The challenges of the institutional framework of mediation in the Republic of Macedonia (part 1)

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Abstract
Mediation is one of the alternative dispute resolution methods. The institutional framework of mediation in the concrete legal system is an important link which allows the growth and development of this method for dispute resolving. This framework is consist of few elements. The paper analyses institutional framework of mediation in the Republic of Macedonia through the status of the mediators as the most important element of the mediation institutional framework. The introduction of the paper gives some general remarks about the mediation and mediators. The first part is dedicated to the title of “mediator” in the Republic of Macedonia, the conditions for becoming a mediator and their liabilities. The second part describes the trainings of the mediators in the Republic of Macedonia. The conclusion includes assessments of the analyzed questions and recommendations for the further treatment of the mediators in the Republic of Macedonia. Results in this paper are generated by analyzing official legal documents and political acts and using literature connected with the issue.

Keywords: mediation, Republic of Macedonia, mediators, institutional framework.

Introduction
Mediation is an alternative dispute resolution method (ADR method) which can be defined as resolving a dispute in a voluntary, informal process through negotiations with the help of a neutral third party called a mediator (Riskin, 1996; Moore, Wood and Kemp, 1998). The mediator can be defined as a third independent and impartial party who assists the parties in the mediation procedure for better understand the nature of their dispute and helps them in finding numerous opportunities that would lead to solving the dispute in whole or in a part (Schulz, 2007; Waldman, 2011; Stulberg, 2005). Sometimes, depending on the type of mediation mediator may offer a solution to the dispute, but never to impose a solution (Zumeta, 2015: Recommendation Rec(2002)10). Mediation as an ADR method has its own structure and dynamics that "ordinary" negotiations have not. These features require mediators to use different techniques for starting or improving the dialogue between the dispute parties, in order to help them to reach an agreement (Boulle and Nesic, 2010). As a critical issue for the development of mediation appears the need to build trust between the dispute parties and the mediator, which largely depends on both: the personal character and the skills of the mediator. Due to this sensitive feature a large number of countries formally regulate the question of who can be a mediator and what are the conditions that the mediator as a neutral third party must satisfy. This is especially characteristic of countries of the civil law system. In this regard, all the international and domestic legal documents insist on quality mediation and direct connect the quality of the mediation with the capabilities of a mediator (Directive 2008/52/EU; UNCITRAL Model Law on International Commercial Conciliation). Therefore it is particularly important what concrete law stipulates for the mediators.

Because of the all previously mentioned, analyses of the advantages and disadvantages of the institutional framework that is present in certain circumstances is of the great importance both: for those who use the mediation services and for the development of this ADR method.
1. Mediator – general provisions

1.1. The title of “mediator”

The preceding Macedonian Law on Mediation (Official Gazette of the Republic of Macedonia No. 60/2006, 22/2007, 114/2009) in its Article 10 defined the term mediator as “a natural person who has legal capacity and helps the dispute parties to reach agreement in accordance with the principles of mediation and without the right to impose a solution to the dispute.” The current Macedonian Law on Mediation (Official Gazette of the Republic of Macedonia No.118/13, 148/15, 192/15, 55/16) contains no definition of a mediator, but directly determines the conditions for practicing mediation services (Article 46).

We believe that a law definition of a mediator is needed, because it should define the main role of the mediator. For example, it is very important if the mediator has or has no right to propose a solution to the dispute parties. The analysis of the laws of most states shows that this role of the mediator is regulated even with the definition of the mediator.

The present Macedonian system of mediation knows accreditation and licensing of mediators. This is an area where major changes are made in relation to the previous concept of mediation in the Republic of Macedonia.

