

## Resolution of Civil Disputes through Mediation in the Practice of the Republic of Macedonia

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### Abstract

*Alternative dispute resolutions are receiving full recognition in the world because there are disputes which by their nature are best suited to be resolved in court. In certain cases, the parties are determined for mediation because the process is informal, voluntary, with purpose to identify common interests of the parties to an agreement that will not harm the interests of neither party to the dispute. The process of mediation is far more effective in order to prevent and avoid new disputes that can arise, but also mediation is just an addition to the judicial system – not its replacement. This paper analyses the civil disputes that are solved through mediation in the practice of the Republic of Macedonia. In this context are the reforms in the judiciary of the Republic of Macedonia. The Law on mediation follows the experiences of implementation of the mediation, which is widely used as part of the legal system in the member States of the European Union. With this, Republic of Macedonia once again confirms her dedication to become part of the European family.*

**Keywords:** mediation, settlement, law on mediation, alternative dispute resolution, mediator

### 1. Introduction

Mediation is a flexible, nonbinding dispute resolution procedure in which a neutral third party-the mediator-facilitates negotiations between the parties to help them settle. A hallmark of mediation is its capacity to help parties expand traditional settlement discussions and broaden resolution options, often by going beyond the legal issues in controversy. Mediation is based on satisfying the interests of the parties. This means that mediation must identify the interests of the parties in order to reach an agreement that would make possible for peaceful resolution of the dispute (Plapinger, Stiestra 1996). Mediation as a manner of alternative, amicable dispute resolution presents a re-establishment of communication and reconciliation between the parties to the dispute, which is an important effects of this procedure compared to arbitration and court procedure (Matijevic 2008). In the process of mediation, the role of mediator is crucial. He actively assists the parties to reach an optimal solution to the conflict through an agreement. The mediator is the “guardian of the procedure” which directs the parties to find creative solutions to the dispute. The Directive<sup>1</sup> of the European Parliament and of the Council of Europe on certain aspects of mediation in civil and commercial matters defines “*mediation*” as any process, however named or referred to, where two or more parties to a dispute are assisted by a third party to reach an agreement on the settlement of the dispute, and regardless of whether the process is initiated by the parties, suggested or ordered by a court or prescribed by the national law of a Member State.<sup>2</sup> Countries including Republic of Macedonia started to implement mediation as a way to increase efficiency of the judiciary and to give the option to the parties to establish communication and actively participate in finding an acceptable solution to the dispute. Preconditions for successful implementation of mediation are the judge’s acceptance of mediation, their knowledge of the procedure and its attributes, also their communication in way of promoting the benefits of mediation to the parties.

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<sup>1</sup> Directive of the European Parliament and of the Council on certain aspects on mediation in civil and commercial disputes (2004), Brussels, article 2 (a)

<sup>2</sup> Article 2 (a) from the Directive of the European Parliament and of the Council on certain aspects on mediation in civil and commercial disputes

## 2. Legal Framework on Mediation in the Republic of Macedonia

Reforms of the judiciary in Republic of Macedonia contain complex of measures and activities that are undertaken by state authorities under the Constitution and the Laws. Legislation is the most essential and basic activity of every state. The roots of mediation in Republic of Macedonia can be found fifty years ago, in 1968 year when the Law for Peaceful Councils<sup>3</sup> was enacted. According to the law, peaceful councils represent social bodies with a role to mediate between the parties about any kind of dispute between them. In accordance with the Law, the social councils are calling the parties with indication to the date, time and place of mediation and of course about the subject itself. If the parties settle for the way of resolution of their dispute, the peaceful council prepares a written settlement which has a meaning of extrajudicial settlement.<sup>4</sup>

The importance of the Law consists in its innovative and important solutions on mediation for that period. In that time the Law established the boundaries of new kind of peaceful resolution of disputes in certain cases such as property cases, criminal offences and other violations. After the dissolution of the Socialist Federal Republic of Yugoslavia and the creation of Republic of Macedonia in 1991 as an independent and sovereign state, significant steps were made towards making its own legislation and reforms in all areas especially in the judiciary. Decades after the independence of the Republic of Macedonia were taken first steps towards creating a roadmap for the development of mediation. In the Republic of Macedonia during 2004 was implemented a project of ADR-Mediation, the International Finance Corporation (IFC). With the support of the project, legal framework has been made for the introduction of mediation in the legal system. For that purpose were organized numerous round tables on which were presented the advantages of mediation as an alternative way of resolving disputes. In April 2005, IFC and the Ministry of Justice signed a Memorandum of Understanding, which established the foundations of cooperation in developing an efficient and open system of mediation in Macedonia

