

The mediation procedure in Romania

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Abstract: The mediation activity as an alternative way of solving conflicts occupies an important place in modern society. Currently, the mediation reached its maturity worldwide being adopted without reservations. The future of solving conflicts is undoubtedly closely related to mediation. XXth century is the century of solving conflicts amiably outside the court room. In Romania and the mediation profession were regulated by the Law no. 192/2006, on the basis of the idea that mediation is one of the major themes of the reform strategy of the judicial system 2005-2007. By adopting the mentioned law it was followed the idea of reducing the volume of activity courts, and therefore, relieve them of as many cases, with the direct effect on the quality of justice. Mediation is a voluntary process in which the parties with a neutral and impartial third party, without power of decision - the mediator - who is qualified to assist the parties to negotiate, facilitating the communication between them and helping them to reach a unanimous effective and sustainable agreement. The parties may resort to mediation before or after triggering a trial. Mediation can be applied, in principle, on any type of conflict. However, the Romanian legislator has established special stipulations on conflict mediation in criminal, civil and family law. Although not expressly provided, the stipulations regarding the civil conflicts and also apply to commercial conflicts. Therefore, the mediation is applicable to most types of lawsuits, except those relating to personal rights. As a "win- win" principle, the mediation does not convert any of the parties defeated or victorious; all those involved have gained by applying this procedure.

Keywords: mediation, mediator, conflict, alternative method, confidentiality, mediation agreement.

1. Brief history of mediation

To understand the genesis and evolution of mediation as a concept is necessary to study the etymology of the word "mediation". The origins of the word is Latin, originally was used in another form than the current one. The term "mediation" has its etymological origins in the Latin word "mediare". Original meaning of the word is translated in "to divide into two". The term was introduced in the U.S., in 1970 and was acquired for English and German language. The term "mediation" has subsequently become the name of the most important alternative ways of extinguishing conflict. Explanatory dictionary of the Romanian language explains the term "mediere"/"mediation" through "mijlocire"/"intercession". Under the new Explanatory Dictionary of the Romanian language, "a media"/"to mediate" means „a mijloci, a interveni în calitate de intermediar pentru a înlesni"/"intercession, to intervene as an intermediary means to facilitate". Human society has tried, over the time, to develop indigenous methods of conflict resolution other than the traditional ones. In this context, the mediation was born, as a reaction to the existing inefficiency.

Mediation has been used since ancient times, Phoenicians, Greeks and Romans solved their conflicts through mediation. Mediation is a really old weapon, and it was known by man since the first years of its existence. According to historians, the first cases of mediation were known in the Phoenician trade.

The practice of mediation has developed clearly in Ancient Greece and then in Roman civilization (Roman law recognized mediation). Subsequently, the mediation was found in all modern societies. It is assumed that mediation was used in Babylon, in ancient Mesopotamia. Justinian is the first Roman Emperor who recognized mediation in the empire. In ancient Rome the mediator knew different names: "internuncius", "medium", "intercessor", "philantropus", "interpolator", "conciliator", "interlocutor", "interpres" and, finally, "mediator". Confucius (551-479 BC) considered that the best way of solving disputes was made amicably and not through coercion. Buddhist traditions encouraged the settlement of disputes by consensus rather than by coercion. And now, in China the focus is on conciliation and mediation in the purpose of stopping the conflict, with about 6 million of local

mediators. In time the people of Japan were encouraged to settle all disputes amiable, based on the slowness of having access to justice. Relatively small number of lawyers is due to its rich history in mediation. In local communities in Africa anyone could ask for mediation, a respected member of the community and having to fulfill the role of mediator. These practices were widespread, settling amiably with the help of a stalwart member of the community by acting as a mediator, this situation was encountered in almost all communities on the African continent. Islamic culture has developed a strong tradition of mediation and conciliation, in which a third specialized person intervenes between the parties in an attempt to preserve the social harmony by reaching to an understanding of the parties in conflict. In the Middle Ages, Catholic clerics were called to mediate the disputes between families and sometimes even diplomatic disputes. Nowadays, there are several types of mediators; the relation between mediation and commercial domain is highly developed.

