THE ADEQUACY OF MEDIATION IN RESOLVING CIVIL DISPUTES

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Abstract

Mediation in the legal system of Republic of North Macedonia has been officially recognized in 2006, which was the year of reform for the judiciary of our country when the first law on mediation was issued as an alternative of the court procedure, while amendments and additions of the law and finally the issuance of a new law in 2013 paved the way for the further development of the mediation procedure. Because mediation presents a new concept, in theory and in practice the purpose, its elements and expectations are not very much analyzed and elaborated. But if we analyze this concept we will see that the idea of resolving disputes through mediation as an alternative dispute resolution method without the participation of the element of justice, in fact does not present a bad idea. Although it is thought that this way will greatly affect the solution of the problem with the overload of the judiciary in our country, mediation is considered of good potential to start in this direction, but still, most of the work remains with the judiciary itself, who should pursue mediation in terms of the effectiveness of dispute resolution, and why not in terms of its economy. In a relatively large number of cases, alternative dispute resolution methods, including mediation as such, can lead to a more creative, faster and cheaper dispute resolution as well, compared to resolution which can be reached in court. This paper will focus on the facts that support the success of mediation in resolving civil disputes and also will include recommendations for eventual changes to the Law on mediation and the Law on contentious procedures also to ensure easier and greater access of citizens for taking the necessary legal protection for their for their injured or threatened civil rights.

Keywords**:** *Mediation, Contentious procedure, Civil disputes, Law on mediation, Law on contentious procedure.*

1. Is mediation appropriate for resolving civil disputes?

Mediation is the expansion of negotiations between the parties and a neutral, impartial third party in discussions on conflicting issues which could affect the relationship between the parties and help them to reach an agreement by which they will overcome the conflict, respectively the dispute created between them. Directive 2008/52/EC of the Council of Europe and of the Parliament on certain aspects of mediation in civil and commercial matters[1] defines mediation as "a structural procedure in which two or more parties try to reach a settlement agreement through mediation assistance" of the dispute, which process may be initiated by the

[1] The purpose of this directive is to increase the implementation of mediation and to provide a safer legal framework for the parties who use mediation. The main importance of the directive is seen in that it seeks to standardize the basic principles of mediation such as: voluntary procedure, impartiality, confidentiality and neutrality.

parties or proposed tobe initiated by the court or when such a thing is foreseen by the law of the Member State "[1]. Article 3 of Directive 2008/52 / EC excludes mediation applied by a court which is not responsible and authorized for any litigation in relation to the dispute, and on the other hand, it excludes even those who through the court claim to resolve the dispute in court proceedings. These elements in the definition of mediation as a notion accepted in many countries and legislations, are used and are also accepted in our legislation. As a result of the interest and desire of the Republic of North Macedonia for membership in the European Union, the issuance of new laws and the harmonization of existing laws with the legislation of the European Union began, as a result of which a large number of laws began to be drafted and entered into force among which the "Law on Mediation"[2] as well. This law represents a novelty and a big and important step for the legislation of the Republic of North Macedonia which entered into force on May 23, 2006, while the same one started to be implemented fromNovember of the same year The Law on Mediation in the article two provides a definition of mediation, according to which mediation is any mediation regardless of its name, in which the parties to the dispute are enabled to resolve their dispute in the way of negotiations, peacefully with the assistance of one or more licensed mediators, in order to reach a common and impartial solution for the parties, expressed in the form of a written agreement. So, one of the most special features of mediation is that it is implemented with the participation of a neutral third party - the mediator, who actively participates in the mediation procedure, helps the parties to reach a mutual agreement on overcoming the dispute, but who is not authorized to make a decision regarding the dispute, nor can he impose his decision as binding on the parties who have chosen to resolve their dispute through mediation. This feature makes it possible to distinguish mediation procedures from the court proceedings in which the dispute is resolved by a court decision, as well form the arbitration procedure in which the arbitrator, when the parties have reached an agreement, is authorized to bring meritorious decision which is binding on the parties,otherwise the decision will be enforceable. In the definition of mediation in the Law on Mediation, we can clearly see the characteristics of the mediation procedure itself: that it is a voluntary procedure, for the presence of the neutral party, for the control of the parties during theprocedure, their reliability and trust towards the mediator and toward the mediation procedure whose features are also acceptable in international legal instruments[3].

