MEDIATION – A MECHANISM FOR CONDUCTING NEGOTIATIONS IN A DISPUTE

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Abstract: The article aims at a scientific discussion about and the promotion of the issue of mediation, a new form of alternative dispute resolution in Georgia. The entry into force of the Law of Georgia on Mediation is an important precondition for the establishment of a culture of dialogue in the country and for transitioning the country from the path of confrontation to the path of social peace. Today, mediation is key for parties in conflict to conduct negotiations and is often referred to as 'a process of negotiation with the engagement of a third party'. However, awareness of mediation is not high, and therefore a gradual increase in public awareness in this direction is a significant step.

Keywords: mediation, negotiation, agreement

I. Introduction

Modern global development requires society to prepare and activate all possible means to ensure conditions for peace and advancement in the world at the expense of less possible time and by applying reasonable actions. Society should understand that world peace and the establishment of a culture of social dialogue, dialogue in society, may be achieved through the development and increased acceptance of each other in daily life, which has been a great challenge throughout the last centuries, although every country establishes mechanisms at a legislative level for reducing the number of disputes in courts and the amount of tension in society[1].

This reality is conditioned by frequent conflicts which put distance between parties, cut off the path for them towards each other, and push them to seek a way-out in the mazes of the law, which greatly damages the interests of both parties and any resolution achieved turns out to be less relevant[2]. Moreover, such legal remedies become the preconditions for

1. *Ware S.J.,* Principles of Alternative Dispute Resolution, 3rd Ed, West Academic Publishing, 2016, 393.
2. *Feehily R.,* International Commercial Mediation, Cambridge University Press, 2022, 3.

disputes because no-one wants to embrace the status of 'loser', no-one likes being wrong[3] – this is characteristic of human nature.

Negotiation, mutual acceptance, and the achievement of mutually beneficial final decisions[4] are those resolutions where society should be headed[5], and considering the current legal regulations, it is available and tangible for everyone; however, several circumstances impede the transfer of that reality into everyday actions. The effective application of a negotiation platform should become a precondition for regulating conflicts both locally and globally, especially if the realisation of the results of negotiation is guaranteed via legal mechanisms; in the case of the extensive popularisation of such mechanisms, the disputing parties will try to transition from the path of tension to the path of peaceful regulation, provided they have the sense and expectation beforehand that the decisions arrived at through negotiation, with their involvement, will be executable.

To this end, society will always be searching for effective ways of dispute resolution that would meet their needs and be adjusted to the actual interests of the parties. Such searching and planning automatically takes a legal path; in this direction, inter alia, the major concern is for state legal policy to coincide with public interests and needs, and consequently respond to the interests that the main constituents of a state – the citizens – have and need.

Today's requirement for disputing parties from the standpoint of regulating an issue is the existence of simple, effective, timely and available forms of dispute resolution[6].

It is noteworthy that, considering all the above, national interests should be and are concurring with the needs mentioned above, as on the one hand, judicial authorities, by developing similar opportunities, are given the possibility to be relieved of proceedings that have accumulated in their courts or are ongoing, and on the other hand, a major social function is fulfilled when the parties retain the relationship with each other by trying to resolve a dispute by legal ways other than a court, as applying these alternative mechanisms result in the absence of the syndrome of a winner and a loser between the parties, which makes it easier for the representatives of the public and businesses to carry on cohabitation or business relations with the other party to the conflict. In other words, it is in states' interests at the macro level and in the interests of each disputing party at the micro level[7] to find a mechanism for dispute resolution which is efficient both in terms of time and cost, and which enables the parties, and states as well, to save resources; and this will serve as a precondition for social peace.

3. *Vries T.*, Mediation als Verfahren konsensualer Streitbeilegung, Peter Lang Internationaler Verlag der Wissenschaften, 2012, 115.
4. *Palmeter D., Mavroidis P.C., Meagher N.*, Dispute Settlement in the World Trade Organization (practice and procedure), 3rd Edit, Cambridge University Press, 2022, 11.
5. *Campbell C.*, International Mediation, Wolters Kluwer, Special Issue, 2020, 32
6. *Carvalho J.M., Carvalho C.,* Online Dispute Resolution Platform in Alberto de Franceschi (ed), European Contract Law and the Digital Single Market –The Implications of the Digital Revolution, Intersentia, 2016, 245, 246.
7. *Steffek F.,* Mediation, in The Max Planck Encyclopedia of European Private Law, Volume II, Basedow J., Hopt J.K., Zimmermann R., Stier A., Oxford University Press, Oxford, 2012, 1163.

