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The Mediation Process, its Principles and Challenges in Georgia

Mediation is based on the interests of the parties and not on rights, and this feature makes it even more effective. In the mediation process, the disputing parties try to prove their truth and, consequently, try to reach a "fair decision" together. Mediation may not settle with consesus, but after this process the disputing parties will know more precisely the causes of the conflict, their own demands, they will be free from aggression and will concentrate on the desired outcome. The psychological-emotional basis is largely seen in the mediation process. The initiation and ongoing (progress) of the mediation process depends on the voluntariness of the disputing parties; however, a legitimate limitation of the principle of voluntariness should be considered the different rules for initiating and continuing the mediation process in collective disputes. The neutrality and impartiality of the mediator during the mediation process reinforces the factor of trust between the parties. Confidentiality in mediation forms trust between the parties and the mediators. When it becomes mandatory to disclose information protected by the principle of confidentiality, it is necessary to maintain a balance between the principle of confidentiality of mediation and the public interest.

Keywords: *Mediation Process, Principles, Parties, Challenges.*

1. Introduction

Disputes between the parties can be resolved by appealing to the court, however, in addition, there is an alternative way of resolving the dispute, which differs from the litigation in different features and is associated with lower costs.[1] An alternative dispute resolution may provide more favorable terms for the parties, so it is advisable to analyze it. In this regard, it is essential, on the one hand, to define the legal content of an alternative dispute resolution, and, on the other hand, to highlight the importance of the art of negotiation in this process. In the 21st Century, Alternative Dispute Resolution (ADR) is often referred to as a peaceful, amicable settlement of a dispute.[2]

Fairness is achieved when the parties reach a consensus. A consensual agreement results from a process in which two parties actively participate with the help of a neutral third party. n the negotiation process, it is possible to draw up agreements that take into account the different needs, interests, and concerns of each party and the inherent nuances of the dispute arising from the dispute. The legal right to legal protection has been granted the status of a general principle of European Community law by The European Court of Justice, and this principle is enshrined in Article 47 of The Charter of Fundamental Rights of the European Union.[3]

The development of mediation within the EU operates on the background of the following legal principles: access to justice for all is a fundamental right enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; The legal right to legal protection is enshrined in Article 47 of the EU Charter of Fundamental Rights. As for the national legislation of Georgia,

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1 *Sussman E.,* The Advantages of Mediation and the Special Challenges to its Utilization in Investor State Disputes, Journal "Revista Brasileira de Arbitragem", Vol. 7, Issue 27, 2010, 56.

2 *Brady A.,* Mediation Developments in Civil and Commercial Matters within the European Union, "Arbitration: The International Journal of Arbitration, Mediation and Dispute Management", Vol 86, №2, 2020, 390.

3 Ibid.

Article 31 of the Constitution of Georgia regulates procedural rights, according to which the possibility to appeal to the court and, at the same time, the right to a fair, timely hearing is provided. Justice is a feature of mediation.[4] In the mediation process, the disputing parties try to prove their truth and, consequently, try to reach together "fair decision" according to their opinion. Mediation may not end by the settlment, but after this process the disputing parties will know more precisely the causes of the conflict, their own demands, they will be free from aggression and will concentrate on the desired outcome. Therefore, this process always brings positive results for the parties. The main factor of this positive result and the main feature and factor of the above-mentioned "future-oriented process" is the confidentiality of the process, which is managed by a third independent, neutral and impartial person.[5]

The court is the decision-maker. Unlike the court, the mediator is not the decision-maker. A neutral third party is involved in the mediation process to facilitate the agreement between the parties.[6] Mediation, as a process based on the interests of the parties, increases the rights of the mediator – the third neutral party – to the extent that the disputing parties allow. Mediation tools used by the neutral party (mediator) and its opinion is non-binding. This factor and procedural flexibility precisely has led to the success of mediation.[7] The court issues decisions in accordance with the internal belief of the judge, which are in line with specific facts and applicable law, while in mediation the decision is made by the parties as a result of reconciling (merging) their own interests.

Thus, litigation is a long and, at the same time, expensive and formal process. Mediation is a confidential, non-lengthy, low-cost, and informal legal process.[8] How free mediation will depend on the content of the mediation agreement. Under Article 7 of the Law of Georgia on Mediation, the precondition for initiating the mediation process is an agreement on mediation or the transfer of the case to a mediator by a court or other authorized body on the grounds provided by law or at the request of the parties. If we do not find a different regulation from the law in the agreement, then the rule established by Article 8 of the Law of Georgia on Mediation shall apply.[9] However, under the Law of Georgia on Mediation, in the event of an agreement on mediation, in which the parties agree to not apply to the court or arbitration until the specified period or circumstances arise, The court or arbitral tribunal shall not consider the dispute before the fulfillment of the conditions laid down in the mediation agreement, except the case, that the plaintiff confirms that he will suffer irreparable damage without a court or arbitral award. According to Paragraph 4 of Article 8 of this Law, in the absence of an agreement between the parties, the mediator defines the rule of conducting the mediation, taking into account the views of the parties to resolve the dispute effectively. Adherence to the principles of good faith, impartiality, independence, voluntariness, equality, and confidentiality established by law for the mediator in determining the rules of conduct of mediation is essential.

The mediator has the right to provide them with additional information that will increase the effectiveness of alternative and amicable dispute resolution. In the mediation process, the mediator may allow himself/herself to offer the parties (with their consent) the terms of the mediation settlement, which will be based solely on their interests expressed in their positions in the process. The offer of a mediation settlement condition should not be equated with the mediator's decision, as the mediator has no right to make any decision on behalf of the disputing parties.

