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NATIONAL CENTER FOR ALTERNATIVE DISPUTE RESOLUTION

# Alternative Dispute Resolution

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## Fair Settlement as Basis for Ethical Integrity of Mediation\*

*The article offers study of fair mediation settlement, as an ethical and normative category, as one of the fundamental principles of mediation, on the basis of review of mediation acts and Codes of Ethics of EU countries and USA. At the stage of improving mediation legal framework and formation of ethical regulations in Georgia, it is essential to develop research-based recommendations for the purpose of approximation of domestic legal framework with EU legislation. Public interest for protecting trust of society towards mediation stipulates assigning to a mediator the function of a guarantor of fair settlement.*

**Key words:** *mediation ethic, parties' right of self-determination, fair mediation settlement, unfair outcome of mediation, ethical integrity of mediation, professional role of a mediator, illegal mediation settlement, neutral third party.*

### I. Introduction

Fairness is a fundamental principle of mediation,<sup>1</sup> its main normative and ethical standard.<sup>2</sup> Though its uniform meaning is not still established – on one hand this concept is defined in many mediation laws<sup>3</sup> and Codes of Ethics,<sup>4</sup> on the other hand it is not reflected in individual legal acts.<sup>5</sup>

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<sup>1</sup> 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.

<sup>2</sup> Nolan-Haley J.M., *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 *Notre Dame L. Rev.*, 775, №.12, 1999, 778, <[http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1273&context=faculty\\_scholarship](http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1273&context=faculty_scholarship)>; Woo M.Y.K., *Collagher M.E.*, *Chinese Justice Civil Dispute Resolution in Contemporary China*, Cambridge University Press, United States of America, 2011, 38.

<sup>3</sup> Chinese Civil Procedure Law, Art. 9, <[http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383880.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383880.htm)>; Woo M.Y.K., *Callagher M.E.*, *Civil Procedure Law of the People's Republic of China*, 1991, 38; People's Mediation Law of the People's Republic of China, promulgated in 2010, active in 2011, Art. 3 (2), <[http://www.cspil.org/Uploadfiles/attachment/Laws%20and%20Regulations/\[en\]guojifalvwenjian/PeoplesMediationLawofthePeoplesRepublicofChina.pdf](http://www.cspil.org/Uploadfiles/attachment/Laws%20and%20Regulations/[en]guojifalvwenjian/PeoplesMediationLawofthePeoplesRepublicofChina.pdf)>; Trevor M.B., Palo G., *EU Mediation Law and Practice*, Oxford University Press, 2012, 183; Draft General Scheme of Mediation Bill 2012, Ireland, Head 2, <<http://www.justice.ie/en/JELR/MedBillGSFinal.pdf/Files/MedBillGSFinal.pdf>>; Finland Act on Mediation in Civil Matters and Confirmation of Settlements in General Courts, 394/2011, Art. 23, <<http://www.finlex.fi/en/laki/kaannokset/2011/en20110394.pdf>>.

<sup>4</sup> Malta Code of Conduct for Mediators, MJCL, Art. 9, <<https://mjcl.gov.mt/en/mmc/Pages/Code-of-Conduct-Mediators.aspx>>. Standards of Practice For California Mediators, Preamble, <<http://www.cdrc.net/mediator-standards#stdspreamble>>; Florida Rules for Certified and Court-Appointed Mediators, Florida Dispute Resolution Center, §§10230 (c), 10.300, <<http://www.mediate.com/articles/floridarules.cfm>>; Standards of Conduct for New York State CMTY, Dispute Resolution Center, Mediators, Office of Alternative Dispute Resolution & Court Improvement Programs 2009, §4 Cmt, <[https://www.nycourts.gov/ip/adr/Publications/Info\\_for\\_Programs/Standards\\_of\\_Conduct.pdf](https://www.nycourts.gov/ip/adr/Publications/Info_for_Programs/Standards_of_Conduct.pdf)>; Core Standards of Mediation Practice, §III (Oregon Mediation Association, 2005), <<http://www.omediate.org/docs/2005CoreStandardsFinalP.pdf>>; Virginia Standards, Virginia Standards of Ethics and Professional Responsibility for Certified Mediators, §§K.1. K.4, 2011, 7-8, <<http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/soe.pdf>>; Model Standards of Conduct for Mediators, AAA, ABA, ACR, 1994, Revised 2005, §VI, <<http://www.americanbar.org/content/dam/aba/mig->

According to Ethical Codes of mediation fairness is related to mediation process,<sup>6</sup> which should be implemented by provider organization,<sup>7</sup> according to the principles of mediator's diligence,<sup>8</sup> due prudence,<sup>9</sup> impartiality,<sup>10</sup> unacceptability of conflict of interests,<sup>11</sup> voluntary,<sup>12</sup> conscious,<sup>13</sup> fair<sup>14</sup> and equal participation of parties,<sup>15</sup> opportunity of participation<sup>16</sup> of parties and realization of the right<sup>17</sup> of their self-determination.<sup>18</sup> This is how laws of certain countries view mediators' role, i.e. that they assist parties to achieve fair settlement.<sup>19</sup>

Fairness implies that on the basis of knowledge of main principles of mediation,<sup>20</sup> understanding actual significant circumstances,<sup>21</sup> analyzing agreement terms and conditions<sup>22</sup> and informed consent<sup>23</sup> par-

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- rated/2011\_build/dispute\_resolution/model\_standards\_conduct\_april2007.authcheckdam.pdf>; Georgia Ethical Standards for Mediators, §IV. A, Georgia Commission on Dispute Resolution 2012, <[http://godr.org/sites/default/files/Godr/mediator\\_ethics\\_information/APPENDIX%20C%2C%20CHAP%201%2C%206-18-2013.pdf](http://godr.org/sites/default/files/Godr/mediator_ethics_information/APPENDIX%20C%2C%20CHAP%201%2C%206-18-2013.pdf)>, Compare: Code of Conduct for Mediators, ADR Institute of Canada, 2011.
- <sup>5</sup> Code of Conduct for Mediators, ADR Institute of Canada, 2011, <<http://adric.ca/pdf/ADRMEDIATIONRULES2014.pdf>>; Ethical Guidelines for Mediators, Law Council of Australia, 2002, <<http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1166&context=adr>>.
- <sup>6</sup> Ethical Standards for Mediators, Georgia Commission on Dispute Resolution, §IV, <[http://godr.org/sites/default/files/Godr/supreme\\_court\\_adr\\_rules/APPENDIX%20C%2C%20CHAP%201%2C%206-18-2013.pdf](http://godr.org/sites/default/files/Godr/supreme_court_adr_rules/APPENDIX%20C%2C%20CHAP%201%2C%206-18-2013.pdf)>.
- <sup>7</sup> *Trevor M.B., Palo G.*, EU Mediation Law and Practice, Oxford University Press, 2012, 93.
- <sup>8</sup> Ethical Standards for Mediators, Georgia Commission on Dispute Resolution, §V, <[http://godr.org/sites/default/files/Godr/supreme\\_court\\_adr\\_rules/APPENDIX%20C%2C%20CHAP%201%2C%206-18-2013.pdf](http://godr.org/sites/default/files/Godr/supreme_court_adr_rules/APPENDIX%20C%2C%20CHAP%201%2C%206-18-2013.pdf)>.
- <sup>9</sup> *Hopt K.J., Steffek F.*, Mediation: Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 74.
- <sup>10</sup> Draft General Scheme of Mediation Bill 2012, Ireland, Head 2, <<http://www.justice.ie/en/JELR/MedBillGSFinal.pdf/Files/MedBillGSFinal.pdf>>; Austrian Mediation Act, June 6, 2003, Art. 16(2), <<http://bgarf.ru/science/baltic-center-of-mediation-and-conflictology/publikacii/avstriya.pdf>>; Bulgaria Mediation Act, (promulgated 2004, amended 2011) Art. 9 (1), <[http://www.pamb.info/index.php?option=com\\_content&view=article&id=112%3Amediation-act&catid=30%3Aactsformiation&Itemid=74&lang=bg](http://www.pamb.info/index.php?option=com_content&view=article&id=112%3Amediation-act&catid=30%3Aactsformiation&Itemid=74&lang=bg)>; Core Standards of Mediation Practice, §III (Oregon Mediation Association, 2005), <<http://www.omediate.org/docs/2005CoreStandardsFinalP.pdf>>.
- <sup>11</sup> Standards of Conduct for New York State CMTY. Dispute Resolution CTR. Mediators, Office of Alt. Dispute Resolution & Court Improvement Programs 2009, §III. B, <[http://www.courts.state.ny.us/ip/adr/Publications/Info\\_for\\_Programs/Standards\\_of\\_Conduct.pdf](http://www.courts.state.ny.us/ip/adr/Publications/Info_for_Programs/Standards_of_Conduct.pdf)>.
- <sup>12</sup> Bulgaria Mediation Act, (promulgated 2004, amended 2011) Art. 5, <[http://www.pamb.info/index.php?option=com\\_content&view=article&id=112%3Amediation-act&catid=30%3Aactsformiation&Itemid=74&lang=bg](http://www.pamb.info/index.php?option=com_content&view=article&id=112%3Amediation-act&catid=30%3Aactsformiation&Itemid=74&lang=bg)>; Chinese Civil Procedure Law, Art. 9, მოთხოვნილია: *Woo M.Y.K., Callaghan M.E.*, Civil Procedure Law of the People's Republic of China, 1991, 38.
- <sup>13</sup> Family Mediation Canada Members Code of Professional Conduct, Art. 9.2, 9.3, <[http://fmc.ca/sites/default/files/sites/all/themes/fmc/images-user/Members%20Code%20of%20Professional%20Conduct\\_0.pdf](http://fmc.ca/sites/default/files/sites/all/themes/fmc/images-user/Members%20Code%20of%20Professional%20Conduct_0.pdf)>.
- <sup>14</sup> German Mediation Act, 21 July, 2012, §2 (3), <[https://www.gesetze-im-internet.de/englisch\\_mediationsg/englisch\\_mediationsg.html](https://www.gesetze-im-internet.de/englisch_mediationsg/englisch_mediationsg.html)>; *Rützel S., Wegen G., Wilske S.*, Commercial Dispute Resolution in Germany, 2<sup>nd</sup> ed., C.H. Beck, München, 2016, 202.
- <sup>15</sup> Bulgaria Mediation Act, (promulgated 2004, amended 2011) Art. 5, <[http://www.pamb.info/index.php?option=com\\_content&view=article&id=112%3Amediation-act&catid=30%3Aactsformiation&Itemid=74&lang=bg](http://www.pamb.info/index.php?option=com_content&view=article&id=112%3Amediation-act&catid=30%3Aactsformiation&Itemid=74&lang=bg)>.
- <sup>16</sup> Malta Code of Conduct for Mediators, MJCL, Art. 9, <<https://mjcl.gov.mt/en/mmc/Pages/Code-of-Conduct-Mediators.aspx>>.
- <sup>17</sup> Georgia Ethical Standards for Mediators, Georgia Commission on Dispute Resolution 2012, Introduction, <[http://godr.org/sites/default/files/Godr/supreme\\_court\\_adr\\_rules/APPENDIX%20C%2C%20CHAP%201%2C%206-18-2013.pdf](http://godr.org/sites/default/files/Godr/supreme_court_adr_rules/APPENDIX%20C%2C%20CHAP%201%2C%206-18-2013.pdf)>; *Rützel S., Wegen G., Wilske S.*, Commercial Dispute Resolution in Germany, 2<sup>nd</sup> ed., C.H. Beck, München, 2016, 207.
- <sup>18</sup> *Shapira O.*, Conceptions and Perceptions of Fairness in Mediation, 54 South Tex. Law Rev., 2012, 285.
- <sup>19</sup> Malta Mediation Act, MJCL, 2004, Art. 26 (1), <[https://mjcl.gov.mt/en/mmc/Documents/Chapter\\_474t.pdf](https://mjcl.gov.mt/en/mmc/Documents/Chapter_474t.pdf)>; Royal Decree Law 5/2012, of March 5, on Mediation in Civil and Commercial Matters, Statement of Reasons I, მოთხოვნილია: *Trevor M.B., Palo G.*, EU Mediation Law and Practice, Oxford University Press, 2012, 560.
- <sup>20</sup> German Mediation Act, 21 July, 2012, §2 (2), <[https://www.gesetze-im-internet.de/englisch\\_mediationsg/englisch\\_mediationsg.html](https://www.gesetze-im-internet.de/englisch_mediationsg/englisch_mediationsg.html)>.

