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MEDIATION VS. MEDIATOR

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Abstract

The title of this paper was suggested by the confusion existing even among certain mediators about what mediation is and what it represents actually.

Is mediation "a different type of justice" or, otherwise, it is "an alternative to traditional justice"? Is mediation a procedure still unknown to the public and professionals? Is mediation insufficiently publicised? Is there a background of distrust about this procedure?

In this paper we are trying to answer these questions and suggest solutions likely to determine the strengthening and promoting of the mediation procedure like a procedure both efficient and necessary all the same.

Keywords: *mediation, conflict, conciliation, procedure, alternative.*

Introduction

Is mediation a simple form of solving conflicts as a result of conciliation discussions skilfully and equably held by mediator or is it a procedure where the mediator can venture to suggest solutions often unlikely to comply with the legal provisions?

Is mediation an efficient alternative to avoid bureaucracy and save time and financial costs otherwise spent for settling litigations or is it an incorrect method of simulation of some "conflicts" approached under a mediation agreement likely to be subsequently validated by the court, without meeting all procedural and taxation duties imposed by law for such a procedure?

We believe mediation is a noble activity by its very purpose, by the economic and social importance generated by the result obtained, an activity which should be first respected by mediator and then by those who resort to mediation.

With a long history, with its sources in ancient Greece and Rome, they can be found in the modern history of civilized states, in our country it still faces problems of acceptance and perception as fighting a conflict procedure. From a legislative perspective "the mediation is a way to resolve conflicts amicably, with a specialized third party as mediator,... "[1].

If we consider that during 2007-2011, 265.772 cases were registered in the 15 civil appeal courts, representing a 77% increase, and if we consider that 941.335 cases were registered in the 46 civil courts of law, representing a 61% increase, and if we also analyze the fact that 1.942.001 cases were registered during the same reference period at courts, representing the stock existing on the 31st of December 2010, that is a 68% increase, then we can easily see that the mediation procedure is both useful and necessary as well.[2]

[1] Article 1 of Law no. 192 of 16 May 2006 regarding the mediation and establishing the mediator profession, published in the Official Gazette of Romania no. 441/22 May 2006, thus amended by Law no. 370/2009 for amending and supplementing Law no. 192/2006 on mediation and establishing the mediator profession, published in the Official Gazette of Romania no. 831/3 December 2009.
[2] Reports of the Superior Council of Magistracy from Romania, 2007-2011.

Nevertheless, in the year 2010 only 258 mediations were approved during lawsuits.

Under these circumstances one may naturally wonder about the reason why such a friendly and less expensive procedure like mediation is not adopted by courts or litigants.

Is mediation a procedure still unknown to the public and professionals?

We shall try to answer this question by submitting the result of a survey which, regardless of the sociological method of measurement used, shows certain values likely to generate conclusions.

In this regard we shall submit the survey conducted by the specialist publication MediereNet during 1 January-15 February 2013, on a sample of 1.800 people from Bucharest, Cluj-Napoca, Braşov and Sibiu cities.[3]

Here are the complete results of the survey conducted by MediereNet.ro:

1. Have you heard about the institution of mediation in Romania? Yes - 56%; No - 44%;
2. Have you ever participated in an information session about mediation? Yes - 4%; No - 96%;
3. Have you ever been part of mediation? Yes - 2%; No - 98%;
4. Do you know what prior information about mediation involves? Yes - 49%; No - 51%;
5. Do you know that prior information about mediation is mandatory in certain types of lawsuits, in accordance with the New Code of Civil Procedure? Yes - 38%; No - 62%;
6. Do you think the mandatory information on mediation is useful? Yes - 47%; No - 38%; Don't know-15%;
7. Do you know that prior information on mediation is mandatory since 2014 as well as in certain criminal law cases, according to the New Code of Criminal Procedure? Yes - 4%; No - 96%;
8. Do you know information about mediation is free of charge, in any situation? Yes - 32%; No - 68%;
9. Would you resort to mediation unless informing about mediation were mandatory? Yes - 17%; No - 69%; Don't know - 14%;
10. I you were part of a possible dispute where would you like to get informed first? Lawyer - 87%; Mediator - 8%; Another option - 5%;
11. In what types of disputes do you think mediation would be most useful? (This question allowed multiple choices) Family, divorce, inheritance - 60%; Work conflicts - 26%; Criminal law disputes - 56%; Commercial disputes - 2%; Other disputes - 16%;
12. Do you think there are enough information about mediation and the prior information on mediation? Yes -16%; No - 84%.