This shows that mediation can be considered as the most appropriate method among the alternative methods of resolving disputes. Why use mediation? Because it is effective, fast, cheap, convenient in terms of time and place of implementation, it gives many solutions and is confidential. It is effective because in the Republic of North Macedonia close to 85% of mediation cases are successfully completed as a result of reaching a mediation agreement between the parties. It is fast because it can be completed within days, maximum within two months[4]. It is free because for the first four hours, the payment of 15 euros per hour is coveredby the Ministry of Justice. It is also considered convenient as sessions can be held anywhere and at any time. Mediation provides many options for resolution as the parties have a palette of solutions available which can decide on the basis of suitability for both parties what will be the way of resolving their dispute, as well as the procedure. And because it is also a confidential

[1] point a), Article 3 of Directive 2008/52 / EC
[2] The Law on Mediation published in the Official Gazette of the Republic of Macedonia no. 60 of 2006 and with amendments and additions no. 117/06, no. 22/07, no. 34/07, no. 114/09, no. 138/09, no. 188/13, no. 148/15, no. 192/15 and no. 155/16.
[3] Directive 2008/52 / EC on Certain Aspects of Mediation in Civil and Commercial Matters, UNCITRAL, Model Law, para. 2, Article 1, Recommendation on Mediation REC (2002) 10 under I.
[4] Article 16, para. 1, Law on Mediation

procedure which makes confidential all statements, facts and proofs that will be given or will be introduced during the mediation procedure, as well as the documents that are prepared during this procedure will remain confidential and the same cannot be used in any way without the prior consent of parties.

First of all, mediation is considered appropriate because it provides fast and quality legal protection to the parties who request it, it also affects the unloading of courts, although in our country the consequences of applying mediation as an alternative method of dispute resolution are still not well seen because mediation lately entered the legal system of dispute resolution, as well because of the advantages of its use which allows the parties to resolve their dispute before the start of the court procedure as a method of resolving their dispute. Mediation also allows the parties to lead the procedure at all times, which makes them the ones who will find a solution to their dispute based on their interests and needs. So here the mediator is not the one who makes the decision on how the dispute of the parties will be resolved. The focus in the mediation procedure and especially in resolving the dispute always lies in the needs and interests of the parties, as through the solution which would end the dispute of the parties is exactly what is considered most appropriate to satisfy the needs and the interests of the parties. This procedure also helps to transform the relationship between the parties, as it unites them, puts them at the same table and makes them start communicating with each other, which is different from the relationship that is created in a contentious procedure in which the parties increasingly alienate each other, become hostile and attack each other in order to prove their claims. In this way they align their personal interest with the interest of the other party in order to come to a mutual settlement of the dispute. Even the high satisfaction of the parties who choose the mediation procedure as an alternative method of their dispute is what makes mediation appropriate for this way of resolving the dispute. This is because their high commitment to come to a solution to the dispute, and the completion of the procedure with such form of solution which they have designed, makes them feel a greater satisfaction than when the party tin contentious procedure with the final judge decision wins the case. Mediation is a procedure in which the parties can feelbetter and more comfortable than in a contentious procedure. This is a result of informality or lack of strict rules of procedure. So, it is very flexible and allows them to get involved in draftingthe agreement and its content as well. Mediation is also very suitable for cases when disputes which arise between the parties are considered minor. What can be minor disputes? These are exactly the disputes which due to the nature of the dispute are inappropriate to be resolved in a contentious procedure. Not that they cannot be resolved in that kind of procedure, but resolving those disputes would cost a lot and take a lot of time to be resolved. So, they are not reasonableto be the cause of initiating the contentious procedure. To better illustrate these disputes we will take the most banal examples, but which in contentious proceedings may escalate to the pointthat they are the cause of the initiation of proceedings other than contentious proceedings, e.g. unfinished business, defamation, etc. In order to avoid these situations which may cause a bigger dispute than the actual dispute, it is preferable for the parties to turn to the mediator to overcome the conflicting situation presented between them which would result in better relations among them in the future.

