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Labour dispute mediation in Romania: an alternative way?

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The European Commission has seen, back in 2002, a growing interest in alternative dispute resolution (ADR), as many Member States have passed legislation encouraging it. On the other hand, back in 2002, ADR was seen as a 'political priority, repeatedly declared by the European Union institutions'.[1] According to the European Commission, alternative dispute resolution mechanisms represent one of the most important 'means of improving general access to justice in everyday life'[2]. Is this conclusion valid for all the EU Member States? Do such mechanisms genuinely improve access to justice or we are rather speaking of a desired result? We believe that the answer to the question highly depends on the social, economic and legal historical context of each EU Member State.

In Romania there is a relatively recent general tendency to promote alternative dispute resolution (ADR) mechanisms. The most vivid promoters are some judges – who see mediation as the magical solution that could reduce the number of cases heard by the courts – and, of course, certified, specialised mediators. This tendency to promote ADR mechanisms is more and more visible also for individual labour disputes, leading to a change of paradigm. Until a few years ago, labour disputes were considered to be of the exclusive competence of labour courts, out of the scope of alternative dispute resolution[3]. Now, the trend is to include as many types of individual labour disputes as possible under the scope of mediation. This trend was manifested in the context of major legislative changes[4], including the adoption of a new Code of Civil Procedure and reforms aimed at reducing the number and duration of the trials.

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1 Since 2012, improving the quality, independence and efficiency of judicial systems has been a central feature of the European Semester – *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters,* COM(2016) 542 final, 2016. 08. 26., p. 2 (hereinafter: COM(2016) 542 final).

2 Commission of the European Communities: *Green Paper on Alternative Dispute resolution in civil and commercial law.* Brussels, 19. 04. 2002, COM(2002) 196 final, p. 5 available at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0196en01.pdf (hereinafter: *Green Paper on ADR*).

3 I. Deleanu – S. Deleanu: *Arbitrajul intern şi internaţional.* Editura Rosetti, Bucureşti, 2005.

4 Starting with 2009, Romania has changed the four traditional, basic codes: the Civil Code (the previous code was adopted in 1864), the Code of Civil Procedure (the previous code was adopted in 1865), the Penal Code and the Code of Criminal Procedure.

Romania was one of the 15 countries that have introduced new laws or procedures since 2000 to provide alternatives to court proceedings[5]. The tendency to promote ADR mechanisms didn't lead to spectacular results in Romania so far. However, the initiative to encourage the use of ADR might prove to be useful, as - among the specific advantages of such mechanisms – is the fact that they are more consensual and faster than recourse to courts. On the other hand, they were developed in the context of the crisis and lack of confidence in the effectiveness of justice. But, as a paradox, mediation itself was the victim and not the winner of this lack of confidence.

Such mechanisms have been considered at EU level as being mainly suitable for civil or commercial disputes and not for labour disputes[6]; in the employment relations, they were seen as playing an important role in trans-national social conflicts[7]. In Romania, the employment relationship is based on the mutual trust between the employer and the employee, but on many employees' rights the parties are not free to decide themselves. In addition, access to court is a fundamental right, guaranteed by the Romanian Constitution, which allows an individual to make a claim to a court concerning a breach of his rights. Thus, we can identify, from the very beginning, two obstacles to the use of ADR mechanisms: the effectiveness of the fundamental, constitutionally guaranteed right to access to court and the employee's non-negotiable rights of public policy concern.

In this paper, we shall briefly analyse the existing ADR mechanisms in Romania that may or have to be used for the resolution of labour disputes; the scope and some procedural aspects of labour disputes' mediation in Romania (1) and the limitations, advantages and disadvantages of the use of mediation for individual labour disputes (2). We shall focus mainly on mediation for several reasons: first of all, because it is the only legally recognised alternative dispute resolution mechanism for individual labour disputes; then, because the evolution of mediation in Romania is very recent, yet tumultuous and highly controversial.

1. Alternative labour dispute resolution mechanisms in Romania

The Romanian legislation allows for individual labour disputes concerning breaches of labour legislation, the collective agreement or the employment contract (so-called 'rights dispute') to be heard in a specialised labour court. The procedure is free of any charge, urgent according to the law

5 Alongside with Belgium, Bulgaria, the Czech Republic, Finland, Hungary, Italy, Luxembourg, Malta, the Netherlands, Norway, Portugal, Slovakia, Slovenia and the UK – European Foundation for the Improvement of Living and Working Conditions, 2010, *Individual disputes at the workplace: Alternative disputes resolution*, p. 2, available at: https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/individual-disputes-at-the-workplace-alternative-disputes-resolution (hereinafter: *Individual disputes at the workplace: Alternative disputes resolution).*

6 In the sense that, according to its recital 10, the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters should not apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law, such rights and obligations being particularly frequent in employment law. However, the *Green Paper on ADR* was concerned with ADR in civil and commercial matters, including employment law (p. 6).

7 The 2001 Laeken European Council stressed the "the importance of preventing and resolving social conflicts, and especially trans-national social conflicts, by means of voluntary mediation mechanisms" – paragraph 25 of the Presidency conclusions.

(at least theoretically[8]) and legal aid may be granted in order to allow for the payment of attorney fees. Traditionally, individual labour disputes were considered to fall outside the scope of alternative dispute resolution mechanisms, as – on the employee's side – he/she is entitled to rights that he/she cannot waive.

However, under the alleged influence of European Law (Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters), the general mediation procedure, settled by Law no. 192/2006 on *mediation* and organising the profession of mediator, has been extended to individual labour disputes or rights disputes (concerning the conclusion, the performance and the termination of the employment contracts). Besides this general mediation procedure, in the case of rights disputes, an *internal mediation* has to be used in discrimination disputes, according to Law no 202/2002. The internal mediation takes place according to the rules established by the social partners by way of collective agreement. If there is not any collective agreement governing the parties or in the case of small businesses, where there is no trade union representation of the employees, the employer may establish the applicable mediation procedure by way of internal regulation. In addition, *conciliation* (as well as mediation and arbitration) is used in order to resolve collective labour disputes, according to Law n. 62/2011 on social dialogue.

