



Mediation a Conflict Solving Modality in the Banking Area

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Abstract: The overall objective of the paper is a current topic of a real interest for the reasonable solution of the conflicts which emerge in the banking area. Using the method resulted from a detailed analysis of the field literature and the judiciary practice, the article manages to identify the amplitude and generic principles of solving the litigations in the commercial area through alternative methods to the state justice, overcharged with cases, within the context of the European Union's regulations and implicitly at the national level. Therefore, we shall perform an analysis of the following objectives: the concept of conflict solving through alternative methods to the state justice, reasonable solution of the conflicts with the possibility of preserving the relations between the partners, the application of the privacy principle. Mediation in the banking area aims at solving the conflicts between the credit institutions, banks or the non-banking institutions and their customers by a person with a special training in the mediation area, independent from the two parties, through a more simplified procedure, so that the relation between the credit unit and its customer should remain a partnership. The paper may contribute to the development of the legislation on the more rapid resolution of this type of litigations; it is useful for the law practitioners: judges, lawyers, counsels, teaching staff and also for the business people in the banking area.

Keywords: mediation; special procedure; common law procedure; credit institutions

The multitude of legal relations between the credit units and the persons who avail themselves of these relations inevitably determine conflicts of interests, as well. However, in such cases, neither the credit unit nor the client is interested in solving the litigation which was meant to be long or to go public care, which is the case when using the common law procedure of courts².

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² For further details on the procedure for solving litigations in courts, see: (Stoenescu & Zilberstein, 1983, p. 454; Leș, 2008; Deleanu, 1997, p. 5; Măgureanu, 2010, p. 288 and the next; Tăbărcă, 2004, p. 284 and the next).

As a result, in such cases, it is better to solve the case without publicity, which should develop reasonably and should not lead to a final breakup of the parties, sometimes the parties having traditional business relations or being interested in maintaining those relations, mediation being the best solution to these requirements, especially in the cross border cases, which are extremely complex because of the different national legislations, of the costs and the linguistic regime.

According to the provisions of the art. 1 of Law no. 192/2006, mediation represents an optional modality to solve the conflicts amiably, with the help of a third party an expert in mediation, under the terms of neutrality, impartiality and confidentiality and it is based on the confidence the parties trusts to the mediator, as a person able to facilitate negotiations between themselves and to support them to solve the conflict, to obtain a mutually advantageous, efficient and long-lasting solution¹.

Replacing the procedure applicable to the courts with the alternative of mediation is meant to prevent the action in justice, if the consensual solution through the parties' agreement will determine the end of the conflict arisen between the credit unit and its client.

The concept of mediation appeared in the United States in 1976, as a result of a governmental initiative whose target was unloading the charges of the courts. It has extensively grown, the courts being discharged of a large number of cases, the American Association of Arbitrage registering success in over 80% of the cases under mediation, which is a success encouraging other states to adopt corresponding legislative measures.

In Europe, ever since the '70s, there have been major efforts to search means of solving conflicts through other procedures except those of the courts. Ever since that period it has started to get shape a profession of the conflict mediators, which, lately, has developed into a real industry. The mediation companies have developed extensively in all areas, becoming renowned as the lawyers' companies. Presently, mediation covers not only commercial conflicts, but also labor conflicts, family conflicts, conflicts of the insurance domain, health, education and even army. Under the circumstances, the relations between the credit institutions and their clients could not be included in the category of the conflicts under mediation,

¹ Law no. 192/2006 on mediation and organizing the mediator's profession, was published in the Official Journal, Part I no. 441 of 22nd May 2006. I was modified, including through Law no. 202/2010, published in the Official Journal, Part I no. 714 of 26th October 2010. Also see Law no. 62/2011 of the social dialogue published in the Official Journal, Part I no. 322 of 10h May 2011.

if there might arise conflicts which involve a legal solution but in a much shorter term and with the confidentiality which characterizes this type of relations.

In several contracts there is the formula: "Any conflict will be solved amiably, through mediation, and only to the extent that this is not possible one will appeal to the common law courts". Actually, this is a mediation clause inserted in the contract.

