

report

MEDIATION IN BUSINESS!

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AMONG BUSINESS SUBJECTS IN CROATIA, there is a prevailing opinion that disputes between two and/or several companies should be solved before the court, in the course of a regular court procedure. This means the following: for open claims, the beginning of a distress/foreclosure procedure that later on, as a rule, turns to litigation; for unfulfilled contract obligations, civil proceedings are also initiated, as well as for different violations of contractual clauses.

Clearly, before initiation of civil procedure, business subjects as a rule attempt to reach a peaceful agreement. But that attempt to reach a peaceful agreement is not the same as the MEDIATION procedure.

WHAT IS MEDIATION?

The Mediation Act (official gazette 'Narodne Novine' 18/11) defines that the mediation is every procedure during which the parties attempt to solve the dispute consensually, with one or more mediators assisting parties in reaching a conciliation, but who are not authorized to impose the binding solution.

MEDIATION LEGAL FRAMEWORK

In the Republic of Croatia, the first Mediation Act was already enacted in 2003 (NN 163/03), making Croatia one of the first European countries that legally framed the mediation procedure into an autonomous law. The role models for creating the Mediation Act were two extremely significant European documents adopted in 2002, namely the **Recommendation by the Council of Europe About Mediation in Civil and Commercial Disputes** (Rec (2002)10) and European Commission's "**Green Paper**" on alternative resolution of disputes in civil and commercial law (COM (2002)196).

It is also important to note that **UNCITRAL's Model Law on International Commercial Conciliation** adopted in 2002 at the UNCITRAL's 35th session held in New York, also played an important role in the creation of the Mediation Act since, along with directives, it contains legal standards that can be directly transposed into domestic legislation.

In view of strengthening mediation in Croatia, the PHARE 2005 project "Enhancement of Mediation as an Alternative to a Court Based Dispute Settlement" was initiated, with its holder being the Ministry of Justice, and its stakeholders the Croatian Chamber of Trades and Crafts, the Croatian Chamber of Economy, the Croatian Employers' Association and the Croatian Mediation Association. The project implementation involved various professionals and consultants from the United Kingdom, Slovenia, Austria and Germany. The general project objectives were the development of in-court and out-of court alternative dispute resolution

systems for legal and private persons. One of the results of the PHARE 2005 project was by all means the adoption of the **Ethics Code for Mediators** at the session of the Committee for Alternative Ways of Dispute Resolution that took place on 26 November 2009.

Because of the enthusiastic mediators' persistent insistence, the mediation was given a green light and was listed among the provisions of the **Civil Procedure Act** (NN 148/2011). The new Mediation Act was issued in 2011 (NN 18/2011) adapted to the **Directive 2008/52/EC** of the European Parliament and Council about specific aspects of mediation in civil and commercial matters (21 May 2008).

WHAT DOES THE CIVIL PROCEDURE ACT SAY ABOUT MEDIATION?

The provision in Article 186 d of the Civil Procedure Act defines: "The court may during the entire civil procedure propose to the parties to solve the dispute in in-court or out-of court mediation procedure. If the parties consensually propose or accept solving the dispute peacefully before the court, a hearing shall be scheduled without delay in order to attempt a mediation to which the parties, their representatives and proxies, if they have them, are invited. The in-court mediation procedure is led by the mediator judge appointed from the list of mediator judges defined by the Court President. The settlement reached in the mediation process has the status of the court settlement."

Furthermore, the provision in Article 186e of the Civil Procedure Act stipulates as follows: "Upon the filing of legal remedy, the parties can consensually submit the proposal for mediation procedure before the mediator judge of the court competent to decide about the legal remedy. If the mediation is not successful, the mediator judge must not participate in making decision about the legal remedy in the matter."

Furthermore, the provision in Article 186f of the Civil Procedure Act stipulates as follows: "If the parties in a civil procedure submit the agreement proposing mediation at one of the mediation centers, the court shall instruct the parties to address the suggested mediation center within eight days and the procedure shall stay until termination of the mediation procedure at the selected mediation center. The parties shall inform the court about addressing the selected mediation center in the subsequent period of eight days. If the mediation at the selected mediation center is successful, the parties shall conclude the court settlement before the court that directed the parties to mediation. If the mediation at the selected mediation center is not successful, the court that directed the parties to mediation shall be informed without delay for continuation of civil procedure."

From the quoted provisions of the Civil Procedures Act, it is clearly derived that the MEDIATION procedure can be initiated before initiation of a court procedure, during the court procedure or upon the submission of legal remedy to the court ruling.

Apart from that, the procedure can be conducted before the court where the litigation is already in course or at any of the mediation centers.

MEDIATION PROCEDURE PRINCIPLES

The mediation procedure, except for being quick, economical, voluntary and informal, has certain defined principles that should be kept in mind. Pursuant to Article 4 of the Mediation Act (NN 18/11) "when interpreting the provisions of this Act, one should follow the principles of consciousness and honesty and internationally adopted mediation standards represented in the documents of the European Union, United Nations and the Council of Europe. The matters that are not regulated by this Act should be resolved in line with the principles of voluntarism, procedure efficiency, equal party treatment, autonomy of procedure parties, confidentiality of the procedure and mediator's impartiality".

DOES THE INITIATION OF MEDIATION PROCEDURE IMPLY WEAKNESS?

The problem that most often appears in practice is that the party suggesting the mediation might be considered "weaker" by the opposite party, because in the latter's eyes it has less chance to "win" in the legal procedure only because it wants MEDIATION.

But such perception is a distorted image of reality, because the one suggesting mediation is at the same time suggesting less expense, less lost time, a human tailored procedure and a resolution suitable for all participants.

Experience shows that resolution of problems and misunderstandings through mediation does not represent a sign of weakness, but a smart decision – **"Mediation is not a sign of weakness, but a smart decision."**

ADVANTAGES OF MEDIATION RELATIVE TO COURT PROCEEDING

It should not be forgotten that the media increasingly points out that resolution of the dispute before the court also means loss of control over the dispute. By putting one's faith in the hands of the court, judge, lawyers, etc., the dispute is conceded to those who can never know better than we ourselves what it is we want exactly.

But, if all facts related to the in-court resolution of disputes are taken into account, and especially the duration of the procedures, the fact that one party always loses in the dispute, and that the ruined business relationship remains ruined, it might not be the best way to solve the "disputes" pertaining to the relationships between companies.

"It will cost less, it will take less time and it will be adapted to your needs."

WHERE TO INITIATE THE MEDIATION PROCEDURE?

Although mediation related to companies is significantly represented in the world, its implementation has just started in Croatia. There are several institutions in Croatia that also include Mediation Centers within their scope of work. Thus it is sufficient to address one of the below stated institutions in order to initiate the mediation procedure. In the area of the City of Zagreb only, there are several Centers providing mediation:

- Croatian Chamber of Economy - Mediation Centre • Croatian Chamber of Trades and Crafts - Mediation Centre • Croatian Bar Association - Mediation Centre • Croatian Mediation Association - Mediation Centre • Croatian Employers' Association - Mediation Centre; Croatian Banking Association - Mediation Centre • Croatian Insurance Bureau - Mediation Centre and Social Partnership Office of the Republic of Croatia.

Apart from the mediation procedure being quick, economical, voluntary and informal, it is also the most flexible solution for citizens and business subjects, because it adjusts to the needs of each individual client, considering potential and present conflicts as opportunities to solve the problem.