UDC 347.961

Nana Rosepashvili,
Doctor of law, Assistant-professor
Of Davit Agmashenebeli teaching University of Georgia

Maka Tkebuchava,
Doctorate of TSU

NOTARY MEDIATING IN GEORGIA

The alternative way of dispute solution or mediation is a method of dispute solution by negotiation, where neutral person-mediator helps opposing parties or their representatives to finish conflict arisen between them by mutually beneficial agreement. In this article we briefly review, notary mediation, course of notary mediation and legal content of made resolution, the question of resolution execution by writ of execution issued by notary, the terms of notary mediation and cost of notary mediation.

Key words: *notaries, mediation, the dispute, a writ of execution.*

Н. Росепашвілі, М. Ткебучава

Нотаріальна медіація в Грузії

Альтернативне вирішення спору, через посередництво, являє собою спосіб вирішення спору шляхом переговорів, у якому нейтральна особа – посередник конфлікту між протиборчими сторонами або їх представниками, допомагає їм дійти до взаємовигідної угоди з обробкою.

Ця стаття є коротким викладом нотаріального посередництва, нотаріального процесу посередництва і юридичного змісту рішення, виконання виконавчого листа, виданого нотаріусом.

Ключові слова: *нотаріус, медіація, спір, виконавчий лист.*

Н. Росепашвили, М. Ткебучава

Нотариальная медиация в Грузии

Альтернативное решение спора, через посредничество, представляет собой способ разрешения спора путем переговоров, в котором нейтральное лицо – посредник конфликта между противоборствующими сторонами или их представителями, помогает им прийти к взаимовыгодному соглашению с отделкой.

Эта статья представляет собой краткое изложение нотариального посредничества, нотариального процесса посредничества и юридического содержания решения, исполнения исполнительного листа, выданного нотариусом.

Ключевые слова: *нотариус, медиация, спор, исполнительный лист.*

Article relevance. Mediating is an alternative method of dispute solution in the way of negotiation, where neutral person-mediator helps opposed parties or their representatives to finish arisen conflict productively for both. The main point and purpose of mediating is to renew and preserve social relations between the parties.

The purpose of article – in this article we briefly review, notary mediation, course of notary mediation and legal content of made resolution, the question of resolution execution by writ of execution issued by notary, the terms of notary mediation and cost of notary mediation.

Problems of implementation of mediation in the notarial practice engaged in a number of scientists: G. Rieger, P. Far, K. Schlieffen, B. Wegmann. However many questions remain unresolved.

Mediating process is fully free and informal. The parties-participating in negotiation agree with this process voluntarily. The agreement is reached

between the parties independently; this is completely based on parties' self responsibility. The parties are able to discontinue this process any time, at the first meeting and after it. What about mediator, in the process of mediating, he is an independent, impartial, person, who helps parties to reach consensus and does not influence over terms of agreement. Mediator leads mediating process and helps negotiation participator parties to reach agreement in lesser time, than they would be able independently.

Basic material. In Georgia on the way of mediating institutionalization «the first swallow» was Legal Entity of Public Law established on 7th June of 2010 year – Health Insurance Mediating Service. After liquidation of this service, (decree N 790 of 5.12.2011 year of president) State sub departmental Institution in the sphere of administration of Ministry of labor, health and social protection of Georgia was charged with rights and undertaken obligations, at present Legal Entity of Public Law – State Agency regulating medical activity [1, pg. 2].

By amendments made in law in force, in Georgia mediating institute was established in the form of court mediating, Revenue mediating and Medical Mediating. What about notary, notary mediating was established by amendments made «about notary» in law from 1st September of 2012 year , following which notary was empowered with mediator's functions.

International experience in a different fields regarding using Mediating procedure is interesting. At first, Mediating was being developed in different direction at the same time: family, neighboring, in labor litigations and industrial relations. In 2002 Europe's commission worked out a green book over the questions of alternative decision of civil and industrial litigations [2]. In a industrial sphere using mediating is based on entrepreneurs' will to solve all dispute inside of industrial society an interest-partner relations between the parties to be preserved and deepened, and winning of court process by one party and losing of the second party frequently causes conflict escalation, that will be followed with impossibility to continue partner relationship. Besides, Dispute solution through mediator helps them to preserve reputation, as procedure is informal differently from court process that may be followed with broad response. Reputation and image question is not less important. On the contrary, in competitive terms in separate spheres of market it has a decisive importance.

