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ARBITRATION AND MEDIATION - ALTERNATIVE METHODS OF SETTLING DISPUTES BETWEEN PROFESSIONALS

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Abstract *Since ancient times people have made the trade, the need for those goods which they could not produce. Whether it is in kind or barter exchange or payment of goods with different amounts of money depending on their value, such activities were creating conflicts. Conflicts whose solution must be found quickly, because the lack of goods and trade could create problems in society. Such people, in the absence of a judgment of a State authority (either does not exist initial or later was too expensive and take too long until a definitive solution) resorted to various means of resolving conflicts, of which we will highlight whereas, mediation and arbitration. This study aims to investigate the efficacy of the two procedures to resolve conflicts arising between professionals and there are advantages and disadvantages for those who use mediation or arbitration.*

Keywords
Litigation, traders, mediation, arbitration a court of law

Introduction

Conflict is inevitable in trade relations since the existence of human interaction involves a series of agreements or disagreements between individuals or companies involving large amount of money, short time-scales or a certain quality of goods, and hence can be easily reached the conflict, which always affect the parties concerned.

On the other hand the very existence of money, along with perishable goods creates prerequisites for quick fixes, each party having the interest to solve the problem quickly, being less important personal pride to the resulting gain in commercial transactions.

Especially the need for money is the underpinning of any business, and locking money to resolve disputes in a court of law, is the most dangerous for business, because the money must circulate for the business to go. Therefore it found several ways to solve conflicts were highlighted including arbitration and mediation.

Arbitration. Broadly speaking, the term arbitration met in a legal context illustrates the idea of "settling a dispute by an arbitrator" (DEX, 1998), so that the main elements that make up the content of the concept are: the parties, the dispute between them, the referee, its action and the protesters - dispute.

Of course, these elements are added - depending on the particular characteristics of each type of arbitration - and others, such as the applicable law and rules of procedure, in addition, each of the elements mentioned above have different characteristics depending on the type of arbitration [Rădulescu DM (coord), 2013].

In accordance with the Rules of Arbitration of the International Commercial Arbitration Court, prepared by the Chamber of Commerce and Industry, Rules of 16 January 2012, published in the Gazette. Part I, no. 97 of 7 February 2012, the Court of Arbitration organize the settlement of internal disputes and international arbitration on institutional or ad hoc, if the parties concluded in this respect, an arbitration agreement in writing and expressly requested. (art. 4 para. 1)

With the mention that the arbitral proceedings means "any dispute arising from a contract, including on the conclusion, interpretation, execution or termination, as well as other legal relations arbitrators" (art. 4 para. 2), the internal dispute when "Parties have Romanian nationality or citizenship and legal relationship does not contain extraneous elements which call into question the application of foreign law" and international when "arising from a legal relationship which concerns international trade or civil legal relations with foreign elements" (art. 4 para. 3 and 4).

Nomination permanent arbitral institution inserted in the arbitration agreement on the settlement of disputes within the exclusive competence of the institution determined according to the regulations and rules of their arbitration proceedings, any derogation from this provision is deemed unwritten.

If permanent arbitral institution is nominated and the parties had agreed in the arbitration agreement settling disputes by arbitration, in the absence of other evidence, jurisdiction will be determined by where there was request for arbitration/arbitration proceedings by.

With the mention that the arbitration agreement provided that the parties had agreed that their disputes will be subject to ad hoc arbitration proceedings, they shall have the right:

a) to appoint arbitrators or to establish means for referees will be appointed in case of dispute, their number and the manner of appointing an arbitrator if a collegial tribunal;

b) to fix the procedural rules to be followed by the arbitrators;

c) to determine the place of arbitration;

d) to determine the language in which to present documents and debates will take place (Article 1 paragraph 4).

It should be noted that throughout the procedure of arbitration the parties must be provided, under penalty of nullity of the arbitration award, equal treatment, the right to defense and the adversarial principle, the case file is confidential, no person other than those involved in conducting the proceedings in question not having access to the file without the written consent of the parties.

The arbitral tribunal shall consist of independent and impartial arbitrators in carrying out their judicial and consists of either a single arbitrator or 3 arbitrators one of which is presiding.

Settlement of the dispute is based mainly contract and addenda to the contract, the evidence adduced and the applicable law, taking into account, where appropriate, trade usage and intimate conviction of arbitrators.

The judges decide unanimously or by majority, by a judgment, called arbitral award is final and binding, producing such effects a final and binding judgment so pronounced that the party against which we must carry out the willingly, immediately or within the period stated in the sentence.

