

Perspectives of Mediation Legislation Development in Georgia

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The purpose of this article is to outline the development, use and legal perspective of mediation in Georgia and to consider that in the context of the implementation of the EU Mediation Directive 2008/52/EC among member states. It outlines the benefits/reasons for mediation legislation as provided for through the EU Mediation Directive 2008/52/EC. Article considers if Georgia would benefit from a national mediation law, and if so what such a law might include. Alternative dispute resolution development is discussed in the article starting from the historical background, including current legislation.

Main research is performed for discussing the main components of EU Mediation Directive 2008/52/EC and its implementation.

The article offers recommendations for the development and promotion of mediation in Georgia. The EU Mediation Directive 2008/52/EC study determines the key provisions that have to be considered while drafting the law.

Introduction

Alternative Dispute Resolution (ADR) is defined as “*out-of-court dispute resolution processes conducted by a neutral third party, excluding arbitration proper*”. [EU Green Paper on alternative dispute resolution in civil and commercial law COM (2002) 196 final 19th April 2002]. Within the ADR framework mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. [Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters dated 21st May 2008 (the EU Mediation Directive)].

The purpose of this article is to outline the development, use and legal perspective of mediation in Georgia, and to consider that in the context of the implementation of the EU Mediation Directive among member states. It will outline the benefits / reasons for mediation legislation as provided for through the EU Mediation Directive. It will consider if Georgia would benefit from a national mediation law, and if so what such a law might include. The article makes other recommendations for the development and promotion of mediation in Georgia.

Bilateral trade between Georgia and the European Union has grown fast, whereas in 2005 total trade was € 0.96 billion in 2015 it was € 2.59 billion. In 2014, the EU and Georgia entered into an Association Agreement which aimed to deepen political and economic relations, with Georgia benefiting from easier access to the EU market and new trading opportunities. Expanding the trade market means increased number of commercial disputes between two parties.

In both domestic and international trade commercial disputes can arise from many different reasons. When disputes involve individuals or organisations based in different countries, those involved are often confronted with an array of complex issues in various jurisdictions. The majority of commercial problems are routinely settled through negotiation. When negotiation does not work, the parties may elect to mediate. Mediation is more likely to be successful because it introduces the new dynamic of the mediator’s skills. Mediation uses a tried and tested process, which does work. If the parties

trust the mediator with confidential information, he is in a unique position to assess if there is a zone of agreement, and guide the parties to it.

According to an EU-funded study, the time wasted by not using mediation prior to court in disputes in the EU is estimated at an average of between 331 and 446 extra days, with extra legal costs ranging from € 12, 471 to € 13, 738 per dispute. [The Cost of Non ADR: Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation 9th June 2010].

To help build trust and encourage the use of mediation in cross border disputes, on 21st May 2008, the European Parliament adopted Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters. The objective of the EU Mediation Directive is to promote amicable settlement of cross- border disputes by encouraging the use of mediation, to ensure that parties having recourse to mediation can rely on a predictable legal framework, and ensure a balanced relationship between mediation and judicial proceedings.

Development of mediation in Georgia

ADR sits well in Georgian history. Over the centuries, conciliation was used in various forms. Article 60 of the document “Georgian Customary Law”, dated on 19th century, mentions “judging mediators”. The number of mediators could be between 2 to a maximum 6, and they were appointed by the decree of the King, in order to arrive at a decision about a disputed matter. Later in the era of Russian influence, mediators was appointed by the parties, and when the parties arrived at a made a written agreement they could apply to the court for approval of the agreement. (Davitashvili Giorgi, Court Organization and Procedure in Georgian Customary Law”, Tbilisi University Publishing, Tbilisi, 2004, page 13).

Twenty First Century Georgia does not have a stand-alone Mediation Law, but the Civil Procedural Code of Georgia (“the Code”) provides mediation provisions. Amendments effective from 1st January 2012 to Chapter 21 of the Code made provision for “Court Mediation”. According to article 187¹ after application to the court, mediation can be used in the following types of disputes:

- a) Family (however, on the basis of public policy disputes involving adoption and parental rights are not suitable for mediation).
- b) Inheritance.
- c) Neighbourhood.

In addition, with the parties consent, any dispute can be referred to mediation at any stage of the court procedure.

The mediator is defined as a physical person or legal entity. Eligibility to act as mediator (for judges) is prescribed on the grounds of not being an interested party, or being a party itself, not being involved in that case, and not being a relative of a party, or its representatives. However, the Code does not set out how procedural issues in terms of eligibility to mediate will be determined.

