Mediation versus Court

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***Abstract*:** *Conflict is a challenge at any age, in any area of life. Conflicts do not leave any nook and cranny of our lives untouched. We have controversy with our loved ones, friends, relatives and work colleagues. We are witnessing conflicts in movies, in newspapers, in magazines and on the internet. We participate in wars that we wanted or not* [1]. *Whether we like it or not, we live in a world full of conflicts. The conflict is not in fact the problem but rather the way in which we perceive and manage it. Conflict resolution is one of the great challenges of humanity, given that violence and disagreements are now encountered from an early age, and the boxing ring seems to have moved into schools and colleges. After 2006, when Law no. 192, on mediation and organization of the profession of mediator, was adopted, this way of amicably resolving conflicts, used in all civilized countries, also began to take shape in Romania*.

***Keywords*:** *conflict; mediation; mediator; Court; mediation advantages*;

Introduction

Mediation, as it was enacted in Romania by the law 192/2006, represents a method for resolving conflicts, in a friendly way, using a specialized third party as mediator, in conditions of neutrality, impartiality and confidentiality and given the free consent of the parties [2].

In recent years, the Romanian judicial system underwent significant transformations, thus managing to define its role alongside the other powers of the State. The judicial reform, crowned with success by the adoption of the new codes, tries to be useful to the citizens in general and in particular to the litigants. In the Strategy for the development of Justice as a public service 2010-2014 the strengthening of the mediation institution, as an alternative method of resolving disputes in court has been included as an objective. The factors that lead to the establishment of this objective were: relieving the courts of law, European integration, but also the importance of the use of this amicable procedure.

On the other hand, the introduction of mediation and ensuring its good functioning was a requirement included in the accession process to the European Union. This meant the transposition into national legislation of the provisions of Directive No. 2008/52/EC of the European Parliament and of the Council on certain aspects regarding mediation in civil and commercial cases. Simultaneously, the application of these provisions had to be ensured.

Domestically, the Ministry of Justice aims at capitalizing their own competencies in the promotion of mediation's values and in encouraging the institution's functioning, convinced that it is in the benefit of us all, a society where citizens learn to dialogue, to jointly resolve disputes and become from adversaries, partners.

The Ministry of Justice positively responded to the proposals formulated by mediators and the draft law on speeding up the resolution of lawsuits contained several provisions designed to make known the benefits of mediation to the parties that already are in legal disputes and encourage them to call for dialogue [3].

I. Short historic of the Mediation Law

Law No. 192/2006 on mediation and organization of the profession of mediator was published in the Official Gazette, part I, no. 441 from 22.05.2206. Further, the law has undergone numerous changes through laws, decrees or emergency ordinances of the Government. Chronologically, the modifying documents are: Law No. 370/2009 which stated at art. 6 of the Act that "*the judicial and arbitral bodies, as well as other authorities with jurisdictional attributes informs the parties on the possibility and the advantages of using the procedure of mediation and guides them to use this path to resolve conflicts between them*"; GO no. 13/2010; Law No. 202/2010 - more commonly known as the law of the little reforms; Law No. 76/2012; Law No. 115/2012; EGO No. 90/2012; EGO No. 4/2013; Law No. 214/2013 and EGO No. 80/2013.

Taking into account the fact that traditional means of conflict resolution have become scarce and difficult to navigate, that courts are suffocated by the large number of cases whose settlement may be prolonged for several years and the pronouncement of judgment can lead, most of the time, to the worsening of the conflict between the parties, the application of some concrete solutions, alternative to justice must be applied in order to reduce the costs involved in an ongoing process. Moreover, and more than ever, it is necessary to answer to the need that demands "a different kind of justice" [4].

At the end of the year 2013, we can say that 7 years have passed since the adoption of Law no. 192/2006 on mediation. Although legislative changes made to the law in question are designed to promote this alternative method of dispute resolution, the litigants, those who come to a trial in court, know very few details about the advantages of this procedure.

II. About the information meeting on the benefits of mediation

With the entry into force of the new civil Code of procedure, mediation has gained momentum, taking into account that a new article - 60 [5], was introduced in the mediation law. According to it, in a number of disputes, the parties, under the inadmissibility sanction of request for summons, must first undergo a free information meeting, concerning the procedure and the advantages of mediation.

According to the provisions of the article mentioned, ***the disputes which require those steps prior to a trial*** - the information meeting regarding the benefits and the procedure of mediation are:

a) in the field of consumer protection;

b) in the field of family law (continuing marriage, the division of joint property, the exercise of parental rights, the establishment of children's home, parental contribution to the maintenance of children, any other misunderstandings that arises between spouses with respect to the rights they may have under the law);

c) in disputes relating to possession, expulsion of foreigners, as well as in any other litigation involving neighborhood relations;

d) in the field of vocational training;

e) in work litigations arising from the conclusion, performance and termination of individual contracts of employment;

f) in civil cases whose value is under $ 50,000;

After the information meeting, depending on the mediator's ability to capture their attention and confidence, the parties will decide whether to follow mediation or to go to court. After completing this stage, the mediator will release to both parties either a report (if all parties are not present), or a certificate, through

which the Court is informed about the fact that the parties have completed the information procedure and mentions their decision whether or not to settle the dispute through mediation [5].

The purpose of the information meeting is that the parties find out details about the principles of mediation, be familiar with the rights accorded under the procedure of mediation, but the most important aspect is knowing and understanding the advantages of mediation. To decide why it's better to choose mediation as a conflict resolution procedure, the parties involved must be properly informed about the advantages of this procedure. The mediator should ensure that the parties have understood what this is about, and then, on the basis of the principle of self-determination, they decide what's best for them.

III. The advantages of mediation

1. First of all, *people who choose mediation as an alternative method of conflict resolution are called sides and not complainant or respondent as it happens in court*. The document through which a party is called to mediation is named invitation and not summons as in court, the party being requested and not cited. If the party cannot be present at the mediation at the date and time specified in the invitation, the meeting can be rescheduled with the consent of all parties involved in the conflict.

2. *The parties may choose to appoint the mediator that will mediate the conflict*. The mediator may be selected from the index of authorized mediators [6], listed on the website of the Mediation Council, from the displays at the courts or on referral. This same thing does happen in court where the litigant parties can not choose the judge that will hear the trial, the file being distributed randomly by a specially designed program.

3. *The parties, in consultation with the mediator, shall determine the date and time at which the mediation meeting will be held*. Mediation meetings can be arranged daily. In court, the time limits are imposed, are numerous, with long distances between them and cannot be negotiated with the case judge.

4. *For the mediation meeting there is no time limit*. The parties, together with the mediator shall determine how long they will spend to resolve the case, and if necessary, the time can be extended with the agreement of all parties. Moreover, the parties may discuss with the mediator in joint meetings, but also in separate sessions. The mediator is a natural channel of communication, if necessary, between the parties, is the person who mediates the understanding between the opposing parties and supports them in their official arrangements for the peaceful resolution of the conflict. They are the only ones who know in detail the conflict, which unfortunately is not always sufficiently taken into account by the courts [7]. Most of the time, in court, the parties are not allowed to speak because of the shortage in time of the judges who enter a meeting with a few dozen files. In mediation, the parties are encouraged to discuss and the mediator facilitates the communication between them. This is based on an ancient rule of law "Audiatur alter pares" ("listen to the other side"). When people are experiencing difficulties in listening, often it's not because they don't know how to listen, but, paradoxically, because they don't know how to express themselves. The unexpressed feelings can cease the ability to listen. Why does this happen? Because a good listening ability requires an open and honest curiosity towards the other person and, at the same time, willingness and capacity to remain focused on that person. Hidden emotions make us turn our attention onto ourselves. Instead we must ask ourselves: "what does the other person want to say?" and let’s say: "give me time to

learn more". Meanwhile in our minds a cassette, which is locked to the pattern of our own feelings, is running: "I'm so mad at him!", "I simply feel that he doesn't care about me", "I'm feeling so vulnerable at this point". It's hard to be attentive to each other when we feel ignored, even though the reason is that we have chosen not to share our feelings. Our ability to listen increases significantly with the expression of our own feelings [8]. In mediation the dialogue between the parties is encouraged by the mediator. In court, however, people speak only when the judge asks them to.

5. *Mediation is a confidential procedure*. Everything that is discussed during the proceedings remains strictly confidential under the privacy clause contained in the mediation contract between the mediator and the parties under the agreement of confidentiality signed by the other persons who take part in mediation. The classic process, in the courtroom, is conducted in open court; the statements of the parties before the judge are heard by all those present. The persons participating in mediation are those found in conflict and, eventually, their lawyers or other individuals accompanying them, but only if both parties in the conflict accept them.

6. *The room in which the mediation meeting takes place always is more discrete and more welcoming than a courtroom*. Court is dominated by formalism and those present are bound by certain rules of procedure, otherwise there may be sanctioned.

7. *In mediation, the solution reached belongs to the parties*. The mediator cannot impose anything to the parties; they choose the solution which they deem to be mutually beneficial. The mediator does not judge the parties and does not give verdicts. In court, however, the judge is the one who decides for the parties and the solution is practically imposed on the parties by a court panel. In terms of the non-unitary solving of cases, mediation resolves this problem based on the principle that the solution is the one on which the subscribing parties jointly and in full consensus agree upon and not the one that a third person - called judge or arbitrator – indicates [9]. The solution adopted in the mediation procedure is given by the parties through their full consent of will. Thus they give a proof of maturity in thinking and understanding that the resolution of conflicts in real time can save many relationships (family or commercial) and can ease conflicts. In mediation, both sides must win, there isn't a winner and a looser, the parties discuss from the same positions. In court, however, there will always be a plaintiff and a defendant, someone who wins and someone who loses. Through mediation, the existing conflicts are extinguished and the emergence of other misunderstandings is prevented. The mediator is interested in the reconciliation of the parties and insists on a communication based on respect. At the end of a trial the communication between the parties disappears, being replaced by a more accentuated conflicting state, because unlike mediation, where the Parties apply the win-win principle, in court there will always be winners and losers. The judge is interested in the correct application of the law, in doing justice. In the trial, the parties are accusing each other at all times, either in person or by means of attorneys or other authorized person. A lawyer is bound by ethics code, to represent only the interests of a single party and fight alongside him in court, trying to throw the burden of responsibility of the conflicting status only on the shoulders of the opposing party. During this time, the mediator is basically a kind of advocate for all those involved in the conflict, who instead of fighting to establish the guilty parties, communicates with them in order to determine each contribution of the parties to the amicable resolution of the conflict [10].

8. Another advantage of mediation is that *the mediation agreement, the final document of a successful mediation, is drawn up quickly, even on the day when the parties arrive at a mutually beneficial solution*. In court, after the court panel reaches a verdict it takes a few months to drawn up the decision containing the sentence ruling by the judge, after which it is sent to the parties involved in the process.

9. Last but not least we should mention *the reduced costs of mediation in comparison to the classic lawsuit in court*. Generally the fee of the mediator is negotiated and paid on an equitable basis by the parties, because all sides seek a mutually beneficial solution. In court, the plaintiff will pay the established stamp duty at first, eventually will hire a lawyer, and if it will be necessary will pay the costs of any expertise. Finally, if he wins, he will see what expenses he will be able to recover. We will not even mention the stress accumulated during a trial that may take a few years, if the parties use all appeal avenues allowed by procedure. Regarding to the procedure of mediation, EGO no. 80/2013 has brought important regulations. More specifically, article 11 stated that if an agreement results from mediation, the owed stamp duty is reduced by half.

In General, mediation does not present advantages only for the people who have a conflict.

Resolving as many conflicts as possible through mediation frees the courts, increases the quality of Justice due to the fact that the judges enter the courtroom with a smaller number of cases and reduces the activity costs of the courts and thus important amounts of money can be redirected for other purposes within the courts.

For lawyers, the resolution of cases through mediation means that their clients win so, their customers are satisfied. In the mediation procedure, the lawyers may ask for the same fees as in the court, or even larger, justified by reducing the time the conflicts are settled, assisting and advising clients in proceedings, the comfortable and elegant way of mediation sessions. Moreover, the lawyer is not obliged to urgently draw up papers, because in mediation there are no strict procedural deadlines. In addition, the lawyer has no downtime in court, running from one room to another, so he can use the time to prepare for his cases in court. The most important advantage for lawyers is that due to the rapid success and reduced costs, the happy customers will bring new customers.

Conclusions

Taking into account the fact that in all civilized countries, mediation is preferred by the Court litigants, precisely because of the many advantages presented above, we can be optimistic about the future impact of mediation in Romania. It is important that the domestic legal environment have the required opening and encourage this alternative means of settling disputes amicably. Mediation takes time and results in order to be imposed in Romania also.

To enforce mediation, means to overthrow the mentalities of the judicial hierarchy, of clerks, judges, experts and lawyers. You must bother, impose, create, organize, instill, find mediators, form them, mobilize them, control them, evaluate them, keep the best, remove those who do not comply with the standards, pursue, continue without being hindered by hostility, despite the distrust, despite the reluctance [11].

A recent study carried out within 126 top companies in the USA by the International Institute for Conflict prevention and Resolution, has highlighted the fact that about 98% of the cases that they had, were settled before they got to court, making it obvious that these companies prefer to resolve conflicts amicably.

In the USA, we can talk about a ***culture of mediation*** in which a company that has a dispute does not think first to settle it in the courtroom but, beforehand, attempts to settle the dispute through mediation.

Starting from the certainty that mediation is a success in the USA and that the majority of disputes are settled before they reach the courtroom, we can be optimistic about the future impact of mediation in Romania. It is important that the domestic legal environment have the required opening and encourage this alternative means of settling disputes amicably. Mediation takes time and results in order to be imposed in Romania also. The first steps have taken place, but we must not fall into the trap of reporting the results that we will obtain to those currently obtained in the USA. The gap between the Romanian legal system and the American one is considerable.

The implementation of mediation in the Romanian legal system is not easy, but we have all the prerequisites to obtain in time results and a change of mentality [12].

By having these examples, over time, we will gain a mediation culture and we hope that those who will have a conflict will gradually replace the moniker "See you in court!", with "See you at the mediator!".

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