

THE ONLINE COMMUNICATION IN MEDIATION, A SOLUTION IN THE PANDEMIC CRISIS

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Abstract

The paper aims to present the options offered by online communication, in the sense that they can represent a real alternative in the mediation process, given the restrictive measures generated by the existence of a global pandemic state, which has reshaped many human activities, due to the requirements that have to be adapted in order to combat the pandemic. The online mediation variant presented in this paper derives from the other forms of conflict resolution, which accept that the people involved in the dispute are not face to face and can use online communication facilities to solve their conflict at a distance, with the help of a specialist, also called mediator.

Keywords: *online communication, online mediation, pandemic crisis, COVID-19.*

1. INTRODUCTION

The paper represents the author's answer to the question: Can the mediation process can take place outside the office, with the help of some forms of online communication? Perhaps this question would have been considered unnatural under the conditions of a normal life, without the current threat to human health, created by the COVID-19 pandemic, which generated a global crisis, by the extent of contamination and its effects on human activity. In order to combat the effects of the pandemic crisis, all the states of the world have taken firm measures to protect people's health, first imposing home isolation and then proceeding to the application of firm measures of physical and social distance, which led to the suspension of professional activities considered to be risky, where people interacted directly, in the exercise of their activity.

The mediation activity is part of the activities included in the risk category, because due to the specifics of the process, the participants in the mediation process usually sit face to face, in a mediator's office, being supported by the

mediator, with the aim of overcoming a conflict or dispute, in an amicable attempt to avoid a lawsuit. This paper presents the implications of the mediation process outside the mediation office, in which the parties involved in the conflict can communicate using an audio-video connection provided by technology or via the Internet, being assisted in the same way by a mediation professional, called mediator, who will assume the coordination role for the online communication process, aiming to achieve a mediation between the participants, in their attempt to reach a mediation agreement to end their conflict.

2. ADAPTING THE MEDIATION PROCESS TO A DISTANCE COMMUNICATION FORM

We believe that the entire professional activity that normally takes place in a mediator's office can be adapted with real success to a mediation process that can be carried out outside the mediation office, used only by the mediator, and which will communicate online with the participants in the mediation process, each of them being in a different location, such as home, thus ensuring the conditions of physical distance and safety of the person, imposed by the measures taken to combat the pandemic crisis. The premises of this adaptation to which we refer have already been outlined with the approach of the concept of *alternative dispute resolution*, noted with the acronym ADR (ȘUȘTAC & IGNAT, 2008), with its online version generically called *the online dispute resolution* and noted by the acronym ODR, a form in which the parties do not stand face to face, but they prefer to communicate at distance,

using an online connection (MARUȘCA, 2010). This online conflict resolution option is also presented by other authors, who study the conflict and how to resolve it, other than through the face-to-face meeting of the parties. They render this form as the e-ADR (KAUFMANN-KOHLER & SHULTZ, 2004) and it also includes mediation in the online forms presented, all of which are considered real challenges for the contemporary justice system and its alternative services, as well as for service providers who can be attracted to ensure online communication. In the presentation of the alternative forms of conflict resolution, as an option to support the relief of the justice system, the negotiation or arbitration is included in addition to mediation, as well as the hybrid forms between them, such as *Med-Arb* or *Arb-Med* (ȘUȘTAC, 2013). We believe that the mediator can perform the entire mediation process, remaining in his mediation office and using the facilities provided by technology to communicate with mediation participants, by using a connection that facilitates online communication, where the parties are in front of a computer or device, equipped with a video system, and thus can actively participate in the mediation process initiated by the mediator specialist. This form of mediation is currently applied in Romania, by mediators specialized in cross-border disputes, in which the parties are at great distances, in different locations and states, but who agree to participate in the mediation process initiated by a mediator, and who can use either a neutral, unanimously chosen location, or they can use an audio-video connection via the Internet or video-telephone (ȘUȘTAC et al., 2013).

The possibilities of performing mediation at distance were analysed in Romania by specialists who studied the current legislative framework, to identify the possible restrictions on the mediation process, given that the parties are not in the same location as the mediator, for the simple reason that they live in other cities, and their trip to the mediator's office implies greater efforts, materialized in the travelling costs, accommodation, allotted time, but they have the intention to perform the mediation with the help of the communication methods offered by technology. In the analysis of the distance

mediation option, those who analysed the subject did not identify specific regulations for such a form of mediation (CONSTANTINESCU, 2014), concluding that the distance procedure falls within the existing legislation on mediation, but also in civil law, which regulates the agreement of the parties, proposing the adaptation of the specific contracts concluded by the mediator, at the mediation process.