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4 Constitution of Georgia, 24/08/1995, 786, Article 31.

5 *Kandashvili I.,* Judicial and Non-judicial Forms of Alternative Dispute Resolutions in Georgia on the Example of Mediation, Tbilisi, 2019, 18-19 (in Georgian).

6 *Bichia M.,* The Importance of Using Mediation in Business Disputes During a Pandemic, Herald of Law, №3, 2021, 12-14 (in Georgian).

7 *Tsuladze A.,* Comparative Analysis of Georgian Judicial Mediation, Tbilisi, 2017, 28 (in Georgian).

8 *Bichia M.,* The Importance of Using Mediation in Business Disputes During a Pandemic, Herald of Law, №3, 2021, 15 (in Georgian).

9 Law of Georgia on Mediation, 18/09/2019, 4954-Iს.

2. The Essence and Means of Alternative Dispute Resolution

2.1. The Historical and Philosophical Basis of Mediation

It will not be uninteresting to present the historical and philosophical basis of mediation to determine role of mediation.

For Saint Augustine, the mediator has both a rhetorical and a theological function. This is the way in which Platonic thought and Christianity are divided and become the embodiment of the world in which Jesus Christ appears to the world as a mediator. According to Platonic demonology, demons appear as mediators between gods and humans, albeit with a completely different demonic body, devoid of spirit and far removed from human nature. In the view of Saint Augustine, the existence of good demons is ultimately denied. According to Blessed Augustine, the mediator is the uncreated Word of God, through Whom all things were made, and by participating in Whom we are blessed. And still who is this Mediator? It is the "Lord" who is not only the Word, but also the bearer of human nature, a God Who has become a sharer in our humanity, and so has furnished us with all that we need to share in His divinity. For in redeeming us from our morality and misery, He does not lead us to the immortal and blessed angels so, that, by participating in them, we may ourselves also become immortal and blessed. Rather, he leads us to the trinity by participating in whom the angels themselves are blessed.[10]

From the philosophical-emotional worldview of Saint Augustine it can be seen what skills of the mediator were developed in the collective unconscious of people:

1. Mediator – a sharer of the problems of the parties and their life at that moment;
2. Mediator – the so-called "mediation sharer" for the parties;
3. Mediator – pointer[11] of only the best and most favorable path for the parties in the mediation process.

Mediation was not strange in Georgia either. If we look at Beka-Agbugha's law book ("The book of all the sins of men in law"), we come to the court of negotiator people, whose function was to resolve disputes by customary law.[12] In Georgian Customary law, there was no sharp line between the functions of a mediator and a judge, and their functions were not separated.[13] Also, the role of "Khevisbers" in mountainous Georgia is interesting. According to the customs and established dogmas, the attempt of the "Khevisbers" to regulate public relations in the community is somewhat similar to the function of a mediator or conciliatory judge. There are similarities between modern mediators and "bche- mediators", for example, the rules for choosing a mediator acceptable to both parties, the duty to protect the confidentiality, etc.[14]

When we mention the introduction and establishment of a culture of mediation in Georgia, the role of Ilia Chavchavadze is essential in creating a modern concept of a mediator – a conciliator. First of all, Ilia Chavchavadze connects the need for conciliation judges in modern language with the development of life, globalization and capitalization (the relationship between people, which is related to giving and receiving), the alternative of unloading the justice system, economic existence, and, finally, it is related to resolving the disputed issue quickly and easily.[15]

Of course, the modernist and eclectic world adds to mediation new functionalities, renews, and prepares for new challenges. The parties become the main participants in the process, trying to find out what

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[10] *Guretzki D.,* The Function of "Mediator" in St. Augustine's De civitate Dei, Book IX, Hirundo: "The McGill Journal of Classical Studies*",* Vol. I, 2001, 66-67, <https://www.mcgill.ca/classics/files/classics/2001-07.PDF> [12.10.2021].

[11] Person who shows way favorable for both parties.

[12] In that period, it implied unwritten regulations, which emerged from relevant society.

[13] *Davitashvili G.,* Judicial Organization and Process in Georgian Customary Law, Tbilisi, 2004, 34 (in Georgian).

[14] *Tsuladze A.,* Comparative Analysis of Georgian Judicial Mediation, Tbilisi, 2017, 176-177 (in Georgian).

[15] Ibid, 180-183.

their main interests are, so mediation is based on the interests of the parties and not on their rights.[16] One of such challenges, which has been reflected in the Civil Procedure Code of Georgia since 2019, is the use of court mediation in property disputes if the value of the subject matter of the dispute does not exceed 20,000 GEL.[17]

2.2. The Essence of Mediation and its Difference from Arbitration

Arbitration proceedings are a process based on legal norms. The demands of the parties during mediation are unlimited. The interests of the parties should be combined and ultimately the decision of consensus/agreement they should make by themselves, a neutral person – a mediator – participates in the formal part of the conclusion.[18] Of course, the agreement of the parties is ultimately a binding decision that should be performed by the parties. Arbitration is clearly related to litigation, where the process does not provide a broad opportunity for the parties to exercise their powers (rights) and is clearly constrained by the relevant norms.[19] Arbitration and mediation differ from one another according to the decision-makers. The arbitrator reviews the case has jurisdiction over the case, and ultimately makes a decision that is binding for both parties. In mediation, the decision-makers are parties.[20] The arbitrator also has the right to impose on one party a refund of damages to the other party, therefore, the parties are concentrated on a future decision of the arbitrator in their favor. Unlike above-mentioned nuances of arbitration, the mediator seeks to help the parties reach an agreement that takes into account the interests of both parties.[21] In addition, the difference between mediation and arbitration is most clearly shown in Articles 17 and 18 of the Law of Georgia on Arbitration, which provide the conditions for the use of arbitration measures: Prior to the commencement of the arbitral proceedings or during the proceedings, a party may petition the arbitral tribunal for the application of arbitration measures.[22] In this case, the arbitral tribunal may based on a reasoned appeal by a party, by a written arbitral decision, instruct the party to maintain or restore its original condition within a reasonable time before the final arbitral decision is made.

