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**LEGAL ASPECTS OF MEDIATION INSTITUTION IN
GEORGIA**

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I declare that I have compiled the paper independently and all works, important standpoints and data by other authors have been properly referenced and the same paper has not been previously been presented for grading. The document length is 19.987 words from the introduction to the end of conclusion.

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TABLE OF CONTENTS

ABSTRACT.....	4
INTRODUCTION.....	5
1. MEDIATION AND ITS MAIN SIGNS.....	8
1.1. Positive and negative sides of mandatory and voluntary mediation.....	9
1.2. Historical experience of settlement disputes in Georgian Legislation.....	13
2. INTERNATIONAL REGULATION OF MEDIATION.....	16
2.1. Uniform Mediation Act.....	18
2.2. UNCITRAL.....	19
2.3. EU Directives.....	21
3. MEDIATION MODELS IN GERMANY, USA AND GEORGIA.....	23
3.1. Mediation in Germany.....	24
3.2. Mediation in the USA.....	27
3.3. Mediation in Georgia.....	29
3.4. Recommendations from international experts.....	35
4. MEDIATION AND ADVOCACY WORK.....	41
4.1. Attorney’s ethical obligations in accordance with the Code of Ethics of the Georgian Bar Association and the Model Rule.....	43
4.2. Analysis of private case of violation of attorney’s ethical obligations in Georgia.....	48
CONCLUSION.....	51
LIST OF REFERENCES.....	55

ABSTRACT

Today mediation is one of the popular ways to solve legal dispute. It is focused on solving legal dispute quickly and getting mutually beneficial result for the parties. In Georgia mediation is still new institution and its development is at the initial stage. For effective functioning of judicial mediation in Georgia it is necessary to develop a model that will successfully respond to the challenges facing the Georgian judiciary system. The introduction of a new legal institution is a challenge, because it isn't enough to transfer the model, strategy or implementation plan prepared by an international organization in to local legal system, especially when there isn't universal formula for the successful implementation. For the successful establishment of legislative novelty, it is necessary to develop certain visions and principles regarding court mediation policy in Georgia.

Mediation is a great opportunity and challenge for Georgian justice system. There are a lot of court disputes and it will be reduced by development of the mediation institution. In order to reach vivid results, the establishment of legislative basis and the scientific elaboration on the issue is needed. Another problem is the absence of the ethical code for lawyers in mediation. In Georgia, there is some disagreement around regulation subject and methodology on ethical standards of a lawyer participating in the mediation process. The aim is fast and timely realization of the court mediation project that will have crucial importance to gain public trust towards the court mediation and develop recommendations for improvement of mediation.

Keywords: mediation, ethics, lawyer mediator, court mediation, mediation advantage

INTRODUCTION

Mediation is a new phenomenon for Georgian legal system. It is “*A process in which the parties to a dispute with the assistance of a neutral third party (the mediator), identify the disputed issues, develop opinions, consider alternatives and endeavour to reach an agreement.*”¹ In this process “The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.”² In order for mediation to become more popular and be used further in Georgian legal system, must become the subject of the legal analyses and the public discussion. In the last few years the statistics show that using court to solve disputes isn't always effective and good idea. In this situation introduction of mediation, as an alternative method of dispute resolution is a right and timely decision. However, if Georgian judicial system wants to give mediation wide opportunity, it needs itself to be established in the society so that it will gain trust from the Georgian society. This will be guaranteed by establishing correct legislative regulation.

Today people actively use mediation in various legal disputes. After the information about mediation became more accessible to public, the wide use of mediation started.³ Many interesting facts happened about mediation in Georgia during 2012.⁴ Mediation has a long history in Georgia. However, the problem is how much we will be able to integrate this institution into the existing legislation in the 21st century. There is no universal formula for the successful implementation and introduction of this new legal institution.

Along with the popularization of the mediated activities, it becomes more important and more relevant the legal regulation of ethical issues during mediation process. A special role has the advocate representative of the party in the mediation process that should provide qualified and good legal service to the client. Absence of ethical obligations for lawyers in the mediation process is also a big problem in Georgia. There are some disagreements around the regulation

¹*Global Trends in Mediation.*(2003).Ed/ N. M. Alexander. s.l.Otto Schmidt Verlag DE, p. 40.

²*Arbitration and Dispute Resolution in the Resources Sector: An Australian Perspective.* (2015).Eds./G.A.Moens., P. Evans. Volume. 43. s.l. Springer, p.103

³Kandashvili, I. (2017). Mediation –New Form of Alternative Dispute Resolution and the Prospect for its Legal Regulation in Georgia. *Ivane Javakhishvili Tbilisi State University Journal of law*, No. 2, 84-90, p. 115.

⁴National Center for Alternative Dispute Resolution.(2013). Prospects of legal regulation of mediation in Georgia. Tbilisi, 3-263, p. 17. (დავის ალტერნატიული გადაწყვეტის ნაციონალური ცენტრი.(2013). მედიაციის სამართლებრივი რეგულირების პერსპექტივები საქართველოში. თბილისი, 3-263. გვ.17).Accessible: [http://www.library.court.ge/upload/5529edited-final-version-\(1\).pdf](http://www.library.court.ge/upload/5529edited-final-version-(1).pdf)

and methodology regarding ethical obligations of a lawyer participating in the mediation process. For development of well perceived legislative regulation, it is necessary to develop certain vision and principles regarding court mediation policy first of all. It is important to determine whether the lawyer's representation in the mediation process is an advocacy activity and the universal ethical obligations of the lawyer apply to it, or not.

The thesis will focus on the following research questions, what gaps exists in the regulatory framework addressing foundational questions and institution of mediation in Georgia? How can these gaps be filled? The aim to be achieved with this thesis is to help with effective implementation of mediation institute in Georgia, develop recommendations for improvement of legal regulations of new ADR form and setting rules of ethical standards for lawyers involved in the mediation process. The author uses qualitative, analytical and explanatory approaches. In order to answer the research questions presented in the thesis, it is important to discuss them from legal perspective. Comparative method will be used to analyze different judicial regulatory norms of judicial mediation in Georgia, Germany and the USA. Germany and USA is used, because mediation was developed there earlier compared to Georgia, because of economical, historical and legal reasons. The comparative method will show that the problems regarding mediation institutions in Georgia is similar as it was in the USA and Germany. Also different EU directives on mediation and model rules will be discussed. Historical facts about the origination and development of mediation in Georgian legal systems will be elaborated. In general, selected methods of the research are focused on the integration of knowledge obtained in practice and theory. The use of those methods will facilitate the study of judicial mediation further. Scientific books and journals, research papers, EU directive on mediation and UNCITRAL model rules, American, German and Georgian local legislation on mediation will be used. Also case from Georgian judiciary practice will be analyzed, as well as recommendations from international experts will be presented.

This thesis is important from a theoretical and practical point of view, as it will facilitate the development of practice and regulatory norms regarding mediation in Georgian among legal and civil society. Also based on analyzes collected from historical experiences regarding mediation in Georgia, it is possible to create a conceptual vision about the development of the court mediation system in Georgia. In this thesis the following hypothesis will be justified: The lack of legal certainty in the Georgian regulatory framework concerning mediation would be reduced by implementing the relevant EU regulatory instruments on mediation and introducing mandatory

mediation. It will be justified based on the analyses done by the author. The universal ethical liabilities of the lawyer apply to the lawyer participating in the mediation process as well, since lawyer has universal meaning and he must maintain its professional ethical standards always for the sake of the proper conduct of mediation process.

The thesis is divided into four chapters. Each of it is divided into sub-chapters. In the first chapter author discusses mediation in general, it's positive and negative sides and what makes it more beneficial compared to the court system. Historically it will be shown that mediation isn't new for Georgian reality. In the second part the international regulation of mediation processes will be discussed in Georgia, Germany and the USA, also the EU directive on mediation and UNCITRAL model rules will be discussed in order to understand, which system and rules will be ideal for Georgian legal system. In chapter three, the situation regarding mediation in Georgia will be discussed, what problems it faces and what changes it needs. In the final chapter the role of attorney in the mediation process will be discussed and attorney's ethical obligations in accordance with the Code of Ethics of the Georgian Bar Association and the model rule will be shown, as well as analysis of private cases of violation of attorney's ethical obligations in Georgia. In the end above mentioned hypothesis will be justified and author will try to give recommendations and suggestions what should be done in order for mediation to become more popular in Georgia and perspectives of future development of mediation in Georgia.

1. MEDIATION AND ITS MAIN SIGNS

Today more and more people are willing to solve dispute fast, cheaper, out of court and reach their desired result. The mediation can be considered as a beneficial method for resolving disputes in today's modern world. O.J. Coogler explains mediation in the following words: "When two or more persons are having trouble resolving a controversy, they may agree to turn to a neutral third person who will help them resolve it. Agreeing to work out their problems in this way is called mediation. It is also a commitment to reach settlement cooperatively rather than in a competitive struggle with each other."⁵ This method seeks to reach agreement where both parties are winners and the mediator is a person, who gives them several options and the parties are the ones who make decisions. It involves "win-win"⁶ method. Parties have possibility to have good relationship after the process.⁷ Another definition of mediation is that: "mediation is a voluntary process in which parties to a dispute, with the help of a neutral third party, explore ways to resolve their differences and reach a satisfactory resolution."⁸ "Mediation is neither the practice of law nor the practice of therapy."⁹ It can be considered as a non-traditional means of dispute resolution, because there aren't such strict rules as it is in court system and parties are responsible for the outcome of the process. The court system may not be always effective and rational, because of that parties choose to mediate. The popularity of mediation institute is guaranteed by the following key indicators:¹⁰

- Informal process;
- Neutrality principle;
- Mediation process is confidential;
- Parties must be present during mediation process;
- Focusing on interests and not rights.

⁵Hyde, L. (1984). Mediation. *Juvenile Family Court Journal*, Vol. 35, No.1, 57-72, p. 57.

⁶Bannink, F. P. (2008). Solution focused mediation. *Trial Excellence*, Vol. 20, No.3, 13-21, p. 13.

⁷Hardy S., Rundle O.(2010). *Mediation for Lawyers*. s.l. CCH Australia Limited, p. 8.

⁸Hyde, L. (1984), *supra nota 5*, p 57.

⁹Waxman, G.; Press, S. (1991). Mediation: Part ii: Mediation in florida. *Nova Law Review*, Vol. 15, No. 3, 1211-1226, p. 1211.

¹⁰*Ibid.*, p. 1212-1215.

It can be said that the ADR in various countries is used with different approaches, but common grounds.¹¹ Mediation institution is new for Georgian reality and it needs proper development plan.

Mediation is more popular in certain countries compared to others. The reason for this could be the lack of exposure of the mediation institution and the lack of professional mediators in those countries.¹² It was mentioned above that one of the mediation aspects is the voluntary process. However, there is also “mediation exceptionality”¹³ which means that there is mandatory mediation. Mandatory mediation can have more negative effects compared to voluntary mediation, since person hates to be controlled and is characterized as a rebellious kid.¹⁴ In the following chapter the positive and negative sides of mandatory and voluntary mediation and which is best suited for the Georgian legal system will be discussed.

1.1. Positive and negative sides of mandatory and voluntary mediation

One of the important aspects of mediation is its voluntary nature. It gives parties more confidence to take part in the process and reach desired results. Professor Jennifer David described voluntary mediation in the following form: “Experience has shown that willingness to negotiate and to bargain in good faith is the decisive factor in whether a case is suitable for conferencing or mediation.”¹⁵ There is no guarantee that the case will be resolved if parties don’t want to participate and aren’t motivated to find a solution to their problems. Senior Member of the Commonwealth Administrative Appeals Tribunal, John Handley said: “Voluntary participation also ensures that mediation will not be used as a case management tool or used by the tribunal to ensure or manipulate speedy resolution of applications for the sake of case management.”¹⁶ Senior female lawyer mediator, who states that: “I guess the difference is in the culture or the mindset of the parties. I think in a perfect world we would have a voluntary system. But I don’t think our society, our culture, is there yet where we can look at the benefits beyond a settlement outcome.”¹⁷ We can see that there should be willingness factor and parties

¹¹*21st Century Communication: A Reference Handbook*. (2009). Ed/W.F. Eadie. Volume no. 1. California, London, New Delhi: SAGE, p. 215.

¹²Hill, R. (1995). Non-adversarial mediation *Journal of International Arbitration*, Vol. 12, No. 4, 135-144. P. 137.

¹³Nolan-Haley, J. (2009). Mediation exceptionality. *Fordham Law Review*, Vol. 78, No. 3, 1247-1264, p. 1247.

¹⁴Paulk, J. H. (2001). Why mediation works. *Tulsa Law Journal*, Vol. 36, No. 4, 861-864, p. 863.

¹⁵Spencer, D., Brogan, M.(2007). *Mediation Law and Practice*. New York: Cambridge University Press, p. 267.

¹⁶*Ibid.*, p. 267.

¹⁷Relis, T.(2009). *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs, and Gendered Parties*. s.l. Cambridge University Press, p. 65.

must realize the importance and value of mediation. It is also important to know the reason why parties may be against mediation. The best way to reduce the fear of the unknown is to educate lawyers on mediation so that they will know benefits of it.¹⁸ The voluntary nature of the mediation is also presented in the first paragraph of European Parliament and European Council Directive no. 2008/52/CE which states: “The mediation provided for in this Directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time.”¹⁹ The author thinks that if mediation will be forced upon parties it will be less durable and the purpose of mediation will be lost. The wording, “including after the start of a law suit before the courts”²⁰ means that parties can start dispute settlement process with mediation unless the case is pending in the court. The perfect mediation scenario is when parties are oriented on the solution of problems and not on winning in the psycho-legal war. The author thinks that the openness of the parties, variety of options and the power of decision making makes voluntary mediation more preferable by the parties. However, first of all society must have strong mediation and court system in order to effectively use voluntary mediation in practice.

We can say that there doesn't exist one ideal model of mediation for every country in general. The model of mediation depends on the culture and social system of each country separately.²¹ In George Orwell's work, called *Animal Farm* it is mentioned: “All animals are equal, but some animals are more equal than others”.²² Based on that it can be stated that, “All mediations are voluntary, but some are more voluntary than others.”²³ This means that courts must consider and adopt practices from other countries and consider the interests of the parties involved in the process in order to show the full potential of mediation.

