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Circumstances Excluding the Enforcement of Mediation Settlements Under the Legislation of Georgia and the Member States of the European Union

Mediation settlement is the final product of mediation. It represents the action of mediation in practice and the result of the whole process depends on it. It is considered that the degree of enforcement of the mediation settlement is higher than the judgment, because, unlike the latter, it is based on compromise and voluntary self-restraint.[1] *However, entrusting the destiny of mediation settlement with the parties' kind will is not enough. "If there are no guarantees for enforcing settlements reached through the mediation, every advantage of the mediation will lose significance.".*[2] *The purpose of the article is to estimate circumstances that exclude the enforcement of mediation settlement under the basis of a comparative analysis of the mediation acts and civil procedural legislation of Georgia and the member states of the European Union, examine circumstances that prevent enforcement, analyze the issue of enforcement of the international mediation settlement and outline alternative perspectives of regulation.*

Key Words: *Mediation, Mediation Settlement, Enforcement, Accessibility of Mediation, Legal Force of Settlement, Legal Nature of Settlement, Regulation of Mediation in the Member Countries of the European Union, Recognition and Enforcement of International Mediation Settlement.*

1. Introduction

At first glance, when, after the mediation process, a party voluntarily expresses the free will to undertake the responsibility of fulfillment of the certain obligation, it is expectable that he/she will act accordingly. However, no one is protected from the fact that even after reaching the agreement, there will be certain circumstances that will affect the will of the parties. Such circumstances may include external factors that are objectively unforeseen at the time of the agreement, changes in the leadership of the company, negative attitude of the society, etc.[3] "The issue of enforcement may arise in mediation, if despite the consensual character of a Mediated Settlement Agreement *[...] a party to it chooses to disregard it.".*[4]

The efficacy of the mediation process cannot be dependent on the possible reasons of refusal on its performance that may arise after settling. When the settlement is reached between parties, appropriate guarantees of its enforcement are important to exist. Otherwise, the chain of conflict will be endless.

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1 *Susmann E.,* The Final Step: Issues in Enforcing the Mediation Settlement Agreement, Newsletter of the Mediation Committee of the International Bar Association, Vol. 2, №1, 2006, 2.

2 *Barnabishvili G., Tsiklauri S.,* Enforcement of the Mediation Settlements in Georgia, Journal "Alternate Dispute Resolution – Yearbook 2017", Special Edition, TSU Publishing, 2018, 9 (in Georgian).

3 *Susmann E.,* The Final Step: Issues in Enforcing the Mediation Settlement Agreement, Newsletter of the Mediation Committee of the International Bar Association, Vol. 2, №1, 2006, 3-4.

4 *Meidanis Haris P.,* Enforcement of Mediation Settlement Agreements in the EU and the Need for Reform, Journal of Private International Law, Vol.16, Issue 2, 2020, 276.

As stated in the explanatory note of the draft amendments to the "Civil Procedure Code", *"The proper functioning of mediation, to some extent, depends on the rules of enforcement of the settlement reached as a result of mediation."*.[5] The necessity to guarantee effective mechanisms of enforcement was mentioned as well.[6] Nevertheless, Georgian legislation is not very comprehensive while regulating the enforcement of the mediation settlement. It is possible, that mentioned is the response of the "omnis definito in jure periculosa est"[7] principle. However, the fact is that since Georgia does not have a long tradition of mediation, the practice will itself demonstrate the need for further regulation.

The article will discuss the circumstances, which exclude the enforcement of mediation settlement, taking into account the current legislation.

2. The Importance of Certain Legal Aspects of Mediation Settlement in Relation to the Issue of Enforcement

According to the Law of Georgia "On Mediation", mediation settlement is *"a binding written document on reaching an agreement on the settlement of a dispute as a result of mediation."*.[8] *According to the law, international mediation settlement is also interpreted as a "written agreement."*.[9]

The first necessary character of mediation settlement is clear from the explanation: written form.

2.1. The Form of the Mediation Settlement

The mediation settlement will be enforceable only if it is made in writing. However, this does not mean that all written settlements are subject to enforcement.

It should be noted that *"the association agreement, drawn up between the EU and Georgia and the association agenda obliges the state to develop alternative means of resolving disputes."*,[10] as a result, Georgia has become a signatory to international treaties regulating mediation.

"Directive of 2008 of The European Parliament and the Council on Certain Aspects of Mediation in Civil and Commercial Matters" (hereinafter "Directive") also indicates the written

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5 Explanatory Note on the Draft Law of Georgia on "Making Amendments to the Civil Procedure Code of Georgia", Website, 27/09/2019, 2, <https://info.parliament.ge/file/1/BillReviewContent/216092> [27.09.2021] (in Georgian).

6 Ibid.

7 *"Every definition in law is perilous"*, referred to in *Steffek F., Chong S.,* Enforcement of International Settlement Agreements Resulting from Mediation Under the Singapore Convention – Private International Law Issues in Perspective, Research Collection School of Law, Vol. 31, 2019, 457.