2.3. Disadvantages and Advantages of Mediation

Mediation is indeed an effective way to resolve a dispute, but there are several disadvantages:

A) Implementation of the administration of justice in the hands of private individuals[23], which will create the danger of mediation "privatization". Because mediation operates under the "shadow of the law", it is better for the state to take care that mediation does not become just a "second class" justice system for the people in a hopeless situation;[24]

B) creating a threat to the proper functioning of the legal system and national legislation; Forming abnormal (wrong) stereotypes in society;

C) the disputing subjects must have their will to communicate and resolve the dispute;

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16 *Bichia M.,* The Importance of Using Mediation in Business Disputes During a Pandemic, Herald of Law, №3, 2021, 12 (in Georgian).

17 Civil Procedure Code of Georgia, 14/11/1997, 1106. Article 1106, 187^3.

18 *Tsertsvadze G.* (*ed*.), Perspectives of Legal Regulation of Mediation in Georgia, National Center for Alternative Dispute Resolution, Tbilisi, 2013, 15 (in Georgian).

19 *Kandashvili I.,* Judicial and Non-judicial Forms of Alternative Dispute Resolutions in Georgia on the Example of Mediation, Tbilisi, 2019, 47-52 (in Georgian).

20 *Austermiller S. M., Swenson D. R.,* Alternative Dispute Resolution Georgia: A Textbook of Essential Concepts, Tbilisi, 2014, 210 (in Georgian).

21 Ibid, 211.

22 Law of Georgia on Arbitration, 19/06/2009, 1280.

23 *Kandashvili I.,* Judicial and Non-judicial Forms of Alternative Dispute Resolutions in Georgia on the Example of Mediation, Tbilisi, 2019, 70 (in Georgian).

24 *Boulle L. Kelly K.,* Mediation: Principles, Process, Practice, Dalhouse Journal of Legal Studies, Vol. 9, 2000, 360-362.

D) an unscrupulous party's interest to use dispute[25] for the purpose to delay the case .[26]

Despite some negative signs, the benefits of mediation are much greater, namely:

A) Speed (rapid in time);

B) Promoting[27] the real interests of the disputing parties;

C) Lowering the emotional background and shifting the relationship to negotiation mode;

D) Freedom of the parties to creatively express their views while managing the reins of the process;[28]

E) To maintain commercial or other relationships during and after the completion of the dispute;

F) The capability of the disputing parties to fully disclose their secrets in the background of confidentiality;[29]

G) Ability to make a fair decision at the discretion of the disputing parties;

H) Unloading of justice system;[30]

I) Low in price (cheapness).[31]

In this case, the opinions of the followers of natural law and positive law should be taken into account: Max Weber argued that normative acts that are written only on paper and are not upheld by the behavior of citizens have no legitimacy.[32] According to Plato's worldview, fair law is a divine order.[33] Thus, if the role of justice in society will be somewhat minimized and diminished, this could lead to negligence of existing legislation by citizens and weaken the validity of the country's normative base.

3. Psychological-emotional Aspects of the Mediation Process and their Legal Consequences

3.1. Psychological-emotional Foundations of the Mediation Process

In the mediation process can be found the psychological-emotional basis. Mediation, of course, would be a relatively simple process if the parties were guided only by their best interests or acted out of love for those around them.[34] If individuals are guided by emotions, expectations, bias, or a deep belief in their truth, the rational model loses effectiveness. If the mediator is not sensitive to the client's personal feelings, and details, and also does not control his or her own reactions to the assessment of the "hard" stories of the disputing parties, mediation is likely to enter a dead-end (deadlock) or can be destroyed at all. The process of priming is important, which lasts for virtually the entire mediation process, and means that with a better understanding of mediation, the parties build trust in the institution. Therefore, for the parties, it leaves a feeling of a tangible and accessible process. The mediator should show the disputing parties the need for “creativity” and "thinking outside the box". We can rely on the theory that the disputing party tells three stories. The mediator should be able to see (separate) the real story from the unreal stories in order to use the

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25 Mediation process.

26 *Bichia M.,* The Importance of Using Mediation in Business Disputes During a Pandemic, Herald of Law, №3, 2021, 13 (in Georgian).

27 Putting ahead.

28 National Center for Alternative Dispute Resolution, CEDR, Mediator Handbook, 5th ed., Tbilisi, 2013, 9 (in Georgian).

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

30 *Bichia M.,* The Importance of Using Mediation in Business Disputes During a Pandemic, Herald of Law, №3, 2021, 15 (in Georgian).

31 *Austermiller S. M., Swenson D. R.,* Alternative dispute resolution Georgia: A Textbook of Essential Concepts, Tbilisi, 2014, 144 (in Georgian).

32 *Spencer M.,* Weber on Legitimate Norms and Authority, The British Journal of Sociology, Vol. 21, №2, 1970, 123-134.

33 *Lebar M.,* Stanford Encyclopedia of Philosophy, Justice as a Virtue, *Zalta E. (ed.),* 2020, 5, <https://plato.stanford.edu/archives/fall2020/entries/justice-virtue/> [07.12.2021].