ties make non-coercive,<sup>24</sup> voluntary<sup>25</sup> decision, realizing<sup>26</sup> anticipated outcomes<sup>27</sup> or, if they wish so, can stop<sup>28</sup> mediation at any moment.<sup>29</sup> Fairness of the process is also ensured, unless participation in the process does not serve to gaining unfair advantage<sup>30</sup> and it is not based on manipulative and intimidating methods of negotiation.<sup>31</sup>

The present article aims at studying fairness of settlement of mediation, as ethical and normative category on the basis of analysis of mediation acts and Ethical Codes of EU countries and USA. The study will attempt to develop specifications for the purpose of approximation of domestic legislation with EU law at the stage of formation of legal basis and ethical regulations of mediation in Georgia.

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- <sup>21</sup> German Mediation Act, 21 July, 2012, §2 (6), <[https://www.gesetze-im-internet.de/englisch\\_mediationsg/englisch\\_mediationsg.html](https://www.gesetze-im-internet.de/englisch_mediationsg/englisch_mediationsg.html)>; Bulgaria Mediation Act, (promulgated 2004, amended 2011) Art. 13 (1), <[http://www.pamb.info/index.php?option=com\\_content&view=article&id=112%3Amediation-act&catid=30%3AAactsformeditation&Itemid=74&lang=bg](http://www.pamb.info/index.php?option=com_content&view=article&id=112%3Amediation-act&catid=30%3AAactsformeditation&Itemid=74&lang=bg)>; *Rützel S., Wegen G., Wilske S.*, Commercial Dispute Resolution in Germany, München, 2<sup>nd</sup> ed., C.H. Beck, 2016, 202.
- <sup>22</sup> Georgia Ethical Standards for Mediators, Georgia Commission on Dispute Resolution 2012, §IV. A, <[http://godr.org/sites/default/files/Godr/supreme\\_court\\_adr\\_rules/APPENDIX%20C%2C%20CHAP%201%2C%206-18-2013.pdf](http://godr.org/sites/default/files/Godr/supreme_court_adr_rules/APPENDIX%20C%2C%20CHAP%201%2C%206-18-2013.pdf)>; German Mediation Act, 21 July, 2012, § 2 (6), <[https://www.gesetze-im-internet.de/englisch\\_mediationsg/englisch\\_mediationsg.html](https://www.gesetze-im-internet.de/englisch_mediationsg/englisch_mediationsg.html)>; *Rützel S., Wegen G., Wilske S.*, Commercial Dispute Resolution in Germany, 2<sup>nd</sup> ed., C.H. Beck, München, 2016, 202.
- <sup>23</sup> Mediation Council of Illinois (MCI) Professional Standards of Practice for Mediators, 1999, §III. E, <<http://www.mediate.com/articles/illstds.cfm>>.
- <sup>24</sup> The California Rules of Court, 3.857(b), <[http://www.courts.ca.gov/documents/title\\_3.pdf](http://www.courts.ca.gov/documents/title_3.pdf)>.
- <sup>25</sup> Family Mediation Canada Members Code of Professional Conduct, Art. 9.1. <[http://fmc.ca/sites/default/files/sites/all/themes/fmc/images-user/Members%20Code%20of%20Professional%20Conduct\\_0.pdf](http://fmc.ca/sites/default/files/sites/all/themes/fmc/images-user/Members%20Code%20of%20Professional%20Conduct_0.pdf)>; European Mediation Training for Practitioners of Justice, A Guide to European Mediation, Association of International Arbitration (ed.), Antwerpen, Apeldoorn, Portland, Maklu, 2012, 143.
- <sup>26</sup> *Hopt K.J., Steffek F.*, Mediation: Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 74.
- <sup>27</sup> Family Mediation Canada Members Code of Professional Conduct, Art. 9.5, <[http://fmc.ca/sites/default/files/sites/all/themes/fmc/images-user/Members%20Code%20of%20Professional%20Conduct\\_0.pdf](http://fmc.ca/sites/default/files/sites/all/themes/fmc/images-user/Members%20Code%20of%20Professional%20Conduct_0.pdf)>; Austrian Mediation Act, June 6, 2003, Art. 16(2), <<http://bgarf.ru/science/baltic-center-of-mediation-and-conflictology/publikacii/avstriya.pdf>>; Bulgaria Mediation Act, (promulgated 2004, amended 2011) Art. 9 (1), <[http://www.pamb.info/index.php?option=com\\_content&view=article&id=112%3Amediation-act&catid=30%3AAactsformeditation&Itemid=74&lang=bg](http://www.pamb.info/index.php?option=com_content&view=article&id=112%3Amediation-act&catid=30%3AAactsformeditation&Itemid=74&lang=bg)>.
- <sup>28</sup> German Mediation Act, 21 July, 2012, §2 (5), <[https://www.gesetze-im-internet.de/englisch\\_mediationsg/englisch\\_mediationsg.html](https://www.gesetze-im-internet.de/englisch_mediationsg/englisch_mediationsg.html)>; Bulgaria Mediation Act, (promulgated 2004, amended 2011) Art. 5, <[http://www.pamb.info/index.php?option=com\\_content&view=article&id=112%3Amediation-act&catid=30%3AAactsformeditation&Itemid=74&lang=bg](http://www.pamb.info/index.php?option=com_content&view=article&id=112%3Amediation-act&catid=30%3AAactsformeditation&Itemid=74&lang=bg)>; Georgia Ethical Standards for Mediators, Georgia Commission on Dispute Resolution 2012, §V, <[http://godr.org/sites/default/files/Godr/supreme\\_court\\_adr\\_rules/APPENDIX%20C%2C%20CHAP%201%2C%206-18-2013.pdf](http://godr.org/sites/default/files/Godr/supreme_court_adr_rules/APPENDIX%20C%2C%20CHAP%201%2C%206-18-2013.pdf)>; *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, 284; European Mediation Training for Practitioners of Justice, A Guide to European Mediation, Association of International Arbitration (ed.), Antwerpen, Apeldoorn, Portland, Maklu, 2012, 143.
- <sup>29</sup> *Shapira O.*, Conceptions and Perceptions of Fairness in Mediation, 54 South Tex. Law Rev., 2012, 285.
- <sup>30</sup> Model Standards of Practice for Family and Divorce Mediation, §XI. A. 6, <<https://www.afccnet.org/Portals/0/PublicDocuments/CEFCP/ModelStandardsOfPracticeForFamilyAndDivorceMediation.pdf>> *Folberg J., Milne A.L., Salem P.*, Divorce and Family Mediation, Models, Techniques and Applications, The Guilford Press, New York, London, 2004, 540; *Waldman E.*, Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 13.
- <sup>31</sup> Family Mediation Canada Members Code of Professional Conduct, Art. 9.4, <[http://fmc.ca/sites/default/files/sites/all/themes/fmc/images-user/Members%20Code%20of%20Professional%20Conduct\\_0.pdf](http://fmc.ca/sites/default/files/sites/all/themes/fmc/images-user/Members%20Code%20of%20Professional%20Conduct_0.pdf)>.