8 The Law of Georgia "On Mediation", Legislative Herald of Georgia, 18/09/2019, subparagraph "I" of article 2nd.

9 Ibid, subparagraph "I[1]" of article 2nd.

10 Explanatory note on the Draft Law of Georgia "On Mediation", Website, 27/09/2019, 1, <https://info.parliament.ge/file/1/BillReviewContent/216089> [27.09.2021] (in Georgian).

form of the settlement.[11] "United Nations Convention on International Settlement Agreements Resulting from Mediation" (hereinafter "Singapore Convention"), explains the written form in which it considers any form by which the content of the agreement is recorded.[12] "UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation" (hereinafter "Model Law") even regulates the essential elements of the written form of the settlement, which includes: signatures of the parties and a mediator, indication that the mediation has been carried out, an attestation by the institution that administered the mediation, etc.[13]

It is true that international treaties, to which Georgia is a signatory, are considered as part of Georgian legislation. However, mediation legislation is desirable to regulate certain issues itself. For example, the Law of Georgia "On Mediation", indicates the written form of the mediation settlement and the obligation of the parties and mediators to sign it, although its essential elements are not specified.[14]

According to the experience of the member states of the European Union, the writing form of the settlement is a necessary requirement, although, the standard is different between the types of the written form itself. For example, if the legislation of Lithuania allows facsimile to be used (if the signature can be identified),[15] in Spain, "executive force" can be granted to settlement only if it is notary certified.[16] There is an interesting regulation in Belgium, which, allows the enforcement of the settlement, drawn up electronically, in case its authenticity can be confirmed.[17] According to the legislation of Slovakia, for the settlement to be enforceable, it is essential that the intention of the parties on granting the binding force to it to be clear.[18] Czech law sets the requirements that the mediation settlement must meet from the formal standpoint, in particular, the signatures of the parties and the mediator are essential, also, the date of completion of the mediation process, must be indicated.[19] An additional requirement is set by Swedish legislation: payment of an application fee.[20]

In fact, for the purposes of enforcement, it is important not only to have the written form as a criterion of the formal admissibility,[21] but also the formulation of the terms of the

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11 Directive 2008/52/EC of The European Parliament and the Council on Certain Aspects of Mediation in Civil and Commercial Matters, Official Journal of the European Union, 2008, Art. 6.1., <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0052&from=EN> [27.09.2021].

12 United Nations Convention on International Settlement Agreements Resulting from Mediation, General Assembly Resolution 73/198, 2018, Art. 2.2., <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf> [27.09.2021].

13 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018, (Amending the UNCITRAL Model Law on International Commercial Conciliation, 2002), A/73/17, Art. 18.1, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex_ii.pdf> [27.09.2021].

14 The Law of Georgia "On Mediation", Legislative Herald of Georgia, 18/09/2019, subparagraph "a" of article 9 (1) and article 9 (3).

15 Civil Code of the Republic of Lithuania, Art. 1.73, Par. 2, 18.07.2000.

16 *Palo De G., Trevor B. M.,* EU Mediation Law and Practice, Oxford, Oxford University Press, 2012, 330-331.

17 Ibid, 25.

18 Ibid, 306.

19 Ibid, 63.

20 Ibid, 348.

21 Author's remark: As it is already obvious that according to the law the mediation settlement must be made in writing in any case, therefore, the requirement of formal admissibility of the settlement will always be met.

settlement, i.e., the criterion of the contextual admissibility. Often the settlement may not become subject to enforcement since parties haven't clearly established demands and obligations, they raise to one another.

While regulating the form of the mediation settlement, it is the challenge for the legislator, on the one hand, not to create an artificial barrier for the parties during the enforcement of the settlement that is already reached, and, on the other hand, to promote the mediation settlement to be drawn up in such form that will guarantee its further enforceability and exclude its ambiguous, non-enforceable content. To avoid future incomprehensibility, it is desirable for the "Law of Georgia "On Mediation" to regulate the essential characteristics of the settlement act, such as identification of the parties (designation of the responsible person), claims of the parties, content of the settlement, content of the breach, deadline for the fulfillment of the claim (if possible), the intention to confer binding force to the agreement, etc.[22]

2.2. Legal Nature of the Mediation Settlement

"Mediation settlement is equalized to the judgment. Based on the settlement, a decision is made on behalf of Georgia and the mediation settlement – reached within the framework of the contractual freedom by manifesting parties' autonomy, is declared as an act of justice by the court.".[23]

The decision of the court on the enforcement of mediation settlement is made in the form of court ruling.[24] In case of enforceable settlements, their legal nature is easily identifiable because they are directly equalized to the judgment, regardless of the fact they have resulted from court or non-court mediation.

