

MEDIATION - AN AMIABLY WAY OF RESOLUTION OF CONFLICTS

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Abstract:

Conflict is an everyday fact, part of our society and can be seen at every step, the stress and the "crisis" of time in which we live. The only "problem" that arises is how we manage these conflicts, so that our life is not very affected. We can go to court to judge, hoping thus we get "justice" absolute (which, unfortunately, did not quite happen) and we exhausted nervous, amplifying the initial conflict or we can find a solution to conflict Amiaia to defuse the situation without creating trauma us.

And the easiest way to resolve conflicts amicably about mediation, a confidential, quick and relatively low-cost held in the presence of a third specialized party, called mediator.

Key words: conflict, process, amicable settlement, mediation.

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1. Introduction

The first forms of mediation can be found in the Bible (Matthew 5.9 - Blessed are the peacemakers, for they shall be called sons of God), and in ancient Greece and in traditional

communities in Asia and Africa, as in England century XIV appear "mediators question".

Mediation term appears in the current sense, in the United States, in 1970, and being taken in other languages, in the same way. Germans call the mediation "die mediation", the French "la mediation" and in Romania we use the term "mediere".

Mediation can be used to prevent the escalation of conflict (preventive diplomacy) can be used to end violence (conflict management) or can be used in post-conflict phase (post-conflict reconstruction). Therefore, mediation can help build and maintain peace in a way not found in other strategies.

Such mediation techniques can lead to the transformation of others fighting the "fair play" and put into practice the most important lessons received the education received by each.

2. Mediation in Romania. General aspects

In Romania interest in mediation and the mediation profession is still growing, and the mediation law in 2006 all those interested in this way of resolving conflicts amicably looking

forward an alternative to the classical justice (Sandru, Radulescu & Calin, 2012).

In terms of institutional, instrumental in implementing this system in Romania has returned to "Craiova Mediation Center" set up alongside Dolj Craiova Court and the Court by Order no. 1391/C/2003 the Ministry of Justice.

In this institution started under a national program of training of mediators, in partnership with the Ministry of Justice, the U.S. Embassy and Bar County, first training and training of mediators with Romanian and American instructors.

Mediation can be:

a) extrajudicial - out of court, prior to referral to it, made in order to prevent a decision resolving the dispute through the courts, being used especially in commercial contracts;

b) the judicial process, made to extinguish it, the will of the parties and through an amicable solution - under certain aspects, under judicial control, likely finding it by the expedient decision.

Judicial mediation agreed by the parties as provided by law, may be considered a procedural civil institution, a possible way of fighting the case.

Mediation can be applied in many fields, belonging to the civil law, family law, commercial law, labor law, intellectual property law, consumer protection or malpractice.

Thus civil law (Lisman, 2011) mediation may apply inheritance (succession), division of property, property claims, cancellation of contracts, or other monetary claims, conflicts with neighbors, the obligation to make termination of contracts or termination of execution.

Commercial law apply to claims, order for payment, termination of contracts, claims, evictions, disputes between partners or termination of execution.

Employment law is used in labor disputes arising between employees and employers, financial rights, individual employment termination, etc..

In family law mediation may intervene in conflicts between spouses, disputes between parents and children or between adult members of the same family, finance disputes, desires, etc..

In conflicts related to consumer protection, mediation occurs in case of damage or failure to comply with contractual clauses guarantees provided or unfair terms in contracts.

In other words can resolve any conflict mediation in civil, commercial, family and other

materials, except for strictly personal rights (individual status) and those in which the parties may have by convention.

Notice that mediation may not be use on strictly personal rights of the parties under the law, and parties can not decide about this rights by agreement or by any other means not permitted by law.

A special situation appreciating criminal law, where mediation is useful in cases in which action shall be initiated upon prior complaint (hitting, rape, etc..)

Or the reconciliation of the parties removes criminal liability and civil actions to resolve lawsuits.

3. Mediation and the mediator

According to art. 1 of Law 192/2006 Mediation is a voluntary way of resolving conflicts amicably through a third party as a mediator specializing in conditions of neutrality, impartiality and confidentiality.

According to art. 3 of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters ", mediation "means a structured process, however named or referred to it, in which two or more parties to a dispute attempt, on its own initiative, to reach an agreement on the settlement of their dispute with the assistance of a mediator.

Are considered principles governing mediation:

Neutrality. The mediator does not represent either party interests and not impose their results with throughout the mediation a position equidistant from the other participants in mediation sessions. Its role is simply to facilitate the process between the parties, or otherwise meditate views so bring them to a common point to eliminate the state of conflict. The mediator is not a judge with power and can not decide on conflict resolution and can not impose to the parties a result.

Impartiality. A feature of this principle is the very conduct which requires that the mediator mediator to conduct a mediation with an equidistant position between the parties. It is forbidden mediator to encourage, by word or deed, any of the parties. During the process continually ensure that no party is disadvantaged or feel that is

disadvantaged during mediation, carefully avoiding any form of manipulation, intimidation or threat. It is very important to not preexist any personal or professional relationship between the mediator and one party.

Confidentiality. The mediator will keep secret the information that you get from the parties during mediation and will not disclose without the consent of their. Also discussions taking place during the mediation process are confidential can not be disclosed without the consent of both parties.

Self-determination. Parties may exercise self-determination by choosing mediator, participate or withdraw from mediation, and result as the content of the mediation agreement is the responsibility of the parties.

Regarding individual mediator, the mediator calls the same direction as any third invited to conduct a mediation in an effective, impartial and competent, regardless of denomination or profession of the third party in that Member State and how the third party was appointed or requested to conduct the mediation.