Regarding the contracts concluded by the mediator, the cited author takes into account the possibility of using the electronic signature for the signatories of the mediation contract or the option of representation by proxy of one of the parties or the option of sending the documents in order to be signed. The legal basis that allows this process to be carried out outside the mediator's office is given by the norms that regulate this activity in Romania, respectively by *Law no. 192 of May 16, 2006 regarding the mediation and organization of the mediator profession*, which provides, in art. 51, the following: "Mediation usually takes place at the mediator's headquarters. If necessary, the mediation can take place in other places agreed by the mediator and by the parties in conflict". The law can be found on the website of *The Mediation Council* (CMEDIERE, 2006).

Based on these findings, we can generalize, in the sense that the procedure can be used in the same way for concluding the mediation agreement, a document that is made by the mediator at the end of a mediation, and that will reflect the understanding of the participants in the mediation. We consider that the mediator respects his mission of being only the facilitator the negotiation between the parties involved, on the settlement of the dispute, and by his signature put to the agreement of the parties, he will certify the conditions of their agreement, not their presence in the mediation office. For rigor, the mediation agreement will include an express specification on the communication of the parties involved in the mediation process, especially if the mediation process took place at a distance, and the parties by signing the mediation agreement confirm the agreed working procedure, but also the fact that the agreement of the parties is fully reflected in the agreement signed within the same distance procedure, in

which the parties receive for signature the agreement drafted by the mediator at the end of the mediation, and which will certify by his signature both the parties participation and the agreed agreement by them to resolve their dispute.

In practice, exceptional situations may arise, when the court can verify the legality of the agreement recorded in the mediation agreement, and can require each party a special statement certifying the identification of the signatory of the mediation agreement facilitated by the mediator, including the statement for the confirmation of the content of the mediation agreement thus concluded. Starting from the previous finding on the mediation process that can take place at a distance, a fact also supported by the European rules that allow the resolution of extrajudicial disputes through the use of online means of communication, referring to *Regulation (EU) no. 524/2013 on the online settlement of consumer disputes* (EUR-LEX, 2013), we will further analyse what are the ways to carry out this process, based on the facilities offered by the technology used for online communication.

3. ONLINE COMMUNICATION FORMS USED BY MEDIATORS

In the mediation process, the first stage is the one in which the mediator is requested by one of the parties to start a procedure of informing the person with whom he is in conflict, a situation in which the mediator can use various means of communication, to achieve this goal. Communication with the potential participant in mediation can be achieved by sending a written invitation, which may have in its content the option to communicate with the mediation specialist through an audio and video connection or via the Internet, through similar applications, for preliminary information on the mediation process, and highlighting the advantages over a judicial process, for resolving the existing conflict.

If mediation is accepted by both parties, the mediator may agree that the mediation process be carried out at a distance, in order to ensure

optimal safety conditions, avoiding any risk of contamination with the COVID-19 virus, caused by traveling to the mediation office or even through the mediation process itself, if it takes place face to face, in the mediator's office, which is usually organized in a smaller format, without the possibility of always ensuring optimal conditions for the physical distance of the parties; or the risk generated by the length of the mediation process, while the parties are in the same office, and this increases risk of contamination of all participants in the process, including the mediator. In order to avoid these risks and to eliminate the additional expenses that must be incurred by the mediator for the reorganization of the office space, for the safe conduct of the mediation process face to face, which would implicitly lead to a substantial increase in mediation costs, all these aspects would have the effect of discouraging the interested people to resort to mediation, or to postpone the mediation procedure until the return to normality, when all the world gets out of this pandemic state.