Another issue is when a mediation settlement is not affirmed by the court. According to Danish law, the settlement is enforced based on the same terms as those applying to written agreements,[25] under article 1965 of the "Civil Code of Italy", "*the final mediation agreement is classified as a type of [...] contract in which the parties agree to terminate a present dispute and to prevent disputes that might arise in the future. The enforceability of the agreement is therefore supported by contract law.*",[26] according to the mediation legislation of Romania, mediation settlement has a force of the written agreement.[27] Equalization of the mediation settlement to the contract is also manifested from the grounds of its invalidity, for example, under Belgian law, such grounds are: unconscionability, mistake, fraud, and duress.[28]

As discussed in the scientific literature, in terms of legal nature, mediation settlement stands between contracts and judgments / arbitral awards.[29]

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22 *Tsur M.,* The Art of Writing a Mediation Agreement: An Instructional Manual, Journal *"Alternate Dispute Resolution* – Yearbook 2012", TSU Publishing, 2013, 223-229.

23 *Chitashvili N.,* Online Discussion organized by the Mediators' Association of Georgia on the topic: Legislative Guarantees of the Court and Private Mediation in Georgia, 14.12.2020 (in Georgian).

24 Civil Procedure Code of Georgia, Parliamentary Gazette, 47-48, 14/11/1997, 363[33](1).

25 *Palo De G., Trevor B. M.,* EU Mediation Law and Practice, Oxford, Oxford University Press, 2012, 78.

26 Ibid, 191.

27 Ibid, 294.

28 Ibid 24.

29 *Meidanis Haris P.,* Enforcement of Mediation Settlement Agreements in the EU and the Need for Reform, Journal of Private International Law, Vol.16, Issue 2, 2020, 290.

Contrary to the existing practice of European countries, the affiliation of the mediation settlement to the type of contracts should not be approved, as this reduces the uniqueness and high legitimacy of this institution than we have in case of ordinary agreements. The mediation settlement is the product that resulted from the well-thought-out, voluntary, self-examination-based and informed decision, which, because of the criteria enumerated above, has much higher legal value than the contract. Its equalization to the contracts, in fact, disregards the role and effort of the mediator, his / her involvement in this process, withal, it should also be noted that principles of the contract law may not correspond to the goals of enforcement of the mediation settlement.[30]

Thus, it must be identified as a third type document and given its own status under the legislation.[31] Otherwise, it will turn out that the mediation settlement is an ordinary written agreement, in case of non-fulfillment of which the parties will have to continue the dispute in court again under the framework of the contractual obligations.

In response to this problem, in certain countries of the European Union, there was a proposal to enforce mediation settlements directly,[32] without any formal barriers.[33] There was an initiative in the Czech Republic to have mediation settlement directly enforced if it was prepared with the participation of the mediator-advocate, however, that proposal failed to acquire support on the legislative level.[34]

Determination of the legal nature of mediation settlement is important. Mediation settlement is essential to stand out from contracts or even judgments and independent status must be granted to it, which will be suitable for its legitimacy. Explanation of the concept of mediation settlement and guaranteeing mechanisms for its enforcement under the Law of Georgia "On Mediation", must be considered as the advantage of Georgian legislation as it distinguishes settlement from ordinary transactions and contracts and ensures its high legitimacy.[35] As for the possibility of direct enforcement, from the perspective of Georgian reality and poor tradition and culture of mediation, this issue remains only a distant prospect.

3. Circumstances Excluding the Enforcement of Mediation Settlements Under the Legislation of Georgia

According to the "Civil Procedure Code of Georgia", *"the court will refuse to enforce mediation settlement, if its content contradicts the Georgian legislation or if, due to its content, its enforcement is impossible."*.[36] In case of collective labor dispute additional element is the contradiction to the public order.[37]

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30 *Weller S.,* Court Enforcement of Mediation Agreements: Should Contract Law be Applied, Judges' Journal, Vol. 31(1), 1992, 13, 16.

31 *Meidanis Haris P.,* Enforcement of Mediation Settlement Agreements in the EU and the Need for Reform, Journal of Private International Law, Vol.16, Issue 2, 2020, 295.

32 *Palo De G., Trevor B. M.,* EU Mediation Law and Practice, Oxford, Oxford University Press, 2012, 295.

33 Author's remark: for example, affirmation by the court, the obligation of notary certification, etc.

34 Ibid, 63.

35 The Law of Georgia "On Mediation", Legislative Herald of Georgia, 18/09/2019, subparagraph "I" of article 2, article 13.

36 Civil Procedure Code of Georgia, Parliamentary Gazette, 47-48, 14/11/1997, 47-48, 14/11/1997, article 363[32].

37 Ibid, article 363[35].

Similar grounds for excluding enforcement of mediation agreements are set under the legislation of the member states of the European Union. However, this prohibition is formulated differently, in particular, in some cases, this clause is direct, for example, it is indicated that the settlement mustn't breach the law (Austria),[38] mustn't contradict the law and moral (Bulgaria,[39] Estonia[40]), or national law (Malta).[41] Indirectly but still, the requirement established for mediation settlement on its fairness and the exclusion of violation of the rights of third parties, are the expressions of the demand of legality (Finland).[42] In some cases, the court assesses whether the desire to settle was the result of undue influence or coercion or not (Ireland).[43] The "Civil Procedure Code of Georgia" may not explicitly refer, for example, to the rights of third parties, although in this sense, the criterion of legality should be interpreted teleologically, thus, it already includes above-mentioned elements, because, the settlement can not be considered lawful if it contradicts/violates the rights of other parties.