From 80 years in Europe's countries mediating was used in family litigations. For example, in Germany, mediating is used for child upbringing and earning, also property settlement, in order to solve the financial questions arisen as a result of divorce. There is a federal working team of family mediating (BAFM) that trains qualified mediators and works our different directives and rules over the questions of family mediating. What about labor disputes, in labor relationships mediating was used in the United States of America as yet in the first half of 20th century, following which it was successfully developed and distributed in other countries. In this case, mediating is used between employer and employee for negotiation, in order to preclude such a negative result, as it is strike or massive dismission. For example, according to information presented by Consent consultation service of Great Britain and Arbitrage, it participated during 90 % dispute solution; herewith 40 % of cases were on the basis of joint addressing of employer and prof unions and consensus was reached over 90 % of completed disputes, in the way of regulating disagreement [3].

In this article we briefly review notary mediating of Georgia, its processes and legal content of its decision, also, resolution execution question by execution writ issued by notary, notary mediating terms and its price.

The first paragraph of 381st article of law of Georgia «about notary» enumerates these possible disputes that may be subordinated to notary mediating process. According to this law, notary may be a mediator between contending parties: a) Over family legal litigations (except adoption, annulment of adopting, limitation of parent right and limitation of parent right and disentitle of parent right); b) Over hereditary legal litigations; c) Neighboring legal litigations; d) Any other litigation, if there is not defined special rule of mediating over such litigation by Georgian legislation [4].

Notaries have a right to execute notary mediating, who have passed a special training [5] if nota-

ry, who had started case proceeding in the way of mediating, was discontinued or suspended power, any other notary will finish mediating process according to parties interests. The requests -towards mediators are interesting, that is established by legislation of foreign countries and that is an obligation of notary. Privately, European code of mediator conduct [6] defines a wide range of principles, that must be kept my mediators ob their own will and responsibility:

1. Competence and appointment of mediator – Mediator must be competent and have a special knowledge in mediating sphere. In case of parties' request, mediator is obliged to show information about past activity and work experience.

2. Independence and impartiality - The circumstances are mentioned, that may influence over mediator's independence and impartiality (personal or business relationship with one of the party, interest in mediating result and etc.) In these circumstances mediator does not have a right to act.

3. Agreement over mediating proceeding, process and compensation- mediator must clearly explain to parties the main point of mediating proceeding: process, rules, that concern to confidentiality and compensation.

4. Confidentiality - Mediator must keep private all information known for him, besides that case, when law requires divulging it.

Notary mediating may be executed by consent of contesting party. Mediator notary is obliged to make for parties advantageous environment for mediating.

International legislation, also as Georgian, did not make a strict regulation of procedural questions, entrusted their determination to parties and mediator. In this case, we do not review all possible approach and stage, but cite only these stages, that may be used the most effectively in notary practice:

Pre mediating is the first stage; this is the time for preparation and agreement about carrying out of notary mediating procedure. Before starting process, mediating parties and mediator study case history and obtain information about mediating process. Before starting of notary mediating process, it is necessary to determine a place, where this process must be carried out.

Proceeding of mediating procedures is the second stage. Notary mediating is started by forming of requests and positions of party/parties regarding justiciable questions that determine agenda of mediating process.

Searching for decision is the third stage. It is remarkable, mediator-notary may offer to parties' different alternative ways of dispute solution. Besides that, notary will listen to them and promote to solve a dispute, also has this important function that other ordinary notaries do not have. This functions means, that notary is always a lawyer he will necessarily have to check «rightness» legal propriety of consensus obtained as a result of mediating process and, accordingly, any consensus, at variance with Georgian legislation, must not be confirmed by notary. It follows from that; notary is obliged to conform not only parties' consensus, but also private procedural actions to law.

Concluding and settling of successful agreement reached as a result of mediating is the fourth stage, that must be certified notarially and is considered as a document of legal effect. The parties' signature means consent over existed terms and is considered as an ordinary contract, that parties must fulfill voluntarily and execution of which is subordinated to contractual norms of law. Accordingly, agreement reached as a result of mediating is an obligatory-legal contract by its legal features. In case of non fulfillment of obligations established by agreement act made by party within notary mediating, coercive execution is made on the basis of execution writ issued by notary, by rule established by law of Georgia «About execution proceeding».

According to 3rd paragraph of 40th article of law of Georgia «about notary», this mediator notary issues execution document, who conducted notary mediating process and confirmed consensus reached as a result of mediating process [4]. Question of decision execution according to parties' interests is resolved by writ of execution. In an agreement reached as a result of notary mediating, the parties envisage coercive execution of agreement by writ of execution issued by notary. Accordingly, agreement, evading the court goes directly to executor, who, without any procedural complications and proceedings, executes agreement

reached as a result of mediating process by rule established by legislation. Above-mentioned principles stipulate preference of notary mediating from court and other kind of proceedings. The party easily and fast reaches consensus (or disagreement), spends less time and executes reached consensus without all additional procedure.

