ALTERNATIVE METHODS OF DISPUTE RESOLUTION IN PRIVATE LAW

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Abstract

The present study attempts to take stock of the current position on this question, and to demonstrate that the answer varies depending on the area in which one resorts to ADR (alternative dispute resolution mechanisms). In matters where parties can freely dispose of their rights, the principle of freedom of contract must prevail, save that the procedural purpose of dispute resolution agreements will naturally affect their regime.

Recently, in international arbitration practice are used multi-tiered dispute resolution clauses which provide some preliminary steps of temptation to solve dispute superior to address them to arbitration. These kinds of the clauses are perfectly lawful.

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Alternative dispute resolution methods are expanding. These alternative methods of dispute resolution are pure techniques of amicable settlement of the dispute or even certain judicial modes.

In private law certain alternative ways of litigation are used, such as: conciliation, mediation, transaction and arbitration.

Some alternative methods of dispute resolution are orchestrated by a third party, sometimes having a jurisdictional power that allows it to settle the dispute between the parties, applying the law, otherwise the third party plays the role of reconciler, having the task of reconciling the parties.

These processes have a conventional origin in that their implementation results from the will of the parties, which is formalized by agreement.

In this regard, a first observation must be made. In the event of the informal negotiations take place, it must be admitted that there is no contractual relationship between the parties. On the other hand, if the parties agree to appoint a third party, who is responsible for carrying out a mediation brief, we are in the presence of a contract.

When the parties explore an amicable way of resolving their dispute, it is their task to agree on a procedure to follow.

The provisions regarding the conventional or extrajudicial mediation are contained in the Law on mediation no. 137 of 03.07.2015. Mediation on its own initiative or conventional mediation is made through an agreement whereby the parties undertake to submit to the mediation an existing dispute or one that may arise between the parties regarding a contractual or non-contractual legal relationship (art.2 of the Law).

The mediation agreement or agreement must be differentiated from the mediation contract which is an agreement concluded between the mediator, on the one hand, and the parties in dispute, on the other, by which the mediator commits himself to mediate a dispute according to the procedure established by the provisions of the Law regarding the mediation no. 137 of 03.07.2015.

The mediation contract imposes obligations on the parties. Failure to comply with these obligations exposes their author to the conventional sanctions provided by contract law. However, it should be noted that these sanctions will often be difficult to enforce. The victim of non-execution will have difficulties in justifying the damage suffered as a result of the violation committed by the opposite party. That is why it is insisted on the procedural character of the mediation contract that makes it possible to justify the application of the procedural law, which contributes to strengthening the efficiency of this contract.

Judicial mediation is regulated in Chapter XIII of the Code of Civil Procedure and is initiated on the court's motion. The court establishes an amicable settlement of the dispute in which the parties are informed about the law applicable to the dispute, the length of the proceedings, the possible costs of the case, the possible solution on the case and its effects for the parties to the trial.

The purpose of the amicable settlement hearing is to help the parties communicate, negotiate, identify their interests, evaluate their positions and find mutually satisfactory solutions. The term of judicial mediation may not exceed 45 days from the date on which the first amicable settlement of the dispute was fixed, unless otherwise provided by law.

All discussions or acts made in the process of judicial mediation are confidential.

The agreement of the parties regarding the amicable settlement of the dispute is made by concluding a settlement which is confirmed by the court.

The transaction between the parties is not allowed if it contravenes the law or violates the rights, freedoms and legitimate interests of the person, the interests of the company or the state.

The civil procedure code comes to consolidate the settlement by facilitating the conditions for its execution. Article 1824 of the Code of Civil Procedure provides that the civil procedure is concluded by the effect of the settlement and adds that it is within the jurisdiction of the judge to enforce the settlement of the parties through its confirmation. In this case, each of the two parties will enjoy some kind of privilege before requesting the execution of the settlement.

The transaction is a contract whereby the parties terminate an dispute or prevent an dispute to arise (art. 1331, para. 1, C. civ.).

The settlement constitutes a written contract by which the parties undertake to make mutual concessions in order to resolve disputes that have arisen or which may arise in the future. The parties may also resort to resolving their disputes through the transaction, by inserting a clause to that effect in a contract.

As a special contract, the settlement is subject to a legal regime derogating from the common contract law, especially regarding the flaws of consent.

In principle, regarding the error, the settlements cannot be canceled due to errors of law (art. 1334 para. 2 C. civ).