Similar general exclusionary circumstances are indicated in the international treaties as well. For example, the directive states that the settlement mustn't contradict the legislation and the legislation of the state must ensure its enforceability.[44] The Singapore Convention considers contradiction to the public order and the legislation as the grounds of refusal on enforcement.[45]

3.1. Contradiction to the Legislation

Mediation settlement mustn't be enforced if it contradicts the legislation of Georgia. In general, *"it is emphasized in the scientific literature that mediation agreement must be made with great caution because the margin between legality and illegality is too small."*.[46] It is important to assess what is considered under the contradiction to the law.

In a broad sense, legislation consists of legislative and subordinate normative acts of Georgia.[47] In a narrow sense, under the content of contradiction to the legislation can be implied unconformity with the fundamental human rights, guaranteed by the legislation. Given the purpose of the settlement and the rationality of its examination by the court, the latter explanation is more acceptable and appropriate. Otherwise, if the element of legality was perceived as a resolution of a dispute under the provisions of the legislation, then the main

38 *Palo De G., Trevor B. M.,* EU Mediation Law and Practice, Oxford, Oxford University Press, 2012, 13.
39 Mediation Act of Bulgaria, Art. 17, Par. 3.
40 Ibid, 89.
41 Mediation Act of Malta, art. 17B, Par. (1) (b), 21.12.2004.
42 *Palo De G., Trevor B. M.,* EU Mediation Law and Practice, Oxford, Oxford University Press, 2012, 103.
43 Mediation Act of Ireland, Art. 11, Par. (3) (b), 2017.
44 Directive 2008/52/EC of The European Parliament and the Council on Certain Aspects of Mediation in Civil and Commercial Matters, Official Journal of the European Union, 2008, Art. 6.1., <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0052&from=EN> [27.09.2021].
45 United Nations Convention on International Settlement Agreements Resulting from Mediation, General Assembly Resolution 73/198, 2018, Art. 5.2., <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf> [27.09.2021].
46 *Neamtu B., Dragos D. C.,* Alternative Dispute Resolution in European Administrative Law, Springer Verlag, Berlin, Heidelberg, 2014, 447, referred to in *Chitashvili N.,* Fair Settlement as Basis for Ethical Integrity of Mediation, Journal "Alternate Dispute Resolution – Yearbook 2016", TSU Publishing, 2017, 17 (in Georgian).
47 Organic Law of Georgia "On Normative Acts", Legislative Herald of Georgia, 33, 09/11/2009, article 7 (1).

sign, distinguishing mediation from the court would lose its sense. The criterion while assessing the legality of mediation settlement mustn't be the fact, how the court would resolve this dispute. According to the Law of Georgia "On Mediation", the risks of the illegal course of not only the mediation settlement but the mediation process itself are ensured by the mediator, as he/she is granted authority to terminate the process anytime if he/she believes that further continuation of mediation would be unreasonable and unjustifiable.[48]

Mediation settlement is indeed the guarantor of successful completion and effecttiveness of the mediation process. However, for the mediator, it mustn't be a goal in itself. When the terms of the mediation settlement clearly violate the constitutional rights of one or both parties, or the mediator notices that the parties made a decision without conceptualization, the actualization of the principle of self – examination, analyzing its consequences, he/she must take measures to prevent drawing up such settlement.[49]

3.2. Public Order

Regarding the concept of public order, it should be admitted that several articles of the "Civil Code of Georgia", contain records similar to the Law of Georgia "On Mediation".[50] For example according to the paragraph 4 of article 2, customary norms shall be applied only if they do not contravene universally accepted principles of justice and morality or public order. Article 54 states that contradiction to the public order is the ground for the transaction to be considered void, whereas, on the basis of paragraph 5 of article 61, the confirmation of the indisputably void transaction shall only become valid if it does not contravene the principles of morality and the requirements of public order.

The universally accepted definition of public order is not established by legislation. However, it may include economic, political, and moral principles necessary for maintaining public order in the country.[51] Legal values of principle, fundamental principles of civil turnover, such as freedom of property, entrepreneurship, contract, etc., are also considered as a part of the public order.[52]

According to the explanations of the Supreme Court, *"the purpose of the legislative ordinance of article 54 is to avoid such transactions, which aren't formally illegal, although in their essence, violate the public order and worsen the cohabitation of the subjects of civil turnover, which, consequently holds up the civil turnover."*.[53] Considering mentioned explanation, fortiori, given that it is prohibited to enforce such mediation settlements, which contradict the legislation and/or public order, the goal of the legislator was to prevent enforcement of such mediation settlement, that would be illegal, or wouldn't be contra legem, but would be inappropriate in general with the law and order.

