ON-LINE MEDIATION BETWEEN ECONOMIC AGENTS

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Abstract

Now, in Romania there is an ever increasing number of conflicts between the economic agents related with the non observance of their obligations resulting from the economic contracts, this leading to an overloading of the courts with their solution, to the increase of the costs occurred through the application of the justice - these being as a rule exaggerated large, the increase of the time for passing through all procedures steps. Therefore, there appeared as a necessity the finding of alternative methods for solving the commercial, civil, labour right, family right or even criminal right field disputes, more rapid, more flexible and more economic ones, as far as the legislation allows to resolve these disputes by other process means than on the way of the common law justice. As the mediation or the arbitration can be done on line, the solving period of time for a dispute can be reduced and the costs diminished.

Keywords: Electronic documents, trade companies, electronic signature, on line arbitration, on line mediation, qualified digital certificate.

Contents

In the Western countries, there were major concerns for finding means of solving the disputes, among other ways than legal ones, still from the "70 years.

The necessity to solve the conflicts of interests arisen between physical or legal persons, every day more numerous in the last period of time, has imposed the finding also in Romania of some ways, legal also, but which allow to avoid the slow-moving and costly way unfolded before the courts and those of compulsory execution.

The concept of mediation has appeared in the United States of America in the year 1976, following some government initiative aiming the decongestion of the courts, witnessing rapidly a strong development, the courts being relieved from a large number of files.

The classic system of solving the disputes in the civil law or trade law[2], is today obsolete, being characterized by slow-moving and inadequate means of action for solving the everyday larger number of disputes between the economic agents. And this is much more valid for electronic disputes, whose solution is required with even more promptness and which cannot be localized within a limited geographical space.

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[2] For a larger examination concerning the solving of disputes in civil and commercial fields, see: I. Leş, Treaty of civil process right, IVth edition, Ed. CH-Beck, Bucharest, 2008, p. 413 and following.; I. Deleanu, Treaty of civil process right, IInd vol., Ed. Europa Nova, Bucharest, 1997, p. 5 and following.; Fl. Măgureanu, Civil process right, XIIth, Ed. Universul Juridic, Bucharest, 2010, p. 277; M. Tăbârcă, Civil process right, Ist vol., Ed. Glogal Lex, Bucharest, 2004, p. 284 and following

The application of the classis system at these cases, would generate a disproportionate cost in relation with some activities, such as, for example, the average value of an electronic transaction between two physical persons. Further, the means of action the competent national authorities have at their disposal, as well as the collaboration between these authorities are limited, and not always transparent and efficient ones.

The European Commission has suggested to the States Members, still from 1998, the finding of solutions that offer to the consumers the access to justice for protecting their violated rights and for applying " extrajudicial solutions of the disputes".

In this sense, for solving the disputes arisen in the electronic space, it is recommended:

- The EU States Members have to draw up a legislation allowing, in case of a disputed between a service provider and a recipient of a service from an IT company, the efficient use of the mechanisms for an extrajudicial solution of the dispute, of course by an electronic way.
- The EU States Members have to watch that the competent bodies for extrajudicial solution of the disputes apply, within the established norms of the community law, the principles of independence, transparency, contradictory character, efficiency of the procedure, equality of decisions, freedom of parties and representation aimed to improved the communication between the professionals and the consumers;
- The EU States Members have to encourage the bodies that solve the disputes on extrajudicial ways inform the Commission about the taken decisions concerning the services provided by the informatics society and about the information concerning the practices, the usances or the customary laws of the electronic trade[3].

By these recommendations it was aimed that the decisions taken in this field will be put into practice by setting up an European form for complaints for the consumers, the adoption of some minimal principles governing the activity of the bodies established by the law to solve on extrajudicial way the disputes by setting up an Internet portal dedicated to the on line solution of the disputes generated by the trade of electronic type.

The portal has as scope the creation of a cross-border entity meant to facilitate the solution of the disputes involving parties from different states, in order to ease the solution with rapidity for the disputes between them, for elimination of the costs generated by the travel expenses, for administration of the proofs and others.