According to the most commonly accepted definition, alternative dispute resolution mechanisms represent out-of-court dispute resolution processes conducted by a neutral third party.[9] An essential criterion of any alternative dispute resolution mechanism is, whether it is compulsory or voluntary. "In other words, whether such mechanisms are imposed as a requirement prior to turning to the courts of justice and whether this requirement has been established by autonomous agreement (through collective agreement or otherwise) or by other means (primarily, national legislation)"[10]. Several types of ADR may be emphasized and the most common distinction is drawn between 'judicial ADR' and 'non-judicial ADR'.

Judicial ADRs are conducted by the court or entrusted by the court to a third party ('ADRs in the context of judicial proceedings').[11] According to the Romanian Code of Civil Procedure, the judge has to try to reconcile the conflicting positions of the parties under an individual labour dispute. In

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8 However, labour disputes are solved much faster than civil or commercial disputes.

9 *Green Paper on ADR*, p. 6. The European Commission excludes, therefore, from the scope of alternative dispute resolution (ADR) mechanisms: *expert opinions*, which are not a method of dispute resolution, but a procedure involving recourse to an expert in support of a judicial or arbitration procedure; *complaint handling systems* made available to consumers by professionals, as such procedures are not conducted by third parties, but by one of the parties to the dispute and *automated negotiation systems*, which do not involve any human intervention, are offered by providers of IT services (basically, they are technical instruments designed to facilitate direct negotiations between the parties to the dispute). The European Commission also excludes arbitration, as it is considered to be closer to a quasi-judicial procedure than to an ADR mechanism (see also: I. Deleanu: Medierea în procesul civil. *Dreptul*, 2006/10. 73.; C. Leaua: Metodele alternative de soluţionare a disputelor (ADR), cu privire specială asupra medierii. *Dreptul,* 2006/3. 120.

10 Ricardo Rodríguez (coord.) – Fernando Valdés Dal-Re – Rob Jagtenberg – Annie de Roo – José María Miranda – Jean Michel Servais: *Study on out-of-court settlement mechanisms in transnational labour disputes.* Final Study Report, DG Employment, Social Affairs and Inclusion, p. 7.

11 *Green Paper on ADR*, p. 6.

addition, in Romania, judges are entitled to advise parties, prior to the hearing, to solve the dispute themselves or to have recourse to a certified mediator.[12]

'Non-judicial ADRs' are used by the parties to a dispute through an out-of-court procedure, involving the appointment of a private, certified mediator. The New Code of Civil Procedure provides for the parties' possibility to solve their dispute through mediation. In Romania, parties are entitled to have recourse to non-judicial ADRs: before the claim has been made; before a court hearing[13] is fixed; or during the court hearing, but before a judicial decision is rendered.

The main regulation establishing alternative labour dispute resolution mechanisms is Law no. 62 on social dialogue[14] adopted on 10 May 2011, but it only sets alternative dispute resolution mechanisms *for collective disputes*. ADRs represent an important way of dispute settlement in industrial relations in all the Member States. In addition, we have to emphasize the role of the social partners in solving disputes. In Romania, besides the mandatory conciliation of collective disputes, the social partners have organised themselves, before the entry into force of Law no. 62 of 2011, the mediation and arbitration of collective disputes. In addition, the social partners, usually under the terms of sectoral collective agreements, but also in group of undertakings or company level collective agreements, set up permanent *conciliation committees* to which disputes concerning the performance, modification, suspension or termination of collective agreements are referred to.

Briefly, for labour disputes, the Romanian legislation settles several alternative dispute resolution mechanisms: *conciliation* (prerequisite and compulsory mechanism in collective labour disputes), *mediation* and *arbitration* (mainly as voluntary mechanisms for collective labour disputes); respectively *mediation of individual labour disputes*. The Romanian law recognizes two types of labour disputes: 'individual labour disputes' (disputes over existing rights, on the interpretation and application of contractual or regulatory provisions) and 'collective labour disputes', strictly related to the collective bargaining process[15] (on the adoption, interpretation, modification or performance of the collective agreement).

However, there is a certain inconsistency in the definition of different types of ADR, if we take into consideration the role of the third party. 'Mediation' has different meanings in Romania and it is organised according to different procedures, depending on the type of dispute. The general ('standard') mediation procedure of individual labour disputes (concerning conclusion, performance and termina-

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12 This is also the case in Spain, Italy and Sweden. However, there isn't any Romanian regulation concerning a special category of judges, principally concerned with mediation (such as the 'justice of peace' in Italy or in Greece).

13 The narrow definition of ADR is "the use of third parties engaging in conciliation, mediation and arbitration prior to a court hearing" – *Individual disputes at the workplace: Alternative disputes resolution*, p. 1.

14 Law no. 62 of 2011 – Legea dialogului social – was published in the *Romanian Official Gazette* No. 322 of 10 May 2011 and has repealed the former Law no. 168 of 1999 regarding the settlement of labour disputes.

15 A study financed by the European Commission in 2003 (the study can be consulted at: http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=214) showed that dispute resolution is a central feature of the industrial relations environment of 15 Member States; the study did not address the situation of the 12 acceding Member States regarding alternative dispute resolution in labour disputes).

tion of employment contracts), involving a certified third party is closer to the traditional definition of conciliation, as the third party is not entitled to provide possible solutions[16].

For discrimination cases, mediation is a purely conventional ADR, organised according to the general provisions of contract law and to the procedure established by the social parties in the applicable collective agreement or by the employer, in the internal regulation[17]. On the other hand, mediation of collective disputes, entirely regulated by the social partners before the entry into force of Law no. 62 of 2011 on social dialogue, has empowered the mediator – mutually chosen by the parties – to provide them with possible solutions, which they may have voluntarily accepted or rejected.