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48 The Law of Georgia "On Mediation", Legislative Herald of Georgia, 18/09/2019, subparagraph "E" of article 9 (1).

49 *Chitashvili N.,* Fair Settlement as Basis for Ethical Integrity of Mediation, Journal "Alternate Dispute Resolution – Yearbook 2016", TSU Publishing, 2017, 10 (in Georgian).

50 Civil Code of Georgia, Parliamentary Gazette, 31, 26/06/1997, article 54.

51 *Jorbenadze S.,* Commentary of the Civil Code of Georgia, Book I, Tbilisi, 2002, 31 (in Georgian).

52 *Zoidze B.,* Commentary of the Civil Code of Georgia, Book I, Tbilisi, 2002, 178 (in Georgian).

53 №as-15-15-2016 Decision of the Supreme Court of Georgia of 1st March 2016 (in Georgian).

Tbilisi Court of Appeals has directly cited what could be considered contrary to public order, in particular, according to its explanation, *"a transaction or any of its terms is incompatible with the principles of morality and public order, when it contradicts the principle of social justice, puts the party of the contract in an incompatibly difficult condition."*.[54] Under the legislation of Lithuania, settlement won't be subject to affirmation as well if it unjustifiably gives one party an excessive advantage over the other.[55] As an example of mentioned, can be considered a mediation settlement that, although formally is in conformity with the legislation, puts one of the parties of the mediation process in a clear advantageous position and, in response, imposes such obligation on another one, that is irrational and disproportional concerning the content of the dispute.

Like Georgian legislation, the legal definition of public order also doesn't exist in other countries. Under Italian law, its definition is subject to quite broad discretion of judges.[56] Belgium leaves the space for interpretation as well; a contradiction to the interests of the juvenile is the additional prerequisite for excluding the affirmation of agreement made within family cases.[57]

3.3. Impossibility of Enforcement Due to the Content

One of the most important advantages of the mediation process is its flexibility and informal character, within which the parties are given the opportunity to consider and agree on any term that wouldn't be enforceable during litigation. Nevertheless, as much as this factor, on the one hand, positively portrays the mediation process, on the other hand, it may cause problems in terms of its implementation in practice.

The parties may consider such conditions in the settlement, the fulfillment of which cannot be objectively controlled even by the parties themselves, depend on the occurrence of a future hypothetical event, etc.

In this respect as well, the role and function of the mediator are very important in assisting the parties to draw up a settlement that will have the perspective to become enforceable.[58] In addition, the formal requirements that are established for mediation settlements can play an important role in this regard: by establishing such requirements to the agreement document, that provide sufficient clarity of the agreed terms, eliminate the risks of the impossibility of enforcement caused due to the ambiguous content.

3.4. Confidentiality as the Circumstance Excluding the Enforcement

Indeed, the legislation doesn't directly consider confidentiality as an exclusionary circumstance for the enforcement of the mediation settlement. However, it acts as a preventive factor in the process of enforcement due to its content and specific character.

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54 №2b/4123-12 Decision of Tbilisi Court of Appeals of 6th February 2013 (in Georgian).
55 Civil Code of the Republic of Lithuania, Art. 6.228, Par.1, 18.07.2000.
56 *Palo De G., Trevor B. M.,* EU Mediation Law and Practice, Oxford, Oxford University Press, 2012, 192.
57 Ibid, 26.
58 The Law of Georgia "On Mediation", Legislative Herald of Georgia, 18/09/2019, article 9 (2).

For the court to approve the mediation settlement and issue a writ of execution, it must at least be provided with the content of the agreement which establishes that such an agreement exists,[59] this factor is already the problem for the parties, who don't want to disclose even the fact that there is a dispute between them.

Therefore, the principle of confidentiality and enforcement of mediation settlement by the court affirmation cannot be compatible with each other, because some amount of information must be disclosed for the purposes of enforcement, or conversely, it will not be possible for the court to affirm the settlement in full confidentiality.

4. Other Circumstances Excluding the Enforcement of Mediation Settlements under the Legislation of the Member States of the European Union

4.1. Accreditation of a Mediator, as a Prerequisite for the Enforcement

In some cases, the enforceability of mediation settlements may be determined by whether the agreement is reached with the participation of the accredited mediator or not. For example, the legislation of Belgium differentiates the enforcement of mediation settlements that are reached voluntarily and under court mediation. It doesn't fully trust mediation, which is conducted completely freely, without the participation of the qualified representatives and mediation settlement, which is reached under the voluntary mediation, can be subject to affirmation only if the process was led by the accredited mediator.[60] Different and interesting regulation exists in Estonia, in particular, "the requirements for enforcement of a mediation agreement depend on who performs the role of mediator."[61] If the settlement is reached with the participation of notary public or advocate-mediator, it will be enforceable in case of court's affirmation, whereas, if the mediator is neither notary public nor advocate, the settlement will only be enforced if the court ascertains that impartiality and independence of mediator was guaranteed.[62]

