Recent Additions to Kosovo's Law of Mediation

Fatime DERMAKU[1]

Abstract: The purpose of this scientific paper is to introduce the new law on Kosovo's mediation and the changes from the previous law of Mediation. Mediation is an alternative dispute resolution between the parties, with the intermediation of a third person. The new Law on Mediation, which complies with the Directive 2008/52 / EC of the European Parliament and of the Council of 21 May 2008, on certain aspects of mediation in civil and commercial matters, as such envisages substantive changes. The novelties of this law consist of: mandatory mediation for certain disputes, the choice of the mediator by the parties themselves, the possibility of mediation, the duration of the mediation, from 90 days as it was previously with an extension of 30 days, i.e 120 days in total, as well as the establishment of Chamber of mediators, which will function based on its internal acts.The aproach used in the research includes a combination of legal analysis, observations and review from legal practice and theory. The conculsion of the study aims to explain the benefit of mediation as an alterantive dispute resolution, in achieving an acceptable agreement by the parties as well as the reduction of cases in the courts.

Keywords: mediator; alternative dispute resolution; novelties; civil disputes

1. Introduction

The resolution of disputes between civil parties is classified in two major types, the first being adjective processes such as litigation, in which the court determines the outcome and the second being consensual processes known as the alternative dispute resolutions such as arbitratio, mediation, conciliation or negotiation in which the parties attempt to reach an agreement. The alternative dispute resolution is being highly encouraged by the courts because of the benefits of it in reducing time and cost to the parties' involed in the dispute as well as the judicial system. One of the

[1] PhD Candidate, University of Prishtina, Faculty of Law, Prishtina, Republic of Kosovo, Address: Pristina, str. Agim Ramadani 10000, Republic of Kosovo, Tel.: +38344368744, Corresponding author: fatimedermaku@hotmail.com.

most expressed ways of resolving disputes between the parties has been and remains to this day, mediation and as such is regulated by legal provisions.

Mediation is an extrajudicial procedure for resolving disputes and disagreements between the subjects of the law in accordance to the conditions provided by law (Article 3 paragraph 1 item 1.1 of the Law on Mediation). The Kosovo legal system has strengthened the mediation procedure and has given it legal character, so all that comes from the mediation process produces legal effects for the parties (Qehaja & Jahmurataj, 2018, pp. 16-24).

The history of mediation dates back to the Old Romans who have known similar procedures to mediation, while, in Roman law, the provisions regarding alternative dispute resolution are found in the Justinian Digest of 530-533 (Bilic, 2008, p. 13). Historians claim that mediation cases in commercial disputes existed at the time of the Phoenicians and the Old Babylonians, while, at the contemporary time, the Courts are those who have been entrusted with dispute settlement between the parties (Knol Radoja, 2015, p. 113).

In our society the roots of mediation date back a long time, especially after the establishment of this facility with the "*Kanun of Leke Dukagjini*" (Gjeçovi, 2014, pp. 65-66). In Kosovo since 2008, there is a Law on Mediation but, to this day, the mediation is very rarely used and this can best be illustrated by the cases referred to mediation at the Pristina Basic Court, which covers almost half of the territory of Kosovo in the meaning of the number of civil cases presented to the court. In the last two years there has been a very symbolic number of mediation enforcement in civil dispute resolvement and as in 2017, there are only two cases referred to mediation but they have not been successfully completed, and as of 2018, there are only two cases referred to mediation and only one of them has been successfully resolved by this procedure.

2. The Novelty of the Law on Mediation

2.1. Obligatory Mediation

In Kosovo, up until September 2018, the Law no. 03/L-057 on Mediation of 2008 has been into force, which has been replaced and abolished by law no. 06/L-009 on Mediation, which has come into force in September 2018 and which law complies with Directive 2008/52/EC of the European Parliament and of the Council of 21 May

2008 on certain aspects of mediation in Civil and Commercial Matters (Article 1 par. 2 of Law on Mediation) (Directive 2008/52/EC, 2008).

