

CONFLICT RESOLUTION BY MEDIATION – A SHORT ANALYSIS OF THE SITUATION IN ROMANIA

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Alternative dispute resolution methods (ADR), although more than two decades old in northern-American and western-European legal systems, are almost unknown in Romania. Only arbitration in commercial matters and mediation of labor conflicts are regulated by law and practice. The present article describes the efforts made by lawmakers to pass a bill of mediation as a non-judiciary method of conflict resolution, and offers an insight into the main aspects contained in the project currently being discussed in the Romanian Parliament.

Mediation, as an alternative procedure of solving conflicts, is relatively unknown in Romania and, so far, insufficiently regulated by law. In the last five years there have been several attempts to promote a law regarding mediation per se and the exercise of the profession of mediator. The initiatives to regulate this profession have come from both governments and lawmakers, but, for different reasons, none of the projects has succeeded. They have either been withdrawn by their own initiators, or the means of promoting them have been rejected, with or without good cause. This year, the Ministry of Justice restarted the regulating procedure, and the final draft of the law¹, as well as the recitals².can be seen on its website. Below, we will provide an overview of the “joyful” history of a draft law – with direct reference to the way the Romanian authorities (The Ministry of Justice, the Government and the Parliament) have approached a

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¹ http://www.just.ro/rtrv_mc.php?param=proiect_lege_mediere_2005

² http://www.just.ro/rtrv_mc.php?param=expunere_lege_mediere_2005

matter related, in the final analysis, to the free access to justice. We will describe the efforts of the civil society (to be understood as the few NGOs running programs in this field), and, last but not least, we will attempt to do a short punctual analysis of the draft law, within the limitations of the medium, and we will return to this subject which remains very much a mystery.

I. Recent history

a) In 2000, the draft law regarding mediation³ was registered at the Chamber of Deputies under number 62/14.02.2000, initiated by the PDSR Deputies Dumitriu Carmen and Ionescu Mariana. “During the debates regarding the draft law regarding mediation, Deputy Wittstock Eberhard-Wolfgang has shown that, by adopting this law, the duration of dispute settlement, already long in the Romanian justice system, would increase to the disadvantage of the protection of the citizen’s rights. Also, he pointed out that the Legislative Council had given negative opinion on this draft law, and, as a consequence, he proposed that it not be given favorable opinion. By majority of votes, the Commission adhered to this point of view, and the draft law was not approved.”⁴ The legislative procedure for this proposal ended on February 1, 2001, by falling outside of the provisions stated in Article 60(5) of the Constitution of Romania, of 1991.⁵ We did not have access to the documents related to this proposal (recitals, text of the proposal, opinion of the Legislative Council), and, therefore, we cannot opine on its contents. It is the first mention of the term “mediation” in the title of a draft law, after 1990, registered in the database of the Chamber of Deputies, and its first failure.

b) In 2001, in the Chamber of Deputies the draft no. 508/18.09.2001 (*draft law regarding conflict resolution by mediation*),⁶ was registered, initiated by the PNL Deputies Andrei Ioan Chiliman, Titu Nicolae Gheorghiof, Ion Mogoș, Valeriu Stoica and Cornel Știrbeț. It was actually an attempt to resuscitate a former attempt to regulate this field of legislation. As the opinion of the Legislative Council no. 1065/10.10.2001 points out: “*a previous project with similar content was part of the bundle of normative acts which was nominated as <reform of justice> which was going to be promoted, initially, by Government accountability, then by emergency ordinance, which received negative opinion in 2000 from the Legislative Council, and was then abandoned, in order to follow the common way of draft legislation. [...] The recitals and the draft law are integrally identical to the form proposed by the previous Government, incorporating certain observations and proposals of the Legislative Council*”.⁷

The importance of this project consists in the fact that, for the first time in an official document, the three great shortcomings of the classical form of conflict resolution, adjudication/ appeal to a court, were pointed out:

- duration – a normal trial can last for years;
- costs – taxes, public funds allotted for the functioning of the courts, lawyers’ fees, experts’ fees, expenses related to the application of the courts’ decisions etc.,
- social costs – each time one of the parties “loses”; especially when trials are lost on procedural grounds, the frustration of the party who is convinced that “he or she is right” leads more often than not to an escalation of the conflict.

