MEDIATION, A VIABLE ALTERNATIVE TO SETTLE LABOR DISPUTES

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Abstract. ADR understood as *Alternative Dispute Resolution* (Alternative Methods of solving Disagreements), or the latest doctrine as *The Appropriate Dispute Resolution* (Appropriate Methods for Resolving Disagreements) is a conflict resolution procedure, except for the court of law. Its aim is to enable the parties to choose and decide one of several ways to solve conflicts. Thus, alongside simple negotiation, conciliation and arbitration, the scope of ADR methods includes mediation, which represents according to the provisions of *Law no. 192 of 2006 on mediation and the mediator profession organization* entered into force on June 8 2008, a way of solving conflicts amicably through a third party specialized in mediation, in terms of neutrality, impartiality, confidentiality and having free consent of the parties (art. 1). Mediation involves a third party mediation so that the parties proposing some solutions, but not imposing them, therefore a third party negotiates with the parties who have the conflict to represent their claims project. In accordance with those legal dispositions, mediation can be used as a method of disputing resolution matters, including labor disputes, respecting the legal process. According to the trend manifested internationally, the amicable settlement of disputes will be used on a larger scale, both to resolve labor disputes and conflicts of other categories. The trend that is predicted is that mediation tends to become an amicable way of solving a wide range of conflicts, such easing courts and leading to appropriate solutions according to their real interests. If a legal decision is applied often forcefully, under threat of criminal penalties that failure of application, would result a solution obtained by consensus in a friendly way, almost always implemented voluntarily, as the expression of individual wills. And as an employment relationship is often a relationship for life, it is not a negligible advantage.

Keywords: alternative dispute resolution, mediation, negotiation, self.

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General aspects regarding amicably dispute resolution

Resolving conflicts amicably was covered by extensive doctrinal analysis that identified both the mechanisms for achieving this and especially their characteristics and how to apply them.

ADR understood that *Alternative Dispute Resolution* (alternative methods to solve disputes) or in recent doctrine as *Appropriate Dispute Resolution* (appropriate methods to solve disputes) is a procedure of dispute resolution, except court. Its purpose is to enable the parties to choose and decide one among several ways of resolving disputes. Thus, the scope of ADR methods includes simple negotiation, mediation, conciliation and arbitration.

Each of the methods mentioned have their own characteristics, which individualizes them, the option for one of them doesn't exclude the possibility of using other. However, the doctrine revealed the presence of basic terms that define how to solve the disputes, according to the structuring of the content of resolving disagreements.

Therefore, the negotiation involves the voluntary participation of the parties to the proceedings, their exclusive presence, to obtain a solution not imposed, a mutually acceptable solution and at the same time based on interest, an informal procedure, private and confidential. Reconciliation is itself an alternative dispute resolution imposed by law (art.720 Civil Procedure Code) which requires exclusive presence of the parties, obtaining a non imposed solution, a mutually acceptable and based on interest solution, with an informal procedure, private, confidential.

Mediation is achieved with the voluntary participation of the parties, but unlike the other methods mentioned above, it requires the presence of a third person, a third party mediator. The solution is not required, but is mutually accepted and at the same time based on interest, and the procedure is informal, private, confidential.

Although arbitration as an alternative dispute resolution involves the voluntary participation of the parties, pursuant to a contract term, it is done in the presence of a third person, especially the obtained solution is enforceable, legally enforceable, based on law and not on the interests of the parties. The natural consequence of this feature is that the procedure followed, although private and confidential will be a formal one, official.

Analyzing these alternative opportunities for the settlement of disputes between individuals, comparing them with each other and especially with the legal proceedings it highlights that, as the option is made closer to formal method, published alongside the increasing consumption of time and necessary resources for the solving of dispute decreases the control of the parties both the procedure and especially the solution obtained , with consequences in particular regarding its effectiveness and sustainability .

Returning to the subject under review, Article 3 of Law no. 168/1999 stipulates that conflict resolution work is done by agreement or by procedures prescribed by law. In fact, the onset of any such procedures must be preceded by an attempt

basically amicable settlement of the conflict. If in case of conflicts of interest, the Law no. 168/1999 governs the conciliation and mediation as methods of settlement, settlement or prevention methods are met in the conflicts of rights as well.

Amicable settlement of labor disputes

Article 8 of the Labor Code establishes the principle of good faith in carrying out the service, both in terms of performance obligations on the parties and the exercise of their rights (Athanasiu et. Al, 2007) adding that, for the purposes of their participants in legal relationships shall notify and consult each other as to the law and collective agreements. In fact, the whole regulation of employment is based on the imperative of dialogue between the social partners, therefore going to court appears as "a last resort", always possible and unrestrained. (Dumitriu, 2007).

This dialogue between the social partners will take the form of one of the following obligations that incubates the employer (Dumitriu, 2007):

- To inform employees, obligation which is found in Article 17 of the Labour Code, in article 40 paragraph 2 letter a and d, in art . 69 paragraph 2, in Article 70 and 70 of the Code Article 85, 104 paragraph 2 and paragraph 2, article 114, article 158 paragraph 2, article 170, article 259, article 267 paragraph 2 of the Labour Code, etc.

- Consultation of employees, provided in article 40 paragraph 2, letter e, Article 69 paragraph 1, article 170 of the Labor Code, and so on;

- To obtain their consent, referred to in article 41, paragraph 1, article 129 paragraph 1 of the Labour Code, etc..

The provisions of article 38 of the Labor Code expressly determine, as we mentioned, that employees cannot waive their rights, rights which are recognized by law, any transitional arrangements in this regard will be null and void. Therefore, the conflicts regarding the failure of employees' rights under the law shall not be subject to conciliation. Apart from these, however, disagreements between employers and employees can even be advisable to settle amicably.

In the doctrine (Elisei, 2002), the conciliation of work was defined as the main way of resolving disputes between employees and employers and between civil officer and public authorities (institutions), which have as their object either professional, social or economic interests or rights, contained in the legal work. Conciliation ratios, according to the same author, are legal related to work relations and are governed, inter alia, by the principle of legal equality of the parties exclude the idea of legal subordination of the employee to the employer, characteristic of the employment relationship. Labor conciliation function satisfies the peace, the amicable settlement of disputes with the utmost celerity and decongests the activity of the labor jurisdiction as a deterrent and cautionary, cultivating good faith in the legal work. Reconciliation as a means by which the parties reach an agreement of wills by waiving can be made free by the judge, or by a council of justice (as does a

third party mediation paid). From this point of view, the balance may be (Ignat, Sustac & Danileț, 2004): judicial, para- legal and outside judicial matters.

Judicial conciliation is the one done by the judge, being a form of conciliation that is allowed also by the Romanian legislation (Article 129 paragraph 2 and Article 131 of the Civil Procedure Code). Even if the conciliation proposal comes from the judge, it does not have a binding effect on the parties, they remain free to decide how to understand the litigation.

The para-legal reconciliation is entrusted to a conciliator of justice, between him and the judiciary system there are some connections. The conciliator is an auxiliary justice system, a system that is not to be found in our country and the minute, signed by the parties and the judge, becomes enforceable.

Extra-judicial conciliation is a form of conciliation in which the judge is not involved. It is seen in the Romanian legal system in matters of labor disputes for settlement of collective labor disputes (Law no. 62/2011 on social dialogue), the conflicts of interests (Article 26-31 of Law no. 168 1999 on the settlement of labor disputes that regulate more, a form of extra-trial conciliation, now repealed statutory provision). Such a form of reconciliation is provided also in the matters of public international law (eg article 38 of the European Convention on Human Rights, as amended by the Protocol. 14).

After intervening time, the conciliation may be before referral to court or done during, and after its character conciliation process can be optional (most times) and mandatory (found in our law in commercial matters).

Labor conflict parties are free to enter into a settlement agreement dissension or not and configure the contents of this agreement. Agreement will be achieved by seeking conciliation consistent supply of accepting this offer, which can be analyzed by the rules of the common law (Elisei, 2002).

The possibility of an amicable settlement of conflicts of rights finds its source as a series of ad hoc legal provisions that refer to the way of solving conflicts defined as the subsidiary sources of law (based on normative acts), governing without interference static factors, amicable settlement procedure requests or complaints of individual employees. We refer here to internal rules and provisions negotiated through collective bargaining. Option legislature for bylaw that subsequent regulatory legal principle of amicable settlement of conflicts of rights, is natural. Of the two sources of law collective agreement may not be concluded within a given unit, while the internal rule is required in any legal employer (Vartolomei, 2004).

The provisions of article 258 of the Labor Code, which actually brought extra regulation on this matter than those previously existing, established expressly that the bylaw binding act for any unit specific source of labor law will regulate the procedure for solving the individual applications and claims of employees. Clauses inserted in the internal rules, pursuant to article 258 letter d of the Labor Code shall be established by the employer, in consultation with unions or employee representatives, as appropriate. The entire content of the regulation will be brought

to the attention of employees through the employer about following to effect on employees once they are notified. (Article 259, Labor Code).

Thus, often the internal regulations are covered in detail (Dumitriu, 2007): the body to which there can be addressed complaints, objections or requests by employees, the procedure by which they will be resolved, appeals to the decision of these bodies at different hierarchical levels corresponding to the internal structure of the unit.

The internal rules will be provided and how to resolve other tensions within the organization, triggered between employees on similar hierarchical positions, working in the same department that work between employees in relation of subordination. Pursuant to article 261 of the Labour Code, if the employee requests and complaints target the very but content of internal rules, they can address the employer and ask for that provision to be modified to the extent that they prove the infringement. The lawfulness of the provisions of the internal rules is for the courts, which can be determined within 30 days of notification by the employer on how to resolve the complaint made (Top & Savu, 2003).

Inclusion in the internal regulations of such amicable settlement procedures of individual labor disputes (and not the collective rights) presents an important benefit because on one hand it contributes to meeting a general legal requirements in relation to labor disputes, namely in the attempt to resolve their differences amicably, in order to achieve social peace, and on the other side and for additional reasons that interest justice, meaning relieving them.

Article 96 of the collective labor agreement concluded at national level for 2007-2010 states that "The Parties agree to strive to promote a normal climate in work units, in compliance with the law, collective labor contracts, the regulation of internal order and the rights and interests of employees and union members. To create a work environment that encourages respect for the dignity of each person by collective agreement at the unit, there will be set procedures for settling complaints amicably for individual complaints from employees, including those relating to sexual violence and harassment in addition to those provided by law. "

In the category of legal provisions punctual as the source of the amicable settlement of conflicts of rights, the doctrine (Dumitriu, 2007) mentions, along the ones that establish the obligations of the employer (for information, consultation and obtaining the employees agreement) and mentioned above, and others.

Thus it is, for example, the provisions of article 57 paragraph 6 of the Labour Code which provide: nullity and law establishing its effects will be done by the parties, which will be designed precisely to prevent a lawsuit. Also, the provisions of Article 55 letter b of the Labor Code, establishes the possibility of termination of the individual employment contract by agreement of the parties, all as a friendly way to end their relationship without stress or unnecessary conflict.

Another example of provision that encourages the amicable settlement of conflicts of rights is contained in the Law no. 202/2002 on equality between women and

men. According to article 43 paragraph 1 of the said enactment, where employees are considered discriminated on grounds of sex, have the right to submit complaints / appeals against the employer, if directly involved. Paragraph 2 of the same Article also provides that, if the claim / complaint has not been resolved through mediation by the employer, the person who feels discriminated against, may address the court. It's actually the only situation in which the law expressly establishes individual labor conflicts matters a friendly, alternative mediation between the employee and the employer, if the latter is not directly involved (Stefanescu, 2002).

Also, it is worth mentioning the idea that immediately after the conflict started its rights and subjecting settlement by the court amicable settlement of the dispute is still possible. Moreover, the court has the obligation, according to article 76 of Law no. 168/1999, to attempt reconciliation, fulfilling this purpose the role of conciliator.

We consider appropriate, to create an accurate picture regarding the possibility of resolving labor disputes, and in this case the rights by agreement, to bring into question and analyze the institution of mediation.

According to Law no. 192 of 2006 on mediation and the mediator profession came into force on 8 June 2008 (published in Official Gazette no. 441 of 22 May 2006 and was recently amended by Law no. 370/2009 published in the Official Gazette, no. 831 of December 3, 2009), mediation is a way of resolving conflicts amicably with a third party as a mediator specializing in conditions of neutrality, impartiality, confidentiality and with free consent of the parties (article 1). Mediation involves a third party mediation so that the parties propose some solutions, but without being able to impose, the third party negotiates with the parties, and drafts their claims. Basically, mediation is a means to reach reconciliation, but the mediator is paid by the parties. The two ways of resolving conflicts amicably and not mutually exclusive active role in the exercise, the judge is obliged to continue in an amicable settlement of the dispute engaging himself in giving appropriate advice the parties, and to bring their knowledge about methods of organization and functioning of the mediation.

Under the provisions of Law no. 192/2006, as amended, mediation may be used in any civil dispute, commercial disputes, family disputes covering conflicts in the consumer, criminal, only that the offenses for which the law provides that criminal liability is removed by withdrawing prior complaint or a reconciliation, as well as in conflicts of rights in labor disputes.

Mediation doesn't contain strictly personal rights, such as those concerning the status of the person and any other rights of the parties under the law, cannot have by agreement or by any other means permitted by law (article 2, paragraph 4). We believe that those provisions mentioned apply to the situation covered in article 38 of the Labour Code, namely conflicts related to the breach of rights recognized by law, employees cannot be resolved through mediation.

In any agreement the parties may have rights which they may enter a mediation clause, whose validity is independent of the validity of the contract of which it forms part (article 2 paragraph 5).

Mediation may cover all or part settlement of the dispute. The mediation procedure is triggered when the agreement is concluded, the mediation contract between the parties in terms of form and substance described in article 44-47 of the Law.

If the parties engage in mediation prior to the beginning of judicial proceedings, provides in Article 49 of Law no.192/2006 that the limitation of the right of action for the right case submitted to mediation shall be suspended from the date of signing the mediation, to the closure of the mediation process. According to article 56 paragraph 1 mediation process closes, as appropriate: a) the conclusion of an agreement between the parties after conflict resolution; b) the finding of failure by the mediator of the mediation; c) by submitting the contract of mediation by one party.

It should be noted that if the parties have entered into a partial understanding, for the rest of the object that wasn't decided upon, any party may reach to the court of justice. This possibility is valid also, in case of failure of mediation or filing of the contract.

If the parties use mediation after referral to court, article 62 of Law no. 192/1996 provides that "the court shall suspend the civil proceedings, including conflicts of rights, at the request of the parties, under article 242 paragraph 1 Section 1 of the Code of Civil Procedure. "However, the obsolescence term is suspended during the course of the mediation process, but not more than 3 months from the date of signing the mediation.

So the idea that emerges from the text of the law is that the legislature's intention was to suggest mediators resolving the dispute within 3 months from the date of commencement of the mediation procedure. If completion was not possible in these terms, mediation may be continued but without having to suspend the period of obsolescence (Ignat, Sustac & Danileţ, 2004).

The settlement obtained from mediation is a contract between the parties within the meaning of article 942 Civil Code, namely a transaction contract according to article 1704 Civil Code which could have been reached obviously even without the intervention of a mediator.

Mediation agreement may be concluded orally or in writing (Article 58 paragraph 1) it is not necessarily that the settlement ending dispute between parties to materialize in written form. In many cases the agreement embodied in a contract is not applicable - e.g. ordinary disputes at work (the non-contractual).

The contract can be recorded, ad probationem, in a document under private signature value. (Article 1174, 1176 Civil Code). To add value of an authentic document, the parties have at hand two ways: one extra-judicial, namely obedience

verification agreement by public notary for authentication and the other judicial, involves checking the agreement by the court to declaration of, obtaining in this way an enforceable according to intervene when mediation (article 59).

If the conflict was settled through mediation, the court will decide, at the request of the parties, an expedient decision, in accordance with Article 271 of the Code of Civil Procedure, which, according to the law analyzed is enforceable. With the delivery of the judgment, at the request of the interested party, the court shall order the return of judicial stamp duty paid for its inauguration (article 63).

Although provisions on mediation be found in Romanian legislation before the adoption of Law no. 192/1996, including the conflict of rights (eg those contained in Law no. 202/2002 on equality between women and men discussed above), mediation was introduced in Romania, at the institutional level, only through the mentioned normative act entered into force on June 8, 2008, with the publication of the first panel of mediators.

Conclusions

Although currently in the Romanian legal system, mediation is still an under-researched area, with a new legislation and insufficient attention to new professions, the advantages of using this procedure, including the matters covered by our analysis are undeniable. Therefore, going to a mediator would require resorting to reduced financial expenses but mostly, reducing time for settling disputes and obtaining a satisfactory outcome for all parties involved, a solution mutually convenient, efficient and sustainable. (Article 1, paragraph 2)

European concerns about mediation have existed for many years (Ignat, Sustac & Danileţ, 2004). The increasing role of the judge to encourage the amicable settlement of the case was highlighted in the Council of Europe among several recommendations of the Committee of Ministers.

