

LEGAL AND INSTITUTIONAL FRAMEWORK OF MEDIATION IN REPUBLIC OF MACEDONIA

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Abstract: Mediation as an alternative dispute resolution enables faster, more efficient and less costly resolution of disputes in relation to the proceedings. Its operation is based on the following principles: voluntary, equality of the parties, neutrality of the mediator, exclusion of the public, efficiency of the procedure, confidentiality of information, fairness. In Macedonia the mediation as an alternative dispute resolution was introduced by the Law on Mediation in 2006. However, besides this law, the resolution of disputes by mediation is regulated by other special laws such as the Family Law Act, Consumer Law, the Juvenile Justice, Law for the peaceful resolution of labor disputes, etc.. For effective functioning of the mediation, except legal regulation of mediation, and established appropriate institutional framework is an important link for a successful mediation. The institutional framework of mediation includes: Ministry of Justice - Sector for Mediation, Board for Mediation, the Mediators Chamber of Macedonia and mediator. All the above institutions have proper function in the system of mediation and their jurisdiction is governed normative-legal. The legal and institutional framework actually consists of mediation system in the country and represent a whole.

Key words: *Law on mediation, Board for mediation, the Mediators Chamber of Republic of Macedonia, mediators.*

Introduction

Citizens in modern societies are faced with the problem of access to justice and trial

within reasonable time. Access to justice and legal protection is considered a fundamental human right, guaranteed by Article 6 of the European Convention on Human Rights. Result, Alternative dispute resolution (ADR) is an integral part of the legislative and policy reforms in all European countries and can lead to faster, cheaper and more efficient resolution of disputes. The problem of access to justice in modern legal systems derived from three primary factors: 1) the number of court cases in all countries is constantly increasing and the courts are overloaded with cases; 2) the procedures are complex and long-lasting; 3) court costs in the proceedings are exceptionally high. Result, ADR is an integral part of the legislative and policy reforms in all European countries and in the Republic of Macedonia and that leads to faster, cheaper and more efficient resolution of disputes.¹

Mediation is an alternative way of resolving disputes (out of court dispute resolution) and means negotiating of the conflicting parties in the presence of a mediator, as a neutral and impartial third person who has no right to rule, but rather helps the parties in the dispute themselves to reach an acceptable

¹ Green paper on alternative dispute resolution in civil and commercial law, Commission of European Community, COM 2002.

agreement. By its nature, the institute mediation in countries with a long tradition and more experience, is a procedure in which governs the principle of the autonomy of the parties.²

The Judicial resolution of disputes, generally is characterized by an adversarial proceeding, impersonality, the lawyer control and the rule of centralized authoritarian orders, while *mediation* is based on the values of modern society, such as respect for the dignity of the person, fairness, justice, reciprocity, individual participation, consent and control of the parties in resolving of their conflicts and others.

The principles on which rests the mediation are: voluntary, confidentiality, informality, equality, the mediator is independent, neutral and impartial.

In this paper we will look at the legal framework of mediation arranged in a number of international legal instruments, and we will also focus on the legal framework in Republic of Macedonia. However, for mediation to function effectively there must be and institutions that will ensure for its development.

1. Legal framework of mediation in the Republic of Macedonia

The legal framework for alternative dispute resolution, in that context mediation consists of Constitution, the Law on Mediation³,

Civil Procedure Law⁴, Law on Consumer Protection⁵, Family Law⁶, Juvenile Justice⁷, Law on international commercial arbitration⁸, and the Law on peaceful resolution of labor disputes⁹.