Through the EU decision, the States Members are obliged to have a legislation allowing the efficient operation of the mechanisms used for extrajudicial solution of the disputes in the electronic trade. Also, the consumers must be informed about the possibility to appeal to a court in case that the RDO decision[4] does not satisfy them, and about the right to cease at any moment these procedures outside the legal system.
Most of the time, the consumers most of cases, but also the offerers, are confronted with major difficulties in solving the issued arisen following the electronic transactions, such as: differences of linguistic and cultural nature, the expenses resulted due to the fact that

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[3] www.ecodir.org

[4] RDO (Resort Development Organization) is a professional body dedicated to the excellence and correctness of the trade transactions, with headquarters in Brussels, Belgium.

the offerer and the consumer are in completely different geographical locations, at large distances sometimes and others.

Also, there is possible to be problems in defining the jurisdiction with regard to the applicable law and putting into practice the decisions taken by the courts. Moreover, the companies have difficulties in establishing the territories where they could be subject of jurisdiction and which laws are applicable for them.

The fact that you have to obey laws from numerous jurisdictions and that you are vulnerable to be sued in more courts leads to the increase of the costs involved by carrying out the on line trade. Therefore, there are necessary fast instruments, adequate and convenient ones from the financial point of view for solving the disputes in order to create a feeling of trust in the electronic space. The term ODR means generally an electronic form of an alternative resolution of a dispute (Alternative Dispute Resolution) and includes more type of activities:

- negotiation – by which the parties try to reach a consensus through active communication between then by means of Internet by using for example e-mails, videoconferences or tele-videoconferences.
- mediation – process in which the mediator, a neutral person against the parties being in disputed, communicates with both parties. By presenting them the advantages of solving the dispute in a friendly way and not in the court and trying to bring them to an agreement.
- arbitration – process in which a third party chosen by mutual agreement by the parties involved in the dispute, provides the function of an referee and takes a decision by an arbitral decisions, after having studied the relevant evidences and after having studied the existing proofs.

Because of the specific existing in the electronic space of business, these alternative ways for solving the disputes are encountered .Many virtual forums for solving the disputes offer already services on Internet, making from the resolution on line of the disputes a reality. This rises the question of the compatibility between the RDO and the actual legal frameworks, national or international ones, and the regulation of the activity carried out by providers of services of RDO type.

The statistics of the available services at the present time shows that the negotiation is for most of cases done by e-mails, while the procedure of mediation uses also other type of communication (videoconferences, phone, voicemail[5], fax).

The on line arbitration, where it is used, is confronted with difficulties, because the parties involved in dispute do not want to obey the decisional authority of the referee. The sole

[5] Term used in a larger sense for indicating any system of transmitting stored voice messages, including by means of a telephone answering machine.

authority for on line international arbitration is ICANN[6], an organization that deals with the problems related with the name and the property over the Internet domains[7].

Within the procedure of arbitration, the availability of adequate means of communication means more than even the quality of the legal act itself. If the documents are not correctly transmitted, there is a risk of receiving a unfavourable decision from the referee, and these decisions are hardly corrected. In the processes of on line mediation, all the involved parties have private and confidential documents. The cases are never published with real data, but only as statistics.

As a rule, the parties wait an increased confidentiality. The personal data are not made public, and the persons not familiar with a certain process of arbitration are not accepted to assist to the hearings or to analyze the registrations of the process[8].

The resolution of the disputes arisen in the field of electronic trade, can not be done in a reasonable way by using the classic legal system[9]. By the European Directive the competent bodies try to take the most important measures for facilitate to the consumers of services within a information society the right to an impartial judgment. We are talking about alternative methods for solving the disputes, their existence being necessary, fact proved by the legal decision taken by the competent bodies and that oblige the EU States Members to facilitate and to regulate the activity of these entities.

A particular efficient method is represented by the mediation, which, according to the provisions of the Code of ethics and professional deontology of the mediators, adopted in the year 2007 by the Council of mediation, the mediation is the voluntary way for solving the disputed between two or more persons, in a friendly way, with the assistance of a third neutral person, qualified and independent, through an activity carried out in conformity with the legal provisions in the field and the norms of the above mentioned Code.

