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THE MEDIATION OF INDIVIDUAL LABOUR CONFLICTS. NEW PERSPECTIVES FOLLOWING THE ADOPTION OF THE CODE OF CIVIL PROCEDURE

Lavinia ONICA-CHIPEA[1]

Abstract: *The paper aims to analyze the view on mediation after the adoption of the new Code of Civil Procedure, applicable for individual work conflict resolution. Information sessions on mediation procedures and force, and the establishment of specific tasks for the judge in order to go through the entire reconciliation process, providing the necessary guidance, produces significant changes in individual labour conflict mediation. However, mediation remains an optional alternative to judicial proceedings, the parties must agree to work conflicts amicably and, - one party will not suffice.*

Key words: *mediation, individual labor disputes, mandatory information meeting, certificate information, the minutes;*

1. Overview of the legal conflict mediation

According *to Law no. 192 of 2006 on mediation and the mediator profession* that came into force on June 8, 2008, mediation is a way of resolving conflicts amicably through a third party as a mediator specializing in conditions of neutrality, impartiality, confidentiality and with free consent of the parties (Article 1).

Mediation involves "third party mediation, proposing solutions to parties, but without being able to impose" and negotiate with the parties" a project that is supposed to represent them".

Thus, "mediation is the means whereby conciliation is reached, but the mediator is paid by the parties" [1]. The two manners of solving conflicts amicably are not mutually exclusive and an active role in the exercise is held by, the judge who has the obligation to continue in an amicable settlement of the dispute by engaging himself in giving appropriate advice to parties, and to bring their to knowledge the organization and functioning of the mediation process.

According to the provisions of Law no. 192/2006, as amended, mediation may be used in any dispute in civil, commercial, family disputes, consumer rights disputes, criminal law, or only for offenses for which the law stipulates that criminal liability is removed by withdrawing prior complaints or by reconciliation, as well as in individual labour conflicts.

[1] Faculty of Law, University of Oradea.

Therefore "another (new) manner of conflict resolution (litigation) procedure is regulated, in addition to the one that requires the intervention of the courts that the referral does not preclude courts." [2, p.1033] Mediation is not mandatory but voluntary, the parties must agree to work on conflict resolution amicably therefore one party will not suffice.

But we cannot subject to mediation *strictly personal rights*, such as those regarding the status of the person and any other rights that the parties, according to the provisions of the law, cannot decide by agreement or by any other means provisioned by law. (Article 2, point 4)

As regards transactions, mediation may be used to prevent a dispute, to settle a dispute or even after a ruling in the event of a court hearing or *to agree on how the performance of the obligation contained in* it, therefore including the enforcement phase.

2. Mediation of Individual Labour Conflicts

Before analyzing the impact of the new provisions of the Code of Civil Procedure in matters of resolving individual labour conflicts, we consider it appropriate to try to clarify what is the scope of mediation in that regard.

Thus, until the amendment of Art. 73 paragraph 2 of Law no. 192/2006 on mediation and the mediator profession, by means of Law no. 370/2009, the procedure of mediation was excluded in individual and collective conflicts of rights, turned into individual labour conflicts, because of the conclusive presumption established by Article 38 of the Labour Code, according to which the rights recognized by law, to employees cannot be subject to waiver by the latter, the transactions having this object, including limiting the exercise of rights, being considered void. In other words, the mediation of conflict was considered "inadmissible" by the legislature because its purpose is that of reconciling antagonistic interests by trading rights, which implies mutual limitations on the rights of the parties in conflict" [3]. The new law stated, in Article 73 paragraph. 2, was amended as follows: "The provisions of this law shall apply in the mediation of rights' conflicts that the parties may benefit from in labour disputes."

It is thus evident that the intention of the legislature in 2009 was to extend the procedure of mediation and conflict of rights, to individual labour conflicts present although the drafting of the law is "flawed and ambiguous". But the question that arises is whether the provisions can be reconciled with those of Article 38 of the Labour Code and whether there are categories of conflicts of rights that, in individual labour conflicts, can be resolved through mediation.

