



SHORT CONSIDERATION REGARDING THE MEDIATION IN ROMANIA

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Abstract

Due to the favorable international context for the promotion and development of alternative methods of dispute resolution, mediation has also established itself in our country as an important element of the judicial reform strategy. The classic resolution of the conflict by going to court does not always appear as a covert response to the needs of the parties involved.

The prolonged health crisis has repercussions in the already existing crisis of the judicial system - the high number of cases encumbering the activity of the courts, therefore, in these times any solution is welcome for the effective resolution of disputes between participants in legal relations.

Keywords: mediation, mediator, legal framework, Mediation Council

INTRODUCTION

In 2006, the Law on mediation and the organization of the mediator profession was adopted (Law, no. 192, 2006), the legislative approach starting from the international principles and rules in the field, the new legal framework having the role of ensuring the mediation procedure functionality and utility.

I. MEDIATION

The structure of the normative act includes 7 chapters, these being presented as follows: Chapter I "*General provisions*" contains the definition of mediation and indicates its scope. The mediation is a way of resolving conflicts amicably, with the help of a third party specialized as a mediator. The mediation is based on the trust that the parties place in the mediator, as a person capable of facilitating negotiations between them and supporting them in resolving the conflict, by obtaining a mutually convenient, efficient and lasting solution. Also in this chapter

are stated the fundamental principles of mediation, which take into account the voluntary nature of the procedure, impartiality, neutrality and confidentiality. Unless otherwise provided by law, the parties may resolve their disputes of any kind through the mediation procedure, even after the commencement of a trial before the court. Strictly personal rights, namely those which the parties may not dispose of by convention or by any other means permitted by law may not be subject to mediation.

The voluntary character of the mediation was also strengthened by the Decision of the Constitutional Court (Decision C.C., no. 266, 2014) by which it emphasized that the parties are themselves responsible for the procedure and can organize it as they wish and conclude at any time. It was also noted that the parties can only be invited by a court to resort to mediation to resolve the dispute (the courts may invite the parties to participate in an information session on the use of mediation, if such sessions are organized and easily accessible. The Court notes that, although both the national law, Law No 192/2006 and the Code of Civil Procedure, and Directive 2008/52 / EC of the European Parliament and of the Council have made the mediation an optional, alternative and informal procedure, Article 2 paragraph (1) of Law No. 192/2006 provided for the obligation of the parties to participate in the information session on the advantages of mediation, under the sanction of inadmissibility of the request for summons, established by the same article, however, the briefing on the benefits of mediation was mandatory.

The Court also considered that the criticized legal regulation, by which the parties were forced to go through the information procedure on mediation, overturned the presumption "nemo censetur ignorare legem". Thus, the citizen benefits from the presumption of knowledge of the law. As such, no special information procedure on the content of a law was justified. Undoubtedly, this obligation established under any sanction, not only under that of the inadmissibility of the request for summons, contravened the provisions of art. 21 of the Constitution, which stipulate that no law may restrict the exercise of free access to justice. The obligation to participate in information about the advantages of mediation is a restriction of free access to justice, because it was a filter for exercising this constitutional right, and by sanctioning the inadmissibility of the lawsuit, this right was restricted. As a result, according to the Decision of the Constitutional Court, starting with August 10, 2014, the provisions that stipulated the obligation to participate in the information ceased to have legal effects (Morozan Florina, 2014, pp. 231-233).

According to the regulations in force, the judge, the prosecutor, the public notary, the lawyer, the bailiff and the legal adviser recommend to the parties, respectively to the party they represent the amicable settlement of the dispute, of the conflict, through the mediation procedure.

In principle, any conflicts in civil, commercial, family matters, some in criminal matters, conflicts in the field of consumer protection may be subject to mediation if the consumer alleges the existence of damage as a result of the purchase of

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defective products or services, non-compliance with the contractual clauses or guarantees granted, the existence of abusive clauses contained in contracts concluded between consumers and economic agents or the violation of other rights provided by national or European Union legislation in the field of consumer protection.

