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Ph.D. Thesis

The Mediation as alternative method of solving international disputes

Summary

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Motto:
"Better a wrong understanding
than a good trial"

KEY WORDS: ***international mediation, mediator, international conflict, alternative methods for solving conflicts, technics and policies for mediation negotiation, steps of mediation, mediation styles.***

INTRODUCTION

In the context of promoting the alternative methods for solving conflicts internationally, connected to the need to reform the Romanian justice system, in the year 2005, following the Protocol concluded between the USA Embassy and the Romanian Ministry of Justice, the bases of the mediation institution were laid in Romania and the first Romanian mediators were trained. One year later, by adopting the Law 192/2006 concerning the mediation and organizing the profession of mediator, this new profession was institutionalised and a new stage was surpassed within the process for making the judicial process in Romania more efficient.

The Romanian mediators, freshly trained by the American school of mediation, besides having the duty of making the mediation into a new field in the Romanian juridical system, have the difficult mission to try to change the wide preconception of the Romanian society, i.e. that the court of law is the only option available for solving a case, i.e. the fight against the dictum deeply rooted in the collective thinking "what the law will decide". Conquered by the idea of pioneerdom in promoting mediation in Romania and getting involved actively in the new "Union of the Romanian Mediators" (UCMR), in setting the Romanian Mediation Centres (at a district level), the first mediators joined the legislative

effort to outline the mediation law and got involved in the activity of informing and educating legal advisers, attorneys-at-law, magistrates, etc. making a special effort to convince different professional categories to give credit to mediation.

Following the attempt to give more efficiency to the institution of mediation, the Law 192/2006 was later amended and completed by the provisions introduced in the "Law of Small Reform", i.e. the Law No. 202/2010 concerning certain measures for accelerating the solving of trials, introducing the magistrates' obligation to inform and recommend the parties to try solving the case by this alternative method.

Legislatively recognised and received at a European level since 1998, when the first Recommendation of the European Council in the field of mediation was adopted, this institution was promoted exclusively by negotiations in Chapter 21 "Justice and internal affairs", the mediation being included in the measures taken by the countries on the verge of adhering to the EU. Adopting the EC Directives 52/2008 and CE/64/2007 imposes practically all member states to adopt a set of unitary legislative measures in the field of mediation until May 2011; promoting the mediation especially in the cases with elements of extraniety became a priority on a European level. In this context, the 21st century will be the century of solving conflicts amicably. "The traditional litigation might be a mistake that needs to be corrected …. For certain disputes, the process will be the only way, for others, not … Our system is too costly, too painful, too destructive, too inefficient for really civilised people." (Chief Justice Warren E. Burger , U.S. Supreme Court- Washington DC[1])

The degree of diversifying social, economic and political relations in a more and more complicated society, the economic development, the birth of new industries, the complexity in the development of all aspects of daily life adds new types of conflicts. Classically solving the conflict by referring it to the

[1] Craiova Mediation Centre Association, Course for training mediators, 2010, page 3, http://www.mediere.ro/

justice authorities and solving it according to the concept winning-losing (winner-loser) proved not to be always the best answer, capable to offer solving all present-day uncertainties and economic, social and political difficulties.

The idea of solving amicably a litigation or a conflict that has not become a litigation, with the help of a specialist, has become more and more appealing and has more adherents, the procedure of mediation being preferred by parties, people and institutions that the complexity of the present-day social, economic and political relations places them in different conflict situations in certain situations.

The mediation is one of the most common means for solving international conflicts, due to the fact that it is flexible and adaptable, and these specific features make it an effective strategy for building peace in all conflict stages. The mediation can be used for preventing the escalation of the conflict in violence (preventive diplomacy), it can be used for putting an end to violence (conflict management) or it can be used in the post-conflict phase (post-conflict reconstruction). In short, the mediation may contribute to building and keeping peace in a manner not seen before in case of other strategies. Approaching the international conflicts has become a priority in the global Agenda, as there exist a few peaceful ways for solving international conflicts, such as: negotiation, mediation and arbitration.[2]

Apparently, getting involved in the mediation process can only have a positive result: even if the litigation is not solved by mediation, the parties will have better outlined claims, following the mediation and, being aware of the positions as compared to the object of litigation, they will be much closed to solving it.