34 *Hoffman D. A., Wolman R. N.,* The Psychology of Mediation, Cardozo Journal of Conflict Resolution, Vol. 14, 2013, 760.

tools that will help the parties to resolve the dispute peacefully. However, during the process of mediation, it is important to keep in mind that "small details tell big stories."[35] Consequently, the mediator must listen carefully to the parties, as any small matter (detail) can be of great importance in resolving the dispute.

3.2. The Legal Significance of the Not Legal (Meta-legal) Beginnings of the Mediation Process

The entire process of searching for not legal sources in jurisprudence is The subject of constant consideration. Assuming that the actions of the object of legal relations are subject to legal regulation, then the circumstance is uncovered, where the content of the relationship and the process of the legal order are closely linked.[36] The point is that illegal origins in mediation can be encountered in the form of psychological-emotional moments that belong to the realm of existing[37] (nonfictional) events. But the legal aspects of the problem are most important for the science of law because, in this case, the events are considered in an ideal form. Nevertheless, worth noting that legal relationships arise in the public relations system, and certain non-legal aspects may also have legal consequences. In this context, psychological-emotional moments come to the fore in mediation but based on them is reached a legally important agreement.[38] The question may arise: what is the need for the "ought" (sollen) phenomenon in the process of legal regulation, or rather a synthetic-a Priori provision – the categorical "ought"? The phenomenon of ethics will help us in response. Ethical behavior unswers one of Kant's main questions, "What should I do". If the state transforms the norms regulating legal relations in the minds of citizens into "ought" (sollen) category, They will be integrated (established) as ready-made molds in the collective unconscious, which will lead to the correct perception and following of these norms by society. [39]

4. German Model of Mediation

Distinguish between broad and narrow models of mediation regulation. According to the broad model, the mediation process is regulated exhaustively. A narrow (limited) model of mediation is characterized by fewer regulations in the mediation process; In particular, there are only a few essential issues in this area that are regulated by legal norms, and it is characterized by fewer legislative interventions, which is why the parties have more freedom of action.[40] Under national law, presumably, Georgia has a narrow model for regulating mediation, especially it is reflected in the right of parties at its discretion to plan the mediation process, decide on the involvement of third parties, and most importantly even agree on different rules for the protection of confidential information. The broad model of mediation regulation does not allow the parties to maneuver[41] and places them within the framework of binding rules. Therefore, it is better to use a narrow model of regulation for the development of mediation. [42]

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35 Ibid, 762-764.

36 *Bichia M.,* Methodological Issues of Public Legal Relations, TSU "Journal of Law", №1-2, Tbilisi, 2010, 82 (in Georgian).

37 Real.

38 *Bichia M.,* Methodological Issues of Public Legal Relations, TSU "Journal of Law", №1-2, Tbilisi 2010, 84 (in Georgian).

39 *Batiashvili I.,* Legal and Meta-legal Origins of the Chaotic World Regulation, Jemal Gakhokidze Anniversary Book, Tbilisi, 2021, 402-403 (in Georgian).

40 *Klaus Hopt J., Steffek F.,* Mediation: Principles and Regulation in Comparative Perspective, Oxford University Press, 2013, 17-18.

41 The opportunity to decide at its own discretion.

42 *Bichia M.,* The Importance of Using Mediation in Business Disputes During a Pandemic, Herald of Law, №3, 2021, 14 (in Georgian).

4.1. The German Model of the Concept of Mediation and the Principle of Confidentiality

On February 14, 2007, the German Federal Constitutional Court issued a decision where was explained the importance and urgency of mediation (1 BvR 1351/01): "In a state governed by the rule of law, it is desirable that the dispute be resolved by mutual consensus at first, as opposed to the legal competitive process, litigation, and court decisions.".[43] Since 2012, the non-mandatory transformation of the essence of mediation into a German legislative system has not led to diminishment in its role. The Constitutional Court of the Federal Republic of Germany has clarified that settling a dispute amicably is not the only means of resolving it. This means that if the parties are unable to find a solution, they should be able to go to court freely and without complication (barrier).[44] The Law on Mediation, enacted in Germany in 2012, explains the essence of mediation succinctly:[45] Confidential and structured process in which the parties voluntarily enter and also, at their own responsibility, try to reach an amicable agreement through one or more mediators.[46] According to the established practice, after explaining the opening speech and the rules, the mediators offer the parties to sign an agreement of confidentiality. According to Article 4 of the German Mediation Act, all persons involved in the mediation process (except the parties) are obliged to maintain the confidentiality of the information disclosed. Before the mediation, the parties sign the agreement about keeping confidentiality so that the party does not use the confidential information disclosed at trial. German law and European regulation allow the mediator to be exempt from the principle of confidentiality only in a few cases, for example: If disclosure of the information is required for the fulfillment of the agreement; Information is made public for the protection of the rights of the child or the physical/mental condition of a person (public order) Or the information has become clear to everyone over time, and the legitimate purpose of keeping this information confidential no longer exists.[47]

4.2. The American Model of the Concept of Mediation and the Principle of Confidentiality

Mediation has been introduced into practice probably since three people gathered on earth. Mediation has deep roots in world history, evolving, changing, and adapting to new circumstances. In ancient China, the Confucian view was that the best way to resolve a dispute was through moral persuasion, agreement, and not sovereign coercion. The closest mediation model in the United States originates from labor dispute resolution procedures. The labor relations are long-term and depend on the future cooperation of the parties, i.e. the mediation process will take place through the background of the continuation of future relations. From the 1960s, the American public saw an interest in alternative forms of dispute resolution.[48] Since 1970, family disputes have increased catastrophically in America. This fact and the involvement of lawyers led to the establishment of non-competitive mediation, where the disputing parties received advice on determining the child's place of residence and alimony. In the 21st century in the United States, which is at the peak of globalization, free trade, and business development, mediation is also quite popular and in this connection may be noted the judgment of the United States Supreme Court in 1991 in the case Gilmer v. Interstate / Johnson Lane Corporation that led to the frequent use of mediation in labor disputes.[49]

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43 *Trenczek T., Loode S.,* Mediation "Made in Germany" – a Quality Product, Vol. 23, 2012, 64. <www.researchgate.net> [07.12.2021].