In accordance with constitutional amendments during the 2006 year were brought significant and important laws regulating the judiciary. One of the significant positive regulations in this sphere that connects the project of IFC and the Ministry of Justice was the Law on Mediation.<sup>5</sup> Like any law, this law has specific and significant developments on the basis that differs from other laws. In fact, the Law on Mediation was first step towards promoting the procedure for mediation as a way of resolving civil disputes. The purpose of the Law on Mediation is amicable dispute resolution to allow a good part of the court cases to be resolved by the mediators in the process of mediation, primarily because the mediation procedure is faster and more efficient. With mediation, citizens are provided with a procedure for quickly resolving of disputes to which the parties have easy access, to guarantee fair treatment, efficiency, neutrality, impartiality and confidentiality. With this law, mediation is successfully applicable model for resolving individual disputes and facilitating the judiciary from numerous items.

### 2.1 The New Law on Mediation and its Application in the Republic of Macedonia

During these several years, unfortunately, the Law on Mediation from 2006 has shown as quite ineffective law, because the number of solved cases through mediation was insignificant. Because of that purpose was enacted a completely new Law on Mediation in 2013.<sup>6</sup> The law represents primary source regarding mediation in civil disputes *lato sensu*. “*Mediation*” is defined as 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 to achieve mutually acceptable solution expressed in the form of a written agreement.<sup>7</sup> The law also defines the principle of mediation including: *voluntary, equality, confidentiality, neutrality, excluding the public from mediation, equality between the parties, efficiency and fairness of the mediation*.<sup>8</sup> In order to give more attention on the mediation as a better way of resolving civil disputes, the Government of Republic of Macedonia gave support to the law through adoption of a program for development of mediation, in which are determined the measures and the resources that provide support to mediation.

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<sup>3</sup> Law on Peaceful Councils, Official Gazette of SR. Macedonia no.21/1968

<sup>4</sup> *ibid*, article 19

<sup>5</sup> Law on Mediation, Official Gazette of Republic of Macedonia no.60/2006

<sup>6</sup> Law on Mediation, Official Gazette of Republic of Macedonia no188/2013

<sup>7</sup> *Ibid*, article 2

<sup>8</sup> *Ibid*, article 6 -14

With a purpose to achieve greater promotion of mediation as an alternative dispute resolution, the legislator made changes in the Code for Civil Procedure<sup>9</sup> with whom imposed 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 decide to settle the dispute through mediation. If the parties agree to resolve the dispute through mediation, the court will make a decision to discontinue the procedure.<sup>10</sup> The main purpose of every process of mediation is to achieve amicable dispute resolution with signing of the mediation settlement. In mediation, parties are free in their choice of a mediator, in the way of leading the procedure and also in making suggestions in order to make a compromise and find a solution that will satisfy the interests of the both parties. One of the successful ways of finishing the process of mediation is with signing of a written mediation settlement.<sup>11</sup> This settlement may be written and brought by the parties, or on their request, by the mediator who puts his stamp on the settlement and delivers to the Ministry of Justice in order to be put in the Register for evidence of the mediation procedures. When the procedure of mediation is conducted before initiation of a court procedure, and the parties want their settlement to have an enforcement character, the content of the mediation settlement in written form is certified by an authorized notary public. If the mediation procedure in conducted after instruction of the court, the mediator is obliged in term of three days after conclusion of the mediation procedure to inform the court for the way of concluding the procedure and to deposit the written mediation settlement in the court.<sup>12</sup>