³ http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=1524

⁴ Taken from the minutes of the works of Committee on Human Rights, Cults, and the Problems of National Minorities of the Chamber of Deputies, 21.06.2000, on the following website http://www.cdep.ro/pls/proiecte/upl_com.lista

⁵ Which stated that “procedure for draft legislation and legislative proposal put on the previous Parliament’s agenda is to be continued under the current Parliament.” Therefore, the project “died” because it was not put on the agenda.

⁶ http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=2677

⁷ The opinion of the Legislative Council on the draft law regarding conflict resolution through mediation is available, in facsimile, on the website: http://www.cdep.ro/caseta/2001/10/11/pl01508_cl.pdf

Thus, in their recitals, the initiators state that: *“the simplification and the acceleration of the legal procedures, the increase in the quality of the legal act, the reduction of the tasks for the courts and of the trial-related costs are, undoubtedly, an absolute priority. [...] in the context where traditional means of conflict resolution are insufficient, the courts are suffocated by the huge number of files whose final resolution can last, according to procedure, for years and the simple sentencing can lead to an escalation of the original conflict between the parties and not to a reduction thereof, the danger of creating a potential blockage in the legal system begs for the adoption of emergency measures. To this purpose, concrete solutions must be found in order to reduce the burden carried by the legal courts, as well as the economic and social trial-related cost and, last but not least, to answer the need for “another type of justice”, based on the reconciliation of all the parties involved in a conflict. Not lastly, it must be stressed that, at this time, the Romanian society can no longer ignore and neither put an end to the mediation phenomenon, which exists in more or less organized forms, especially in the private initiative area, at the level of a training form more or less professional and which is, anyway, winning more and more field.”*⁸

The last phrase can cause some confusion given that mediation is a “phenomenon” in exactly the same measure in which reconciliation of the parties in criminal causes or arbitration in commercial causes are phenomena. Only the lack of serious legal research in the matter can justify such an alarmist choice of words, given that the ADR (Alternative Dispute Resolution) techniques have a significant weight both in American and Western European law. In the absence of institutional interest from the public authorities, it is not surprising that the private sector took the initiative of developing a method to solve conflicts which is more advantageous from many points of view than the “traditional”, time and money-consuming trials. Suspicions regarding the professionalism of the private training forms are part of a legacy of stereotypes which we will not delve into here.

The document which “buried” the debate on mediation in the Parliament until recently was “The Government’s point of view” sent to the Chamber of Deputies by the Ministry for the relation with the Parliament by address no. 1059/MRP/11.03.2002, which provides the following quote: *“Given that, both the recitals and the text of the draft law are integrally identical to the draft law elaborated by the Ministry of Justice and sent to the Parliament for approval during the previous legislature, the Government does not support the adoption of the draft law as a Parliamentary legislative initiative and will promote its own draft law which can be amended by the current initiators, according to Parliamentary procedure”*.⁹ This point of view was adopted by the Deputies in the Committee for Legal Matters, Discipline, and Immunities, who, during the December 2003 session “decided, by majority of votes, to submit to the plenary of the Chamber of Deputies the rejection of the draft law regarding conflict resolution by mediation.”¹⁰

c) On January 6, 2004, the draft law regarding mediation in civil matters and the organization of the profession of mediator¹¹ was published on the website of the Ministry of Justice and, two months

⁸ Taken from the recitals of the draft law regarding conflict resolution by mediation, <http://www.cdep.ro/proiecte/2001/500/00/8/em508.pdf>

⁹ http://www.cdep.ro/caseta/2002/03/12/pl01508_pvg.pdf

¹⁰ The Conclusion to the Report of the Committee for Legal Matters, Discipline, and Immunities of the Chamber of Deputies no.796/R/18.12.2003. It is also stated in the report that *“Mrs. Maria Marițescu, manager, also took part in the Committee’s works, on behalf of the Ministry of Justice, and informed the members of the Committee that, **shortly**, a draft law will be promoted, which was elaborated on the basis of the expertise performed by the Council of Europe and which took into consideration the provisions included in the current draft law”*. The report is signed by the President of the Committee, the lawyer and university professor Ion Neagu. Source: http://www.cdep.ro/caseta/2004/01/28/pl01508_rp.pdf (the “shortly” referred to in the paragraph actually took two years –n.n.)