## 2. Fair Settlement of Mediation, as a Result of Fair Process

Definition of fair outcome of mediation is not provided in most of the Codes of Conduct for Mediators of foreign countries, therefore the above is possible through doctrinal analysis of mediation process and consequent settlement.<sup>32</sup>

According to Ethical Standards of Conduct for Mediators' of Georgia State (US)<sup>33</sup> neutral third party is a guarantor of fair process of mediation and<sup>34</sup> he / he is also responsible for ensuring fair outcome.<sup>35</sup>

Fairness in the process of mediation is infringed if settlement is substantially and fundamentally unjust,<sup>36</sup> illegitimate,<sup>37</sup> unenforceable,<sup>38</sup> if parties have not realized the content of settlement, as well as possible impact of outcome of settlement on them<sup>39</sup> and / or third parties.<sup>40 41</sup>

Settlement is fair in case: a) Is at least acceptable or just for parties of settlement; b) Restores harmony or balance of interests between participants of mediation; c) Increases opportunities for mutual understanding and better relations; d) Approximates to the boundary, which is viewed by parties as adequate compensation for their damage; e) Saves money and time on both individual and institutional level; f) Reduces stress and irritation; g) improves communication between members of society (in neighborhood, business environment, employment field, etc.); h) Creates social precedents for better regulation of relations.<sup>42</sup>

Contrary to the above settlement is unfair in case: a) Even if one of the parties makes involuntary decision; b) Fundamental interest of a party, that belief of a person shall not be denied, has not been realized; c) Terms and conditions agreed by parties contradict positive law; d) Terms and condition of settlement substantially violate or ignore dignity of a person; e) It is not achieved in conditions of full understanding of possible alternative outcomes of the case; f) Terms of the agreement are incompatible with the fundamental values of an individual, recognised by broad society;<sup>43</sup> The above mentioned features of the doctrine naturally cannot be comprehensive and standard of fairness should be assessed for each specific case through interaction of ethical principles.

There is mutually stipulating link between mediation process and outcome. Namely, in order to achieve fair outcome, it is essential to ensure in the process of mediation: voluntariness, sharing mutual interests between parties, acknowledgement of public importance of the outcome, dignified treatment and

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<sup>32</sup> On the issue of fair mediation settlement see: *Marlow L., Sauber S.R.*, Handbook of Divorce Mediation, Springer Science – Business Media, LLC, New York, 1990, 45-62; *Dworkin J., London W.*, What Is a Fair Agreement?, 7 Mediation Q. 3, 5, 1989; *Hyman J.M., Love L.P.*, If Portia Were a Mediator: An Inquiry into Justice in Mediation, 9 Clinical L. Rev., 157, 2002, 186; *Gibson K.*, Mediator Attitudes Toward Outcomes: A Philosophical View, 17 Mediation Q. 197, 1999, 207–209; *Bercovitch J.*, Mediation Success or Failure: A Search for the Elusive Criteria, 7 Cardozo J. Conflict Resolution, 289, 2006, 291; *Isabelle R.*, Gunning, Know Justice, Know Peace: Further Reflections on Justice, Equality and Impartiality in Settlement Oriented and Transformative Mediations, 5 Cardozo J. Conflict Resolution, Vol. 5, 2004, 87.

<sup>33</sup> Ethical Standards for Mediators, Georgia Commission on Dispute Resolution, §IV. A, <[http://godr.org/sites/default/files/Godr/supreme\\_court\\_adr\\_rules/APPENDIX%20C%2C%20CHAP%201%2C%206-18-2013.pdf](http://godr.org/sites/default/files/Godr/supreme_court_adr_rules/APPENDIX%20C%2C%20CHAP%201%2C%206-18-2013.pdf)>.

<sup>34</sup> See also *Rützel S., Wegen G., Wilske S.*, Commercial Dispute Resolution in Germany, 2<sup>nd</sup> ed., C.H. Beck, 2016, 202.

<sup>35</sup> *Hopt K.J., Steffek F.*, Mediation: Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 664.

<sup>36</sup> Ethical Standards for Mediators, Georgia Commission on Dispute Resolution, §IV. A, <[http://godr.org/sites/default/files/Godr/supreme\\_court\\_adr\\_rules/APPENDIX%20C%2C%20CHAP%201%2C%206-18-2013.pdf](http://godr.org/sites/default/files/Godr/supreme_court_adr_rules/APPENDIX%20C%2C%20CHAP%201%2C%206-18-2013.pdf)>.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> Family Mediation Canada Members Code of Professional Conduct, Art. 9.6, <[http://fmc.ca/sites/default/files/sites/all/themes/fmc/images-user/Members%20Code%20of%20Professional%20Conduct\\_0.pdf](http://fmc.ca/sites/default/files/sites/all/themes/fmc/images-user/Members%20Code%20of%20Professional%20Conduct_0.pdf)>.

<sup>40</sup> Ethical Standards for Mediators, Georgia Commission on Dispute Resolution, §IV. A, <[http://godr.org/sites/default/files/Godr/supreme\\_court\\_adr\\_rules/APPENDIX%20C%2C%20CHAP%201%2C%206-18-2013.pdf](http://godr.org/sites/default/files/Godr/supreme_court_adr_rules/APPENDIX%20C%2C%20CHAP%201%2C%206-18-2013.pdf)>.

<sup>41</sup> *Shapira O.*, Conceptions and Perceptions of Fairness in Mediation, 54 South Tex. Law Rev., 2012, 285.

<sup>42</sup> *Hyman J.M., Love L.P.*, If Portia Were a Mediator: An Inquiry into Justice in Mediation, 9 Clinical L. Rev., 157, 2002, 186.

<sup>43</sup> *Stulberg J.B.*, Mediation and Justice: What Standards Govern?, 6 Cardozo J. Conflict Resolution, 2005, 222-227.

respect, opportunity for making informed decision by parties,<sup>44</sup> absence of authority of making decisions by a mediator,<sup>45</sup> acceptance of contradictory and opposing fundamental values.<sup>46</sup>

From the point of view of certain group of scientists, subjective evaluation,<sup>47</sup> perception of fairness by parties, is main criterion for considering the outcome of mediation to be fair.<sup>48</sup> Supporters of this doctrinal perspective believe that it is liability of a mediator to analyse and consider with the parties their considerations regarding fairness and further to help them (parties) in the process of making decisions in accordance with that very notion of fairness.<sup>49</sup> According to this attitude assessment of fairness is based on subjective vision of specific participants of mediation rather than objective understanding of justice by any person with generally recognized moral values, provided he / she were a party to this process. According to this approach the parties themselves judge their own fairness on the basis of right to self determination.<sup>50</sup>

Voluntariness and authority to make an informed decision<sup>51</sup> is indeed a fundament for right of self determination,<sup>52</sup> though a settlement achieved on the basis of the above can only claim to be fair in case an agreement is concluded in compliance with normative requirements of the Code of Ethics<sup>53</sup> and at the same time it is compatible with interests of the third party, not participating in the mediation.

According to equally popular point of view, reflected in scientific literature, illegitimate settlement cannot be fair, since through such settlement parties to the mediation put themselves in advantageous position compared with law abiding citizens.<sup>54</sup> If mediation becomes a privilege – means to avoid the law “unlike other citizens”, naturally this will result in establishment of illegitimate practice.<sup>55</sup> In this case compliance with the rules which are compulsory for the whole society, in addition to realization of right of self determination of parties, so called “individual justice”<sup>56</sup> “coming from the bottom (parties)”<sup>57</sup> is also determinant of fairness. Through the Codes of Ethics legal and moral norms are being incorporated in

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<sup>44</sup> *Irving H.H.*, *Family Mediation, Theory and Practice with Chinese Families*, Hong Kong University Press, Hong Kong, 2002, 94.

<sup>45</sup> *Rützel S., Wegen G., Wilske S.*, *Commercial Dispute Resolution in Germany*, 2<sup>nd</sup> ed., C.H. Beck, München, 2016, 201.

<sup>46</sup> *Stulberg J.B.*, *Mediation and Justice: What Standards Govern?*, 6 *Cardozo J. Conflict Resolution*, 2005, 227-228.