The survey aimed to highlight how Romanians see mediation, especially in the stage of prior information, before and after the coming into force of the new codes.

As we can see, over half of respondents stated they knew about the institution of mediation. It seems that the on-line, audio, video and written campaigns have reached their purpose. The mediation activity, so recently entered on the service market in our country, has managed to become known to a large number of citizens in a very short time. The conclusion shows the promotion was effective. In such a situation, what we should worry about when considering the perception of mediation as an alternative for solving conflicts, is the fact that in the survey, at the question: Would you resort to mediation unless informing about mediation were mandatory?[4] only 17 % answered “Yes” while 69% answered “No”.

Why or more exactly where does the distrust of citizens come from considering this procedure?

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http://www.csml909.ro/csm/index.php?cmd=24

[3] www.medierenet.ro/2013/02/26/sondaj-medierenet-informare-prealabila

[4] *Idem.*

We believe that if we can find an answer to this question, it will become easier to identify a solution.

Considering the public's knowledge or lack of knowledge about the mediation procedure, we think there are still many things to do in this direction, but the inefficiency of the procedure, determined by the fact that it is not accessed, is not the result of ignorance but of distrust.

Is there a background of mistrust likely to prevent the parties involved in a dispute to resort to mediation?

Certainly, the answer to this question is positive. In the following part we are trying to identify the sources of this distrust and submit solutions for changing the situation.

First, approaching the "topic of distrust in the mediation procedure" from social perspective, we wondered whether the occurrence in Romania of Law no. 192/2006 regarding the mediation and establishing the mediator profession was a favourable moment for introducing mediation and the mediator profession in Romania. Was the Romanian society ready to accept and adopt a new possibility for solving disputes? The real situation most mediators find themselves in, in terms of volume of activity, shows that our society, with an impressive number of records in litigation and a strong mental inaction regarding the settlement of these disputes only by court, was not and is still not ready to resort to mediation confidently. At the same time, we believe that the occurrence of the law at that time is appropriate and beneficial. History shows that legislative reforms, the introduction of certain new institutions and procedures have always been met with criticism, fears and resistance by both litigants and professionals. It is not the mistrust and fears existing upon the occurrence of Law no. 192/2006 which should make us worry. We should worry about the fact that this state is perpetuating, it becomes chronic and as it is now obvious, in seven years' time after that moment, the situation is slightly different. Quoting a professional mediator, who expresses the same concerns on his blog, "in the Netherlands, mediation began to operate and was implemented before the occurrence of a law on mediation, and it was enacted only after a few years, when they realized that it works and how it works. First, the Dutch understand. So and therefore, it is not the law that makes mediation work but something else. Or somebody else. I wonder who or what"[5]. The question bothering us is: has the law of mediation, the procedure of mediation or the mediator caused this state of distrust?

We believe that the Law 192/2006 is a very good legislative basis for this activity and profession. We believe that the mediation procedure, as it was provided under the Romanian legislation, is subject to perfection, but applicable. We only have to concentrate on the mediator as a freelancer and on reporting the mediator to the mission he is in charge of under the present legislation.

We believe that every single mediator is responsible to his fellow contemporary mediators, is responsible to the coming generations of mediators, is responsible to the legislative and executive authorities that trusted this procedure and this professional status and is mainly responsible to all present and future litigants who could settle a conflict faster and cheaper, both for themselves and for society.

"Basically, the raw material a mediator works with is trust. Trust in the proceeding, trust in the mediator as professional, trust in the mediator's skills, accuracy and balances are critical in the strategy of promoting mediation and mediators"[6]. If there was such trust, there would be no need for a law to impose obligations on this procedure. Starting with Law no. 192/2006 and continuing with all subsequent legislative acts in this field (Law no.370/2009 on amending and supplementing Law no. 192/2006 regarding the mediation and establishing the mediator profession; Government Ordinance no. 13/2010 for the amendment and

[5] V. Danciu, http://mediatorsm.blogspot.ro/2010/ll/sondaj.html.