2. Changes in the Law on mediation

Because mediation in the legal system of the Republic of North Macedonia is a new category of methods of alternative dispute resolution, in practice it is very little developed. Today it can be considered that mediation in fact exists more as a procedure written in international laws and documents and scientific papers, than as a procedure which is applied in practice. This may be due to several factors that hinder its flourishing in the legal practice of the Republic of North Macedonia. As such factors which are highly emphasized by mediators, experts but also by professionals who deal with research in the field of mediation, are considered: the lack of accurate and large-scale information of citizens about the advantages of mediation but also its existence as an alternative method of resolving disputes; the minimum engagement of the subjects, respectively the bodies which have the duty to promote this method of dispute resolution; citizens' distrust on the mediation procedure due to the lack of security necessary to obtain the necessary legal protection as a result of resolving the dispute through the mediation procedure and thus, they are extending their hand to the classic court procedure; lackof good education of the parties and lack of the necessary legal culture for the selection of mediation in the group of multiple methods for resolving their dispute and similar.

With the act Law on Amendments to the Law on Contentious Procedure, that caused a revolution in the judiciary of the Republic of North Macedonia, which aimed at faster and better resolution of disputes and at the same time to achieve the unloading of courts, was requested that the Law on Mediation should provide an article which will oblige judges in the contentious courts of the Republic of North Macedonia to inform the parties about their right to resolve their dispute through mediation[1]. Mediators in the Republic of North Macedonia are those whounanimously demand that with the law on contentious procedure, mediation must be made a mandatory procedure not only for trade disputes, but also for disputes of other natures such as: family, marital, labor, property and similar disputes which are considered appropriate to be resolved through mediation. Accordingly, if a dispute is considered appropriate to be resolved through mediation, the parties before initiating contentious procedure are obliged to try toresolve the dispute through mediation, and in cases where mediation is unsuccessful then they have to resolve such a dispute in a contentious procedure. But on the other side the situation that will occur if more types of disputes will be a subject of the mediation procedure, would not be a good solution for the mediation procedure nor for the mediators, as the success of the mediation procedure would not be so great due to the load of cases which will be accumulated for the mediators. That is why the examples of states in which mediation is used much earlier and much more than in our state should be followed. Thus, "research in the Netherlands, the United States and Canada has shown that court-instructed mediation during the main session of the trial gives better results."[2] In these countries, same as in the practice of the judiciary in the Republic of North Macedonia, the instruction of the judge for the parties to try to resolve the dispute through mediation has shown very high results. Which of the disputes would be considered appropriate tobe resolved through mediation, is the burden of judges who as a true professional and thanks to

[1] Article 50, para. 2, Law on amendments of Law on contentious procedure
[2] Šimac. S, Mirenje - alternativni način rješavanja sporova, pg. 620

their many years of experience will assess the appropriateness of the dispute to be resolved through mediation or in contentious procedure.