<sup>47</sup> *Marlow L., Sauber S.R.*, *Handbook of Divorce Mediation*, Springer Science – Business Media, LLC, New York, 1990, 52-53.

<sup>48</sup> *Hyman J.M., Love L.P.*, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 *Clinical L. Rev.*, 157, 2002, 164, Compare: *Marlow L., Sauber S.R.*, *Handbook of Divorce Mediation*, Springer Science – Business Media, LLC, New York, 1990, 52-62; *Stulberg J.B.*, *Mediation and Justice: What Standards Govern?*, 6 *Cardozo J. Conflict Resolution*, 2005, 241-242.

<sup>49</sup> *Hyman J.M., Love L.P.*, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 *Clinical L. Rev.*, 157, 2002, 192, cited in: *Shapira O.*, *Conceptions and Perceptions of Fairness in Mediation*, 54 *South Tex. Law Rev.*, 2012, 314.

<sup>50</sup> *Shapira O.*, *Conceptions and Perceptions of Fairness in Mediation*, 54 *South Tex. Law Rev.*, 2012, 315.

<sup>51</sup> *Irving H.H.*, *Family Mediation, Theory and Practice with Chinese Families*, Hong Kong University Press, Hong Kong, 2002, 94.

<sup>52</sup> *Stulberg J.B.*, *Mediation and Justice: What Standards Govern?*, 6 *Cardozo J. Conflict Resolution*, 2005, 227-228.

<sup>53</sup> Georgia Ethical Standards for Mediators, IV. A, Georgia Commission on Dispute Resolution 2012, <[http://godr.org/sites/default/files/Godr/mediator\\_ethics\\_information/APPENDIX%20C%2C%20CHAP%201%2C%206-18-2013.pdf](http://godr.org/sites/default/files/Godr/mediator_ethics_information/APPENDIX%20C%2C%20CHAP%201%2C%206-18-2013.pdf)>.

<sup>54</sup> See *Shapira O.*, *Conceptions and Perceptions of Fairness in Mediation*, 54 *South Tex. Law Rev.*, 2012, 316, with further reference.

<sup>55</sup> *Shapira O.*, *Conceptions and Perceptions of Fairness in Mediation*, 54 *South Tex. Law Rev.*, 2012, 316; *Carr C. L.*, *Fairness and Political Obligation—Again: A Reply to Lefkowitz*, 30 *Social Theory and Practice*, 33, 2004, 40, <[https://www.pdcnet.org/pdc/bvdb.nsf/purchase?openform&fp=soctheorpract&id=soctheorpract\\_2004\\_0030\\_0001\\_0033\\_0058](https://www.pdcnet.org/pdc/bvdb.nsf/purchase?openform&fp=soctheorpract&id=soctheorpract_2004_0030_0001_0033_0058)>.

<sup>56</sup> *Hyman J.M., Love L.P.*, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 *Clinical L. Rev.*, 157, 2002, 160-162, <<http://www.law.newark.rutgers.edu/files/If%20Portia%20Were%20a%20Mediator%209%20Clinical%20L%20Rev%20157.pdf>>.

<sup>57</sup> *Trevor M.B., Palo G.*, *EU Mediation Law and Practice*, Oxford University Press, 2012, 257.

mediation and illegitimate settlement will not be considered fair even in the case it is achieved on the basis of the right of self determination of parties and it is acceptable for them.<sup>58</sup>

### **3. Unfair Settlement – Threat of Discreditation of Mediation Institution and Source of Infringement of Public Interest**

Successful operation of legal institutions shall be based on certain fundamental rules, which ensure viability of these institutions.<sup>59</sup>

Since mediation is mainly voluntary institution, its coexistence with other mechanisms of dispute resolution shall be stipulated by the very essence of this institution itself, rather than coercive means of a state. Even compulsory mediation cannot be fully retained by the state, unless need and necessity of existence of this institution is not proved to the society by its benefits.

Even in case of compulsory mediation parties engage in negotiations on the voluntary basis. Since there is no obligation to achieve a settlement,<sup>60</sup> they are free to stop the process and refuse to further use mediation. It is unacceptable to coerce parties and restrict their freedom, but as soon as they choose mediation as a means for settling their differences, they are not entitled to make a decision which can damage the very institution of mediation.

Unacceptance of unfair outcome is a normative rule of mediation, the whole public, and specifically mediation professional society, which is interested for the mediation to remain high-demand means for dispute resolution, are beneficiaries of this institution.<sup>61</sup>

Mediation institution is supported by the state policy and its successful operation is reflection of public interests in united system of mechanisms of dispute resolution. Mediation is an important mechanism for ensuring social stability and apolitical means for implementation of state policy.<sup>62</sup> The outcome is also a basis for considering it a public interest: Mediation settlement better reflects interests of parties and therefore it is more subject to voluntary enforcement. In addition to satisfying interests of parties mediation also saves court expenses and reduces its work load.<sup>63</sup> Mediation is capable of transforming not just a person, but whole society.<sup>64</sup> With the help of mediator, mediation can turn the world into such a place where public can enjoy better life.<sup>65</sup>

Mediation settlement, which discredits mediation institution, at the same infringes significant public interest. Unfair settlement may cause loss of trust and credibility on behalf of the public in mediation institution.

Introductory clause of Standards of Professional Conduct for Mediators of North Carolina underlines that ethical standards aim at establishing and strengthening trust of society in mediation... Mediation should be based on public recognition and trust.<sup>66</sup> In Poland ADR Civil Council for reforming mediation

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<sup>58</sup> *Shapira O.*, Conceptions and Perceptions of Fairness in Mediation, 54 South Tex. Law Rev., 2012, 317, with further notes.

<sup>59</sup> *Shapira O.*, Conceptions and Perceptions of Fairness in Mediation, 54 South Tex. Law Rev., 2012, 321.

<sup>60</sup> *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, 284.

<sup>61</sup> *Shapira O.*, Conceptions and Perceptions of Fairness in Mediation, 54 South Tex. Law Rev., 2012, 322.

<sup>62</sup> *Zekoll J., Bälz M., Amelung I. (eds.)*, Formalisation and Flexibilisation in Dispute Resolution, Brill Nijhoff, Leiden/Boston, 2014, 128.

<sup>63</sup> *Rosenberg J.D.*, In Defense of Mediation, 33 Ariz. L. Rev., 467, 1991, 467, <[https://www.researchgate.net/publication/228024514\\_In\\_Defense\\_of\\_Mediation](https://www.researchgate.net/publication/228024514_In_Defense_of_Mediation)>.

<sup>64</sup> *Bush R.A.B., Folger J.P.*, The Promise of Mediation, The Transformative Approach to Conflict, Jossey-Bass, San Francisco, 2005, 13-14, 21, 53-54, 65.

<sup>65</sup> *Bush R.A.B., Folger J.P.*, Mediation and Social Justice: Risks and Opportunities, 27 Ohio St. J. on Disp. Resol. 1, 2012, 19-20, cited in: *Shapira O.*, Conceptions and Perceptions of Fairness in Mediation, 54 South Tex. Law Rev., 2012, 333.

<sup>66</sup> North Carolina Revised Standards of Professional Conduct for Mediators, Preamble, <[https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course\\_materials/R13.4%20Standards%20of%20Professional%20Conduct%20for%20Mediators.pdf](https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course_materials/R13.4%20Standards%20of%20Professional%20Conduct%20for%20Mediators.pdf)>.

legislation determined basics necessary to increase public trust in mediation: professionalism of mediators and high requirements for their accreditation,<sup>67</sup> increasing state funding and free of charge mediation services for low income persons.<sup>68</sup> Introductory clause of Standards of Professional Conduct for Mediators of California also mentions that success of mediation institution requires trust of broad society in fairness and ethical integrity of mediation process.<sup>69</sup>

In legal doctrine there is differentiation between personal trust of parties and that of the public. In order to gain public trust a mediator needs to adequately inform the public about his / her qualification, practice, membership in mediation associations.<sup>70</sup> Any action, which infringes public trust in mediation institution, is considered to be unfair from normative point of view.<sup>71</sup>

#### 4. Professional Role of a Mediator – Protecting Ethical Integrity of Mediation Institution

Any professional role - that of a physician, a lawyer, a parent or a teacher has relevant liabilities and moral duty of a professional is to meet these liabilities.<sup>72</sup> Certain moral obligations acquire special importance in case of specific professional roles.

Professional rights contain collateral responsibility for taking moral decisions.<sup>73</sup> Each profession implies moral obligations of various content, but their representatives are united by equal responsibility – to be focused on achieving a result, justified from moral point of view.<sup>74</sup>

Representatives of any profession need first of all to protect and take care of ethical integrity of their professional field, to fully comply with the rules, which their profession is actually based on. Strengthening of ethical norms indicates that certain domain has been established as a relevant profession.<sup>75</sup> Mediators who have undergone certain accreditation training and carry out mediation activities, are considered to be implementers of mediation practice and they are united by definite professional role, ethical rights and liabilities and standards of professional responsibility. According to these ethical standards mediators bear certain liabilities towards parties, persons, not being participants of the mediation, society, courts,<sup>76</sup> as well as towards their own profession.<sup>77</sup>

From the moment of taking the role of a mediator, a person shares responsibility and obligation, to protect mediation institution from possible damage. Therefore such moral obligation exists regardless of the fact, whether it is emphasized in the Code of Ethics of mediation.<sup>78</sup>

A person relates his / her professional activity to mediation on the voluntary basis and thus acquires certain social status, recognition, self-satisfaction, opportunities and privileges.<sup>79</sup> With the permission of the society and the state, mediators carry out important social function, which give them the authority to

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<sup>67</sup> Roberts M., *A-Z of Mediation*, Palgrave Macmillan, 2013.