[6] Ph.D. Associate Professor L.B.Ciucă, *Convorbiri juridice*, no. 4, "Juridică Universitară" Publishing House, 2011, p. 12.

supplementing of some legislative acts for transposing the Directive 2006/123/EC of the European Parliament and of the Council on 12 December 2006 on services in the internal market; Law no.202/2010 on some measures for accelerating the settlement of lawsuits; Law no.76/2012 for the implementation of Law no. 134/2010 on the Romanian Civil Procedure Code; Law no. 115/2012 for amending and supplementing Law no. 192/2006 regarding the mediation and establishing the mediator profession; Government Emergency Ordinance no. 90/2012 amending and supplementing Law no. 192/2006 regarding the mediation and establishing the mediator profession and for amending art. II of Law no. 115/2012 for the amendment and supplementing of Law no. 192/2006 regarding the mediation and establishing the mediator profession; Government Emergency Ordinance no.4/2013 on the amendment of Law no.76/2012 for the implementation of Law no. 134/2010 on the Romanian Civil Procedure Code and for the amendment and supplementing of some related acts; Law no.214/2013 for approving the Government Emergency Ordinance no.4/2013 on the amendment of Law no.76/2012 for the implementation of Law no.134/2010 on the Romanian Civil Procedure Code, and for amending and supplementing certain acts related; Government Emergency Ordinance no.80/2013 on judicial stamp duties) they have tried to strengthen the status of mediator, the mandatory character of accessing a mediation procedure "to further promote a more intensive use of mediation and ensure a legal framework predictable to parties resorting to mediation, the introduction of a framework legislation addressing mainly key aspects of civil procedure becomes necessary"[7].

Despite all these legislative efforts, the procedure of mediation remains unused, except very few cases, insignificant in terms of our analysis. We appreciate them as being insignificant in terms of our analysis, "as, most often, mediation is achieved as a result of certain approaches undertaken by some authorities for guiding clients to certain mediators"[8]. This guidance cannot be taken into account in the process of identifying the level of trust mediation has among people.

We believe the mediator should be aware of the nobility of his activity. We believe the mediator should be aware of the social responsibility he has. We believe the mediator must understand the social benefit he can generate. We believe the mediator should act as a professional towards other mediators like him and towards the parties that step into his office, hoping to find a solution to the conflict they are involved in. Beginning with the preparation, promotion and advertising systems, organizing the office, and continuing with the appearance and language used, ending with the solutions fairly and equally provided, everything must generate trust and appreciation toward the mediator. The same as a perfect picture consists of perfect details; the image of "mediation" consists of every single mediator's image. If they can build trust in the mediator, there will not be needed laws to compel a citizen to step into a mediation office and some mediators will not have any more to produce "conflicts", on a personal level, subsequently solved beyond the law, having the financial benefit as an only purpose.

In this regard, we can provide examples of some mediation agreements which exceed the legal provisions, agreements entitling heirs not having this quality, in compliance with the law. We can also mention mediation agreements which did not consider the legal provisions on the transfer of ownership on real estate properties or which included a transfer of property from individuals who did not have the quality of owners.

In order to support the above-mentioned data, we can mention: Civil Sentence, Case no. 3880/107/2007 public hearing on 18.02.2009 Alba Court; Civil Sentence no.7327, Case no. 11646/278/2010, public hearing on 16.12.2010, Petroşani Court; Civil Sentence no. 1535,

[7] Paragraph 7 from the Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on some aspects of mediation in civil and commercial terms, Official Journal L 136, 24/05/2008, pp. 0003 - 0008

[8] Group of authors, *Medierea un demers eşuat dar cu perspective*, Convorbiri Juridice, no. 6, "Juridică Universitară" Publishing House, 2012, p. 8.

Case no. 12084/278/2010, public hearing on 07.03.2011, Petroşani Court; Civil Sentence no. 1956, Case no. 2320/221/2008, public hearing on 30.03.2011, Deva Court; Civil Sentence no. 3210, Case no. 22362/302/2010, the meeting of the Chamber of the Council on 13 April 2011, Sector 5 Bucharest Court, Civil Division II; Civil Sentence no. 1105, Case no. 1535/179/2010, public hearing on 10.11.2010 Babadag Court; Civil Sentence no. 1394, Case no. 5518/121/2009, public hearing on 01.04.2010 Galați Court, Commercial, sea and river and the administrative-fiscal legal division; Civil Sentence no. 1104, Case no. 1531/247/2010, public meeting of 01.11.2010, Însurăței Court; Civil Session no. 7, Case no. 1914/247/2010, public hearing on 05.01.2011 Însurăței Court; Civil Sentence no. 2007, Case no. 222/296/2011 public meeting of 24 March 2011 Satu Mare Court, Civil Division; Civil Sentence no. 156/2011, Case no. 3035/287/2010, public hearing on 21.01.2011 Ramnicu Sarat Court. In all civil sentences delivered by various courts, we refer to mediation agreements which have ended with the return of stamp duty or have generated inadmissibility due to the non-compliance with the conditions under the law on agreements approved under the mediation agreement. Closely related to the above, we should mention the excellent paper "Directory of court decisions on matters of mediation", performed by GEMME - the Romanian section and by the Association - Forum of Judges in Romania, a paper published at Universitara Publishing House, Bucharest, 2011, a directory prepared relying on the selection performed by Dragoş Călin, Roxana Lăcătuşu and Sanda Lungu.