Before the adoption of the Law of Georgia "On Mediation", similar regulations existed in Georgia as well. Only the mediation settlements, that were reached in accordance with the "Civil Procedure Code", under court mediation, were subject to enforcement,[63] as for private mediation, the agreement, reached during its course, wasn't equivalent to the mediation settlement and was regulated by the principles of the contract law. The Law of Georgia "On Mediation", entered into force from the 27th of September 2019, consequently, the essence of the mediation settlement was determined, standards for the accreditation of mediators and mediators' association were established, a unified register of mediators was created.[64]

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59 *Deason E. E.,* Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality. U.C. Davis Law Review, Vol. 35(1), 2001, 49.

60 *Palo De G., Trevor B. M.,* EU Mediation Law and Practice, Oxford, Oxford University Press, 2012, 25.

61 Ibid, 88.

62 Ibid, 89.

63 Civil Procedure Code of Georgia, Parliamentary Gazette, 47-48, 14/11/1997, chapter XXI[1].

64 The Law of Georgia "On Mediation", Legislative Herald of Georgia, 18/09/2019.

Adoption of law made it possible to ensure the mediation settlements, reached during private mediation, with proper guarantees of enforcement. Which, in turn, contributed to strengthening the accessibility and effectiveness of the mediation institute at the national level.

4.2. Additional Requirements for Mediation Settlement in Relation to the Content of the Dispute

In some cases, considering the content of the dispute, additional requirements may be established for the mediation settlements. For example, under Belgian legislation, *"in certain family cases concerning the interests of children, tighter control over the enforcement of the settlement agreement is exercised." The judge will refuse to ratify a divorce agreement when the alimony for the children is too low, unless other provisions of the mediated agreement offset this amount."*.[65] In Luxembourg, mediation settlement, that is reached within a family dispute, must be reviewed by the same judge, which is in charge of the related court proceedings.[66] In Italy, "*if the agreement refers to a contractual commitment or an act related to the transfer of real estate, it must also be authenticated by the appropriate public officer*.".[67]

The research has shown that the specificity of the dispute may require additional circumstances to be met for the enforceability of the mediation settlement. In Georgia, there are no exclusionary stipulations for enforcement in relation to the content of the dispute. However, it is desirable to regulate them in the future, for ensuring the high standard of protection for the parties' rights. Especially in such cases, which concern the best interests of the child.

4.3. Other Circumstances Excluding the Enforcement of Mediation Settlement Under the Singapore Convention and Model Law

It is noteworthy that the "Singapore Convention" and "Model Law", in addition to the circumstances listed above, establish a broader and almost identical[68] list of grounds for refusal on the enforcement of the agreement, in particular, according to the article 5 of the convention and article 19 of the model law, grounds for refusing to grant relief include: incapacity of a party while drawing up the agreement, if the settlement isn't binding, final, has been subsequently

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65 *Palo De G., Trevor B. M.,* EU Mediation Law and Practice, Oxford, Oxford University Press, 2012, 26.

66 Ibid, 241.

67 Ibid, 191.

68 Author's remark: The convention corresponds to the UNCITRAL model law. This approach is designed to allow states to have flexible choices and to choose whether they want to implement the convention, model laws or both. Thus, the texts of these two documents complete each other and establish the legal framework for the mediation. See.: *United Nations Commission on International Trade Law*, United Nations Convention on International Settlement Agreements Resulting from Mediation, New York, 2018 (The "Singapore Convention on Mediation"), 2018, <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements> [27.09.2021]. It should be noted that Georgia was one of the first countries to join the Singapore Convention in 2019, <https://agenda.ge/en/news/2019/2119> [27.09.2021].

modified, isn't clear and comprehensible, the obligations have already been performed, there was a serious breach by the mediator of standards applicable to the process, etc.

The above-mentioned circumstances are much more comprehensive than the clauses of contradiction to the legislation or the public order. The Law of Georgia "On Mediation" may not exhaustively define all grounds for the enforcement of mediation settlements, although based on these guidelines it is possible to regulate the essential elements necessary for their enforceability.

It should be admitted, that CEPEJ[69] has adopted a handbook,[70] which establishes the frameworks of the legislation concerning the enforcement of mediation settlements. In particular, the form of the mediation settlement (written, signed, attested) and content (if it isn't possible to agree over legal issues, parties may reach written consent on factual matters),[71] enforcement via a court decision, a notarial deed or authorization by another official,[72] possibility of direct enforceability if appropriate requirements are met,[73] etc.

5. Enforcement of International Mediation Settlement

The mediation has not only taken the responsibility for resolving conflicts within the state but also effectively performs the function of an alternative to the "cross-border justice" and simplifies the resolution of conflicts arising in international private and business law.

