ENVIRONMENTAL CONFLICT MEDIATION

GABRIELA G. MIHUT*

Abstract
At a time of global economic crisis followed by resource crisis, a period in which the world seeks alternative resources through eco-investment, environmental conflicts are inevitable. Romania is among the few countries that do not pay enough attention to environmental conflicts and to the advantages to of solving them through mediation procedure. The present paper deals with areas in which conflicts can be applied in environmental mediation and its benefits.

Keywords: *environment, mediation, conflict, gases, pollution*

Introduction

Permanent changes of the economic, standing controversy between the right to economic development and the right to live in a space that continues to provide optimal living conditions led to the emergence of environmental conflicts.

To conserve resources and to ensure optimum life of the inhabitants of the planet, international organizations have developed the principle of sustainable development.

Sustainable development is development that allows the current needs of present generations without jeopardizing the ability of future generations to meet their own needs.

Such a development aimed at equitable and balanced use of natural resources. Any unfair or unbalanced use can give rise to a environmental conflict.

Conflict resolution becomes necessary when resource area priorities conflict.Confrontation polarizes parties that need to sit together, to communicate in order to find resolution. Most of time communication communication was in the form of public participation, this being the form of solving conflicts.It must be stressed that most of the time it has been one-sided that is why conflict were not solved. That is why most of the countries began to orient themselves to resolving conflicts through mediation. Mediation , a form of alternative dispute resolution [1]allows the presence of a third party that supports communication between the parties.

Alternative Methods of Dispute Resolution – ADR were originally defined as means of resolving disputes outside the state judicial system through procedures conducted by a neutral and impartial third party.

In recent years, in many states, have been established the legislative or by rules of the arbitration court, two of alternatives methodes of dispute resolution such as mediation and judicial conciliation.

Section 1 Classification of ADR-s

In the wide acceptance, ADR includes mediation, conciliation, mini-trials (mini-Trials), assessments done by experts (Expert Determination)[2] , arbitration, etc.

---

* Lecturer, Ph.D.,Faculty of Law, "Nicolae Titulescu" University, Bucharest, Romania (e-mail: gmihut@ mihut ro, www mihut ro).

[1] ADR

[2] Expert determination (ED) is a voluntary process in which a third party which is usually an expert specialized in the dispute arose giving a solution that binds the parties.Unlike the arbitrator, the expert is not bound by the rules of procedure, excepte the rule of having a proper behavior.ED is common especially in the construction industry.

But most authors provides a clear demarcation between the ADR and arbitration and therefore a narrow definition has been formulated excluding arbitration and expert assessments from the category of proceedings, called ADR.

In U.S. "dispute resolution" gradually includes various alternative methods of dispute resolution depending on the requirement of the other party and third party participation and the rights and obligations of the last.

In practice are considered alternative methods different types of procedures annexes to judicial courts or abitration.

1.1 Types of Alternative Methods of Dispute Settlement

It seems extremely interesting how ADRs evolved in US and types of ADRs. We still intend to present these forms.

It is appropriate to takeover this by the Romanian system too, as much more, now, when in Romania was regulated by the law 192/2006 only mediation.

1.1.1.Inaction

Inaction is the most commune form of dispute resolution and consists in voluntary withdrawal of at least one of the parties in dispute.

Given the fact that any dispute involves two parties, when one party, the injured,is not seeking for the other than the dispute is resolved. This part choose the method of dispute resolution and its solution.

Another form of inaction is to be completed by the attitude of a party to sit and wait to see what happens. The other party may choose, consciously or unconsciously,the inaction or may choose a method of settlement that would lead to a better solution for it.

Finally,*inaction* may occur as a result of abandoning negotiation and claims by one of the party.In this case the parties begins to negotiate and the injured party formulates claims that the other party can reject them.The injured party withdraw deciding in this manner dispute resolution.

Not only the injured party can use inaction as a method of settling disputes.Even the party that caused the injury can use inaction but,in this case,inaction takes the form of expectations to see what happens. This method is effective only if the other party decides not to act.

The party knows the loss that will suffer but knows the fact that the action to obtain compensation is not without risks and costs.

1.1.2. Compliance / Total Concesivity

Compliance may take the form of action or inaction. This occurs when one party requests the other to act in a certain way and the second complies and does what was asked or refrain.

1.1.3 Compliance and Negotiation

Although the two alternative methods of dispute resolution might seem similar however they differ significantly whereas,in case of negotiation,if the parties agrees than there is a contract which is based on an exchange of positive or negative counter-prestations.In compliance the party that formulates the claims has no obligation.