¹¹ <http://www.just.ro/proiecteinlucrulaMJ.php>

later, it is registered by the Senate, on March 10th, under no. L.166/2004¹². Debates on this project did not last long, as it is withdrawn by its initiator, through the General Secretariat of the Government. There is no public data on the reasons this draft law was withdrawn only a month and a half after having been promoted, and because of that we can only speculate that the new Minister of Justice, Cristian Diaconescu, appointed on the same day that the project was registered by the Senate, March 10, 2004,¹³ felt that the project was not complete.

d) A new attempt to promote the draft law took place on December 14, 2004, when in the draft law regarding the Government's right to issue orders sent to the Senate by address no. E.493/14.12.2004, in chapter III – Justice, there is a point regarding “mediation in civil matters and the organization of the profession of mediator”. We can perceive what happened with this attempt from the minutes of the Senate's session on December 27th:

“Mr. Eckstein Kovács Péter: Thank you. On 23 December 2004, The Committee for Legal Matters, Discipline, and Immunities was notified of the draft law regarding the Government's right to issue orders, by notification sent by the Government and supported by the Minister for the relation with the Parliament. The Committee adopted two amendments and two eliminations, respectively, both in chapter III - Justice elimination of point 2 – Mediation in civil matters and the organization of the profession of mediator, given that the Senate and the Parliament have recently rejected a draft law with similar content.[...]”¹⁴

Unfortunately for the Senator concerned, his last observation is false, the rejection he mentions being, actually, a withdrawal.

e) A new project, initiated by the new Minister of Justice, Mrs. Monica Luisa Macovei, is currently under Parliamentary debate, registered to the Senate under no. L229/2005¹⁵. It is important to state here that the form of the draft law submitted to the Parliament is greatly improved over the form which was submitted to public debate at the beginning of the year. A major improvement, is the extension of the field of competencies on which this type of conflict resolution can operate, from civil matters to commercial matters, family law and even criminal law. Also, the organization of the profession of mediator, the establishment of occupational standards and the regulation of the procedures reflect a major change regarding the current opinion of the Ministry of Justice on the part it must play in the regulation of this field. Although the project submitted to public debate in March, 2005, simply made partial improvements in the previous legislative draft, the final text sent by the Government to the Parliament for approval shows clear efforts to reform justice.

II. Civil society in Romania and the conflict resolution by mediation procedure

Given that the Romanian authorities have allowed this important issue to languish for five years essentially in its exact initial phase, we have no guarantee that, this time, Parliament will decide to proceed in a different way than it has done so far. However, the current proposals appear to be superior from the previous attempts, and a few NGOs have developed a series of projects aimed at familiarizing the Romanian citizens with the new procedure.

Thus, among the pioneers, The Foundation for Democratic Change ran a series of training programs in the field of conflict resolution by alternative means, and it edited a series of papers, among which,

¹² <http://80.97.216.132/senat.proiect.asp?cod=9108&pos=0>

¹³ Decision no.5 of 10 March 2004 for the approval of the amendment to the structure and form of the Government, published in the Official Gazette of Romania, Part I, no.212/10 martie 2004

¹⁴ Taken from the minute of the Senate's session of December 27th 2004, published in the Official Gazette of Romania, Part II no.12/31.12.2004

¹⁵ The initiator's form can be downloaded from <http://webapp.senat.ro/pdf/05L229FG.pdf>, and the recitals from <http://webapp.senat.ro/pdf/05L229EM.pdf> on the www.

was a code of conduct for the mediator. In 2001, the Foundation organized a Center for Documentation for Peaceful Conflict Resolution¹⁶.

The Center for Mediation and Community Security, from Iași, in collaboration with the Faculty of Psychology of the “Al.I.Cuza” University, organized a MA program in conflict mediation and offers training for mediators¹⁷

In 2003, the “PRO Mediarea” Association in Bucharest established “The Center for mediation of conflicts between consumers and economic agents”, in partnership with the Association for the Consumer’s Protection in Bucharest.