Family disputes subject to mediation may have as their object (see, Decision of HCCJ no. 33/2019): sharing of common property, drawing up a parental plan, any other misunderstandings that arise in the relations between the spouses regarding the rights they may have according to the law. This procedure, through mediation, has certain advantages over the classic court trial, among which we would note: short duration, reduction of stress that the parties go through in the case of a lawsuit. Also, through mediation, an attempt is made to reduce the conflict situation between parents, emphasis is placed on the best interests of children and minors (Mihăilă Carmen Oana, 2020, pp.83-96). The rules for communication between the parties are established, as well as a detailed parenting plan, which must be followed by both parents.

According to the law, *the mediation is also possible in criminal matters* in criminal cases concerning crimes for which, according to the law, the withdrawal of the preliminary complaint or the reconciliation of the parties removes the criminal liability (Mirişan Valentin, Domocoş Carmen Adriana, 2019, p. 459). Thus, the crimes for which the mediation is possible would be: assault or other violence, culpable bodily injury, threat, harassment, sexual harassment, home invasion, violation of professional headquarters, violation of privacy, disclosure of professional secrecy, abuse of trust by fraudulent creditors, violation of the secrecy of correspondence. We must specify that if the mediation agreement was concluded in the criminal investigation phase, the criminal proceedings are stopped and the parties request the consecration of the agreement by the court/notary. If the mediation agreement has been concluded in the trial phase, the defendant is acquitted and the agreement is enforced. The mediation agreement may also intervene before the submission of the preliminary complaint, if the injured party does not want to notify the criminal investigation bodies or the perpetrator does not want to risk the notification of the criminal investigation bodies.

Also, in civil matters, disputes can be mediated regarding: the delimitation of property boundaries, claim, eviction, claims, obligation to do, divisions, sharing of movable property and real estate, successions (sharing of estate), execution of contracts of various types, foreclosures, establishing the situation of material and/or moral damages, the field of insurance etc.

If we look at possible litigation in the banking field, the fast and confidential mediation procedure can solve problems related to: a. *complaints from the customers* (miscalculated interest, unjustified increase in interest and fees during the performance of the contract, introduction of new fees not stipulated in the contract, failure to disclose the interest rate and fees, change of contract terms without the agreement of the parties and without signed additional documents by

both parties, bank fraud, unjustified registration as a bad payer at the Credit Bureau, abusive clauses in existing contracts, renegotiation of credit agreements, respectively b. *litigations or conflicts that can be complained about by the bank* (non-payment on time by customers of interest rates on loans, late payment of installments and interest, customers' refusal to pay interest and legally calculated increases etc.).

And, last but not least, mediation can resolve labor disputes regarding issues related to the continuation, termination or performance of an individual employment contract, issues related to collective labor agreements, issues related to conflicts that arise between colleagues or departments. In these situations, the mediation of labor disputes can intervene both before the initiation of a trial before the courts and after a request for a summons, appeal or recourse has been made, as the case may be.

The status of the mediator is configured in chapters II "The profession of mediator", III "The organization and exercise of the activity of mediators" and IV "The rights and obligations of the mediator". The mediator appears as a guarantor of an ethics specific to the mediation process in which confidentiality, neutrality and impartiality occupy a well-established place. According to the law, the person who cumulatively meets the following conditions can become a mediator:

- a) has full exercise capacity;
- b) has a higher education diploma;
- c) has been in service for at least 3 years;
- d) is medically fit to perform this activity;
- e) enjoys a good reputation and has not been definitively convicted for committing a crime likely to harm the prestige of the profession;
- f) has graduated the courses for the training of mediators, in accordance with the law, or a postgraduate program of master level in the field, accredited according to the law and endorsed by the Mediation Council;
- g) was authorized as a mediator, under the conditions of Law no. 192/2006.