1.2. Becoming a mediator

Article 46 of the Law on mediation provides that only a natural person who has legal capacity and who is licensed to perform mediation activities (hereinafter: licensed mediator) can act as a mediator in the Republic of Macedonia. A license for the mediator shall be issued to the person who fulfilled the following conditions: has passed the exam for checking the theoretical knowledge and practical skills for mediator (hereinafter: mediators’ exam) in front of the Board for ensuring, monitoring and evaluating the quality of mediation (hereinafter: the Board) and who has presented a contractual liability insurance. According to the previous, a system of examination and licensing of mediators has been created. Mediators’ exam may be taken by the individuals who have submitted an application for the exam to the Board, together with a proofs of: a) a university degree VII / I or 300 credits under the European Credit Transfer System (ECTS) obtained in the Republic of Macedonia or the decision on recognition of the Macedonian Ministry of education and science for the appropriate higher qualifications acquired abroad; b) completed training according to the accredited training program for mediators lasting at least 70 hours, in the country or abroad, or a decision on recognition of relevant training completed abroad and recognized by the Board; c) at least three years work experience after graduation; d) had followed at least four mediation procedures carried out by the mediator and a confirmation document issued by a mediator supported with an extract from the Register of records of the mediation of the relevant procedures; e) passed a psychological test and a test of integrity issued by a licensed expert; f) certificate of citizenship of the Republic of Macedonia and g) at least five references from people who know the applicant in professional capacity. In fact, according to the legislator, these are minimum criteria that will ensure quality and competent mediators. In respect of such specified criteria, we believe that the legislator’s insisting on higher education is not consistent with the concept of mediation, because the quality of mediation may depends on a person who does not have a university degree, considering the fact that the basic function of the mediator is to enable the communication between the dispute parties in order to improve their relations and find a mutually acceptable solution. Depending on the type of dispute, the person who can reach this may come from different areas, meaning that completed higher education is not a guarantee that the one who finished it would be a good mediator. This is also confirmed by the experiences of other countries. Then, it is unclear why the legislator insists on “at least three years work experience after graduation” and possession of Macedonian citizenship. This insisting on working experience means limitation of the right to act as a mediator for people who do not have the required experience and when it comes to mediation, there should be no this kind of limitations. Indirectly, from this legal provision can also be concluded that a foreign national cannot carry out mediation in the Republic of Macedonia. The requirement for "followed at least four mediation
procedures” is contrary to the essence of the principle of excluding the public and the presence of third party in a confidential procedure as mediation is and can negatively affect the success of mediation. The law also insists on "psychological test and test of integrity” but does not contain provisions that would refer to: non-conviction record for the mediators; persons under investigation as mediators or the existence of circumstances that make the person indecent for mediation work. Namely, for a good mediator does not matter whether he or she is a good lawyer or a good expert in another area. Mediator essentially creates conditions for the exchange of information between the dispute parties, so that the good mediator needs other predispositions, including a very good reputation in the community in which he or she lives and works, and ability to inspire confidence among the parties to the dispute.

The person who will pass the mediators’ exam and will present contract liability insurance shall be issued a license and only he or she can carry out mediation services. Issued license is valid for five years and can be extended or subtracted depending on the results of the evaluation of the quality of work of the mediator. The evaluation of the quality of work of the mediators is conducted by the Board, at least once in five years, in accordance with the methodology and procedure for monitoring and evaluating the quality of work of mediators. In our opinion the mediators are obliged to improve their professional skills and abilities through appropriate ongoing trainings. They are also obligated to advance their own education, mediation skills and abilities, but in the same time we believe that such a solution for conditioning the providing of mediation services with the assessment by the body with inadequate composition is completely wrong.

For conducting mediation in relations where the law provides obligatory mediation, the law may provide additional conditions for a person who takes the mediators’ exam as well as supplement supervision and control. The license of these mediators contains data for the specific mediation area. But the law does not regulate the question who determines these additional conditions, or the question about the by-laws that would regulate this matter. This would imply that beside independence and impartiality, the mediator must also fulfill other conditions. This leads to the conclusion that the legal concept of mediation in Macedonia departs from the original model of mediation based on privacy, and is approaching the functions of the public sector.

1.2. Mediators’ exam

The legislator determines that the mediators’ exam which is based on written tests, essays and reports, checks the knowledge and understanding of the general mediation theory, the legislation regulating the mediators’ activity, mediation procedure and practicing of mediation (Article 47, paragraph 2 of the Law on mediation). In terms of this legal solution, we believe that if we have to make gradation, then knowledge and understanding of peacefully resolution of conflicts, and in this sense mediation too, is much more related to the trainings of the mediators than to the mediators’ exam. Program for the mediator’s exam is adopted by the Minister of Justice (this Program is available on the web site of the Ministry of Justice). It cannot be determined when was this program adopted for the first time, because the available program does not have date of adoption. But this program was available to the public for the first time on 03.11.2014 year, which means a year after the Law on mediation came into force.

The Ministry of Justice does the professional and administrative work for the implementation of the mediators’ exam. The Minister of Justice determines the responsible natural person who determines whether the applicant meets the requirements for the exam. The mediators’ exam technically should be implemented by a legal person registered in the Central Registry and selected from the Minister of Justice (Article 50 paragraph 1 of the Law on mediation). Although from February 2016 up to today mediators’ exam was conducted, not officially information is available if this legal person has been selected and what are the criteria for its selection.

Mediators’ exam consists of three parts: Part I (theoretical part), checks the theoretical knowledge of the candidate; the second part (case study) checks candidate’s capability to implement the process of mediation in practice and third part, evaluates personal traits, characteristics and practical skills of the candidate. The first and second parts are in the form of electronic test on
The third part is implemented as an interview of the candidate with the Commission of five members consists of representatives of the Board. The Board forms the database of questions for the first part and the base of case studies in the second part. For preparing the questions for the first part of the exam and the case studies for the second part of the test, Minister of Justice hires judges, professors from the faculties of accredited universities in the country, sociologists, psychologists, lawyers, businessmen, mediators and others. The law does not specify any value criteria for the third part of the exam, nor how to define them.