In this preliminary stage, the mediator has the task of paying special attention to a distance identification of the people invited to the mediation, in the sense of finding "the most appropriate way to identify the people with whom he will be in contact at a distance" (CONSTANTINESCU, 2014) by using additional checks, including on the email address, if the correspondence takes place in this way, or following an audio-video communication procedure with the guest "to avoid confusion and situations of uncertain identity" and to make sure he is the right person to start the mediation. Following the preliminary information, the parties may agree to start the mediation at a distance, then the next step for the mediator is to conclude with each a mediation contract, provided by the special law, to be signed by the parties, under the sanction of nullity to the process (Law 192/2006: art.47) and which will contain in addition to the mandatory provisions (Law 192/2006: art.45) the conditions agreed for the entire online process, materialized by indicating the details on the connection and technology which will be used in the communication necessary for

distance mediation (CMEDIERE, 2006). It is important for the mediator to ensure that all participants have the necessary technology to perform online communication, and that each participant in the process has the skills required to make the online connection needed for communication. In conclusion, for the validity of the mediation contract, some mediators believe that “a clause providing for a way of signing and confirming a written form by means of distance communication” is necessary and that the “use of any means of distance communication in mediation must be agreed both by the client and by the mediator” (CONSTANTINESCU, 2014).

The Romanian legislation also refers to the procedure of signing distance contracts with the help of electronic signature (Romanian Civil Code, art. 1245) which specifies that in this situation all the formal conditions by which a contract is regulated will be observed (LEGISLATIE.JUST, 2009). The mediation procedure may generate at the end an agreement of the parties regarding the resolution of the mediated conflict, which materializes through the drafting by the mediator of another document, called mediation agreement, which has the character of a document under private signature, which the parties are obliged to sign it, even at a distance, in compliance with the same rules as those followed for the realization of the mediation contract initially concluded. Thus, both documents must contain express references to the form of distance mediation, agreed by the mutual agreement, as well as the manner of transmission and signing of these documents, including by the mediator, and which are an integral part of the mediation process. We recommend that it is necessary to keep in the mediator’s archive all the correspondence with the parties involved in the mediated case, from emails, to copies of the invitations sent or telephone notes concluded unilaterally following calls prior to the start of the process, all aimed at identifying the participants in the mediation process, as well as any other document related to the mediated case, which can be submitted to the mediator’s office by any of the participants.

4. THE REQUIREMENTS OF ONLINE MEDIATION

In order to perform a distance mediation, it is necessary to comply with several requirements that derive from the very definition of the mediation process, which requires full compliance with both the specific principles of mediation, as defined by the rules governing the mediator profession and the requirements imposed by the technology used for distance communication of the parties involved in the process. These principles are found in most coursebooks dealing with mediation: the voluntary nature of the procedure resulting from the parties’ freedom to appeal to a mediator, the acceptance by all participants, offering the prior information on the benefits of mediation, self-determination and equality of parties involved in mediation, ensuring the confidentiality of mediation, and the neutrality and independence of the mediator (IGNAT & ȘUȘTAC, 2010).

When analysing the use of technology in online communication in a mediation process, we refer to the requirement of the mediator to define together with the mediation participants, by mutual agreement, which is the technical way of communication, the Internet application or platform used, and to ensure that all working procedures in the online version used for the proposed mediation are known to all. These aspects will be recorded in the documentation concluded by the mediator, thus confirming the agreement of the participants to carry out a distance mediation, by signing the mediation contract drawn up prior to the start of the mediation process. The agreement will contain another important element, namely the date on which the mediation takes place and the expected duration of work, with possibilities to resume or extend the duration of the mediation, the whole process being facilitated online by the mediator, who intervenes as a third party specialized in alternative procedures for conflict resolution.

The conducting of online mediation is conditioned by the existence of a good connection, by using devices that allow communication to be carried out in good conditions, and participants must be able to access these technical and

communication resources, without restrictions, together with the requirement to ensure optimal ambient conditions, necessary a continuous communication. From a technical point of view, it is necessary for the mediator's office to become a virtual one, containing the technology necessary to ensure communication with the participants in the mediation process, and for the mediator the requirement to develop his technical skills, so that he quickly becomes familiar with all the digital resources needed for the online mediation process. The mediator must ensure in the preliminary discussions of the procedure that all participants know the technology to be used or he can even require a test on this important aspect in the success of mediation. From the point of view of the forms of communication applied in a mediation process (HAṬEGAN, 2020), some of them, especially the elements of verbal or nonverbal communication, will change their proportion, by following other elements, derived from online communication, such as following the moods and emotions of the participants, along with actively listening to their stories, in order to generate the new options for solving the conflict. In addition to the requirements regarding the specific skills required to the use of technology, there are additional requirements for establishing the identity of participants, along with those for compliance with the general principles of mediation, and it is necessary to apply all the specific principles of mediation, as the whole process is subject to the specific ethical standards defining the mediator profession.