More at the request of the winning party, the arbitral award shall be invested with enforceable by law, thus creating a writ of execution that can run forced, like a judgment.

The arbitral awards may only be published with the agreement of the parties, but can be partially or summary published or reviewed in legal matters arising in magazines, works or collections of arbitral practice without name or denomination of the parties or data that would be prejudicial to their interests (art. 9).

Mediation. According to art. 1 para of. 1 of Law 192/2006 "mediation is a way of resolving conflicts amicably with the help of a third party as a mediator specializing in conditions of neutrality, impartiality, confidentiality and having the free consent of the parties".

With the mention that "Mediation is based on the trust that the mediator parties, as a person able to facilitate negotiations between them and support them to resolve the conflict through to a solution mutually convenient, efficient and sustainable" (Article 1 para of. 2 of Law 192/2006).

Mediator is "any person called to lead the mediation in an effective, impartial and competent, regardless of the denomination or profession third party in that Member State and the way the third party has been appointed or requested to conduct the mediation" 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 can be used to resolve disputes in civil (inheritance, division of property, property claims, cancellation of contracts, or other monetary claims, conflicts with neighbors, the obligation to make rescission or termination of contract enforcement etc.), family law (conflicts between spouses, disputes between parents and children or between adult members of the same family) in trade (unsuccessful, order of payment, termination of contracts, claims, evictions, disputes between partners or termination of enforcement etc.), labor law (labor conflicts arising between employees and employers, the financial rights, individual employment contract cancellation, etc.), the intellectual property law or malpractice [Sandru, Radulescu, Calin, (coord), 2012].

Mediation can also be used in consumer, if the consumer invokes the existence of damage as a result of the purchase of defective goods or services, the contract failure or guarantees provided, the existence of unfair clauses contained in contracts between consumers and economic operators or the violation of other rights under national law or EU consumer protection.

It should be noted that mediation may not be strictly personal rights, such as those concerning the status of the person and any other rights that the parties, by law, cannot by agreement or has in any other manner permitted by law.

Mediation is based on the cooperation of the parties and the use of the mediator, methods and techniques, based on communication and negotiation, which should serve the legitimate interests and objectives of the warring parties, the mediator cannot impose a solution on parties the conflict subjected to mediation.

Mediation takes place, usually at the mediator's office, but may also be conducted in other places agreed upon mediator and the parties to the conflict, who have the right to be assisted by a lawyer or other persons, under mutually agreed mediator not allowed to give legal advice the parties.

Being a flexible procedure, the parties agreed with the mediator will determine how mediation takes place and the manner of its completion as a verbal or written agreement, which is usually drafted by the mediator, except situations where the parties and the mediator agree otherwise.

The mediation agreement may be affected resulting in the law, the terms and conditions, but should not contain provisions affecting law and order.

Parties may request mediation agreement authentication notary public in compliance with the law and legal procedures, understanding their power to acquire enforceability or can appear competent court to ask fulfilling legal procedures, to give a judgment, council chamber through which to legalize the their understanding and to constitutes an enforceable title by law.

If the conflict concerns mediated transfer of ownership in immovable property and other real rights, share and inheritance cases, under penalty of nullity, the mediation agreement drawn up by mediator will be presented to the notary public or the court, so that they, based on the mediation agreement, to check their content and form through procedures prescribed by law and issue an authentic instrument or court decision, as appropriate, with regard to due process.

Where the law requires that the conditions for advertising, public or court clerk will ask logged enrollment contract or the judgment in the Land Registry.

2. Arbitration vs. Mediation. Advantages and disadvantages

We can refer to many arguments which persuade the companies to choose mediation as the first option in solving conflicts and the most convincing ones regard the following aspects:

The mediation procedure may be started anytime in a quick step, avoiding some deadlines such as those stipulated by the law for arbitration as the procedure details in mediation are very advantageous compared to those of arbitral procedure: therefore the date and the time of the mediation meeting are set by the parties with the mediator in accordance with their agenda, the mediation sessions being sometimes postponed whether the parties ask for it while in arbitral procedure the terms are established by the arbitral court.

The mediation and the mediation meetings are unlimited in time as the parties may reach an agreement even after one mediation meeting or may result in partial agreements when the scheduling of another mediation meeting some other time is possible in order to finally solve the conflict.

It takes less time to resolve a conflict through mediation than to do it in the arbitral court since a conflict may be solved in few days compared to few months or even years, the average necessary time for a case.

Mediation takes place in a private environment completely confidentially, so the parties' problems are not known by other people since here there are allowed only the parties and their acquaintances. Therefore the emotional stress occurred in any conflict situation is well reduced compared to the situation in the arbitral session which is public.