1.1.4 Self-help

This method is to satisfy their own interests by the party who is injured, without court intervention.The action to meet the claims on its own has to be legal.

A concrete example would be the beneficiary that claims non-conformity of construction work and withheld the last rate of payment that would have to pay as compensation or of the bank that takes possession of the property purchased from the loan(mortgage or pledge)to cover part of the prejudice.

Very interesting is the practice of the Anglo-Saxon legal systems that divides this form of ADR in one based on status and one based on common law.

In the US is considered, especially, provisions of the Uniform Commercial Code which for example,authorizes the buyer who has accepted goods to use self-help under revocation form of the

acceptance of the goods delivered and their return to the seller if non-conformity substantially diminishes the value of goods.

1.1.5 Negotiation

Negotiation is seen as being the form of ADR involving two warring sides, that tries to seek resolution of their conflict without using a third party. In this case, the parties are involved in a process that involves compromise on their part.

In identifying possible solutions, the parties shall consider the facts and the legal provisions.

The parties will think which should be strengths or weaknesses of their position in the event of a dispute.

The agreement concluded by the parties has the value of a contract in which each party undertakes to do, to give or not to do something in exchange for consideration of the other party. (quid pro quo[3]).

1.1.6 Early Neutral Evaluation -(ENE)[4]

ENE is a procedure for specific purposes other than those that are meant to enable parties to reach settlement of their dispute.

It has its origins in 1985 in northern California where district court provided the parties neutral evaluation procedure.

ENE's stated goals are:

1. determination of the parties to confront the strengths of their positions with those of the opposing party;
2. identification since the beginning of the parties dispute of the facts and the law;
3. provide an objective evaluation of the case;

ENE can be organized as an independent procedure that takes place after a party brought an action in court or can be incorporated into a court-sponsored mediation procedure.

In the first case, after placing the action, parties follows an evaluation session led by a lawyer named by court which makes an objective assessment of the case.

If the assessment is incorporated into the mediation procedure, the mediator will establish a private meeting with the parties and their lawyers.In this meeting the mediator assess the strengths and weaknesses of the case and predict the result of the dispute. As a result of this anticipation,the mediator can push the parties to reach a solution.

This type of mediation is different from facilitative mediation where the mediator doesn't push but encourages the parties to discuss possible solutions.

1.1.7 Trial by Jury Summary(TJS)

Represents legal proceedings ordered by the judge in those cases where the state court case and no applications were filed.

It is headed by a judge or magistrate and start by choosing a jury. Counsel for parties submit the case and evidence to the jury obtain a verdict from them.

The entire procedure is brief and lasts two days. The verdict is advisory and doesn't bind the parties.

This trial is recommended especially in cases where the parties have unrealistic expectations regarding the solution.

Parties may choose for a private summary trial with jury. This type of trial is different from the previously indicated by the fact that in this case the parties are those who chooses the rules of conduct of the proceedings.

---

[3] Martin A. Frei –*Alternative Methods of Dispute Resolution*, Ed.Thomson,Delmar Learning, 2003,pag.101;

[4] In England ENE may be conducted by a person possessing legal knowledge but also by a person who does not possess such knowledge. It is clear that in assessing strengths and weaknesses of the position of the parties, assessor shall not consider and legal provisions applicable in case, as it proceeds in case of self-help but and summary trial - see in this respect Hazel Genn – *Mediation in Action. Resolving Court Disputes without Trial,* Ed.Caloust Gulbenkian Foundation, 1999, pag.15 ;

Very interesting seems Trial by Jury Summary where conflict is serious and the stakes are high.In this case,one party may request to TJS that the other party cannot participate. The purpose of such judgments would be to test the jury to see their reaction to their own case and their own expectations.

1.1.8 Ombuds

It is a procedure involving a third party which doesn't represent any person and to whom it is addressed by a person a specific problem.

Ombuds has its own independence and must be impartial and maintain confidentiality of information available when they carry out informal investigations.

Ombuds institution's takes three forms:

1.1.8.1*.the form of classic ombuds*

In case of this form,the third party is officially named and is attached to a state or federal administrative agency.

Its role is to assist the public in how to deal with the thicket of rules and administrative procedures of the institution. Moreover, it addresses to the relevant institutions issues raised by the public about the actions or policies of public institutions or individuals within those institutions without their advocacy.

1.1.8.2 the form of *organizational* ombuds

The third is an employee of public or private organization that reports directly to the people in the organization's management.