More and more professional companies, law and consultancy firms, especially in the human resources management field, offer specialized training programs in conflict mediation.

III. What mediation is, is good for and how it works

Together with conciliation, mediation is one of the new methods of conflict resolution outside the courts of law and other authorities with judicial and arbitrational attributes. Its main purpose is ending the conflict by the intervention of a third party, the mediator, whose function is to facilitate the negotiation of a mutually beneficial solution for the parties, by utilizing specific communication means and techniques. The mediator cannot impose a solution on the parties, which is what differentiates mediation from arbitration, and the parties have the freedom to reach an agreement or not. In arbitration they can opt for the classic judge/arbitrator solution. Mediation works only on “negotiable” issues for the parties, it cannot operate in situations where the parties cannot decide on their rights, such as strictly personal rights. In Europe, the main area of application is in civil law (including family law), commercial law and consumer protection . In the US and Canada, it covers many more areas, including administrative conflicts, work conflicts and a large part of penal law, the negotiating stance of the parties being stronger than in Europe.

Thereafter, we will use the following names for the four Romanian legislative drafts:

- the “Stoica draft”; for the Parliamentary legislative initiative of 2001,
- the “Stănoiu draft” for the initiative of the Ministry of Justice of 2004,
- the „Macovei I draft” for the proposal of the Ministry of Justice open for public debate in March 2005 and the
- „Macovei II draft” for the proposal sent for approval to the Parliament in June 2005.

As for the conflicts which can be solved by mediation, the Romanian legislative proposals have yet to choose between the European model and the North American model. The „Stănoiu” and „Macovei I” drafts are closer to the European forms, while „Stoica” and „Macovei II” drafts follow the North American examples.

Work conflicts mediation is still subject to the provisions of the special law. At this time, there is no specific reference to introducing this method in public administration, or when conflicts within public institutions (public servant vs. institution), interinstitutional conflicts (i.e. Mayor’s Offices vs. Government appointed local authorities) or citizen vs. institution-type conflicts are concerned. By comparison, each agency in the US administration is under legal obligation to create an ADR department.

The way in which parties to the conflict end up in front of the mediator differs from case to case: mediation being regulated as compulsory preliminary procedure (in the US, for certain types of

¹⁶ For more details regarding the activity of this foundation its webpage is <http://www.fdc.org.ro/ro/despre/realizari.html>

¹⁷ <http://www.cmcs.ro/mediere.htm>

conflicts) or as voluntary procedure (regardless of whether the parties addressed a court of justice or not). In the first example, the parties must go through mediation before taking their case to court; or, in the case that they have already taken their case to court, the judge suspends all legal proceedings until they have completed the mediation procedure. In the voluntary mediation case, the parties call in a mediator voluntarily before suing or, if the trial has been initiated, the judge informs the parties of their option to follow the procedure of mediation, of their own will. If mediation is chosen, all legal proceedings and all the terms thereof are halted during the procedure.

All Romanian proposals have opted for the voluntary mediation principle. Thus, the “Stoica” draft proposes that:

“Mediation is optional for the parties and cannot take place in the absence of their written approval”, [in Article 3(1)]

“Legal bodies must inform the parties about the opportunity and the advantages of using the mediation procedure and to counsel them to use it in order to solve the conflicts arisen between them.” [in Article 10]

The “Stănoiu” and “Macovei I” drafts provide variations on this theme:

“Mediation is optional. Unless otherwise provided for in the law, the parties, both physical and legal entities, can use mediation (either in order to avoid a court’s trial or an arbitration procedure, or after having taken a matter to court. – „Stănoiu”, Article 2(1),

“voluntarily, even after having taken a matter to court, regardless of the stage of the trial.” („Macovei I”- Article (1).