5. THE EFFECTS OF ONLINE COMMUNICATION

If we analyse from the perspective of stakeholders in resolving a conflict through mediation, we must highlight some advantages of the process, even when it takes place at distance, through the following features: maintaining confidentiality of the case, similar to the process in the office; ensuring a certain compliance by carrying out the process from locations agreed by the parties, usually an office or personal home; elimination of travel costs at

the mediation office, especially if the person is in some other city than the mediator's office, and implicitly less time spent meeting; the mediation process also becomes accessible to people who do not find mediators available in their area; the fact that he is not physically face to face with the other party can generate the person a certain degree of mental comfort for his reporting of the case, favoring the generation of a solution on the conflict; maintaining the person's safety by staying in the familiar environment at home; eliminating travel to the mediation office generates lower costs and cannot be influenced by weather conditions, which can sometimes hinder physical travel; but adverse weather conditions may only affect the proper functioning of the online connection.

If we look at the mediator from the perspective of the specialist who facilitates the online mediation process, he can have lower costs by restricting the expenses generated by the space dedicated to the mediation office, which becomes largely virtual; offering its mediation services to people who are at a distance or unable to travel to the mediation office, which will also reduce the number of non-appearance situations on the date of the invitation, as some factors such as distance, traffic, travel time or even difficulty to move to another locality; avoiding any risk of infection, by eliminating direct meetings between people; as well as the possibility of having a flexible program, adapted to the requirements of the participants, who sometimes cannot participate in mediation during the normal work schedule, and the online connection facilitates the process in other intervals, if the parties agree together. We note that distance mediation brings some advantages over the standard mediation process, carried out in the mediation office, and online communication can thus be promoted, including through online advertising, to raise public awareness and increase trust in the online mediation process, implicitly to the consolidation of communication culture that flows from this mediation.

6. CONCLUSIONS

Noting the approach of university researchers from countries with different judicial systems,

such as: Spain, Portugal, Great Britain, France and Italy, who participated in a research project carried out under the EU Framework Program for Research and Innovation - Horizon 2020, called the EMEDEU project, they draw up a reasoned proposal to EU bodies for the adoption of a unitary directive on electronic mediation and the concept of E-mediator, a document that includes the proposal to adopt a European Code of Conduct for electronic mediators, the performance requirements of electronic mediators and mediation institutions in cross-border cases, as well as their skills, rights, obligations and responsibilities (BUJOSA VADELL, 2016).

When the dispute is cross-border, in the sense that the parties are in different states and their travel to a mediator's office involves substantial costs, dispute resolution (ODR) becomes an alternative that can be used successfully to solve them, and form employed is the online mediation. An attempt to identify the key issues of online mediation is made by an introductory study on ODR, which presents some of them, such as: trust, establishing the identity of participants and introducing the use of digital signature, ensuring data security and confidentiality, privacy and compliance, as well as the observance of legality in agreements resulting from mediation (HEUVEL, 2000). The mediation at distance is an already agreed form for resolving conflicts in which the parties are in a different city than the mediator's office, and by choosing this working option they will save time and money, avoiding making a trip for this purpose. The process has also generated some debates between mediators or officials in the judiciary, especially on ensuring the security and confidentiality of the mediation process thus conducted, and the pandemic crisis has accelerated the process of adapting the profession to this form of work, which ensures security and taking care of the health of the participants, including the mediator.

The crisis caused by the pandemic also has serious effects on the economy and the people in activity, by resizing some activities, which also led to unemployment, or by relocating some activities at home, measures that implicitly created disputes, which can be the object of some online mediation procedures aimed at protecting people's rights

and resolving the labour disputes generated by the crisis. The pandemic crisis can be considered an impetus for the successful implementation at a distance mediation procedures, in which online dispute resolutions thus become a safe and efficient working procedure, recommended to be implemented by as many practitioners as possible, while constituting the premises for adapting the profession of mediator to the crisis conditions, open to adapt their communication to all the facilities offered by the technology of the 21st century, represented here to be an additional package of knowledge and skills that must be acquired and added to the practice of the mediation profession.

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