The most commonly-used alternative dispute resolution mechanisms (mediation, conciliation and arbitration) are voluntary in most European countries and compulsory attempts at solving labour-related disputes seem to be linked to avoiding collective industrial action[18]. Compulsory mediation, conciliation and arbitration are not very widespread in collective labour disputes, and even less so in individual disputes.[19] On the other hand, voluntary ADR mechanisms regard both the decision to have recourse to them and the acceptance of the outcome.

From this point of view, Romania seems to be out of the trend, with two compulsory alternative dispute resolution mechanisms: conciliation for collective labour disputes[20] and mediation of individual labour disputes (in the sense that, before turning to court, the parties must have met in front of a mediator in order to be informed of the advantages of mediation).

2. The scope of labour dispute mediation in Romania

In order to better define the scope of mediation in the specific field of labour disputes, we shall start with the national legal definition of the labour dispute (1), to continue with some procedural aspects of mediation (2).

In Romania, there is a legal definition both for individual and collective labour disputes.[21] According to Article 231 of the amended Labour Code[22], labour dispute is the conflict between the employer and

16 Deleanu (2006) op. cit. 68.; Al. Ţiclea: Medierea conflictelor de drepturi. *Revista rom*ână de *dreptul muncii*, 2010/3. 15.; A. Băbeanu: Medierea în dreptul muncii. *Revista română de dreptul muncii,* 2008/5. 113.

17 M. Gheorghe: Medierea conflictelor de drepturi. *Revista română de dreptul muncii*, 2010/6. 20.

18 There is a very different use of ADR mechanisms: some countries use both 'judicial' and 'non-judicial' ADR (Ireland, Italy, Luxembourg and the United Kingdom); other countries have a long tradition in the use of non-judicial ADR, relying on the social partners through collective agreements and/or works councils (Austria, Denmark, Germany and Sweden), therefore, the use of judicial ADR is very limited. In certain countries, bipartite conciliation commissions, sometimes called Labour Disputes Commissions, are used (Estonia, Latvia, Lithuania and Poland) –, *Individual disputes at the workplace: Alternative disputes resolution,* p. 2.

19 Rodríguez op. cit. 7.

20 The main regulation establishing alternative labour dispute resolution mechanisms is Law no. 62/2011 on social dialogue, adopted on 10 May 2011 (published in the Romanian Official Gazette No. 322 of 10 May 2011). This law sets ADR mechanisms *only for collective disputes* and has repealed the former Law no. 168 of 1999 regarding the settlement of labour disputes.

21 Individual and collective labour disputes' definition is provided by two different laws: the Labour Code – Law No. 53/2003 – and Law No. 62/2011 on social dialogue.

22 The Romanian Labour Code has been amended in 2011 and republished in May 2011.

the employees, concerning interests of economic, professional or social nature or rights arising out of an employment relationship. This definition distinguishes the interest dispute (arising in the context of collective bargaining, strictly linked to economic, professional or social interests) and rights dispute (arising when existing rights – statutory rights or rights settled by collective agreement – are not respected).[23] The performance or non-performance of an existing employment contract or collective agreement represents an individual labour dispute (rights dispute).[24]

Law No. 62 of 2011 on social dialogue also provides definitions for both types of disputes. The collective labour dispute is the one between employees and employer, strictly related to the collective bargaining process (either linked to the fact that the employer does not initiate the collective bargaining process or is refusing to negotiate, or to the problems arising in the course of collective bargaining linked to the inability to reach an agreement, where a collective agreement does not exist or is being renegotiated).

According to the same law, the individual labour dispute is related to the exercise of certain rights or the fulfilment of obligations arising out of legal provisions, collective agreements or employment contracts. All labour disputes concerning the conclusion, performance, amendment, suspension and termination of an employment contract, including unfair dismissal, are individual disputes. There are also legally considered individual disputes concerning compensations in case of liability for damages caused by the non-performance of the employment contract, as well as disputes over void clauses or void contracts. As a general rule, a labour dispute always concerns a right or an interest related to an employment relationship, arising out of the employment contract, collective agreement or collective bargaining process.

3. Labour dispute mediation: procedural aspects

All the 'non-judicial' alternative dispute resolution mechanisms involve a neutral third party. The main difference consists in the extent to which this third party can interfere with the negotiations between the parties to the dispute. The third party might be empowered to take a decision that is binding for the parties or to make a recommendation that the parties might follow or not.[25] In other ADR procedures, the third party is not entitled to adopt a formal position on the ways of resolving the dispute, but his/her role is limited to helping the parties to reach an agreement.

As a general rule, the powers recognised to the third, neutral party make the difference between conciliation and mediation. Usually, the conciliator acts only as a facilitator; he has the limited role

23 According to the ILO definition, a *rights dispute* arises where there is disagreement over the implementation or interpretation of statutory rights, or the rights set out in an existing collective agreement. By contrast, an *interest dispute* concerns cases where there is disagreement over the determination of rights and obligations, or the modification of those already in existence. Interest disputes typically arise in the context of collective bargaining where a collective agreement does not exist or is being renegotiated.

24 Before its amendment, in 2011, the Labour Code provided different definitions for interest disputes and rights disputes.

25 *Green Paper on ADR*, p. 7.; Deleanu op. cit. 69.; Băbeanu op. cit. 113.

of maintaining the two-way flow of information between the conflicting parties. The conciliator encourages reconciliation between the antagonistic positions of the parties and helps them find their own solution. On the other hand, mediation is a procedure by which conflicting parties are provided with possible solutions by a neutral third party, the mediator, and they may voluntarily accept or reject any of the solutions offered.[26] Thus, the difference between these mechanisms is given by the powers recognised to the third, neutral party. He/she can be 'empowered' by the law or by the parties, who establish the boundaries of his actions.