In this respect, the Civil Code confirms the procedural nature of the settlement and assumes the risks that such a nature implies. Admitting the error of law, that is, an error in the settlement of the dispute settled by transaction would authorize the parties to prove that the claims are unfounded. The exclusion of this error, as a ground for annulment, is therefore intended to prevent discussion of the merits of the dispute after the conclusion of the settlement.

A settlement can be canceled when there is an error on the person or on the subject of the dispute or in cases where there is fraud or violence (art. 1334 para. 1 C. civ).

The out-of-court settlement can be concluded without resorting to mediation and can be confirmed by the courts in accordance with chapter XLV of the Code of Civil Procedure.

The refusal to confirm the settlement can be appealed against (art. 190, para. 3 CPC).

However, these legal provisions do not regulate the extent of the control performed by the court in examining the issue of confirmation (or non-confirmation) of the settlement. In this context, it can be argued that the idea that the judge should be limited to a minimum control has been established. [1]

Arbitration is also an alternative method of dispute resolution in relation to the settlement of disputes by the courts, but unlike other alternative methods of dispute resolution, it is a court that applies the rules of law and makes an award, which has a legal regime similar to that of the court's judgment,

In matters of domestic or international arbitration, the agreement used for the purpose of conducting the arbitration procedure shall be expressed by an arbitration clause or an arbitration agreement. The arbitration clause is generally inserted in a main contract concluded between the parties and aims at resolving future disputes that will arise in relation to the respective contract.

The parties may also draw up an arbitration agreement after the dispute arises. Their contractual freedom is manifested especially in this area. Indeed, in addition to their free choice to settle their dispute through this private justice, the freedom of the parties will be extended as to the mode of arbitration they will select: ad-hoc arbitration or institutional arbitration. in ad-hoc arbitration, the parties benefiting from greater freedom in organizing the arbitration procedure.

In addition, in the international arbitration, the contractual freedom of the parties will also include the free choice of the rules of procedure and of the law applicable to the dispute (1 art. 19 para. 1 and respectively art. 28 para. 1 of the Law on commercial arbitration international 24-XVI from 22.02.2008).

In the case of arbitration, the arbitration decision rendered will have the effect of resolving the dispute and will be vested with a judicial power.

The arbitral decision can acquire enforceable power only through a enforcement application, addressed to the court that would have been competent to examine the civil case in the absence of the arbitration clause (2 -Art.482 paragraph (1) of the Procedural Code). The court seized will, of course review, after which it can refuse to issue the title of enforcement of the arbitral decision if it finds the existence of any legal basis provided in art. 485 of the Code of Civil Procedure.

Recourse to these alternative dispute resolution methods may also be anticipated by the parties to resolve a possible future dispute. For this purpose the parties may use a clause, qualified as a dispute settlement clause introduced in a main agreement / contract.

Such clauses are called multi-level dispute settlement clauses, where the highest level is the settlement of disputes by the courts or arbitration.

These clauses, as in the case of any other valid contractual clauses, will be honored by the parties and applied by the court or the arbitral tribunal.

According to art. 166 (2) h) and art. 167 para. (1) letter (d) of the Code of Civil Procedure in the request for legal proceedings the applicant will include data on the compliance with the procedure for pre-settlement of disputes by extrajudicial means and will attach the supporting documents in this respect, if the procedure is required by law or contract.

The constitutionality of these legal provisions has been challenged at the Constitutional Court for violating a number of constitutional principles, including free access to justice (Article 20 of the Constitution of the Republic of Moldova of July 29, 1994, as amended).

The Constitutional Court rejected the request and stressed that, in view of art. 6 p.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, of November 4, 1950, as subsequently amended, and the case law of the European Court of Human Rights, the right of access to justice cannot be absolute, may imply limitations, including with procedural character, provided that these limitations are reasonable and proportionate to the intended purpose does not affect the substance of the law. [2]

The Constitutional Court also held that the obligation to resort to extrajudicial settlement of disputes is not a limitation of free access to justice, contrary to the Constitution, because the interested party retains the right to size the court to settle the dispute.

Thus, the Court finds that by instituting the pre-litigation procedure, the restriction of free access to justice was not sought, of

which, obviously, the person concerned benefits under the law, but exclusively the establishment of an orderly climate, indispensable, in order to exercise the right. constitutionally stipulated by art.20 of the Constitution, thus preventing abuses and ensuring the protection of the legitimate rights and interests of the other parties.

