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## Alternative Dispute Resolution – Justice without Trial?

Angelica Roșu<sup>1</sup>

**Abstract:** This research is proposed to analyze the alternative means of dispute resolution, as an alternative of justice, or as a justice alternative, after studying both European critical literature and national one. The phrase „alternative dispute resolution” means any alternative way of dispute resolution method whereby two or more people try using a third party to reach a solution to the problem that precludes them, whether it is mediation, conciliation, assisted negotiation. In this research, we proposed to use the observation as a common method. We concluded that the main reason of the alternative means for dispute resolution results from the possibility to avoid the judicial system that makes it available for the litigants. It was also shown that users of alternative means for dispute resolution not seek to resolve the dispute outside a court as an amicable settlement, negotiated, consensual of their dispute.

**Keywords:** mediation; agreement; trial; litigation; conciliation

### 1. Introduction

By this study we proposed to remove the “one size fits all” litigation mentality and prove that more creative problem-solving processes are available through alternative dispute resolution (ADR).

Justification of our approach stems from the fact that “conventional” matter is already present in judicial proceedings, a part being able to claim the other’s party claims, to abandon the promoted action, to abandon the right before the Court, to conclude a transaction, to quit to the right to action. In this paper, we try to give an answer to the next question: alternative means of dispute resolution are they a matter for state jurisdiction or they are under the strict contractual field, escaping from the control of any judge?

ADR is an umbrella term that refers to alternatives to the court adjudication of disputes such as negotiation, mediation, arbitration, mini-trial etc. (Nolan-Haley, 2008). Thus, we consider it necessary to remove *ab initio* terminological ambiguity.

In this work, when we enunciate the concept alternative way, we understand any way of resolving a dispute in which two or more people try, using a third party, to reach a solution to the problem that opposes whether it is mediation, conciliation, assisted negotiation etc.

In this respect, we invoke the UNCITRAL Model Law on International Commercial Conciliation<sup>2</sup> and Directive 2008/52 of the European Parliament and Council regarding certain aspects of mediation in civil and commercial matters<sup>3</sup>, but also different definitions given to alternative means by doctrine and common dictionaries.

As a result, *reconciliation is seen as “a procedure called conciliation, mediation or in any other equivalent manner in which the parties request a third person (“ the conciliator “) the support in their attempt to reach an amicable solution to a dispute arising between them “(article 1 section 3), and mediation as “a structured process, however it is named or referred to it as, in which two or more parties in a dispute attempt on their own initiative, to reach an agreement on the settlement of their*

<sup>1</sup> Associate Professor PhD, “Danubius” University of Galati, Faculty of Law, Romania, Address: 3 Galati Blvd, Galati, Romania, tel: +40372 361 102, fax: +40372 361 290, Corresponding author: rosuangelica@univ-danubius.ro.

<sup>2</sup> Adopted by UNCITRAL on 24 June 2002.

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*dispute with the assistance of a mediator. This process can be initiated by the parties, recommended or imposed by the court or required by law of a Member State* “(art. 3 (a)).

In theory there is no consensus on the legal nature of alternative means of dispute resolution.

Thus, on the one hand it was argued that the alternative modes have been designed in order to avoid the traditional justice system (American doctrine), on the other side it was noted that they are used by those who seek an amicable settlement, negotiated, consensual (French doctrine) to conclude that ADR is neither an alternative to justice, no justice alternative, but an integral part of justice.

## 2. Legal Nature

According to the specialized dictionaries, to study the legal nature of an institution means to analyze its essence, to identify the factors related to its substance, in short, to identify what defines it.

The term “*contractualisation of justice*” is much more used in the works and articles on alternative modes. This translates progressive intrusion and the increasing role of the model of contract, agreement, in fields that normally are beyond the areas the game of free will of the parties and are subject to mandatory rules, in the centre of which is reflected in the justice.

Contractualisation of justice takes place both as a contractual provisions that envision the organisation of the way in which shall refer to judge and the limits that he will decide and also the growing use of the Convention as a legal document aimed to produce legal effects, such as approval, consent agreement reached following a consensual means of dispute resolution.

Also, if the question is the nature of the document concluded as a result of an amicable settlement and the enforceability of its execution, there is no doubt that alternatives means shall be considered in relation to procedural law.

Therefore, it is necessary to emphasize that the study of the report between the alternative possibilities of dispute resolution and procedural law is clearly problematic because of the fact that, in common and original sense, the first are *a priori* designed to remove the application of the second one.

This is the American connotation of the term “alternative” or at least, this is the conclusion reached by French lawyers when they examined the teleological foundations of expansion of alternative means of disposal in the U.S.A.