<sup>68</sup> Trevor M.B., Palo G., *EU Mediation Law and Practice*, Oxford University Press, 2012, 272.

<sup>69</sup> Standards of Practice For California Mediators, Preamble <<http://www.cdrc.net/mediator-standards#stdspreamble>>.

<sup>70</sup> James E.A., Monagan Sh.L., *Participant's Guide Problem Solving Mediation Training*, James and Monagan, 2010, 26.

<sup>71</sup> Shapira O., *Conceptions and Perceptions of Fairness in Mediation*, 54 *South Tex. Law Rev.*, 2012, 323.

<sup>72</sup> Gert B., *Common Morality*, Oxford University Press, 2004, 50.

<sup>73</sup> Fallows S., Chandramohan B. (eds.), *Interdisciplinary Learning and Teaching in Higher Education, Theory and Practice*, Routledge, New York, London, 2009, 26-27.

<sup>74</sup> Fallows S., Chandramohan B. (eds.), *Interdisciplinary Learning and Teaching in Higher Education, Theory and Practice*, Routledge, New York, London, 2009, 26-27.

<sup>75</sup> Kovach K.K., *Mediation, Principles and Practice*, 3<sup>rd</sup> ed., Thomson West, United States of America, 2004, 395.

<sup>76</sup> Standards of Practice For California Mediators, Preamble <<http://www.cdrc.net/mediator-standards#stdspreamble>>.

<sup>77</sup> On addressees of mediation ethical obligations see: Susskind L., *Expanding the Ethical Obligations of the Mediator: Mediator Accountability to Parties Not at the Table*, cited in: Menkel-Meadow C., Wheeler M., *What's Fair: Ethics for Negotiators*, 2004, 513-516.

<sup>78</sup> Gibson K., *Contrasting Role Morality and Professional Morality: Implications for Practice*, 20 *J. Applied Phil.* 17, 2003, 28, <<http://onlinelibrary.wiley.com/doi/10.1111/1468-5930.00232/pdf>>.

<sup>79</sup> Shapira O., *Conceptions and Perceptions of Fairness in Mediation*, 54 *South Tex. Law Rev.*, 2012, 326-327. See also, Cohen E.D., Davis M., *Professionalism Means Putting Your Profession First*, in *Ethics and the Legal Profession*, 2<sup>nd</sup> ed., 2009, 166.



exercise impact of the public. Though this kind of social impact also implies collateral rights and liabilities in relation to public.<sup>80</sup> Decisions of mediators influence lives of people and capability to have impact on others creates moral responsibility.<sup>81</sup> A mediator is banned from implementing an illegal, amoral, dishonest action and supporting such action.<sup>82</sup>

Florida rules on certified and court mediators emphasize liability of a mediator to protect and take care of quality of the profession.<sup>83</sup> According to Model standards of Conduct for Mediators<sup>84</sup> a mediator should act in such a way to facilitate advancement of mediation practice.<sup>85</sup> Liability of a mediator to retain public trust in the profession is emphasized in Carolina Professional Standards for Mediators,<sup>86</sup> Basic Standards for Mediation Practice of Oregon,<sup>87</sup> Alabama Code<sup>88</sup> etc.

California Standards for Mediators' Practice emphasize liabilities of a mediator to carry out mediation in accordance with high ethical standards, so that it can develop credibility towards this profession and establish trust in competence and honesty of the above impartial third persons.<sup>89</sup> According to Florida rules, application of mediation by the society, increasing awareness and satisfaction by mediation can be achieved provided mediators apply high ethical standards.<sup>90</sup>

A mediator who does not care for public opinion, does not comply with rules established for representatives of the profession, undermines his / her colleagues' reputation and the very institution of mediation.

California court rules define that a mediator should carry out the mediation process in such a manner, that has positive impact on public trust in fairness of the process and ethical integrity.<sup>91</sup>

## 5. Interaction of Principles of Self Determination of Parties and Fairness of Settlement

Fundamental rule of self determination of parties should be defined in relation to the principle of fairness and legitimacy of settlement. In such a case it is essential to find the right balance between individual interests of parties and that of the public, which is not possible to be achieved on the basis of simple mathematical algorithm, but rather requires reasonable and substantiated judgment.<sup>92</sup>

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<sup>80</sup> *Beauchamp T.L., Childress J.F.*, Principles of Biomedical, Ethics, 6<sup>th</sup> ed., 2009, 206.

<sup>81</sup> *Shapira O.*, Conceptions and Perceptions of Fairness in Mediation, 54 South Tex. Law Rev., 2012, 331, with further notes.

<sup>82</sup> Bar Code of Conduct, Finland, ob. *Trevor M.B., Palo G.*, EU Mediation Law and Practice, Oxford University Press, 2012, 108.

<sup>83</sup> Florida Rules for Certified and Court-Appointed Mediators, §10:600, <<http://www.mediate.com/articles/floridarules.cfm>>.

<sup>84</sup> Model Standards of Conduct for Mediators, AAA, ABA, ACR, 1994, Revised 2005, <[http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/dispute\\_resolution/model\\_standards\\_conduct\\_april2007.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf)>.

<sup>85</sup> Model Standards of Conduct for Mediators, AAA, ABA, ACR, 1994, Revised 2005, IX. A, <[http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/dispute\\_resolution/model\\_standards\\_conduct\\_april2007.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf)>.

<sup>86</sup> North Carolina Revised Standards of Professional Conduct for Mediators, Preamble, <[https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course\\_materials/R13.4%20Standards%20of%20Professional%20Conduct%20for%20Mediators.pdf](https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course_materials/R13.4%20Standards%20of%20Professional%20Conduct%20for%20Mediators.pdf)>.

<sup>87</sup> Core Standards of Mediation Practice, §X (Oregon Mediation Association, 2005), <<http://www.omediate.org/docs/2005CoreStandardsFinalP.pdf>>.

<sup>88</sup> Alabama Code of Ethics for Mediators, Alabama Center of Dispute Resolution, 1997, §12, <[http://alabamaadr.org/web/roster-documents/documents/med\\_Mediator\\_Code\\_of\\_Ethics\\_150501\\_updated.pdf](http://alabamaadr.org/web/roster-documents/documents/med_Mediator_Code_of_Ethics_150501_updated.pdf)> .

<sup>89</sup> Standards of Practice For California Mediators, Preamble <<http://www.cdrc.net/mediator-standards#stdspreamble>>.

<sup>90</sup> Florida Rules for Certified and Court-Appointed Mediators, §10:200, <<http://www.mediate.com/articles/floridarules.cfm>>.

<sup>91</sup> The California Rules of Court, §3.850 (a), <[http://www.courts.ca.gov/documents/title\\_3.pdf](http://www.courts.ca.gov/documents/title_3.pdf)>.

<sup>92</sup> *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.

Namely, if parents within the confines of mediation negotiate with a doctor to have their under age child undergo illegal genital manipulations, such agreement can definitely not be fair. It is an arguable matter whether an under-age child could fully realize the goal to be achieved through the result of mediation even if being engaged in the mediation process. Informed consent of a child is not sufficient for fair assessment of the outcome of mediation – full realization of the right of self determination cannot justify acceptability of illegitimate and amoral settlement.<sup>93</sup> In this case requirement of legitimacy of outcome of mediation supersedes the right of parties for self determination.<sup>94</sup> Therefore scope of the right of parties for self determination and confines of authority for decision making may be reduced by normative rule of inadmissibility of unfair outcome of mediation.

According to rules of Professional Conduct for Labor Mediators, mediators should realize that their rights and liabilities are related to the whole society.<sup>95</sup> Mediators bear obligation towards children of divorce mediation parties,<sup>96</sup> towards victims of violence threats<sup>97</sup> or towards those who can incur significant damage.<sup>98</sup> Actually mediation result may have direct impact on broad circle of nonparticipant persons – consumers, employees, neighbors, family members etc. Realization of interests of parties is only acceptable on the basis of their right for self determination to the extent, to which interests of third parties are not encroached.

## 6. Illegitimate Settlement as Unfair Outcome of Mediation

In legal doctrine legitimacy of mediation settlement and its compliance with public policy<sup>99</sup> are viewed as frequently mutually engaging requirements of equal importance and preconditions for validity of the agreement. Mediation settlement is illegitimate in case its provisions contradict fundamental principles of legal system, public order, imperative requirements of the law.<sup>100</sup> Similarly, according to the mediation law of Rumania, mediation settlement can not include conditions which oppose to the law or public order.<sup>101</sup>

Scientific literature emphasizes that mediation settlement should be taken with care since there is very fine line between legitimacy and illegitimacy.<sup>102</sup>

Mediation law of Bulgaria makes a mediator responsible for carrying out activities in accordance with the law, honesty, high moral principles, ethical and procedural rules of conduct for mediators.<sup>103</sup>

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<sup>93</sup> *Shapira O.*, Conceptions and Perceptions of Fairness in Mediation, 54 South Tex. Law Rev., 2012, 320.