The provisions of the Directive are related to the definition of mediation and mediators, the definition of cross-border disputes, the quality and access to mediation, the enforcement of mediation agreements, the voluntary and confidential nature of the process, its effects on the statutory restrictions and periods, and rules regarding with public information and determination of the jurisdiction of the court and the relevant authorities (Chereji, 2016, pp. 3-16).

The new law has anticipated a considerable number of innovations from the previous law in force, one of which is the mandatory mediation (Article 9 of the LAW ON MEDIATION), which for certain disputes provides that the parties before filing a lawsuit in court, must first try to resolve their dispute by mediation. Obligatory mediation implies that the parties must try to resolve the dispute in mediation beforehand; otherwise their request will be rejected (Esplugues, 2015, pp. 1-88).

Thus, with the new Law (Article 9 para.1 and 2), mandatory mediation of disputes from family relationships is forseen in cases of alimony, guardianship, contacts, child custody and sharing of joint marital property, property disputes relating to the rights and obligations of the rights of servitudes, and the compensation of the expropriated property, in which cases the judge at the preparatory hearing and after the preliminary examination of the lawsuit should inform and oblige the parties in the mediation procedure. Thus, in the case of filing the lawsuit, it is foreseen that, in the above mentioned cases, the court informs but also obliges the parties to initially follow the mediation procedure (Article 9 par. 4 of the Law on Mediation) and in such circumstances, the parties must meet with the mediator and have thirty (30) days to prove the beginning of mediation, starting from the day the judge obliges the parties to try mediation.

The fact that mandatory mediation is foreseen by law does not mean that the parties are denied the right to pursue their case to the Court. Thus, the parties may not proceed with the mediation procedure and may return to court proceedings, no later than thirty (30) days before the case returns to court (Article 9 paragraph 4 of the Law on Mediation), where the parties shoud present written evidence, signed by the parties and the mediator, that the parties have tried mediation (Law on Mediation, 2018).

"*Mediation is not in law compulsory, but alternative dispute resolution is at the heart of today's civil justice system, and any unjustified failure to give proper attention to*

the opportunities afforded by mediation, and in particular in any case where mediation affords a realistic prospect of resolution of dispute there must be anticipated as a real possibility that adverse consequences may be attracted" (Hurst v Leeming, 2002).

Likewise, the legislator has decisively defined (Article 9, paragraphs 5 and 6 of the Law on Mediation) that: mandatory mediation does not deny the parties the right of access to court or the arbitration procedure if an agreement is not reached in the mediation procedure, and has foreseen the possibility that the case can again be sent to court or arbitration and that the parties are not obliged to reach agreement through mediation without their free will. The voluntary mediation principle means that courts or other authorities may suggest or even order the parties to pursue mediation, but may not deny their right to pursue their case in court, to settle their dispute on the basis of their inconsistency with the court's suggestion or order (Chereji, 2016, pp. 3-16).

Access to justice for all is a fundamental right guaranteed in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. (Council of Europe, 1953). The right to use the valid legal remedies, which has been established by the European Court of Justice as a general principle of Community law and as promulgated in Article 47 of the Charter of Fundamental Rights of the European Union (Commision, 2002, p. 7). Access to justice is an obligation that Member States meet by providing fast and free legal procedures.

If mediation does not succeed, then the case will be processed in court or arbitration. Therefore, it turns out that it is above all the willingness of the parties to reach an agreement on mediation and nothing will be imposed on them to reach an agreement.Without taking into account the fact that they may not reach an agreement by mediation, the parties are guaranteed their right to persue their case in court. (Qehaja & Mulaj, 2016, pp. 83-93). However, it is not always easy for the parties to become aware of the benefit of finding a solution by a mediation agreement, and therefore many legislators have escaped the mandatory stipulation to do so (Knol Radoja, 2015, p. 113).