In order less time to be spent, term is a very important for mediating process, in which negotiation must be finished. This must not be extended endlessly; the parties must not spend material resources and not to reach a consensus. According to civil procedural code of Georgia, legislator fixed 45 days as a term of court mediating, but no less than 2 meetings. Herewith, it is possible, this term to be extended for the same period by parties' agreement [8] in order notary mediating to be more profitable for parties, it is necessary to fix such terms that will not be longer than term fixed for court process. So, it is advisable 20-30 days to be determined as a time limit. In countries, where mediating institute is well developed, mediating process rarely lasts longer than 2-3 days; it means directly length of negotiation. What about number of meetings, no one determines it better than parties, so they will decide the number of meetings that will promote conflict settlement. By this, legal content of mediating-as a process will be protected and almost all steps in this process will be depended on parties' will that will support popularization of notary mediating, its formation and development process [7, pg. 72].

It follows from, that notary mediating is considered as a notary act, and accordingly it is a buyable notary service. Performance of notary act by notary, also legal consultation and technical service connected to this action requires payment. According to the first paragraph of 21st article of law of Georgia «about notary», payment method and amount is determined by service done by notary. Notary is not guaranteed paid by state, so he is paid by people served by notary. By decree «About service terms and fee for notary acts execution and amounts fixed for notary chamber of Georgia, the rule of their payment», fee of notary mediating is not fixed, though in 5th paragraph of 3rd article it is noted, that «Notary has a right to agree with interested person about amount of fee for this service, for which fee is not fixed by this rule». Fee – paid for service executed by notary must be less than cost of proceeding in court in all cases. For more attraction, it is desired, to fix an upper limit of fee amount by law and determine it according to length of process of subject of litigation, spent time, difficulty of case and other circumstances. According to 6th paragraph of 3rd article of the same decree, exemption from fee payment, as an exception is allowed within law of Georgia «about improvement of cadastral findings and special rule of sporadic and systemic rights registration over lands within state project» and fulfilled for the goals for the following notary acts: Settling of notary agreement about mediating execution , notary mediating process, agreement act and certification of authenticity of mediator's and parties signature on mediating agreement and mediator's report.

There is no similar approach of who must make service payment. According to view – generalized in literature and practice, parties may pay equally or they may determine themselves method of service fee payment. Particularly, question is important in case of unsuccessfully completion of mediating regarding payment of fee of done service, which must be imposed to pay agreed fee. In this case, if negotiation ends without result, it will be good if parties of negotiation equally share fee amount, that will surely be relevant to service done by notary [7, pg. 74].

Conclusions. Mediating Institute has as positive so negative sides. The positive side is: cheapness, rapidity, preserving of relationship between the parties, confidentiality, reaching a consensus and comprehension of objective opinion about the main point of litigation by both party. And negative side is that the second party may not agree to participate in the mediating, case resolve is not guaranteed. Notary act is not always a result of mediating process, as despite participation of notary, the parties may not agree and notary act not to be executed, for instance, not to reach consensus over essentials (subject, price and etc.) though, mediating must be related to notary act execution needed for the parties, that is envisaged by law or agreement. Legal consultations and negotiations over the questions,

that are not related to notary act is prerogative of advocates and honest lawyers and not of person authorized by state.

By this brief review we may conclude, that notary mediating, as an alternative method of dispute solution is new in Georgian law. It is indisputable, that it is necessary conciliator technologies to be developed, that is confirmed by practice of foreign countries, scientists' interest towards research of mediating technologies and transformation and support of state towards this field. As a result we get to save time and funds, less conflict and what is important harmonization of people relationships that is a necessary condition of successful development of society and joining European fellowship of country.

References

1. *Analysis* of law in force about mediating. See: http://www.healthrights.ge

2. *Green* Paper on alternative dispute resolution in civil and commercial alw. See: http://eurlex.europa.eu

3. *Kh. Bamberger*. Chance of self elucidation // Mediating and law. – 2007. – N 4 (6). – C. 57.

4. *Notary* mediating. See: http://www.notari.ge

5. *Law* of Georgia about notary. See: https://matsne.gov.ge

6. *European* code of conduct for Mediators. See: http://ec.europa.eu/civiljustice/adr

7. *Perspectives* of legal regulation of mediating in Georgia. Responsible redactor: Assoc. professor Giorgi Tsertsvadze. National center of alternative dispute resolve, Tbilisi, 2013.

8. *Civil* procedural code of Georgia. See: https://matsne.gov.ge