### ***3. Most Common Cases of Mediation in the Republic of Macedonia***

Many disputes that end up in court actually do not need a highly developed and expensive judicial system. The real problem is that the parties stuck in dead end – they do not need a judge or a jury, they need someone who can help them to find a common solution. People are increasingly turning to alternative ways of dispute resolution and especially to mediation. They begin a process that is faster, more efficient and cheaper than a long trial. In Republic of Macedonia the number of disputes resolved through mediation is insignificant, but the facts are that the parties gave up from court battles and turn to mediation as an alternative dispute resolution, tell us that in future the number of disputes resolved by mediation will significantly increase. This primarily depends on knowledge of the parties and the will and interest of the judges to refer the parties to resolve the dispute through mediation. Most disputes that are solved through mediation in Macedonia are debts, often debts between individuals as well as debts to utility companies. Despite private debts through mediation also are solved debts for electricity, broadcasting fees and claims for post and telephone. These disputes are suitable for settlement in mediation because usually it is for smaller amounts, so in order to avoid lengthy litigation; parties are deciding to solve their dispute through mediation. Despite disputes arising from debts through mediation are resolved and several labor disputes. Namely the Law on Mediation from 2006 year predicted that the subject of mediation can only be individual labor disputes and not collective. The changes of the Law on Mediation from 2009 year remove restrictions in respect of collective labor disputes, family and criminal cases, so now also these cases can be settled through mediation.<sup>13</sup>

One of the most controversial disputes resolved by mediation in Republic of Macedonia is certainly the dispute about divorce. The Law on mediation indicated that the verified mediation agreement by notary public presents an executive document, but in this case it is contrary to Family Law.<sup>14</sup> In the present case is not valid an agreement for divorce concluded in procedure of mediation because mediators are not entitled to conclude these kind of agreements, especially not divorce agreements, because the procedure for divorce is regulated by the Family Law and the law indicates that a marriage can be divorced only with a court judgment.<sup>15</sup>

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<sup>9</sup> Code for Civil Procedure Official Gazette of Republic of Macedonia no.07/2011

<sup>10</sup> Ibid, article 272

<sup>11</sup> Law on Mediation, Official Gazette of Republic of Macedonia no.188/2013, article 21

<sup>12</sup> Ibid, article 22

<sup>13</sup> Law on Amending the Law on Mediation, Official Gazette of Republic of Macedonia no.114/2009

<sup>14</sup> Family Law, Official Gazette of Republic of Macedonia no.38/04; 33/06

<sup>15</sup> According to the Law on Court Official Gazette of Republic of Macedonia no 58/2006 : the provision from article 30 states that for determination and contesting paternity, maternity, confirming the existence of marriage, marriage annulment and divorce there is exceptional competence and jurisdiction of a court.

The first cases of mediation in Macedonia appeared after the Law on Mediation was brought in 2006 year unlike other European countries and those from the Balkans where mediation was conducted in practice before the enactment of appropriate law on mediation, in Macedonia a legal framework for mediation was made and then began the implementation of mediation in practice. Statistics and surveys show that small number of cases has been resolved by mediation, but the success in resolving is 77% which is sufficient indication that if mediation was more developed, than the success rate would be increased. Small number of cases resolved through mediation indicates that exist skepticism about mediation as an alternative way of dispute resolution on the one hand and on the other is a lack of awareness and motivation of parties for mediation.

### **3.1 Disputes which are Eligible to be Resolved in the Process of Mediation**

Definition of mediation as a method of consensual resolution of disputes implicates which disputes are eligible to be resolved in the process of mediation. Civil, commercial, labor, family, insurance and other kinds of disputes such as disputes that rise from protection of environment, discrimination can be resolved through mediation. These are the objective limits of resolution of mediation dispute, the subjective limits address to the fact that in the process of mediation can be resolved disputes between natural persons and legal entities. This means that subject of mediation can be every person that has rights and obligations and that can participate in a court or any other procedure.