2.2. Selection of Mediators by the Parties

Another novelty of the Law on Mediation is the selection of mediators by the parties themselves (Article 10 of the Law on Mediation), as well as the possibility that another mediator (Co-mediator) be involved in the mediation procedure other than the principal mediator.

According to the Kosovo Law on Mediation (Article 3 paragraph 1 item 1.4 of the Law on Mediation), the mediator is the third person, impartial, licensed by the Ministry of Justice, selected to mediate between the parties in order to resolve disputes, in accordance with the principles of mediation. The mediator is required to be licensed as such should meet the conditions provided by law.

Regarding the development of mediation, judges have available legal means to encourage potential parties and interested parties that have already raised a case to try to pass through a mediation process: litigants are invited by the judge to meet a mediation professional who will provide information about the mediation process. (GILBERG, 2015, p. 119) .With the new Law on Mediation, it is forseen that, under the agreement of the parties to the mediation procedure, the parties should voluntarily elect the mediator (Article 10 par.1 of the Law on Mediation) from the register of mediators licensed by the Ministry of Justice.

When mediation is initiated by the court, the prosecution or the competent administrative body, the mediation referral, will immediately contact the mediator selected by the parties, who must within three (3) days confirm the availability and the acceptance of the case, and if he does not confirm the call to mediate within this deadline, the mediatior referral will contact the other mediator (Article 10 par.2 of the Law on Mediation). And if the other mediator does not confirm the call to mediate within the deadline of three (3) days from the day of the call, the mediating officer will inform the parties and present the list with the names of other mediators (Article 10 par. 3 and Law on Mediation).

Now with the possibility of choosing a mediator by the parties, a procedure similar to that of arbitration, a standard of trust in the mediation process has been established, as the parties are left in discretion to decide which mediator will mediate in resolving their dispute. If the mediator can not be selected according to the parties' proposal, the mediation referral will select the mediator in the order of the region covered by the court or prosecution (Article 10, paragraph 4 of the Law on Mediation). By this provision, the intention of the legislator was to avoid the risk of mediation failure due to the inability of choosing the mediator by the parties' proposal. The parties may agree to engage a Co-mediator in the mediation process, that isproposed by the mediator selected by the parties with their prior consent (Article 10 paragraph 5 of the Law on Mediation).

So, as can be seen, now with the amendment of the Law on Mediation, it is left to the parties at their discretion to choose their mediator, who will mediate the dispute resolution between them, and that is of special importance since it is very valuable

to go throught the mediation process which is mediated by a person who enjoys credibility by both parties, and of course it makes the mediation process more acceptable by the parties involved.

2.3. Duration of Mediation

Another novelty of this law is the extension of the term of the mediation procedure, as with the previous law, the mediation procedure lasted ninety (90) days (article 13 Law on Mediation). With the new Law on Mediation, the mediation procedure lasts 90 (ninety) days (Article 16 par.1 of the Law on Mediation), with a possibility of extension of 30 (thirty) days (Article 16 par.2 of Law on Mediation), after the parties' request, through mediators or co-mediators of the mediation dispute, which is directed to the competent authority that has approved the referral of the dispute in mediation. The competent authority may approve such an additional term if the time limit does not cause any legal consequence in the loss of the right or the acquisition of rights to one party over time.

The parties, in the mediation procedure initiated by them, if they have failed to settle the dispute within ninety (90) days, they jointly with the mediator may sign an agreement for an additional period of thirty (30) days, that the mediator of the case ensures that such a continuation of the term does not give rise to legal consequences in the loss of the right or the acquisition of rights for one party over time (Article 16, paragraph 3 of the Law on Mediation). From the above, it is conculded that the maximum duration of mediation duration is 120 (one hundred and twenty) days.

2.4. Chamber of Mediators

The other novelty of this law is the establishment of the Chamber of Mediators (Article 21 of the Law on Mediation), which is an independent non-profit legal entity, acting in accordance with this law and its statute adopted by the General Assembly of the Chamber of Mediators and approved by Ministry of Justice. The manner of organization and functioning is regulated by the Chamber's internal act. Thus, the mode of functioning of the Chamber of Mediators is regulated by internal acts, as well as any other chamber carrying out such activities, such as the Chamber of Advocates.