Mediation has become also renowned in countries of the European Union such as: France, where the law of mediation was adopted in 1995, in England, Netherlands and more recently in other countries, as a result of the advantages it has as compared to the common law procedure, where mediation cases have started to appear ever more often in commercial contracts.

Consequently, the lawyers of the European Union and then the mediators after the appearance of this profession, encouraged by the legislation of their countries, have started to take over and apply alternative methods to solve the conflicts, mediation starting to become one of the favorite instruments of more corporations, with the ever more powerful tendency to proliferate among the small and medium sized companies¹.

On 23rd April 2008, the European Parliament adopted the Directive (IP/08/628) on the mediation in civil law and commercial law², on the basis of the Directive Proposal (IP/04/1288) of October 2004, with a view to facilitating and promoting the alternative modalities to solve conflicts and comply mediation with the judiciary procedures in the member states.

The success or on the contrary the failure in business in an economic environment in permanent change, as the one in the banking domain, is based on the quality of the commercial relations between the business partners, relations which once constructed should be maintained, reason for which the European business environment had to adopt without any reserves mediation as a means of ceasing the litigations, especially in commercial matter.

Solving the conflicts between the commercial partners through consensus, through a more rapid, more flexible and more economic procedure, through the mediator,

¹ Also see www.mararu.ro

² Directive no. 2008/52/CE of the European Parliament and of the Council of 21st May 2008 on certain aspects of mediation in civil and commercial matters, was published in the Official Journal of the European Union L 136/3 of 24th May 2008.

means elegance and efficiency, offering them the possibility to continue commercial relations.

In Romania, the emergence of the law on mediation represented an important step forward in organizing, developing this modality to solve the conflicts.

We consider that being unaware of the advantages (Măgureanu, 2009, pp. 19-27) that mediation offers, the lack of the material means to implement it in various areas of social life, the low interest of courts to recommend, according to the provisions of art. 131 align. (2) Law of civil procedure, as it was modified by art. 15 of Law no. 202/2010, mediation in litigations which, according to the law, can be the object of the mediation procedure, determine that the balance of its application should be quite low.

Presently there is no law regulating mediation in legal relations between the credit units and their clients and we consider that such a law is not necessary, the mediator being able to apply a series of specific rules in case of such situations, applying the general rules of the legislation in the matter of mediation and relations in the banking domain.

Neither in this domain nor in other domains can mediation be imposed, taking into consideration the provisions of the art. 21 of the Constitution on the free access to justice, by the emergence of the Law no. 192/2006 aiming at, besides the above mentioned advantages and the reduction of the volume of the courts' activity, discharging them of the caseload which, according to the law, can be solved through mediation.

The simplified procedure provided by the art. 720¹ Law of civil procedure on solving the litigations amiably, which is obligatory in commercial matter, in the cases when the conflict can be assessed in cash, we consider that it can be applied in the banking domain as well, without obligations and taking into consideration the characteristics of this type of legal relations and of the special law.

As a matter of fact, Law no. 192/2006 itself in art. 2 align. (1) provides that *“If the law does not provide otherwise, the parties, natural or legal persons, may appeal to mediation deliberately, even after the beginning of a trial in front of the competent courts ...”*, the parties' volition being important to appeal to a more efficient and rapid modality to solve the conflict emerged. The conflicts in the area of the consumers' protection can also be solved by mediation, when the consumer alleges the existence of a damage as a result of acquiring faulty products or

services, of non-compliance with the contractual clauses or the guaranties granted, of the existence of abusive clauses comprised in the contracts concluded between the consumers and the economic agents, including banks, or the infringement of right provided by the national legislation or the legislation of the European Union in the area of the consumers' protection. The banks, by their activity, offer to clients packets of services where sometimes the contractual clauses are confusing, are inserted in such a way that they are not easily perceived by the beneficiary of the respective services, a large number of such situations determine litigations which can be solved by mediation.

With a view to choosing the mediation procedure in the relations between the credit institutions and the beneficiaries of these, in the contract between the parties they may register a clause, according to which in case of the emergence of a misunderstanding on the legal relation in the first instance, they will try to solve the conflict through mediation, a clause whose validity is not dependent on the validity of the contract it is part of.