Considering the above requirements and reality, the broad spread and use by representatives of the public of alternative means of dispute resolution has been totally logical and eventually predictable, which represents effective mechanisms for the elimination of social[8] tension and conflicts in society; such is also the strong will demonstrated by states, including by political and legal associations thereof on an international level, to promote the introduction of alternative mechanisms for dispute resolution in daily life[9], especially mediation, which can be proudly stated to be implemented in almost every state in recent years as the most effective alternative means of dispute resolution, including the forms[10] characteristic of mediation. In this regard, it should also be considered that several countries have historical experience in dispute resolution via the methodology of mediation or other similar forms, which usually play a positive role in terms of the integration into today's legal system of this institution[11]. Mediation should be determined as a process[12] which helps parties in conflict to eliminate the issues of the dispute themselves by means of negotiation. Negotiation is mediation during which the parties communicate with each other through professional negotiators, the mediators. Unlike usual negotiations, this is a process of negotiation with the engagement of a third neutral party, which is a new and effective possibility for regulating disputes between parties.

The main reason for introducing mediation is to enable the parties to end disputes on the best terms vis-à-vis the resolution of their interests, and to eliminate the conflict themselves[13]. In such a case, they do not just end the dispute with the other party but create the precondition to carry on business or private relationships with them in the future in a civilised form. Mediation is indeed helpful for the parties[14], because during mediation the dispute does not concern who did what in the past, but the parties try to find the best way-out from the current deadlock situation to continue future relationships in accordance with both their interests[15]; this can be achieved by negotiations between the parties; therefore, the essence of mediation encompasses negotiation and these two concepts are often perceived as synonyms, with the only difference being that in mediation negotiation between the parties is facilitated by a mediator, a third neutral entity, and his/her function of negotiator is to arrange effective negotiations between the parties.

8. *Steffek F.*, Mediation, in The Max Planck Encyclopedia of European Private Law, Vol. II, *Basedow J., Hopt J.K., Zimmermann R., Stier A.*, Oxford University Press, Oxford, 2012, 1162.
9. *Esplugues C., Marquis L.,* New Developments in Civil and Commercial Mediation, Springer, Vol. 6, 2015, 2.
10. *Jeong S.,* Kritische Betrachtung űber die Gerichtsmediation in Korea, in Brinkmann M., Effer-Uhe D.O., Vőlzmann-Stickelbrock B., Wesser S., Weth S., Festschrifr fur Hanns Prűtting, Dogmatik im Dienst von Gerechtigkeit, Rechtssicherheit und Rechtsentwicklung, Carl Heymanns Verlag, Kőln, 2018, 831.
11. *Creutzfeldt N.*, Vertrauen in Außergerichtliche Streitbeilegung, Zeitschrift fur Konflikt-Management, Verlag Otto Schmidt, Koln, Heft 1/2016, 15.
12. *Trossen A.*, Mediation (un)geregelt, Win-Management Verlag, Műhlberg, 2014, 37, 49.
13. *Greger R., Unberath H.,* MediationsG: Recht der Alternativen Konfliktlosung, Kommentar, C.H. BECK, Műnchen, 2012, 97.
14. *Jones G., Pexton P.,* ADR and Trusts: an International Guide to Arbitration and Mediation of Trust Disputes, Spiramus Press, 2015, 33.
15. *Wode M., Rabe C.S.*, Mediation, Springer, Berlin, 2014, 27.

The negotiations conducted during mediation help the disputing parties in self-determination, in identifying the actual reasons and approaches of the requirements towards each other[16]. In legal literature, you might come across mediation referred to as 'a process focused on the future'[17]. Mediation[18] enables the parties to receive long-term[19] results in the case of successful conduct and completion of the process, even more so in that the parties in conflict may resort to mediation at any stage of the dispute, although it should be said that the earlier[20] mediation is initiated, i.e. the parties start the process of official negotiation, the higher are the chances of ending the dispute by agreement[21].

Via mediation, the parties try to agree upon their truths during the process of negotiation[22], not letting legal norms decide what they think is true, because as everyone is well aware, fairness and legality are often not concurring notions; therefore, by applying the mechanism of negotiation within the framework of mediation, the parties try to determine their truth by way of agreement; as for the fairness[23] of the decision concerning both parties, the final decision is to be made by the parties themselves; in general, fairness is a standard characteristic of mediation[24].