In Romania, for individual labour disputes, mediation is understood as a procedure by which the mediator helps people under dispute to reach an agreement.[27] Even if it is called 'mediation', the mechanism is similar to traditional definition of conciliation, whereby the mediator meets the parties, or sometimes reviews written submissions, with a view to help the parties find an acceptable solution.[28] According to Romanian labour law, mediation is the only legally recognised alternative dispute resolution mechanism in the case of individual labour disputes.

The 'standard' mediation procedure is established by law. Traditionally, individual labour disputes, concerning alleged violations of the rights arising out of an employment contract, were brought before the competent court, a specialized tribunal. In rare cases, the parties are legally obliged to turn to a conciliator (before declaring a strike) or to a mediator (in the case of gender discrimination, before going to court[29]).

In an attempt to increase the use of ADR mechanisms, several measures have been taken in Romania during the last years concerning mediation of individual labour disputes, which were hotly contested. At a certain moment, the Romanian legislator imposed a mandatory step in certain types of trials, including the mediation of individual labour disputes, in the sense that before making a claim to the appropriate court, the parties were to meet with a mediator in order to be informed of the advantages of mediation.[30] This obligation did not result in a substantial increase in the number of disputes solved through mediation, but it raised a lot of criticism on behalf of lawyers and civil society. The Romanian Constitutional Court has ruled in the sense that this requirement violates the fundamental right of access to court,[31] guaranteed by the Constitution and the European Convention on Human Rights. As a result, mediation is now an entirely voluntary procedure.

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26 *Individual disputes at the workplace: Alternative disputes resolution*, p. 1.

27 Ţiclea (2010) op. cit. 11.

28 The second type of mediation, 'relational mediation', based on the principles of collaborative problem-solving, with the focus on the future and rebuilding relationships, is not legally acknowledged as such in Romania, but it might be useful in cases of discrimination.

29 This obligation is provided by Law n° 202/2002.

30 There is a general lack of statistical data concerning mediation and the number of cases that were solved by using an alternative dispute resolution mechanism. The existing data concern only criminal cases: in 2015, out of 644.391 cases solved by the relevant authority, in 103 cases the parties have tried to solve the dispute by having recourse to mediation, but they have reached an agreement only in 62 cases. During the first semester of 2016, out of 298.131 cases solved by the relevant authority, in 49 cases the parties have tried to solve the dispute by having recourse to mediation but they have reached an agreement only in 31 cases.

31 ADRs were seen as an integral part of the policies aimed at improving access to justice: "access to justice is an obligation which is met by the Member States through the provision of swift and inexpensive legal proceedings" – *Green Paper on ADR*, p. 8. However,

3.1 Collective labour dispute mediation

Mediation of collective labour disputes is not often used in Romania, but it is much less controversial than individual labour dispute mediation. According to the law, for collective labour disputes (concerning the fact that the employer does not initiate the collective bargaining process or is refusing to negotiate, or to the problems arising in the course of collective bargaining linked to the inability to reach an agreement, when a collective agreement does not exist or is being renegotiated), mediation is a voluntary mechanism.[32] The mechanism is deemed to involve an *Office of Collective Labour Disputes Mediation and Arbitration*. The structure and the functioning of this office were supposed to be settled within 90 days after the entry into force of Law no. 62 of 2011 on social dialogue. This Office was supposed to create a body of mediators and arbitrators and should have adopted the mediation and arbitration procedures, but so far it has not been created[33].

Previously, the collective labour disputes' mediation procedure was entirely negotiated and established by the National (Inter-Sectoral) Collective Agreement.[34] If both parties accepted to have recourse to mediation, they met within 48 hours to choose a mediator from a list appointed by the Ministry of Labour. If they could not agree upon a person at the first meeting, the procedure ended. In the opposite case, they followed the next steps: established the mediator by convenient; in maximum 8 days, he/she had to call both parties under dispute; they were obliged to show the necessary data in 48 hours. The mediation procedure was limited to 30 days.

According to the Romanian legislation concerning collective labour disputes, mediation may be used only after the compulsory *conciliation* procedure.[35] Conciliation involves a third party (officials within the labour administration[36]), always a delegate appointed by the Labour Inspectorate (for company level disputes) or the Ministry of Labour (for group of undertakings or sectoral level disputes). The third-party acts only as a facilitator between the parties to the dispute (a delegation of 2–5 members on the employee/trade union side and a delegation of 2–5 members on the employer side) and encourages reconciliation. The conciliator does not make a judgement, but listens to each side and seeks a solution that both delegations find acceptable.

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according to the recent *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters,* COM(2016) 542 final, p. 9, the imposition of mediation within the framework of a judicial procedure must respect the right of access to the judicial system, guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union.

32 Art. 175–180 of Law no. 62 of 2011 on social dialogue.

33 There is only a draft of a Governmental Decision concerning the *Office of Collective Labour Disputes Mediation and Arbitration* published on the web site of the Romanian Ministry of Labour, but the decision has not been adopted yet.

34 Since 2011, after the entry into force of the Law on social dialogue, the possibility to conclude a National (Inter-Sectoral) Collective Agreement doesn't exist anymore.

35 Art. 166–174 of Law on social dialogue.

36 The labour inspectors acting in the conciliation procedures are civil servants within the Territorial Labour Inspectorates and are not remunerated by the parties involved in conciliation.

The use of conciliation as a mandatory alternative dispute resolution mechanism is enacted only for collective labour disputes. The procedure is free of any charge and the solution accepted by both parties forms a part of the collective agreement. Conciliation is a compulsory mechanism, the parties being precluded from declaring a strike until the conciliation process has been gone through without reaching a satisfactory agreement.

