CHAPTER I

INTRODUCTION

More and more litigations are filed in the courts of law, which supposes not only longer waiting periods to settle the litigations, but also an increase of legal expenses which might get to levels quite disproportionate in comparison to the value of the litigation.

Mediation appears as a modern, simple, fast and flexible solution left at the parties' discretion, that are entitled to denounce the agreement during any of the proceedings' phases. The mediation process differs from other procedure or means, such as arbitrage, conciliation or reconciliation, employed to settle conflicts.

The difference between arbitrage and mediation is that in case of litigation submitted to arbitrage, the arbitrators rule on the settlement method of the parties' litigation, while in the case of mediation, the mediator does not settle the litigation, but assists the parties during the negotiation and finding a solution convenient to all parties involved in the conflict. Moreover, in the case of conciliation, parties negotiate the conflict's settlement method, whilst in mediation the parties

negotiate between them, while they are assisted by a mediator – an independent and neutral party towards the parties.

The mediation agreement is an act subsequent to any litigation exiting between the parties, but according to certain opinions[1], nothing prevents the parties, that prior to concluding the fundamental relation or at the same time with it, to mutually agree to an amicable settlement clause in case of litigation.

As part of the mediation procedure, the mediator does not offer the solution and such solution does not bear the mandatory character of a judge or arbitrage ruling, it is the result of parties' negotiations and communication by means of the mediation and it has at its basis the principle of *pacta sunt servanda.* The juridical nature of the mediation is purely contractual, with all the consequences triggered by the contractual character of the concluded act[2].

Distinction must be made between the concept of mediation as a private law institution and the one related to public international law, such mention being necessary as the mediation relations analysed within this paper consider only those of personal non-patrimonial or patrimonial nature belonging to members of the community, regulated by the Romanian legal norm, making also reference, for comparison, to the procedure regulated in other legal systems.

In case of conflicts arising at any given level of the community, the mediation becomes a relatively frequent method

[1] Dumitru A.P.Florescu, Adrian Bordea - *Medierea ,* Bucharest, Universul Juridic, 2010, p.60
[2] Dumitru A.P.Florescu, Adrian Bordea - *op. cit*., p.66

of Alternative Dispute Resolution – ADR, both due to its effectiveness and of its efficiency. This method proves to be a means allowing the conclusion of an agreement satisfying all parties involved in the conflict, thus saving time and financial resources, and in many cases the mitigation of the stress factors.

When a conflict develops, the "classic" resolution method is the court action, usually called litigation. The litigation, turned into a lawsuit, is frequently met in civil matters.

Otherwise said[3], the litigation represents the translation in legal terms of a conflict that is why, when separating the conflict (non-legal dispute) from the litigation (legal dispute) only the mediation has the power to reduce the conflict. As the mediation is exercised only on non-legal plan, it cannot be an alternative to the jurisdictional authority nor make possible the conciliation of the parties involved in litigation. To argue such a claim, the author demonstrates that by presenting the conflict to a judge, the conflict turns into litigation, thus becoming "judgeable". The task of the judge is not to settle the conflict, but to rule on the litigation, supplying a positive resolution by means of the law. During a trial, the judge's endeavour is confined: the power to judge is limited by the terms of the litigation and the confinements of the law. These two limitations implied by the trial's nature explain why the ruling of the litigation does not always or necessarily settle the conflict, but

[3] Béatrice Gorchs - *La médiation dans le procès civil: sens et contresens. Essai de mise en perspective du conflit et du litige,* in: Revue trimestrielle de droit civil, no.3, 2003, p.409-425

the ruling may also imply the conflict's settlement[4]. Out of the aforementioned arises the difference between conciliation (dealing with litigations) and mediations (dealing with conflicts).

All litigations have a plaintiff, raising a claim, and a defendant against whom the respective claims are presented. The complaint entails the submission of a complaint against someone and presenting it in court. The set of alternatives for the litigations' settlement through a formal action in court is called Alternative Dispute Resolution – ADR. Such includes the litigations settlement processes and the procedures employed to find a solution and to reach an understanding outside the court of law (formal litigations, courts of law), with or without the help of a third party.