The period of Court Mediation is 45 days, and requires the disputing parties to participate in not less than 2 mediation meetings. The parties can agree to extend the mediation period to more than 45 days. The Code requires parties to participate in mediation, and if without reasonable excuse a party does not participate certain sanctions will be imposed, for example payment of a fine and accruing liability for court fees irrespective of winning or losing subsequent litigation.

The Code also assists the parties at the conclusion of Court Mediation, envisaging mechanisms whereby an amicable mediation agreement is subject to recognition and enforcement by the trial judge.

The Code also has confidentiality provisions. The Court Mediation process is confidential and absent the parties consent the Code prohibits the subsequent use of information disclosed in mediation in any subsequent litigation. (Civil Procedural Code of Georgia, adopted in 14/11/1997, in force from 15/05/1999, Chapter 21¹ –adopted in 20/12/2011, in force from 01/01/2012).

Beside Court Mediation, Georgian legislation recognizes other types of mediation as well. One such is Medical Mediation. State Service Centre of Health Insurance Mediation was established in 2008, and deals with health insurance disputes. In 2012, the Health Care Law was amended; defining the

meaning of medical mediation and the State Mediation Service Centre was established (Georgian Law of Health Care adopted in 10th December 1997).

Besides Medical Mediation, Georgian legislation allows for Notarial Mediation according to the Law of Notary (Georgian Law about Notary, adopted on 4th December 2009, and in force from 1st April 2010). According to the law, a Notary is granted authority from the state to act as a mediator. Article 38¹ defines the cases when Notary can mediate, and the disputed matters are the same as court case mediation cases.

According the decree of the Head of the Revenue Service of Georgia #766 (adopted in 25th January 2012) revenue service mediation council procedural rules were approved. This decree defined alternative dispute resolution possibilities and associated procedural issues in tax disputes.

According to the Labour Code of Georgia (adopted on 17th December 2010, and in force from 27th December 2010), article 47, individual or collective labour disputes can be settled with conciliation procedures and / or the court or arbitration.

EU Mediation Directive

EU Mediation Directive applies to cross-border disputes of a civil or commercial nature, voluntarily, to reach an amicable settlement to the dispute with the assistance of a mediator. It does not cover revenue, customs or administrative matters, or disputes involving the liability of the State, nor to those areas of family law where the parties do not have a choice of applicable law. However if we consider the term “cross-border disputes” in a boarder sense, the EU Mediation Directive's articles on confidentiality can also be used in purely internal situation, but become international as well at the judicial proceedings stage.

The EU Mediation Directive has the following components: Objective and scope, quality of mediation, courts and mediation, enforceability of agreements resulting from mediation, confidentiality, effect of mediation on limitation and prescription periods, information on mediation. The key issues of EU Mediation Directive are the use of voluntary codes of conduct

for mediators and quality control mechanisms, as well as acknowledgement that judges have the right to invite parties to attempt mediation. One of the main aims of the EU Mediation Directive is that mediated agreement will be enforced as court judgment. Article 6 of the EU Mediation Directive needs the “explicit consent” of all parties for enforceability to be recognised by a court. The EU Mediation Directive also aims to ensure that mediations take place confidentially and that information given or submissions made by any party during mediation cannot be used against that party in subsequent judicial proceedings if the mediation fails.

Beyond the EU Mediation Directive

Mediation is successful with reported settlement rates of over 70% to 90%. [CEDR Mediator Audit. A survey of commercial mediator attitudes and experience 15th May 2012]. Mediation is cost-efficient and fast, it is a process which helps to preserve good business / working relationships and which relieves the stress involved in court proceedings. Dispute the multiple and proven benefits and the EU Mediation Directive, the ‘EU Mediation Paradox’ is that the uptake of mediation in the EU is considered disappointing, and in civil and commercial matters it is used in less than 1% of disputes. A significant number of mediation experts believe that the only way that mediation will become endemic in the EU is by the introducing a ‘mitigated’ form of mandatory mediation. [European Parliament Study ‘Rebooting’ the mediation directive: Assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU (2014). ISBN: 978-92-823-5269-4].

Whereas the EU Mediation Directive provides only for voluntary mediation, it does not prejudice national legislation making the use of mediation compulsory, provided that such legislation does not prevent parties from access to the judicial system. Compulsory or mandatory mediation can have different flavours. One is where there is an automatic entitlement to refer certain matters to mediation as a prerequisite to commencing proceedings. Another is where judges not only have the power to adjourn legal proceedings to allow the parties to engage in mediation, but have the power to refer parties to mediation with or without the parties’ consent on a case-by-case basis.