The Directive of the European Union concerning the mediation in the civil law and commercial law, has as scope to facilitate and to promote the alternative ways for the resolution of the disputes and to harmonize the mediation with the legal procedures in the States Members. The Directive emphasizes the training of the mediators, the observance of the standards for training and the quality of the mediation services and recommends to the judges to counsel the parties to use the mediation.

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[6] *Internet Corporation for Assigned Names and Numbers*

[7] For the arbitration procedure of common law done by referees, see Fl. Măgureanu, G. Măgureanu, The civil process right. Course for masterate. The business law, IInd, Ed. Universul Juridic, Bucharest, 2009; V. Roş, The international trade arbitration, Ed. Monitorul Oficial, Bucharest, 2000.

[8] See also the numerous international rules concerning the arbitration. We mention: The protocol concerning the clauses of arbitration, stipulated at Geneva on 24th March 1923; The convention concerning the putting into practice the foreign arbitration decision, stipulated at Geneva on 26th September 1927; The convention for the admission and execution of the foreign arbitration decision, adopted at New York on 10th June 1958; The European convention for international trade arbitration, stipulated at Geneva on 21st April 1961; The convention for settlement of disputed concerning the investments in states, stipulated at Washington on 18th March 1965; The law type concerning the international arbitration from 21st June 1985 and the Rule of arbitration UNCITRAL from 28th April 1976.

[9] For a detailed examination concerning the resolution of the trade disputes by the common process law by the courts, see Fl. Măgureanu, The civil process law, XIIth ed., Ed. Universul Juridic, Bucharest, 2010.

The agreement reached by the parties through mediation is considered as having the same value as the judge's decision itself, the parties being counselled to show up before the notary or to follow the judicial procedures specific for the respective State Member for putting into practice the agreement concluded between the parties through mediation.

The Directive takes into account the confidential character of the mediation and refers to the duration and the terms of prescriptions, emphasizing the securing of the access to the justice if the mediation fails[10].

According to the provisions of the Art. **2 par. (1), from the Law no.** 192/2006, **if the law does not stipulate otherwise, the parties, physical or legal persons, can resort to the mediation voluntarily, including after starting a judgment before the competent bodies, agreeing to resolve on this way any dispute in civil, commercial, family, criminal field, as well as in other fields, within the conditions stipulated by the law. To the mediation are subjected also the disputes from the field of consumers' protection, if the consumer invokes the existence of a damage following the acquisition of defective products or services, non observance of the contracting clauses or given warranties, existence of some abusive clauses included in the contracts stipulated between consumers and the economic agents or because of the violation of other rights foreseen by the national legislation of that of the European Union in the field of the consumers' protection**

The mediation cannot have as object the strictly personal rights, such as those concerning the status of a person, as well as any other rights of which the persons, according to the law, cannot dispose by convention or any other way admitted by the law.

The use of certain services of RDO type is limited because of the mistrust the users have that the offered information will remain confidential and that the decisions will be impartial ones.

A particular role in carrying out the processes of out-of-court[11] type , have the electronic signature, that come to confirm the will of those involved in such processes and eliminate the suspicion and the mistrust.

The electronic trade is based on the electronic transmission of data. This system has also disadvantages, the vulnerability of the e-mails or that of other forms of communication on web when they are not protected. The solemn declaration that the collected information is confidential does not mean necessarily that the information cannot be transmitted or accessed accidentally or by third parties, interested from the material or moral point of view in decoding the information. The providers of electronic services guarantee that the electronic information are protected and the electronic communications and the access to the data is secured before and after the procedure of solving on line the dispute.

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[10] On 23rd April 2008, the European Parliament has adopted the Directive (IP/08/628) concerning the mediation in the civil law and the commercial law, upon the Proposal of Directive (IP/04/1288) from October 2004, the States Members having at their disposal 3 years to transpose into the internal legislation the provisions of the Directive concerning the mediation in the civil law and the commercial law.

[11] Procedures of solving in an extrajudicial manner the disputes.