In addition, the social partners, usually under the terms of sectoral collective agreements, set up permanent *conciliation committees* to which disputes concerning the performance, modification, suspension or termination of collective agreements are referred. Alternative dispute resolution mechanism by conciliation committees as a mandatory mechanism may also be found in group of undertakings or company level collective agreements. The structure and the functioning of the conciliation committee are established by the social partners, as this is a procedure which is entirely set up by the parties. Normally, the conciliation committee is formed of an equal number of trade union (federation)'s representatives and employers association's representatives. The parties must bring their dispute regarding the performance or the interpretation of the collective agreement before the conciliation committee (as, for example, it is stipulated in the Romanian hospital and medical services group of undertakings' agreement); the decision of the conciliation committee is binding for both parties and they are precluded from bringing the dispute before the relevant court of justice. In other cases, the conciliation committee has also the power to check the conformity of company level collective agreements with the superior level (group of undertakings or sectoral level) collective agreements (as it is settled, for example, in the sectoral agreement of the water supply services). According to several sectoral or group of undertakings' collective agreements, the conciliation committee also plays an important role in the process of mutual information and consultation of the social parties.

In most of the cases, if a decision of the conciliation committee was issued, this precludes the parties to bring the dispute before the relevant courts of justice or, if the judicial procedure was initiated, it ends, as the decision of the conciliation committee is binding for both parties. However, if this amicable dispute resolution mechanism by conciliation committees fails, and no decision is issued, the parties are not precluded to bring the dispute before the courts of justice.

3.2 Individual labour dispute mediation

There is no specific regulation on mediation of individual labour disputes in Romania.[37] Since the 15th February 2013, the general mediation procedure, settled by Law no. 192 of 2006 on mediation and organising the profession of mediator, has been extended to individual labour disputes. Previously,

[37] The general frame is settled by the Law no. 192 of 2006, settling the mediation procedure, the legal requirements in order to be appointed as mediator etc.

mediation of this type of disputes was only mentioned by the law on social dialogue and was admitted only for those rights the parties could dispose of.

Mediation is legally conceived as an entirely voluntary and informal alternative dispute resolution mechanism, in the sense that the parties are free to organize the mediation process. The voluntary nature of mediation has been preserved, but a law adopted in December 2012[38] introduced a legal obligation of the parties to attend a meeting with a mediator, in order to be informed of the benefits of mediation. Starting with 15th February 2013 (the date of entry into force of the New Code of Civil Procedure), the parties must have respected this obligation before referral to courts, under an exorbitant sanction: the inadmissibility of the request.[39] The only authorized person to inform the parties of the advantages of mediation was the mediator and the procedure was not free of charge. Mediators have seen this legislative change as a success, as it was aimed to achieve what they were unable to do: to 'advertise' this alternative dispute resolution mechanism and its benefits. In reality, this measure represented the first step of the burial of labour disputes mediation.[40]

A few days later, the applicability of this radical penalty has been postponed until 15th August 2013. Until this date, in case of infringement of the obligation to attend such a meeting, the judge should have granted the parties additional time to comply with this obligation. After August 15th, if the preliminary procedure was not followed, the sanction provided by law was the inadmissibility of the request. This obligation has been hotly contested by lawyers and, in June 2013 a first step was made, as a legislative act[41] established that judges, attorneys and public notaries are also authorized to inform the parties about the benefits of mediation. In addition, according to the same legislative act, the information meeting is free of charge.

Finally, the obligation to attend the meeting to be informed of the advantages of mediation was ascertained as unconstitutional by the decision of the Constitutional Court in 2014.[42] According to the Court, this obligation violates the constitutionally guaranteed fundamental right of access to court, and it is useless, because of the presumed knowledge of the law (thus, the Court applied the principle of 'prohibition of ignorance of the law').

After this long series of legislative changes, mediation of individual labour disputes has become (once more) an optional procedure, alternative and informal. Any natural or legal person has the right to solve the disputes through mediation in the context or outside the court settlement system.

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38 Emergency Ordinance of the Government (OUG) no. 90 of 2012, published in the Official Gazette No. 878 of 21th December 2012.

39 I. Leș: Sancțiunile aplicabile în cazul neparticipării părților la ședința de informare asupra avantajelor medierii, potrivit Noului Cod de Procedură Civilă și recentelor modificări ale Legii nr. 192/2006 privind medierea și organizarea profesiei de mediator. *Dreptul*, 2013/6. 13.

40 Given the voluntary nature of mediation, if it is rendered compulsory, it would lose its attractiveness compared to court proceedings – COM92016) 542 final p. 8

41 Emergency Ordinance of the Government no. 4 of 2013, published in the Official Gazette No. 68 of 11th January 2013.

42 Decision of the Constitutional Court no. 266 of 2014, published in the Official Gazette no. 464 of 25 June 2014.

Mediation is based on the free consent of the involved parties, who may try to settle the existing dispute before or after bringing the case to court.

The general rule is that parties are free to have recourse to mediation, to decide which person will be in charge of the proceedings, to decide whether to take part in person or to be represented and, finally, to decide on the outcome of mediation. There is no preliminary step required prior to starting this procedure (such as turning to labour inspection or a court of justice). Mediators are independent professionals[43], independent of the parties to the dispute or of the labour administration. According to the law, certified or specialised mediators appointed by the Mediation Council[44] can solve only *individual labour disputes*. They do not have the right to establish a decision, neither to check the legality of the decision taken by the parties, but only to help the parties reach an agreement.

The parties under dispute can present together in front of the mediator. In case that only one party presents in front of the mediator, the mediator shall, on the request of that party, send a written invitation to the other party to inform upon and invite him/her to accept the mediation of the dispute, indicating a maximum fifteen-day period to respond. The invitation shall be sent using any delivery means likely to confirm the receipt of the text.[45] The applicant party shall provide the mediator all the necessary information needed to contact the other party. In case of impossibility for one of the parties to come in front of the mediator when invited, the mediator, on the request of the other party, can decide on a new deadline to inform upon and allow the other party to accept the mediation. In case that mediation is accepted, the parties under dispute shall sign a contract with the mediator.