Disputes that are eligible to be resolved in the process of mediation are:

- disputes in which the parties have a long business cooperation,
- disputes in which should be kept the confidentiality and privacy,
- disputes in which the procedure has a history of long duration,
- disputes between neighbors,
- dispute for compensation of damage,
- dispute for debts,
- bank disputes,
- construction disputes,
- consumer disputes,
- disputes for alimony,
- domestic violence,
- disputes about protection of intellectual property,
- concession disputes and
- disputes between spouses which are connected to a property issues

### **3.2 Disputes that According to their Legal Nature cannot be Resolved in the Process of Mediation**

Every state has intention to keep its right to a monopoly over some areas in the law and to reserve the right those relations to be resolved only in a court procedure. On that way the state excludes the possibility that the dispute can be resolved by some other non-state organs or institutions. Mostly we speak about dispute that has been regulated with legal norms and they address to the public interest and its protection. In those cases, the court procedure guarantees the legality, legitimacy and the legal safety to the parties. Statutory disputes, disputes where exist evidence for the rights of one party, disputes where exist abuses and many other disputes that can be resolved only in a court procedure.

Disputed that cannot be resolved in the process of mediation are:

- statutory disputes and bankruptcy,
- disputes that involve violence,
- divorce between spouses,
- disputes for determination of paternity and maternity,
- disputes in which parties seek for a court decision,
- disputes in the area of protection of competition,
- disputes in which exists maltreatment,
- disputes for protection of minority shareholders,
- disputes in which exists evidence for the right of one party,
- disputes for determination of temporary measures,
- disputes in which the conflict between the parties cannot be overcome and

- disputes in which one party has more rights than the other one

#### ***4. Mediation vs. Court Procedure: Advantages and Disadvantages***

The process of mediation gives a lot of opportunities and advantages for the parties contrary to the court procedure. Probably the biggest advantage of the mediation is the fact that it's efficient, fast and always voluntary – it's a process which can be used before and after the litigation. Mediation allows the parties to keep the control over the process and to develop and consider new options and eventual decision of the dispute. Through the process of mediation, parties are focusing on the real interests over the legal rules and their previous positions (Mazadorian, 2002). Main advantages of mediation are related with the low financial and social price of the procedure and saving money, time and means. The duration of mediation procedure is being measured in hours and days unlike the court procedures which are measured in months and days. Court procedures are expensive rituals which cost a lot of money, paid by the parties (Nejkov p.91). The Law on Mediation actually is limiting the time frame for conducting the procedure of mediation to 60 days from its beginning. In the court procedure, the judge has the all power in determining the result of the dispute, while in the process of mediation, the role of the parties is active – they are the ones who hold the proceeding on their shoulders, in the positive meaning of the expression. This means that, in the process of mediation parties actively participate in looking for the resolution, because that is in their best interest – the result of the mediation depends only on them and no one else.

The process of mediation has big advantages contrary to the court procedure especially in the way of watching the dispute from another perspective, because among other things parties are thinking about the dispute resolution and their common interests. From that point of view, they respect each other dignity and they build common trust especially regarding the fact that the mediation is confidential contrary the court procedure where we have tensions and different positions of the parties. Court procedure never ends with satisfaction of both sides, contrary, in the process of mediation always ends with a solution that is accepted by the both parties. The biggest advantage that mediation has towards the court procedure it's consisted in the informal character of the mediation and the possibility of every party to choose a mediator and then the both parties together to choose the third mediator. This option it is not allowed in the court procedures which strictly governed according to the law and the regulations. Beside, all the above mentioned advantages, the mediation has its own disadvantages towards the court procedure. First of all, mediation is not appropriate for all kind of disputes, especially for the statutory questions, part of the criminal and administrative disputes and also in the cases where the court procedure is mandatory. Limitations which are not in favor of mediation consist mostly in the area of confidentiality and privacy. Because of the principle of confidentiality and privacy in the mediation, there is opportunity the public interest to be abused, mainly because the parties in the process of mediation can enjoy rights that according to the laws are supposed not to use them (Petkovic p.4). Mediation is also limited in those disputes where the position of the parties is not equal, and also in the cases where there is a great possibility of escalation of the dispute that cannot be resolved in the process of mediation.