We support the same doctrinal views which postulate that starting from the meaning of the phrase rights recognized by law to employees, we understand their rights under the law and by collective labour agreements, in the current state of law the rights obtained by collective negotiation cannot be reconciled by the use of mediation, as a form of amicable settlement of individual labour conflicts. In fact, accepting mediation in such a situation would produce a new collective bargaining agreement, which would transform a procedure for amicable settlement of individual labour conflict into a collective bargaining in disguise.

If we accept this interpretation of the mentioned rules of law, it is required to identify the issues that concern employees' rights and which, in the event of conflict, may be subject to mediation under Law no. 192/2006, as amended. So, the following can undergo by agreement of the

parties, prior and amicable mediation procedure: individual labour disputes (former conflicts of rights) which have as their object individually negotiated rights of employees and given solely on the basis of an employment contract; individual labour disputes aimed at interpreting ambiguous, incomplete clauses, within the content of collective or individual employment contracts; labour disputes whose resolution is obtained by partial or total waiver regarding the rights claimed by the employer or by means of which amicable nullity is found, as parties can turn to a mediator in order to establish the cause of invalidity and the way of not considering the contractual partners; disputes in connection with the employees in cases when they do not know the legality or validity of certain claims of the employer.

Regarding the use of mediation procedure for the resolution of collective conflicts of rights, currently a category of individual labour disputes, we also rally to the mentioned doctrinal opinion [4, p.873], which considers that it is only possible according to Law no. 192/2006 as amended, "if social partners agree to seek mediation by an express clause stipulated in the collective agreement" or "ad hoc" for each labour dispute and comply with Article 38 of the Labour Code limiting explicitly and implicitly the subject of mediation "to those rights that do not conflict with the law or its provisions regarding collective labour contracts at superior level."

The doctrine expressed the opinion [4] that would require the establishment of a specialized body of mediators for all labour disputes, including individual labour ones, and therefore Law no. 192/2006 on mediation and on the mediator profession should be renounced.

One of the arguments in support of this point is the lack of a rational basis in the establishment of two categories of people specialized in the mediation of labour disputes (mediators, appointed annually by the Minister of Labour, Family and Social Protection for mediating collective labour disputes (former conflicts of interest) and mediators, appointed according to Law no. 192/2006 for mediating individual labour disputes (former conflicts of rights) who contribute equally, by their participation to amicable settlement, as third parties, to the settlement of the conflict by identifying solutions supported by social partners. [5, p. 439-440]

A further argument in support of this idea derives from the need for specialized professional training in labour individual and collective relations of mediators, a condition that can be met only by persons who are specialized in this field, also having an official quality for this purpose, namely to be appointed annually by the Ministry of Labour, Family and Social Protection, with the agreement of the Economic and Social Council, at the proposal of trade unions and employers.

However, we consider that the mentioned approach would deprive parties of the choice, the option of solving disagreements through voluntary procedure, expressly regulated by the provisions of Law no. 192/2006, whereby the mediator is essential, and which has undeniable advantages for both parties and the courts.

Among these advantages we believe that the following must be mentioned: lower costs because stamp duty is not mandatory, speedy resolution of dispute, the flexibility of the mediation process, active and direct involvement of the parties in the mediation process, confidentiality of mediation, providing a private framework of discussions between the parties, higher chances that the parties reach an agreement, increased quality of justice, lower costs and expenses of courts.

3. The Mediation Process of Individual Labour Conflicts. Mandatory briefing

The mediator has an essential role in mediation; the profession of mediator can be exercised only by persons who have acquired this quality. (Article 12, paragraph 4)

The subject of mediation can be the settlement of the entire dispute or of a part of it. The mediation procedure is triggered at the beginning of the agreement, of the mediation contract between the parties respecting the formal conditions in art. 44-47 in the law.