Both drafts state that the arbitration and court authorities („Stănoiu”), the “legal and arbitration bodies, as well as other authorities with attributions in the field of law” respectively (“Macovei I”), may inform the parties of their option and of the advantages of using mediation and may counsel them to use it in order to solve conflicts arisen between them.” (Article 7). The “Macovei II” draft mistakes the access to this procedure for the application field, but provides for the compulsory informing of the parties by the authorities and maintains the optional feature of the counsel. (Article 2(1) – “*Unless otherwise provided for in the law, the parties, both natural persons and legal entities, can use mediation voluntarily, including after having taken the matter to the competent court of law, by agreeing to solve any civil conflicts in this manner [...]*”; Article 2(3) – “*the procedure of mediation can be used according to this law and before using the compulsory procedures of amiable conflict resolution provided for in the legislation.*” And, especially Article 6 – “*Legal and arbitration bodies, as well as other authorities with attributions in the field of law shall inform the parties of the possibility and the advantages of using mediation in order to solve conflicts arisen between them*”. We feel that the obligation to inform the parties of their options is a welcome one and we believe that in a reasonable timeframe, the system will evolve toward making the procedure compulsory, at least in certain types of conflicts. Also, it would be interesting to study the possibility of including this obligation in certain cases in order to defeat the inherent resistance to change, also given that “the mediator does not wear a uniform”¹⁸.

The parties are free to choose their mediator. It is a universally accepted principle, present as such in all the above-mentioned draft laws. The details about who can be a mediator, what the conditions for working as such are, and what qualifications are required – these are some of the points to which the draft laws provided similar answers, regardless of their author. All of the proposals include, as they should, that the mediator should be completely capable to accomplish his or her duties and in

¹⁸ An argument used in an informal conversation by a young lawyer which was expressing his skepticism regarding a successful implementation of mediation on the Romanian market.

good health (“Stoica” and “Stănoiu” also include psychological disposition here). Higher education is required (with the exception of „Stănoiu” – „high school or higher education” – Article 8(1) point (b), while seniority conditions differ (no seniority – “Stoica”; “at least five years in the field” – “Stănoiu” Article 8(1) point (b); “at least five years in a similar position” – “Macovei I” – Article 8(1) point (c), down to three years in a similar position in „Macovei II” – Article 7(c).

The person in question has never been convicted in a court of law (changed to “*has never been sentenced without appeal for a felony, which may affect the reputation of the profession*” – which is an important change, since not all convictions should forbid someone from having a certain profession – a car accident can happen to anyone) and must be an upstanding citizen – a mention which appears in all four proposals. We go no further.

The condition of speaking the Romanian language was dropped from the “Macovei II” draft, probably in order to insure the free circulation of the work force. Parliamentary debate is sure to be heated on this point, and it would not be surprising if the condition were reintroduced at a later stage.

Finally, a condition which can be found in all four proposals is being a graduate of the mediator training courses and having received a license to practice mediation. As for which authority should be in charge of organizing these courses, the thinking has shifted from the public and private entities authorized by the Ministry of Justice („Stoica”, Article 12), by which we understand public institutions, universities, NGOs and professional organizations authorized by the Mediation Council and the Ministry of Justice through the National Institute of Magistrates (“Stănoiu” and “Macovei I” Article 9) to the following statement “...NGOs and professional organizations which were authorized according to the relevant law regarding professional adult training by agreed higher education institutions. The training programs in the mediation field shall be elaborated based on criteria from the training standards applicable to the field elaborated by the Mediation Council, after being approved by the Council” (“Macovei II” – Article 9).

The mechanism by which Romanian citizens having taken such courses abroad and foreign nationals from Member States of the European Union and the European Economic Space and other states is duly regulated. The procedure is different according to whether the persons concerned practice mediation permanently or temporarily (see “Macovei II” – Article 8).

Advertising for mediators is done through the mediators’ “display” – a solution which can be found in all the proposals. Commercial advertising is an absolute first (“Macovei II”, Article 25 – “*the conditions under which the profession of mediator can be advertised are established by the regulation.*”), as this is the first permissive (although shyly so) regulation in this field, after a long period when advertising for the liberal professions was forbidden from the very start.