The electronic signature is legally acknowledged as proof in justice. Therefore, the development of the legal framework in the domain of the electronic signatures has been accompanied by the setting up of the legislation that regulates the activity of the providers of services of electronic signature.

In the community plan, there is a diversity of legal norms that regulate the electronic signature, fact that led to the initiative of the European Commission for harmonizing the corresponding provisions within the European Union, the guarantee of a good operation of the domestic market in the domain of these signatures, by establishing also the criteria representing the base of legally acknowledgement of the electronic signature and the certification services of it, as well as the assimilation of the electronic signature with the holograph one.

Unlike the traditional deeds, the electronic ones don't have a strictly visual representation unless then when the recipient checks, using specific methods, the conformity of the signature, its authenticity, integrity and the confidentiality of the document contents as well as the identity of the signer. A big advantage is represented by the fact that the digital support (diskette, CD, etc.) is much more durable than the paper, the registration and the possibility of archiving being net superior ones and the electronic language became an universal one, eliminating the difficulties connected with speaking, translation, interpretation.

According to the provisions of the art. 4 pts. 3 and 4 from the Law no. 455/2001, "the electronic signature represents data in electronic form, attached or logically associated with other data in electronic form and that serves as method of identification", and " an extended electronic signature represents that electronic signature observing cumulatively the following conditions: is connected in an unique way with the signer; provides the identification of the signer; is created by means exclusively controlled by the signer; is connected with the data in electronic form, to which is so related that any their successive modification is identifiable".

The main objective of the above mentioned law is represented by the identification and the certification of the agreement given by the author of deed in electronic form and the securing of all conditions of reliability and those of the securing system based upon electronic signature.

In order to provide the conditions of the electronic signature validity, there are required secured devices for creating and checking the signature and creating a valid certificate from the provider of certificating services, its absence leading to the impossibility of assimilating the deed in electronic form with that under private signature.

The Art.4 par.7 from the law stipulates the necessity of using a secured device (hardware and/or software configured) for implementing some data in order to create the electronic signature, and at the par. 8 there are mentioned the conditions to be fulfilled by this one.

The electronic (digital) signature offers to the reader a strong reason for acknowledging the fact that the digital message or document is created by the persons who has signed it,

and the contents of the digital message or document hasn’t been modified since its issuing.

The electronic signature is based upon three algorithms: that of aleatory selection of a private key which it will be associated to a public key; that of signing that, applied to a private key and to a digital document, will generate the digital signature; that of checking the digital signature, which applied to the public key of the digital signature, accepts or rejects the message of conformity.

For the confirmation of the authenticity, there is issued a qualified digital certificate, which secures the ”virtual identity” of the possessor and allows the creation of an electronic signature with legal value allowing an identification without ambiguity, based on the guarantee of the integrity and authenticity of the electronic messages and documents.

It is absolutely necessary to secure the protection of the data for two types of communications: from the portals on Internet belonging to the offerers towards the customers; from the involved parties in a process of dispute on-line and the third mediator or referee.

By using the electronic signature it is possible to eliminate a series of risks connected with the origin of the documents, the person receiving them and the possible modifications of the documents following their interception.

Taking into account that the classic legal system is not adapted to the dynamics of the electronic trade, the costs of its use are sometimes too large as well as the numerous complications connected with the jurisdiction and the geographical localization, it is necessary in succession that the European Union supports the foundation of some bodies that offer the possibility to find new modern means for the resolution of a conflict without resorting to the courts.

Conclusions

Resolving commercial disputes through the common law procedure has become increasingly difficult, presenting numerous disadvantages caused by very long pe riods in which this procedure is performed, imposing the alternative ways of conflict resolution including mediation.

As a result, are required to be taken the most important and urgent measures to facilitate consumers' information society services entitled to a fair trial, but through a simplified procedure to ensure objectivity and legal resolution of conflicts.

Mediation, as a voluntary means of settling disputes amicably, with the assistance of a neutral third party which however must be qualified and independent, will certainly contribute to relieving the courts of the large number of cases they face today and settling in more short-term disagreements between the parties.

If the mediation will be done online, terms and costs of conflict resolution will be shorter and the parties will benefit from many other advantages.

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