If one of the parties gives explicit written refusal for mediation or does not respond to the sent invitation or fails to present two times in a row in front of the mediator at the stated deadlines for signing the mediation contract, mediation is considered to be unaccepted. The mediator can undertake other legal measures he/she considers necessary to invite the parties for mediation. There is not any incentive to motivate the parties to use mediation: not any financial incentives[46]; reductions or full reimbursement of the fees and costs of the court proceedings is not applicable, as court proceedings in labour disputes are free.

Mediation relies on cooperation and on the use, by a mediator, of specific methods and techniques, based on communication and negotiation. In case that the dispute presents difficult or controversial aspects, related to other specialised fields, the mediator may, with the consent of the parties, ask for the opinion of an external specialist.

In case the dispute has already been submitted to a court of justice, its settlement by mediation is possible at the initiative of the involved parties or on the recommendation of the court. Judicial or

43 There is a stable body of mediators; they are professional and independent.

44 The *Mediation Council (Consiliul de mediere)* is an autonomous body of public interest, created at national level by Law no. 192 of 2006 on mediation and organizing the mediator profession. Unlike Denmark or Ireland, in Romania there isn't any service responsible for ADRs in the employment relationship.

45 Țiclea (2010) op. cit. 15.

46 COM (2016) 542 final, p. 8.

arbitral institutions must inform the parties of the possibility and advantages of mediation[47], but this must be accepted by the parties and it may only concern rights they can legally dispose of.

Mediation may deal with the total or partial settlement of the concerned dispute. After closing the mediation procedure, the mediator is bound to inform the court in writing, whether the parties have reached an agreement or not. In order to conduct the mediation procedure, the hearing of the civil cases (including labour disputes) by the courts or arbitral institutions shall be suspended, as well as the out-of-date deadline (the limitation periods for the seizing of the courts), but mediation cannot exceed three months from the signature of the mediation contract.

When closing the procedure, the mediator draws up a Minutes of proceedings (a mediation minute), signed by the mediator and by the parties, in person or by their representatives, and handle an original copy to the parties. If an agreement is reached, a *written document may be formulated*, including all the clauses the parties have agreed on and which shall have the power of a written document under private signature.[48] Usually, the written agreement is formulated by the mediator, except for the situations, when both parties and the mediator agree otherwise. This agreement shall not include provisions likely to affect the laws and the public order, as mediation is allowed only concerning the rights the parties can dispose of. The written agreement may be subject to notary public authentication or to approval by the competent court of justice. This is the case, when there are formal legal requirements, otherwise the agreement is void.

If the dispute has already been submitted to a court of justice, the judge takes note of the parties' agreement and renders a judgement called 'expedient decision', in accordance to the parties' will. The expedient decision is an enforceable title and the solution set in written must be respected by the parties under dispute. However, the judge has to check, whether the agreement respects the imperative rules (the laws of public order).

3.3 Relational Mediation

In discrimination cases, the law stipulates the use of Amicable Dispute Resolution[49] and especially of relational mediation[50]. 'Relational mediation', even if not acknowledged as such in the Romanian legislation, is based on the principles of collaborative problem solving, with the focus on the future and

47 According to art. 6 of Law no. 192/2006. Before the public hearing of the case or at any time during the hearing of the case, the judge may advise or invite the parties to solve their disputes through mediation.

48 Ţiclea (2010) op. cit. 16.

49 The acronym 'ADR', used for 'Alternative Dispute Resolution' is often read, in recent years, as 'Amicable' – see the official explanation provided by the International Chamber of Commerce (ICC) in the *ICC ADR Rules*, G. F. Colombo: Alternative Dispute Resolution (ADR) in Italy: European Inspiration and National Problems. *Ritsumeikan Law Review,* No. 29., 2012. 71.

50 *Exempli gratia,* article 2 paragraph 10 b of the Governmental Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination.

rebuilding relationships. This type of mediation is in line with the theory of contemporary ADR[51], as "being something more refined than a mere patch for the deficiencies of the national court system"[52].

As mentioned above, besides the general mediation procedure applicable in the case of rights disputes, an *internal mediation* has to be used in discrimination disputes[53], according to Law no 202/2002. Internal mediation takes place according to the rules established by the social partners by way of collective agreement. If there is not any collective agreement governing the parties or in the case of small businesses, where there is no trade union representation of the employees, the employer may establish the applicable mediation procedure by way of internal regulation. This type of mediation does not necessarily involve a certified mediator[54]. However, in such cases, the social partners, in the collective agreement, or the parties to the dispute might agree to follow the 'standard' mediation procedure, as regulated by Law no. 192 of 2006[55].

Besides discrimination cases, the employer might settle the use of relational mediation (by way of 'in-company procedures') in other types of disputes, except for those that have to involve a certified mediator, according to the 'standard' mediation procedure.

The essential feature of mediation in discrimination disputes is the fact that it focuses on rebuilding the relationship between the parties, given the fact that, often, they are involved in an ongoing employment relationship. Thus, relational mediation is particularly suited for dealing with disputes, where the applicant is still an employee.

4. The limits of individual labour mediation as an alternative dispute resolution mechanism

There are undeniable advantages of mediation (1). Among these, it allows a better access to justice and a quick and economic out-of–court solution, without having to endure the 'emotional cost' of litigation. However, mediation of individual labour disputes has some limitations and, in the particular case of employees, with respect to the judicial settlement of disputes, some disadvantages (2). Among them, we can highlight the fact that the legal rights of employees, which, according to the law, are non-negotiable statutory rights, become essentially at the will of the parties in the mediation procedure. From this point of view, the employee is much less protected than in judicial proceedings.