2. Regulation. The definition and characteristics of mediation

Legal national literature, based on experiences gained especially from the European doctrine, tried in the last period, the definition of mediation. A definition of mediation an extract from Article 1 of Law nr.192/2006, which provides that: "(1) Mediation is a voluntary way to solve conflicts amicably, with the help of a third person as special mediator, under the conditions of neutrality, impartiality and confidentiality. (2) Mediation is based on the trust that the parties grant to the mediator, as a person able to facilitate the negotiations between them and support them to resolve the conflict by obtaining a mutually convenient efficient and sustainable solution." Another definition of mediation from Article 2, paragraph 1 of the Law nr.134 of 14.05.2007, Law on Mediation in Moldova is: "Mediation is an alternative way to solve the conflict between the parties amiably using a third party". Article 2 of the same law specifies the conditions under which it can be achieved: "Mediation is based on trust that the parties grant to the mediator, as a person able to facilitate negotiations and to assist in solving the conflict by obtaining a mutual acceptable effective and sustainable solution.

Given these issues we may define the mediation as a voluntary process and an alternative way of solving conflict with a third neutral and impartial party, without power of decision, the mediator is qualified to assist the parties to negotiate, facilitating the communication of them and helping them to reach a unanimously accepted effective and sustainable agreement, in confidential conditions.

The term mediation is found also in the Constitution of Romania in 1990, Article 80 paragraph (2), concerning the powers of the President of Romania, who acts as a mediator between the state powers, as between state and society. The mediation empowers the involved parties to decide themselves how the conflict should be solved. Solving conflicts through mediation brings positive changes in personal development and communication and mutual understanding of the people that participate in the conflict. This leads to changes and it strengthens the good relations between people in general, as long as mediation has as purpose also educating the society as a whole.

The definition gives us the opportunity to show the features of the mediations:

a) Mediation has a voluntary feature of solving conflicts;

With reference to the voluntary feature, it must be highlighted the fact that the use of mediation is not compulsory. Therefore, the parties are not obliged to use mediation to resolve the conflict between them, even if there is in a pre-trial stage. In the case of mandatory mediation, it should not be understood that the parties that participate against their will, but that fact that the access to the judicial or arbitrary courts, or perhaps another alternative means to solve the conflict is conditioned by the participation of the parties, to an attempt of mediation. Similarly to our country, the laws of other states also provide the only form of voluntary mediation. Thus, there are cases of compulsory mediation, for example, in German or Austrian law, where such a procedure finds its application in certain matters (neighborhood) before placing an appliance for the court proceedings. We must point out that, in Germany, the mediation was initially mandatory choosing the subsequent and voluntary nature.

b) Mediation is an informal procedure;

Indeed, the mediation procedure is not covered only by a minimum set of rules and forms by which it is performed. However, the imperial procedural norms are few in number, and they are designed to ensure the principles of mediation. The function of this nature, as shown in the doctrine, is to ensure the autonomy of the parties and to create an environment for open communication. The absence of a rigid

framework of mediation gives a great flexibility, depending on each case, which is an advantage over formal procedures for solving conflicts, such as arbitration and judicial.

c) mediation is a amiable procedure;

As it results from definition, the mediation seeks to solve conflicts amiably or, in other words, through negotiations. Negotiations that take place under the mediation are of integrative type, in other words, "winner / winner" type. Therefore, the parties do not attempt to solve the conflict from adverse positions as appropriate for trial, but from a conciliating position based mainly on cooperation. Moreover, this cooperation between the parties is the secret of a successful mediation. At the same time, this nature differs, once again, the mediation of arbitration or court, based on contradictory.

d) the mediation involves the presence of a third party;

A conflict can be solved by the involved parties, amicably or with other persons. The presence, along with a third party (mediator) is one of the essential elements of mediation whereas without them, there can not be a mediation. Thus, the mediator may equal power balance between the parties, which often is due to the unequal forces, thus facilitating a negotiation, and also a fruitful communication. Its presence makes the mediation to distinguish from other friendly forms of conflict resolution, such as conciliation or negotiation, where the parties solve the conflict also themselves.