For the correct perception of mediation, it is important for the parties to properly understand that they always benefit from mediation, even if the negotiation within the scope of the mediation does not end with a specific agreement[25], they will be better aware of the reasons for the conflict/dispute than before the mediation, which might become a precondition for a future settlement of the dispute. Therefore, participation in the process of mediation always has positive results for a party provided he/she/it understands the point of the mediation and is aware of how to use the information obtained during this process[26]. In legal literature, mediation is often characterised as a process beneficial to both parties[27] because the correct and effective application of mediation enables both parties to achieve an agreement beneficial

16. *Alexander N.,* Global Trends in Mediation, 2nd Ed, Kluwer Law International, the Netherlands, 2006, 10.
17. *Trossen A.,* Mediation (un)geregelt, Win-Management Verlag, Műhlberg, 2014, 470.
18. *Deixler-Hűbner A., Schauer M.,* (Hrsg) Alternative Formen der Konfliktbereinigung, MANZ'sche Verlags- und Universitätsbuchhandlung, Wien, 2016, 188.
19. *Kaiser P., Gabler A.M.,* Prozessqualität und Langzeiteffekte in der Mediation, Zeitschrift fur Konflikt-Management, Verlag Otto Schmidt, Koln, Heft 6/2014, 180.
20. *Fenn P.,* Commercial Conflict Management and Dispute Resolution, Routledge, New York, 2017, 68.
21. *Roberts M.M.,* Mediation in Family Disputes, Ashgate Publishing Ltd, Burlington, 2014, 180.
22. 4*Wendland* M., Mediation und Zivilprozess, Mohr Siebeck, Tubingen, 2017, 216, 217.
23. *Windisch K.,* Fair und/oder gerecht? Fairnesskriterien in der Mediation, Zeitschrift fur Konflikt-Management, Verlag Otto Schmidt, Koln, Heft 2/2015, 55.
24. *Steffek F., Unberath H., (eds), Genn H., Greger R., Menkel-Meadow C.,* Regulating Dispute Resolution ADR and Access to Justice at the Crossroads, Hart Publishing, Oxford and Portland Oregon, 2013, 17.
25. *Teply L.L.,* Legal Negotiation in a Nutshell, 4th Ed, West Academic Publishing, 2023, 22.
26. *Ahmed M.,* An Investigation into the Nature and Role of Non-Settled ADR in International Journal of Procedural Law, Vol. 7, intersentia, Cambridge-Antwerp-Portland, 2017, 216, 217.
27. *Deixler-Hűbner A., Schauer M.,* (Hrsg) Alternative Formen der Konfliktbereinigung, MANZ'sche Verlags- und Universitätsbuchhandlung, Wien, 2016, 21.

to their interests[28], whereas the human or financial expense of court proceedings or arbitrary proceedings damage both parties greatly and the victory achieved by one party is belied[29].

The process of negotiation in mediation is confidential; the parties, on a voluntary[30] basis and with the engagement of a third independent and impartial intermediary[31] with no authority to make any decisions, try to achieve an agreement[32] acceptable to their interests without the involvement of a court; in particular, they try to come to conditions agreeable for both parties[33] by means of negotiation, considering the interests of each other[34].

This process has its specific composition and the components thereof should be featured properly in order to ensure that mediation, as a process of negotiation[35] between the parties conducted with the engagement of a neutral third person equipped with special skills[36], is given a very wide area for self-determination and practical use[37]. These components are: providing the public with extensive information on the fact that mediation is a process of negotiation and the parties should engage in this process with a specific purpose; ending a dispute by means of negotiation where the parties, or the representatives of the parties, try to achieve agreement[38].

II. Role of Negotiation in Mediation

Conflict between the parties enables them to identify critical moments in a relationship[39] which, if overcome, create preconditions for more successful future relationships, and mediation plays a positive role in this regard. In legal literature, I often come across the idea that it is easier for participants in a process of mediation to analyse the issue because they have an opportunity to listen to the argumentation of the party directly[40], their 'truth' rather than legal substantiations, because, as it is known, every coin has two sides[41] and the truth of