The mediation clause represents the convention stipulated in the main contract, on the basis of the volition autonomy principle, by which the parties agree that the future conflicts resulting from the conclusion or performance of the main legal relation should be submitted to the mediation procedure, thus avoiding the difficult route of the contentious procedure in courts¹.

For the litigations in the banking domain, mediation can be a more adequate modality, its use may be a plus of elegance for the relations specific to this domain, it would enable the replacement of a judiciary procedure, which is not profitable for the parties, with a more modern and simple one, which is preferable in this type of legal relations.

In our country, the first initiative to introduce mediation as a method of solving disputes in the banking domain was the Government's Ordinance no. 6/2004

¹ See models of mediation clauses which can be inserted in the main credit contract, proposed by the Center of Commercial Conflicts Mediation by the Chamber of Commerce and Industry of Romania and Bucharest Municipality, in case of the legal contractual or extra-contractual relations.

on cross border transfers¹, currently abrogated and replaced with the Government's Emergency Ordinance no. 113/2009².

Government's Ordinance no. 6/2004, provided in art. 10 entitled "Solving litigations – alternative solution procedure" in align. 3, creating a specialized department in the BNR structure with attributions in mediating conflicts related to the cross border transfers emerged between the client and the institutions in Romania involved in performing these transfers³, at the respective date there is no regulation related to the mediator's profession and the mediation service. The regulation provided that the mediation procedure for the conflicts emerged in performing the cross border transfers, which was applied in the cases of the conflicts emerged between the institutions in Romania and their clients, when the cross border transfer was worth less than 50.000 Euros.

The new normative bill, the Government's Emergency Ordinance no. 113/2009, provides in art. 179 align. (1) that „ Romania's National Bank ensures the application of extra judiciary adequate and efficient repair procedures to solve the claims received from payment services users who consider themselves damaged by the payment services providers who perform their activity on Romania's territory, according to the above-mentioned ordinance, payment services users being able to optionally appeal to procedures of solving the claims. In order to apply the legal dispositions mentioned above, in the structure of the Romania's National Bank a specialized department was set up, which will ensure mediation of conflicts emerged between the categories of payment services providers and payment services users, according to the regulations issued by the Romania's National Bank.

The above-mentioned department may issue consultative points of view on the conflicts which did not make the object of mediation by the Romania's National Bank, if such points of view are required by the courts required to solve the litigation. The conflict-solving procedure is free, this specialized department is to issue a solution on the aspects to be solved, in 30 days at the most from the

¹ Government's Ordinance no. 6/2004 on cross border transfers, was published in the Official Journal, Part I no. 82 of 30th January 2004.

² Government's Emergency Ordinance no. 113/2009 on payment services was published in the Official Journal, Part I no. 685 of 12th October 2009, also modified by Law for its approval no. 197/2010, published in the Official Journal, Part I no. 724 of 29th October 2010.

³ Also see Regulation no. 3/25.03.2004 of BNR on mediation procedure of the conflicts arisen in performing cross border transfers.

registration of the mediation petition at the Romania's National Bank, the term may be extended with 30 days more, if supplementary documents and/or information are necessary.

The solution issued by the specialized department in the Romania's National Bank is not obligatory for the parties interested and does not have the authority of a judged case. In case the party who is not satisfied appeal to the courts or the National Authority for Consumers' Protection to defend his rights, the solution issued by the specialized department in the Romania's National Bank may be considered having a consultative character by these authorities.

After the emergence of Law no. 192/2006, the banks, through the Romanian Association of Banks, set up their own system of conflict-solving in the banking domain, appointing the one charged with applying this procedure a „bank mediator”.