3. The appliance domain of mediation

According to Article 2 of Law nr.192/2006 (still named the mediation law) the parties may resort to mediation on a voluntary basis, before or after triggering a trial, before the competent court, agreeing to solve in this way any kind of conflicts. The parties have the right to settle disputes through mediation, outside and within the required procedures for amiable settlement of conflicts under the law. The object of mediation may not only be the personal rights, such as those regarding the status of the person; by the law, they may not dispose by agreement or by any other way allowed by the law. In conclusion, the parties may resort to mediation before or after triggering a trial, the parties having the right to settle through mediation any type of conflict. Although mediation can be applied, in principle, on any type of conflict, the Romanian legislator establishes special stipulations concerning mediation in some domains of law dealing especially with criminal, civil and family conflicts. It is also beneficial a special stipulation relating to commercial conflicts, given the fact that at national level, mediation has a particular applicability in commercial conflicts. However, although it was not expressly provided, the stipulations relating to civil conflicts are applied also in commercial conflicts. In this paper we analyze only mediation in civil and commercial matters.

3.1. Mediation in civil matters

Mediation Law in articles 61-63, contains special stipulations on mediation of civil conflicts. These stipulations concern the procedure of mediation in the event of litigation on court. In these cases, the parties may solve their dispute through mediation, either on its own initiative or at the recommendation of the Court. If the court advised the parties to solve their conflict through mediation, this recommendation is not mandatory in nature, they can not accept it. Thus, the Romanian litigator has provided the opportunity for the parties to consider the appropriateness of mediation, while seeking to make them responsible for it. For mediation to have chance of success it is vital that the parties wish to use mediation as a means of alternative dispute resolution. A mandatory mediation ordered by a law would not always be effective. The parties may propose themselves mediation or to accept the recommendation of the court to resort to mediation. The variant of accepting by the court is preferable since, as an error, due to lack of a tradition in the mediation domain in Romania, some parties would consider this as a sign of weakness from the opponent in the trial its proposal to try to solve the conflict through mediation. Unlike the solution of our law, other legislation, such as the Chinese or the American one, can provide for a judge to compel the parties to try mediation before continuing the trial. Parties may reach a full understanding of all conflicts, the ones between the parties and the ones inferred by the court, or it can be only a partial understanding on certain conflicts deducted by the trial. There are established by the law litigator some obligations imposed to the mediator. At the conclusion of the mediation process, the mediator is obliged to inform in written form the court, if the parties have reached or not to a settlement in the process of mediation. The mediator is obliged to inform in writing the court in all cases: total agreement, partial agreement, failed mediation or denounced

mediation. How the court or court of arbitration should proceed, if the litigious parties wish the mediation procedure? The resolution is given by art. 62. (1) of the mediation law that says: "To conduct the mediation process, judging the civil cases by the courts or arbitration it will be suspended at the request of the parties under the terms of art.242 paragraph 1 point 1 of the Code of Civil Procedure. After analyzing the text of the law, we understand that the parties are obliged to request the suspension of proceedings, which would not happen *ex officio*. The parties' request to suspend the trial can not be rejected by the court, if the parties prove starting the mediation process. However, the parties have also the possibility of not asking the suspension of the case and they will schedule their mediation on during the mediation process. The course of the deadline, in art.62 paragraph 2, is suspended during the conduct of the mediation process. Legislator limits the suspended duration of the deadline up to 3 months from the date of signing the mediation contract. The *ex officio* court or at the request of the party, finds the deadline under the Civil Procedure Code art. 252. The three-month period, provided by law, is a fair term, in which the parties have the necessary time to reach an agreement through mediation. In this period it can be scheduled more mediation sessions where the parties do not reach an agreement after the first mediation session. After the suspension of the cause by the admission of the application for suspension of the court, the parties may or may not reach a settlement using mediation. Whatever the variation, the parties return to court either continue proceedings, in the case of failed mediation or the approval of the settlement by the court. In any case, the parties will request the reinstatement of the pending case. Only the parties are entitled to demand for restoring reinstatement of the pending case; the mediator is not entitled to make this request. The request for reinstatement of the pending case is exempt from stamp duty. The article 63 of the Law provides that if the conflict was solved through mediation, the court will pass a resolution in accordance with art. 271, Code of Civil Procedure. Expedient decision that the court will make on the request of the parties, will contain terms of the settlement reached by the parties. The court will have the decision that may also be partial, in the case where the parties have reached to a partial settlement through mediation. In this case, the court will overrule the application, for the parties have reached an agreement as being redundant. Once the judgment was made, in the situation where the parties failed to solve the conflict through mediation, the court will refund the paid judicial stamp duty for its investment. We may notice that the refund will take place only at the request of the interested party, the court is not doing this *ex officio*.