The regulating authority was initially the Ministry of Justice (the “Stoica” draft), then the Mediation Council (drafts “Stănoiu”, “Macovei I and II”). The fundamental difference between the latest draft and those which preceded it, is in making the profession autonomous and restricting the influence of politics upon it. Unlike previous proposals, in which the Minister of Justice, either directly or through the Council, held most of the attributes regarding the elaboration of the professional standards, the authorization of the training institutions, the authorization of practicing the profession of mediator and the withdrawal of these authorizations, the latest proposal provides for the setting up of a completely autonomous professional organization. Thus, the Mediation Council is defined as “*an autonomous organism with legal personality, of public interest*” (“Macovei II”- Article 17(1), “*made up of nine members elected by direct ballot or by representation, by the authorized mediators...*” (“Macovei II”- Article 17(3). The only attribution of the Minister of Justice is to validate this election (“Macovei II”- Article 17(4). The mandate of the members is of two years, with one possible renewal for the same duration. Its sessions are public and it is financed by its own revenue, except during the first year of functioning.

As its main attributes, the law mentions the following:

- promoting the mediation activity and representing the interests of the authorized mediators;
- elaborating professional training standards in the field of mediation;
- approving the professional training programs for mediators;
- creating and updating the list containing the mediators' training institutions; authorizing mediators;
- creating and updating the authorized mediators' display;
- keeping a list with the offices of the authorized mediators;
- overseeing compliance with the training standards in the field;
- adopting the Code of Ethics and Professional Deontology of the Authorized Mediators, as well as the disciplinary standards thereof;
- making proposals for adding or correlating the legislation regarding mediation; establishing its rules of procedure.¹⁹

A real problem of mediating is covering expenses without affecting the principle of the mediator's neutrality and impartiality. The starting point is to negotiate the mediator's fee with the interested parties. The proposal contained in the "Macovei I" draft was interesting, although unrealistic, namely *"for conflicts whose object can be evaluated in money, the pay cannot be established proportionally to the object's value"*. It is obvious that the financial capability of a normal person cannot be compared to that of an institution (either public or private), or, in financial disputes, to establish the fee proportionally to the object of the dispute and to split it equally between the parties equals, in practice, to exclude from mediation the person who is financially vulnerable. On the other hand, a disproportionate fee which puts one of the parties in advantage over the other may induce suspicions regarding the mediator's neutrality and impartiality. This issue continues to be an object of controversy internationally, and the solutions so far described are many, yet all suggest the establishment of the fee at the beginning of the mediation process, and to specify it in the mediation contract. What the Romanian lawmaker understands is that *"the mediator's fee shall be reasonable, and take into account the nature and the object of the conflict"*, which should be guaranteed by the Mediation Council.

Another important principle upon which mediation is based, together with the neutrality and impartiality principle is confidentiality. Actually, these are the constitutive elements of the framework upon which the confidence of the parts is built. Accepting the third party in the conflict, as a mediator, and accepting or rejecting the solutions proposed by this person is based, first and foremost, upon confidence that the three principles are complied with and only subsidiary to that to the confidence in the professional abilities of the mediator. If there is no confidence in the process itself, there are minimal chances that a particular mediation procedure will be accepted, regardless of whether the proposed solution is rational and reasonable, or the mediator is a professional with a good reputation in the field. This is why the provisions meant to guarantee the confidentiality of the mediation process include the inviolability of the mediator as a person and of his or her headquarters, the obligation to maintain the professional secrecy, as well as serious sanctions for the failure to comply with the latter. Actually, all of the above-mentioned proposals deal with these ideas in one way or another. Thus, *"The professional headquarters of the mediator is inviolable. A search of the mediator's headquarters can be performed only after the issue of a warrant by a judge and shall be performed only by the District Attorney or the legal authority who is in charge of an investigation, according to the Code of Penal Procedure."*(*"Macovei II"*- Article 28). *"The Mediator is under obligation to maintain the confidentiality of the information that he or she is given access to, during the course of his or her mediation activities, as well as of the documentation which was handed to him or her by the parties"*

¹⁹ The attributions listed here are taken from the "Macovei II" draft, Article 20.

during mediation, even after ceasing to practice mediation.” (“Macovei II”- Article 32). “The mediator is under obligation to return the documentation that he or she was entrusted with by the parties during the mediation procedure.” (“Macovei II”- Article 35). “The mediator cannot be brought as a witness in a court of law in relation to acts or documents that he or she became aware of during the mediation procedure. In court cases, the mediator can be brought as a witness only after having been authorized explicitly and in writing by the parties and, if need be, by other interested persons. [...] In all these cases, after having been heard as a witness, the mediator cannot continue the mediation procedure in the cause in question.” (“Macovei II”- Article 37)