3. Conclusions

The new Kosovo Law on Mediation has undergone substantive changes and is in line with Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation of Civil and Commercial Disputes.

The novelties of the new Law on Mediation are of particular importance, especially the issue of mandatory mediation, since the parties necessarily for certain issues as forseen by this law must first try to resolve their case with mediation, and only if the mediation procedure fails, then bring the lawsuit, where along with the lawsuit they must also provide evidence that they have tried the mediation, but, the same has resulted without succes.

The harmonization of the Law on Mediation with the EU Directive is important for the fact that European standards will now be implemented in the mediation procedure, and the parties will have the opportunity to choose the person-mediator who will mediate the settlement of the dispute between them and this represents a security for the parties. Also, with the new law, the duration of the mediation is 120 days, so it has been extended for another 30 days, the time unprecedented for the resolution of mediation disputes.

But, regardless of the legal changes related to the procedure of mediation, it can not be expected that in a near future there will be significant changes in the aspect that the parties will be made aware of the benefit of mediation or consider this alternative resolution as a first choice, since the tradition of dispute resolution in the court is long-lasting and time is needed to understand the advantages they will have when resolving their dispute by mediation.

The benefits of mediation are many including the reduction on time and cost as well as the flexibility and confidentiality of the process.Mediation is a creative alternative as it is less formal, less stressful and intermediated by a third neutral person and as such it offers a higher possibily of the parties maintaining relationships beyond the mediation process. Also a significantly important benefit is the reduction of the number of cases in the courts, as a considerable number of cases will be resolved in the mediation process.Therefore mediation as a alternative dispute resolution has great potential to improve the judicial system and as such it should be strongly supported and recommended by the courts in the matters of dispute resolutions.

4. References

Bilic, V. (2008). *Alternativno rjesavanje sporova i parnicni postupak/ Alternative Dispute Resolution and Civil Procedure.* Zagreb, Croatia: Univeristy of Zagreb.

Chereji, C.R. (2016, April). Mediation in the European Union: The Directive 2008/52/EC and its Effects. *Conflict Studies Quarterly,* Issue 15, pp. 3-16.

Commision (2002). *GREEN PAPER-on alternative dispute resolution.* Brussels: Commission of the European Communities.

Council of Europe (1953, September). *European Convension on Human Rights.*

Directive 2008/52/EC (2008, May 21). *Of the European Parliament and of the Council*.

Esplugues, C. (2015). *New Developments in Civil and Commercial Mediation.* Springer.

Gilberg, K. (2015). *Handbook on Quality of Justice*. In Gilberg, K. *Handbook on Quality of Justice.* France, p. 119.

Gjeçovi, S. (2014). *Kanuni i Lekë Dukagjinit.* Create Space Independent Publishing Platform.

Hurst v Leeming, [2001] EWHC 1051 (Ch), [2003] 1 Lloyds Rep 379 (Royal Courts of Justice May 9, 2002).

Knol Radoja, K. (2015). Obvezno Mirenje – Osvrt Na Rješenja Iz Komparativnog I Hrvatskog Prava/ Mandatory Mirenje - Review of Solutions from Comparative and Croatian Rights. *Pravni vjesnik*, p. 113.

Law on Mediation (2018, 08). *Law No. 06/L-009 On Mediation.* General Assembly of Kosovo.

Qehaja, R. & Jahmurataj, I. (2018). Mediation an Important Segment of Kosovo Legal System for Alternative Civil Dispoute Resolution. *Acta Unversitatis Danubius Juridica,* Vol. 14(1), pp. 16-24.

Qehaja, R. & Mulaj, V. (2016). Mediation as an Alternative Manner of Dispute Resolution in Kosovo. *Acta Universitatis Danubius Juridica, Vol. 12*(3), pp. 83-93.