44 *Tsuladze A.,* Comparative Analysis of Georgian Judicial Mediation, Tbilisi, 2017, 84 (in Georgian).

45 *Tsertsvadze G.* (*ed.*), Perspectives of Legal Regulation of Mediation in Georgia, National Center for Alternative Dispute Resolution, Tbilisi, 2013, 56 (in Georgian).

46 *Tsuladze A.,* Comparative Analysis of Georgian Judicial Mediation, Tbilisi, 2017, 84 (in Georgian).

47 Ibid, 87-89.

48 *Folberg J.,* A Mediation Overview: History and Dimensions of Practice, Wiley Online Library, Conflict Resolution Quarterly, Issue 1, 1983, 4-6.

49 *Gurieli A.,* Ethical Issues in the Process of the Mediation of the Labour Disputes, "Law and World", №8, 2017, 95 (in Georgian).

4.3. Scope of Protection of Confidentiality in the Uniform Mediation Act

In 2001, the National Conference of State Legislatures in the United States drafted the Uniform Mediation Act, which brought together the principles of mediation enshrined in various acts, such as the privilege of participants and the protection of confidentiality.[50] Confidentiality and the privilege of the parties involved in mediation are interrelated rights. The right to confidentiality protects the information provided by the parties in the mediation process from disclosure, while the right to privilege relieves the mediator and the parties from the obligation to testify in court about the mediation process. [51] However, noteworthy that the "Uniform Mediation Act" itself sets a minimum standard of confidentiality and Imperatively does not prohibit the use of evidence that originated from mediation. On the contrary, it allows this option if the parties jointly agree on this issue.[52]

5. Principles of the Mediation Process according to the Legislation of Georgia

5.1. Voluntary Act and Self-determination of the Parties

The initiation and conduct of the mediation process depend on the voluntariness of the disputing parties.[53] During the amicable dispute settlement process, the parties are allowed to find the most appropriate solution to the dispute, which will strengthen the personal or business relationship between the parties in the future.[54] The voluntary involvement of the parties in the process increases the chances of reaching an agreement, while the forced participation of the parties in the process does the opposite. For example, as long as the principle of voluntariness[55] is upheld, mediation remains the most effective way to resolve commercial disputes in China.[56] The principle of voluntariness not only accompanies the process of starting and continuing mediation but also plays a big role in completing the mediation process. It depends only on the will of the parties they will stop the process without an agreement or the dispute will be resolved "amicably".[57] However, we also find exceptions to this discussion, for example, according to paragraphs 3 and 4 of Article 63 of the Labor Code of Georgia, during a collective dispute (dispute between an employer and a group of employees (less than 20 employees) one of the parties has the right to send a written notice to the Minister of IDPs from the occupied territories, Labour, Health and Social Affairs (hereinafter-the Minister) on the appointment of a dispute mediator to initiate a mediation. In this case, it is clear that the start of mediation does not require the consent of both parties, and in fact, we see a legitimate limitation of the principle of voluntariness.[58] As for the example of coercion of mediation, where the voluntariness of both parties is neglected, it is seen in paragraph 4 of the same article, according to which in case of high public interest, at any stage of the dispute the Minister has the right to appoint a mediator without the written request of the party. Of course, the parties will receive written notice of this issue.

The self-determination of the parties is an independent principle that accompanies the parties as a consequence even after the mediation is completed. In general, mediation provides a free space for parties

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50 *Tsuladze A.,* Comparative Analysis of Georgian Judicial Mediation, Tbilisi, 2017, 138-139 (in Georgian).
51 Ibid, 161.
52 Ibid, 140.
53 *Tsertsvadze G.* (*ed*.), Perspectives of Legal Regulation of Mediation in Georgia, National Center for Alternative Dispute Resolution, Tbilisi, 2013, 13 (in Georgian).
54 *Kandashvili I.,* Judicial and Non-judicial Forms of Alternative Dispute Resolutions in Georgia on the Example of Mediation, Tbilisi, 2019, 84 (in Georgian).
55 Willingness.
56 *Chan Ch. H., Peter Ch.,* Mediation Operations for Resolving Commercial Disputes in China, Journal "Revista Chilena de Derecho", Vol. 41, №1, 2014, 153.
57 *Kandashvili I.,* Judicial and Non-judicial Forms of Alternative Dispute resolutions in Georgia on the Example of Mediation, Tbilisi, 2019, 92 (in Georgian).
58 Labour Code of Georgia, 17/12/2010, 4113-rs.

where they enter and operate voluntarily; where they get rid of fears, where they analyze their own priorities; where they identify real problems; where they get free from anger and bad feelings (resentments). Ultimately, in the event of a completion mediation by the agreement, the principle of self-determination of the parties has a positive effect on their future relationship.[59] The parties then develop relationships considering each other's interests and, at the same time, develop skills on how to avoid or defuse a tense[60] situation.

5.2. Confidentiality

One of the cornerstones of mediation is the principle of confidentiality. Mediation is considered confidential by the parties due to the fact that, unlike the court, it is not a public process, and in addition, in the mediation process, the parties individually share their views and confidential information with the mediator. For the parties, this is a guarantee that any information they disclose during the mediation process in court will not be used by the disputing party against them.[61] Even if the mediation is stoped or completed by agreement, the parties know that the information they have entrusted to the mediator, regardless of the time, is protected in accordance with the principle of confidentiality. The charm of mediation, especially in commercial disputes, is related to the principle of confidentiality. All information exchanged during the mediation process is protected by the principle of confidentiality, however, in case of a number of exceptions mentioned in the Law of Georgia on Mediation, the privilege standard of the principle of confidentiality is shifted to the background.[62] When disclosing information protected by the principle of confidentiality becomes mandatory, it is necessary to maintain a balance between the principle of confidentiality of mediation and the public interest.[63] all types of state documents can not be protected by the principle of confidentiality. In the presence of high public interest, the state should provide a sufficiently reasonable reason for the information to be protected by the principle of confidentiality. [64]

Confidentiality of the mediation builds trust between the parties and the mediators. Therefore, this principle offers the parties a secret space for negotiation. When the information provided in the mediation process is not kept confidential, it reduces the degree of efficiency of the mediation process.[65] The mediator, in the role of an outside person, helps the parties to resolve the conflict voluntarily and responsibly, and the essence is that the parties, with the help of the mediator, try to conduct the negotiation process in a structured way and at the same time reach an agreement within the process.[66] An overview of the principle of confidentiality in the light of international standards, as well as the emergence of new threats to the disclosure of information, may require the development of additional standards in national law to protect the rights of the parties. An example of this would be the reflection of information or evidence in the record of a mediation session to provide accurate data that has been disclosed through the mediation process and to automatically protect this information by the principle of confidentiality.[67]

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59 *Kandashvili I.,* Judicial and Non-judicial Forms of Alternative Dispute Resolutions in Georgia on the Example of Mediation, Tbilisi, 2019, 94-95 (in Georgian).

60 Conflict.

61 *Tsertsvadze G.* (ed.), Perspectives of Legal Regulation of Mediation in Georgia, National Center for Alternative Dispute Resolution, Tbilisi, 2013, 25-26 (in Georgian).

62 *Kandashvili I.,* Judicial and Non-judicial Forms of Alternative Dispute Resolutions in Georgia on the Example of Mediation, Tbilisi, 2019, 100-101 (in Georgian).

63 *Brown K.,* Confidentiality in Mediation: Status and Implications, Journal of Dispute Resolution, Vol. 1991, Issue 2, 319.

64 United States v. Kentucky Utilities Co., 124 F.R.D. 146 (E.D. Ky. 1989).

65 *Bichia M.,* The Importance of Using Mediation in Business Disputes During a Pandemic, Herald of Law, №3, 2021, 15-16 (in Georgian).

66 *Kandashvili I.,* Judicial and Non-judicial Forms of Alternative Dispute Resolutions in Georgia on the Example of Mediation, Tbilisi, 2019, 86 (in Georgian).

67 *Kalandadze D.,* The Principle of the Confidentiality in the Mediation Process and Georgian Legislative Reality, Journal "Alternative Dispute Resolution-Yearbook", Special Edition, 2018-2019, 37 (in Georgian).

5.3. Entities Bound by the Duty of Protection of Confidentiality

5.3.1. Parties and Representatives of the Parties

Noteworthy at the outset that the parties have the right to choose a mediator at their discretion. The initiating party of the mediation may send a written invitation to the other party to resolve the dispute through mediation.[68] The other party may accept the invitation or decline it. Only after the consent of both parties do the parties begin to establish rules and select a mediator. During private mediation, in the case of a mediation agreement, the principle of confidentiality binds only the signatories to the contract. Therefore, it is better if third parties, who will be involved in the mediation process, will sign the contract as the parties, representatives, and mediator do.[69] The personal participation of the parties in the mediation process is of great importance. In the mediation, the representatives of the parties should take into account that they are not in a mode of battle. The representative must advise the party if will be useful to commence the mediation process for the party. Also, the representative should give the party an overview of the benefits and disadvantages of mediation.

5.3.2. Mediator, Third Parties

A mediator should be a good listener, motivator, creative thinker, and at the same time, a seeker.[70] The passivity of the mediator should not affect the active phase of the mediation process. One way of obtaining confidential information is information directly entrusted by the party to the mediator, while the other way is the information collected by the mediator in the mediation process. The mediator should protect these two types of information with the principle of confidentiality.[71] The high level of public trust in the mediator helps the development of mediation in commercial disputes.[72] According to the established standards of the mediator: A) must be neutral and must not become a lawyer for either party; B) must focus on the interests of the parties and be able to separate them from the positions of the parties; D) Always must look for possible solutions. However, the function d) depends on the consent of the parties, which means that in addition to the role of the facilitator the mediator will play the role of "appraiser". It is better if the mediator receives such consent at an early stage. [73]

5.4. Equality of the Parties

One of the characteristics of mediation is the equality of the disputing parties. This means that both parties should enjoy equal rights both in the mediation process and in setting the mediation agenda and choosing a mediator.[74] The obligation of the disputing parties to act in good faith and to try completion of the dispute by agreement manifests equality as well. Though, of course, they are independent in making

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68 *Austermiller S. M., Swenson D. R.,* Alternative Dispute Resolution Georgia: A Textbook of Essential Concepts, Tbilisi, 2014, 150 (in Georgian).

69 Erskine White et al v. Susan A. HOLTON, dba Gabriel Ames Associates, Superior Court No. 927915E, Oct.4, 1993.

70 *Austermiller S. M., Swenson D. R.,* Alternative Dispute Resolution Georgia: A Textbook of Essential Concepts, Tbilisi, 2014, 172 (in Georgian).

71 *Gibson K.,* Confidentiality in Mediation: a Moral Reassessment, Journal of Dispute Resolution, Vol. 1992, №1, Art. 5, 30.

72 *Chitashvili N.,* Fair Settlement as Basis for Ethical Integrity of Mediation, "Alternative Dispute Resolution-Yearbook", Special Edition, 2016, 21 (in Georgian).

73 *Austermiller S. M., Swenson D. R.,* Alternative Dispute Resolution Georgia: A Textbook of Essential Concepts, Tbilisi, 2014, 172-173 (in Georgian).

74 *Kandashvili I.,* Judicial and Non-judicial Forms of Alternative Dispute Resolutions in Georgia on the Example of Mediation, Tbilisi, 2019, 103 (in Georgian).

decisions, and the possibility of reaching an agreement is defined (determined) by both parties. The content of this principle derives from the nature of disputes subject to mediation and paragraph 6 of Article 8 of the Law of Georgia on Mediation, based on which the mediator has the obligation to fully ensure equality of the parties in the mediation process. [75]

5.5. Neutrality, Impartiality

One of the main characteristics of mediation is the neutrality and impartiality of the mediator. The mediator should lead the process impartially, which means that the mediator should not give instructions to either party during the negotiations.[76] Article 6 of the Law of Georgia on Mediation regulates the impartiality of the mediator.[77] According to an established international standard, when a person is selected as a mediator, he or she should, as far as possible, identify circumstances that call into question his or her impartiality and independence. [78] According to the current legislation, the mediator must notify the parties in writing about this. In the event of the consent of the parties, the mediator has the discretion to remain a mediator in a particular mediation process or not.

As for the principle of neutrality, a distinction is made between personal neutrality and the mediator's neutrality towards the mediation process. Personal neutrality implies an absolutely independent and impartial approach to the personalities of the disputing parties, in which there should be no outward (apparent) suspicion that the mediator has any kind of relationship with either party. As for the neutrality of the mediator towards the process, in this case the mediator should not be supporter of the interests of either party. For the parties not to doubt the mediator's impartiality and neutrality, a mediator's reputation and personal characteristics must respond to public perception, so the mediator could gain their trust.[79]

5.6. Challenges Facing Georgia in the Field of Mediation

The difference between litigation and mediation costs varies from state to state. In Germany, for example, litigation is less expensive because litigation costs and court fees are regulated by law, and lawyers rarely take hourly fees. This in itself makes legal fees predictable and allows insurance companies to offer legal costs insurance to the parties to cover these taxes.[80] In Georgia, the repayment of a mediator and a lawyer is regulated by agreement, and court costs are a separate burden for the disputing parties. In my view, this will be a new challenge in Georgia, which should be resolved by monitoring both: the duration of the process and the agreement of mediation. If we say that mediation was created to relieve/help the judiciary and effectively resolve disputes, then the financial availability and cheapness of mediation are the important factors. However, the proper functioning of mediation should consider the reasonable expectation of the party that the settlement reached as a result of an alternative dispute resolution will not remain unfulfilled.[81] However, whether the amount of the state duty for the execution of the agreement of mediation corresponds to the concept of cheapness, and effectiveness of mediation, is suspicious.[82]

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75 *Dzagnidze D.,* Georgian Regulatory Model of Mediation in the Background of Legislative Reform, Perspectives of Legal Regulation of Mediation in Georgia, Tbilisi, 2021, 10 (in Georgian).

76 *Kandashvili I.,* Judicial and Non-judicial Forms of Alternative Dispute Resolutions in Georgia on the Example of Mediation, Tbilisi, 2019, 107 (in Georgian).

77 Law of Georgia on Mediation, 18/09/2019, 4954-Is, Article 6.

78 *Tsertsvadze G.* (*ed*.), Perspectives of Legal Regulation of Mediation in Georgia, National Center for Alternative Dispute Resolution, Tbilisi, 2013, 44 (in Georgian).

79 *Kandashvili I.,* Judicial and Non-judicial Forms of Alternative Dispute Resolutions in Georgia on the Example of Mediation, Tbilisi, 2019, 106-109 (in Georgian).

80 *Trenczek T., Loode S.,* Mediation "Made in Germany"- a Quality Product, Vol. 23, 2012, 63-64.

81 Explanatory Card on the Draft Law of Georgia on Amendments to the Civil Procedure Code of Georgia, Ministry of Justice of Georgia, 07-2/319/9, 13 April 2019.