Regarding the issue set out, it was outlined that the best alternative to protect their rights and get some satisfaction, it remains for justice that to move away from some of them by private arrangement. (Chevalier & Desdevises & Milburn 2003).

We can conclude that the main reason of the alternative means for dispute resolution results from the possibility to avoid the judicial system that makes it available for the litigants. It was also shown that users of alternative means for dispute resolution not seek to resolve the dispute outside a court as an amicable settlement, negotiated, consensual of their dispute. Different motivation shall arise from the way in which is organized the public service from France justice, that ensures even by its principles an equal treatment for those who appeal to him.

The terms attached to them as “*alternative justice, alternative to justice*” began to be regarded and frequently used with caution, preferring the term “*complementary*” over the term “*alternative*” (Cadiet & Clay & Jeuland 2005).

Mediation may exert a complementary function, in generally the case of “*judicial mediation*” (for example, when the judge initially asked, proposes or sometimes requires the parties the mediation, for all or part of the dispute). He does this because he particularly estimates that resumption of dialogue and incitement of parties to seek their own solution is without doubt the best way to conclude their dispute.

The mediator is complementary to the judge. It provides, but in another way, the task which originally belonged to the latter.

The judge, in his turn, is complementary to the mediator, since the institution remains anchored to the judiciary body and in principle remains subject to a certain control of the same body. In the same time, it was noted that alternative methods of dispute resolution are not any alternative to justice, not a legal alternative but an integral part of justice (Cadiet & Clay & Jeuland 2005).

### **3. Alternative Means between Agreement and Process**

Classically, the contract is an agreement intended to create legal effects. The procedure is a set of rules and principles governing the chain of acts and formalities that aim for a decision. Freedom of will is manifested in alternative means that materialize is the possibility to choose whether or not for one of them, the opportunity to establish a dispute settlement procedure and the adoption of the solution itself.

During the procedure of solving the conventional alternatives as those judicial, the parties, directly or through a third party, will lead to genuine negotiations, standing on equal footing and free of any procedural constraints.

Finally, a solution to the dispute will not be adopted unless a consensus could be reached. Equality between the parties prohibits, in principle, to impose a decision to the other party. It should be noted the fact that state procedural rules prohibit the negotiation, if the dispute shall carry rights which the parties cannot have and are incidents for the “approval”, consent given by the judge of understanding reached between the parties, this consent is necessary for the acquisition of the agreement of enforceability.

It is also apparent that if there is a contentious situation, it is important to identify the most appropriate way to reach a solution acceptable to both parties, those being free to settle their dispute as they want, without being required to comply with procedural law. At the same time, if the parties agree to designate a third party to facilitate the efforts in this regard, they engage in contractual relations, subject to the rules of common law.

But for them to be identified, an effort of qualification is necessary, requiring that the document concluded by the two sides and a neutral third party to give rise to an obligation (third party undertaking to assist the parties in finding a mutually advantageous solution).

We note, however, that the contract cannot avoid entirely procedural context since its subject is nothing else than performing a procedure, the amicable settlement procedure. As a consequence, identifying the conditions of validity of the contract has, necessarily, a procedural colouring. For example, removing the possibility to express a vitiated consent is obtained by introducing an obligation to declare the links that you might have with a neutral third party or the other party, otherwise, the misinformed party may invoke an error regarding his person.

We can also advance the idea that the requirement for determining the object requires the definition provided in the contract to award support for an amicable settlement, the way in which the parties understand how to proceed, or, this condition will require the parties to take a stand against Procedural law issues - communication documents, determining the place of meetings, duration the procedure.

From this perspective, the procedural law fails to appear as a constraint on the validity of conventions concluded for an amicable settlement; it simply serves as a reference to specify the content, validity conditions imposed by rules of law applicable for this type of convention.

Admission of procedural nature of amicable settlement agreements also allows the use of procedural law in order to strengthen their effectiveness. Thus, for a maximum effect of mediation clauses, French jurisprudence appears to consider that the existence of such a clause is a ground of inadmissibility, thus being a procedural effect devoted to mediation conventions. In the same spirit,

*the transaction*, a contract representing the result of a normal commercial mediation, has procedural effect par excellence, namely, the authority of *res judicata*.

Article 6 - 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, text considered the cornerstone of the procedural law, confirms in part the solutions adopted by French Intern Law (Mole & Harby, 2011).

#### **4. Conclusions**

In matters relating to contractual freedom, the application of procedural law mainly permits object the granting of a full effect for the settlement of the dispute settlement agreements, procedural law will be regarded as a support, and not as a constraint. From this perspective, alternative means were considered as a third way of opening up access to the law.

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