1.1. Constitution of the Republic of Macedonia

Constitution of the Republic of Macedonia as the highest general legal act in a state is not explicitly talking about alternative ways of resolving disputes, but they implicitly derived from the constitutional right of citizens which guarantees legal protection (Amendment XXI).¹⁰ Hence, the Constitution of the Republic of Macedonia undoubtedly constitutes an important source which guarantees the legal protection of citizens in the resolution of all disputes and conflicts arising in connection with the exercise of the fundamental rights and freedoms of man and citizen. Constitution of the Republic of Macedonia under Article 9 to Article 60 of the normative part establishes and guarantees fundamental human rights and freedoms. The realization of human rights and freedom, alternative ways of resolving conflicts and other disputes, constitute very important forms to achieve them. Each country that pretends to be legitimate as a legal state should establish the legal protection. Pursuant to the provisions of the Constitution, the term legal

² Manojlovic, Ognjenka, Flow of mediation procedure, The Faculty of Law of University of Zagreb, Zagreb, 2005, p. 13

³ Law on Mediation is a separate special law for out of court dispute resolution under the mediation. The law was enacted in 2006 and was published in the "Official Gazette of RM" no.60 / 06. Law on Mediation is revised and amended by the Law revising and amending the Law on Mediation in 2007 and 2009. Amendments of the said law are published in the "Official Gazette of RM" no. 22/2007 and no. 114/2009.

⁴ "Official Gazette of the Republic of Macedonia", no. 79/2005; 110/2008; 83/2009; 116/2010 and 7.11.

⁵ Law on Consumer Protection ("Official Gazette of the Republic of Macedonia ", no. 38/2004, 77/2007, 103/2008 and 24/2011).

⁶ Official Gazette of RM no. 38/04; 33/06 and other novels.

⁷ Official Gazette of the Republic of Macedonia no. 87/07 and 145/10;

⁸ International Trade Law Arbitration of the Republic of Macedonia was adopted in 2006 and published in the Official Gazette. 60/2006.

⁹ Law for the peaceful resolution of labor disputes has been published in the "Official Gazette of RM" no. 11/2012 of 24.1. In 2012.

¹⁰ Official Gazette of RM, No.107 / 05. With Amendment XXI is replaced Article 15 of the Constitution of the Republic of Macedonia with whom is guarantee the right of appeal or other legal protections.

protection, its referred of the legal remedies and legal mechanisms applied in the process of realization of human rights and freedoms. In this sense, the term legal remedies, refers to the various legal means and legal remedies that apply in specific cases and specific situations, which will depend on the particular law and the particular freedom.

1.2. Law on mediation

Basic law that legally regulates mediation in Republic of Macedonia is Law on Mediation¹¹ which is passed on 9.05.2006, and entered into force on 1.11.2006. The law was subsequently modified several times¹², including the intervention of the Constitutional Court¹³. In the adoption and amendment of the Law on Mediation, consideration had been on the achieving compliance with Directive 2008/52 / EC of the European Parliament and of the Council of 21 May 2008, for mediation in civil and commercial disputes. The introduction of the Law on Mediation, led to amendments to the Law on Civil Procedure¹⁴. Because of the dysfunction of the Law on Mediation was approached for adoption of a new law. The new Law on Mediation¹⁵ was adopted in December 2013, which entered into force on 31.12.2013.

Law defines (Article 2) that "*mediation*" means any mediation, regardless of its name, the resolution of dispute in the mediation process in

which the parties to the dispute are allow it to resolve the dispute by negotiation, peacefully using one or more licensed mediators (here and after mediator) to achieve mutually acceptable solution expressed in the form of a written agreement. This applies particularly in proprietary, family, work, trading, consumer, insurance disputes, disputes in the field of education, environmental protection, disputes about discrimination, as other contentious relationship where mediation fits the nature of contentious relations can help to resolve them. Also, the provisions of this Law shall apply in criminal cases, unless in a special law is not excluded its application (Article 1, paragraph 3). The law also defines the principles of mediation, including: *voluntary, equality, neutrality, confidentiality, the excluding the public from mediation, equality of the parties, (un)availability of information on mediation in other procedures, efficiency and fairness.*¹⁶ The law further stipulates the procedure of mediation regulated by Articles 15 to 26.

Something new in the Law represents support of the mediation from the Government of Republic of Macedonia through the adoption of a program for development of mediation, in which are determined the measures and resources that provide support to mediation. The program is made for at least four years. Special programs to support mediation also adopted Judicial Council of the Republic of Macedonia and the Supreme Court of the Republic of Macedonia (article. 27, paragraph 1 and 2). According to Art.28 for development of mediation The State is doing subsidizing of part of the cost of mediation under, legally defined criteria.