The Constitutional Court held that the role of the contested procedural rules is to regulate an extrajudicial procedure, which would give the parties the opportunity to agree on the applicant's possible claims, without involving the competent judicial authority. For these major reasons, conditioning the court's referral to the conciliation procedure with the opposing party cannot be qualified as a restriction of the free access to justice, as long as the interested party can submit the request to the court.

The Code of Civil Procedure foresees two possible consequences of the applicant's failure to comply with the pre-litigation procedures:

• the restitution of the request for legal proceedings (art. 170 (1) a) Code of civil procedure);

• removing the request from the role (art. 267 a) Code of civil procedure).

In both cases, the judge issues a reasoned conclusion indicating the obligation of the applicant to comply with the previous stage (s) of dispute resolution before submitting the request for trial (art. 170 (2) and art. 268 (1)) Code of Civil Procedure).

There is no similar regulation in the arbitration procedure, but the arbitral tribunal will have to comply with the multi-level dispute settlement clauses, generally, under the principle of the binding force of the contract (art. 668 Civil Code).

Moreover, the law on arbitration (domestic and international) enshrines the freedom (autonomy) of the parties regarding the conclusion of the arbitration agreement.

The autonomy of will is clearly articulated in art. 4 of the Law on arbitration, which among other "basic principles of arbitration" lists "freedom of arbitration agreements" (art. 4 c) and "constitution of arbitration in accordance with the agreement of the parties" (art. 4 d).

Failure to comply with a mandatory mediation / conciliation clause is a procedural exception and must be invoked before any defense on the merits of the dispute.

With the flow of foreign investments and the use of external and external financing to carry out the infrastructure and other complex projects in the country, standardized forms of contracts are imported and are increasingly employed in the context of the Republic of Moldova. [3]

These standardized forms often contain sophisticated dispute settlement clauses.

Currently, due to the lack of case law regarding the application of the multi-level dispute settlement clauses, we cannot identify what the evolution of arbitration case law is in this area, but we should mention that the beginning of the pre-dispute settlement phases provided by a settlement clause of multilevel disputes, other than mediation, does not suspend the limitation period.

Therefore, if the parties agree on the use of prior procedures, they should consider this aspect to avoid losing the possibility of achieving the subjective right due to the expiry of the limitation period.

Although the law in the field of arbitration does not contain specific provisions regarding multi-level clauses, there are general legal instruments regarding the sanction of non-compliance.

Thus, the arbitral tribunal may be declared incompetent to settle the dispute on the ground that the dispute is arbitrable.

This approach would be particularly plausible if the entire multi-level dispute resolution clause were considered an arbitration clause. [4]

The suspension of the arbitration procedure would be possible only if the arbitration agreement would provide for this possibility, either directly or by reference to the arbitration rules to which the arbitration agreement refers.

Moreover, failure to comply with the pre-litigation stages, in accordance with the multi-level dispute resolution clause before resorting to arbitration, may, in principle, be a reason for the annulment of an arbitration decision under art. 480 (2) e) the civil procedure code if the applicant proves that the arbitration procedure has not been carried out in accordance with the arbitration agreement.

In fact, most alternative dispute resolution methods have been designed as a structured process, capable of resolving a dispute and allowing the parties to reach an agreement. In order to try to obtain the most legitimate result possible, it is therefore logical that alternative methods of dispute resolution should be organized on the basis of a number of main procedural principles. Therefore, both alternative and amicable

dispute resolution methods must take place in accordance with several fundamental procedural safeguards, set out in particular in Article 6 § 1 of the European Convention on Human Rights, concerning a fair trial. This provision provides, in particular, guarantees regarding the qualities expected from the third party involved and for the proper conduct of the alternative dispute resolution.

The third party (the mediator, the arbitrator etc.) must, in particular, be independent and impartial during the exercise of his brief and guarantee the equality of arms between the parties in dispute.

As regards the conduct of the alternative dispute resolution procedure, it must in particular provide a fundamental procedural guarantee: the principle of contradictoriality between the parties.

Of course, the procedure is more flexible, because, the parties that go to an amicable settlement of the dispute do it most often to avoid the procedural constraints that would accompany its judicial settlement.

From a practical point of view, the lack of compliance with the procedural formalities in the alternative dispute resolution is an absolute necessity. On the one hand, because these formalities have not been conceived for a negotiated settlement of the dispute, on the other, because, in any case, a negotiation does not fit well with the procedural rigor.

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