<sup>94</sup> *Id.*, 33-318.

<sup>95</sup> Code of Professional Conduct for Labor Mediators, 29 C.F.R. pt. 1400 app., 2012, <<https://www.law.cornell.edu/cfr/text/29/part-1400/appendix-1ii3>>.

<sup>96</sup> Model Standards of Practice for Family and Divorce Mediation, 2000, §§VIII, IX, <<https://www.afcnet.org/Portals/0/PublicDocuments/CEFCP/ModelStandardsOfPracticeForFamilyAndDivorceMediation.pdf>>; Standards of Practice For California Mediators, §3, <<http://www.cdrc.net/mediator-standards#stdspreamble>>; Mediation Council of Illinois (MCI) Professional Standards of Practice for Mediators, 1999, §IV.C., <<http://www.mediate.com/articles/illstds.cfm>>.

<sup>97</sup> Model Standards of Practice for Family and Divorce Mediation, 2000, §VII. C, <<https://www.afcnet.org/Portals/0/PublicDocuments/CEFCP/ModelStandardsOfPracticeForFamilyAndDivorceMediation.pdf>>.

<sup>98</sup> The California Rules of Court, 3.857(i)(3), <[http://www.courts.ca.gov/documents/title\\_3.pdf](http://www.courts.ca.gov/documents/title_3.pdf)>.

<sup>99</sup> *James E.A., Monagan Sh.L.*, Participant's Guide Problem Solving Mediation Training, James and Monagan, 2010, 60.

<sup>100</sup> *Esplugues C., Louis M.*, New Developments in Civil and Commercial Mediation, Global Comparative Perspectives, Ius Comparatum, Springer International Publishing Switzerland, 2015, 286.

<sup>101</sup> Romania Law no. 192/2006 on Mediation and Organizing the Mediator Profession as modified and added by the law no. 370/2009 and by government Ordinance no. 13/2010 Regarding the transporting the Directive Services, Art. 46(2), <[http://www.edumondemediation.ro/uploads\\_ro/images/515/Law192\\_EN.pdf](http://www.edumondemediation.ro/uploads_ro/images/515/Law192_EN.pdf)>.

<sup>102</sup> *Neamtu B., Dragos D.C.*, Alternative Dispute Resolution in European Administrative Law, Springer Verlag, Berlin, Heidelberg, 2014, 447.

<sup>103</sup> Bulgaria Mediation Act, (promulgated 2004, amended 2011) Art. 9 (1), <[http://www.pamb.info/index.php?option=com\\_content&view=article&id=112%3Amediation-act&catid=30%3Aactsformediation&Itemid=74&lang=bg](http://www.pamb.info/index.php?option=com_content&view=article&id=112%3Amediation-act&catid=30%3Aactsformediation&Itemid=74&lang=bg)>.

Frequently the principle of the rule of law<sup>104</sup> is integrated in mediation rules by Codes of Ethics of mediation. E.g. according to the rules of Florida on certified and court mediation a mediator should abide by any acts, local court rules and administrative ordinances, related to mediation practice.<sup>105</sup>

According to the Code of Conduct for Mediators of Ireland,<sup>106</sup> impartial third party cannot be a party to the settlement which is illegitimate or unenforceable.

Liability of a mediator towards the society becomes effective when a party applies mediation for future illegitimate activity,<sup>107</sup> a mediator advertises his activities,<sup>108</sup> and when there is basis for information disclosure, provided by the law.<sup>109</sup> Therefore a rule banning illegitimate outcome of mediation serves to protect mediation institution and consequently, to realize public interest.<sup>110</sup>

In case a mediator is entitled by the law to stop mediation, he/she should definitely do so in order to prevent illegitimate outcome.<sup>111</sup>

Legislation of majority of EU countries considers unfair mediation settlement to be basis for refusal to enforce mediation settlement agreement, for the reason that it (unfair settlement) is illegitimate, and it encroaches public and third parties' interests.

While approving a mediation settlement agreement, judges are often led by a criterion of protection of public interest and are authorised to refuse to issue enforcement order for the reason that the settlement is illegitimate<sup>112</sup> and it encroaches public interest.<sup>113</sup> According to the Civil Code of Belgium the Court will not enforce mediation settlement which conflicts with public interests or interests of minors.<sup>114</sup> Mediation law of Finland considers an illegitimate, fundamentally unfair settlement or a settlement contradicting third parties' interest as a normative basis for refusal to enforce settlement.<sup>115</sup>

Since mediation outcome is formulated as an agreement, according to Contract Law a settlement, which violates principles of equality and fairness<sup>116</sup> is not subject to enforcement.<sup>117</sup>

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<sup>104</sup> On rule of law in mediation process see: *Marlow L., Sauber S.R.*, Handbook of Divorce Mediation, Springer Science – Business Media, LLC, New York, 1990, 63-73.

<sup>105</sup> Florida Rules for Certified and Court-Appointed Mediators, §10:520, <<http://www.mediate.com/articles/floridarules.cfm>>.

<sup>106</sup> Mediators' Institute of Ireland (MII), Code of Ethics and Practice, <<http://www.themii.ie/code-of-ethics-and-practice>>.

<sup>107</sup> The California Rules of Court, 3,857 (I) (1), <[http://www.courts.ca.gov/documents/title\\_3.pdf](http://www.courts.ca.gov/documents/title_3.pdf)>; Model Standards of Practice for Family and Divorce Mediation, 2000, §XI. A. 5, <<https://www.afccnet.org/Portals/0/PublicDocuments/CEFCP/ModelStandardsOfPracticeForFamilyAndDivorceMediation.pdf>>; Model Standards of Conduct for Mediators, AAA, ABA, ACR, 1994, Revised 2005, §VI.A.9; Jams Mediators Ethics Guidelines, §V, 2013, <<http://www.jamsadr.com/mediators-ethics/>>; *Waldman E.*, Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 195.

<sup>108</sup> The California Rules of Court, §3.858, <[http://www.courts.ca.gov/documents/title\\_3.pdf](http://www.courts.ca.gov/documents/title_3.pdf)>; Model Standards of Practice for Family and Divorce Mediation, 2000 §XII, <<https://www.afccnet.org/Portals/0/PublicDocuments/CEFCP/ModelStandardsOfPracticeForFamilyAndDivorceMediation.pdf>>; Model Standards of Conduct for Mediators, AAA, ABA, ACR, 1994, Revised 2005, §VII. A.

<sup>109</sup> Model Standards of Conduct for Mediators, AAA, ABA, ACR, 1994, Revised 2005, §V. A.

<sup>110</sup> *Shapira O.*, Conceptions and Perceptions of Fairness in Mediation, 54 South Tex. Law Rev., 2012, 322.

<sup>111</sup> *Waldman E.*, Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 13; *Shapira O.*, Conceptions and Perceptions of Fairness in Mediation, 54 South Tex. Law Rev., 2012, 333.

<sup>112</sup> *Zekoll J., Bälz M., Amelung I (eds.)*, Formalisation and Flexibilisation in Dispute Resolution, Brill Nijhoff, Leiden/Boston, 2014, 106.

<sup>113</sup> *Higgs S.*, Mediating Sustainability, The Public Interest Mediator in the New Zealand Environmental Court, Environmental Law, Vol. 37:61, 2007, 83, <<https://law.lclark.edu/live/files/283-371higgs>>.

<sup>114</sup> Belgium Judicial Code, Art. 1736; ix. aseve, European Mediation Training for Practitioners of Justice, A Guide to European Mediation, Association of International Arbitration (ed.), Antwerpen, Apeldoorn, Portland, Maklu, 2012, 221.

<sup>115</sup> Finland Act on Mediation in Civil Matters and Confirmation of Settlements in General Courts, 394/2011, Art. 23, <<http://www.finlex.fi/en/laki/kaannokset/2011/en20110394.pdf>>. *Esplugues C., Louis M.*, New Developments in Civil and Commercial Mediation, Global Comparative Perspectives, Ius Comparatum, Springer International Publishing Switzerland, 2015, 286.

<sup>116</sup> On Enforcement of Mediation Settlement see: *Burns R.P.*, The Enforceability of Mediated Agreements: An Essay on Legitimation and Process Integrity, Journal on Dispute Resolution, Vol. 2:1, 1986, 93-116, <[https://kb.osu.edu/dspace/bitstream/handle/1811/76169/OSJDR\\_V2N1\\_093.pdf?sequence=1](https://kb.osu.edu/dspace/bitstream/handle/1811/76169/OSJDR_V2N1_093.pdf?sequence=1)>; *Siddik A.E.*, Enforceability of the

Thus, illegitimate and amoral settlement damages society, contradicts public interest and therefore such outcome of mediation is not enforceable.<sup>118</sup> It is possible that illegitimate settlement does not encroach public trust in mediation institution, but it still should be banned based on mediation goals.

## 7. Responsibility of a Mediator for Mediation Outcome

In order to determine responsibility, which a mediator might bear in relation to mediation outcome, we need to take into consideration what measures he / she is obliged to take in order to prevent illegitimate outcome of mediation. Therefore responsibility of a mediator can be analyzed on the basis of leverages, which are provided to him / her on the basis of law or ethical norms for avoiding an illegitimate outcome.