According to the provisions of Law. 192/2006, employees and employers can use mediation:

a. prior to referral to court (Article 43 paragraph 2 ^ 1);

b. after the onset of the trial before the court (art. 2).

a. article 49 of Law nr.192/2006 expressly provides that, if the parties, employees and employers resort to mediation *before* the initiation of legal proceedings, *the term of limitation of the right of action under mediation is suspended from the date of signing the mediation contract until the end of the mediation process.* The mentioned text is in conjunction with art. 56, paragraph 1, of the same law, *which states that the mediation process closes, as appropriate: a) when agreement is reached between the parties after conflict resolution, b) by finding the failure of mediation by the mediator, c) by filing the mediation contract by one party.* It should be noted that, if the parties have made a partial agreement, for the rest of the unsolved object any party may appeal to court. There is also this possibility, in case of failure of mediation or submission of contract.

b. law no. 192/2006 expressly provides that the judicial authority, after notification, "informs the parties about the possibility and advantages of mediation proceedings and directs them to resort to this means of solving conflicts between them." (Article 6). Also "natural and legal persons are entitled to - solve disputes through mediation both outside and within the statutory procedures of amicable settlement of disputes according to the law." (Article 2, paragraph 3)

Article 21 of the new Civil Procedure Code (attempt to reconcile the parties) introduces, within the fundamental principles of civil proceedings, the power of the judge to try reconciliation during the whole process, giving them guidance required by law and the possibility to recommend amicable settlement of the dispute through mediation.

The first part of the text of Article 21 of the Code of Civil Procedure expressly provides that the judge will recommend the parties amicable settlement of the dispute by mediation according to special laws. The text must be linked with art. 227 of the Code of Civil Procedure, paragraph 2, 3,4,5.

Thus, in cases which, according to the law, can be subject to the mediation procedure, including those related to solving individual labor conflicts, within the limits mentioned in the study, the judge may invite the parties to attend an information session regarding the benefits of this procedure. Also, when it is necessary, given the circumstances of the case, the judge will advise the parties to use mediation in order to solve the dispute amicably, at any stage of the proceedings.

The new Code of Civil Procedure brings an important addition to Law nr.192/2006 by introducing the mandatory information session. If the judge recommends mediation, the parties shall submit to the mediator, in order to be informed about the

benefits of mediation. Mediation, as a procedure of amicable settlement of individual labour disputes is not mandatory, as, after being informed, the parties will decide whether to accept or not to solve the dispute through mediation. By the deadline set by the court, which cannot be less than 15 days, the parties are obliged to submit the report prepared by the mediator regarding the outcome briefing.

The new Code of Civil Procedure, article. 2 of Law no. 192/2006 was amended to regulate mandatory information session regarding mediation. Thus, the rule expressly provides that, unless the law provides otherwise, parties, natural or legal persons, are required to attend briefing on the advantages of mediation, including, if necessary, after the start of a trial before the competent court, in order to solve conflicts in this way in civil, family, criminal and other matters, as provided by law.

The proof of participation in the briefing session regarding the advantages of mediation is done by a certificate issued by the mediator who made the informing. If one of the parties refuses in writing to participate in the briefing, does not respond to the invitation referred to in art.43 paragraph. (1) or is not present at the date of the briefing, a report is prepared, which is submitted in the court file.

The court shall reject the application for summons as inadmissible if the applicant does not meet the obligation to attend the information meeting on mediation, prior to the request for summons, or after the beginning of the process until the deadline given by the court, for litigation in matters specified in Art. 601 paragraph (1) a)-f).

The provisions of art.60^2 of Law. 192/2006 stipulate, in accordance with the Code of Civil Procedure, that the procedure of information, including formalities for convening the parties, may not exceed 15 days and the acceptance of participation or the participation in briefing does not represent an acknowledgement of the right that would be subject to dispute and does not interrupt the limitation period.

Regarding the information on the costs of mediation - the provisions of art. 26 paragraph (1) of the law stipulate that the mediator is entitled to payment of a fee established by negotiation with the parties, and to the reimbursement of costs incurred by mediation. According to paragraph (3) thereof, for the information meeting, the mediator cannot claim fee. From the combination of the two texts, it is shown that briefing is not completely free, because, although a fee is not charged, the party is obliged to reimburse the costs of notifying the other party pursuant to art. 43 of the law. The solution is reasonable, since the mediator cannot be expected to advance these costs without being able to recover them. The doctrine [6] considers that a solution would be represented by ensuring these costs from a special fund, within the budget of the Ministry of Justice.

Paragraph 4 of art. 227 of the Civil Procedure Code stipulates that the provisions do not apply if the parties have attempted to reach agreement by means of mediation before the action.

If the parties reach an agreement, the judge will find their agreement in his decision. The decision that confirms the transaction between the parties can be appealed on procedural grounds only by appeal to a higher court.

Regarding the second part of the mentioned regulation, starting from the established legal obligation, the role of the court is conciliatory and reconciliation should be seen as a guiding principle of the whole process and can occur at any stage of its deployment. (Art.440, Civil Procedure Code)

In the Labour Legislation applicable to individual labour conflict resolution, the procedure prior to attempting reconciliation was, according to Law no. 168/1999 on the settlement of labour disputes, currently repealed, mandatory, but the court had, in terms of legal duty, an obligation of care and not of result, that is, it had to continue in order to find reconciliation of the parties. In the event that the parties fail to agree amicably, the instance went to the trial court. Moreover, the failed attempt to reconcile of the parties, had to be recorded in the end of the session, or at least in the practice of judgment. If reconciliation was not achieved, the court proceeded to the trial of the actual case, but the failure to attempt to reconcile the parties, involved absolute nullity of the judgment given in the case. The doctrine of Labour law [3] posed the question whether in the situation of amicable resolution of proceedings, the court may grant a "court settlement" pronouncing an "expedient decision." It was thus considered that the use of court settlement as a way of settling the conflict amicably, appears as a real and legal possibility only if it concerns the waiver of such rights or its limitation to the employer, that is to the extent in which it does not affect the provisions of Article 38 of the Labour Code, which stipulates that "any transaction which seeks waiver of rights recognized by law to the employees or limiting such rights shall be void." In what concerns the employee, he shall have the judgment renunciation institution, in accordance with art.406 of the new Civil Procedure Code, if he wants to end the dispute by conciliation.

In actual practice, it was found that, in the case of court fulfillment, although not clearly provided, of granting the parties time to attempt settlement of the conflict by good understanding, a large number of conflicts of rights were settled by reconciliation, especially in situations in which the object of a lawsuit was salary rights, the cancellation of unilateral decisions of the employer or insurance benefits.

Law no. 168/1999 was repealed and Law no. 62/2011 of social dialogue contains no express statutory provision that refers to the obligation of the court to attempt reconciliation. We believe that although the Code of Civil Procedure will apply to labour jurisdiction, namely the procedure for solving individual labour conflicts, it is still necessary in order to reflect the spirit of labour legislation by repealing the legal vacuum created by art. 76 of Law no. 168/1999 on the settlement of labour disputes which was actually the only safe labour law rule that made explicit and direct reference to the procedure for amicable settlement of conflicts of rights, turned into individual labour conflicts. [7, p.353]

In this regard, the judge will require the personal appearance of the parties, even if they are represented.

If the parties, employees and employers resort to mediation after court referral, art. 62 of Law no. 192/1996 provides that the court shall suspend civil proceedings, including individual labour conflicts, at the request of the parties according to the Code of Civil Procedure. However, the term of obsolescence is suspended during the course of mediation, but no more than three months from the date of signing the mediation contract.

It results, therefore, that the legislature's intention "was to suggest mediators to solve the dispute within 3 months from the date of commencement of the mediation process". But if mediation could not be completed within the time specified, it can be continued but "without having as result the suspension of obsolescence". [1]

The understanding gained from mediation "is a contract between the

parties within the meaning of the Civil Code, namely a contract of settlement that could be reached, of course, without the mediator." [1]

The mediation agreement may be concluded orally or in writing (Article 58 paragraph 1 of Law nr.192/2006), the written form not being a compulsory condition for the validity of the agreement between parties. There are situations in which, despite not being materialized in a contract, the mediation agreement is not applicable - for example, in the case of usual disputes at work (the non-contractual ones).