Confidentiality is not only the obligation of the mediator, but also of the parties. In this case, the sanction is applied by the mediator by withdrawing from the procedure and keeping a part of the mediator’s fee proportional to the expenses incurred and the stages of the procedure that had been completed. Also, the mediator can ask the parties to sign a confidentiality agreement. “*Assertions made during mediation by the parties to the dispute, [...] are confidential to third parties and cannot be used as evidence in court or during an arbitration procedure, unless otherwise provided for in the law or otherwise agreed upon by the parties. The mediator will remind the persons who take part in the mediation process [...] of their obligation to maintain the process confidential and may ask them to sign a confidentiality agreement.*” (“Macovei II”- Article 53)

Actually, all proposals provide for, although not in identical form, the mediator’s obligation to inform the parties if, during mediation, a situation occurs which might affect the purpose of the mediation, and the mediator’s neutrality or impartiality. At that juncture, it is the decision of all the parties involved as to whether to continue the procedure or not. There may be situations when the parties want to continue the process, and the mediator decides to end the procedure and repay the part of his or her fee which is proportional to the cost for the steps of the procedure which were not covered. (see “Macovei II”- Article 54)

Logically, a mediation procedure ends in three cases:

- a) if the parties reach an agreement and therefore the dispute is settled, in which case a report is to be established, which will contain all the details of the dispute;
- b) if the mediation procedure runs its course, but the parties do not reach an agreement, in which case the mediator states the mediation’s failure;
- c) if any of the parties denounces the mediation agreement.

In the last two situations, the mediator will file a report and the parties will be able to take the matter to court, in keeping with tradition.

An interesting solution, suggested by the “Stoica” and the “Stănoiu” drafts, was to allow the mediator, if mediation fails, to settle the dispute by arbitration, upon demand of the parties, according to the provisions of the Code of Civil Procedure. (“Stoica” – Article 73 and “Stănoiu” – Article 65). The benefit of such a regulation would be the fact that it increases the chances of reaching an agreement, even if arbitration means that the resolution is imposed by a third party and not mediated. Probably the reason this idea was abandoned was in order to channel the mediator’s interest to the mediation process, rather than toward obtaining a result, regardless of its nature. We can easily imagine a situation where, knowing that arbitration is an option, the mediator would have little interest in the mediation process and would rather insist on arbitration, imposing resolution upon the parties. The fundamental idea on which mediation, as an alternative means of conflict resolution, is based is to reach, after negotiations, a long-term win-win solution. Arbitration, like the trial procedure, is based upon having a third party impose a solution, regardless of whether the parties to the dispute agree with it or not.

A positive aspect of all the four proposals is the legal force of the mediation agreement. Even if, initially, it only has value as an agreement under private signature, it can be authenticated by a

notary public or approved by a court of law and, thus, becomes an authentic act with the value of a definitive court decision.

Because the mediator is not necessarily qualified in legal sciences, the option to turn to law professionals (lawyers, experts, counsels etc.) is also provided for in instances where legal controversies might arise. Also, the parties can be represented by a lawyer for the entire duration of the mediation process. Moreover, lawyers, notaries public and legal counsels who become mediators can include this activity among the attributions of their profession. (see “Stoica – Article 84 , “Stănoiu” – Article 75 (1), “Macovei I” Article 74(1) – only regarding lawyers and notaries public and “Macovei II” Article 75).

It is slightly funny, in these circumstances, to hear fears (publicly addressed or not) of the lawyers of losing one of the objects of their profession, in the case that mediation is legalized. It is obvious that the number of disputes (and of clients) would remain the same, and the lawyers’ activity would actually be simplified. A complementary effort is, nevertheless, required – in order to practice mediation, one has to obtain the necessary qualifications.

To conclude, we hope that the Parliament will soon adopt the draft regarding mediation and the organization of the profession of mediator. The courthouses will be freer, the legal expenses will be lower, the duration of the proceedings will be shorter and, most importantly, the citizens will have better access to the materialization of their own ideas of justice. Because justice does not equal law, does it?

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