The concept of mandatory mediation is controversial for two main reasons. The first is that *“compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court”*. The second is that courts are reluctant to compel parties intransigently opposed to ADR to mediation believing it would *“achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process”*. Halsey -v- Milton Keynes General NHS Trust [2004] EWCA Civ 576

It is however to be remembered that mediation is not a ‘poorer alternative’ or ‘second class’ justice and compulsion to mediate is not compulsion to compromise the dispute. Notwithstanding compulsion, settlement rate statistics from some mandatory schemes in Australia and Singapore offer the prospect that such a referral to mediation does not inhibit settlement. [Mandatory Mediation. LC Paper No. CB (2)1574/01-02(01)]

In addition to mandatory mediation, it is possible for courts to create an environment which encourages parties to mediate. For example, by denying a winning party its costs on the grounds that it had unreasonably refused to mediate. [PGF II SA -v- OMFS Company 1 Ltd., [2012] EWCA Civ 1288] In addition, the courts can support any contractual agreement by the parties to use mediation as a condition precedent to commencing proceedings where there is a *“sufficiently certain and unequivocal commitment to commence a process, from which may be discerned what steps each party is required to take to put the process in place and which is sufficiently clearly defined”*. [Wah (Aka Alan Tang) and another -v- Grant Thornton International Ltd and others [2012] EWHC 3198 (Ch)]

Mediation can be encouraged by contract. The ICC offers four alternative model mediation clauses to parties wishing to use mediation conducted under the ICC Mediation Rules. The default position is that arbitral, judicial or similar proceedings may be commenced in parallel with proceedings under the ICC Mediation Rules. However, it is open to the parties’ to incorporate into their contract an option which requires them to first refer a dispute to ICC mediation and it is only after an agreed period of time has elapsed that the parties can proceed to a final determination.

Mediation can be encouraged by legal professionals, for example by lawyers providing clients with information so that they are in a position to make

informed decisions about the dispute resolution options available to them. The EU Mediation Directive provides that member states shall make available information on how to contact mediators and mediation services providers. The draft Irish Mediation Bill goes further and requires solicitors and barristers to advise parties to disputes to consider utilising mediation as a means of resolving them. Mediation does not deny parties the right to arbitrate or litigate and information and knowledge can alter the perception of the courts as the first and only resort for dispute resolution.

Mediation Law of Georgia

Bearing in mind Georgia's culture and legislative priorities, it is recommended that Georgia considers the creation of a specific law on mediation. Existing legislation will promote the use of mediation.

Although the EU Mediation Directive is not binding for Georgia, it is an important reference framework which we should consider when it discusses mediation legislation and interpretation of mediation rules.

Some of the EU Mediation Directive articles can be considered as statements of intent, for example article 4 on ensuring the quality of mediation, whereas some articles contain concrete and hard rules to be implemented, for example article 6 on the enforceability of settlement agreements and article 7 on confidentiality.

Usually an agreement resulting from a successful mediation is only enforceable as a contract, requiring court proceedings to enforce it if breached. For many businessmen, one of the key benefits of the EU Mediation Directive is that with their consent the national courts can transform a mediation settlement agreement into a 'mediation settlement enforcement order', which may then be recognised and enforced in all other member states (a sort of mini 1958 New York Convention for mediation settlement agreements). This should be a key provision of any Georgian mediation law, as it would encourage confidence in cross border trade. The practical way to deal with this in cross border settlement agreements is for an enforceability clause to be drafted in the mediation settlement agreement.

Georgia's consideration of mediation law could include the different facets of international mediation law in the widest sense, including issues not directly dealt with by the EU Mediation Directive, for example accreditation of mediators, liability of mediators or the regulation of mediation service providers. Although lawyers sell professional services, they are not business people in the purist sense of the word. Party autonomy should allow business people to have access to suitably trained mediators who are professionals with qualifications other than the law. Competent mediators should not be disqualified from accreditation or eligibility based on professional background or nationality.

The purpose of accreditation of mediators is to ensure that mediation professionals and mediation service providers demonstrate a minimum level of competency standards for mediation users. Currently Georgia has only 17 court mediators, which are accredited by CEDR (Centre for Effective Dispute Resolution), the Supreme Council of Justice of Georgia and the Supreme School of Justice of Georgia. It is expected that accredited mediators can demonstrate awareness and knowledge of general dispute resolution, competent use of the mediation process and have other essential mediation skills such as being able to help the parties craft a durable mediation settlement agreement.