The contract may be recorded, ad probationem, in a document that has value of document under private signature and the parties have at hand two legal ways to give value of authentic document: one extra-judicial, which involves checking the agreement by the notary public to have it authenticated, and the other judicial, which requires "the verification of agreement by the court for approval" obtaining in this manner an "enforceable title", depending on when mediation occurred. (Article 59 of Law nr.192/2006)

If the conflict was settled through mediation, the court will decide, at the request of the parties, an "expedient decision 'under the Code of Civil Procedure, which is, according to the analyzed legal dispositions, "enforceable title"(Article 63).

4. Conclusions

Although the provisions on mediation could be found in the Romanian legislation before the adoption of Law no. 192/1996, including in the area of conflict of rights, in the current individual labour disputes (e.g. those contained in Law no. 202/2002 regarding equality of chances between women and men discussed above), mediation was introduced in Romania, at institutional level, only when the mentioned normative act came into force on June 8, 2008, with the publication of the first panel of mediators.

Although now in the Romanian legal system, mediation is a not an often approached area, with new legislation and insufficient attention given to new professions, the advantages of this procedure, including the matters covered by our analysis, is undeniable.

At European level there have been for many years concerns about the regulation of mediation. A number of recommendations of the Committee of Ministers deserve careful attention in this regard: Recommendation no. (81) 7 on the means to facilitate access to justice; Recommendation no. (86) 12 on measures to prevent and reduce workload in courts; Recommendation no. (93) 1 on effective access to justice for persons at high material difficulty; Recommendation no. (94) 12 on the independence, efficiency and role of judges".

Another series of recommendations of the Committee of Ministers within the Council of Europe is with special reference to mediation. In this category we include: Recommendation no. 98 (1) on mediation in family matters is applicable especially regarding divorce and child custody; Recommendation no. 99 (19) on mediation in criminal matters aims to increase the active participation of the victim and the offender in criminal proceedings. From the perspective of the mentioned act, criminal mediation is "any process in which victim and offender, if they agree freely, may participate actively in solving problems arising from the offense with the help of an impartial third party (mediator)", Recommendation no. 2001 (9) on alternatives to litigation between administrative authorities and private parties offers solutions that exclude the resolution of the dispute by a judge: "internal administrative appeal",

"reconciliation", "mediation", "transaction", "arbitrage";

Recommendation no. 2002 (10) on mediation in civil matter defines mediation as "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"[1].

Thus, recourse to mediation would involve, as we mentioned, reduced financial expenses but especially reduced time to solve disputes and achieve a satisfactory result for all parties, a mutually agreed, effective and sustainable solution. (Article 1 paragraph 2)

The doctrine [8, p. 25] supports the idea that, in line with the trend manifested internationally, the amicable settlement of disputes will be used "on a larger scale, for solving labor disputes and for other types of conflicts." The trend that is projected is that conciliation and mediation tend to be manners of solving amicably a wide range of conflicts, "taking away the burden from courts and leading to appropriate solutions in the real interest of the parties." The introduction of briefing among the advantages of using mediation as a way of solving conflicts amicably is a step forward in this field. If a judgment is often applied forcefully, under threat of criminal sanctions, a solution obtained by consensus, amicably, is almost always implemented willingly, as it is the expression of individual wills.

In addition, if "solutions of courts are focused on solving litigious situation of the past", a solution negotiated amicably by the parties, with or without the assistance and support of a third party mediator, is "focused on the future, on how to conduct future relations between the parties". And as an employment relation is often a "lifelong relationship", this represents an advantage that cannot be neglected [9, pp.32-43].

The existence "of social peace" as a result of dialogue between social partners, of social dialogue [10, p.245], does not preclude the onset of labor disputes at both individual and collective level, "the appeal to courts being a manner of solving disputes that can always be used".

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