A mediator shall warn parties about probable impact which the settlement might have on non – participant third parties,<sup>119</sup> also a mediator shall advise them about problems that may arise in case efficiency of mediation settlement depends on the will of outsiders.

A mediator is liable to avoid achieving a settlement, to which a party agrees without realization of right of self determination.<sup>120</sup> Namely when a party takes involuntary, uninformed or coercive decision or when a party is in weak position, incapable situation while coming to a settlement with another party.<sup>121</sup> According to New York standards, in case there is disbalance of forces between parties, as a result of which one or both parties are incapable to realize their right of self determination, a mediator should postpone a session, withdraw from the process, stop mediation or undergo consultations with mediation centre employees.<sup>122</sup>

Mediators' Standards of Texas provide that it is liability of a neutral third party to postpone mediation, when a party is deprived of a possibility to ensure conscious participation in the process.<sup>123</sup> Standards of Virginia reflect liability of a mediator to withdraw from the process when one of the parties can not comprehend terms and conditions of mediation settlement.<sup>124</sup>

California court rules provide that a mediator shall facilitate participation of parties in the process on the basis of voluntariness and right of self determination.<sup>125</sup> A mediator shall not allow a settlement which is illegitimate or threatens integrity of mediation institution. This may imply unacceptability of such actions, which result into losing public trust and credibility in mediation institution and undermining ethical integrity of the institution.

## 8. Stopping the Process - Discretionary Right or Liability?

Certain Codes of Ethics for mediation and legal acts<sup>126</sup> state, that in case parties make an illegitimate, amoral decision, the settlement will be unenforceable and a mediator shall either stop mediation, or refuse

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Mediation Outcome, *ELaw Journal: Murdoch University Electronic Journal of Law*, 17(2) 2010, 13-22, <<file:///C:/Users/user/Desktop/curret%20research/62-260-1-PB%20enforceability.pdf>>.

<sup>117</sup> *Stulberg J.B.*, *Mediation and Justice: What Standards Govern?*, 6 *Cardozo J. Conflict Resolution*, 2005, 242.

<sup>118</sup> *Shapira O.*, *Conceptions and Perceptions of Fairness in Mediation*, 54 *South Tex. Law Rev.*, 2012, 333.

<sup>119</sup> *Finland Act on Mediation in Civil Matters and Confirmation of Settlements in General Courts*, 394/2011, Art. 23, <<http://www.finlex.fi/en/laki/kaannokset/2011/en20110394.pdf>>. See also *Esplugues C., Louis M.*, *New Developments in Civil and Commercial Mediation, Global Comparative Perspectives*, *Ius Comparatum*, Springer International Publishing Switzerland, 2015, 286.

<sup>120</sup> *Stulberg J.B.*, *Mediation and Justice: What Standards Govern?*, 6 *Cardozo J. Conflict Resolution*, 2005, 242-243.

<sup>121</sup> *Shapira O.*, *Conceptions and Perceptions of Fairness in Mediation*, 54 *South Tex. Law Rev.*, 2012, 336.

<sup>122</sup> *Standards of Conduct for New York State CMTY. Dispute Resolution CTR. Mediators, Office of Alt. Dispute Resolution&Court Improvement Programs 2009*, §I cmt. 4, <[http://www.courts.state.ny.us/ip/adr/Publications/Info\\_for\\_Programs/Standards\\_of\\_Conduct.pdf](http://www.courts.state.ny.us/ip/adr/Publications/Info_for_Programs/Standards_of_Conduct.pdf)>.

<sup>123</sup> *Texas Ethical Guidelines for Mediators*, §13, *Advisory Committee on Court-Annexed Mediations 2005*, <[http://www.txcourts.gov/All\\_Archived\\_Documents/SupremeCourt/AdministrativeOrders/miscdocket/05/05910700.pdf](http://www.txcourts.gov/All_Archived_Documents/SupremeCourt/AdministrativeOrders/miscdocket/05/05910700.pdf)>.

<sup>124</sup> *Virginia Standards of Ethics and Professional Responsibility for Certified Mediators*, 2011, §1.3, <<http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/soe.pdf>>

<sup>125</sup> *The California Rules of Court*, §3.853 (a), <[http://www.courts.ca.gov/documents/title\\_3.pdf](http://www.courts.ca.gov/documents/title_3.pdf)>.

<sup>126</sup> *Law of Lithuania on Conciliatory Mediation in Civil Disputes*, 2008, Art. 5 (4).

to participate.<sup>127</sup> In case a mediator or outsiders to the mediation consider, or would have considered in certain circumstances that mediation settlement is illegitimate, or is substantially uneven for parties, is based on wrong information, he/she has to advise the parties about the above problem, guide their efforts, so that they can change their offers or make new ones. If, despite many attempts, an impartial third party is not able to ensure fairness of the process, he / she is entitled to withdraw from the process or stop it.<sup>128</sup> Nebraska guidelines define that a mediator shall consciously and deliberately not allow making an illegitimate decision.<sup>129</sup>

A mediator can refuse to draw up a settlement agreement or sign it if it is fundamentally unfair<sup>130</sup> for one of the parties,<sup>131</sup> is unfriendly,<sup>132</sup> or its content will not be recognized and supported by the public.<sup>133</sup> If in such a case a mediator does not attempt to avoid plainly unfair outcome,<sup>134</sup> and later illegitimacy of mediation becomes clear, it will significantly undermine mediation institution.<sup>135</sup>

According to individual Codes of Ethics<sup>136</sup> a mediator has discretion to decide whether to refuse participation or to stay in a specific process. E.g. Canada Family Mediation Code<sup>137</sup> states, that a mediator is not entitled to withdraw from the process without a valid excuse and relevant notification made to the parties.<sup>138</sup> He / she is entitled to stop mediation process if he / she believes that with high probability decision will be made without meeting<sup>139</sup> the principle of autonomy<sup>140</sup> or it will be illegitimate.<sup>141</sup> It seems that the above provision is facultative, but it should be defined in relation with another provision of the same Code, which says, that a mediator shall suspend or stop the mediation process, if it can no longer be beneficial.<sup>142</sup> It is difficult to define what is meant here – benefit acceptable for parties, or generally, common good. Though on the basis of systemic analysis of the above provision it may be said that an ille-

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<sup>127</sup> *Shapira O.*, Conceptions and Perceptions of Fairness in Mediation, 54 South Tex. Law Rev., 2012, 317.

<sup>128</sup> *Cooley J.W.*, A Classical Approach to Mediation – Part I: Classical Rhetoric and The Art of Persuasion in Mediation, 19 Dayton L. Rev., 83, 1993, 130.

<sup>129</sup> Manual of Standards and Ethics for ODR- Approved Mediation Center Mediators, Directors and Staff, § III. E. 3, Nebraska Office of Dispute Resolution, <[www.supremecourt.ne.gov/5553/statutes-rules-policies-and-standards](http://www.supremecourt.ne.gov/5553/statutes-rules-policies-and-standards)>.

<sup>130</sup> Jams Mediators Ethics Guidelines, §VII, 2013, <<http://www.jamsadr.com/mediators-ethics/>>; *Waldman E.*, Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 394.

<sup>131</sup> Georgia Ethical Standards for Mediators, §IV. A, 30, Georgia Commission on Dispute Resolution, 2012, <[http://godr.org/sites/default/files/Godr/mediator\\_ethics\\_information/APPENDIX%20C%2C%20CHAP%201%2C%206-18-2013.pdf](http://godr.org/sites/default/files/Godr/mediator_ethics_information/APPENDIX%20C%2C%20CHAP%201%2C%206-18-2013.pdf)>.

<sup>132</sup> German Mediation Act, 21 July, 2012, §2 (5), <[https://www.gesetze-im-internet.de/englisch\\_mediationsg/englisch\\_mediationsg.html](https://www.gesetze-im-internet.de/englisch_mediationsg/englisch_mediationsg.html)>; *Rützel S., Wegen G., Wilske S.*, Commercial Dispute Resolution in Germany, 2<sup>nd</sup> ed., C.H. Beck, München, 2016, 206.

<sup>133</sup> *Gibson K.*, Mediator Attitudes Toward Outcomes: A Philosophical View, 17 Mediation Q., 197, 1999, 209.

<sup>134</sup> *Judith J.L.*, Maute, Mediator Accountability: Responding to Fairness Concerns, Vol. 19990, Issue 2, J. Disp. Resol., 1990, 349, <<http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1196&context=jdr>>.

<sup>135</sup> *Bush R.A.B.*, The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications, J. Disp. Resol., Issue 1, 1994, 25–26, <<http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1267&context=jdr>>.

<sup>136</sup> Georgia Ethical Standards for Mediators, Georgia Commission on Dispute Resolution 2012, Standard IV.A, <<http://www.godr.org/files/APPENDIX%20C,%20Chap%201,%201-19-2010.pdf>>; Model Standards of Practice for Family and Divorce Mediation, §XI. A. 4, <<https://www.afccnet.org/Portals/0/PublicDocuments/CEFCP/ModelStandardsOfPracticeForFamilyAndDivorceMediation.pdf>>.

