therefore, lawyers involved in mediation must be vigilant not to cause even more alienation and tension between the parties.

b) To realize the acceptance of their offers, lawyers should put themselves in the place of the other party.

c) Lawyers should evaluate all the strengths and weaknesses of their cases and the interests and wishes of their clients, as well as the maximum and minimum of achieving the agreement. Several studies conducted on mediation demonstrated that well-prepared parties for mediation are an unconditional prerequisite¹⁰¹ for an amicable end to the dispute.

d) In the process of mediation, the lawyer must select the right time for his party to make the first offer to the other party under specific conditions for an agreement to end the dispute but the legal capacity of an offer (the maximum or the minimum) must be considered to provide his party to manipulate within the offer after hearing the response of the other party to the offer.¹⁰²

e) To show respect to all parties involved in the process with his verbal and non-verbal expressions, gestures, and addresses.¹⁰³

⁹⁹ *Frasco J., Hetherington H.L., The Lawyer's Guide to Negotiation, American Bar Association, 2009, 11.*

¹⁰⁰ *Hollander J., Mediation for Civil Litigators, Irwin Law Inc, 2013, 6, 7.*

¹⁰¹ *Ibid., 28.*

¹⁰² *Ponschab R., Verhandlungsführung: Mutter aller Konfliktlösungen, ADR-Verfahren im Vergleich –Teil 9, Zeitschrift für Konflikt-Management, 17 Jahrgang, Heft 1/2014, Januar/Februar, Seiten 1-32, PVSt 47561, 5.*

¹⁰³ *Nelson M.R., Nelson on ADR, Thomson Carswell, 2003, 58.*

The stage of preparation for mediation is selecting the right mediator for the dispute by the parties. In some jurisdictions, the court appoints a mediator in case of disagreement between the parties therefore, both parties should agree on the candidacy considering the specifics and content of their dispute taking into account the experience and knowledge of a mediator because in case of disagreement, the mediator chosen at random, can appear to be with a paucity of awareness and skills that results in the damage to the interest of the party.¹⁰⁴

Conducting negotiations in two forms is the main tool¹⁰⁵ to achieve an agreement in mediating the interests of a client. Negotiation is a process that amalgamates legal training and experience, personal skills, and only a good combination of the mentioned provides a result in negotiations.¹⁰⁶ Society regards a lawyer as a good negotiator, under this perception most states, including the government of the United States of America,¹⁰⁷ hire lawyers to conclude negotiations (negotiations for international trade relations, e.g. North American Free Trade Agreement, negotiations in the field of copyright law, the issues related to trade, and others). Recently, in Europe and the United States of America has been developed a training program for lawyers “Mediation Advocacy”,¹⁰⁸ which provides lawyers with the suitable skills to conduct correct and successful mediation.

Lawyers apply the same standard in the mediation process as when representing in court, particularly, to protect the best interest of their attorney¹⁰⁹ however, the difference refers to the form in which the lawyer has to exercise his authority. He should comprehend that he has to work in an alternative format of resolving the dispute chosen by the client, during which the current conflict a negotiated settlement must be reached by consensus¹¹⁰ rather than being won through the adversarial process, which is the challenge for lawyers in some cases.

The main function of the representative in mediation is to assess the suitability of his client’s dispute for mediation and select the strategy to apply a specific form of mediation.

In the case of achieving an agreement in the process of mediation, the lawyer drafts the agreement¹¹¹ and works on it with the other party.¹¹²

Following the new approach being established in Europe, representation¹¹³ in the mediation of civil and commercial disputes is a different direction for persons engaged in legal work and requires specific training and appropriate marketing to provide consumers with access to persons who perform representation in mediation. Lawyers are traditionally associated with the court and the competitive process, which is a historical assessment of their activities however, the modern perception and

¹⁰⁴ *Hollander J.*, *Mediation for Civil Litigators*, Irwin Law Inc, 2013, 27.

¹⁰⁵ *Frasco J., Hetherington H.L.*, *The Lawyer’s Guide to Negotiation*, American Bar Association, 2009, 1.

¹⁰⁶ *Ibid.*, 2.

¹⁰⁷ *Ibid.*, 2.

¹⁰⁸ *Brown H., Marriott A.*, *ADR Principles and Practice*, Sweet & Maxwell, Thomson Reuters, 2011, 405.

¹⁰⁹ *Ibid.*, 405.

¹¹⁰ <<http://www.mediationadvocates.org.uk>> [21.09.2023].

¹¹¹ *Blake S., Browne J., Sime S.*, *The Jackson ADR Handbook*, 2nd Ed, Oxford University Press, Oxford, 2016, 40.

¹¹² *Brown H., Marriott A.*, *ADR Principles and Practice*, Sweet & Maxwell, Thomson Reuters, London, 2011, 423.

¹¹³ *Goodman A.*, *Mediation Advocacy*, 2nd Ed, Nova, 2010, 175.

understanding of those activities in mediation needs their effective involvement and action in the matrix of alternative means of dispute resolution.¹¹⁴

4. Conclusion

Today, mediation is the fastest developing alternative means of dispute resolution in the world,¹¹⁵ which is characterized by the involvement of a third¹¹⁶ independent, unbiased, and neutral person,¹¹⁷ within the framework¹¹⁸ of a confidential and structured process, delegating the opportunity for the parties to decide on the dispute to the conflict, which is the main feature of the European¹¹⁹ and non-European perception of mediation. Mediation is an effective alternative tool¹²⁰ for conflict resolution because, in this process, a third neutral person(s) helps the parties to the conflict to reach an agreement¹²¹ tailored to their interests.

The correct approach and positioning of the parties to each other is extremely important in the effective negotiation process because the parties unlike other mechanisms to settle the dispute, appear to be the decision-making subjects in mediation. Thus, if the representatives are not provided with representative skills, the parties are expected to deal with much more difficulty in reaching an agreement.

Therefore, along with the introduction of mediation as a new mechanism for resolving disputes, it is equally important to inform a wide circle of lawyers about the institution of representation in mediation and train them in the relevant skills related to representation in mediation. Only taking such subsequent steps can ensure the successful operation of this new mechanism in the country.

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¹¹⁴ *Boulle L., Field R.*, Australian Dispute Resolution, Lexis Nexis Butterworths, 2017, 152.

¹¹⁵ *Alexander N.*, International and Comparative Mediation, Wolters Kluwer, 2009, 1.

¹¹⁶ *Blake S., Browne J., Sime S.*, The Jackson ADR Handbook, 2nd Ed, Oxford University Press, Oxford, 2016, 144.

¹¹⁷ *Trenczek T.M.A., Berning D., Lenz C., Will H.D.*, Mediation und Konfliktmanagement, Handbuch, 2. Auflage, Nomos, Baden-Baden, 2017, 50.

¹¹⁸ *Tutzel S., Wegen G., Wilske S.*, Commercial Dispute Resolution in Germany, 2nd Ed, C.H.BECK, Munchen, 2016, 191

¹¹⁹ EU-Mediationsrichtlinie 2008, Art. 3a.

¹²⁰ *Berkel G.*, Zur Diskussion gestellt: Deal Mediation als Konfliktbeilegung, Zeitschrift für Konfliktmanagement (ZKM), Verlag Otto Schmidt, Köln, 2018, 61.

¹²¹ *Germund R.*, Außergerichtliche Streitbeilegung durch Co-Mediation, Pro Business GmbH, Berlin, 2012, 3.

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