According to current Romanian law, mediation is possible in all individual labour disputes (concerning the conclusion, performance and termination of an employment contract). At the same

51 Conceptually conceived by the 'School of Harvard".

52 Colombo op. cit. 71.

53 It is also the case in Finland, relational mediation being considered particularly suitable for dealing with cases of workplace bullying and in the UK, for accusations of bullying, harassment and the breakdown of interpersonal relationships (*Individual disputes at the workplace: Alternative disputes resolution*, p. 7)

54 Ş. Beligrădeanu: Corelaţii între Legea nr. 196/2006 privind medierea şi organizarea profesiei de mediator şi dreptul muncii. *Dreptul,* 2006/10. 87.; Gheorghe (2010) op. cit. 19.

55 Gheorghe (2010) op. cit. 20.

time, the Romanian Labour Code forbids employees to waive their statutory rights, therefore, any transaction designed to waive or to abridge such rights is null and void.

The Romanian Labour Code prescribes the following fundamental employee rights: right to a wage for the activity carried out; to daily and weekly rest; to annual leave; to equal opportunities and treatment; to dignity at work; to health and safety at work; to access to vocational training; to information and consultation; to participate to the establishment and improvement of the working conditions and working environment; to protection in case of dismissal. These rights are considered to be of public policy and the parties cannot dispose of; their minimum legally set level has to be respected in any circumstance; they cannot be subject to any transaction or mediation. From this point of view, the parties' obligation to attend a meeting to be informed about the advantages of mediation was completely useless. In addition, this obligation has caused in reality longer and more expensive procedures. The costs of this meeting were paid by the applicant – usually the employee –, who bore the risk of its application being rejected as inadmissible in case of breach of this obligation.

Yet, we must underline the fact, that in work-related disputes, mediation might play an important role. Employees and employers could use this mechanism in those cases, when the affected rights are superior to the minimum compulsory level set by the law. Employees' minimal legal rights – such as working hours, minimal wage, health and safety – are considered to be non-negotiable rights of public policy. For example, an employee cannot waive his/her right to a wage, but in case of delay in his payment by the employer, through mediation, both parties could validly reach an agreement to wage payment in several instalments. In the case of such an agreement, the acceptance without reserves of a part of the wage or the signature of the payment documents in such situation may not be understood[56] as the employee waiving the full wage rights due, according to the legal or contractual provisions. As a result, the acceptance by the employee of a part of the wage during the mediation procedure doesn't stop him to claim the difference before the specialised labour court.

As a conclusion, there is a limit of mediation as to the minimal level of employees' rights, because of the fact that they are non-negotiable rights of public policy[57]. If this limit is respected, individual labour disputes, that could be solved through mediation, might concern almost every kind of breaches of the employment relationship (liability for total or partial non-performance of the contract; modification, suspension or some aspects of termination of the employment contract; void clauses or contracts), with some exceptions: unfair disciplinary dismissal and disciplinary sanctions must be brought before the specialised court. The main argument for this exception is contained in the provisions of Article 252, paragraph 5 of the Romanian Labour Code, according to which the disciplinary

56 According to Article 170 of the Romanian Labour Code.

57 Given this feature. labour disputes are very little compatible with equitable solutions – S. Amrani Mekki: La Médiation en droit du travail. COMPTRASEC / WPS/2013/5. 5.

sanction may be brought by the employee before the specialized labour courts within 30 or 45 days from the notification of the written decision, depending on the grounds of dismissal.

As a general rule, mediation is considered to be inappropriate for the resolution of disputes generated by unfair practises in the employment relationship or related to the mutual recognition by the social partners, as well as for disputes generated by disciplinary sanctions[58].

Given the nature of employees' rights, despite the legal obligation to be informed of the benefits of mediation, this is not really used in the settlement of labour disputes. Mediation still has to be 'advertised' in order to be more easily accepted. Moreover, according to a decision of the Romanian Constitutional Court, the obligation to attend a meeting to be informed about the benefits of mediation has been declared contrary to the Romanian Constitution, as it violates the right of access to court, constitutionally guaranteed. Under these circumstances, it is highly unlikely that any law would 'transform' mediation in a legally binding procedure, that would contradict the very nature of mediation.

4.1 The advantages of alternative dispute resolution mechanisms in labour disputes

There are undeniable advantages of alternative dispute resolution mechanisms compared to judicial settlement in labour disputes. First, mediation is much faster than the judicial procedure. For the moment being, judicial settlement of labour disputes takes more than 18 months, while mediation cannot last for more than 3 months. Another advantage lies in the confidentiality of the proceedings and, for the employer, in the absence of negative publicity eventually generated by the public hearings.

The main advantage of such mechanisms lies in their flexibility, for example mediation meetings may be established according to the parties' will. Flexibility is a key feature of mediation in organizing the procedure itself, but also from the point of view of its outcome, the solution agreed at the end of the procedure. In addition, the parties do not have to endure the 'emotional cost' of litigation. From this point of view, the alternative means of dispute resolution provide better access to justice and an economical and quick solution. In cases, when the parties have settled themselves the requirement to try to find a solution of their dispute through an alternative dispute resolution mechanism and have established the procedure, the steps to be followed and the prerogatives of the third party, the solution that they might reach is more easily accepted, as it is the outcome of the parties' will and negotiation[59]. However, such a negotiated procedure requires some experience and, most often, a longer cooperation between the parties, as well as real bargaining powers. This is particularly the case, when collective labour disputes occur, trade unions being one of the most important actors involved in their resolution.

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58 International Labour Organization: *La conciliation dans les conflits du travail. Guide pratique.* Bureau International du Travail Genève, 1998. 113.

59 This is the case of the Scandinavian countries and the Netherlands, where the system of collective bargaining is responsible for establishing the requirements and scope of mandatory ADR mechanisms.