#### ***5. Will Mediation gave Results and Progress in Resolution of Civil Disputes in the Practice in Macedonia?***

Even though mediation offers significant advantages to litigants and to the court system, it takes time and effort for all the parties to recognize those advantages and to trust this new method of resolving disputes. Mediation is a puzzle: It requires all the pieces to be put in place in the right order and in proper manner, to complete the picture and have a positive outcome (Perunovska 2008). Regardless of the alternatives and the obvious financial and other benefit, the parties are still hesitant to use the mediation as a shortcut to justice and as an alternative way of dispute resolution. First of all, the lack of use of mediation lies in the litigation tradition and the fact that the parties prefer going to court because they have trust in the judiciary regardless of the possibility of influencing the procedure and the outcome. Also, sometimes eligibility of some dispute to be resolved through mediation it is not enough, because mainly depends of the personal characteristics of the parties and their determination to resolve the dispute by using the mediation. In Republic of Macedonia great number of disputes are about debt between the parties, so they decide to choose the court procedure that can last for months and even years instead of mediation because they do not have will to resolve the dispute easily and quickly. The success of mediation is based on voluntary participation of the parties, who often do not know what the essence of mediation is and what can be reached with its use. That is a result of the lack of mediation experience in the Balkan countries and especially in the Republic of Macedonia.

Because of that we often ask ourselves the question: *How can we achieve more trust in mediation and how to increase the level of awareness?* The duty mainly lies to the judges, lawyers, mediators and the Chamber of mediators. By offering mediation judges became gate keepers of mediation. If they present the advantages that mediation offers instead of having a court battle, the parties may think again if they want their dispute to be resolved in a court procedure. Also the role of lawyers is significant, because they may be trained as mediators and on that way they can practice mediation and show the positive effects that mediation has in resolution of disputes. Problems that appear in practice are addressed to the fact that in many occasions lawyers are not ready to recommend the mediation as an alternative dispute resolution, mainly because of the fear that they will lose clients because of the mediation. The paradox consists of the fact that lawyers in some cases are prepared to be mediators in disputes of other clients, but they are not ready to offer mediation as an optimal option on their own clients. For that purpose, training is required for the lawyers in order not to look on mediation as “*threat*” to their profession, but as an efficient mechanism for peaceful resolution of civil disputes that have been “*stuck in the judiciary system*”.

The key to success of any mediation is the quality of the services offered by the mediators. A person who wants to become a mediator needs to have a university degree, finished training and passed exam, at least three year work experience after graduation and other qualifications according to the Macedonian Law on mediation.<sup>16</sup> Regardless of the all advantages that mediation offers before court procedure, there are still some barriers that must be overcome. The first detected problem lies in the people mentality and their skepticism towards the new alternative ways of dispute resolution such as mediation. Often people choose court in order to resolve the dispute because they believe more in the court authority and in the legal provisions and the “*protection that the law offers*”. This habit should be diminished and the parties should leave a space for the mediation can evolve and to show its positive effects. We need an increased public awareness of mediation as an alternative dispute resolution in order to show what mediation can offer and the most important that in mediation there is no winner or loser – both parties are satisfied with the mediation settlement because both parties made exceptions in order to reach a reasonable solution that will satisfy the interest of both parties – something that can never be achieved in a court procedure. Regarding then above mentioned, we must promote mediation in order to remove the barrier between the mediation and the people because mediation offers something that is innovative, with low financial costs and a solution by which both parties will be satisfied and that is necessary for the modern contemporary societies.

## **6. Conclusion**

The current legal framework for mediation in Republic of Macedonia provides a good base for mediation to establish as a main source for alternative dispute resolution. Although the Law on Mediation represents *lex generalis* regarding the process of mediation and its conduction, in practice there are lots of obstacles that must be overcome. In order to release the judiciary from the enormous number of court cases, mediation should be promoted as best way for out-of-court resolving cases. Regarding the above mentioned, the motivation and awareness of the parties is essential for the dispute to be resolved in a process of mediation. Sometimes, it is not enough the dispute to be suitable for resolution through mediation, it also depends from the personal characteristics and the motives of the parties and their willingness to resolve the dispute through mediation. The new Law on Mediation represents Mediation as “*other way to justice*” certainly will find its place in the practice of alternative dispute resolution in the Republic of Macedonia. The changes of the Law on Mediation and the support of the mediation from the Government of Republic of Macedonia through the adoption of a program for its development promises that soon mediation will most used mechanism for alternative dispute resolution.

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<sup>16</sup> Law on Mediation, Official Gazette of Republic of Macedonia no.188/2013, article 47

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