Another issue that should be considered to be elaborated in the legislation of the Republic of North Macedonia is the issue of misuse of the mediation procedure by the parties, and the prevention of those cases. Why can it be misused by the parties? The parties can use the mediation procedure to achieve some malicious intent with which they harm the other party and the mediation procedure as well. Automatically such a procedure will be considered an unsuccessful procedure. It is again the duty of the court to ascertain and analyze well the terrain in which the parties will decide for solving their case in mediation. The Council of the Slovenian Insurance Association in March 2019 adopted several rules[1] in form of a law which regulates the work of the mediation center and the mediation procedure of the Slovenian Insurance Association in the field of consumer disputes. It foresees the cases when the request for mediation by the parties will be rejected by the Secretariat of the Mediation Center and the basis for their rejection. One of them was when "the request is frivolous or implies a clear misuse ofthe procedure"[2]. Such abuse can be considered when the party uses mediation as a mechanism to be able to gain time in contentious procedure, respectively when he wants to achieve his goals in contentious procedure but uses mediation to achieve those goals because in otherwise he would lose the lawsuit. "The disadvantage of mediation is that it can be used as a tool for detection or intimidation, or it can be a waste of time if one or both parties are not willing to compromise."[3]In this regard, the Recommendation of the Committee of Ministers and member states onmediation in civil matters, stipulates that when organizing mediation, states should pay special attention to issues of how to avoid unnecessary cancellations of mediation and use of mediation as a tactic for such annulment[4]. It will be considered very useful if the law on mediation will contain a provision, the purpose of which would be to sanction the parties who misuse the mediation procedure. For example, it is considered appropriate that the parties who initially accepted and initiated the mediation procedure and then the same for their own reasons decide to give up, which reasons for the mediator are obvious to be used for malicious purposes, all costsof the parties who are covered by each party individually, but also the joint expenses which include the mediators remuneration, to be covered and to be borne by the party who misused the mediation procedure. It is also thought that it would be a good choice for the mediators to informthe parties at the beginning of the proceedings not only about the purposes of the proceedings,the role of the mediator as well as the rules of procedure and its costs, but also about obliging theparties to be correct, principled and respectful towards the opposing party, the mediator but also towards the mediation procedure. This claim of the mediator against the parties may be added to Article 18, paragraph 1 of the Law on Mediation. In this way this problem has been solved in England as well, so in cases when the parties who, although they have the obligation to initiate a mediation procedure to resolve their dispute, but on the other hand they ignore that obligation, they will cover all the unfavorable costs.[5]

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[1] Rules on mediation procedure in domestic and cross-border consumer disputes of the mediation center of the Slovenian Insurance Association, (2019), Lubljana.

[2] Article 9, Rules on mediation procedure in domestic and cross-border consumer disputes of the mediation center of the Slovenian Insurance Association

[3] Mediation Can Resolve Disputes Faster, at Less Cost Than Litigation, February 2019, https://www.reliasmedia.com/articles/143903-mediation-can-resolve-disputes-faster-at-less-cost-than-litigation

[4] Guiding Principle III, point 7, Recommendation Rec (2002) 10 adopted by the Committee of Ministers of the Council of Europe on 18 September 2002

[5] https://www.lordhacking.com/Documentation/Can%20mediation%20become%20international.pdf

Another point which is considered very important for mediation but also for providing the necessary legal protection for the parties who seek it in mediation proceedings but also in court proceedings, is that judges in addition to the parties must be careful when it comes to mediation proceedings as an alternative method of dispute resolution. Why this special care is required for judges as well? Since they are the ones who decide whether to instruct the parties to initiate mediation proceedings in relation to the dispute they have, and whether they think that mediation would be more appropriate for the dispute and its resolution,[6] it is thought that the law on contentious procedure should contain an article which would specify the obligation of judges to be careful when they will instruct the parties for using mediation. With the amendments of the law on contentious procedure[7] of article 272, the court is obliged to instruct the parties togetherin the invitation for the preliminary hearing for disputes for which mediation is allowed as a method of dispute resolution and also for the mediability of their case to be solved through mediation. The instruction on mediation can be moved a little higher in the law on contentious procedure, as well as in the same article to emphasize the obligation of the judge to act with greatcare while instructing the parties to the dispute, taking into account the nature of the dispute, the demands and goals of the parties, the appropriateness of the mediation solution and similar.

Amendment or addition to the law on contentious procedure is thought to be made on how the judge or court will act when the parties before filing the dispute, respectively before initiating the contentious procedure, enter into agreements with mediation clause, with whichthey agree in the future if there is a dispute between them which is related to the object of the agreement, to resolve the same in mediation procedure as an alternative method of dispute resolution. This type of dispute resolution is also recognized by the Law on Obligations[8] in Article 13, which foresees that the participants in the obligation relationship, in case of a dispute between them, to try to resolve it peacefully, respectively through mediation. The "Green Book" also foresees the cases where the parties can freely dispose their rights, and in case of non- fulfillment of any obligation stipulated in the agreement of alternative dispute resolution, thenthe solution will be required in the interpretation of the will of the parties in accordance with the rules of contract law. Consultations with the courts have shown that the refusal to resolve the dispute through the methods of alternative dispute resolution, despite the fact that such a thing is provided in the contractual agreement between the parties, can be sanctioned as it represents non-compliance with the contractual obligation. The Green Paper sets out how the judge should act when a situation arises before him when, despite the existence of a mediation clause in the agreement as a way of resolving disputes between the parties in the event of a dispute, the party decides to initiate for the same dispute a contentious procedure. So, the judge in these cases is obliged to dismiss the lawsuit as inadmissible[9]. Accordingly, it is considered appropriate an addition in the law on contentious procedure in the part of the preliminary review of thelawsuit[10], which will indicate how the court should act in cases when the lawsuit is filed in court,if in the agreement between the plaintiff and the defendant has a clause that mediation is going tobe method for resolving their disputes if the dispute arises between them in the future. So in this