Of which we point out the following:

- Recommendation no. (81) 7 on the means to facilitate access to justice is provided in section 3 "that there should be taken measures to facilitate or, where appropriate, encourage the parties to reconcile or resolve conflicts amicably before the commencement of legal proceedings or during a procedure already initiated ";

- Recommendation no. (86) 12 on measures to prevent and reduce the workload in the courts referred to in Objective 1 "that encourage the Member States, where appropriate, to resolve disputes amicably or outside the judiciary system, either before or during court proceedings". To this end, the recommendation states that " Member States could consider the following measures: a) providing with appropriate benefits, conciliation procedures, before or at the beginning of the court proceedings, this would aim to resolve the dispute; b) entrust judges, amid their main tasks, as a requirement to seek an amicable settlement of the dispute between the parties in all cases possible, either at the beginning of the

procedure or at any other stage of its right; c) to devote as an ethical obligation of lawyers or invite the competent authorities to recognize the possibility of conciliation of the lawyers with the opposing lawyers before resorting to judicial process and in all appropriate stages of court proceedings " ;

- Recommendation no. (93) 1 on effective access to justice for people at high financial difficulty referred to point 2a "that one of the solutions to facilitate effective access to alternative means of dispute resolution for people impoverished: involvement of non-governmental development or mutual aid associations of people at high financial difficulty through para-legal forms of dispute resolution such as mediation and conciliation";

- Recommendation no (94) 12 on the independence, efficiency and role of judges, Principle 5 states among the responsibilities of judges the encouragement of parties to reach a settlement, where this is appropriate. Explanatory Memorandum accompanying this recommendation states: this responsibility underlines the importance of the role of conciliator judge held in Justice efficiency plan. It is the natural function of the judge to ensure reconciliation of parties: talks are better than litigation. However, judges must fulfill this task with tact and common sense and in a way that impartiality is not questioned.

There are also a number of recommendations of the Committee of Ministers of the Council of Europe with special reference to mediation:

- Recommendation no. 98 (1) on mediation in family matters is applicable especially regarding divorce and child custody. The purpose of this document is not only to reduce the load of the courts, but to create a better solution and acceptable to the parties and child welfare.

Family mediation can be used in any dispute between members of the same family which have either ties of blood or marriage, and those that exist or have existed between family ties, as defined in national legislation. However, states are free to establish specific issues or cases that can be resolved through family mediation;

- Recommendation no 99 (19) regarding Mediation in Criminal Matters, which aims to increase the active participation of the victim and the offender in criminal proceedings. Recommendation seeks, on one hand, to recognize the legitimate interest of victims to have a strong voice in dealing with the consequences of crime and communicate with the offender, and secondly, to encourage the sense of responsibility of the offender giving him the opportunity for reintegration and rehabilitation. Recommendation defines criminal mediation "this means any process whereby the victim and the offender may, if they agree freely to participate actively in solving problems arising from the offense with an impartial third party (mediator)";

-Recommendation no. (2001) 9 on alternative ways to litigation between administrative authorities and private parties devote cutting solutions that

exclude the dispute by a judge: internal administrative appeal, conciliation, mediation, settlement, arbitration;

-Recommendation no. 2002 (10) regarding mediation in a civil matter defines mediation: it is a process of dispute resolution where the parties negotiate over the disputed object to reach an agreement with the assistance of one or more mediators.

The doctrine supports the idea that (Dumitriu, 2007), in agreement with the international tendency, the amicable settlement of disputes will be used on a larger scale, both for solving labor disputes and conflicts in the other categories. The looming trend is that mediation and conciliation tend to become amicable ways to a wide range of conflicts, relieving courts and leading to solutions really appropriate for parties. If a court order is applied often forced, under the threat of criminal sanctions that failure would entail, a solution made by consensus, in an amicably way, it is almost always implemented voluntarily, the expression of individual wills.

In addition, if the solutions of courts are focused on solving the litigious situation in the past, the amicably negotiated solutions by the parties, with or without the assistance and support of a third party mediator, are focused on the future, on how to conduct future relations between the parties. And as "an employment relationship is often a relationship of a lifetime, it is an advantage that cannot be overlooked" (Dumitriu, 2004).

The existence of social peace as a result of dialogue between the social partners, of social dialogue (Athanasiu & Dima, 2005), does not preclude the onset of labor disputes at both the individual and collective level, appeal to the courts being a way of resolving disputes that can be used always.

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