Main types of ADRs are the negotiation, common agreement between the parties, arbitrage, as well as the mediation (incorrectly sometimes called conciliation).

The negotiation is a dialogue between two or several individuals or parties, in order to reach an understanding, to solve a dispute, to reach an understanding on future actions, for the individual or collective benefit.

The common agreement between the parties is achieved with the lawyers' help (specialized in this respect) and mutually agreed experts, who enable the settlement process, following special contractual terms. None of them imposes a solution upon the parties. Nevertheless, the common agreement

[4] *idem*, p.416

between the parties is rather a formal process than an ADR methodology. It is the component of the litigation and of the resolution system by means of judge's resolution and it is frequently used in case of divorces and family litigations.

In *arbitrage*, parties transfer the resolution of the litigation to a third party, formed of one or several individuals ("arbitrator" or "arbitral tribunal") that analyses the case and imposes a solution, legally mandatory for both parties.

The arbitrage is frequently used to settle commercial litigations, namely international commercial transactions, as well as case matters related to consumers' rights and labour disputes, cases in which the arbitrage is provided by the terms of the commercial or labour agreement. The arbitrage can be voluntarily or mandatory and the solutions may be mandatory or given as recommendations. The recommendation type of arbitrage is very similar to the mediation, main difference being the fact that while a mediator will try to help the parties finding a compromise, the arbitrator (without mandatory character) will determine only the responsibility and, as the case may be, will present an estimation of the potential damage quantum to be borne.

Conciliation, as it is generally established and accepted seems to be a dispute resolution means between two or several parties (private individuals or legal entities or even states), a means to remove disputes, a means of closure, a multilateral manifestation of will to extinguish a litigation without the intervention of a neutral individual[5].

[5] Dumitru A.P.Florescu, Adrian Bordea – *op. cit*., p.16

In an approach, from the perspective of the private legal institution, the conciliation represents a mandatory trial measure before the party makes appeal to state's public force, in case of administrative or commercial litigations with an object that is assessable in money.

In Romania, the scope of the conciliation differs from the scope of mediation, the conciliation addresses the commercial litigation, thus preceding the request for summons before the state's courts of law, and at the same time excluded from private jurisdiction – arbitrage. While the amicable resolution procedure bears the fingerprint of the private arbitrage, dominated by the parties' contractual freedom, by simplicity, flexibility and celerity, the procedure provided at art.720^1 of the old Civil Procedure Code bears the fingerprint of the judicial dispute, submitted to certain more formal legal regulations, more detailed and usually imperious which inevitably make the process more difficult and longer. Thus, even though they have some common traits and the same goal, they are strictly applied to the dispute for which they have been provided, and there shall not apply one for each other, if there is no understanding between the parties or a legal ruling[6].

The New Civil Procedure Code gave up the direct mandatory conciliation in the litigations between traders – a formality which, in most cases, prolonged uselessly the duration of the trial. Other preliminary formalities have been introduced, some of them through the New Civil Procedure Code, some others through special laws.

[6] *idem*, p.18

The mediation means a structured process where two or several parties involved in litigation voluntarily try to reach an agreement regarding the settlement of the existing litigation, with the help of a mediator. Such process can be initiated by the parties, recommended or imposed by a court or provided by the law. The mediation is used in a large variety of cases, such as commercial, judicial, diplomatic, conflict of work, disputes within the community or in the family.

The mediator is a third party asked to carry out efficiently, impartially and competently the mediation, regardless of his/her title or profession, or the manner in which this third party was appointed or requested to carry out the mediation. The mediator helps the parties to negotiate their solutions (facilitation mediation), and in some of the cases, he/she can express an opinion on what could be a fair and reasonable resolution, generally if all parties agree that the mediator could do so (evaluative mediation).

Some courts request that certain cases should follow certain alternative dispute resolution paths before the parties present their case in the court of law. Thus the mediation becomes a preferred method within ADR and the European Directive regarding the mediation (Directive 2008/52/EC) makes reference expressly to the so called "mandatory" mediation.

According to Law no.192/2006, the mediation represents conflicts' amicable settlement method, with the help of a third specialized party, as mediator, in neutral, impartial and confidentiality conditions and with the free consent of the parties.