28. *Tsuladze A.,* Comparative Analysis of Mediation of Georgian Court Mediation, Publishing house World of Lawyers, Tbilisi 2017, 14.
29. *Bevan A.,* Alternative Dispute Resolution, Sweet & Maxwell, London, 1992, 1.
30. *Hirsch G.,* Alternative Streitbeilegung: ein neuer Zugang zum Recht, Honorati C., Ohly A., Padovini F., Hirsch G., Picotti L., Knauer C., Patentrecht ADR Wirtschaftsstrafrecht, Műller Verlag, Heidelberg, 2017, 64.
31. *Steffek F.,* Mediation, in The Max Planck Encyclopedia of European Private Law, Volume II, Basedow J., Hopt J.K., Zimmermann R., Stier A., Oxford University Press, Oxford, 2012, 1162.
32. *Hirsch G.,* Alternative Streitbeilegung: ein neuer Zugang zum Recht, Honorati C., Ohly A., Padovini F., Hirsch G., Picotti L., Knauer C., Patentrecht ADR Wirtschaftsstrafrecht, Műller Verlag, Heidelberg, 2017, 69.
33. *Bäumerich M.,* Gűterichter und Mediatoren im Wettbewerb, Duncker&Humblot, Berlin, 2015, 23.
34. *Feehily R.,* International Commercial Mediation, Cambridge University Press, 2022, 99.
35. *Hale T.,* Between Interests and Law, Cambridge University Press, Cambridge, 2015, 54.
36. *Willis T.,Wood W.,* Alternative Dispute Resolution in Golden J., Lamm C., International Financial Disputes, Arbitration and Mediation, Oxford University Press, Oxford, 2015, 72.
37. *Moore C.W.*, The Mediation Process, 3rd Ed, Jossey-Bass Publishing, San Francisco, 2003, 467.
38. *Feehily R.,* International Commercial Mediation, Cambridge University Press, 2022, 11.
39. *Ulrich H.,* in Klowait J., Gläβer U., MediationsGesetz, Handkomentar, Nomos, Baden-Baden, 2014, 469.
40. *Hakimah Y.,* Alternative Dispute Resolution (ADR), International Shari'ah Research Academy for Islamic Finance (ISRA), Malaysia, 2012, 36.
41. *Bhatt J.N.*, A Round Table Justice through Lok-Adalat (People's Court) -A vibrant -ADR-in India, 2002, 1.

the other party helps the parties to make a comprehensive analysis of an issue. However, the most important thing is for the parties to have appropriate resources to achieve an agreement, which can always be achieved if the primary interest[42] of the disputing parties is to eliminate the dispute.

The establishment and introduction of mediation as a platform for negotiation are promoted by several factors, including the bureaucratic nature of courts and arbitration institutions[43], and the time-consuming procedures and expenses incurred in the proceedings, which means the 'order without law'[44] and the prospect of its applicability is being established in almost every jurisdiction[45]. Like the actual interest of the parties, in mediation, in order to end a conflict and achieve an agreement with each other[46], the parties often disclose their actual interests[47] hidden behind their legal requirements and agree upon specific ways and means to achieve them.

In mediation, negotiations offer the disputing parties flexible[48] alternative means to resolve conflict while spending less time[49], incurring fewer expenses[50] and reducing the backlog of proceedings in courts. One more positive effect of mediation is that if the parties cannot come to an agreement in the process they still have the opportunity to go to court to resolve the dispute[51]. Mediation is more focused on the interests of the parties than their legal rights, therefore an agreement achieved through mediation represents a commercial compromise by the parties[52] more often than a decision made legally in terms of their rights; this is a process which is facilitated by negotiation[53] where the achievement of an agreement provides for the minimisation of risk for the parties and the avoidance of the determination of law against them[54].

By way of negotiation[55] in the scope of mediation, the parties are enabled to define the ongoing conflict with each other, shed light on the essence of the problem, perceive the real

42. *von Maik B.,* Guterichter und Mediatoren im Wettbewerb, Duncker &Humblot, Berlin.2015, 21.
43. *Thalmeir L.,* Die grenzuberschreitende Durchsetzung elterlicher Entscheidungen, Mohr Siebeck, 2023, 32.
44. *Ellickson R.C.,* Order Without Law: How Neighbours Settle Disputes, Harvard University Press, Cambridge MA, 1991.
45. *Esplugues C., Barona S.,* Global Perspectives on ADR, Intersentia, Cambridge, 2014, 5.
46. *Teply L.L.,* Legal Negotiation in a Nutshell, 4th Ed, West Academic Publishing, 2023, 80.
47. *von Maik B.,* Guterichter und Mediatoren im Wettbewerb, Duncker &Humblot, Berlin.2015, 22.
48. *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, V.
49. *Malacka M.,* Mediation als Appropriate Dispute Resolution im Tschechischen und Slowakischen Rechtssystem in Osteuropa Recht Zeitschrift, Nomos, Baden-Baden, 2018, 91.
50. *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 38.
51. *Lindblom P.H.,* Progressive Procedure, Iustus, 2017, 422.
52. *Kajkowska E.,* Enforceability of Multi-Tiered Dispute Resolution Clauses, Hart Publishing, Oxford and Portland, 2017, 10.
53. *Stephen W.J.,* Principles of Alternative Dispute Resolution, West Academic Publishing, 2016, 7.
54. *Teply L.L.,* Legal Negotiation in a Nutshell, 4th Ed, West Academic Publishing, 2023, 3.
55. *Boulle L., Kathleen K.J.*, Mediation Principles, Process, Practice, Butterworths Canada, 1998.12.16.