We consider that the banking system cannot create an own body of mediators to mediate the conflicts in this domain, so unfortunately there are also bank executors, because other institutions where mediation is legally permitted (insurance institutions, leasing institutions, health and social assistance institutions) may neither create their own mediators, as the parties should have the possibility to choose the mediator and not to accept an appointed mediator by the credit unit or, in other cases, by the respective institution. The profession of mediator should be an independent one to ensure the impartiality of the mediator and, as a result, both a fair solution professionally speaking and an objective one. Otherwise, the mediator may be “loyal to the system”, even if he left the respective system, he may be tempted, even unconsciously, to lead the procedure to obtain a solution which should favor the system he came from “issuing” solutions which may not be objective.

Conflict-solving through mediation between the credit institutions and their clients has a series of advantages, among which the following (Măgureanu, & Măgureanu, 2009, p. 113 and the next):

- the current conflicts may be solved and litigations which can seriously damage the relations between the credit institution and the beneficiaries of its services may be prevented. Mediation is based on cooperation between the parties and use of specific methods and techniques based on communication and negotiation by the mediator;

- the rapidity and efficiency of solving the conflict emerged through eliminating the current excessive formalism in the common law procedure performed in courts, by eliminating the countless possibilities of adjournment for solving the cases, by eliminating the attack procedures through the common law procedure, eliminating the possibility of providing numerous exceptions which may tend to unjustified prolongation of solving the misunderstanding. Mediation is a way to offer the contractors a much more rapid and efficient, less formal, cheaper judgment and which is meant to protect the long-lasting relations between the litigants.

- much reduced costs as a result of eliminating judiciary stamp taxes established at the value of the case object, of the costs for administering the evidence, of the experts' fees or for the payment of bails, of the taxes for exercising the attack procedures and for the mail necessary during the use of these procedures, for exercising the right to defense in various stages of the common law procedure, stages which are not common in case of mediation;

- Confidentiality. The parties of the legal relation in the area of the credit institutions, very often are not interested in making their misunderstandings public. In case of the common law procedure, according to the provisions of art. 127 of the Constitution, the court sessions are public, except for the cases provided by the law. As a result, usually the civil suitcase is governed by the principle of publicity, according to which the judgment of each suitcase has to take place in a certain room, at the court place, where are allowed persons who, even though they are not parties, want to participate in the case judgment, in any of its stages, except at the date of issuing the judgment (Stoenescu & Zilberstein, 1983, pp. 104-105) (Deleanu, 1995, pp. 33-34). The publicity of the sessions is also provided by art. 12 of the Law no. 304/2004 for the judiciary organization.

However, article 32 of the Law no. 192/2006 provides that mediators are obliged to observe the privacy of information they are aware of during their mediation, as well as regarding the documents drawn or which were delivered by the parties during the mediation, or even after the end of their function. Non-observance of this obligation may trigger disciplinary responsibility of the mediator according to the provisions of art. 38 letter a) of the above-mentioned law and has to be obliged to pay the damages for the damage caused, if they will establish that the disclosure of a confidential aspect has caused damage and which is its value. The mediator solves the conflict on the basis of the main contract and of the legal norms applicable, considering if necessary the procedures in the matter and the European

norms. According to the provisions of art. 53 of the law, the allegations made during the mediation by the parties under litigation, or by the experts asked by the parties or the mediator, has a private character towards the third parties and they cannot be used as evidence in the judiciary or arbitrary procedures, except for the case the parties agree in a different manner or the law provides the contrary. Moreover, the mediator is obliged to draw the attention of the persons who participate in mediation on the obligation of keeping the confidentiality and they can be required to sign a confidentiality agreement.

- The mediation procedure is governed by the principle of the freedom for the parties' agreement; this may be limited only by the necessity to observe the imperative norms of the law and of the public order. The mediator may be chosen by the parties. In case of the common law procedure, the parties may choose the judges, and these may be randomly appointed. Mediators are experts, specialists and practitioners in the area the litigation is performed or in related areas. Without denying the judges' professionalism, sometimes, because of the complexity of the litigation, the specificity of its object which is strictly specialty, a domain where the judge may have less knowledge than the expert in that domain, the mediator being a professional, may find a more objective solution, which may better fulfill the legal interests of the parties.

