

Mediation – Mandatory Information and Facultative Applicability

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Abstract: Considering that mediation is a facilitating way to access the alternative solving of litigations in conciliatory terms, the study is encouraging using the mediation and providing a balanced relationship between mediation and judiciary procedures. As an aftermath of summary definition, we can say that role of mediation is to overcome the communicative barriers in order to solve the conflict and save the fact situation on both parts. The study aims at analyzing objectively all consequences of both solving ways of litigations: traditional one, through the law court and mediation, with the advantages derived from them (celerity vs. time consuming, expensive judiciary proceedings vs. low costs, etc.)

Keywords: alternative justice; conciliation; celerity; advantages

1. Introduction

The multitude of juridical rapports issued due to the existence of free circulation of people and goods in the EU lead to a growth of the litigations between people with residence in the different EU member states, therefore of cross border litigations.

Carrying on a lawsuit in another member states than that of the residence state can be rather discouraging because of the high costs, linguistic differences and uncertainty related to recovering claims. This is the reason why the first step in putting an end to the conflict is the attempt to solve it in a conciliatory manner.

An efficient instrument of solving the conflicts in such a manner is the cross-border mediation as a type of mediation. The mediation, besides other alternative methods of solving conflicts (conciliation, negotiation, arbitration), can outweigh the disadvantages of a trial.

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Due to its specific characteristic, not only does mediation solve the conflict but it also eliminates it, causing both parts to respect willingly, the agreements as a result of the mediation and hence to maintain the relationship between them. It means a major progress of civilization mainly because it allows both parts to adopt willingly, their own decisions, also assisted by a third independent impartial neutral part when two of them failed in their attempt to find a solution themselves to put an end to the argument they are involved in (Mitroi, 2010). This trial can be initiated by both parts, on court recommendation or given by the right of a member state.

2. Legislation

As regard the legislation, Directive no. 2008/52/CE was issued by the European Parliament and the Council of May 21st 2008 concerning certain aspects of mediation in civil law and commercial law (the Mediation Directive). The Directive also provided the role of the magistrate in mediation that emphasizes both in terms of judiciary and conventional mediation (2008/CE/52 Directive of the European Parliament and Council).

Thus, the Art. 5 of the Directive, the law court- the magistrate - considering the case circumstances, can invite the parts to mediation or participate in an informative session concerning the mediation procedure, if such sessions are organized and easily accessible in any stage of the lawsuit (Robaru, 2009).

3. Applicability

The Directive is applicable to cross border conflicts of civil and commercial/trade matter, as well as criminal law but the most frequent litigations concerning family conflicts or those issued between traders (Dragne, 2011). It is applicable in pre-contractual negotiations and quasi-judicial procedures, as well as certain conciliation systems of customer complaints, the arbitration and experts decisions, or procedures when persons or those who are in charge of the procedure issue an official recommendation which can be mandatory or not concerning the litigation.

4. The Mediation Procedure in Romania

From 1st of August 2013, **the information** about mediation is mandatory, but **the mediation itself** is still optional.

Who conduct the information sessions within the information meetings implemented by changes made through the Law no. 192/2006 concerning mediation and the organization of the mediator position.

In accordance to the Art. 29 indent 1, Law no. 192/2006 concerning the mediation and organization of the mediator profession, the mediator has to offer explanations to the parts involved in mediation activity so that these should understand the aim, the limits and the effects of the mediation especially on the rapports that make the object of the conflict (Law no. 192/2006 on mediation and the profession of the mediator, as amended by Law no. 370/2009). The mediator has to inform both parts on the mediation procedure about their rights, before the beginning of the mediation so that the parts should get to know the mediation principles, all the details about the procedure within the meeting and the way of unfolding it.

4.1. What Information Must Contain this Procedure?

The parts must know the mediation principles, the rights deriving from the principles of this procedure- that they benefit within the mediation procedure- the advantages of the mediation, details about the procedure within the mediation meeting and the way of unfolding it.