Moreover it is about image as the companies do not want their problems to be exposed because any scandal, be it deprived of reasons, can make them look unreliable on the market (Radulescu, 2007) and cause the loss of certain goods and services supply/ delivery contracts. This may have negative consequences regarding the investments' attraction or the expanding of particular foreign credit lines as well as the refusal of certain governmental and charitable agencies to further collaborate.

The parties may pick the same mediator to call upon and this is not possible in a case where the files distribution is aleatory, or the parties' choice of mediator gives them a greater confidence in the mediation procedure, thereby obtaining the desired result.

We should not forget that mediation allows its whole approach of the conflict while the arbitral way answers to one or mostly few questions (only a possible visible part of a conflict), allowing at the same time the discovery of conflict source as well as the misunderstanding cause, not only resolving the effects. Moreover mediation entails the partial agreements which allow the parties to resolve the conflict step by step, through a graphical and percentage-like approach in this respect.

Hence the amicable solution reached by the parties after mediation is always decided by them as it is considered for mutual advantage never imposed by the mediator who neither judges the parties nor gives verdicts, his task being to facilitate the dialogue between parties and as a consequence options are generated for solving the existing conflicts while in a arbitral procedure the solution is always imposed to the parties by the arbitrator.

Although the best result is not obtained through mediation, there is found a real solution in which both parties win, a solution which may be implemented afterwards, as there are all the premises for the resulted agreement to be respected by the parties after the mediation is concluded.

Also, after mediation, the existed conflicts between parties are resolved and there are created the conditions for preventing the occurrence of new ones, as throughout the mediation the parties communicate and in case of arbitral procedure the communication is

absent and completely disappears at the end, being replaced by a confrontational and sharper situation, since unlike mediation in the arbitral court there are winners and losers. Thus, mediation is a way of solving the conflict whereas the arbitral is only a way of confrontation.

Even from a financial point of view, mediation is less expensive than the arbitral procedure as the mediation costs include only the mediator's fee (equally paid by both parties) and any costs allowed by the parties interested in mediating, while regarding the arbitral procedure the expanses are higher and include: the fees of lawyers and experts, the taxes for stamps and arbitral ones. However these expanses are not pegged/fixed and can be increased during the procedure depending on complexity of case and its prolongation.

This may be possible especially because in international business there are involved companies form different countries which carry out activities and in third countries calling upon the arbitral court must be made by respecting the rules from these countries which requests additional costs for travel, hiring of interpreters, not to mention the costs of accommodation, meals or subsistence expenses of personnel involved.

Moreover launching the mediation does not hamper the access to arbitral proceedings and if parties fail to settle conflict through mediation, they have the opportunity to address to the arbitral court, (Radulescu, 2011).

In this respect, whether the parties decide to use mediation after the start of proceedings, the arbitral court proceedings may be suspended at the request of the parties. In case of resolving the conflict through mediation, the arbitral court will decide in accordance with parties' demand a decision that reflects their agreement.

The mediation procedure like the mediation contract signed by both parties may be denounced in any stage of it by everyone from conflicting parties, in every moment, but only to stipulate in writing the approval of the other party and mediator as well, not being compelled to end it.

In mediation the parties can be accompanied by lawyers and experts as well, so all agreements will respect the law in order to be later certified in front of public authorities or law court (Radulescu, 2012).

3. Conclusions

Considering the large number of disputes pending in Court, and the limits and drawbacks involved in a process, whether formal procedures to be observed by specific legal terminology used in court proceedings, but also the duration of the case, over time it has tried to find alternative ways of resolving conflicts.

Brought together under the concept of ADR (Alternative Dispute Resolution) alternative conflict resolution methods include, among others Arbitration, Mediation and Med-Arb (a hybrid form that combines arbitration with mediation, the mediator can provide solutions offering parties after serious analysis situation) and have the common feature of voluntary and involves a private and confidential procedure that does not require special expenses.

If arbitration is conducted after a formal procedure prescribed by law and which cannot be derogated, informal mediation procedure requires flexible, the parties decide where and how it takes place meeting and the topics to be discussed, discussed issues remain confidential.

Such in arbitration and mediation is required and participation of a third party appointed arbitrator or mediator.

As regards the purpose of those procedures, the resulting solution from mediation is based on the compromise agreed by the parties, based on meeting interests and their positions and their voluntary decision to execute in good faith the obligations assumed after discussion, without purpose enforceable unless it is accepted by the court or authenticated by a notary.

Arbitration, however, ends with a final and binding arbitration award, which also effect a final and binding judgment, and may be enforceable, that can enforce the request of the interested party.

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