Today mandatory mediation is quite popular and effective mean of dispute resolution all over the world. For example, in Italy mandatory mediation helped to “eliminate one million cases”²⁴ and

¹⁸Smith, G. (1998). Unwilling actors: Why voluntary mediation works, why mandatory mediation might not. *Osgoode Hall Law Journal*, Vol. 36, No. 4, 847-886, p 880.

¹⁹Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008, p. 3–8.

²⁰Rosu, A. (2010). Mediation voluntary or mandatory procedure. *Acta Universitatis Danubius Juridica* 2010, No.1, 121-126, p. 124.

²¹Ali, S. F. (2018). Nudging civil justice: Examining voluntary and mandatory court mediation user experience in twelve regions. *Cardozo Journal of Conflict Resolution*, Vol. 19, No. 2, 269-288, p. 273.

²²Hedeem, T. (2005). Coercion and self-determination in court-connected mediation: All mediations are voluntary, but some are more voluntary than others. *Justice System Journal*, Vol. 26, No. 3, 273-292, p. 286.

²³*Ibid.*

²⁴Hanks, M. (2012). Perspectives on mandatory mediation. *University of New South Wales Law Journal*, Vol. 35, No.3, 929-952, p. 937.

reduce overload of the cases in the court.²⁵ Green paper of April 2002 states that: “ADR offers a solution to the problem of access to justice faced by citizens in many countries due to three factors: the volume of disputes brought to the courts is increasing, the proceedings are becoming more lengthy and the costs incurred by such proceedings are increasing.”²⁶ Professor Frank Sander mentions mandatory mediation as “categorical”²⁷ type court mediation. He argues that mandatory mediation must include option of opt-out, where parties can refuse to mediate at any stage of the proceeding. These options can be seen in Australian legal system and English Court of Appeal.²⁸ The second term used by Sanders is “discretionary”²⁹, which allows judge to start mediation process without consent of the dispute parties. It is popular more in Australia rather than in Europe.³⁰ The third term is “quasi-compulsory”.³¹ Mandatory mediation is affected by local and outer components. The question is whether mediation is justified if there is no consent of the parties on it.³² According to the Nadja Alexander “experience in numerous jurisdictions around the world suggests that court-referred ADR only begins to develop as a real alternative to court proceedings where it is subject to some degree of mandating”.³³ We can say from above discussed that due to the effectiveness of ADR many forms of it have been developed, among which the most popular can be seen mandatory and voluntary mediation. The author thinks that the goal of mandatory mediation is to increase the popularity and awareness about mandatory mediation and effectively use judicial resources. The question which law scholars must ask to themselves is, “Has law gobbled up the creativity of mediation: has it subverted mediation to prevent mediation’s subversion of law?”³⁴ The important issue is to think about how to adjust mediation so that it will be in compliance with the needs of dispute parties and to be in compliance with ADR rules at the same time.

The problem is that mandatory mediation may be seen as a “bureaucratic”³⁵ mechanism established by government to control the flow of the dispute resolution and supervision of court resources.³⁶ Mandatory mediation turns mediators into judges and more and more mediation

²⁵*Ibid.*

²⁶*Ibid.*, p. 933.

²⁷*Ibid.*, p. 931.

²⁸*Ibid.*

²⁹*Ibid.*

³⁰*Ibid.*

³¹*Ibid.*

³²*Ibid.*, p. 949.

³³*Ibid.*, p. 951.

³⁴Hughes, P. (2001). Mandatory Mediation: Opportunity or Subversion. *Windsor Yearbook of Access to Justice* Vol. 19, 161-202, p. 171-172.

³⁵*Ibid.*, p. 192.

³⁶*Ibid.*

processes replace court. This makes mandatory mediation part of judicial process, rather than voluntary. Stempel states that: “the problem with restricting the mediator’s ability to raise questions about an agreement is that a party may end up in a worse situation because he or she was forced to mediate than would have been the case at trial.”³⁷ The dilemma is why we have to force person into mandatory mediation if the mediation process is generally considered as a non-binding? In mandatory mediation, parties of the dispute are jammed in to “first to blink”³⁸ situation, where parties wait for each other to make first step in reaching agreement. Mediation process is voluntary. If there is breach of this formulation it can be said that the mediation is improper.³⁹ There is no preferable time when to start mandatory mediation, it all depends on the complexity of dispute itself and whether lawyers have collected all the important information.⁴⁰ In order for mandatory mediation to be successful the following steps should be followed:⁴¹

1. The parties should have the right to decline mediation;
2. The parties should be allowed to select mediator themselves;
3. The court should appoint mediator, if parties aren’t able choose themselves within reasonable time;
4. Individuality is protected and the emphasis should be on finding common solutions;
5. The case should be returned to the court only when the mediation process fails.

Critics say that mandatory mediation is expensive and after this process it is difficult to get to the court. On the other hand, supporters say that, mandatory mediation reduces the overload of the court cases and high costs.⁴² In Italy the existence of mandatory mediation increased the use of voluntary mediation. From that we can see that mandatory mediation elements are seen in other types of mediation models.⁴³

The question arises, whereas the parties haven’t agreed in advance in case of dispute to request for mediation process, how should the disputed parties agree about mediation procedure, if there is a conflict between them already? The answer to this question may vary, but author thinks that the most reasonable one is to raise public awareness regarding mediation, including both models

³⁷*Ibid.*, p. 200.

³⁸ Hutchinson, C. C. (1996). The case for mandatory mediation. *Loyola Law Review*, Vol. 42, No. 1, 85-96, p. 89-90.

³⁹*Ibid.*, p. 90.

⁴⁰*Ibid.*, p. 92.

⁴¹*Ibid.*, p. 93-94.

⁴²Carson, P. L. (2010). Mandatory mediation: burden for benefit. *Resolved: Journal of Alternative Dispute Resolution*, Vol. 1, No.1, 13-15, p. 13.

⁴³*The New Regulatory Framework for Consumer Dispute Resolution*.(2016). Ed/P. Cortés. New York:Oxford University Press, p. 418.

(mandatory and voluntary). In this case since in Georgia mediation is new and there is weak legal basis for regulating it, mandatory mediation must be justified.

Overall, it can be said that the advantages outweigh the disadvantages. The use of ADR is justified, because it is time consuming and cheap process. The author thinks that mandatory and voluntary mediation has both positive and negative sides. Without proper knowledge and analyzes it is difficult to make a right decision regarding which is more appropriate for Georgian legal system. Because of that problem first of all the research must be done by legal scholars and Georgian authorities. The fact is that, both of them have supporters as well as the opponents in Georgia and abroad.

1.2. Historical experience of settlement disputes in Georgian legislation

In order to be able to find out what problems mediation institution has in Georgia first of all the first evidence of existence of mediation mechanisms in Georgia must be discussed. According to H. Berman, legal term “has not only history, but it tells us a history itself”.⁴⁴ As researcher of history of law G. Davitashvili mentions in his work, the term mediator first appeared in Georgia in 1802.⁴⁵ We can say that mediation process was seen at early stage of social and judicial development in Georgia. According to historical documents there have been several terms referring to mediator: Mediatori, Bche, Rjulis Kaci (Man of Denomination), Morevi, Intermediary, Metskulari, Lepkhuli and Makhvshi.⁴⁶ Mediation first appeared in Georgia based on the customs law, called “redemption through blood”⁴⁷, where person killed member or his family member of the murderer in order to get revenge. With the elimination of community system, government started to converse legal power in its hands.⁴⁸

The judge with the functions of mediator first appeared after the reforms in Russian Empire in 1864, who considered cases not exceeding 500 Rubles (Russian money). The cases, which judge-dispute settler examined covered cases regarding personal insult, property, robbery (not

⁴⁴Oniani, S. (2013). For the Meaning of Term "Btche" in Old Georgian Law. *Ivane Javakhishvili Tbilisi State University Journal of law*, No. 2, 13-23, p. 13.

⁴⁵Tsuladze, A.(2016). Conceptual Vision of Court Mediation. *Ivane Javakhishvili Tbilisi State University Journal of law*, No.1, 138- 157, p. 139.

⁴⁶Tkmaladze, S.(2017). *MEDIATION IN GEORGIA: FROM TRADITION TO MODERNITY*, p. 13-14. Accessible: http://www.ge.undp.org/content/dam/georgia/docs/publications/DG/UNDP_GE_DG_mediation_eng.pdf, 20 November 2018.

⁴⁷*Ibid.*, p. 15

⁴⁸*Ibid.*

exceeding 300 Rubles).⁴⁹ For the Georgian people living in the mountains it was very difficult to accept Russian laws, because they saw that it was unfair and a lot of bribe was seen. In order to reach satisfactory results they had to take Vodka to judges. According to Vazha Pshavela, “If all cases of Khevsureti were subject to the new laws, Khevsureti would be based in Kamchatka by now”.⁵⁰ According to Aleksandre Tsuladze it might be strange to consider judge and mediator as one and the same person, however according to the situation at that time it can be justified, since the objectives and tasks both had were similar. Today judge and mediator are used as synonyms in many parts of the world, including USA and Germany.⁵¹

Another significant document is the Law Book of Vakhtang VI. In it is mentioned: “Where two individuals have a dispute, it should be submitted to the judge; however, if they do not wish to approach the King, the Patriarch, the Metropolitan or the judge for justice, then such individuals may select one person. They should approach this person and inform him about the dispute while declaring that they will accept his decision. Such a person will be referred to as the mediator”.⁵² According to the Bill of Davit Batonishvili “the mediators may be appointed by the King and may also be chosen by the parties. If the mediator fails to consider the case, then the party has to refer to the “initial justice;” that is, the King’s court.”⁵³ The interesting fact here is that during those times person had the right to choose mediator himself and not the King, who was the high sovereign. If the mediation process failed the case was referred to the court again. We see that some parts of mediation process haven’t changed fundamentally up till now. According to the regulation which entered in to force on November 22, 1866, “the judge-conciliator was granted personal judicial powers over his district. He was competent to decide civil cases as well as criminal actions and infractions determined by the statutes on civil and criminal law proceedings.”⁵⁴ We can see that mediation system was developing and it had more structured regulations. Mediators could carry out civil and criminal cases.

On February 1, 1868 Ilia Chavchavadze was appointed as a mediator judge.⁵⁵ He can be considered first person as a mediator in Georgia. His name is related with the establishment of mediation institution. He has written many articles regarding alternative means of dispute resolution. In one of his works he has written: “the further life goes on, the harder relations

⁴⁹Tsuladze, A.(2016), *supra nota* 43, p 139-140.

⁵⁰Tkemaladze, S.(2017), *supra nota* 44, p 19.

⁵¹Tsuladze, A.(2016), *supra nota* 43, p 140.

⁵²Tkemaladze, S.(2017), *supra nota* 44, p 16-17.

⁵³*Ibid.*, p. 17.

⁵⁴Tkemaladze, S.(2017), *supra nota* 44, p 18.

⁵⁵Tsuladze, A.(2016), *supra nota* 43, p 140.

between people are. We encounter brisk trade exchange and hence, importance of the settler court is higher. More and more cases the Court has to deal with and the small number of the Courts is insufficient to meet the requirements of local jurisdiction...”⁵⁶ “People need quick and easy, informal Court. Violated rights need to be quickly restored”.⁵⁷ We can say that this issue is relevant even today, because court system suffers from case overload. Adding judges isn’t enough. As Ilia has stated, if mediators will increase it will help people to get closer to justice.⁵⁸

Levan Zhorzholiani thinks that delay in establishment and development of mediation institution in Georgia was, because of countries integration in Soviet Union 70 years ago. There wasn’t private property, since Soviet authorities were rudely interfering in every part of human life and they couldn’t raise their voices against injustice. After Georgia became independent, there was another disaster, the civil war, after which the Georgian judiciary system was in a vital situation. In 2011 the idea of creating alternative methods of dispute settlement was introduced. The problem is that court mediation is still in progress and needs a lot of reforms. The political and social will is needed in order to make new changes and regulations.⁵⁹

The author thinks that in order to develop mediation in Georgia comparative methods is important, so that Georgia is able to create its own mediation system and won’t just copy paste it in its legal system. Culture, history and local legislation must be considered, while creating suitable model.

⁵⁶*Ibid.*, p. 141.

⁵⁷*Ibid.*

⁵⁸*Ibid.*

⁵⁹Zhorzholiani, L.(2015). Development of Mediation and Comparative Law. *Ivane Javakhishvili Tbilisi State University Journal of law*,122-125, p. 125.

2. INTERNATIONAL REGULATION OF MEDIATION

As it is known the cases pending in the court are regulated by legislation. The mediation process needs legislative regulation as well, because of its flexible and informal process, so there is always risk that strong will have big influence on the weak.⁶⁰ The author thinks that principle of fairness might be at risk because of unregulated mediation. The parties need to be sure that the process will be justified and fair, as well as the mediation process structure will be guaranteed. The mediation process is decided by parties themselves, so we can say that there is autonomy principle as well.

The regulation of mediation is considered as a debatable topic today.⁶¹ The regulation of mediation process can be divided in two categories: extensive and restrained regulation. The main point is to carry out certain provision are mandatory.⁶² The group of certain countries: Japan, Austria and France rely on comprehensive method, which includes wide range of regulatory norms. For example in Australia civil matters are regulated by the Civil Law Mediation Act, the Civil Law Mediator Training Regulations, and the EU Mediation Act. In France mediation is regulated by the Code of Civil Procedure, the Code of Criminal Procedure, the Labor Code and the Civil Code. Japan uses same method, however with fewer regulatory acts. The “Act on the Promotion of the Use of Alternative Dispute Resolution”⁶³ is created as a reference law, which provides the legal framework for mediation for a wide variety of institutions outside state jurisdiction.”⁶⁴

The second group of countries use “restrained”⁶⁵ law approach. The supporters of this approach say that mediation isn’t so well developed yet to regulate it systematically. The strict regulation would be considered as a barrier for development of mediation. In England there is Civil Mediation Council, which guarantees the quality of mediation processes. In Netherlands there are private organizations, which provide framework of mediation.⁶⁶

⁶⁰Roberts, M.(2014). *Mediation in Family Disputes: Principles of Practice*. 4th ed. Burlington: Ashgate Publishing, p. 251.

⁶¹Alexander, N. (2008). Mediation and the art of regulation. *Queensland University of Technology Law and Justice Journal*, Vol. 8, No.1, 1-23, p. 2.