4.2. Principles Applicable

a) the voluntary character concerning the participation to the mediation procedure- represents the basic principles of this procedure which results from Art. 1 Law no. 192/2006 regarding the mediation and the organization of the profession of a mediator altered and further revised. This principle is based on the free approval of the parts to resort on this procedure (Pancescu, 2008). Consequently, any part has the right to withdraw from this procedure, any time the mediation may occur - if he/she reaches the conclusion that he/she cannot come to terms – the same way as he/she cannot be forced to take part to such a procedure, by another person or authority.

b) the self-determination of the parties – a principle according to which the agreement of the parties pertains to them, and the mediator will not be able to decide or influence the terms settlement where the common solution of the parts is assessed.

c) the confidential character of mediation procedure – the confidential character is applicable to all the information conveyed within the mediation procedure, where, both the mediator and the present parties or their lawyers must keep confidential character of the mediation meeting by signing a confidential agreement before the beginning of the procedure.

d) the neutral aspect of the mediation/ the neutrality of the mediator-concerns the mediator as an outsider of the conflict, his lack of involvement in this conflict, except within the limits imposed by the procedure.

Therefore arise following rights that the parts involved in a conflict can benefit, as a result of the mediation procedure:

- the right to dignity and non discrimination;
- the right to benefit from a neutral, fair and impartial treatment, of the mediator;
- the right to assign third parts, including a lawyer to represents the interests within the hearing and to negotiate an agreement on their behalf and at their account (within the limits of the mandate issued);
- the right to be informed concerning the mediation process , the effects of the mediation, the effects of signing a mediation agreement;
- the right of legal assistance or by any third party considered by the parts desirable or advisable.

The mediator tasks within the information meetings is to give thorough explanatory accounts to the parts concerning the mediation activity, so these should understand the aim, the limits and the effects of the mediation and nevertheless, the benefits that derive for them by using this alternative solving the conflicts (Vlad, 2009).

Among the advantages of the mediation for the parts that can be enounced by the mediator within the information meetings, we can mention:

a) The possibility of the reimbursement of the stamp duty- when such a duty has been charged and the cause is tried in the law court- there must be stated that as a result of the article rescission 23(1) form Law no. 146/1997 concerning the stamp duty, that stipulated the reimbursement of the stamp duty in case the parts made a

deal, *actually, the retrieval of the paid amounts as stamp duty can occur only if the conflict is solved through mediation by mediation agreement.*

b) The procedure of the mediation is an informal, confidential civilized procedure that means the meeting between the parts *should takes place in a private environment by respecting the well behaviour code*; that any information that is conveyed to the mediator or any document presented cannot be unveiled/ revealed to the law court.

c) By means of mediation, the people involved in the conflict are actively and directly involved in order to get to a solution that satisfies the needs of anyone and doesn't passively expect an imposed solution of a third part (the court).

d) The conflict between the parts can be solved in a shorter period of time because the formal and hard procedure that is under the jurisdiction of the Civil Procedure Code or Criminal Procedure Code is ruled out (and the assigning of terms to notify the procedural papers, the witnesses hearing, statement making of the parts, or interrogation of the parts in civil matter).

There must be stated to the parts during the information meetings that certain judiciary procedures may last long in the case of solving certain types of litigations, because *the evidence valuation is necessary* which can last for months - the complexity of such evidence, or as a result of a counter expertise - so that an agreement settlement through mediation would definitely make the litigation period shorter and would bring benefits to all parts.

e) The *costs implied will be diminished*, as a consequence of reduction of time consuming procedures necessary for solving the conflict and the stress caused during traditional proceedings.

f) The mediation procedure helps the parts involved in the conflict to find the solution that satisfies their interests and real needs and to become aware of that appealing to such judiciary procedure has its own risks. It is time consuming, expensive, it can cause energy loss without any palpable goal or the unsatisfactory solution of his/her real interests or needs.

5. Conclusions

In order to encourage the parts to resort on mediation and ensure the compatibility of the mediation with the proceedings as they are closely interrelated, we think *the most important obligation assigned to the member states, is to offer the parts choosing the mediation*, the reinforcement that they will not be hampered to initiate a judiciary or arbitrary procedure regarding the litigation under discussion as a result of fulfilling of terms of incapacity or limitation as long as the mediation process takes place.

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