The fact that the parties have the possibility to choose their mediator provides a higher confidence bestowed in him. Mediation is organized and develops according to the agreement of the parties, who are free to establish through their convention characteristics regarding the common law procedure which however does not infringe the imperative legal norms or the public order. According to the principle of the freedom for agreement, the parties may convene: if the conflict solution through this procedure should be performed by one or more mediators, the mediation place, the rules according to which the judgment of the case is performed, the evidence that is to be administered in the case, if the mediator should issue a solution in equity, if the mediation costs should be paid by both parties or only the one charged to establish the guilt or innocence. According to the same principle of the freedom for agreement, the parties may fulfill a reconciliation which represents a mechanism for amiably solving the litigations, by the services the mediator offers. If the parties under litigation reached an agreement, they may perform a written agreement, which will comprise all the clauses agreed upon by the parties and which have the value of a written document under private signature. Usually, the agreement is

dawn by the mediator, except for the situations where the parties and the mediator agree differently (art. 58 align. 1 of the law);

- the mediator's neutrality and impartiality may lead to an objective solution, mediation is based on the confidence the parties have into the mediator, as a person able to facilitate the negotiation between them and to support them for solving the conflict, for obtaining a mutually convenient efficient and long-lasting solution and which does not damage the parties. The mediator has to be impartial, to provide any explanations to the parties regarding the mediation activity, for they understand the purpose, the limits and the effects of mediation, especially regarding the relations which constitute the object of the conflict and ensures the fact that mediation should be performed following the liberty, dignity and the private life of parties;

- the possibility for preventing future litigation having as object the assessment of the abusive clauses in the credit contracts by creating a jurisprudence in the matter, preventing the conflicts in the credit units and the beneficiaries of these contracts, being meant to ensure the stability and efficiency of such legal reports, the protection of the credit beneficiaries and a better image of the credit institutions. We consider that under the current regulation, mediation offers to the credit institutions and their beneficiaries, a much more simple, rapid and efficient alternative for solving the conflicts arisen, that the courts, by the common law procedure may offer.

Conclusion

Obviously, the implementation of mediation in the banking domain is a long-lasting operation which requires a sustained effort from the credit institutions to understand the necessity of replacing the state procedure they were accustomed to and into which they have much more confidence. Solving conflicts through mediation ensures the development and extension of the financial and banking sector, of the abilities such as communication, negotiation and amiably solving the litigations, it contributes to the construction of discriminatory relations between debtors and creditors, finding a common agreement on the procedures to resolve the litigation to the benefit of both parties, it offers the credit institutions and their clients the possibility to assume the responsibility to resolve their own conflicts, it supports the strengthening of relationships and it helps creating bonds between the

credit institutions and their clients. However, the methods have to exclusively serve the legitimate interests and the objectives aimed at by the litigants, the mediator not having the right to impose a solution to the parties.

We also consider that, it would be preferable that the credit contracts should be provided with clauses on the obligation of the parties to try to solve the conflicts in the banking domain, through mediation, before appealing to the court, as it is stipulated, for instance, by Law no. 62/2011 on the social dialogue in the area of collective labor conflicts¹.

To ensure the success of this approach in the area of the credit institutions, the mediators authorized by the Council for Mediation have to form a body of specialized professionals, whether or not they come from the area of these institutions, thus answering the needs of the banking services consumers to have an alternative solution to the complaints made to the banks. Unfortunately, the banking domain is one of the most contested by the consumers regarding the quality of the services as well as the abusive clauses provided in the contracts, the mediation alternative being made public to the beneficiaries of these services. Mediation, as a voluntary modality of amiably solving conflicts, will certainly contribute to discharging the caseload the courts have to deal with currently and to solving in a much shorter term the litigations between the parties, with the assistance of a neutral third party who has to be qualified and independent.

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*** www.mararu.ro

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*** Law no. 192/2006 on mediation and organizing the profession of mediator.

*** Law no. 62/2011 on the social dialogue.

*** Government's Ordinance no. 6/2004 on cross border transfers.

*** Government's Emergency Ordinance no. 113/2009 on payment services.

*** Regulation no. 3/25.03.2004 of BNR on the mediation procedure of the conflicts arisen from performing the cross border transfers.