⁶²*Mediation: Principles and Regulation in Comparative Perspective*. (2013). Eds./ K. J. Hopt , F. Steffek. s.l. OUP Oxford, p.17

⁶³*Ibid.*, p. 18.

⁶⁴*Ibid.*

⁶⁵*Ibid.*

⁶⁶*Ibid.*, p. 18-19.

Regulatory forms are based on government policy, legal tradition and culture and they should all work together. The four main approaches are: “1. market regulation, 2. self-regulation, 3. formal framework, and formal legislative approach.”⁶⁷ According to Australian research clients who have economic difficulties “are more likely to experience difficulty in accessing ADR schemes than those from different demographic backgrounds.”⁶⁸ The problem during regulation is to find silver middle where consistency and diversity will be placed in a uniform legal form.⁶⁹ Tension between diversity and consistency includes the following: “regulatory tension”⁷⁰; “professionalisation tension”⁷¹ and “process tension”.⁷² Paleker states that: “a lack of clear process definition leads to disparate practices.”⁷³ According to New Zealand commentators: “due to the relative immaturity of mediation as a profession and the somewhat unnatural and conflicting principles that underline the differences between ADR and mediation processes (consensual and subjective) and adversarial litigation processes (imposed and ostensibly objective).”⁷⁴ In the end it can be stated that any legal mechanism, which tries to regulate mediation process is to identify and acknowledge mediation qualities and at the same time inform society more regarding mediation process.

Mediation is associated with the soft law, because mediations itself is a voluntary process. Nye defines soft power in the following words: “the ability to “[get] the other to want the outcomes you want,” and is primarily based on three resources: culture (in places where it is attractive to others); political values (when it lives up to them at home and abroad); and foreign policies (when they are seen as legitimate and having moral authority).”⁷⁵ The soft law has become more common after globalization.⁷⁶ According to Hart “Defining “soft law” is difficult because not only there is no consensus on its definition, the term itself is a “nebulous” and oxymoronic with a broad range of meanings.”⁷⁷ Some think that it is non-binding set of rules, others that it has

⁶⁷Alexander, N. (2008), *supra nota* 59, p 3-4.

⁶⁸*Ibid.*, p. 4.

⁶⁹Alexander, N. M.(2009). *International and Comparative Mediation: Legal Perspectives*.Volume 4. s.l. Kluwer Law International B.V, p. 1.

⁷⁰*Global Trends in Mediation*.(2006). Ed/ N. M Alexander .Volume 1.s.l. Kluwer Law International B.V., p. 29.

⁷¹*Ibid.*

⁷²*Ibid.*, 30.

⁷³*Ibid.*, p. 34.

⁷⁴Alexander, N. (2008), *supra nota* 59, p 23.

⁷⁵Vukovic, S. (2015). Soft power, bias and manipulation of international organizations in international mediation. *International Negotiation*, Vol. 20, No.3, 414-443, p. 426.

⁷⁶Galbraith, J., Zaring, D. (2014). Soft law as foreign relations law. *Cornell Law Review*, Vol. 99, No.4, 735-794, p. 744.

⁷⁷*Arbitration and Mediation in the ACP-EU Relations*.(2008). Ed/Association for International Arbitration. s.l. Maklu, p. 164.

binding force and is necessary to be followed. Some even question the existence of such term.⁷⁸ Palmer states that soft law is more “politically convenient”⁷⁹ for government.⁸⁰ Soft law is best suited for mediation since it is non-binding and it changes along with society.⁸¹ The author thinks that recommendation character of mediation makes it more significant in the law system.

Soft law agreements are convenient, because violation of them has low costs, they can be easily changed and have strict conditions. Soft law agreements don’t require ratification and they “lie more completely within the domain of the executive branch of government.”⁸² Some scholars define soft law as a “*rule issued by a lawmaking authority that does not comply with constitutional and other formalities or understandings that are necessary for the rule to be legally binding.*”⁸³ We see that soft law is flexible and can be easily changed. However, at the same time it has strong nature. Based on that, mediation can be called as a soft way of resolving conflict in such a way that it gives person the feeling of satisfaction.

2.1. Uniform Mediation Act

Uniform Mediation act was adopted by National Conference of Commissioners of United form State Laws and by American Bar Association. The main aim of this document is to make sure that the information which is disclosed during mediation process is protected.⁸⁴ It “applies to a mediation in which the parties agree in a record to mediate or are required by statute or referred by a court, governmental entity, or arbitrator to mediate.”⁸⁵ The UMA maintains balance between the rights of parties and mediator. The disadvantage is section 6(a) (5), which allows mediator to disclose information, which has been known for him during mediation process. That makes him “more equal than others”⁸⁶, because victim doesn’t have the right “to compel the mediator to testify.”⁸⁷ That makes dispute parties and mediator in uneven situation. Also if plaintiff wants to cancel settlement agreement under section 6(b) (2) and wants to remove

⁷⁸*Ibid.*, p. 164-165.

⁷⁹*Ibid.*, p.168.

⁸⁰*Ibid.*

⁸¹*New Developments in Civil and Commercial Mediation: Global Comparative Perspectives.* (2015).Eds/C.Esplugues, L. Marquis. Volume 6. s.l. Springer, p. 500.

⁸²Galbraith, J.; Zaring, D. (2014). *supra nota* 64, p 747-749.

⁸³Gersen, J. E.; Posner, E. A. (2008). Soft law: Lessons from congressional practice. *Stanford Law Review*, Vol. 61, No.3, 573-628, p.579.

⁸⁴Deason, E. E. (2002). Uniform mediation act. *Dispute Resolution Magazine*, Vol. 8, No.4, 7-9, p. 7.

⁸⁵Rausch, M. (2003). The uniform mediation act. *Ohio State Journal on Dispute Resolution*, Vol. 18, No.2, 603-618, p. 607.

⁸⁶*Ibid.*, p. 617.

⁸⁷*Ibid.*

mediator, in this situation mediator can't provide evidence and plaintiff can block other party.⁸⁸ The act guarantees confidentiality principle. The private information may be disclosed only if there is serious public threat. Dispute parties actively take part in mediation process and they decide the final decision themselves.⁸⁹ It should be noted that mediation isn't a process which is focused on finding the truth as it is in court. If party sees that it can't show that opponent is lying, the uniform style of the UMA helps parties to conduct mediation process more easily and what measures to take later.⁹⁰ The use of mediation reduces the extra human and economic resources. The state places a great amount effort in to making mediation more popular.⁹¹ States have supported the mediation institutions by funding them. Uniformity of the act guarantees proper work of the act in all states of America the same way: Texas, California and Florida. "Uniformity of the law helps bring order and understanding across state lines, and encourages effective use of mediation in a number of ways."⁹² According to Hughes the UMA follows the following obligations:⁹³

- Confidentiality;
- The active role of dispute parties;
- Parties have the concluding deciding power.

2.2. UNCITRAL

The United Nations Commission on International Trade Law was established by the United Nations General Assembly in 1966, in order to facilitate international trade and make strong regulations, also help with unification of international trade law. It promotes implementation and adoption of the legislative and non-legislative instrument for EU member states, non –EU and international and non- governmental organizations.⁹⁴ In 2002 the Model Law on International Commercial Conciliation (MLICC) was adopted. In the same year the General Assembly stated that this law had significant importance and, "in view of the desirability of uniformity of the law of dispute settlement procedures and the specific needs of international commercial conciliation

⁸⁸*Ibid.*

⁸⁹National Conference Of Commissioners On Uniform State Laws.(2002). The uniform mediation act. *Northern Illinois University Law Review*, Vol. 22, No.2, 165-250, p. 167-168.

⁹⁰*Ibid.*, p.171.

⁹¹*Ibid.*, p.166.

⁹²*Ibid.*, p. 172-173.

⁹³Schneider, A. K. (2001). Which means to an end under the uniform mediation act. *Marquette Law Review*, Vol. 85, No.1, 1-8, p. 2.

⁹⁴United Nations Commission on International Trade Law.(2007). *The UNCITRAL Guide: Basic Facts about the United Nations Commission on International Trade Law*. s.l. United Nations Publications, p. 1.

practice.”⁹⁵ It has recommendation nature and states have to adjust them according to their local legislation.⁹⁶ After the adoption of UNCITRAL rules many international organizations adopted their own alternative dispute resolution mechanisms. Among such organizations are: the International Chamber of Commerce, the American Arbitration Association, ICDR, the London Court of International Arbitration, the Stockholm Chamber of Commerce and the CPR Institute for Dispute Resolution. The Commission working on harmonization of UNCITRAL ADR laws stated that the unification of such laws in countries would guarantee the following: “(i) admissibility of certain evidence submitted in conciliation in subsequent judicial or arbitral proceedings; (ii) the role the conciliator might play in other adversary proceedings, and (iii) the enforceability of settlement agreements reached during conciliation proceedings.”⁹⁷

The model law deals with five issues: the first one is the definition of the term conciliation. The problem is broad definitions, which often makes it difficult of unification the standards of process. The second issue is the principle of the autonomy of the parties, which is the main characteristic of the mediation and conciliation process, and provides the parties with the possibility to avoid any rule which they consider not relevant. The only exceptions are article 2 and 6(3). Third is fair treatment. This characteristic is also important during mediation, since if fairness is violated there is threat that the dispute will move to the court.⁹⁸ The fourth issue is to protect the confidentiality of mediation process and the last one is enforcement of the decision. The confidentiality exists in three types: “insider-outsider, insider-insider, and insider-court.”⁹⁹ Here the mutual agreement is important in order to reach final decision and party autonomy plays important role. The last characteristic doesn’t have mandatory nature. It leaves the decision about the execution of the settlement of the mediation process up to the states. This happens, because there is no unified idea how to apply final decision of mediation process in all countries in the same way.¹⁰⁰

According to van Ginkel, “Both confidentiality and the enforcement of settlement agreements interact closely with the judicial, arbitral and/or administrative adjudicatory systems of the same

⁹⁵van Ginkel, E. (2004). Uncitral model law on international commercial conciliation, the. *Journal of International Arbitration*, Vol. 21, No. 1, 1-66, p. 4.

⁹⁶United Nations Commission on International Trade Law.(2007), *supra nota* 92,p 14.

⁹⁷van Ginkel, E. (2004), *supra nota* 93, p 5-6.

⁹⁸Alexander, N. M.(2009), *supra nota* 67, p 345.

⁹⁹*Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2011)*. (2012). Ed/A.W.Rovine. Volume 5. s.l.Martinus Nijhoff Publishers, p. 395.

¹⁰⁰*Ibid.*, p. 394-395.

or another country, and therefore ought to be mandatory law.”¹⁰¹ The author agrees that countries, where ADR is a new phenomenon and they don't have strong regulations have to look at countries where there are strong and effective regulations and try to comply them with their local laws and those rules must be mandatory, so that it will guarantee better legal system. Both confidentiality and enforcement are important aspect of the ADR processes.

2.3. EU Directives

In 2002 the EU issued green paper on ADR in civil and trading law. It can be considered as a source for re-establishment of mediation institute, since after it, many member states and other countries started to discuss ADR.¹⁰² In 2004 Directive on certain aspects of mediation in civil and commercial matters was presented. Its aim was to cover mediation processes on international and local level. A lot of debate was regarding it. Finally, after four years it was adopted. According to article 1, part 1, mediation directive was created, “to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings”.¹⁰³ However, there are still problems with this directive. It needs consent of the parties and directive doesn't force member States to have special mediation process schemes.¹⁰⁴ The lack of regulations and rules make mediation less desirable and effective. That's why each country must plan with diligence and observation the mediation schemes. Another criticism regarding mediation directive is that it covers only disputes on civil and trading matters and only on international level. Locally it is possible if Member State decides so.¹⁰⁵ The author thinks that the mediation is still considered not as effective as court and that's why there are so many criticism regarding mediation process and its regulation. As we can see most of ADR regulations are considered not to cover comprehensively the existing problems.

In 2013 new enhanced ADR directive was adopted. According to recital 5 of ADR Directive: “ADR... is not running satisfactorily... in the Union. Consumers and traders are still not aware of the existing out-of-court redress mechanisms, with only a small percentage of citizens knowing how to file a complaint... Where ADR procedures are available, their quality levels

¹⁰¹van Ginkel, E. (2004), *supra nota* 93, p 7.

¹⁰²*The New EU Directive on Mediation: First Insights*.(2008). Ed/ Association for International Arbitration . s.l. Maklu, p. 10.

¹⁰³Wrbka, S.(2014). *European Consumer Access to Justice Revisited*. Cambridge University Press, p. 87-88.

¹⁰⁴*Ibid.*, p. 89.

¹⁰⁵*Mediation: Principles and Regulation in Comparative Perspective*. (2013), *supra nota* 60, p 6.

vary considerably in the Member States...”¹⁰⁶ We can see that the lack of knowledge regarding the mediation process is also visible. That’s why government must focus first on raising awareness and after that only it is possible to develop better regulations. The first step could be establishing mediation institutions. The aim of mediation institutions is to promote mediation and raise knowledge in the public, also guarantee the proper work of mediation.¹⁰⁷ According to Alexander N., “one of the risks associated with international mediation standards is the impact they have on the ability of mediation to translate across borders and cultures.”¹⁰⁸ “If globalism is to aspire to a truly open marketplace, then the process of globalising mediation must be inclusive and fair. It must accommodate culturally appropriate, familiar and accessible dispute resolution processes.”¹⁰⁹

¹⁰⁶Wrbka, S.(2014), *supra nota* 101, p 92.

¹⁰⁷*Global Trends in Mediation*.(2006), *supra nota* 68, p. 379.

¹⁰⁸ALEXANDER, N. (2010). Four mediation stories from across the globe. *Rabel Journal of Comparative and International Private Law*. Vol. 74, No.4, 732-758, p .756.

¹⁰⁹*Ibid.*, p. 757.

3. MEDIATION MODELS IN GERMANY, USA AND GEORGIA

The role of mediator becomes more seen at the end of 20th century.¹¹⁰ In Europe the first document regarding solving conflicts by mediation process appeared in 1648 during war in Europe.¹¹¹ The mediation refers to western legal tradition. The United States can be considered as a first country to introduce mediation to the rest of the world. In the past fifteen years EU also started to promote ADR process.¹¹² However, there are differences in mediation process between the USA and Europe. Jeswald W. Salacuse identifies the following cultural differences:¹¹³

- “Is the negotiating goal a contract or a relationship?
- Is the negotiating attitude to win /lose or win/win?
- Is the personal style informal or formal?
- Is the method of communications direct or indirect?”¹¹⁴

The supporters of mediation say that even though there exists mediation directive, mediation doesn't stand firmly. “Each year, only a small number of cases actually go to mediation.”¹¹⁵ Mediation field isn't well-regulated, and there is no specific mediators' qualification requirement. Mediator can be person, with different career background. However, if person wants to succeed as a mediator he should of course have legal background and has to be the lawyer. There are many organizations, which help to train mediators and raise their qualifications. In the USA for example the mediators after finishing the course receive certificate of successful compilation of mediation training.¹¹⁶ The regulation of mediators is important in order to offer clients safe process without any complications. Also it guarantees to raise awareness regarding mediators and makes mediator profession more popular and qualified.¹¹⁷

¹¹⁰*Mediation in Political Conflicts: Soft Power or Counter Culture?*.(2011). Ed/ J. Faget. Oxford, Portland: loomsbury Publishing, p. 31.

¹¹¹*Ibid.*, p. 33.

¹¹²*Mediation in Europe at the cross-road of different legal cultures.* (2014). Ed/A. Miranda. Roma: Arcane, p.97-98.

¹¹³*International Arbitration and Mediation-From the Professional's Perspective.*(2007). Eds/A. Alibekova, R. Carrow. s.l. Yorkhill Law Publishing, p. 37-38.

¹¹⁴*Ibid.*, p. 38.

¹¹⁵de Hoom, M. W. (2014). Making mediation work in europe: What's needed is new balance between mediation and court proceedings. *Dispute Resolution Magazine*, Vol. 20, No. 2, 23-26, p. 23.

¹¹⁶Hinshaw, A. (2016). Regulating mediators. *Harvard Negotiation Law Review*, Vol. 21, No.2, 163-220, p. 172-173.

¹¹⁷*Ibid.*, p. P198

3.1. Mediation in Germany

The mediation in Germany was transformed from United States. The judges and lawyers were first people who tried mediation.¹¹⁸ Mediation was introduced in German legislation in order to reduce national state costs. Few states decided not to use ADR since they think that “mandatory mediation does not fit every case, and consequently, might be inappropriate.”¹¹⁹ In order to introduce mediation in to German legal system changes were done to the German code of civil procedure and after adoption of the Mediation Directive German laws were changed. The EU-Directive on mediation was adopted in 2012. On 67th German Lawyers Forum in 2008 there was discussion regarding mediation regulation. In January 2011 the Federal Ministry of Justice presented first draft of the bill. It was first drafted as an amendment of §15 GVG.¹²⁰ The implementation is mandatory and it covers the following areas: family, labor, social, administrative, financial, patent and trademark law. Germany can adopt itself regulations regarding qualification of mediators, educational and professional programs for citizens and mediators. The German law is in accordance with German Bill on mediation. However, in the bill confidentiality principle is already envisaged in the the definition of mediation. The parties decide the final outcome of the process themselves, choose mediator (they can also refuse to that option as well) and they can refuse to mediate at any time.

The German mediation bill (GMB) includes the training requirements of mediators as well. If person wants to be a mediator he should comply with the requirements established by mediation institutions. In the explanatory memorandum it was stated that 120 training hours are important. In order to promote mediation state should conduct mediation research and low income researchers will be refunded by state. Approximately, after five year local government must analyze law on mediation to check how it functions and what should be done in order to eliminate existing problems.¹²¹ From that we can assume that mediation needs constant development and exchange of ideas. That’s why it is important to look at the countries where mediation works better and try not to be afraid of new ideas and challenges. It is important to come out from comfort zone and think broader and not slow down the development process.

¹¹⁸Hoffmann, A. (2007). Mediation in germany and the united states. *European Journal of Law Reform*, Vol. 9, No.4, 505-552, p. 518.

¹¹⁹*Ibid.*, p. 522

¹²⁰de Vries, T. (2012). The legal regulation of mediation in germany. *Acta Universitatis Lucian Blaga* 2012(2), 209-217, p. 211-212.

¹²¹*Ibid.*, p. 216-217.

In 2000 §15a EGZPO Introductory Law of the Code of civil Procedure was introduced. The aim was to reduce the overload of the court with cases and second to develop mediation practice. In order to make court mediation more preferable and to make people use this process the mediation was made mandatory. “The federal law empowers state parliaments to legislate to require participation in a mediation process as a prerequisite to formally beginning court proceedings.”¹²² Court mediation is mandatory and it gives opportunity to continue dispute later in the court. In each German state the model of mediation is different. It depends on economic and social situation. German judges are obliged to encourage dispute parties to mediate, before taking case to court. Most of the judges don’t take part in conciliation processes.¹²³ Introductory Law of the Code of civil Procedure doesn’t mention the term mediation, it uses terms: “*Schlichtung* and *Streibeilegung*”.¹²⁴ Some German states, like Niedersachsen doesn’t intend to introduce §15a EGZPO into their legislation, because they think that “routine mandatory mediation will see many inappropriate cases referred to mediation.”¹²⁵ We see that in some states the mediation is considered as ineffective mechanism and the main problem is that the case might not be the subject of the mediation to be discussed.

In 2002 a big project was introduced called, “Niedersachsen project”.¹²⁶ It was unique, because mediation was conducted by specially trained judge mediators. If the case wasn’t solved by mediation process it was sent back to court. This three year pilot project was focused on four civil courts: two District courts, two Magistrates’ Courts, one Administrative Court and one Court for Social Security Issues. This project had big influence also on other German states and it helped to develop more options for dispute resolution.¹²⁷ There aren’t any general laws on how to conduct mediation, or the mediator ethics. The local organizations issue special guidelines, which help with the mediation process. They aren’t binding. However, court tries to use them so that they have convincing nature. Such is §15a EGZPO, which guarantees that the dispute can be taken to court if there is no conciliation reached by mediation process. In 278(5)2 ZPO it is stated that judge can suggest mediation to the parties.¹²⁸ The current problem, which mediation has in Germany is no legal aid and regulations, which would guarantee proper, conduct of

¹²²Alexander, N. (2001). Mediation in Practice: Common Law and Civil Law Perspectives Compared. *International Trade and Business Law Annual* 6, 1-18, p. 6.

¹²³*Ibid.*, p. 6-7.

¹²⁴*Global Trends in Mediation*.(2006), *supra nota* 68, p 233.

¹²⁵*Ibid.*, p. 235.

¹²⁶*Global Trends in Mediation*.(2006), *supra nota* 68, p 236.

¹²⁷*Ibid.*, p. 236.

¹²⁸Hoffmann, A. (2007), *supra nota* 101, p 532.

mediation.¹²⁹ “Germany, as a civil law country, tends to focus more on a rather scientific approach in order to eliminate as many mistakes as possible before a real mediation is conducted.”¹³⁰ The German Code of Civil Procedure (ZPO) article 278a states, “if the case is already pending before court and the court forwards them into a mediation outside the court and the parties choose this possibility, than the procedure before court rests..”¹³¹ In the end the system of conciliation in Germany is the following, if parties fail to reach conciliation based on §15a EGZPO, the case can be taken to court. If conciliation isn’t reached based on 278(5)2 ZPO then the case can be taken to court.¹³² We can see that in both situations parties has option to take case to the court.

Before mediation was established in Germany there was topic regarding whether judges could act as mediators. The German Grundgesetz, article 92 states: “The judicial power shall be vested in the judges.”¹³³ So the judge had the right to act as a mediator if he had “judicial power”¹³⁴ to discuss the case.¹³⁵ Today BAFM has established mediation qualifications and training programs for mediators. More than 10 training institutions are opened in 14 cities of Germany.¹³⁶ There are many organizations, which focus on mediation development, training of mediators and sharing information to the public. Such organizations are: National Mediation Association, the German Society for Mediation and the Centre for Mediation.¹³⁷ In Germany there is less willingness to compromise and highly value court system.¹³⁸ Germany doesn’t face problem with uniformity of regulations, since it is country of federal laws. However, it has problem with the code of conduct for mediators, which doesn’t exist.¹³⁹

We can see that in Germany mediation development has taken a lot of changes and they are still happening. It isn’t perfect and it won’t be since mediation process is a mechanism, which has strength to change peoples’ mind and vision and it can be seen more than just a dispute resolution mechanism. The coexistence of court system and mediation institution must be in

¹²⁹*Ibid.*, p. 534.

¹³⁰*Ibid.*, p. 545.

¹³¹de Vries, T. (2012), *supra nota* 103, p 214.

¹³²Hodges, C., Benöhr I., Creutzfeldt N.(2012). *Consumer ADR in Europe*. Oxford, Portland: Bloomsbury Publishing, p. 78.

¹³³*The Future of Civil Litigation: Access to Courts and Court-annexed Mediation in the Nordic Countries*.(2014).Eds/ L. Ervo., A. Nylund. s.l. Springer, p. 90.

¹³⁴*Ibid.*

¹³⁵*Ibid.*

¹³⁶*Global Trends in Mediation*.(2006), *supra nota* 68, p 239

¹³⁷*Ibid.*, p. 241.

¹³⁸Hoffmann, A. (2007), *supra nota* 101, p 529.

¹³⁹*Ibid.*, p. 534.

harmony and consumers must have as many opportunities as possible to resolve dispute. That will guarantee more respect towards justice and law and further development of mediation processes. “The motto cannot be mediation at any price, but rather peaceful coexistence of accessible courts and mediation services.”¹⁴⁰

3.2. Mediation in the USA

Mediation first appeared in the USA in 1970 and it covered a wide range of disputes. The US Supreme Court judge, Sandra O’Connor said that: “Courts should be the place of last resort, rather than the place of first resort.”¹⁴¹ This can be quite fair, because mediation is more flexible and can be considered easier going mechanism compared to court. Court is rougher, systemized mechanism and deals with more serious and violent cases, where conciliation is far more difficult, because of the complication situation. Mediation first became popular in labor and neighborhood disputes.¹⁴² The creation mediation was caused because of big aggression, which was collected in American society. The Vietnam War, civil rights struggles, racial discrimination and other were causes. There was “litigation explosion”¹⁴³ which caused the rise of ADR. There was a lot of cases and court couldn’t manage to discuss them fast and that why there was overload in the court. Country was in despair and there was need for new changes.¹⁴⁴ The mediation supporters were saying that the mediation process was faster, cheaper and more satisfying for the consumers than court. They started to fund different programs in order to make mediation more popular and known to the public.¹⁴⁵ Today mediators are in special organizations. A lot of agencies and organizations have regulations for mediators and mediation process.¹⁴⁶

In 1990 the Civil Justice Act (CJRA) and the first Administrative Dispute Resolution Act (ADRA) were passed, which would regulate mediation process. Even though, CJRA considered all the ADR forms equal, mediation was considered the most popular among all. In 1998 the Dispute Resolution act was issued according to which each federal state had to have its own form of regulations for conducting mediation processes. According to ADRA every state had to

¹⁴⁰*Global Trends in Mediation*.(2006), *supra nota* 68, p 258.

¹⁴¹*Mediation in Context*.(2011). Ed/M. Liebmann. London and Philadelphia: Jessica Kingsley Publishers, p. 111-112.

¹⁴²*Global Trends in Mediation*.(2003), *supra nota* 1, p. 362.

¹⁴³Hoffmann, A. (2007), *supra nota* 101, p. 513.

¹⁴⁴*Ibid.*, p.. 513.

¹⁴⁵*Global Trends in Mediation*.(2003), *supra nota* 1, p 366.

¹⁴⁶*Ibid.*, p.360.

promote alternative dispute resolution and for that there would have to be special agencies established, which would be controlled by senior officials. This would “*encourage the use of alternative means of dispute resolution.*”¹⁴⁷

R. B. Bush and J. Folger suggest that “the appropriate model should be a *transformative* approach, one in which the mediator is a time for the parties to see how they contributed to the problem, and how they can provide recognition and empowerment to the other party and themselves.”¹⁴⁸ This was topic of debate, because some thought that people needed effective mechanism which would solve their problems and not just advise. The word transformation was unclear and was considered most of the times as a weapon for mediator to control and manipulate person during the mediation process. Here was conflict between whether person wanted to solve dispute, or to learn about himself.¹⁴⁹ The next step in shaping mediation in American legal system was adoption of Uniform Mediation Act. The process of drafting UMA was filled with debate. One of the authors of UMA claimed that there were 300 statutes on confidentiality alone, so there was need for additional uniform regulation.¹⁵⁰ The UMA “appears to be an attempt to create uniformity for those who rode on the backs of the domestic relations bench and bar, and the community and labor mediators who built mediation practice.”¹⁵¹ The debate is still continuing.¹⁵²

To find right answer is difficult, because mediation can be considered as a mechanism, which was invented based on variety of different legal mechanisms and is merged with different aspects of today’s world. It is not clear should there be standardization and uniformity of it or not and whether we should look at it if it was a single thing. As A. Hoffmann states the greatest achievement what UMA has done is to make mediation regulation same in all the USA states. He also adds, “it is certainly not what everyone wants, but it is a good start towards what everyone needs.”¹⁵³

Today there is a struggle regarding policy issues. Today there is a struggle regarding policy issues, professional standards, certification, funding from government, foundations and so on.¹⁵⁴

¹⁴⁷*Ibid.*, p. 374-375.

¹⁴⁸*Ibid.*, p. 381.

¹⁴⁹*Ibid.*, p. 381-382.

¹⁵⁰*Ibid.*, p. 384.

¹⁵¹*Ibid.*, p. 388.

¹⁵²*Ibid.*

¹⁵³Hoffmann, A. (2007), *supra nota* 101, p. 532.

¹⁵⁴Mosten, F. S. (2001). The evolving field of mediation in the united states. *Bond Law Review*, Vol. 13, No. 2, [i]-19, p. 9.

According to F. S. Mosten, the finding must come from government, because there is no chance that only one single organization can raise awareness and make mediation popular on its own. There is also fear that lawyers may take place of professional mediators. There was vivid tension in the past decades. At first mediation wasn't considered as a serious profession, but today it is a ladder for future career and professional development.¹⁵⁵ Bush and Felfer define "true mediation"¹⁵⁶ as a process where participants grow morally and mentally and not where necessarily decisions are made.¹⁵⁷ "They endorse a facilitative approach to resolving conflict in mainly joint sessions where the parties can communicate directly and learn from each other."¹⁵⁸ It is interesting to see that mediation has come so far and there are still problems. A lot of research is done and new laws and regulations are being adopted.

So the style of mediation in America and Germany is quite different. America is a country of immigrants, while Germans decided to stay in their country, so for them it is more difficult to practice new methods and take challenges.¹⁵⁹ There can be several reasons why mediation is more successful in the USA than in Germany. Firstly, mediation appeared in Germany later. Second, US had to come up with mediation, because of litigation explosion. Third, Mediation was forced to be fitted in to German legislation. In US mediation was for a long time unregulated and it had more time for development. Fourth, Germans look more skeptical to mediation, since they have a strong sense of assurance and safety.¹⁶⁰ We see that there are differences regarding use of mediation in both countries. Generalization may not give us answer what should be done to make mediation regulation in Georgia more preferable. However, it may help to show what to avoid and what may be done.

3.3. Mediation in Georgia

In 2011 there was still no mediation institution established in Georgia. However, at that time there was high interest in it. The ADR Center at Tbilisi States University has played an important role in the development of it. The IFC mediation programs, which work in Balkans, can be used in Georgia as well according to USAID assessment group on ADR in Georgia. It will guide

¹⁵⁵*Ibid.*, p. 9-11.

¹⁵⁶*Ibid.*, p.13.

¹⁵⁷*Ibid.*

¹⁵⁸*Ibid.*

¹⁵⁹Hoffmann, A. (2007), *supra nota* 101, p 546.

¹⁶⁰*Ibid.*, p. 550.

Georgian legislators to structure proper plan for developing mediation as an institution. The main components are:¹⁶¹

- Cooperation between Georgian ministry of justice and courts;
- Invite foreign experts on mediation, who will instruct local future mediators;
- Adopt laws on mediation in accordance with international and EU regulations and directives;
- Make mediation more known to the public, by conducting different cognitive projects and informing judges and lawyers about the advantages of mediation process;
- Creating mediation centers, where consumers will pay for the service.

In 2011 to Georgian Code of Civil Procedure new amendment was made and new Chapter XXI¹ called judicial mediation was included. It includes categories of cases, which are subject to mediation, terms of mediation, confidentiality principle and conditions necessary for successful conduct of the process.¹⁶² On May 7, 2012 in Tbilisi, memorandum was signed regarding development of judicial mediation in Georgia between The High Council of Justice of Georgia, the High School of Justice, the Tbilisi City Court and The National Center for Alternative Dispute Settlement at Ivane Javakhishvili State University, German International Cooperation Society, USAID project on the judicial independence and legal empowerment. According to the memorandum, the Tbilisi City Court will create a pilot project on court mediation. At first 35 candidates will be selected based on public competition, which will be conducted in two stages. The candidates, who pass it, will attend practical and theoretical courses on mediation and will have chance to take part in mediation processes.¹⁶³ On April 1, 2017, Memorandum of Understanding was signed between the High Council of Justice of Georgia, Tbilisi City Court and Georgian Mediation Association. Memorandum guarantees the implementation of mediation, which will reduce the amount of cases in the court.¹⁶⁴

¹⁶¹Blechman, M.D.(2011).Assessment of ADR in Georgia, 1-17, p.16.Accessible:<http://ewmi-prolog.org/images/files/6743assessment-of-adr-in-georgia.pdf>

¹⁶²Civil Procedure Code of Georgia. Parliamentary Gazette, 47-48, 31/12/1997. (საქართველოს სამოქალაქო საპროცესო კოდექსი. პარლამენტის უწყებანი, 47-48, 31/12/1997.)

¹⁶³High Council of Justice of Georgia.(2012).*A memorandum was signed on the issue of mediation.* (საქართველოს იუსტიციის უმაღლესი საბჭო. მედიაციის თემასთან დაკავშირებით მემორანდუმი გაფორმდა).Accessible:<http://hcoj.gov.ge/ge/sasamartlo-mediatsiis-temastan-dakavshirebit-memorandumi-gaformda/1924>, 24 November 2018.

¹⁶⁴High Council of Justice of Georgia.(2017). *A Memorandum of Understanding was signed with the purpose of implementation of the Mediation Program.*(საქართველოს იუსტიციის უმაღლესი საბჭო.(2017). მედიაციის პროგრამის იმპლემენტაციის მიზნით ურთიერთგაგების მემორანდუმი გაფორმდა). Accessible:<http://hcoj.gov.ge/ge/mediatsiis-programis-implementatsiis-miznit-urtiertgagebis-memorandumi-gaformda/2863>, 24 November 2018.

By the order of the Council of Justice of Georgia on December 30, 2016, the “Rules of Administration of court Mediation Process”¹⁶⁵ was adopted, in which the judicial mediation management and organizing issues were discussed and other aspects of the process.¹⁶⁶ Within the framework of the mediation pilot project, 83 cases were handed over to mediation. In about 50% of this case, the parties were able to reach agreement by mediation. Currently, the Council of Justice actively participates in forming law on Mediation. The existence of such law in Georgia is of vital importance for the development of judicial mediation. At this moment there are 18 articles in the project, which includes also the recommendations from international experts. The draft law also provides definitions, main principles of mediation, the procedure for starting, choosing the mediator and compensation rules of mediator.¹⁶⁷ According to article 2, subsection C of the draft law states, private mediation is a process, which starts on the basis of the Mediation Agreement, without transferring the case to the mediator. This process makes it possible to resolve the dispute without court interference in informal circumstances. It should also be noted that the alternative solution of disputes serves not only to solve a particular problem within the scope of the dispute, but also to restore its original state and relationship. This is directed towards “cure”¹⁶⁸ of the parties. In the draft law, the mediator's qualifications are also defined. Person who is in the registry of mediators, physically capable person, who isn't found guilty for any crime, has done 40 hour mediation training and has certificate issued by the Georgian Mediation Association can work as a mediator. Effectively implementing the mediation project in Georgia is crucial in order to improve the quality of justice.¹⁶⁹

According to the Article 187¹ part 1 of the CIVIL PROCEDURE CODE OF GEORGIA, it is stated that, “after a claim has been filed with the court, a case that falls within the jurisdiction of a judicial mediation may be transferred to a mediator (a natural or legal person) in order to conclude the dispute by a settlement between the parties.”¹⁷⁰ As it is stated in the materials of

¹⁶⁵Council of Europe. Support to the judicial reform in Georgia.(2017). Materials of International Conference of Judges Association of Signatories of the Memorandum.-*Judicial performance assessment, court mediation and juvenile justice*, 28-29 April 2017, Tbilisi.(Eds). N. Gvenetadze, E. Gociridze, V. Tordia, L. Murusudze, K. Sofromadze. 5-224, p. 65. Accessible:<https://rm.coe.int/mosamartleta-saqmianobis-shefaseba-for-web/1680788227> (ევროპის საბჭო. სასამართლო რეფორმის მხარდაჭერა საქართველოში.(2017). მემორანდუმის ხელმოწერი ქვეყნების მოსამართლეთა ასოციაციების საერთაშორისო კონფერენციის მასალები. მოსამართლეთა საქმიანობის შეფასება, სასამართლო მედიაცია და არასრულწლოვანთა მართლმსაჯულება. 28-29 აპრილი, თბილისი.(რედ.)ნ. გვენეტაძე, ე. გოცირიძე, ვ. თორდია, ლ. მურუსიძე, კ. სოფრომაძე. 5-224, გვ. 65).

¹⁶⁶*Ibid.*

¹⁶⁷*Ibid.*, p. 66-67.

¹⁶⁸*Ibid.*, p. 67.

¹⁶⁹*Ibid.*, p. 67-68.

¹⁷⁰Parliamentary Gazette, 31/12/1997, p.40.

National Center for Alternative Dispute Resolution, the reference to the legal person in the formulation isn't justified for several reasons. First of all, according to the terms of the Uniform Mediation Act, mediator is a natural person who leads the mediation process. Mediator can't be a legal person based on the role and function of the mediator. The mediator plays important part in the process. The person can be offered mediation process by state and in the court by judge. Accordingly, the state is obliged to take responsibility and provide parties with the services of the qualified mediator.¹⁷¹ In order to select qualified staff, it is necessary to set certain criteria and requirements. A legal person can't perform as a mediator. In most US states the qualification requirements of the mediator are established by law. It is ridiculous to consider mediator as a legal entity, who will have high education and has attended a 46 hour mediation training. In the law reference to a legal entity can be understood as a reference to a person, who offers mediation process to the customer. Such legal entity unites several natural persons. Only one or several individuals from it take part in each mediation process and perform as a mediator.¹⁷²

The Article 187³ provides a list of disputes falling under judicial mediation. In case of submitting an appeal regarding succession and neighboring disputes, the case shall be handed over to the mediation process. In this case, the willingness of the parties doesn't matter and neither the consent of the parties is necessary to start mediation process. Those two kinds of cases are discussed by mandatory mediation, because it guarantees the further relationship between parties. The exception is cases, where child is involved. As a rule, the state is trying to be more careful about the child's interests. That is why the legislator has decided that such issues should not be resolved on the wish of the parties and only to leave the case for court. In the Directive of the European Parliament it is indicated that the mediator has no right to give testimony in court and to disclose confidential information except for two exceptions. One exception is the case when confidential information is needed to protect the child's interests. It is desirable to add labor disputes to the list of mandatory mediation cases as well. Labor disputes are quite specific and like the above mentioned disputes, personal relationship of the parties is very important. Therefore, it is desirable that the parties try to resolve disputes through mediation before taking case to the court. The mediation process is the most flexible way to solve such disputes.¹⁷³

According to subparagraph d of part 1, article 187³ of the CIVIL PROCEDURE CODE OF GEORGIA, mediation can be extended to any dispute in case of consent of the parties. In

¹⁷¹National Center for Alternative Dispute Resolution.(2013), *supra nota 4*, p. 61-62.

¹⁷²*Ibid.*, p. 62.

¹⁷³*Ibid.*, p. 62-63.

accordance with part 2 of Article 187³, in case of consent of the parties, the dispute may be given to the mediator at any stage of the hearing. This increases the possibility that the parties may select to mediate until the end of the dispute in court and it reduces the possibility that the parties may decide to apply for mediation when it is late. Consequently, granting of such rights to the parties gives more flexibility to the process. There won't be any situation where parties have no rights to start mediation process, because of the law.¹⁷⁴

The Code doesn't regulate the rule and procedure of elimination of the mediator as it is in case of a judge elimination. It is unclear at what stage the party may declare to dismiss the mediator and who should be informed about it, party should tell personally mediator or go to court. The elimination of mediator must be regulated by law. The Code doesn't provide also the mediator's self-withdrawal from the process. It is desirable to be added in the article on the self-withdrawal of the mediator and to indicate that if there are grounds for withdrawal of the mediator he is obliged to declare self-withdrawal himself or what to do.¹⁷⁵

According to part 1 of Article 187⁵ of the CIVIL PROCEDURE CODE OF GEORGIA, the court mediation process lasts for 45 days. It can be extended for another 45 days. One of the advantages of mediation compared to court is that, mediation process isn't stretched in time and the parties can achieve the final outcome faster than in the court. It is good that the mediation process is defined by period of time. This won't allow person to delay the mediation process. It is difficult to say that 45 days are enough for reaching consensus or is reasonable time. However, It is justified to continue the mediation term in agreement with the parties. If parties want to end dispute with conciliation and they think more time is needed for that they shouldn't be limited in time. In this situation it is important to define what is important, 45 days or to reach agreement. The mediation is considered successful when conciliation is reached.¹⁷⁶

According to part 1 of Article 187⁶ of the CIVIL PROCEDURE CODE OF GEORGIA, parties are obliged to appear on the time and place appointed by the mediator for participation in the judicial mediation process. In accordance with part 2 of the same article, if party doesn't appear for unjustifiable reason, he will have to pay court expenses. The objective of this article is to ensure that the parties will attend mediation process. The existence of such sanctions may force the party to attend the process physically. However, it is disputable whether it will have effective

¹⁷⁴*Ibid.*, p. 63.

¹⁷⁵*Ibid.*, p. 64.

¹⁷⁶*Ibid.*, p. 64-65.

outcome. Part 3 of the same article gives a motivation, in case of conciliation the party will be released from the imposed fine. According to article 187⁶ part 4, in the case of unjustifiable reasons of not appearing on the mediation process, the party is given second chance and if parties fail to reach agreement during the mediation, they can go to court and settle dispute there. They won't have to pay fine in that case. The main purpose of the article is to help parties reach an agreement and to release party from sanctions.¹⁷⁷

According to part 1 of article 187⁷ of the CIVIL PROCEDURE CODE OF GEORGIA, if dispute is resolved between the parties within the time period established for judicial mediation, the court shall, on the petition of a party, enact a judgement on the conciliation between the parties. The judgement shall be final and may not be appealed. In case of fulfillment of the mediation agreement, the court shall approve the agreement of the parties. The parties will sign an agreement. If the party agrees on conciliation, it means that he is ready to fulfill the terms of the mediation agreement. However, we shouldn't exclude the possibility of nonfulfillment of it. That's why the party needs an effective mechanism for enforcement of the judgement. According part 2, article 187⁷ if the conciliation isn't reached by judicial mediation, party can take case to court and act according to the general procedure. It is important that after the mediation process, the right to appeal to the court is guaranteed by law.¹⁷⁸ According to the Directive of the European Parliament (2008/52/ECE), the state shall make sure that parties who choose to mediate will have the right to appeal to a court.¹⁷⁹

Part 1 of article 187⁸ of the CIVIL PROCEDURE CODE OF GEORGIA states that the mediation process is confidential. The mediator has no right to disclose the information he has been aware of when fulfilling the duties of the mediator unless otherwise agreed by the parties. Part 2 of the same article imposes on the parties the obligation to protect the confidentiality as well. The article doesn't indicate that the mediator can't disclose information, which was obtained by him during the mediation process to the court. The principle of confidentiality isn't unlimited and universal. In some cases it is possible to breach the principle of confidentiality in favor of public safety. The law should specify the exceptional cases when the mediator has the right to disclose confidential information received during the mediation process.¹⁸⁰

¹⁷⁷*Ibid.*, p. 65.

¹⁷⁸*Ibid.*, p. 66.

¹⁷⁹OJ L 136, 24.5.2008, p 5.

¹⁸⁰National Center for Alternative Dispute Resolution.(2013), *supra nota 4*, p 66-67.

43 mediation cases were registered in 2013-2015, 73 cases in 2016-2017. The European Union and UNDP support development of mediation institution in Georgia, which is part of EU4 Justice Programme. EU has allocation EUR 50 million from its budget.¹⁸¹ We can see that a lot of new changes are happening for mediation development, new mediation law project has been established, which can be considered as a replacement for the Chapter XXI¹ of Civil Procedure Code of Georgia. The mediation now can be conducted more structured way and process has the main regulation aspects. However, it isn't well used still and lacks content. In the following chapter from the recommendations from international experts will be visible what problems the development of mediation as an institution in Georgia lacks.

3.4. Recommendations from international experts

In 2011 Mr. Michael D. Blechman with other Georgian experts made an evaluation of ADR in Georgia.¹⁸² The survey showed that there is a great interest in mediation. For example, ADR Centre at Tbilisi State University has a programme of education of ADR.¹⁸³ Ministry of Justice of Georgia stated that, “Georgia lacked a culture and of working system of mediation. It was noted that mediation would be helpful in international cases since it would be a way to preserve relationships, e.g. with foreign investors.”¹⁸⁴ Judge, Valeri Tsertsvadze said that, mediation was very important and Georgia should learn from US and European experience.¹⁸⁵ According to Dr. Irakli Burduli, the head of the Law faculty at Tbilisi State University “mediation fit well with the Georgian culture, which dislikes going to court but likes to bargain.”¹⁸⁶ ADR center in Tbilisi State University has the following plan, which will be help to develop mediation in Georgia in general and ADR center as well:¹⁸⁷

- Establishing regulations for ADR center;
- Adoption of the law on mediation;
- Promoting the mediation law;
- Special program to train judges and lawyers on mediation;

¹⁸¹UNDP Georgia.(2017). *Developing Mediation to Ease Access to Justice in Georgia*. Accessible: <http://www.ge.undp.org/content/georgia/en/home/presscenter/pressreleases/2017/12/19/developing-mediation-to-ease-access-to-justice-in-georgia-.html>, 2 December 2018.

¹⁸²Blechman, M.D.(2011), *supra nota* 159, p 1.

¹⁸³*Ibid.*, p. 3.

¹⁸⁴*Ibid.*, p. 6.

¹⁸⁵*Ibid.*

¹⁸⁶*Ibid.*, p. 7.

¹⁸⁷*Ibid.*

- Develop study plan on mediation;
- Establish a research center on mediation.

At the end of the assessment, Michael D. Blechman thinks that mediation has potential in Georgia. Not only lawyers and judges are interested in it, but also people from ministries. The involvement of private and public society is important.¹⁸⁸

From January 27 to February 2 in 2015, international mediation expert, Aleš Zalar was invited in Georgia to evaluate and analyze situation regarding court mediation pilot project in Georgia. He met with local lawyers, judges, mediators and others who have played role in the development of project. Mr. Zalar suggested creating mechanism, which would help people in dispute to know the benefits of mediation process. Also the Georgian Bar Association and Tbilisi City Court should cooperate in order to raise awareness about the mediation in the public and attorneys should inform clients as well.¹⁸⁹ Mr. Zalar thinks that in Georgia there are two main problems regarding mediation: there is no proper document that would help with the development of the alternative means of dispute resolution and no “Advisory Body in view of definition of the policy for alternative means of dispute resolution, to implement the functions of the coordination agency.”¹⁹⁰ The problem is lack of information and no uniform regulation. Even though there exists chapter on court mediation in Civil Procedure Code of Georgia, chapter XXI¹ there is still need for legislative act, which would comply with EU directive on mediation. Mr. Zalar has emphasized the positive and negative aspects of chapter XXI¹ of the Civil Procedure Code of Georgia. The advantages are the following. The first one is the possibility to have two types of mediation process, court mediation and court related mediation; mediation is used in inheritance and neighboring disputes; the 90 days of mediation process is possible; if party doesn’t appear during the mediation process, he must pay reasonable sanction; the confidentiality principle is viable and the decision reached on mediation process is enacted by the court.¹⁹¹

The code lacked the following aspects. There is no rule how and who can choose mediator; it is not in compliance with UNCITRAL Model Law and EU directive on mediation; there are no special programs, which would encourage judicial authorities and courts to develop mediation institutions and financing of mediation process isn’t well regulated. The recommendations from

¹⁸⁸*Ibid.*, p. 17.

¹⁸⁹Promoting Rule of Law in Georgia.(2015). *EWMI/JILEP Analyzes Achievements of Court Mediation Pilot*. Accessible:<http://ewmi-prolog.org/en/news/514-2015-02-06-01>, 2 December 2018.

¹⁹⁰Tsuladze, A.(2016), *supra nota* 43, p 152.

¹⁹¹*Ibid.*

Mr. Zalar also were the following, to court and consumers of mediation must cooperate with each other; it is more effective and desirable to start mediation process as early as possible; make mediation process mandatory.¹⁹² In 2015 Victor Schachter (President) and John Koeppel (Mediation Ambassador) visited Georgia and evaluated situation regarding mediation development in the country.¹⁹³ The recommendations¹⁹⁴ were mostly the same as was already mentioned above. The problem was the lack of cases on mediation and broader scope of mandatory mediation. The advisors stated, “We encourage you to initiate a more vigorous program and expand it as results warrant, and to draft broader enabling legislation for mandatory court referrals.”¹⁹⁵ At the end of the document it was stated that, “Expanded and successful mandatory mediation programs have the potential to transform the country’s civil litigation landscape.”¹⁹⁶

On June 7, 2017 on conference in Georgia it was decided to issue “law on mediation”,¹⁹⁷ which would guarantee the proper regulation of the mediation process. The Ministry of Justice, Private Law Reform Implementation Coordination Council and members of the Working Group, also the Minister of Justice, Tea Tsulukiani and Supreme Court all were involved in the process. The law on mediation includes the general principles of mediation, the start of the process, the end, selecting and appointing of mediators. On the conference it was stated that there was several obstacles to the effective work of mediation. There isn’t law on mediation; mediation isn’t popular; lack of knowledge about mediation and no specialists in this field; no ethical standards of mediators; no proper regulation laws on mediators sanctioning and refunding.¹⁹⁸ It must be

¹⁹²*Ibid.*, p.153.

¹⁹³The Foundation for Sustainable Rule of Law Initiatives. (2015). *FSRI Assessment and report on the Tbilisi Court–AnnexedMediationProgram.a1000/00104/docs/3696256.2.1-8*,p.1.Accessible:<http://hcoj.gov.ge/files/images/FSRI%20Assessment%20%26%20Report%20on%20the%20Tbilisi%20Court-Annexed%20Mediation%20Program.pdf>

¹⁹⁴Tsuladze, A.(2016), *supra nota* 43, p 154.

¹⁹⁵The Foundation for Sustainable Rule of Law Initiatives. (2015), *supra nota* 191, p 2.

¹⁹⁶*Ibid.*, p. 8.

¹⁹⁷Ministry of Justice of Georgia. *Georgian Law on Mediation. Project*. №07-2/319/9,1-26.(საქართველოს იუსტიციის სამინისტრო. *საქართველოს კანონი მედიაციის შესახებ. პროექტი*. №07-2/319/9,1-26). Accessible: <https://info.parliament.ge/#law-drafting/17577>

¹⁹⁸Ministry of Justice of Georgia(2017). *The Mediation Act is set up for a quick and effective settlement of civil disputes*. (საქართველოს იუსტიციის სამინისტრო.(2017).*სამოქალაქო დავების სწრაფად და ეფექტიანად მოგვარებისთვის მედიაციის შესახებ კანონი იქმნება*. Accessible:<http://www.justice.gov.ge/News/Detail?newsId=6421>, 2 December 2018.

emphasized that the main aim of mediation isn't to replace court system, but to develop ADR in general, make access to justice system easier and reduce overload of the cases in the court.¹⁹⁹

In 2011 European Parliament conducted a survey on “*Quantifying the cost of not using mediation – a data analysis*”²⁰⁰ based on Italy and Belgium examples.²⁰¹ In the survey it was stated that today court system can't cope with the complicated economic situation in this globalized world. In order to implement mediation the cooperation between European business and local government is needed. Even if there are low rates of mediation use, it still makes significant difference for citizens, business and government.²⁰² Effective mediation plan must include two main things: motivation “carrot”²⁰³ and rules “stick”.²⁰⁴ Many statistics show that the successfully conducted mediation rate is 85%.²⁰⁵

Today Georgia faces several problems regarding implementation of mediation institution. First of all there is no certain organization that would guarantee to join mediators in one organization; second, there is no special programme of certification and qualification of mediators; third, there doesn't exist code of ethics for mediators, which would in case of necessity impose disciplinary liability and other important functions. Currently there are several organizations, but they don't exactly respond to the challenges of mediation in a wide scale. They lack common principles and firm institutional basis. Their activities are based only on the norms of the Civil Procedure Code and in case of court mediation only. As for private mediation, there is no proper normative base in this area. Those organizations have quite narrowly focused tasks.²⁰⁶ A pilot project on mediation in the Tbilisi City Court has confirmed that the successful implementation of mediation can't be achieved without joint efforts and involvement of all individuals, who have legal links in this field. Low awareness about the mediation and the absence of the infrastructure, necessary for the development of mediation, have become the main reasons for the low popularity and use of mediation. Since 2012 only several mediation processes have been

¹⁹⁹Ministry of Justice of Georgia.(2017).*Disclosure Card on the Law on Mediation*. p. 1. (საქართველოს იუსტიციის სამინისტრო.(2017).*განმარტებული ბარათი საქართველოს კანონის პროექტზე „მედიაციის შესახებ“*) Accessible: <https://info.parliament.ge/file/1/BillReviewContent/216089>

²⁰⁰*Ibid.*, p. 14.

²⁰¹*Ibid.*

²⁰²Giuseppe , D.P., Feasley, A., Orecchini, F.(2011). *Quantifying the cost of not using mediation – a data analysis*. European Parliament: Brussels. 3-18, p. 18. Accessible: https://www.giustizia.it/resources/cms/documents/Paper_EU_Parliament.pdf

²⁰³*Ibid.*, p. 16.

²⁰⁴*Ibid.*

²⁰⁵*Ibid.*, p. 10

²⁰⁶Ministry of Justice of Georgia.(2017), *supra nota* 199, p. 3.

conducted. Based on the total number of civil cases conducted in Georgian civil court it can be stated that mediation failed to find a proper place in Georgian legal system.²⁰⁷

Once again Tbilisi City Court presented several challenges concerning mediation pilot project. Among these challenges were: the availability of unified policy on mediation; No popularity of mediation and skepticism towards it; Shortage of certified mediators; No certification standard of mediators; The absence of mediators' ethical standards; Low level of support from legal professions towards Mediation; Lack of financial resources for mediators remuneration and to organize infrastructure for mediation; Low level of knowledge about mediation process and so on. Those factors listed above remarkably prevent the development of the mediation institute in Georgia. In order to improve current situation significant legal changes must be made in to Georgian legal system. The factors, which help the development of mediation must be identified and developed. Those factors are request and distribution. Those two must be developed together in unison.²⁰⁸ On November 21, 2018 international conference on mediation was held in Tbilisi with support of the European Union, UK Aid, United Nations Development Program, International Labor Organization and UN Women. On the conference developments regarding mediation system in Georgia were discussed. The Chairperson of the Supreme Court of Georgia, Mzia Todua emphasized the importance of mediation in Georgian legal system: "Georgia has made important steps forward in developing mediation and its legal framework. To keep pace, we need to share the best international knowledge and practice".²⁰⁹ "Through our projects, we support developing fair, high-quality and efficient mediation, as a real alternative for citizens to solve their disputes in an amicable, swift and win-win way"²¹⁰, said Peter Danis, justice program manager of the European Union in Georgia.²¹¹

We see that up till now many changes are happening in the development of mediation. There exists Georgian code on mediation. However, it is still new and there is no information how effectively it works. This makes it difficult to make analyses how mediation has adopted in Georgian legal system and do research on it. If we will look at the statistics mediation is still not well-used and people aren't well aware of it. The mediation institution lacks some significant elements, for example the ethical code of mediators, which would regulate the mediators'

²⁰⁷*Ibid.*, p. 15.

²⁰⁸*Ibid.*, p. 15-16.

²⁰⁹Supreme Court of Georgia.(2018).“Mediation Days 2018” in Tbilisi. Accessible: <http://www.supremecourt.ge/eng/news/id/1831> , 2 December 2018.

²¹⁰*Ibid.*

²¹¹*Ibid.*

behavior. There doesn't exist special mediation bodies, where mediation will be held. The lawyers and judges aren't fond of this institution and think that it is a waste of time and in the end the dispute will go to the court. The author thinks that only time and the number of cases will show how successful mediation will be in near future. The collaboration between private and public sector is important as well. Georgia must take example from other countries. However, laws mustn't be just copied, but be adapted to local legislation.

4. MEDIATION AND ADVOCACY WORK

The topic regarding the role of lawyer in mediation process is quite disputable, since some people generally think that lawyers aren't informed well enough to take part in the process. The problem is also no existence of ethical guidelines for lawyers taking part in mediation. In Georgia many lawyers don't exactly understand the significance of mediation institution. In the last few years many changes have happened in mediation development field, but the role of lawyer in mediation hasn't been discussed well. The main discussion is around the legislation on mediation. However, there is nothing about the lawyers. Since mediation is an alternative option to court system and is new of course it is important to discuss it, but on the other hand the people involved in the process should also be considered.

Lawyers, who are unfamiliar with the mediation process, may be worried that they might lose clients who choose to mediate instead of going to court. They may try to change clients mind, who want to choose mediation. Mediation can be considered as a barrier to go to court by some lawyers. The skills of lawyers can be very useful in mediation, but it can have negative side as well, since lawyers may not behave as they should during mediation process. Mediation is a popular process around the world, so generally clients are looking for lawyers who have high quality mediation knowledge, skills and experience. The clients' wish is that lawyer will work in accordance to mediation principles.²¹²

Lawyer must prepare for mediation process in the same way as he prepares for court. "A lawyer should look beyond the legal issues and consider the dispute in a broader, practical and commercial context."²¹³ Lawyer must collect information, analyze, and discuss case with his client and so on. Mediation needs time and the preparation plays an important part in the success of the process. The lawyer helps customer with, "(i) undertaking a risk analysis and linking risks to the client's interests; (ii) explaining the nature of mediation; (iii) identifying interests; and (iv) developing strategies to achieve final outcomes."²¹⁴

It is important for a lawyer to be able to give advice to the client. This advice must be "the fullness of the lawyer's experience as well as his objective viewpoint."²¹⁵ The advice includes:

²¹²Azarov, A. (2014). Mediation for Lawyers. *IVANE JAVAKHISHVILI TBILISI STATE UNIVERSITY, NATIONAL CENTER FOR ALTERNATIVE DISPUTE RESOLUTION*.98-104, p.98.

²¹³Hardy, S., Rundle, O.(2010), *supra nota* 7, p. 111.

²¹⁴*Ibid.*

²¹⁵Ellmann, S. (1987). Lawyers and clients. *UCLA Law Review*, Vol. 34, No.3, 717-780, p. 732.

explaining the mediation process, if mediation is relevant, explaining the main principles of mediation. Lawyers are in more advantageous situation compared to mediators, because client feels more secure and free to share information with its lawyer. Mediator can't do this, because he is neutral third person, who can't be on any ones side. The lawyer can ask his client to be realistic and be prepared for the worst. It is important for the disputed parties to consider each other's situation and try to reach the outcome, which may not be the best, but still acceptable for both parties. What role lawyer will have depends on the wish of the clients. This is why the preparation stage before mediation is an important part of the process. Lawyers must be great actors and have ability to change roles according to the needs of their clients.²¹⁶

Sometimes there can be situation, where parties aren't in the same position. According to Rutherford, "a legal representative should play a neutral non-partisan role in mediation, providing advice to his or her client to help ensure that the mediated agreement is fair rather than attempting to help the client to obtain an advantage over the opposing party."²¹⁷ From this it can be stated that lawyer can be considered skillful if he is able to do his job, while remaining neutral.

There is discussion regarding the role lawyer has in mediation process. It is stated that it depends on the character of the case. In the court litigation, lawyers actively take part in the process. However, things are different in mediation. They have only advisory role and that may seem difficult for lawyers to understand. According to Coben, "many clients do not want to be active participants in the resolution of their disputes, which is why they encourage a lawyer to act on their behalf."²¹⁸ The active role of lawyer may not be the best choice, because the main needs, interests and emotions may be lost during the process. Direct participation of client is important. If the client's interest is not relevant, it's not appropriate for the mediator to take part in the mediation process directly. However, another party may not agree on that, because he wants genuine reaction from the opponent and active role of an advocate may be irritating for him. That is why it is important to know the exact aim of mediation from the beginning.²¹⁹

²¹⁶Azarov, A. (2014), *supra nota 210*, p 100-101.

²¹⁷Wolski, B. (2015). On mediation, legal representatives and advocates. *University of New South Wales Law Journal*, Vol. 38, No.1, 5-47, p. 32.

²¹⁸Rundle, O. (2008). Barking dogs: Lawyer attitudes towards direct disputant participation in court-connected mediation of general civil cases. *Queensland University of Technology Law and Justice Journal*, Vol. 8, No.1, 77-92, p. 85-86.

²¹⁹*Ibid.*, p. 87-89.

Mediation includes not only legal issues, but also emotions, relationships and interests of the parties. Even though some criticize lawyers' participation in mediation, because of their dominant behavior over client, author thinks that lawyers can play a very important and vital role in the resolution of disputes. The most important is for a lawyer to understand strengths and weaknesses of the process and to use skills, let disputants participate, which will maximize the chances of satisfied results for client. It should be clear that, direct disputant participation is effective in mediation. Clients who had an active role in resolving their dispute are much more likely to be satisfied with the results. Clients, who feel they didn't have much participation, may feel dissatisfied with the process. Lawyers should try to help only when client wants it. If a client lacks confidence, it would be more useful to encourage him to do it alone and before the process starts explain how to act during tense situations.

4.1. Attorney's ethical obligations in accordance with the Code of Ethics of the Georgian Bar Association and the model rule

In Georgia there isn't ethics code for mediators, which makes it difficult to regulate the behavior of mediators during mediation process. Also there is no ethical standard for lawyers participating in mediation process. In this sub-chapter the discussion will be whether the Code of Ethics of the Georgian Bar Association and model laws applies to lawyers who participate in mediation process as well. There isn't much research done on this issue, since mediation is new and the emphasis is on the development of the mediation code. However, it is necessary minimal discussion regarding lawyers' participation in mediation process and regulation of their ethical standards.

In Georgia attorney's ethical obligations are guaranteed by the following laws: Law of Georgia on lawyers; Statute of the Georgian Bar Association; Code of Professional Ethics of Lawyers; Disciplinary provision of lawyers; the basic principles of the UN and Recommendation of Council of Europe.²²⁰ The Law of Georgia on Lawyers, article 2 covers advocate activities. Attorney can give legal advice to the client; he can represent person in case of constitutional,

²²⁰Georgian Bar Association. *Legislation*. (საქართველოს ადვოკატთა ასოციაცია. კანონმდებლობა). Accessible:<https://gba.ge/ka/%E1%83%A9%E1%83%95%E1%83%94%E1%83%9C%E1%83%A1-%E1%83%A8%E1%83%94%E1%83%A1%E1%83%90%E1%83%AE%E1%83%94%E1%83%91/%E1%83%A1%E1%83%90%E1%83%9B%E1%83%90%E1%83%A0%E1%83%97%E1%83%9A%E1%83%94%E1%83%91%E1%83%9A%E1%83%98%E1%83%95%E1%83%98-%E1%83%90%E1%83%A5%E1%83%A2%E1%83%94%E1%83%91%E1%83%98> , 7 December 2018.

criminal, civil or administrative disputes; prepare legal documents on behalf of the customer; legal assistance not related to a representation of the third person.²²¹ From that we can't say that those rules also apply to the lawyer taking part in mediation process. When there is definition, the concept and the scope of attorney's activities, it is important also to determine the condition and moment when the general ethical obligations apply to lawyer as a representative in the mediation process. It is important to mention that currently legislation of Georgia doesn't regulate the special ethical obligations for lawyers who represent their clients in the mediation process. Special attention must be paid to the Georgia Code of Professional Ethics of Lawyers article 11, part 1, which states that, "The Code of Ethics applies to lawyers. The advocate is responsible for the ethical behavior of those who act on the behalf of a lawyer or act on behalf of his / her behalf, except when the lawyer has received all reasonable measures to ensure that the behavior of these persons in compliance with the requirements of the Code of Ethics."²²²

In 2012 the EU issued the document on "Enhancing Judicial Reform in the Eastern Partnership Countries"²²³ with the help of Eastern partnership and national bar associations, which aims to support the judiciary reforms in Armenia, Azerbaijan, Georgia, Moldova, Ukraine and Belarus. Those countries share their knowledge and experience between each other.²²⁴ The most important document, which regulates bar association in Georgia, is the Law on Advocates. According to its charter, the objective of the Georgian Bar Association mainly is promotion. The promotion includes the following, encourage justice; promote the advocates' profession; promote advocates' rights; support legal education and the development of the advocates' profession; manage advocates' ethical standards and provide the social well-being for advocates.²²⁵ In the EU document regarding the strengthening the judicial reform in the Eastern Partnership Countries, it was mentioned by experts to make general description of Georgian Bar Association in the law.²²⁶

With the development of mediation the ethical standards of lawyers have also become an important issue. The Council of Europe Recommendation states that: "*Bar associations or other*

²²¹The parliament of Georgia. Law of Georgia on Lawyers. (საქართველოს პარლამენტი.საქართველოს კანონი ადვოკატთა შესახებ). სსმ, 22, 06/07/2001, 1-15.

²²²Georgian Bar Association.Code of Professional Ethics of Lawyers. 08.12.2012.(საქართველოს ადვოკატთა ასოციაცია.ადვოკატთა პროფესიული ეთიკის კოდექსი 08.12.2012), 1-8.

²²³Directorate General of Human Rights and Rule of Law.(2012). *Eastern Partnership Enhancing Judicial Reform in the Eastern Partnership Countries*. May 2012, Strasbourg, 1-312, p.7. Accessible: http://gba.ge/uploads/files/etika/Eastern_Partnership_Report_on_Lawyers_English_Version.pdf

²²⁴*Ibid*

²²⁵*Ibid.*, p. 15-16.

²²⁶*Ibid.*, p. 17.

lawyers' professional associations should draw up professional standards and codes of conduct...".²²⁷ The professional ethical standards must be in compliance with moral and civil norms which exist in the local society. "...enhance the sense of community among members, of belonging to a group with common values and a common mission."²²⁸ The ethical code must be based on basic principles, which will be common for all. It is only possible to reach through discussion within legal community. The scope of the ethical code is different in each country, because lawyers may have different needs and demands. Today it is difficult to find country which hasn't adopted code of ethics for lawyers. This shows that there is no unified set of standards for lawyers.²²⁹

The Georgian Code of Professional Ethics for Lawyers provides Georgian lawyers with ethical guidelines. The code is divided in to three chapters. Chapter I of the code gives clear and coherent definition of each principle. Those principles are: independence, trust, confidentiality, acting in the client's best interests, avoiding conflicts of interest and so on. Chapter II of the Code deals with the advocate's relationship with his client, the court and other lawyers. Chapter III deals with final provisions and explains the scope of the code.²³⁰ In 2011 Georgian Bar Association issued document, which included analyses about the Code of Professional Ethics of Lawyers. The document includes comments of Ethics Commission of the Georgian Bar Association from 2006 up to 2011. It was created with the help of the EU. The Ethics Commission, while trying to form ethical code for Georgian lawyers, uses UN's basic principles on the role of advocates, recommendations of the Committee of Ministers of the Council of Europe on Freedom of Implementation of the Attorney's profession and the cases of the European Court of Human Rights. It is significant that all judgments made by the Ethics Commission, which were appealed at the Supreme Court of Georgia, remain viable, which means that the Ethics Commission's recommendations and analyses comply with Georgian legislation and international standards.²³¹

²²⁷*Ibid.*, p. 68- 69.

²²⁸*Ibid.*

²²⁹*Ibid.*

²³⁰Georgian Bar Association.Code of Professional Ethics of Lawyers. 08.12.2012.

²³¹Georgian Bar Association.(2011).*Comments on Code of Professional Ethics of Lawyers Based on the Ethics Commission Practice*. 1-52, p.4. (საქართველოს ადვოკატთა ასოციაცია.(2011). *ადვოკატთა პროფესიული ეთიკის კოდექსის კომენტარები ეთიკის კომისიის პრაქტიკაზე დაყრდნობით*). Accessible: <https://gba.ge/pdf/5c385034a7af3.pdf/5c385034a7af3.pdf>

The Model Rules of Professional Conduct was adopted by American Bar Association in August 1983.²³² Some of this rules have compulsory nature and contain “shall or “shall not”²³³, some contain “may.”²³⁴ The rules have also descriptive nature.²³⁵ In the Model Rules of Professional Conduct it is stated, “The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.”²³⁶ There is always a problem regarding formulation of such laws, because there isn’t unity and constructive vision about it. For example, Walter, R. N. states that, “Formulating professional standards presents intractable problems; for example the appropriate level of generality to be used and the extent to which the subjective mental state of a lawyer should be a factor in legislating standards of conduct. Many lawyers will differ on the approach taken on any number of issues. Debate and consideration of these important questions at the state level should not be curtailed by the ABA’s endorsement.”²³⁷ We see that in order to reach conclusion lawyers must understand first of all their main needs and after that how that needs are accomplished in the local legislation. As Walter, R. N. states, “Through far from perfect, the proposed Model Rules are an important and improvement and represent a positive step in the right direction.”²³⁸

According to the preamble of The Model Rules of Professional Conduct, lawyer has various obligations in front of its client. According to part 2, “As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications.”²³⁹ Part 3, “a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter.”²⁴⁰ The main problems regarding lawyer-client relationship are interests. Sometimes lawyers exceed their rights. That is why The Model Rules of Professional Conduct exists. The principles, which are presented in it, “include the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.”²⁴¹ The author thinks that legal profession mustn’t be

²³²Walter, R. N. (1985). An overview of the model rules of professional conduct. *Washburn Law Journal*, Vol. 24, No.3, 443-470, p. 443.

²³³American Bar Association .(1983). Model rules of professional conduct. *American Bar Association Journal*, Vol. 69, No.11, 1-1705, p. 3.

²³⁴*Ibid.*

²³⁵*Ibid.*

²³⁶American Bar Association. House of Delegates.(2009). *Model Rules of Professional Conduct*. Chicago, Illinois: American Bar Association, p. 3.

²³⁷Walter, R. N. (1985), *supra nota* 230, p. 470.

²³⁸*Ibid.*

²³⁹American Bar Association. House of Delegates.(2009), *supra nota* 234, p. 1.

²⁴⁰*Ibid.*

²⁴¹*Ibid.*, p. 2.

independent, without regulations, because there is always threat that lawyer may act not sufficient to the legal profession. However, it must be flexible, so that lawyers can regulate their actions according to the needs of the client. The legal professions have tight relationship with government, so the main power is in the hands of the government, “ultimate authority over the legal profession is vested largely in the courts.”²⁴² In part 11 of the preamble, it is stated that self-regulation of the legal profession is advantageous, because government doesn’t invade the privacy of the lawyers and can’t control their actions. In part 13, it is mentioned that lawyers play vital role in forming society. They preserve legal order and relationship between legal and civil society.²⁴³

There are questions regarding, whether attorneys have to behave differently in mediation process compared to other ADR processes? “Alternatively, do clients have the rights to expect their attorneys to also zealously represent them within mediation by acting to maximize their interests? Or, would such a supposition mean that mediation is merely another adversarial proceeding that must be handled in the same manner as litigation?”²⁴⁴ In the Preamble of the Model Rules it is stated that, “a lawyer may also serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter”.²⁴⁵ This means that the ethical responsibilities are extended to the lawyers taking part in the mediation process as well. According to the Rule 1.2. of the Model Rules, there is constant discussion between lawyer and its client. Lawyer listens to the needs of the client. “In all cases, however, the objectives and means of representation should be defined through consultation between lawyer and client.”²⁴⁶ It can be stated that the client has the leading role and he decides the course and the development of the mediation process. The lawyers have the role of tool, who helps to reach the goal and is the source of information.

Confidentiality has an important aspect in model rules. It guarantees that mediator remains neutral and client has more trust in the process. If the information gained during the mediation process is disclosed that may be used against dispute party in the further process. Rule 1.6. states, “(a)A lawyer shall maintain in confidence all information gained in the professional relationship

²⁴²*Ibid.*, p. 3.

²⁴³*Ibid.*

²⁴⁴Sherrill, J. A. (2012). Ethics for Lawyers Representing Clients in Mediations. *American Journal of Mediation*, Vol. 6, 29-40, p. 30.

²⁴⁵*Ibid.*, p. 30.

²⁴⁶*Ibid.*, p. 31.

with a client...”²⁴⁷ The Georgia Commission on Dispute Resolution Committee on Ethics’ issued opinion 6, according to which, the confidentiality principle doesn’t apply if there is child abuse, threatening violence and if there is urgent need to give information.²⁴⁸

The good faith also plays an important role in mediation process. The problem is the definition of the good faith. “When considering many of the issues that would be involved, the inevitable conclusion is that trying to define what constitutes good faith in some, or all, aspects of mediation would be extremely difficult and might well create more problems and issues than the imposition of any such obligation would solve.”²⁴⁹ So in the end it can be stated that lawyer taking part in the mediation process must know the rules and explain them to the client. He should make goal and aim of the client clear and reach conciliation, which will be more sufficient to its client. All the above mentioned principles must be protected, so that lawyer can act in accordance with The Model Rules of Professional Conduct.

As Nolan-Haley, J. M. states, representing client in the mediation process by lawyer is a new thing and there isn’t much discussion regarding it. More research and study is needed regarding ethical issues of lawyers in the mediation process.²⁵⁰ It can be stated that, The American Bar Association’s Model Rule is similar to Georgian Code of Ethics of lawyers’ rules regarding the competence, confidentiality and general principles. It also defines the duties of the third party. In both legislations, other participants in the mediation process are considered. The answer to the question, which was asked in the beginning of this chapter, is the following, Code of Ethics of the Georgian Bar Association and model laws apply to lawyers who participate in mediation process.

4.2. Analysis of private case of violation of attorney's ethical obligations in Georgia

In the decision of the Disciplinary Chamber of the Supreme Court of Georgia it was stated that, the lawyer will have to face disciplinary liability in cases and rules established by the Code of Law on Advocates and the Code of Professional Ethics of Georgian Bar Association. According

²⁴⁷*Ibid.*, p. 34.

²⁴⁸*Ibid.*, p. 35.

²⁴⁹*Ibid.*, p. 37-38.

²⁵⁰Nolan-Haley, J. M. (1998). Lawyers, clients, and mediation. *Notre Dame Law Review*, Vol. 73, No.5, 1369-1390, p. 1389.

to the case materials, at the end of the court process, in the court, between two lawyers (L. S and N.A) there was verbal quarrel, which grew into physical confrontation.²⁵¹ Ethics Commission examined this situation and said that the lawyer has violated Article 5 (c) of the Law of Georgia on Lawyers, according to which “the lawyer is obliged not to infringe the rights of the court and other participants of the process”.²⁵² Also code of professional ethics of lawyers, Article 9 of part 1 was violated, which states that “an advocate, who participates in the case before Georgian or foreign court or tribunal, is obliged to observe and respect the rules of conduct in the courts or in the tribunal”.²⁵³ The lawyer, who was violent and started the fight first (L.S) was saying that he was acting as a party in the case and didn’t violate the Code of Professional Ethics of Georgian Bar Association.²⁵⁴

Ethics Commission thinks that lawyer must respect his profession and control his behavior. He should try to gain trust from his client and raise awareness about attorneys’ role in the dispute process. The Ethics Commission mentioned one of the decisions of the European Court of Human Rights, R.S. Z.V. Switzerland, where it was stated that certain attorney’s unacceptable behavior doesn’t cause liability for the entire lawyers. Also it was mentioned that even though lawyer (L.S.) was acting as a defendant in civil case, it doesn’t change the fact that he was violent to the other lawyer(N.A). Everybody in the courtroom knew that he (L.S.) was lawyers and not a physical person. So he should face liability based on being a lawyer. The lawyer (L.S.) appealed the decision at the Disciplinary Chamber of the Supreme Court of Georgia.²⁵⁵ It was mentioned that (L.S) was party and not representative in the case, so it wasn’t the responsibility of the Ethics Commission to make decision on this case.²⁵⁶

According to article 2 of the Law on Advocates, attorney activities include: giving legal advice to the client; Client representation in the court, Preparation of the legal documents and legal assistance not related to a representation of a third party. The Disciplinary Chamber considers that the professional requirements for a lawyer aren’t covered only in article 2 of the Law on Advocates and it also covers the relationship between the lawyers. According to the article 6(b) of the the Code of Professional Ethics of Georgian Bar Association one of the reasons to start

²⁵¹Disciplinary Chamber of the Supreme Court of Georgia; Case №5-15, 06.05.2015, p. 4. Accessible: <http://www.supremecourt.ge/files/upload-file/pdf/6maisi-5-15.pdf> (საქართველოს უზენაესი სასამართლოს სადისციპლინო პალატა; დს-შ/5-15, 06.05.2015, გვ. 4).

²⁵²*Ibid.*, p. 2.

²⁵³*Ibid.*

²⁵⁴*Ibid.*

²⁵⁵*Ibid.*, p. 2-3.

²⁵⁶*Ibid.*, p. 4.

disciplinary proceedings is the attorney's demand that there is disciplinary offense conducted by another lawyer, which is what happened in this particular case. L.S was presented in this case as a party. However, the lawyer must protect the norms of professional behaviors not only during representing his client, but also while being party in the process. Since 2006 L.S has been engaged in advocacy activities. The condition that he wasn't in the court trial as a representative, but as a party, didn't allow him to violate the rules of professional conduct. The Code of Ethics includes norms related not only to the attorney behavior during the process of advocacy, but also it includes the general standards of attorney's behavior in the relations between the other lawyers. According to article 7 of the Code of Professional Ethics of Attorney, "the attorney is obliged to respect colleagues, not to damage their dignity and to protect professional values";²⁵⁷ According to Article 10, "the lawyer is obliged to respect his colleague".²⁵⁸ This norms apply also to the lawyers, who have relationship outside the court, and those rules must be protected by lawyer when he is in the courtroom, because everyone knows his professional status and his action is perceived not as a physical person, but as an advocate. The Disciplinary Chamber agreed with the conclusion of the Ethics Commission, that the lawyer violated the professional ethics, by insulting another lawyer.²⁵⁹ In the end The Disciplinary Chamber stated that the disciplinary case materials were examined perfectly and dispute had been settled correctly. The lawyer had violated the Code of Professional Ethics of Lawyers and the Law on Advocates and the imposed penalty is relevant to the offenses committed by the lawyer.²⁶⁰ The lawyer must be loyal to the Principle of lawfulness, which is "golden"²⁶¹ rule. In the code of ethics new changes were introduced on 8 December 2012. It was stated that the lawyer is required not to make compromise even for the sake of its client.²⁶² The above mentioned case makes it clear that the attorney's ethical obligations are directly related to his status and aren't limited to the legal activities that the lawyer carries out in a particular case. By the same justification we can conclude that the attorney who is in the mediation process is subject to the ethical norms established by the Code of Ethics and is obliged to follow the above mentioned ethical norms for the sake of its client and other participants in the the mediation process.

²⁵⁷*Ibid.*, p. 5.

²⁵⁸*Ibid.*, p. 6.

²⁵⁹*Ibid.*, p. 5-6.

²⁶⁰*Ibid.*, p. 8.

²⁶¹Gasitashvili, E., Khubuluri, T., Bochorishvili, K., Kvachantiradze, D.(2013). Activities of the Ethics Commission. Precedents and recommendations. 2010-2013. Tbilisi, 1-159, p. 12. Accessible: <https://gba.ge/pdf/5c3ca52befe6d.pdf/5c3ca52befe6d.pdf> (გასიტაშვილი, ე., ხუბულური, თ., ბოჭორიშვილი, კ., კვაჭანტირაძე, დ.(2013).ეთიკის კომისიის საქმიანობა პრეცედენტები, რეკომენდაციები. 2010-2013 წწ. თბილისი, 1-159, გვ. 12).

²⁶²*Ibid.*,p. 12-13.

CONCLUSION

Today it can be stated that mediation is in competition with the court system all over the world. Going to court doesn't mean that person has used all the sources to resolve dispute. There was time when experts considered mediation as a waste of time, but in the last few years that view has changed, because of the mediation process advantages compared to the court. From the above mentioned analyses, we can see that mediation is becoming more and more relevant in Georgian legal system. However, if we look at the number of cases and its current legislation, there is no evident satisfactory result. The reason for that can be different. Before mentioning what is the best model of court mediation in Georgia, it is important to identify its' main principles. First of all mediation must be based on interest and not on rights, because mediation process involves psycho -social aspects as well. Herewith confidentiality has significant place in mediation process. Those two factors are important in mediation since the main objective of the process is to reach satisfactory result and to maintain good relationship with the opponent.

Mediation process has two models, voluntary and mandatory mediation. There are different approaches regarding voluntary and mandatory mediation in different countries. However, in Georgia it must be mandatory since there is no strong regulatory norms on mediation. Even though some may think that strict rules may have negative influence on consumers. Mandatory mediation may have a positive impact on the voluntary mediation, because after mandatory mediation is established and results are positive, more people will be willing to try mediation process. After certain level is reached, the voluntary mediation can be considered. Both mandatory and voluntary mediation needs certain amount of human and economic resources. Referring to mandatory mediation at the earliest stage creates possibility of increasing the benefits for mediation, because the earlier you start the process there is much more chance to reach consensus. There is always possibility that if mediation doesn't work out, person can take dispute to the court. But, there can be exception if there is some serious threat, which prevents person from using mediation. Also person must have strong argument in order to be able to choose court and not mediation process. In Georgia at the moment mediation process has voluntary nature. The reason for that could be several. One of them is the lack of knowledge about the benefits of the mediation process and because of that some people think that it is a waste of time. The court system has much higher status in Georgian society. That is why there is case overload in the courts. There is no exact statistics, how successful is mediation in Georgia. This is one of the major problems. We can't say exactly what causes the problems and why there

is no mandatory mediation instead. One of the reasons could be that lawyers who aren't familiar with mediation may be against the mandatory mediation, because they think that it isn't effective method to resolve conflict and at the end consumer will go to the court to reach satisfactory result.

From the thesis we find out that Georgia has been introduced to mediation institution since a long time ago and it wasn't able to develop, because of the political and historical events. The regulation of issues that have normative acts of course is much easier than process which is based on conciliation, where parties are freer in their actions. The dilemma is finding the certain regulatory instruments, which will be effective for Georgia. The ability to review and adapt the mediation process to different circumstances is vital. It isn't enough to transfer the model, strategy, or implementation plan for successful enactment of the mediation institute prepared by the international organizations. In order to regulate court mediation in Georgia the following traits must be considered: flexibility, informality, freedom and independence. The main goal of the country must be to balance the interests of government, mediation institution and the parties involved in the mediation process with each other. In Georgia mediation is regulated by the Georgian Code of Civil Procedure Chapter XXI¹. Also recently project was created on mediation. However, it is still in progress and hasn't been adopted yet. So at the moment Georgia has narrow regulation of the mediation process. The changes made to the the Georgian Code of Civil Procedure can be considered positive, but that isn't enough. The legislative authorities, mediation centers and mediation association with the help of the soft law must fill out the parts of legislation on mediation, which isn't regulated. There is no rule how and who can choose mediator; financing of mediation process isn't well regulated; there are no statistics about the amount of conducted mediation processes; no proper regulation laws on mediators sanctioning and refunding; no body, non-effective mechanisms to promote mediation and no ethics code for mediators.

Today in Europe, there are a lot of regulations and directives on mediation. However, the effectiveness of it lies on civil society and government, also international and local organizations. In Georgia more information and knowledge is needed in order to make ADR processes more desirable and uniformity and harmonization in the forming processes play big part. The government must raise awareness regarding mediation institutions and its positive impact on legal system. From the recommendations of international experts it can be stated that the cause for the unsatisfactory results regarding use of mediation in Georgia is the insufficient

support from legal, civil and private society. It is important to regulate the problem timely and effectively. The use of mandatory mediation will guarantee the results focused on solving problem and satisfactory results for the dispute parties.

Mediation must be developed in Georgia based on the experience and knowledge of Europe and America. One of the issues is also the development of court-annexed mediation and court based mediation in Georgia. Georgian legislation gives freedom of choice, to take mediation process in court, or out of court. The mediation institution regulations are working better in the court and court based mediation is more comfortable for court consumers. Transferring mediation in to court system needs a lot of material and human resources. The mediation institutions must work in such a form which resource is available in the local court. If there is no possibility to establish mediation center in the court, then additional outer space must be used. It is also important to make association of mediators, as it is for lawyers.

The idea of regulating mediators' qualifications isn't new. The mediation process regulation is often discussed. However, the less attention is paid to mediators regulations. Every mediator has to work within its legal framework. That will help legal scholars to understand what problems mediation has and find better solution to the dispute. Lawyers and mediators work together and "we versus them" isn't relevant any more. However, in Georgia there are still lawyers who think that mediation is a waste of time. Mediators can have different backgrounds, levels of experience and styles. Practical and theoretical knowledge is the key to success for mediation speedy development. The role of lawyer in the mediation process was also discussed in this thesis. It is important that lawyers consider their client's interests during mediation process. Preparation for mediation is as important as preparing for the trial. In order for the mediation process to be effective, lawyer must prepare beforehand for it. Lawyers help customers to understand case more easily and they help with emphasizing the main aspects of the process. Lawyers must prepare themselves first and after that their clients. We see from the thesis that based on the lawyers high professional and moral responsibility, as well as the primacy of the interests of the client, a lawyer may represent a client in the mediation process, during which ethical obligations of a lawyer established by national normative acts and international norms will apply. It was suggested by international experts to make sure that the rights and interests of lawyers are respected and protected by the supervision of the Georgian Bar Association. The recommendation states that lawyers should develop ethical norms themselves, because they know better what they need. While giving advice to the client lawyer must remember several

aspects. Attorney must play high role in civil and law society. Any action must be in compliance with the ethical standards, which the attorney should follow, despite whether he is representative of the client, or if he is a party in the dispute.

In the end hypothesis is justified. The effectiveness of mediation is proven on the example of different countries and Georgia has a long way to go to refine the best mediation model suited to its legislation.

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