Under the "Singapore Convention", for a mediation settlement to be subject to "international" status, at least two parties to the settlement must have their places of business in different states or the state in which the parties to the settlement agreement have their places of business must be different from either: (i) the state in which a substantial part of the obligations under the settlement agreement is performed; or (ii) the state with which the subject matter of the settlement agreement is most closely connected, etc.[74]

The convention, together with the directive and other international treaties, in fact, fill the vacuum during the regulation of cross-border mediation, as they cover such issues, that aren't considered by the other relevant international treaties, and therefore, they establish important guidelines.[75]

The analysis of the directive has shown that for the mediation settlement to be enforceable on the international level, it needs to be considered enforceable firstly on the ter-

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69 European Commission for the Efficiency of Justice.

70 European Commission for the Efficiency of Justice, European Handbook for Mediation Lawmaking, Adopted at the 32th Plenary Meeting of the CEPEJ, Strasbourg, 13 and 14 June 2019, Art. 6, <https://rm.coe.int/cepej-2019-9-en-handbook/1680951928> [27.09.2021].

71 Ibid, Art. 6.1. a, b.

72 Ibid, Art. 6.2. a.

73 Ibid, Art. 6.2. c.

74 United Nations Convention on International Settlement Agreements Resulting from Mediation, General Assembly Resolution 73/198, 2018, Art. 1, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf> [27.09.2021].

75 *Steffek F., Chong S.*, Enforcement of International Settlement Agreements Resulting from Mediation Under the Singapore Convention – Private International Law Issues in Perspective, Research Collection School of Law, Vol. 31, 2019, 457.

ritory of the member state and then if all above-mentioned requirements are met, it can become subject to enforcement.[76]

From the Georgian perspective, for the enforcement of international mediation settlement, it is important for it to be recognized at first and then to be enforced. Amendments to the "Law of Georgia "On Mediation" dated June 22, 2021, regulated the issues, that were unsettled before, related to the recognition and enforcement of the international mediation settlements, in particular, the concept of the international mediation settlement, prerequisites for its recognition and enforcement and mediation settlements, that aren't subject to recognition and enforcement were introduced.[77]

The Law of Georgia "On Mediation", regulated the concept of international mediation settlement similarly to that provided by the "Singapore Convention". According to the new regulation, exclusionary circumstances for the enforcement of international mediation settlement include: if it's concluded for personal, family, and household purposes, relating to family, inheritance, or employment law, if it has already been approved by a court, is subject to enforcement as an arbitral award or its *"one of the parties is the state itself or state authority or any person acting on behalf of the state authority.*".[78] Additionally, technical requirements, that are established for the application concerning recognition and enforcement, are regulated by the "Civil Procedure Code",[79] the code has also laid down the grounds for refusal on approval of the petition on recognition and enforcement, which resemble the ones, regulated by the "Singapore Convention" and include the capability of parties, consideration of the standards established for the mediator, clarity of the content of mediation settlement, etc.[80]

The regulation of the issue of recognition and enforcement of international mediation settlements should be considered as a step forward, which will create the ground for the effective use of mediation to resolve not only local but international disputes as well.

6. Conclusion

Mediation settlement guarantees the effectiveness of the mediation process, therefore, when the issue of regulating its enforcement is on the agenda, special attention is required from the legislator, to facilitate the proper regulation of the enforcement mechanism.

Based on the results of the research, the circumstances excluding the enforcement of mediation settlement can be classified as follows:

a) Exclusionary circumstances, that are directly regulated by the legislation

Such circumstances include contradiction to the legislation and public order, also, the impossibility of enforcement due to the content of the settlement. Regarding the contradiction to the legislation, it should be admitted that, unlike, for example, Finland, which concentrates on the fairness of the settlement, or Bulgaria and Estonia, which assess the

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76 *Meidanis Haris P.,* Enforcement of Mediation Settlement Agreements in the EU and the Need for Reform, Journal of Private International Law, Vol.16, Issue 2, 2020, 279-280.

77 The Law of Georgia "On Mediation", Legislative Herald of Georgia, 18/09/2019, subparagraph "I[1]" of article 2, articles 13^1 and 13^2.

78 Ibid, article 13^2.

79 Civil Procedure Code of Georgia, Parliamentary Gazette, 47-48, 14/11/1997, chapter XLIV[16].

80 Ibid, article 363^{45}.

settlement according to a criterion of morality, the Georgian approach must be considered more appropriate, because the concept of fairness, in general, is too obscure and there is no objective criterion, which would drop a boundary between what might be considered fair or unfair. The same applies to morality. Establishing the requirement of conformity to the legislation for the mediation settlements, based on its teleological interpretation, already excludes the existence of such agreement, which puts one party in a clear advantageous condition, or violates the rights of any person. As for public order, it is an additional circumstance that fills the space left behind the requirement of legality and additionally ensures cases that may be in conformity with the law, however, there still is sufficient reason for it to not be enforced. As for the content-related circumstances of the settlement, it is an objective fact resulted from the innovative character of mediation, its flexibility, that allows parties to agree on the issues, which had no perspective in the court.

b) Circumstances, that, according to the legislation aren't directly considered as exclusionary, however, must be deemed as such, taking into account their content

First, such circumstance is the issue of confidentiality. As usual, in mediation parties are allowed to agree on the confidentiality of not only the information that is disclosed during the process but on the confidentiality of the mediation process itself and a dispute, as a fact as well. Accordingly, logically, a mediation settlement can't be enforced by the court if its existence is confidential. However, the problem is balanced by the "self-regulatory nature" of the principle of confidentiality, because when maintaining confidentiality is the important interest for the party, it motivates him/her to voluntarily fulfill other terms of the settlement.