Law no. 192/2006 defines the mediator as the person who satisfies the following conditions:

- a) promote mediation activity and represents the interests of authorized mediators to ensure quality of mediation services;
- b) has higher education;
- c) has a work experience of at least 3 years or completed a graduate level degree in the field, approved by law and approved by the Board of Mediation;
- d) is appropriate, medically speaking, for the conduct of business;
- e) enjoys a good reputation and was not finally convicted for committing an intentional crime, prejudice the reputation of the profession;
- f) graduated mediator training, under the law, except for graduates of master's level graduate programs in the field, approved by law and approved by the Board of Mediation;
- g) was certified as a mediator.

4. The mediation procedure

Prior procedure includes steps one of the party / the parties to a dispute use to start mediation sessions (Ignat, Sustac & Danileț, 2009).

If only one party is present, the mediator, upon request, will address the other party written

invitation, to accept mediation and the contract of mediation.

The invitation is sent by any means that provides acknowledgment text (registered letter with acknowledgment of receipt, courier, fax, e-mail with confirmation of receipt).

If the conflicting parties present themselves to the mediator, they could then sign the contract of mediation.

If the called accept mediation, but is unable to appear at the time appointed by invitation, the mediator may set a new date for the submission to mediation, with the agreement of both parties. Mediation may be, however, refused the invited, either expressly or tacitly, by not come to mediation.

According to art. 23, paragraph 2 of the Law on mediation and the profession of mediator, mediation contract is concluded between the mediator, on the one hand, and the parties to the conflict, on the other hand.

Mediation the contract of must contain, under penalty of nullity, the following clauses:

- a) identity of the parties to the conflict or, where appropriate, their representatives;
- b) reference to the object type or conflict;
- c) a statement that the parties were informed by the mediator on mediation, effects and rules;
- d) the obligation of confidentiality mediator and the parties decision on confidentiality, where appropriate;
- e) the commitment of the parties to the conflict to respect the rules applicable to mediation;
- f) that the conflicting parties to pay proper fees and expenses incurred by the mediator during the mediation in the interests of the parties and how the advancement and payment of these amounts, including in case of withdrawal or failure of mediation proceedings and the proportion to be borne by the parties, taking into account, where appropriate, their social situation. Unless agreed otherwise, these amounts will be borne by the parties equally;
- g) understanding of the parties regarding the language of mediation is to be conducted;
- h) the number of copies to be drafted agreement where it will be written for the number mediation parties to the contract;
- i) the obligation of the parties to sign the report prepared by the mediator, regardless of how mediation ends.

Mediation agreement is enforceable on the parties an obligation to pay outstanding fees due mediator.

Limitation of the right of action under dispute mediation law is suspended from the date of signing the mediation, by the end of the mediation process.

Mediation is based on the cooperation of parties and use by the mediator, methods and techniques based on communication and negotiation, which should serve the legitimate interests and objectives of the parties in conflict.

Mediation takes place usually at the mediator. If necessary, mediation may take place in other places, agreed mediator and the parties in conflict.

Conflicting parties have the right to be assisted by a lawyer or other persons under the conditions agreed upon, which can make documents available in the law.

Submissions made by the parties during mediation in conflict and the mediator are confidential to the parties and can not be used as evidence in legal proceedings or arbitration, unless the parties agree otherwise or the law provides otherwise. The mediator will attract the attention of people who participate in mediation under the obligation of confidentiality and will be required sign a confidentiality agreement.

If during mediation, there is a situation affecting the purpose, neutrality and impartiality of the mediator, he is obliged to notify the parties will decide on continuation or termination of the mediation contract.

Mediator has the right to refrain and close the mediation procedure, which applies accordingly. In this case, the mediator is obligated to return the fee in proportion to the stage of mediation neaparcuse or, where appropriate, to ensure the continuation of the mediation process, as determined by the mediation contract.

If the dispute submitted to mediation difficult or controversial legal or any other specialized field, the mediator, the parties' agreement, may require the standpoint of a specialist in the field.

When seeking a professional point of view outside his office, the mediator will only highlight controversial issues without disclosing the identity of the parties.

The mediator can not impose a solution on the parties to the dispute submitted to mediation.

The mediation procedure is closed, as appropriate:

a) agreement is reached between the parties, following conflict resolution;

b) finding the failure of mediation by the mediator;

c) leaving of the contract by one party's mediation.

If the parties have made only a partial understanding, any party may apply to the competent court or arbitration.

When closing the mediation, the mediator will prepare a report, signed by the parties, either personally or by proxy, and mediator. Parties receive a copy of the original minutes.

When the warring parties reached an agreement, an agreement are drawn up, which will contain all the terms agreed by them and that is the value of a document under private signature.

Agreement of the parties shall not contain provisions affecting law and order may be impaired, under the law, the terms and conditions and can be checked notary for authentication or, where appropriate, a sentence of the court.

Conclusions

Mediation belongs to the great family of alternative methods of dispute resolution - ADR (Alternative Dispute Resolution) and is an alternative to judicial dispute resolution between the parties, by which a third party neutral, impartial and without power of decision - the mediator - help the parties together to find a solution to resolve disputes between them.

Even if a solution is not found, the parties will leave the mediation table knowing much more about the differences between them and being able at least to modify their original positions.

Compared to other legal proceedings, mediation has the advantage of providing results that meet the best interests of the parties takes less and have much lower costs, in conditions of confidentiality.

REFERENCES

1. Ignat C., Șustac Z., Danileț C. (2009). *Ghid de mediere*, Universitară Publishing House, Bucharest.
2. Lișman F. (2011). *Medierea în procesul civil*, Universitară Publishing House, Bucharest.
3. Șandru M, Rădulescu D., Călin D. (2012) – *Medierea în România. Legislație și jurisprudență*. Universitară Publishing House, Bucharest.