Mediation is closer to employees also from a geographical point of view, for the place of mediation may be established by agreement, while the courts are organized at departmental level. Alternative dispute resolution mechanisms can lead to a faster, mutually agreed solution. From this perspective, access to justice is facilitated. But in the specific case of employees, does it necessarily mean access to social justice? An answer to this question could be given after analyzing the disadvantages of alternative dispute resolution mechanisms for labour disputes settlement.

4.2 Disadvantages of alternative dispute resolution mechanisms in labour disputes

As we have seen above, given the nature of employees' rights, mediation has a limited scope in the case of individual labour disputes. Among the disadvantages, the enforceability of the mediation agreement represents the main disadvantage. If the mediation agreement is not executed voluntarily, authentication of notary or the approval of the court is necessary in order to render it enforceable.

Another important problem is represented by the minimum guarantees offered to the parties, such as effectiveness and respect for the law, especially for the employees' minimal level of statutory rights. The solution both parties might find acceptable does not necessarily reflect the legal provisions in the field, but the parties' agreement. In exercising its powers, the mediator has no decision-making power with regard to the content of the agreement, but it can direct the parties to verify the legality of the agreement by subjecting it to the authentication by a notary public or the approval by the relevant court of justice. One of the main problems and objection against the use of mediation in this type of disputes is the lack of specific protection of employees' rights. In court proceedings, the judge keeps a close protection of the employees' rights, the judicial decision always taking in consideration the non-negotiable rights of public policy concern. In Romania, there are specialised courts for labour disputes and a particular, free and less lengthy procedure. The judicial procedure is free of charge, urgent under the law – which is not always the case in practice[60] – and involves two legal assistants representing the social partners.

The mediator is not a law specialist and even less a labour law specialist. Any person having full civil capacity, holding a high education diploma, with at least three years of working experience of and having followed a specialised training can be appointed as a mediator by the Mediation Council. The solution accepted by both parties does not necessarily protect the weaker party, which is usually the employee. There is not any public administration or a labour authority authorised to supervise the procedure or the legal aspects concerning the parties' agreement, nor legal rules to encourage the actors involved in mediation to boost third-party control. The intervention of the notary public authentication or the approval of the court is necessary in order to insure the enforceability of the title. The notary public has no jurisdiction to examine the legality of the decision taken, except on the

[60] Anyway, labour disputes are solved faster than civil or commercial disputes.

request of the parties. Thus, the non-negotiable rights of public policy concern are basically at the good will of the parties. In this context, the employee is much less protected than in a judicial procedure.

In the judicial systems, an additional important protection is given by the fact that trade unions are entitled to represent employees before any court. Thus, employees do not have to personally bear the 'emotional cost' of their dispute and can be represented throughout the judicial procedure. On the contrary, there is no legal recognition of such representation rights in front of the mediator, therefore, employees loose the protection of an important, specialised and experienced actor.

While mediation could be particularly useful in disputes, where the worker is still in employment, if the breach of contract is analysed mainly from the point of view of the compensations to which the aggrieved party is entitled, the employee will always have the feeling that through a judicial settlement, he/she would have been better protected and could have obtained higher compensations. Thus, a general obstacle for the mediation of the labour disputes is related to the imbalance of power between the parties.

The cost of mediation is another essential factor that must be taken into account, as it is a service for a fee. The parties to an individual labour dispute are obliged to cover a mediation fee and the expenditures made during the procedure in their interest. In general, the cost is borne equally, while the judicial settlement of a labour dispute is free and the employee has the right to legal aid in order to be assisted in court by a lawyer. In addition, when the information meeting was paid and mandatory, the penalty of the inadmissibility of the claim struck only the applicant – most often the employee - who was required to pay the fees for this prerequisite and mandatory procedure.

5. Conclusions

Has labour dispute mediation been a success or a failure in Romania? It is difficult to give a precise answer, given the lack of official data. Alternative dispute resolution mechanisms, if accepted by the parties under dispute, represent a form of justice that is easier accepted. In an employment relationship, mediation, conciliation and arbitration are voluntary in most European countries. Romania seems to be out of this trend, with mandatory alternative dispute resolution mechanisms. Among such mechanisms, mediation has a recent, yet tumultuous evolution in Romania, being highly promoted, yet rarely used in labour disputes.

The lack of success of individual labour dispute mediation in Romania could be partly explained by the attempts to render it mandatory, attempts that contradict the very nature of ADR, as a completely voluntary mechanism. On the other hand, it could be explained by the lack of 'mediation culture' in Romania. In this context, the fact that mediators strongly advocate in the sense of turning mediation in a mandatory mechanism in specific disputes (including the obligation to attend information sessions on mediation), rather than developing practices aimed at motivating parties to use mediation has

turned out to be a totally wrong strategy. The voluntary nature lies in the heart of mediation: the possibility to reach an agreement, which the parties are most likely to respect is built on the parties' free will to solve their dispute by mutual consent. *Obliging* the parties to a labour dispute to solve it by mutual consent seems to be, from this point of view, an absolute nonsense.

It should be emphasized, as a final remark, that in Romania, despite recent legislative changes, the use of alternative dispute resolution mechanisms for the settlement of individual labour disputes is unusual. First of all, similarly to the Italian case[61], the Romanian legislator was more concerned by the wish to deflate the work amount of judges, rather than to focus on the quality and effectiveness of mediation. This approach was contrary to the purpose of Directive 2008/52/EC, according to which mediation should not be regarded as a 'poorer alternative' to judicial proceedings[62].

Even if it might sound as a paradox, the decrease of confidence in the effectiveness of justice also affects confidence on the abilities of the mediator to reconcile the conflicting interests of the parties. According to a relatively recent study, the social partners would like a clear legal framework for alternative dispute resolution mechanisms, but their vast majority considers, for the moment being, that such mechanisms are adapted to collective disputes and less appropriate for individual labour disputes.

61 Colombo op cit. 79.

62 See recital 19 of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters.