SPECIAL ISSUES REGARDING THE MEDIATION PROCESS IN THE COMMERCIAL FIELD

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Abstract

The purpose of the research subject to this paper is to find proper solutions for the increase of the volume and efficiency in the field of commercial mediation. Starting from practical remarks, after an analysis of the substance, a new concept is suggested to be included and put into operation, namely the special commercial mediation, and a plead is made for its use in the current activity of alternative dispute resolution.

The first major objective of this paper is to demonstrate once again the need and utility of mediation in the commercial field, insisting though on its remarkable specific nature. The second objective is, starting from the outlined differences between the commercial mediation and the classical mediation, to define and to conceptualize the special commercial mediation, as a separate branch of mediation. The third objective of this paper is to draw the regime of the newly defined category of commercial mediation from a regulatory point of view, of the implementation structure and techniques as foreseen.

KEY WORDS: *mediator, arbitration, facilitative, negotiation, evaluation*

Introduction

This study has for object the use of mediation, as ADR, in the commercial field. Although in the countries where the mediation is used intensively, the commercial area for its application is not avoided, the results are not up to the level of the possibilities. ADR star is still the more expensive, complicated and risky commercial arbitration, especially at international level. Moreover, in the countries where mediation is incipient, such as Romania, the cases of commercial mediation are singular and fortuitous, without outlining a positive increase trend. This paper aims to identify the reasons for such failure and to suggest a new approach, more pragmatic and more efficient of this field.

By this paper, we are building and suggesting the solution to the above-mentioned issue, which is a new category of mediation, deviating from the classical mediation, namely the commercial mediation. Once adopted, we believe that the effect would be of extreme importance: a better and more efficient resolution of commercial conflicts, a spectacular increase of the number of cases brought in for resolution, a recovery of the commercial relations, the relief of the Courts of law from most of the pending litigations. Therefore, the objectives of the paper are to individualize and to delimit the commercial mediation within the context of general mediation and to build a new concept, namely the special commercial mediation, and to configure it.

In order to reach such objectives, the paper underlines the need to use the mediation in the commercial field, identifies its particular features, sets forth its similarities and differences compared to the regular mediation with a facilitating nature, defines the special commercial mediation, explores the ways of its prescriptive assimilation and outlines some of the fundamental techniques that may be related thereto.

The subject of mediation in the commercial field is approached in the specialty literature. Emphasis is made more on the use of mediation as such and on case studies, but less on finding the deficiencies of its classical form. Although the evaluative approaches are present, we were not able to identify the theorization of a new concept as a separate branch of mediation detached from the trunk of regular mediation, even if we have the feeling that the idea is hovering and – in an intuitive and

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empirical manner – that there are practitioners who use it, to a certain extent and not systematically. That is why we hope that an original contribution in this field is made by our paper.

Utility of commercial mediation

Commercial conflicts represent a divergence area presenting a special interest and importance in the relational landscape of modern society. Commercial law, as a branch of private law, covers the entire performance of economic activity, with its major importance and inclusion in the contemporary existence.

Obviously, the commercial activity means interactions among people, among individuals and legal entities, among legal entities as such. The relations among protagonists are governed by laws and contracts. The inevitable misunderstandings among the parties are settled in a canonic way in front of the Court. The number of disputes is high, and the complex nature of the cases is huge, therefore it is important to settle them efficiently.

But it is the efficiency of settling the cases in front of the Court that is more and more often questioned. The methods of alternative dispute resolution (ADR) are current options in this field. The most popular is the commercial arbitration, an extremely widespread institution during the last decades, both at national and at international level[2]. Following its steps, mediation started to strongly impose itself after having been preceded by the simpler formula of the conciliation.

Why is it necessary to have an alternative to traditional justice in the commercial field and - in particular - why can this be better used in the business field? We'll give some answers herein below, in this introductive chapter of our paper.

Thus, first of all, it should be mentioned that the approaches of the participants in the economic life are harsh, but rational. Rationality is specific for the entire field so it is natural for it to be present in the disputes' resolution. The parties may foresee the costs and risks of each method of dispute resolution and decide on the most suitable one, and also when this one represents a compromise. The emotional elements are not preponderant here, as they are in the conflicts among common individuals[3] or within the community, and to establish a communication platform is also natural and accepted. Negotiation is the universal language for closing businesses, all the more so as the parties may use it again - why not? - for the conflicts' resolution. These are circumstances which - at least apparently, we are going to get back seriously to this aspect! - are in favor of ADR, especially the mediation.