The organization of mediators in the Chamber of mediators and its authorities and responsibilities is defined by Law (Article 32 to 45). The law contains also the rules of the mediation procedure, which will be adequately

¹¹ Official Gazette of the Republic of Macedonia ", no. 60/2006; 22/2007 and 114/2009.

¹² Law for Amending the Law on Mediation ("Official Gazette of the Republic of Macedonia ", no. 22/2007) and the Law on Amending the Law on Mediation ("Official Gazette of the Republic of Macedonia ", no. 114/2009).

¹³ Decisions of the Constitutional Court of the Republic of Macedonia: U. No.. 117/2006 from 1.11.2006, published in the "Official Gazette of the Republic of Macedonia ", no. 119/2006 and U. No.. 34/2007 of 06.06.2007, published in the "Official Gazette of the Republic of Macedonia ", no. 77/2007.

¹⁴ Law amending the Law on Civil Procedure ("Official Gazette of the Republic of Macedonia ", No. 116/2008).

¹⁵ Official Gazette of the Republic of Macedonia No. 188/13.

¹⁶ The principles of mediation is regulated in Articles 6 to 14.

considered in this paper. In Chapter VII of the Act are stipulates the conditions for practicing mediator and arbitration and mediation work (article. 46 to 55), mediation exam, The Program for taking the mediator exam, taking the exam, while in Chapter VIII relates to security, monitoring and evaluation of the quality of the work of mediation through a special Board for that purpose. Composition, mandate, scope of work, organization, work and funds for the Committee are governed by Articles 56 to 61.

Based on the Law on Mediation (Official Gazette of RM no. 60/06) are adopted some bylaws, with whom its completed the general legal framework for mediation. They primarily refer to issues related to the profession of mediator and include:

1) Pricelist for reward and compensation of the costs of mediators;¹⁷

2) Rulebook for the manner and procedure of conducting training of mediators;¹⁸

3) Pricelist for reward and compensation of the costs of mediators;¹⁹

4) Rulebook for the training program for mediators and form for finished training for mediator;²⁰

1.3. Law of Civil Procedure

An integral part of the legal framework for the mediation also is the Code of Civil Procedure (Civil Procedure). In Article 272, paragraph 2, imposes an obligation on the court in the cases in which mediation is allowed, along with an invitation to the preparatory hearing, to the parties to be submitted written indication that

the dispute can be resolved through mediation. Also, in the invitation to the parties is submitted a request to state whether they have decided to settle the dispute through mediation (Article 272, paragraph 4). If the parties agree to resolve the dispute through mediation, the court will make a decision to discontinue the procedure. Civil Procedure also, regulates the issue of the court settlement, to which can be reach through mediation. The law gives the possibility the agreement reached through mediation, when litigation is initiated and stopped for mediation to be considered for a court settlement (Article 308 in relation to Article 307, Civil Procedure). The law, also, provides an opportunity before filing the lawsuit, the party that filed the lawsuit to submit a proposal to the other party for settlement (Article 310, Civil Procedure).

1.4. Law on Consumer Protection

The Law on Mediation and the Law on consumer protection are containing provisions that regulate the issues related to the resolution of consumer disputes arising between buyer and seller (merchant). In Article 1, paragraph 2 of the Law on Mediation, predicts mediation of consumer disputes. Thus, in accordance with the Law on the protection of consumers, Consumer Associations (in accordance with Article 128, paragraph 1, line 8) are entitled to mediate between consumers and traders of goods and providers of services, in order to resolve disputes. Such practice exists. The Consumers Organization of Macedonia, as an umbrella organization, through its advisory bureaus within the counseling which are performed in certain way also is doing mediation in resolving disputes. In 2011, OPM has achieved 3.330 counseling.

But even if there was no such provision, as the Law on Consumer Protection provides subsidiary application of the Law of Obligations

¹⁷ Official Gazette of RM No 12/11;

¹⁸ Official Gazette of RM No 12/11;

¹⁹ Official Gazette of RM No 46/08;

²⁰ Official Gazette of RM No 78/06.

(hereinafter ZOO)²¹ in consumer contracts, and accordingly and its principle of peaceful settlement of disputes makes consumer disputes suitable for mediation. Namely, in accordance with Article 2, paragraph 2 of the Law on Consumer Protection, when the law is not otherwise, contracting and other Contracts Act of supply of goods and services shall apply the provisions of the Law of Obligations. In accordance with Article 13 of ZOO, participants in the obligation relations will endeavor to resolve disputes with compliance, mediation or other peaceful means. Hence, mediation as a way of peacefully resolving disputes out can be a mechanism to resolve consumer disputes.

1.5. Mediating family disputes in Macedonia

Given the specifics of marital and parental disputes, in many states, mediation is considered for more appropriate way to resolve family conflicts, as opposed to the standard court procedure.

When it comes to mediation in family disputes, the autonomy of the parties allows the spouses and parents to find a solution that best suits their needs, especially the needs of their children. Resolving marital and family disputes through mediation is much more appropriate than their resolution through litigation. The main reason is the nature of the proceedings, where there are conflicting sides that they entrust their conflict for court to resolve, in which one side is always defeated and the other winner.²² Practice shows that if the court resolves family disputes, especially disputes between parents, their relationship will be permanently impaired, the conflict between them would not be resolved to

the satisfaction of both parents, but will continue to respect the exercise of parental rights and responsibilities. This situation have an extremely negative affect on the children, because they have become "*weapon in the conflict between their parents.*" Despite the involvement of the court in resolving family disputes, mediation provides a collaborative agreement between the parents, and better application of the principle of protection of the rights and interests of the child. Except for keeping and raising children, mediation provides a more flexible approach than litigation to resolve the financial and property issues, especially after the divorce. In this regard, the parties can reach better solutions that suit their specific needs, and provide a deal for the division of joint property, alimony, particularly agreements to preserve the home as a continuous residence of the children, instead selling.

1.6. The Mediation in Juvenile Justice in the Republic of Macedonia

When a juvenile will appear in the role of a perpetrator of a crime, the Law on Juvenile Justice enable conducting of the mediation procedure. Mediation is conducted in accordance with the provisions of the Law on mediation, but because it has specific penalty area, certain aspects of dispute resolution is regulated by the Law on Juvenile Justice. The mediation procedure in *the Law on Juvenile Justice* is contained in Chapter XII (artc.72-78). Mediation in juvenile justice is primarily focused on the future of the juvenile, and not on his sanctions and isolation. In other words, mediation gives a new chance in life for social integration and a new start of the minor. In the process of mediation with minors main actors are the children and the parents.

Referral to mediation. Pursuant to the provisions of the Law on Juvenile Justice, Attorney General and the juvenile judge can

²¹ Law of Obligations ("Official Gazette of the Republic of Macedonia", No. 18/2001, 4/2002, 5/2003, 84/2008, 81/2009 and 161/2009).

²² Dr. D. Micković, Mediation in family disputes in the Republic of Macedonia, The dispute resolved - yes, with mediation. - Skopje: Institute for European Politics (EPI), Skopje, 2013th

assess whether a particular case there are conditions parties to be referred to the mediation. Because mediation is designed for lighter offenses, the parties may be referred to mediation by an application for action which by law is defined as a criminal offense and punishable with imprisonment of up to five years, when for this type of crime a minor is on trial.

In order to start the procedure there must be consent of the involved parties. The consent is given in writing to the prosecutor or the juvenile court within three days from the date of the proposed initiating a mediation procedure. If within the specified period the parties do not submit written consent is considered that the proposal for mediation is not accepted.

In cases where litigation is initiated, and the Public Prosecutor did not instructed the parties to mediation, then the referral to mediation is conducted by a juvenile court, with the prior written consent of the juvenile and his attorney, the counsel and the injured until the main hearing by interrupting the procedure with a decision.

By achieving the consent of the parties to initiate a mediation procedure, then approaches amicable determination of a mediator from the list of mediators in the court for minors. For the common agreement on the selected mediator, the parties shall inform the Public prosecutor or the juvenile court. If the parties do not agree on a mediator, the prosecutor, or the court shall, within three days to appoint a mediator from the list of mediators and notify the parties.

With the act of choosing a mediator can begin the process of mediation, but before it start, the mediator shall inform the parties to the rules, principles and procedural costs. The mediator, in agreement with the parties will determine the timing for mediation, and the

presence of the parties is required²³. The communication with the parties can be together or separately, whereby the information that the mediator receives from any party to the proceedings, may disclose them to the other party, except those for which a party shall determine to be confidential.²⁴ The parties and the mediator unless otherwise agreed may at any time during the proceedings amount their proposals for the agreement that would resolve the dispute.²⁵

The deadline for completion of the mediation procedure is up to maximum 45 days from the submission of a written agreement with the competent authority. If the this period is mediation is not completed, the case is returned to the public prosecutor or the trial continues where stopped.²⁶

2. Institutional framework of mediation in Republic of Macedonia

2.1. Ministry of Justice

The Ministry of Justice also has been responsible for the efficient functioning and development of mediation. The ministry also supervises the work of mediators. Therefore, within this ministry is formed Department ie Division of Supervision of mediators.

Monitoring Unit of the work of the mediators perform the following tasks: preparation of proposals for the adoption of laws, draft laws and proposal on laws and other regulations and general acts in the field of mediators; preparation of reports, opinions, analysis, reviews, information and other materials relating to the work of mediators; preparation of a Program for training of mediators; supervising the work of mediators ex

²³ Art. 76 paragraph 1 and 2 of ZZMP

²⁴ Ibid. Art. 76

²⁵ Ibid, Art. 76

²⁶ Article 74 paragraph 1 of the Law on Juvenile Justice (Official Gazette of RM no. 87/07, No.103 / 08 and 161/08)

officio or upon objection by interested persons; supervising the work of the Chamber of mediators; keeping records of persons who completed training for mediators and others.²⁷

2.2. Board for providing, monitoring and evaluating the quality of the work of mediation

With the new Law on Mediation²⁸ is introduced the institution Board for providing, monitor and evaluate the quality of the work of mediation, whose main task is to monitor the quality of work of mediation.²⁹ The Board has ten members appointed by the Government of Republic of Macedonia on the proposal of authorized bodies.³⁰ The term of the members of the Board is four years and a person cannot be appointed for more than twice in succession.

Based on the principle of independence and expertise, the Board shall: determines whether the conditions for issuance of a certificate of completion of finished training for mediators; forms the basis of questions for the exam for mediators; sets, examinations and how the methods of examination of mediators, organizing and conducting the examination and issue certificates for passing the exam; issued licenses for mediators and trainers of mediators; keep a register of trained mediators, trainers of mediators, determines the methodology and manner of monitoring and evaluating the quality of the work of mediators, trainers of mediators, and implementation of accredited training programs for mediators, monitors and evaluates the quality of the work mediators, trainers of

mediators, in implementation of accredited training programs for mediators and based on the results of periodic evaluation decisions for extension or revocation of licenses or credentials; reviews and decides on complaints from the operation of trainers in mediation, or the implementation of training programs for mediation and perform other duties prescribed by law.

Funds for the Committee are provided from the Budget of the Republic of Macedonia and from their own revenues.

2.3. Mediator

Mediation in Macedonia is regulated profession. The system of organization of the profession is set by the Law on Mediation. In accordance with Article 46 of the Law on Mediation, a mediator can be any legal capable person who holds a license to perform arbitration and mediation work, and mediator license issued to a person who will pass the exam to check the theoretical knowledge and practical skills of mediation (in hereinafter exam mediators) to the Board for ensuring, monitoring and evaluating the quality of the work of mediation (hereinafter the Board) and will present a contract for liability insurance for damages pursuant to Article 24 paragraph (4) of this Act . License issued is valid for five years and the same may be extended or subtracted depending on the results of the evaluation of the quality of the work of the mediator.

The exam mediator can be taken by persons who have submitted to the Board for examination along with proof of:

a) University degree VII/I or 300 credits according to the European Credit Transfer System (ECTS) in the Republic of Macedonia or solution for proper recognition of higher education qualifications obtained abroad issued by the Ministry of Education and Science;

b) training completed by an accredited training program for mediators of at least 70

²⁷ www.mp.gov.mk, open on day 30.08.2014

²⁸ Official Gazette of RM no. 188 of 31.12.2013.

²⁹ Article 56 of the Law on Mediation

³⁰ According to Article 56 of the Law on Mediation, as authorized bodies are determined: Chamber of Mediators, the Judicial Council of the Republic of Macedonia, the Macedonian Bar Association, Inter-University Conference, Chamber of psychologists, Ministry of Justice, Ministry of Labor and Social Policy, Ministry of economy, Chambers of Commerce and the Association of Consumers of RM. All the above organizations and institutions proposed by one member.

hours in Republic of Macedonia or abroad, or a decision to recognize the proper training completed abroad adopted by the Board;

c) at least three year work experience after graduation;

d) sent at least four mediation procedures implemented by the mediator issued a certificate of mediator supported with an extract from the Register recording procedures appropriate for mediation procedures;

e) conducted psychological tests and tests of integrity issued by a licensed professional;

f) certificate of citizenship of the Republic of Macedonia;

g) at least five references from people who know the applicant professionally.

With the exam for mediator is checking knowledge and understanding of the general theory, legal regulations governing mediator activity, process and procedure of mediation and mediation practice, based on written tests, essays and reports. Person under paragraph (1) of this Article shall be obliged to reimburse the cost of the exam.

2.4. Chamber of Mediators

The mediators are organized in the Chamber of mediators, which is a legal entity and is based in Skopje. Bodies of the Chamber are Chamber Assembly (which is the highest governing body made up of all mediators), President, Board of Directors, Supervisory Board and Ethics Council Chamber. Chamber (Board) maintain a Register to record the proceedings for mediation and Directory of Mediators. The Directory of registered mediators is total of 156 mediators. If their qualifications are analyzed, it should be noted that most of them are with legal education and more than half operate in the city of Skopje. The main weakness of the structure of the list of

mediators is the uneven representation of regional mediators.

3. Conclusion

The current legal framework for mediation in Republic of Macedonia provides a solid opportunity in more social spheres to resolve disputes by mediation.

Institutional framework, also provides a good opportunity for efficient operation and faster development of mediation. Board for providing, monitoring and evaluating the quality of the work of mediation should soon be established and begin to work with the aim of providing, monitoring and evaluating the quality of the work of mediation.

The recruitment of new mediators, the mediators Chamber of Republic of Macedonia should take account of regional balanced representation of mediators.

Although the Law on Mediation was adopted eight years ago, a general evaluation of its use is that is far from accomplished its primary goal, which is to facilitate out of court resolution of disputes, they to be resolved in less time and for them to not be allocated more funding. According to the survey *"Perception and attitudes of the mediators for mediation in Republic of Macedonia"*, the total number of mediations conducted with interviewed mediators was only 58, and 1/3 of the total number of mediators is not established contact with a client. Main reasons for the weak effects of the law, lie in the lack of tradition in our environment for mediation, lack of awareness of the professional and the general public about the benefits of mediation, the tendency of citizens "to seek justice in court" lack of coordination of all actors in the mediation process (Chamber of Mediators, the Ministry of Justice, courts, mediators) and others. Increasing the mediators knowledge of justice. As noted, the Directive on mediation requires the mediator competence.

Only good knowledge of the specifics of the resolution will allow the mediator to guide the parties to find an appropriate solution to the dispute. In this regard, should be provided specialized training of mediators and that, moreover, continued training will set as a condition for keeping the status mediator;

In order to increase the use of mediation, one should bear in mind the need for *transparent work* of mediators. The current practice of not having publicly available data is not aimed at gaining public trust.

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