[6] In such cases when the judge considers that the dispute of the parties is not suitable to be resolved through mediation but only in contentious procedure, they should not be instructed in mediation procedure. The same applies when the parties want their legal issues to be resolved by an authoritative court decision.
[7] Article 59, Law on amendments of the Law on contentious procedure, Official Gazette of the Republic of Macedonia, No. 116/10
[8] Law on Obligations, Official Gazette of the Republic of Macedonia, no. 18/01, 04/02, 05/03, 84/08, 81/09, 161/09.
[9] Pt.g5, Green Book
[10] Articles 265, 266, 267 and 268 of the Law on contentious procedure.

case it should be emphasized in this article that the court should reject this lawsuit as inadmissible.

Another point which to some extent endangers the confidentiality of the mediation procedure and also of the content of the agreement reached between the parties in the mediation procedure, is that the parties who have been instructed by the court after the initiation of the contentious procedure to resolve their dispute through mediation and the same have resolved the dispute successfully, except that the mediator has the obligation to notify the court within three days of the outcome of the proceedings also the parties have the obligation to submit that agreement to the court for the same to be announced or certified it in the minutes in order for that document to gain executive power. It is said that this procedural action in fact endangers the confidentiality principle as with the announcement of the agreement in the minutes, it will become a public document which may be available to the public. The same applies for the cases when the mediation agreement between the parties from the mediation procedure who have been initiated regardless the contentious procedure, is solemnized in the notary to gain the power of the enforcement document in order for the parties to be sure that in the future, the obligation which is stipulated in that agreement will be fulfilled. Even in this way, the content of the agreement, which according to the law on mediation is considered confidential, is in danger of being made public. We are of the opinion that it should be left to the parties to decide whether the mediation agreement should be announced in the minutes or not, especially when we talk about mediation ordered by the judge in contentious procedure and thus not be mandatory, but the parties to decide on whether or not they agree that their agreement to be verified in the minute.

CONCLUSION

Mediation is defined as a procedure in which the parties, with the help of a neutral third party - the mediator, manage to end their dispute by signing a mediation agreement. This neutral third party can in no way impose a way of resolving the dispute and the same to end with his decision. It is the parties who have the final say here. The moment they realize that the solution to all their problems lies in their hands, creates an indescribable satisfaction for them. It also affects the legal system of the state which enables better and easier functioning, and in the end everyone is satisfied, and above all the parties are the ones who are satisfied, because the end is over the future of their placed. This is also the strongest feature of mediation which makes it different not only from the regular court procedure but also from the ranks of other alternative methods of dispute resolution. Mediation starts from the idea that the judiciary should not be overloaded and at the same time the dispute of the parties should be resolved, and in the end, they should come out satisfied and to maintain the relations between them.

From the above, we can conclude that indeed mediation is the most appropriate method from the group of alternative dispute resolution methods because it is fast procedure, cheap and also very effective when we talk about the resolving of the disputes. But even that we have all these kind of features that makes the mediation process very attractive, still its use is not in the required degree which it was thought that will be with its regulation with legal framework in our legal system. There are a lot of reasons which obstruct the implementation of mediation in our state such as the lack of information of the citizens for the existence of mediation, resistance of

lawyers for their personal financial benefits, lack of information from judges and jurists and similar. But the main problem is in the need for this method to be promoted and advanced as well as all the defects and deficiencies that exist in the current law to be eliminated. It is no coincidence that for seven years two laws on mediation were introduced because the first law ina very short period of time underwent so many changes, and unfortunately, we can say that the same fate is predicted for the current law also. But better now than ever.

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