The examination is recorded and broadcasted in live on the website of the Ministry of Justice. If the broadcasting is interrupted because of the technical reasons, the record of the entire test shall be placed on the website of the Ministry of Justice. We believe that this legal decision is contrary to the constitutionally guaranteed right to privacy (Article 25 of the Macedonian Constitution stipulates the following: "Every citizen is guaranteed the respect and protection of the privacy of personal and family life, dignity and reputation.")

In the room for the examination during the exam, a representative of the Ministry of Justice and Ministry of Information Society and Administration and a representative from the Government on the proposal of the Office of the Prime Minister, are present (Article 50, paragraph 8 of the Law on mediation). The law provides that during the examination is not allowed use of a mobile phone, portable computer and other technical and information resources, legal texts, pre-prepared items and the like. Also mutually contacting among the candidates is not allowed. We believe that these provisions are mainly of technical character and should not be contained in the law, because it is not only an unnecessary burden on the law text, but it is even humiliating for candidates who should be characterized as honorable by good faith, not in force. Otherwise they do not have personal traits necessary for mediators.

Also, the law stipulates the revision of the exam by the Commission. This Commission should be formed by the Minister of Justice. This Commission is comprised of: two representatives of the Board, one representative of the Government, one of the Ministry of Justice and one of the Ministry of Information Society and Administration. Law provides that this Commission shall meet after each test session and will review the whole process of a mediators` exam, including whether the examination was taken from the applicants who are not qualified for the exam. For the founded facts the Commission is obligated to submit a report to the Minister of Justice. No data or any information from the Ministry of Justice are available whether such a commission was established or whether it exercised its legal obligations, given the fact that mediators` exams had been already conducted.

The cost of exam shall be reimbursed by the person who will take the test at the expense of revenues of the Ministry of Justice. The amount of the actual costs should be determined by the Minister of Justice. Official decision of the Minister of Justice about the cost of the mediators` exam is not available yet. But the costs of the exam that are visible from the notices for the mediators, published on the official web site of the Ministry of Justice and not signed either by the Minister of Justice, or any other, are about 9.100, 00 denars (these notes are available at the web site of the Ministry of Justice).

Since the entry into force of the Law on mediation in 2013, the mediators` exam for the first time was conducted in February-March 2016. Official data about applicants, examination and the results are not available. But the first reactions about the test were very negative.

The basic impression of this legal placement of the mediators` exam is that too many powers are given to the Ministry of Justice. If we make a simple comparison with the legal responsibilities concerning mediation entrusted to the Albanian Ministry of Justice, for which the Albanian law expressis verbis stipulates that the mediation in Albania is conducted under the auspices of the ministry, it is determined that the Macedonian Ministry of Justice has many more responsibilities. Per analogiam, it is not wrong to conclude that mediation in Macedonia is performed under the auspices of the Macedonian Ministry of Justice.
1.3. Liability of the mediators

There is no dilemma that the mediators are and should be responsible for the damage towards the dispute parties or third parties, caused with mediator’s illegal actions and by defaulting mediator’s obligations. Hence, a “third party” is all persons who suffered damage, except persons who are parties of the mediation procedure. Illegal actions or default of the mediator’s obligations are determined by a court decision made in civil proceedings.

Novelty which introduces law is the obligation of the mediators to conclude an insurance contract to third parties in the amount of not less than 50,000 Euros (article 24 paragraph 4 of the Law on mediation). According to the proposer of the law – the Government this is particularly important because of the novelty in the Macedonian Civil procedure law for mandatory mediation in commercial disputes of a value up to 1,000,000 denars. We consider that mediation is a process of peaceful disputes settlement, envisaged in the interests of the conflicting parties and the mediator as a neutral third party, who should help the dispute parties to come to a solution is obliged to act in conscientious and responsible way. His behavior contrary to determined by the laws that would cause harm for the dispute parties or third parties, would lead to the realization of their right to compensation under the provisions of the Law on obligations. According to the nature of the professional services provided by the mediators; the role of mediator in the process of mediation and impossibility for mediator to impose a solution, particularly problematic is the amount of insurance of 50,000 Euros. If we take into consideration the fact that lawyers who have much more responsible role than the mediators and a lot more space for causing harm to the parties, in accordance with the legislation in the Republic of Macedonia are insured in the amount of 10,000 Euros.