The authorized mediators are registered in the list of mediators, an instrument prepared and updated by the Mediation Council. The public information mentioned in this table allows the persons interested in the mediation procedure to form an objective image of the mediator, of their practical experience and professional training. These data refer to the identity elements of the mediator (including the website of the office), the mediation course completed, the year of starting the activity, the field of specialization, the professional organization of which the mediator is a member, the form of exercising the profession (professional civil society of mediators, abbreviated SCPM; mediator's office, abbreviated BM; office of associate mediators, abbreviated BMA; employee with individual employment contract within one of the forms of exercising the profession provided above), possible causes of suspension. In order to organize the mediation activity, the Mediation Council was established, consisting of nine full members and three alternates, elected by secret ballot by the mediators with the right to vote. The term

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of office of the members of the Mediation Council is four years. Also, for the good development of the Mediation Council activity, permanent consultative commissions are organized, respectively: Consultative Commission of the professional body of mediators in Romania, The Commission on the Relationship with the Judicial System, The Consultative Commission for the Training Quality, The Consultative Commission for the Quality of the Mediation Service, The Committee on the Promotion of Mediation, The Committee on Relations with Authorities and Other Representative Bodies, The Legislative Committee, The Committee on International Relations, The Advisory Committee on Mediation Organizations.

According to the provisions of the Statute of the mediator profession, the exercise of the mediator profession is subject to the following fundamental principles: the principle of legality; the principle of professionalism; the principle of autonomy; the principle of freedom; the principle of independence; the principle of neutrality; the principle of impartiality; the principle of confidentiality; the principle of professional secrecy; the principle of disciplinary liability; the principle of adopting a fair and civilized behavior; the principle of discrimination; the principle of preventing conflict of interest; the principle of cooperation and partnership; the principle of responsibility.

Although the mediation procedure has a number of advantages (participants finding mutually convenient, efficient and sustainable solutions, flexibility, low costs, etc.) and in the current period there is a need to promote mediation effectively, both among participants in the administration of justice and among the citizen as an integral part of civil society.

Knowing the advantages of the procedure, those involved in the conflict can thus make an informed decision whether it is in their legitimate interest to resort to mediation. In fact, in the activity I carry out, I have often identified the need of the economic agent, service provider, to resort to mediation in resolving disputes arising in customer relations - the trader understood that the mediation procedure provides the lawyer, legal counsel, greater control over the understanding and implicitly over the conclusion of the conflict.

Given these considerations, we must remember an important step in promoting the mediation, because by amending the National Education Law (National Education Law, No. 1, 2011), Legal Education was introduced as a discipline, which will be taught in schools from 2022. In the new law there are several mentions regarding the possibility of resorting to mediation in certain criminal cases.

In accordance with the provisions of Law no. 192/2006 on mediation and the organization of the mediator profession, the Mediation Council, in its capacity as regulatory authority in the field of mediation, has decided that it is important to get involved, in order to make proposals for the introduction of such theoretical as well as practical mediation lessons in the school curriculum. The Mediation Council wishes to be involved in this approach because there is the possibility of introducing mediation as a discipline of study and restorative practice for both middle school and high school students. In this view, it has been suggested to set

up a working group that will act to establish concretely the basic content for the middle school level as well as for the high school level. Subsequently, two or three distinct teams will be organized to continue the specific activity of the project Mediation in school, on the levels Mediation in secondary school, Mediation in high school within the subject Legal education and Mediation in high school within a new subject "Restorative methods and practices. Mediation". The working group will include in a document strong arguments for which the mediation is worth getting to school, to be submitted to the Ministry of Education to draw up the curriculum for the new discipline whose sanctioning law is to be published, the discipline "Legal Education"; it will contribute to the elaboration of a set of didactic support documents for the structure of an optional course, of some lessons on mediation, including the adaptation for the online education.

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