82 Law of Georgia on State Duty, 29/04/1998, 1363. Article 4 Paragraph 1, subparagraph A.[6]

Also noteworthy, in collective disputes, the right of the Minister of Labor, Health and Social Affairs to receive a report from a mediator comes in collision with the requirement of the normative act to the mediator to keep confidential all information entrusted to him during the mediation process. In my opinion, in the future, it would be better to add another paragraph to Article 63 of the Labor Code of Georgia, which will clearly define what kind of information/report the mediator is obliged to provide to the Minister of Labor, Health, and Social Affairs. It should also be considered to what extent the information obtained during the mediation process should be reflected in the report, so as not to violate the principle of confidentiality.[83]

Any information that the parties in writing agree to disclose will no longer be considered confidential information. This gives us reason to assume that this information is no longer subject to Article 10 of the Law on Mediation consequently, the use of this information in court will not be considered a breach of confidentiality. Moreover, there is a record in the Code of Civil Procedure that the court will not accept the information received from the mediation process as evidence unless the parties agree in writing about this matter.[84] However, since this is an assumption, it is better to mention in Paragraph 2 of Article 10 of the Law on Mediation that this rule applies to the information on the confidentiality or disclosure of which the parties have not agreed in an additional written form, although this rule or a different agreement between the parties does not oblige the mediator to disclose the information which he holds. [85]

6. Conclusion

Mediation, as an alternative dispute resolution, allows the disputing parties to set their own standards of justice, establish rules, and demand what they want to get out of the dispute. Mediation, as a process based on the interests of the parties, increases the rights of the mediator to the extent that the disputing parties allow.

Under national law, presumably, Georgia has a narrow model for regulating mediation, especially it is reflected in the right of parties at its discretion to plan the mediation process, decide on the involvement of third parties, and most importantly even agree on different rules for the protection of confidential information. The neutrality and impartiality of the mediator during the mediation process reinforce the factor of trust between the parties. Also noteworthy is the German model of mediation, according to which alternative dispute resolution took on a non-binding form and repositioned (shifted) to the private sector. However, there is a danger here as well, how ready the state justice system is with human resources and finances to remove mediation from the mandatory character, in order to prevent the replacement of justice by an alternative dispute resolution mechanism in the future. The advantages of mediation are speed, cost reduction, control of the outcome by the parties, maintaining relationships, confidentiality, enforcement of the settlement, and compliance with the agreement reached through the mediation process and the desired outcome.[86]

Also, in terms of confidentiality, it is quite important for enterprises, which consist of an employer and an employee, a modified form of mediation integrated into labor relations. Reducing the voluntariness of the parties and forcing one of the parties to start mediation reduces the completion of the mediation process by the mutual agreement, however nevertheless, the employer understands the content of the problem better, and this may be the basis for a change in his views or internal policy. With this change, the employer will avoid future disputes, and mediation will bring positive results for employees in the future. Also noteworthy, in collective disputes, the right of the Minister of Labor, Health, and Social Affairs to receive a report from a mediator. From my perspective, henceforward, it would be better to clearly define what extent and what kind of information the mediator must give to the Minister.

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[83] *Batiashvili I.,* Confidentiality in Mediation in Resolving Property Disputes: Reality and Challenges, Law and World, №8, 2022, 76-116 (in Georgian).

[84] Civil Procedure Code of Georgia, 14/11/1997, 1106, Book I, Section III, Article 104.

[85] *Batiashvili I.,* Confidentiality in Mediation in Resolving Property Disputes: Reality and Challenges, Law and World, №8, 2022, 76-116 (in Georgian).

[86] *Austermiller S. M., Swenson D. R.,* Alternative Dispute Resolution Georgia: A Textbook of Essential Concepts, Tbilisi, 2014, 141 (in Georgian).

The majority of Georgian citizens try to resolve any property disputes by appealing to the court, which leads to an overload of the judiciary. Therefore, in recent years, the development and strengthening of the institution of mediation is considered to be one of the best ways to unload/help justice in Georgia.[87] Defining the exact time limit for the suspension of a dispute in national law is somewhat a prevention of the mediation from becoming as a long-winded tedious event. As for the enforcement of the settlement, the agreement reached as a result of both court and private mediation has legal force under the legislation of Georgia.[88] Maintaining business relationships is one of the major benefits of the mediation process. It does not matter what kind of the result the mediation will be completed, as the dispute will remain psycho-emotionally relaxed and in addition the disputing parties will already be informed of the real causes of the dispute. As a counterweight/on the contrary to this advantage we can even consider of the phenomenon of the insincere[89] party.[90] During the mediation process, the parties should not be coerced from someone into agreeing on any kind of issue. However, notable that the confidentiality of the entire mediation process is one of the strongest advantages of alternative dispute resolution.

Also, it is better to mention in Paragraph 2 of Article 10 of the Law on Mediation that this rule applies to the information on the confidentiality or disclosure of which the parties have not agreed in an additional written form, although this rule or a different agreement between the parties does not oblige the mediator to disclose the information which he holds.

According to commercialization, it has been suggested that in the focus of the broader concept of privacy, personal data may be considered part of property rights, which increases the probability that this data will be more effectively protected.[91] From this point of view, we can conclude that the personal information obtained during the mediation process enjoys maximum protection, and also it can be seen in the context of property rights, moreover, in conditions of the individual characteristics[92] of business relations. The resolution of the dispute by agreement depends on the willingness of the parties to become the driving force of the mediation process. In this regard, it would be good to raise public awareness on certain issues: the purpose (aim) of starting mediation, concrete[93] expectations, and knowledge of the general standard of advantages and disadvantages of mediation.

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87 Explanatory Card on the Draft Law of Georgia on Amendments to the Civil Procedure Code of Georgia, Ministry of Justice of Georgia, 07-2/319/9, 13 April 2019.

88 Law of Georgia on Mediation, 18/09/2019, 4954-Is, Article 12.

89 Party not acting in good faith.

90 *Austermiller S. M., Swenson D. R.,* Alternative Dispute Resolution Georgia: A Textbook of Essential Concepts, Tbilisi, 2014, 142 (in Georgian).

91 *Bichia M.,* The Danger of the Privacy "Disappearance" during a Pandemic in the Context of Globalization and the Grounds for its Legitimacy: an Institutional Analysis, "Globalization and Business", №11, 2021, 45 (in Georgian).

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