reasons for the confrontation[56], regulate the conflict peacefully, manage the conflict, ensure that both parties succeed[57] (i.e. a win-win situation[58]), prevent the further development of the conflict, and ensure that they retain a relationship[59]. The doctrine of Christianity encourages the prevention of conflict as well[60]. It is noteworthy that Islam also encourages resort to the elimination of conflict (in Arabic, *Sulh*)[61].

Mediation is a good means of self-determination for the parties[62], because they conduct negotiation directly with each other rather than through court proceedings, where a judge is charged with that function, so 'mediation helps the parties to resolve their case themselves, while the court and arbitrage 'meddle' in the parties' business to resolve it for them'[63].

According to today's understanding, mediation is a means of achieving the purpose of the administration of justice[64], and it is quite a strong instrument; however, for now, it is less used as an alternative means of dispute resolution[65]. Mediation aims at achieving agreement between the parties[66]; and the relationship between the parties will be conciliated when the resolution of the dispute with an agreement facilitates the future relationship[67], which means that the purpose of the mediation is achieved[68]. On the other hand, there are cases when mediation cannot be completed by an agreement; however, during the mediation, the parties explore their positions and actual interests with respect to each other, which may serve as a precondition for the parties not to continue the legal dispute between each other or not to initiate a legal dispute at all, which ultimately should be evaluated as a positive[69] and a specific result, without achieving an agreement per se through mediation.

One of the main preconditions of the extensive application of mediation, as well as other alternative means of dispute resolution, and the promotion of the institutional

56. *Kumar A.,* Alternative Dispute Resolution System, K.K. Publications, 2016, 233.
57. Ibid, 233.
58. *Haft F., von Schlieffen K.G.,* Handbuch Mediation, C.H. BECK, Munchen, 3 Auflage, 2016, 85.
59. *Englert K., Franke H., Grieger W.,* Streitlosung ohne Gericht – Schlichtung,Schiedsgericht und Mediation in Bausachen., Werner Verlag, 2006. 242.
60. *Roebuck D*., Mediation and Arbitration in the middle Ages (England 1154-1558), Holo Books, The Arbitration Press Oxford, 2013, 51.
61. *Hakimah Y.,* Alternative Dispute Resolution (ADR), International Shari'ah Research Academy for Islamic Finance (ISRA), Malaysia, 2012, 97.
62. *Menkel-Meadow J.C., Love P.L., Schneider A.K., Sternlight R.J.,* Dispute Resolution Beyond the Adversarial Model, Wolters Kluwer Law&Business, Aspen Publishers Inc, 2011, 224.
63. *Meyer A.S.*, Chairman, New York State Mediation Board, 1969, 164.
64. *Eidenmuller H, Wagner G.,* Mediationsrecht, ottoschmidt, 2015, 7.
65. *Filler E.,* Commercial Mediation in Europe, Wolters Kluwer, 2012, 277.
66. *Goodman A.,* Basic Skills for the New Mediator, Solomon Publications, 2nd Ed, Maryland, 2005, 20.
67. *Teply L.L.,* Legal Negotiation in a Nutshell, 4th Ed, West Academic Publishing, 2023, 3.
68. *Glenewinkel W.*, Mediation als ausergerichtliches Konfliktlosungsmodell, ibidem-Verlag, 1999, 44.
69. *Waring M*., Commercial Dispute Resolution, CLP Legal Practice Guides/College of Law Publishing, 2016, 160.

development of mediation by institutions of justice, is provided by the fact that its application relieves courts[70] from the burdensome flow of cases, which in some cases is a factor preventing the quality implementation of justice.

The purpose of mediation is assessed differently in legal literature[71]. The main purpose is seen to be the exhaustion of a conflict by the involvement of the parties and the achievement of an agreement which, inter alia, might serve as a precondition[72] to the future relationship of the parties, representing the positive side of mediation.

Finally, we should take into consideration that the additional value of mediation is not only the fact that the expenses[73], and the time, of the courts and judges are saved, and that it is a less competitive process than that in a court, but also the circumstance that mediation enables the parties to solve their problems themselves, to take responsibility, and to control the progress of the process, it being a process which enables the parties to restore or thaw out an already damaged relationship, i.e. to constructively advance their business interests and private life without stress and tension[74], and it is a process in which the parties are more content with the proceedings[75]. Mediation is also notable for the involvement of the legal profession in the neutralisation of disputes where specific professional mediators play a decisive role[76].

As already mentioned above, mediation as an alternative means of dispute resolution represents an effective way of resolving conflict between parties by way of negotiation, and the interest in mediation increases daily. However, mediation has a certain negative effect as well, although, considering the benefits of its importance and application, this negative effect cannot outweigh the advantages. In particular, an opinion prevails in both legal literature and practice that the establishment of mediation may result in the 'privatisation' of justice and the administration of justice might end up in the hands of private persons, which will endanger the proper functioning of the legal system[77], and may represent a certain risk.

70. *Bhatia K.V., Candlin C., Gotti M.,* Discourse and Practice in International Commercial Arbitration, 2012, 211.
71. *Zenk K*, Mediation im Rahmen des Rechts, Nomos, 2008, 36.
72. Comp. Schlieffen 2002, p.7; Walker 2001, p.24; Faller 1998, 36.
73. *Penny B.,* Mediation Law, Routledge Taylor&Francis Group, 2013, 9.
74. *Brown H., Marriott A.*, ADR Principles and Practice, Sweet & Maxwell, Thomson Reuters, 2011, 107.
75. *Penny B.,* Mediation Law, Routledge Taylor&Francis Group, 2013, 9.
76. *Goldberg S.B., Sander F., Rogers E.A., Nancy H., Cole S.R.,* Dispute Resolution: Negotioanion, Mediation, Arbitration and other Processes, 6th Ed, Wolters Kluwer, 2012, 559. (Often, the questions of student lawyers and practitioners concern the issue of providing ourselves by offering neutral means of dispute resolution on the market. In 1985, when the first edition of the book was being printed, the answer would be that it is possible only when working as an adjudicator of labour disputes, or a mediator of divorce disputes. In 1992, when the second edition was being prepared, the answer to the above question covered a mediator reviewing a minor property dispute as well, and today the prospect of receiving income from such activities has significantly increased, which has been facilitated by successful pilots of compulsory legal mediation in different countries).
77. *Goldberg S.B., Sander F., Rogers E.A., Nancy H., Cole S.R.,* Dispute Resolution: Negotiation, Mediation, Arbitration and other Processes, 6th Ed, Wolters Kluwer, 2012, 9.

However, this should be considered more of a hypothetical opinion, and it can be explained by the result of less awareness among those who spread such ideas regarding mediation than the actual negative effect itself, because the correct introduction of this mechanism of alternative dispute resolution in any state, and the full awareness of the public thereof, will minimise such a risk[78].

Moreover, an opinion also prevails that in mediation a party that has a certain power in comparison to the other party to the conflict may use its influence to achieve agreement with the other party in his/her/its own interests[79]. This opinion has the right to exist; however, such risk might exist when resolving a dispute in any form, as well as mediation; if the parties correctly apply the institution of mediation, it is absolutely possible and practicable to level this negative effect.

Another negative effect of mediation, based on the examples of different states, is the excessive regulation thereof; in such cases, mediation as an alternative means of dispute resolution loses its flexible nature, which distinguishes it from court proceedings or any other alternative forms of dispute resolution, and which actually is its advantage and positive side, not a risk which needs regulating; besides, such extensive regulation cannot avoid any risk in practice.

That and many other negative effects will show themselves and have actual effect only if mediation is not of an institutional form in the country and is of a fragmentary nature, but in cases where mediation is regulated at a legislative level, even in a basic form, and where the process of mediation is approved in practice and is actually applied by the disputing parties, any negative effects of the process of mediation or the process itself on the subjects participating therein are neutralised[80].

In this regard, the necessity for a broad spread of information concerning mediation and the need for benevolence concerning mediation on the part of the legal profession should be highlighted as well; when this is achieved, mediation will be destined to be successfully established and functioning in any country.

Modern society is strongly dependent on legal proceedings; it is a kind of unwritten rule that the more developed the society and state, the higher the statistics of referral to court[81]; as they say, a 'litigation[82] explosion' is taking place[83].

78. *Carroll E., Mackie K.,* International Mediation: The Art of Business Diplomacy, Kluwer Law International, Tottel Publishing, London, 2006, 8.
79. Ibid, 10.
80. *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 38.
81. *Esplugues C., Barona S.,* Global Perspectives on ADR, Intersentia, Cambridge, 2014, 48, 49.
82. The term originated from: Olson, W.K., The Litigation Explosion: What Happened When America Unleashed the Law Suit, Truman Talley Books, New York, 1991.
83. 'Litigation Explosion'.

The above 'explosion' automatically leads to the overburdening of the courts, delays in ongoing proceedings, and the need to incur additional expenses by the disputing parties[84].

Therefore, states cannot actually offer people effective and timely justice, which leads to the introduction of alternative dispute resolution mechanisms and their increasing development in different parts of the world[85], despite the weak execution mechanisms for the decisions achieved via these mechanisms in some cases[86]. These mechanisms of dispute resolution are acquiring a name for justice in the 21st century.

Mediation, as an alternative means of dispute resolution, has many clients and followers in many parts of the world on the basis of specific impartial means. The main features of mediation are given below:

a) the process is less expensive[87];

b) the process helps states relieve courts from the burdensome flow of cases;

c) mediation offers disputing parties specific results in less time, and not only a means achieving an agreement in favour of both parties, but also enables the parties to completely and exhaustively clarify the conflict between themselves, the reasons therefor, and approaches towards each other and their future prospects.

It should be noted that the approach of applying to court only in specific cases is being established[88], whereby applying to court only takes place when all the resources of peaceful resolution and regulation have been exhausted. Such an approach explicitly needs to be more popularised and introduced in practice, because the establishment of this standard will provide relief to the courts from its burden. Moreover, it will enable the parties to save the time and finances, and the nerves and energy, incurred in court proceedings going on for years, and make them try to end the conflict on their own, by means of negotiations relevant to their interests, where such opportunity is possible.

Considering the above reality and argumentation, doctrine is already discussing an opinion regarding the capability of alternative means of dispute resolution to serve as an alternative to court proceedings[89], because it actually serves the purpose of justice both

84. European Commission, Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, Brussels, 19.04.2002, COM (2002) 196 final, p.7, n.5 (available at:<http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002/com2002_0196en01.pdf>. [15.05.2018].

85. *Alfini J.J., Press S., Sternlight B.,* supra n.182, 13ff.

86. *Esplugues C., Barona S.,* Global Perspectives on ADR, Intersentia, Cambridge, 2014, 49.

87. *De Palo G., Feasley A., Orecchini F.,* Quantifying the Cost of Not Using Mediation – A Data Analysis, European Parliament, Directorate-General for Internal Policies. Policy Department Citizen's Rights and Constitutional Affairs, Brussels 2010, p.3. (Available at: <www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19592/20110518ATT19592EN.pdf)>.[15.05.2018].

88. *Bamberger H.G*., Mediation und Justiz in Haft F., von Schlieffen K.G., Handbuch Mediation, C.H. Beck, Munchen, 3 Auflage, 2016, 236.

89. *Esplugues C., Barona S.,* Global Perspectives on ADR, Intersentia, Cambridge, 2014, 50.

openly in a demonstrative form, and by its hidden content, as it enables clients to eliminate disputes i.e. achieve actual results, which is a mission of justice. However, on the other hand, all the above is in favour of state affairs, because introducing and developing these alternatives actually relieve state courts from the burden of an increasing number of cases, and apart from saving human and financial resources, helps them to become more effective and accessible for clients. In other words, the advantages and benefits of mediation leave everyone content, including, on the one hand, the parties who are able to end disputes in accordance with their interests[90] and incurring thereby less expenses[91], many judges whose flow of cases becomes lighter, thereby saving human resources, and also states, which can save the expenses of providing a judicial system and its services. Furthermore, states achieve far more effective, timely and quality justice, together with satisfied clients.

To embody the issue, it should be noted that based on the analysis and review of the above argumentation, it can be stated explicitly that mediation, and alternative means of dispute resolution in general for that matter, should not be perceived and understood as a radical alternative to the courts, but as an actual means of ensuring the availability of justice. Moreover, in some cases, it is an immediate mechanism for exercising justice institutionally; on the other hand, the view prevailing in the literature that alternative means of dispute resolution might at some stage create a 'private autonomous dispute resolution mechanism[92]' should be assessed as an idea; it is also referred to as a certain risk of privatization of this direction of justice[93].