Form of the mediation settlement is also the important factor, which has an influence on the enforcement because the probability of enforcement is low for the settlement which is concluded without the observance of the form. Georgian legislation regulates only basic requirements such as written form, signatures of the parties and a mediator, however, there isn't more precise regulation regarding the essential elements of the settlement itself, i.e., the criteria, that should be met by this document, as it is regulated, for example, under the legislation of Slovakia and the Czech Republic.

The legal nature of the settlement document is also a very important issue. In this regard, the approach of Georgian legislation is praiseworthy, which distinguishes this document from the contracts, arbitral awards, or judgments and grants independent status to it, unlike the mediation legislation of Italy, Romania, and Belgium.

c) Other circumstances, which came to light as a result of a comparison

In some member countries of the European Union, there is an essential requirement established for the enforcement of mediation settlement: to be concluded under the mediation process, which is led by the accredited mediator. Before the adoption of the Law of Georgia "On Mediation", mentioned issue was problematic for Georgia as well, however, after the law entered into force, this issue was settled.

As for differentiation of the exclusionary criteria concerning the content of the dispute, for some cases, it may be considered necessary and justified for protection of the rights of parties.

Based on the comparative analysis and taking into account the current regulation of Georgian legislation, the following recommendations can be made:

The Law of Georgia "On Mediation", may determine the necessary criteria and essential elements of the act, which must be met by mediation settlement, in particular, in addition to the signatures of the parties and the mediator, the mediation settlement should indicate: date of completion of the mediation process, explicitly formulated content of the settlement, identification of the parties and obligations undertaken by them ("terms of the settlement") should be formulated in a sufficiently clear way, the term for the fulfillment of the claims (if it's definable), expressed will of the parties on granting the binding force to the agreement, etc. Formal, as well as contextual congruence of the settlement, is indeed the responsibility of the mediator and representatives of the parties, however, establishing formal requirements for the agreement document will ensure its comprehensive content.

It is possible for the parties to reach an agreement at the very beginning of the mediation, that upon successful completion of the process, the mediation settlement will become enforceable. In this way, they will be able to prevent the exclusion of enforcement in advance.[81] It is also possible to have interim agreements concluded during the mediation process, which will regulate the most important terms, for example, rule of payment or performance, timing of performance, confidentiality, etc.[82]

It is important to note that the role of the mediator in drafting the settlement act is essential to assist the parties in determining the rational content of the settlement and to ensure that an illegal agreement won't be concluded.

Regulating the direct enforceability of mediation settlement under the legislation is also an interesting issue, however, it is complex, as well. On the one hand, the easier the enforcement of the settlement is, the more effective and attractive the mediation institution itself will be, however, certain circumstances need to be considered. When the mediation settlement is affirmed by the court, the judge examines whether there are exclusionary circumstances for the enforcement and then approves the settlement. If the settlement isn't examined by the court, then other guarantees must exist for ensuring that the settlement, upon its adoption, meets all requirements which are established by the law. According to the handbook, which is adopted by the CEPEJ, if direct enforceability is allowed, full responsibility for the content of the mediation settlement is imposed on the advocate representatives.[83] In some cases, the "executive force" may be granted to the mediation settlement due to its notarization and in this case responsibility to examine the admissibility of the settlement is imposed on the notary public (Bulgaria,[84] Spain[85]). Despite advantages, the issue of direct enforceability, taking into account the current reality of Georgia, remains only a distant prospect.

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81 *Chitashvili N.,* Online Discussion organized by the Mediators' Association of Georgia on the topic: Legislative Guarantees of the Court and Private Mediation in Georgia, 14.12.2020 (in Georgian).

82 *Widman S. M.,* More Mediation Confidentiality Limits: What the Court May Allow In to Establish a Settlement Agreement, International Institute for Conflict Prevention & Resolution, Vol. 24, Issue 11, 2006, 179.

83 European Commission for the Efficiency of Justice, European Handbook for Mediation Lawmaking, Adopted at the 32th Plenary Meeting of the CEPEJ, Strasbourg, 13 and 14 June 2019, Art. 6.2. c, <https://rm.coe.int/cepej-2019-9-en-handbook/1680951928> [27.09.2021].

84 *Palo De G., Trevor B. M.,* EU Mediation Law and Practice, Oxford, Oxford University Press, 2012, 38.

85 Ibid, 330 – 331.

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