<sup>137</sup> Family Mediation Canada Members Code of Professional Conduct, <[http://fmc.ca/sites/default/files/sites/all/themes/fmc/images-user/Members%20Code%20of%20Professional%20Conduct\\_0.pdf](http://fmc.ca/sites/default/files/sites/all/themes/fmc/images-user/Members%20Code%20of%20Professional%20Conduct_0.pdf)>.

<sup>138</sup> Family Mediation Canada Members Code of Professional Conduct, Art. 13.3, <[http://fmc.ca/sites/default/files/sites/all/themes/fmc/images-user/Members%20Code%20of%20Professional%20Conduct\\_0.pdf](http://fmc.ca/sites/default/files/sites/all/themes/fmc/images-user/Members%20Code%20of%20Professional%20Conduct_0.pdf)>.

<sup>139</sup> Party autonomy is considered to be one of the fundamental principles within mediation process. See, *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, 284.

<sup>140</sup> German Mediation Act, 21 July, 2012, §2 (5), <[https://www.gesetze-im-internet.de/englisch\\_mediationsg/englisch\\_mediationsg.html](https://www.gesetze-im-internet.de/englisch_mediationsg/englisch_mediationsg.html)>.

<sup>141</sup> Family Mediation Canada Members Code of Professional Conduct, Art. 13.4, <[http://fmc.ca/sites/default/files/sites/all/themes/fmc/images-user/Members%20Code%20of%20Professional%20Conduct\\_0.pdf](http://fmc.ca/sites/default/files/sites/all/themes/fmc/images-user/Members%20Code%20of%20Professional%20Conduct_0.pdf)>.

<sup>142</sup> Family Mediation Canada Members Code of Professional Conduct, Art. 13.2, <[http://fmc.ca/sites/default/files/sites/all/themes/fmc/images-user/Members%20Code%20of%20Professional%20Conduct\\_0.pdf](http://fmc.ca/sites/default/files/sites/all/themes/fmc/images-user/Members%20Code%20of%20Professional%20Conduct_0.pdf)>.

gitimate decision may not be viewed as providing well-being, which could be supported by Code of Ethics of mediation as a beneficial outcome of mediation.

Florida rules for Certified and Court Mediators oblige a mediator to timely stop the mediation process which is led by parties towards illegitimate outcome.<sup>143</sup>

Virginia Standards of Ethics and Professional responsibility define for mediators: a mediator shall stop mediation if he / she believes that fairness of the process is being encroached. The above may happen because of incapability or lack of will of a party to be actively involved in the process, fundamental inequality of participation in the negotiation process or uneven capacities of parties, unfairness, caused by withholding information, fraud on behalf of one of the parties or if there is legal commitment of a mediator to disclose confidential information.<sup>144</sup>

According to Model Standards of Conduct for Mediators<sup>145</sup> in case conflict of interests of a mediator may reasonably encroach ethical integrity of mediation, fairness of the process, it is desirable that a mediator stops the process or refuses to participate in it, despite of interest expressed by parties and their agreement regarding participation of the mediator.<sup>146</sup> In this case interest to protect public trust in mediation supersedes the right of self determination of parties.

If a mediator does not avoid a settlement to be made on the basis of coercion, deceit or principles of dishonest negotiation, this will undermine mediation institution but in addition it will be considered a failure of a mediator to meet his / her liabilities in relation to parties.<sup>147</sup>

Liability of a mediator in relation to society is to protect public interest from possible damage, which concurrently implies meeting his /sher liabilities in relation to the profession – avoiding ethical discreditation of mediation activity.<sup>148</sup>

Commitment of a mediator towards the profession reflects public opinion, – what the attitude of the society is and how it assesses mediation outcome. Public interest is abstraction of views and beliefs of individuals about pros and cons of certain events.<sup>149</sup> In this context a mediator is obliged to avoid such actions which might cause loss of trust of the society in mediation institution. A mediator's liability towards society is not limited to forming positive public opinion in relation of mediation. It also implies protection of public interest on behalf of a mediator. It is exactly within the confines of commitments in relation to the society, that a mediator is obliged not to allow illegitimate settlement to be made even if loss of public trust in mediation institution is not expected at all, since based on the confidentiality of information, the public will know nothing about illegitimacy of a settlement.<sup>150</sup> Since mediation settlement is achieved in compliance with confidentiality principle, behind closed doors, it is natural that threat of encroachment of public interest is increased.<sup>151</sup> In this case a mediator's commitment not to allow making an illegitimate settlement increases proportionally with this threat. This obligation is still in force based on importance to protect public interest.<sup>152</sup>

Providing just the right for stopping the process to a mediator might become a source for non-homogenous practice. In addition, in case parties make an illegitimate decision, which the court might in future refuse to enforce, parties may rise a reasonable right to claim indemnity in relation to a mediator, which might have had an interest to prolong the process in order to receive additional fee. A mediator may

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<sup>143</sup> Florida Rules for Certified and Court-Appointed Mediators, §10.420(b)(4), <<http://www.mediate.com/articles/floridarules.cfm>>.

<sup>144</sup> Virginia Standards, Virginia Standards of Ethics and Professional Responsibility for Certified Mediators, §K. 4, 2011, 8 <<http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/soe.pdf>>.

<sup>145</sup> Model Standards of Conduct for Mediators, AAA, ABA, ACR, 1994, Revised 2005f.

<sup>146</sup> Ibid, Revised 2005, §III, E.

<sup>147</sup> *Shapira O.*, Conceptions and Perceptions of Fairness in Mediation, 54 South Tex. Law Rev., 2012, 339.

<sup>148</sup> Ibid.

<sup>149</sup> *Higgs S.*, Mediating Sustainability, The Public Interest Mediator in the New Zealand Environmental Court, Environmental Law, Vol. 37:61, 2007, 82, <<https://law.lclark.edu/live/files/283-371higgs>>.

<sup>150</sup> *Shapira O.*, Conceptions and Perceptions of Fairness in Mediation, 54 South Tex. Law Rev., 2012, 340.

<sup>151</sup> *Zekoll J., Bälz M., Amelung I. (eds.)*, Formalisation and Flexibilisation in Dispute Resolution, Brill Nijhoff, Leiden/Boston, 2014, 65-66.

<sup>152</sup> *Shapira O.*, Conceptions and Perceptions of Fairness in Mediation, 54 South Tex. Law Rev., 2012, 340.

be considered to have failed to meet the liability of efficient use and expenditure of parties' and state resources, along with the principle of legitimacy of mediation.

It would be appropriate that future mediation legislation and Codes of Ethics of Georgia clearly emphasize stringent liability of a mediator and binding conduct rule in case of anticipated threat of making an unfair decision.

## 9. Conclusion

On the basis of survey of Codes of Ethics and legal acts it may be said, that from normative point of view a fair mediation settlement shall meet the following criteria: a). it should be made on the basis of self determination of parties; b). It should not undermine mediation institution by reducing public trust and credibility in it; c). it should not be illegitimate, or supporting illegitimate activities;<sup>153</sup> and d). it should not be amoral.

The principle of legitimacy of mediation,<sup>154</sup> as normative and doctrinal category, does not only require that mediation process is led in accordance with set procedures, but also implies legitimacy of content of a settlement achieved. Strict and direct interpretation of the above implies precise compliance with normative requirements of the law.

According to more popular interpretation, the principle of compliance of mediation implies, that a settlement shall not violate imperative norms of the law, shall not encroach state, public and third parties' interests. Full compliance and identity with norms of the law is not necessary.<sup>155</sup> The principle of legitimacy of mediation, as process, based on interests, requires exactly the above interpretation, which is recognized in international practice. Considering that mediation targets to achieve mutually beneficial outcome through settlement between parties, rather than just relevant distribution of rights and liabilities in accordance with the law, it is reasonable to allow insignificant deviation on behalf of parties<sup>156</sup> within confines, prudently defined by notion of fairness, third parties' and generally, public interests, state policy and moral principles.

In addition, any settlement of mediation, an action, damaging mediation institution, is illegitimate and amoral and should be considered unfair from normative point of view,<sup>157</sup> since it encroaches standards, set by the law and Codes of Ethics, moral norms, existing in relation to the profession and society.

It would be appropriate that conceptual findings presented on the basis of the study are adequately reflected in future Mediation Law and Codes of Ethics of Georgia, for retaining ethical integrity of mediation institution and advancement of fair practice.

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<sup>153</sup> *Waldman E.*, *Mediation Ethics, Cases and Commentaries*, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 195.

<sup>154</sup> *Cao L., Sun I.Y., Heberton B.*, *The Routledge Handbook of Chinese Criminology*, New York, 2014, 121.

<sup>155</sup> *Jiang B.*, *Civil Procedure Law of the People's Republic of China: A Practical Guide to Understanding and its Application*, Law Press, Beijing, 2012, 246, cited in: *Esplugues C., Louis M.*, *New Developments in Civil and Commercial Mediation, Global Comparative Perspectives*, *Ius Comparatum*, Springer International Publishing Switzerland, 2015, 212.

<sup>156</sup> *Esplugues C., Louis M.*, *New Developments in Civil and Commercial Mediation, Global Comparative Perspectives*, *Ius Comparatum*, Springer International Publishing Switzerland, 2015, 212.

<sup>157</sup> *Shapira O.*, *Conceptions and Perceptions of Fairness in Mediation*, *54 South Tex. Law Rev.*, 2012, 341.