Other organisations, for example the Chartered Institute of Arbitrators, has a Pathways Programme in Mediation which covers the basic principles of mediation, skills based training, law of obligations and mediation theory.

Accreditation and training of Georgian mediators exclusively using internationally recognized organisations should be considered an important, but interim way of working. By its nature it is almost inevitable that such accreditation is based on evaluation using English language. For mediation to become part of the culture of dispute resolution in Georgia, mediation accreditation and training should be by Georgian mediators and in Georgian language.

To promote and support high standards by mediators and mediation service providers Georgia could have a "Mediation Standards Board". Part of the "Mediation Standards Board" remit would be to generate and uphold approval standards, use these to oversee the quality application of mediation training and the quality standards of mediation service providers, and maintain a register of nationally accredited mediators.

One of the recommendation, that the law might consider is establishing a Georgian Organisation of Mediators, in order to unite mediators to achieve the general purposes relating to development of mediation in Georgia. Proposed key objectives of the Georgian Organisation of Mediators will be:

- After evaluation of international codes such as the European Code of Conduct for Mediators, approve and maintain a Professional Ethics Code of Conduct for Mediators;
- Assess and accredit mediators as being competent to practice in Georgia and to issue a certificate of appropriate training in mediation;
- Maintain a panel of competent professional mediators (the “Mediation Panel”);
- Help members understand the nature of conflict in business relationships and become more aware of the opportunities that exist for conflict resolution;
- Encourage best practice in the way that members approach mediation and keep members aware of the latest developments in mediation;
- Provide a forum/network to discuss matters relating to mediation and learn from each other;
- Publish papers in relevant journals and at appropriate conferences;
- Liaise with appropriate international mediation bodies and committees;
- Provide a central source of links and information related to mediation.

Some more key aspects must be considered while developing the law: mediation support mechanisms within and outside court, procedural issues of mediation, and mediator’s code of conduct, mediator fees and court fees, confidentiality issues, enforcement of mediated settlements.

Law has to set incentives for mediation, such as lower costs, shorter process, assurance of confidentiality, informality of the process, more control by the parties. Judges play a significant role in the court-connected mediations. Judges shall inform parties about the benefits of mediation and encourage them to mediate. Law can determine appropriate cases for mediation, but judges have to be entitled to select some on their own. Key factors affecting the choice of dispute resolution process can be assessed through three categories: a) goals, b) facilitating features, c) impediments (Frank E.A.Sander and Lukasz Rozdeiczer “Matching Cases and Dispute Resolution Procedures; Detailed Analysis and

Mediation-Centered Approach”, 11 Harvard Negotiation Law Review, Spring 2006).

The Georgian Chamber of Commerce has the remit to develop and further the interests of companies and businesses in Georgia, and is an organisation whose members are local operating and international companies. One more recommendation for legal framework would be that the Georgian Chamber of Commerce could develop ‘boilerplate’ mediation clauses which the parties could incorporate into their contracts. The mediation clauses would provide that where the contract was between Georgian parties the mediator would be Georgian and the where the parties where from different countries the nationality of the mediator would be different.

Conclusion

Despite the helpful and progressive amendments to the Civil Procedural Code of Georgia providing mediation provisions, mediation is not yet part of Georgian commercial culture.

Bearing in mind Georgia’s culture and legislative priorities, it is recommended that Georgia considers the creation of a specific law on mediation. It has to take emphasis on following issues: quality of mediation, court role in mediation process, enforceability of negotiated agreements, confidentiality, codes of conduct of mediators and accreditation of mediators. Georgian Organisation of Mediators can play a key role in development of mediation in Georgia, by establishing the platform of appropriate trainings for mediators and developing the network for discussing best practice.

As discussed, there are several ways of encouragement of mediation, where judges and lawyers play are the key contributors. Georgian Chamber of Commerce can play significant role with developing “boilerplate” clauses that will be beneficial for parties.

Law has to determine the border between voluntary and compulsory mediation, but has to guarantee the right to access to the judicial system.

Conceptually there are two facets to the debate on overarching aims. The first is should any mediation law contain provisions in respect of mediation in domestic

disputes between Georgian parties. The second is what should any mediation law include to give non-Georgian entities confidence that Georgia is a good place to do business and a mediation friendly country.

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