3.2. Mediation in commercial matters

When we relate to commercial law, we can not leave a side the business environment and legal contractual and commercial relations between traders on the one hand, or between traders and non-traders, on the other. There is a close interrelationship between these two categories of co-participants to the acts of commerce, and their immediate aim is to obtain their own profits and as soon as possible. We may say that *profits* and *time* are two key elements that influence both the legal and commercial contractual and commercial relations and also the business relation between traders. Mediation is a voluntary procedure and an alternative procedure by which a third party, called a mediator, facilitates achieving a mutually beneficial agreement and unanimously accepted by the mediated parties, understanding based on real interests of the parties, however in terms of neutrality, impartiality and confidentiality. Considering that time and profit factors are decisive elements in a business and that the directly interested parties have a legitimate interest and immediate interest, mediation proves to be a viable solution that satisfy all the needs of traders or participants in acts of commerce. Mediation, both through the fastness of the process and with immediate results, it may be a solution for the involved parties in a classical process to save both time and money, and above all, the reached solution in the process of mediation to satisfy all interests. Another advantage of mediation in relation to court is that mediation is a confidential procedure, while the trial is essentially public. This principle of mediation may satisfy the merchant's other hidden interests, which could not be done in a public proceeding. For example, a trader does not want its business partners to find out that he can not execute a contract whereas he has an ongoing process with suppliers, in which case its image among the business community would be affected, which would lead to loss of credibility and of business opportunities. In other words, mediation may satisfy the material and image interests, by mediating the interested party and also to maintain the image and good and fair trader.

As a way to reach and use this procedure, there are two possibilities:

- A first way is self-reference, when the operator chooses free will and determination under the self-

determination mediation procedure and the mediator;

- The second way is guiding the court towards mediation proceeding, leaving the choice up to the mediator, in which case the process is suspended until the conclusion of the mediation process.

In both cases the self-determination principle regarding choosing the mediator is obeyed. Moreover, if the mediation occurs during trial and the parties have reached a mutual accepted and beneficial agreement, the stamp duty payable by the state may be reimbursed. Also, the parties may use mediation even when you are involved in other forms of conflict resolution, such as arbitration or conciliation procedure. In these circumstances, we may seek of the fact that mediation is based on trust, that the conflicted parties shall grant to mediator, being able to conclude that, in legal terms, the choice of a mediator has a deep *intuitu personae* nature. Another advantage of mediation is the opportunity for traders to avoid arbitration and the court, by including in commercial contracts of clauses on solving disputes through mediation. This clause acquires the force of law, since it constitutes the law of the parties and it was stipulated by mutual agreement and acknowledgment. Validity of the mediation clause is independent by the validity of the Convention. The institution of representation mandate operates also in the case of mediation on the parties involved in a conflict. In commercial mediation, they may participate as parties in conflict, the legal and physical persons that commit acts of commerce, or that had different relationships with legal persons, and also other persons that were or were not involved in conflict. The lawyers belong to this latest category, translators, experts and interpreters and other persons with whom the parties are in agreement to participate in mediation when the parties consider that their presence is necessary. With a voluntary nature, the parties have the possibility renounce to mediation at any time without creating legal consequences. Understanding in commercial mediation is concretized in an agreement which is widely accepted by the parties and it is the result of the negotiation between the parties on the basis of their real and immediate interests, without having constraints. We conclude that after a mediation procedure, the traders may declare themselves winners, not only for the fact that they have solved the conflict in convenient way, but also because they have the opportunity to keep their trade connections.

4. Conclusions

- Mediation is voluntary and provides to the parties directly involvement in the possibility of choosing the mediator, saving stress time and money; extinguishing conflicts and avoiding some other misunderstandings etc.;

- Mediation is governed by the confidentiality neutrality and impartiality principles;

- Mediation does not convert any of the parties defeated or victorious, but is based on the "win- win" principle;

- The mediator does not judge the parties, does not give verdicts, but facilitates the dialogue between parties, generating options for solving the existing differences;

- We must add that it is required for the Mediation Law to add stipulations referring to the refund of paid stamp duty procedure; employing authorized mediator's procedure with individual contract of employment, and changing art. 75 on the lawyers, notaries and advisers that acquire the mediator status, in the sense of establishing the way of exercion the mediator profession.

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