The second reason refers to a major coordinate of the commercial relations, namely the continuity, at least by defined time periods. Incidents are possible, and even probable in the commercial relation between two partners. But it is necessary to manage them in an efficient manner, to find an economic solution in order to surpass the same. A "*win - lose*" solution, as the solution dictated by justice and even by an arbitral proceeding, may give entire satisfaction to either party, but it is quite difficult for someone to rely on the fact that the losing party will still wish to continue the contractual relation, or somehow that both parties will accept to initiate new relations between them. Such additional price that is paid, the long-term discrediting of the relation, represent *per se* a common cost that is not worthy to be rationally, pragmatically incurred. It leads to the decrease of the turnover, to the lessening of the potential partnerships. The consequences are often more dramatic in an asymmetrical situation when one of the belligerent parties holds a privileged position in its field of activity (for ex.: *de facto* monopoly). The other party, avoiding or being from now avoided, risks to seriously influence its activity, almost compromising it. Therefore it is natural for this one to find suitable a method of resolution which avoids the sacrifice of the relation.

[2] Christian Buhring-Uhle – "Arbitration and Mediation in International Business", Kluwer Law International BV, The Netherlands, 2006, pp.180-195

[3] Jennifer E.Beer, Eileen Stief – "The Mediation Handbook", New Society Publishers, 1997, p.84

There are also other aspects which may influence the interests of a trader in case of a public judgment. Its involvement in a lawsuit, even without any evident guilt - but especially in case of an apparent guilt - is likely to deteriorate its image and to adversely influence its present or future partnerships. A negative reputation, including the aggressiveness in justice, but also noticeable vulnerabilities as a result of involvement and attrition in long or costly lawsuits, or weaknesses caused by the execution of certain Court decisions, may cause additional vulnerabilities in the relation with current or future business partners. Not to forget also the virtual prejudice caused by the divulgations resulted from the public performance of lawsuit-related debates regarding the involved parties, non-public information which loses its confidential nature until then.

The commercial cases are, by their nature, complex, full of technicalities. Their resolution in front of the Court implies time, attrition. The expenses[4], even in case of success, are high, and not always nor fully covered by the opposing party which was found guilty. However, often the repair occurs with delay, is late, or has a weak coverage and efficiency. Traders search in fact rapid solutions, with the lowest costs possible, and the legal proceeding does not answer - evidently - to such criteria, on the contrary.

Time and cost are not the only adverse consequences of the complexity of commercial conflicts in common law. Their high technicality, given the absence of economic and technical training of the judges in the field of the dispute (fatally and innocently only jurists!), which can be only partially covered by expert reports, makes commercial cases be difficult to understand by law people. Correlated with the high busyness level of those judges, with the inherent weaknesses and the unavoidable idiosyncrasies of human nature, the judging process in which a third party, not qualified in issues related to the substance of the case, decides and imposes without your consent, you being a trader under litigation, may lead to unexpected and inconvenient Court decisions, even when the lawful appearance is in your favor. The above-mentioned aspects are valid, *mutatis mutandis*, even when it is about the ADR star, arbitration.

Finally, the conclusion may be that the resolution of commercial cases using common legal ways presents different risks and costs, material and non (immediately) material for the parties.

Resulted most often from negotiations, the commercial relations can be saved also by negotiations. But it is necessary that such negotiations take place under a special format[5]. They should be assisted by a third party who is dedicated, neutral, competent and respected by the belligerent parties. The procedure for dispute resolution that is outlined here has already a name. It is called **mediation**. Using mediation is a rational option, deeply in compliance with the spirit and the instruments of traders. But even a regular mediation does not have a maximum efficiency in business - in our opinion -, but a special one. This paper tries to present certain aspects about such special mediation.

Features of the commercial mediation

The previous chapter of our paper enunciated some of the inconveniences of using legal means for settling commercial litigations. This chapter highlights how to surpass by mediation the inconveniences referred to and - in the same time - explores the targets and lines of a special regime of the commercial mediation, such as this idea has already been proclaimed at the end of previous chapter.

In our opinion, the main deficiency of the solution for commercial disputes' resolution in front of the Court is the risk regarding the Court decision. The legal mechanism, when this is chosen, supposes the dictate of a third party, namely the Court. Even in case of the existence and use of remedies at law that could correct the subjectivism or the mistake of the first instance, these do not

[4] Alina Gorghiu (coordonator) – "Medierea – oxigen pentru afaceri", Universul Juridic, Bucuresti, 2011, pp.127-128

[5] Douglas N. Frenkel, James H.Stark – "The Practice of Mediation", Wolters Kluwer, 2008, pp.119-124

eliminate the difficulties faced when identifying and imposing a correct solution. The luxuriance of the commercial facts and aspects, both quantitative and qualitative, make often difficult to include them in the abstract and simplifying patterns of law. Being busy with a lot of cases pending in front of the Court, with at most a superficial understanding of the field, organizing the cases according to some legal stereotypes, the judges are not always ruling correct solutions. It is a common joke that good commercial lawyers are not necessarily winning your lawsuits in front of the Court, but help you not to get there. Anyhow, many times the parties must take into account a risk of Court decision different from zero.

Obviously, rationally thinking, the traders should eliminate such risk, if possible, by an alternative method, under certain conditions that make it efficient. A first condition for such alternative uses an asset of the legal proceeding itself: to draw on a third party when the mere dialogue between the parties has failed[6]. A second condition refers to the availability and commitment of the third party. This one should be actively and continuously involved, as long as necessary, for the exclusive purpose of settling the conflict. The third condition refers to the third party's expertise as regards the substance of the case. In order to understand and then to be an useful participant in settling the issue, the third party must have the competences and – ideally – the accepted experience specific to this field. Finally, the solution found is advisable not to be imposed, but validated by the parties' agreement. The alternative resembles to mediation. But a revised form of mediation.

The issue is that, in the commercial field, in many cases, we do not simply deal with a breach of the obligations, but in reality, at the beginning, with deadlocks and not with conflicts. The initial challenge is not to administer justice (as subjective as justice often is!), but to identify a way to surpass the above-mentioned deadlock. The impossibility or the difficulty to surpass in due time a crisis situation that occurred or to continue the normal course makes appear the conflicts, which shortly after become constant. As regards the commercial relation, justice cannot but decide *post mortem* and impersonally the liabilities. It makes an autopsy and not a therapy. Its intervention is no longer useful in reality but – at most – partially reparative. Again, an agreed solution, able to save the relation and make it operational, is the better one.

The important assets of canonic mediation are, of course, also awarded accordingly in the commercial field. The material values in dispute are often impressive. The expenses for settling the conflict (taxes, fees, expert reports, etc.) are incurred accordingly. Naturally, the substantial reduction of costs is wished and appreciated by traders. Also the celerity or confidentiality, which are the well-known advantages of the mediation.

As it may be noticed, strong reasons plead for using mediation in the field of commercial conflicts resolution. That is what happens in reality in the countries that are economically developed and have a tradition in this field. But why is this not happening at a larger scale, including in developing countries, such as Romania? Why is mediation still a Cinderella compared to the commercial arbitration that is the unchallenged international star of the ADR? In our opinion, two explications exist:

a) canonic mediation has a facilitating nature. Mediator is declared to be the third party who only restores the dialogue. Its part is to make some valves operational in order to release the adverse emotions and to restore the dialogue. Then the parties, relieved and finally capable to collaborate, will find the solutions.

This pattern is not operational in the commercial field. There are no emotions here. In addition, the parties communicated and incline to continue communicate. They have already tried, most often, to find the solutions together. They did not succeed. They need a third party to substantially contribute also as regards the substance, not only procedurally, to their identification or construction. A simple communicator is not enough for them. With its standard methods and its

[6] Douglas N. Frenkel, James H.Stark – "The Practice of Mediation", Wolters Kluwer, 2008, p.9

optimism and peace recipes, this one risks becoming slightly ridiculous. The mediator in the commercial field, taking the risk involved by such enormous enunciation, must be at least a valid interlocutor as to the substance of the issue of the parties in dispute.

b) canonic mediation may fail[7]. In exchange, a lawsuit or arbitration ends with a solution. As long as the parties, for not reaching an agreement, may fail the mediation procedure, this risks becoming a loss of time. Moreover, the actual danger exists for them to divulgate their positions, defenses, evidence, which afterwards may be annihilated in Court. In addition, a Court decision or an arbitral award is easy to be made enforceable. In exchange, the management of the parties' behavior after mediation is more difficult to be made operational, and the mediator is practically no longer involved in the process. Its part was – wasn't it? - only to "conciliate" (for the moment?) the parties! This aspect is discouraging for the pragmatic, lucid traders.