Considering the introduction of mediation in the jurisdiction of all European countries, the matter of the applicability of mediation will be separately analysed, in particular whether its mandatory introduction in certain jurisdictions is in opposition to the right of the availability of court remedies provided for by Article 6 of European Convention for the Protection of Human Rights and Fundamental Freedoms[94].

When analysing the issue from this standpoint, two major opinions are of importance. The first is that in practice there is no such case when the binding nature of using mediation serves as a factor in impeding access to the courts. Secondly, mediation by nature is a process based absolutely on the will of the parties, and the autonomy of the will of the parties, so ultimately applying mediation as an alternative means of dispute resolution is again a matter of the parties exercising free will.

90. *Relis T.,* Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs and Gendered Parties, Cambridge University Press, Cambridge, 2009, 65, 66, 67.
91. *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 38.
92. *Wagner G.*, Harmonization of Civil Procedure –Policy Perspective, in X.W.Kramer and C.H.van Rhee, Civil Litigation in a Globalising World, Springer, Heidelberg, 2012, 112.
93. *Esplugues C., Barona S.,* Global Perspectives on ADR, Intersentia, Cambridge, 2014, 52.
94. Cortes P., The New Regulatory Framework for Consumer Dispute Resolution, Oxford University Press, Oxford, 2016, 83.

Therefore, the idea, essence and prospect of the development of mediation as a platform for negotiation suggest that mediation is not in opposition with the universal principle of the availability of the courts.

III. Conclusion

Nowadays, mediation is the fastest developing alternative means of dispute resolution in the world[95], which is characterised by delegating the resolution of disputes between parties to the involvement of a third[96] independent, impartial and neutral person[97], within the framework of a confidential and structured process,[98] which is the main characteristic of the European[99] perception of mediation. Mediation is an efficient alternative instrument for regulating a conflict,[100] because in this process a third neutral person assists the parties in conflict in achieving an agreement in favour of their interests[101] by applying elements of negotiation, and in this format, the dispute is ended by an agreement with a mutually favourable result.

In this process of effective negotiation, the correct approach and positioning of the parties with respect to each other is of utmost importance, because the parties are the main figures in mediation, who, unlike in other mechanisms of dispute regulation, are decision-making entities in the process of negotiation, and it can be stated that, if not for negotiators equipped with representative skills, the parties would have difficulty in achieving agreement in such a process.

Accordingly, along with the introduction and development of mediation as a new mechanism for dispute resolution, it is equally important to inform lawyers about the institution of the negotiator in mediation, and to retrain them in skills related to negotiation. Only such accompanying steps might ensure the successful establishment and operation of this new mechanism.

Summary

Mediation as an alternative means of dispute resolution is being introduced and established in daily use as the most favourable means for parties in conflict to achieve an agreement.

Many European countries have introduced in their jurisdictions forms of compulsory

95. *Alexander N.*, International and Comparative Mediation, Wolters Kluwer, 2009, 1.
96. *Blake S., Browne J.,Sime S.,* The Jackson ADR Handbook, 2nd Ed, Oxford University Press, Oxford, 2016, 144.
97. *Trenczek T.M.A., Berning D., Lenz C., Will H.D.,* Mediation und Konfliktmanagement, Handbuch, 2. Auflage, Nomos, Baden-Baden, 2017, 50.
98. *Tutzel S., Wegen G., Wilske S., Commercial Dispute Resolution in Germany, 2nd Ed, C.H. BECK, Munchen, 2016, 191.*
99. EU-Mediationsrichtlinie 2008, Art. 3a.
100. *Berkel G.,* Zur Diskussion gestellt: Deal Mediation als Konfliktbeilegung, Zeitschrift für Konfliktmanagement (ZKM), Verlag Otto Schmidt, Kőln, 2018, 61.
101. *Germund R.,* Außergerichtliche Streitbeilegung durch Co-Mediation, Pro Business GmbH, Berlin, 2012, 3.

mediation before initiating court proceedings, which promotes this alternative means of dispute resolution in public and its increased application.

Aiming to save their resources and time, this alternative form of dispute resolution has become the preferred choice of many parties in conflict. Different states are working on more innovative forms of carrying out mediation, which will result in more extensive use of this process.

Mediation has already proved in different countries that it is an effective means of dispute resolution and is being established as the most sought-after alternative means of dispute resolution, justifying once again the opinion that 'the development of alternative means of dispute resolution does not have an alternative', and this opinion can be expanded as follows: any correctly planned and understood reform which is based on international experience on the one hand, and on the other reflects a correct perception of national needs, is destined to be a success; this is what should happen to mediation in Georgia and it will ultimately provide the effective and quality operation of justice in the country.

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