2. Trainings for the mediators

Trainings for the mediators are performed by the trainers. According to the law as a trainer for mediators can act all natural persons who have legal capacity and have the license for a trainer (hereinafter: licensed trainer). The law stipulates that the license can be issued to the persons who will submit a request for license to the Board along with the proofs for the fulfillment of the following conditions: a) completed training for trainers of mediators in lasting of minimum 32 hours, in the country or abroad in the last three years, or university diploma of higher education VII / I or 300 credits under the European credit transfer system (ECTS) in the Republic of Macedonia in the field of mediation, conflict resolution, negotiation or conciliation, or a decision on recognition of appropriate high - educational qualifications acquired abroad in the relevant field, issued by the Ministry of Education and Science of the Republic of Macedonia; b) registration of his status as mediator in the Register of mediators or appropriate register of a foreign state, if the applicant is a foreign national; c) registration from the Register of records of mediation proceedings or appropriate register of a foreign country if the applicant is a foreign national, for conducted at least 12 mediation procedures in the last three years and d) at least two references from people who know the applicant in professional capacity and attest for its ability to transfer theoretical and practical knowledge. From these specified conditions we can conclude that the trainer of mediators must be a mediator, who must show sufficient professional experience in the field of mediation and has cumulated enough relevant experience in mediation. Although we believe that the legal decision which requires "... completed training for trainers of mediators… in the last three years ..." implicitly does not recognize as valid trainings held four and more years ago, and in the same time puts in a disadvantage position trainers who completed trainings more than three years ago. However, we consider that in general this solution is appropriate. This solution resulted in problems from a practical aspect from 2016 to 2018, because the mediators who had completed appropriate trainings for trainers were not licensed mediators, and accordingly could not provide trainings for mediators. Also, it is evident that in the period from February 2016 to March 2018 mediators’ exams are conducted and finished without a mediators’ training to be scheduled or conducted.

At the invitation and in the presence of the licensed trainers, part of the training for the mediators, but not more than 10%, can be performed by distinguished experts from the practice of a
particular area of importance for the mediation. Persons who are licensed trainers are registered in the Register of trainers of mediators.

The law provides that the license issued to the trainer can be extended or subtracted depending on the results of the evaluation of the quality of the work of trainer. The Board makes the evaluation of the quality of work of the trainers, at least once in every five years, in accordance with the methodology and procedure for monitoring and evaluating the quality of work of the trainers of mediators.

The trainings for mediators are conducted according to the accredited training programs for mediators. Accreditation is granted to programs that meet the requirements for accreditation. The conditions for accreditation of these programs and the circle of persons who are eligible to apply for are determined by the Board. By March 2018 there is no official information whether and which are the conditions and people chosen from the Board. We believe that this issue deserves much more serious treatment than it gets, especially in the terms of some of the above mentioned legislation decision relating to the mediators’ exam.

Issued accreditation may be extended or subtracted depending on the results of the quality evaluation of the implementation of the accredited training programs. This evaluation is carried out by the Board at least once in every five years, in accordance with the methodology and procedure for monitoring and evaluating the quality of the implementation of accredited training programs for mediators. Also, like many times before, the methodology and procedure for monitoring and evaluation remains unknown to the professional and general public.

Training programs for mediators which have been granted with an accreditation are recorded in the Register of accredited training programs for mediators. The Board maintains The Register of trainers for the mediators and the Register of the accredited training programs for mediators. By March 2018 there is no official information whether and which are the accredited training programs for mediators.

Conclusion

According to the previous analyses, it can be concluded that the legal framework for the mediators is very important for the development of mediation. As regards to the legal framework of mediators in the Republic of Macedonia, despite the remarks made in the analysis above, we can underline the following main points: we believe that a lack and failure of the law is that it does not contain provisions on conflicts of interest of mediators. The Law on mediation must have provisions which stipulate that the mediator can not act in disputes where he or she has or had a personal interest, personal, family or business relationship with any of the dispute parties, or if there are other circumstances that would cause doubt in his impartiality. The mediator shall not act in disputes where previously acted as a judge, was a representative, attorney, arbitrator or adviser of any of the dispute party. The person who will be proposed as a mediator is obliged to disclose to the parties all circumstances that may give rise to a reasonable doubt in his or her impartiality and independence. During the whole procedure, mediator is obligated to disclose these circumstances to the parties, without delay, except if he or she has not already informed the parties about this. Although the law provides adoption of a Code of conduct for mediators and this issue should be covered by it, we still believe that presence of such a provisions in the Law on mediation is particularly important as an additional guarantee for the good behavior of the mediator and for confidence in the mediation procedure. The legal regulation of this matter we consider as essential for the development of the mediation in the Republic of Macedonia.

The current Law on Mediation also does not have special provisions on the duties and rights of the mediators. We believe that the existing Law on mediation particularly in the section on mediators should be improved from the technical aspect.

The transparency of activities related to the mediators is on a very low level. After more than ten years from the beginnings of mediation, we can still say “the process of introducing of mediation” in the Republic of Macedonia, not “the process of development of mediation”.

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