The above-mentioned obstacle is difficult to surpass in mediation because it is correlated to an inherent feature of this one: its optional nature, including of adhering to the solution.

We are going to try in the next chapter to identify however some non-standard versions for resolving this major adverse aspect of using canonic mediation in the commercial field.

Similarities and differences between commercial mediation and canonic mediation

The previous chapter underlined two important theses:

- mediation is critically needed in the commercial field
- in order to be efficient and attractive, mediation in the commercial field must be redefined and improved in comparison to canonic mediation

For the purpose of answering the second thesis, this chapter tries to outline the differences between canonic mediation and what we define herein as being commercial mediation. We'll start by emphasizing once again the fundamental useful features of canonic mediation, and then we'll analyze which one is fit and which one is not for the commercial mediation. We mention once again that in this paper **commercial mediation** means a new procedure of approaching the mediation process in the commercial field, as we are going to define herein below and not the classical approach and application of mediation with facilitating nature in the commercial field (less different than the canonic mediation and – in our opinion – not enough efficient, at least in the countries with weak experience in the field of ADR, such as Romania).

(Canonic) mediation supposes[8]:

1 the existence of a dispute occurred between the parties
2. not using the legal proceeding for settling the dispute
3. the appointment of a third party which catalyzes finding a solution for resolution - the mediator
4. the mediator is impartial, independent and reputed
5. the mediator is not a specialist in law or does not use its legal knowledge
6. the mediator is not a specialist in the field of the substance of the case
7. the mediator has competencies, at least natural, in communication and psychology
8. the parties are under the influence of emotions and the lack of communication
9. the mediation process takes place according to a standard procedure (method)
10. the solution for the dispute resolution is sought by negotiation
11. the negotiation is based on interests and not on rights
12. no proofs are produced, no guilty parties are determined
13. the case is not analyzed nor assessed legally, not even by the mediator
14. no decisions are ruled

[7] Douglas N. Frenkel, James H.Stark – "The Practice of Mediation", Wolters Kluwer, 2008, p.126

[8] Cristopher W.Moore – "The Mediation Process – Practical Strategies for Resolving Conflict", 3-rd Edition, John Wiley & Sons, 2003, pp.43-55

15. the participation is voluntary
16. each party voluntarily adheres to the solution
17. the solution is generated in common by the parties
18. the mediator does not participate in the discovery or construction of the solution
19. the mediation process ceases as soon as the parties reach an agreement (or when the negotiations fail, as ascertained)
20. the part of the mediator is (exclusively)
a) to release emotions
b) to restore and ensure the dialogue
c) to formally conduct the works
d) to ensure going through the stages and performing the method

As regards the commercial mediation, following the order of the above-mentioned features, the following details and distinctions are necessary:

1. Obviously, commercial mediation may occur as a result of a dispute between the parties. As a rule, this is due to the failure to accomplish or the faulty accomplishment of a commercial obligation. It should be noticed however that such dispute is often translating the occurrence of a deadlock in the commercial relation between the parties, which can no longer take place as initially agreed by them. The deadlock may be most of times noticed prior to the failure of the commercial obligation, which this one precedes. It is the result of the issues faced by one of the parties, or maybe both of them.

Without questioning the behavior or the individual liability of the parties, the deadlock represents more critically an issue of the relation *per se*, than of the parties. More than in other conflicting situations, the question is not in the terms according to which the parties should have evolve and interfere peacefully in proximity, but that those traders had to work, in a broader sense, together. Therefore the intention is not to simply to extinguish, by mutual compromises, a conflict, but to really find solutions acceptable for both parties to solve a deadlock, during a joint activity.

That is why, in most cases, mediation in the commercial field is dedicated no so much to settle a dispute[9], but to identify a solution in order to surpass a deadlock. It is not about an understanding point where the parties may split, but a line that the parties understand to follow.

2. If an alternative solution is chosen for solving the relational crisis, the traders waive (at least temporarily) to use legal means.

3. In commercial mediation of course it is called on the services of a third party: the mediator.

4. The neutrality, independence and reputation are also in the commercial field conditions required for the mediator. Given that the mediation in the commercial field is mainly cerebral and not emotional, we mention that the first two aspects are more related to nature and less to essence. They must relate rather to the current procedure of the actual case resolution (based, for example, on a commitment). The third aspect is mainly pertaining to the competency and honesty (pragmatic aspects) and less to fame.

5. The lack of competence or of legal perspective or the agreed mediator's waiving to use the same does not represent, in our opinion, an advantage in commercial mediation, but rather a handicap. Without setting oneself up as a judge or lawyer, the mediator must understand the legal context of the conflict. He must be able to distinguish and to show the parties (individually) the risks they might face in justice and to assess the case (similarly to the evaluative mediation). Not accepting in discussion the legal aspects during a commercial mediation is deceitfully and may cause participants' mistrust or discontent. The cases have several sizes, among which the legal aspect is essential. A solution different from the legal one is searched, and not because the lawful aspects would not have a major importance, but for rational reasons that were talked about. But to ignore law

[9] Cristopher W.Moore – "The Mediation Process – Practical Strategies for Resolving Conflict", 3-rd Edition, John Wiley & Sons, 2003, pp297-299

is not realistic. In fact, it must operate as a pressure for those who hesitate or simulate, reminding them that it may come back in force unless a solution through mediation is not found.

Moreover – we'll see –the possibility exists to use certain hybrid mediation branches, in which the mediator formulates a decision (facultative or mandatory).

6. The concept of general mediator, who is not a specialist in the field in which the mediation takes place, represents a hot spot in the mediation theory. The formula enounced is almost a taboo. It is deemed to be a mediation pattern in which the parties, on one hand, do not succeed (mostly because of emotions) to communicate, and on the other hand have a rigid, positional approach. The mediator should solve those difficulties, based on a panacea method, and then the parties, knowing the field, would find the solution, using joint efforts.

In the commercial field, in most cases, the approach described above is naive. The parties communicate and – in general – have prospected (individually or jointly) the unblocking solutions, but without success. They need a decision made by a third party, as it happens in the legal or arbitration field, or a reexamination of the theme along with a third party. In order for his intervention to virtually have success, until he suggests and uses the stock of techniques, a first condition is to have – at least – the competence[10].

7. The communication competences of the mediator are useful in commercial mediation, but these must not be transformed into fetishes. The psychological competences are a bonus, but not essential.

8. In commercial field, setting up communication between the parties does not usually represent an issue. Communication functions or has functioned until a certain moment. As a rule, the parties' adhesion to mediation is a prior consent for dialogue.

Emotions do not characterize either the affected relation between the parties. They represent, at most, an ingredient, should they be sincere, or otherwise a way to put pressure. Getting over or ignoring them is not an issue.

9. In commercial field, the standard method of carrying out the mediation process becomes difficult and inefficient. There are useless, formal stages and steps. Indeed, discipline and strictness of the mediation meetings, as well as planning the objectives continue to be useful. However, in our opinion, a (new) method is necessary, being inspired only by the classical one. We plead for a lighter approach of the cases *per se* and – if possible – which may be individualized. In our opinion, the emphasis must be on the techniques and procedures selected and used specifically in management and the commercial field.

10. The key of the commercial mediation is the negotiation, both based on interests, and the positional one (unlike the canonic mediation)[11].

11. A great common interest exists in the commercial field, that is to continue the relation between the parties. Also, there are similar interests regarding the celerity, confidentiality, minimizing the costs, etc. Together, they led to the selection of mediation as dispute resolution method. Even due to such reason, the interests are the principal factor taken into account. The rationality of the parties, the pragmatism specific to this field make us understand that rights are ancillary to the interests.

On the other hand, it must not be neglected the fact that the parties are aware of their rights and of the possibility (under given circumstances) to use them in justice. That is why they cannot be and will not be ignored. The parties do not enter as equals in the negotiation during the mediation process. They are charged with their (infringed) rights and their (unobserved) obligations. The interests form into desiderates, while the rights and obligations represent however the legal reality.

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[10] Douglas N. Frenkel, James H.Stark – "The Practice of Mediation", Wolters Kluwer, 2008, pp.77-79

[11] Cristopher W.Moore – "The Mediation Process – Practical Strategies for Resolving Conflict", 3-rd Edition, John Wiley & Sons, 2003, p.252

This distinction is that the rights must come under the larger interests and that they may be reviewed (fully or partially capitalized) in a wider arrangement and not that they must be ignored or abandoned.

An approach which would claim to approach the rights in exchange of the interests is not only wrong, but could discourage the participation of traders in mediation. The solution would rather be to enlarge the negotiation area in order to identify new common interests which may compensate the current deficiencies.

In conclusion, the negotiation in the commercial field tends to use the current and future interests, based on the parties' current rights and obligations.

12. As a principle, the procedural methods related to the legal field are not used either in commercial mediation. The parties know each other's situation and agreed to jointly search for a solution, and this is based on an elementary good-faith. However, the possibility exists that certain aspects or facts be differently seen or construed. Under such circumstance, some evidence (for example, written deeds) or even expert reports might be necessary.

Also, the (joint) analysis of the situation and facts cannot ignore the unobserved obligations or the infringement of the rights, namely to determine, even in a declarative manner, of certain guilt, which must be compensated.

It must be added to all the above mentioned that (if necessary) in the hybrid versions in which a decision is ruled, the third party must be made available the investigation and administration methods.

13. The canonic mediation having a (purely) facilitating nature does not seem the most suitable for the commercial mediation. In our opinion, the mediation evaluative (and not only these!) elements must be added in this case.

14. In case the usual procedure is used, the solution in the commercial mediation is not ruled by the third party, but is jointly generated and accepted by the parties. The hybrid versions may bring new elements to this effect.

15. As in any mediation, the participation of the parties in the commercial mediation is voluntary.

16. The adhesion of the parties to the solution built during the mediation process is voluntary. Only in the hybrid versions of commercial mediation other possibilities may be held.

17. The commercial mediation preserves the nature and the advantage of the canonic mediation when the parties generate the solution, using analysis, debate and negotiation.

18. The most important change that we suggest, without being mandatory, for the commercial mediation practice is as regards the part played by the mediator in identifying/constructing the solution. We believe that the mediator's active participation is useful and particularly appreciated by the parties even in the activity of generating the solution. Such capacity, based the mediator's on competences and/or the experience in the basic or a related field, would be added to the part that this one plays anyhow to organize, order and manage the mediation process works. The lucid, objective, neutral and competent contributions are the major element that the traders search in fact when the negotiations among them have failed and they resort to the mediation.

Depending on the format and the provisions of the agreement between the actors, an evolution is possible also toward other hybrid forms of negotiation, in which, after using the means for the identification of an agreed solution, the third party acting as mediator or another person may make even a decision, either mandatory or to which the parties may voluntarily adhere.

19. One of the mediation's weak points which must be recognized is the legal force of the mediation agreement. Its investiture in justice supposes an additional procedure, likely to complicate and putting it in danger. Assuming a voluntary performance, as it is natural, the parties' comfort and trust would significantly rise if an authority supervising such process could operate. The mediator himself is the most suitable as he knows the case and the turns of its resolution, the particular features and the conditional aspects of the solution built, but also as his authority is recognized and

consolidated in the process. Though, his part ends in case of a conventional mediation. As a complete formula of the commercial mediation will have to cover this deficiency also, completing the process with an after-mediation stage.

20. As already mentioned, besides the fundamental classical functions of the canonic mediator, we suggest in the commercial mediation also the parts of assessor, expert, solver, (possibly) arbiter, organizer and supervisor of the post – mediation process.

Thus, the mediator not only becomes liable for the communication between the parties and is the guide during the mediation procedure (a facilitator), but also actively involves himself in the practical resolution of the dispute.

The conclusions of the comparison in twenty points above will lead us in the next chapter to the definition of the new form of commercial mediation that our paper suggests.

Definition of the concept of special commercial mediation and its regime

The considerations developed in the previous chapters were meant to argue our thesis according to which mediation in the commercial field may be configured separately from the "regular" mediation. We called the first form of mediation "special commercial mediation" (briefly and only in this paper **commercial mediation**), and the second one, regular mediation or **canonic mediation**.

Obviously and essentially the commercial mediation is a form of mediation. That is why, the essential features of the canonic mediation are characterizing it too. They represent its proximal genre. What differentiates it from the canonic mediation is its specific distinction. We are going to briefly identify them herein below so that we define the concept of (special) commercial mediation we are going to present.

Thus, the commercial mediation has the following features that pertain to

a) the proximal genre (canonic mediation):

- represents an alternative for dispute resolution
- the participation of the parties is voluntary
- appeals to the participation of a third party (the mediator)
- the mediator is impartial or independent (towards the case)
- the solution is not (as a principle) imposed from outside
- the solution is built by negotiation of the parties
- the mediation process is conducted by the mediator
- the mediator uses and implements communication techniques between the parties
- the negotiation takes (also) into account the interests

b) the specific distinction:

- the general nature of the case is commercial
- the mediator may be actively involved in the process of building the solution[12]
- the mediator has legal expertise and may offer the parties a legal assessment of the case
- the mediator has the expertise and or the experience in the field of the substance of the case and/or in a related one[13]
- the negotiation takes (also) into account the rights
- the mediation process is simplified and focuses on generating options and building the solution
- in case of deadlock, a decision may be made by the third party, to which the parties may adhere

[12] Alina Gorghiu (coordonator) – "Medierea – oxigen pentru afaceri", Universul Juridic, Bucuresti, 2011, pp.229, 232

[13] Alina Gorghiu (coordonator) – "Medierea – oxigen pentru afaceri", Universul Juridic, Bucuresti, 2011, pp.127-128

- if necessary, the process may be settled (also) by assisted competitive negotiation
- it may be instrumented, with the parties' agreement, a procedure for post – mediation supervision, managed by the third party

Thus the definition being the (special) commercial mediation, related to the proximal genre and the identification of the specific distinction, there are two aspects we are going to detail hereinafter: its legal nature and functionality.

Legally speaking, the special laws of mediation are definitely covering the canonic mediation (with facilitating nature). That is what happens in Romania too. Although the law avoids defining it univocally, the way it is officially construed and practiced lead to its restrictive reading, such as it (only) allows to exercise the mediation with a facilitating nature.

The commercial mediation pattern (not so facilitating or not only with facilitating nature) that we suggested is not however just an exercise of imagination. It succeeds an analysis and represents a solution (if not the solution itself!) so that mediation operates in the commercial field. As this is defined and practiced today, simply facilitating, it is neither attractive nor efficient.

The laws are drafted in order to meet the needs of the reality and not to impose on the reality. That is why, our opinion follows the school of reasoning according to which what is useful and claimed by the economic reality must be allowed by the laws meant to favor it. Namely we adhere to the doctrine of the ascendant of the economic (of the real life) over the legal (the instrument). In this case, three solutions exist.

The first solution, the simplest and rational one, is another positive and permissive reading of the current law. Mediation must not transform itself into a dogma. That is, on one hand, in its essence, a right granted to the parties to settle themselves their disputes, and the law approves this. On the other hand, the same law regulates and gives stability to the profession of mediator, for the primary purpose of protecting the parties in conflict. That's all and nothing more. As regards how this thing takes place, here it should be the freedom that allows adapting it to the needs of those who are in conflict and to the arsenal specific to each mediator separately. In case of interpersonal disputes, of course psychology is necessary, as for other disputes, knowledge of law or economy is required, as it happens in the commercial field. It would be ridiculous to favor the first ones (because everybody knows psychology, don't they) and to prejudice the other ones, by generalizing the approaches in the field of inter-personal mediation at the level of the mediation for economic organizations. Such wide line of reading the law in favor of which we plea is, as a matter of fact, to our information, compatible with what happens in the countries having a developed mediation practice, where, besides mediation with facilitating nature, are also used the evaluative mediation, the transformative mediation, the narrative mediation, etc.

The second solution, more complicated, is amending and complementing the law. With a view to the future law, it should be expressly defined other forms of mediation too in order to settle the disputes among professionals, such as the commercial mediation. The text formulas that might be adopted are either those generically permissive (which are preferred), or those elaborate and specific.

Finally, the third solution is to relate to common law and not to the special mediation law. Mediation, as an agreement between the parties, was able to operate (and still operates in some countries) also without a special law. it may be seen as an agreement between the parties and the mediator, under the conditions of the mediation process as provided by the contract. The freedom to extinguish conflicts by negotiation is natural; in addition common law provides even a special institution to this effect, namely the transaction. Then, there are even professionals, such as lawyers, who have a general vocation for mediation, not expressly circumstantiated within the strict framework of a law, such as mediation law.

So, the solutions for recognizing and practicing the special commercial mediation, such as defined herein, exist under the versions above or a combination thereof.

By the end we'll make some brief references also to the instruments indicated to be used during the commercial mediation.

As already mentioned, besides the formal aspects relating to the process' organization and initiation, some of the stages of the classical mediation process are no longer necessary or their importance or the time spent on them during the procedure is going to decrease.

The central part of the process will be represented by the actual construction of the dispute resolution solution. The methods used relate to the technique of group analysis and to the decisions theory[14]. The mediator must be able (including by persuasion) to transform the parties from an antagonist duo, into a working group. In relation to this aspect, the communication and psychological techniques are intensely used. A special attention will be paid to the mediations with multiple parties.

There are two possible evolutions of such process. In the favorable situation when the efforts of the mediator succeed and the parties accept to cooperate in aiming to accomplish a joint solution, the next step is to generate options. Now, it is a negotiation based on interests. The techniques used usually are those of brainstorming or collective management of decisions. A provocative, modern and creative method is, for example, the technique of parallel thinking. The mediator will participate actively, using in a constructive manner its competences in the legal field and in the field of the substance of the case.

In the less happy situation, when the parties still remain on different positions (the second possible evolution), the mediator will assist them and organize the framework of a competitive negotiation. In order to avoid the risks of confrontation, the technique recommended to be used with priority is that of individual discussions (*caucus*), when, on one hand, the mediator will be the messenger of the parties' suggestions, and on the other hand will interactively assess with each party the legal situations separately, as newly configured.

Finally, in case no solution is accepted by both parties after using both versions, if they accept and if evidence has been produced during the procedures, the third party may rule a solution itself. Such solution may be accepted voluntarily or mandatorily, or may be used as a reference for another (final) stage of negotiations. The above-mentioned development is included in a broader concept of hybrid ADR called med-arb ("*mediation&arbitration*")[15].

Both the solutions of prescriptive accommodation as well as the techniques around the special commercial mediation are to be detailed in a future research. These have been formulated above, just as examples and not restrictively, complementing and adjusting the new concept suggested hereunder.

Conclusions

This paper tries to identify a solution for making the mediation process in the commercial field more efficient. The presentation strategy follows a practice – theory – practice path. It starts from remarks regarding the appetence, which can be and is ascertained, for mediation of the commercial field, and from practical remarks regarding its specific nature and desiderates. A theoretical table was drafted with the features of the classical mediation and the similarities and differences between this one and the commercial mediation were analyzed according to the doctrine. A concept of a new form of mediation resulted, namely the special commercial mediation. Finally, an attempt was made for identifying the most suitable formula of legal accommodation of the method and some practical approaches of the method have been suggested.

The results of the research are likely to stimulate the optimism as regards the viability and feasibility of the newly suggested formula of mediation in the commercial field.

We think that the global result of the research should have an impact and possibly to cause controversies which are prolific from the point of view of the debates on ideas among the mediators.

[14] Alina Gorghiu (coordonator) – "Medierea – oxigen pentru afaceri", Universul Juridic, Bucuresti, 2011, p.235

[15] Christian Buhring-Uhle – "Arbitration and Mediation in International Business", Kluwer Law International BV, The Netherlands, 2006, pp.148-152

We hope that it will be convincing and that the newly suggested paradigm will conquer the dogmas or the prejudices in this field and will have a liberating effect.

The new pattern of commercial mediation will be lighter, more fitted, more efficient. The reshaped mediation would correspond to a greater extent to the needs of the traders' conflicts resolution, would attract more cases in front of the Court, which would be settled to a greater extent and more convincing. Also, we hope that in this way we'll stimulate actual, substantial and intellectual debates among practitioners, jurists and representatives of the business environment.

The future research activities will be able first of all to deepen and to test the concept, to check its theses. Secondly, an actual way of accommodation to the current legal framework must be found. A study will be conducted to see to what extent the concept is supported by the special law of mediation, if necessary, as an alternative, taking into account only the regular commercial laws and not the special ones, or if it is necessary to amend the special laws in this field.

The efforts for theoretical drafting and the practical tests will outline the structure of the related procedure and the combination of facilitating, evaluative techniques and of hybrid procedures which will equip it.

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