It receives complaints of members of the organization (employees, contracting parties, students, educational institutions, etc.).and help them resolve informally and respecting the principle of confidentiality. It also alerts the organization's top management on major issues.Neither in this case the third party doesn't argues in favor of applicants.

1.1.8.*3* *the form of ombuds defender* in which the third party contractor, named in public or private section,pleads in favor for those who requires their services.It is often met in medical field and of licensing,etc.

Ombuds after hearing the party,gathers the information and helps it to clarify the problems and to find possible solutions to resolve the conflict.

Although it is not intended to resolve the problems of the party that notifies it, however, dispute resolution can be achieved after discussions with the party that caused the problem.

1.1.9 Private mediation

Private mediation is the consensual process,planned,led by a neutral and impartial third party *facilitating* discussions between parties in an attempt to help them to resolve their dispute by concluding an agreement.

In some systems the mediator is more active by proposing solutions to the parties.

The mediation is called private because it is entrusted to a private mediator and it is not held under the the auspices of the court.

1.1.10 Mediation Funded by the Court

It is the type of mediation, known in some legal systems such as the Anglo-American, where the procedure is conducted by a judge, a magistrate or a special mediator appointed by the court.The last one,usually, sometimes, is the mediator called adjunct settlement judge(ASJ).

This type of mediation was ADRs which enjoyed its greatest success in the U.S.

1.1.11 Mini - Trial

Mini - Trial is the type of procedure used in solving disputes between companies.

The procedure consists in an abbreviated trial, reduced, taking place in front of a presidium composed of three persons, one representative of each company, part of the conflict and a neutral third party.

The procedure takes place in two stages.In the first stage the presidium listens to the lawyers arguments of the two companies and attend a formal presentation of evidence.

Later, the Presidium has the opportunity to interogate the parties.

The company representatives,being in presidium,hears mostly, for the first time the details of the dispute from its own lawyers as from the lawyer of the opposing party.

The end of the procedure runs between the two representatives of the parties from presidium without the participation of the lawyers of both companies.

The involvement of the neutral third party in procedure differs from a mini-trial to another.Sometimes it has an active role and in other cases the role of consultant.If our neutral third party is there when the two representatives are meeting to negotiate a solution than he will have the role of mediator between the two.If the third party is not there the two representatives will negotiate directly with each other the solution.

The third party can have many roles:may advise the parties regarding technical and legal aspects, may question witnesses and parties lawyers, may prepare a summary or analysis of the case etc..

This procedure seems very interesting. It is interesting the changing position of representatives of both parties,from leader to „judge"or adminstrator of the procedure in the second phase of the mini-trial.

It is also interesting the role of the third party in this procedure that depends on the will of both parties involved and progressivelly evolvs from a passive attitude (that of consultant if the parties requires opinion)up to a very active one,being able to interogate witnesses,lawyers of the parties,etc.

This procedure is different from *negotiating session(settlement conference)*in which the third neutral party negotiates with the parties and mediates between them and of *summary trial by jury* where the advisory jury pronounce a consultative decision.The difference is in the fact that in this case the two representatives of the presidium of the parties are those who solves their dispute.

We cannot avoid mentioning the fact that, this procedure shows the great disadvantage of the fact that in the situation in which the parties don't reach an agreement, risks disclosing their strategies to the other party.

It also appears as being interesting the fact that,this procedure of ADR is the only one applicable or especially in commercial disputes and,more accurate,in those in which the parties are the companies.

1.1.12 Private Arbitration

Private Arbitration is that procedure by which the parties refer to a third party, a group of neutral third parties or an institution that examine evidences and issue a decision based on law.

The parties are usually those that sets the arbitration procedure and the decision of the arbitrators is mandatory for the parties.

In this procedure the parties are entitled to decide that this decision is not compulsory for them.

The decision pronounced by arbitrators is final and can not be appealed only on grounds of unconstitutionality of the procedure or abuse of arbitrators consisting in violation the obligation of discretion. [5].

1.1.13 Arbitration courts handed

It is defined as a form of arbitration that has become a public process because of their takeover by the courts.

The procedure is common in some states in the US that have developed special programs of arbitration and, unlike private arbitration which is voluntary, this is mandatory.

The procedure starts after the introduction of legal proceedings and takes the form of an abbreviated process.

The arbitrator is appointed by the court from a list of arbitrators accredited by it.

[5] Martin A. Frei - op.cit., pag.223

Unlike the private arbitration this type of arbitration is compulsory and follows the procedure established by the court(not chosen by the parties)and the pronounced decision is not compulsory for the parties.

They may ignore the decision and request the court the proceedings from the beginning as no arbitration had occurred.

We will not insist on this type of arbitration being seen only in civil actions not in the commercial one that is the subject of this report.

1.1.14 Mediation-Arbitration (MED-ARB)

It is a procedure composed from mediation and arbitration.

In MED-ARB,the parties agrees that the procedure to begin with a private mediation and if the conflict between them cannot be stopped with an agreement to continue with a private arbitration.

Depending on the agreement of the parties,the arbitrator may be the same person with the person of the mediator.

The particularity of this procedure lies in the fact that priority is given to parties's agreement and in the end of the procedure,if such an agreement is not established,the conflict will be settled by an arbitration decision.

1.1.15 Litigation

It is not considered as a general rule, a form of ADR.

1.1.16 Private Judgement (RENT-A - Judge)

It is that procedure, considered as the ADR right, in which the parties choose to submit the conflict between them to a private trial conducted by a neutral third party, usually a former judge, a law professor, lawyer, etc.

Private Judgement may be under a contractual provision or the permission of such judgments may result from the law.In this last case, the parties addressed the court for appointment of the third party who will lead the proceedings.

Such a "judge" doesn't have the power of a court judge. In addition, the trial procedure is determined by the parties, parties may limit the decision rendered by setting financial limits minimum and / or maximum, that will determine whether the decision of the judge is mandatory or not, if it is motivated or not, etc..

If the decision is mandatory it can not be appealed by neither of the parties because of error or misapplication of the law by the judge.

British legal system knows the following forms of ADR:arbitration, early neutral evaluation, conciliation and mediation.

Section 2 Environmental Conflict Mediation

2.1. Definition of mediation

Mediation is defined as an unofficial procedure / informal in which a third party, called mediator, assist parties in reaching an agreement that will lead to dispute settlement.

The mediator has no power to take decisions or to give solutions which obliges the parties.

2.2 Areas in which mediation takes place in Romania

Mediation can be performed areas like : waste management, water pollution and air pollution, environmental damage on urban issues (cutting of trees, construction, development of parks, etc.), infrastructure management, collaboration with public sector institutions, public services (sewerage, water supply, etc.), etc.

Mediation or Arbitration, are possible in those conflicts that aims the rights that the parties may have.

Mediation is not recommended in clear cases, in those in which the party does not want mediation but wishes to obtain the opinion of a third party or a public rehabilitation.

In contrast to these cases, that misses the purpose of using the mediation procedure or the good faith that is necessary to such procedures, it is found that it is useful in cases in which parties

are involved in a business relationship because usually they want to continue business and not getting justice, reason that will make concessions to reach a compromise, a mutually satisfactory solution (ie - parts of a license agreement).

2.3 Mediator

Complex environmental conflicts are most often related to social, economic and cultural. Therefore, such a conflict mediator must be a highly qualified person, to have knowledge in the field and ability to work with specialists. Most often such conflicts necessitate an evaluation of environmental management, requires the opinion of a chemist, engineer, etc.

Law 192/2006 does not provide additional conditions to the general ones to give mediator the right to mediate such kind of conflicts. Therefore, any person who has lawfully acquired the status of mediator could mediate un environmental conflict**.**

In fact, such a mediator will not have the necessary skills to support the parties in finding a mutually satisfactory and lasting solutions.

2.4. The type of mediation which can be use in international and in Romanian conflict

Countries as Austria, USA, Germany offers both the evaluative and facilitative mediation. Romania allows only facilitative mediation.

Facilitative mediation, the only one known by our legal system is that the mediator offers or provides to parties an assessment of the situation that is not meant to bind parties.

In *evaluative* mediation, the mediator has the power to assess the situation and propose a solution in which parties may accept or reject it.

Although the law 192/2006 does not offer this option, in practice is used more frequently this type of mediation rather than the facilitative mediation. The explanation would be that skills in communication, empathy and negotiation of the Romanian side involved in the conflict are not developed, lacking the ability to defuse the intra-and interpersonal conflict itself and finding a solution. Therefore, the mediator finds itself forced to overcome the limits of facilitating a discussion, to support the parties in finding a solution and him providing potential solutions.

References

- 1.Martin A. Frei –*Alternative Methods of Dispute Resolution*, Ed.Thomson,Delmar Learning, 2003;
- 2. Hazel Genn – *Mediation in Action. Resolving Court Disputes without Trial,* Ed.Caloust Gulbenkian Foundation, 1999;
- Law no.192/2006 ;
- OUG. 195/2005 ;
- Anca Ciuca – Environmental Conflict Mediation ;