Conclusions

Considering the brief opinions expressed in this paper, we can submit the following conclusions:

There is a relatively high level of awareness among people considering the mediator profession and the mediation procedure.

There are few situations when people resort to mediation.

We can see a high level of distrust in the procedure.

Based on these findings, we believe that the mediator is at the heart of generating confidence in mediation. We refer to that honest, dedicated and professional mediator, that mediator who loves his profession and sees mediation as a modern, European and less expensive activity suitable for solving a conflict, that mediator who does not act as a judge, lawyer or notary, concluding thus mediation agreements beyond legal requirements. The mediator who wants to be mediator must be at the heart of this strategy!

We believe they must conclude partnerships with the other professions a mediator collaborates with in a mediation procedure or subsequently to the conclusion of a mediation agreement. It is known that public notaries support the mediation activity and welcomed the appearance of Law 192/1996, considering that a practical collaboration with mediators is beneficial to both parties. They must use the advantage provided by the fact that many lawyers are also mediators. We believe that this may be a way to get recognition and inter professional collaboration. Last but not least, mediation must be recognized and appreciated by all state institutions, professional organizations and by the public. We also need a more stringent regulatory activity on promotion and advertising, as well as on the minimum conditions of the functioning of an office; the training of future mediators should be balanced and honest without allowing mercantile aspects dominate the professional criteria. It is necessary to exploit the advantage generated by all legislation and we mention here the provisions from the Romanian New Civil Code of Procedure "The judge will advise the parties of the dispute amicably solution through mediation, according to the special law"[9]; "in disputes where according to the law may be subject to mediation proceedings, the judge may

[9] Article 21, paragraph (1) of Law 134/2010 on the New Civil Code of Procedure, republished in the Official Gazette of Romania, nr. 545 of August 3rd, 2012.

invite the parties to attend at an information session regarding the advantages of using this procedure"[10].

The legislative advantage is especially strong as, even if "mediation is not mandatory"[11].

"If the law provides otherwise, the parties, the natural or legal persons are obliged to attend the meeting of informing regarding the benefits of mediation"[12].

While this obligation "is striking" and is criticized as a form of "restriction of access to justice"[13] - using these advantages and even more than these, the mediators must first of all see in the mediation an activity that must be appreciated and respected, especially by those who practice it. The professional satisfactions surly will later on generate both financial satisfactions as well as satisfaction of social acknowledgement.

Mediation is fast, flexible and discreet. Mediation generates lower costs compared to a conflict settled in court and is a legal obligation in some circumstances. Mediation as procedure has all data to succeed. The mediator, as individual, must stand up to the nobility of this activity and the rigors of professional status. A decisive role in the construction and application of this strategy is the professional organization of mediators who must impose standards likely to be met by those who work as mediators and likely to be reached only by those deserve it.

In conclusion, we consider that the Romanian society needs mediation. It needs a mediation procedure likely to be practiced honestly and equally by professionals who must comply with regulation strictly and efficiently. Considering the social need for mediation and the lack of appropriate regulatory measures, there is the risk of a regulation coming from the outside, a situation likely to cause the risk of an inappropriate regulation, unjust and excessive, both for mediators as well as for those who need mediation.

We believe that the solution lies right at the mediators. At mediators as a person, at the mediator as a professional. As I have mentioned, the Romanian society needs this procedure and many professionals and passionate mediators who are passionate about what they do to deserve and to receive the necessary support in order for the mediation to be where it belongs, meaning among the procedures which appeals with confidence.

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[10] Article 227, paragraph (2) of Law no. 134/2010 on the New Civil Code of Procedure, republished in the Official Gazette of Romania, nr. 545 of August 3rd, 2012.

[11] *Idem.*

[12] Article 2, paragraph (1) of Law no. 192 of May 16th, 2006 on mediation and establishing the mediator profession, published in the Official Gazette of Romania no.44 I/May 22nd, 2006.

[13] http://www.juridice.ro/279898/despre-mediere-si-informarea-asupra-acesteia-aspecte-critice.html