Thus, we can ascertain that the motivation for choosing a theme is mainly the attention that the alternative conflict solving methods (ADR) have,

[2] Jacob Bercovitch, Su-Mi Lee, *Mediating international Conflicts: Examining the effectiveness of Directiv Strategies,The International Journal of Peace Studies* ,Vol.8, No. 1, 2003, pages 1-2.

especially the international mediation. The purpose of my paper is understanding this institution, understanding the substantial and procedural legal norms it involves, the techniques and tactics a professional mediator has to master for an efficient communication and, therefore, for a successful process of international mediation.

The means we understand to use for fulfilling the above-mentioned purpose are the regulations, the speciality literature and practice from other law systems.

Approaching the proposed theme has two ways:

- Introductory approach by presenting the facts, the grounds and statistics from documentation and bibliography, in the sense of supporting the research conclusions, as well as,
- Deductive approach in analysing the phenomena at a national and international level, especially for presenting the study cases.

The methodological support of research is represented, on one hand by using the theoretical methods, such as analysis, synthesis and abstractisation. At the same time, the comparative method was used especially for presenting different mediation styles and techniques; the advantages and disadvantages it involves were presented comparatively.

When presenting the state and non-state actors involved in mediating international litigations, not only the exhaustive presentation was aimed at, but especially a quality analysis of their role and implication, the qualitative aspect being followed when analysing the laws, documents and analysed studies. As concerns the empirical methods, three case studies were analysed, that are significant for understanding the importance of mediation in the attempts to solve the international litigations amicably, as well as a series of interviews with persons involved in promoting the mediation, but also with practitioners of international mediation.

The bibliography used includes primary sources: laws, treaties, documents, official reports, as well as secondary sources: dictionaries, books, studies published in the speciality magazines. The bibliographical sources offered by the websites of associations and organisations involved in promoting the mediation came to complete the analysis performed.

The idea of researching the institution of mediation, as alternative method for solving international litigations occurred as a result of the chance of the Ph.D. student to be one of the first graduates of the mediation courses organised in Romania, pursuant to the Protocol concluded between the USA Embassy and the Romanian Ministry of Justice (2005), later becoming a founding member and vice-president of the Romanian Union of the Mediation Centres (UCMR), founding member and vice-president of Club Mediation Centre. At the same time, the author represented the Romanian Union of the Mediation Centres at the Congress of the International Union of the Attorneys-at-law – Section Mediation Paris (2007), at the World Forum of the Mediation Centres in Milan (2008), at the World Forum of the Mediation Centres in Ljubljana (2010) and at the World Forum of the Mediation Centres in Athens (2011), where she coordinated as a speaker the section "Styles and Techniques in Mediation and Negotiations". On the occasion of participating to numerous internal and international conferences on the subject of mediation, an example being the international conference "Mediation in the European Union. Stage and Perspective", organised in Bucharest in 2010 and at the World Mediation Forums, the theoretical research was completed by the experience shared by mediators specialised in solving international litigations.

The originally consists of approaching for the first time in Romania the issue of mediation, as an alternative method to solving international litigations, from the perspective of a close future where Romania could play an active role in solving these conflicts by training mediators specialised on solving international conflicts.

CHAPTER 1. THE MEDIATION IN THE INTERNATIONAL RELATIONS

1.1 The concept of mediation

The Law No. 192 of May 16, 2006, as amended, concerning the mediation and organising the profession of mediator, in chapter I, art. 1 defines the mediation as representing "a way of solving conflicts amicably, with the help of a third person, specialised as mediator, under conditions of neutrality, impartiality, confidentiality and having the free consent of the parties." Approaching the international conflicts from the mediation perspective has become a priority on the world agenda, as well as on the agenda of the European Union, as the EU legislation recognised by different recommendations the use of mediation in the international litigations, litigations involving elements of extranity. Thus, "the states have to take into account setting up certain mechanisms that could allow, when applicable, the use of mediation under the situations which involve elements of extranity … taking into account the special nature of international mediation, the international mediators have to be specially trained for this purpose [3]."

The speciality literature defines mediation as "a special type of negotiation, a process where a third neutral party intervenes. It is a voluntary process; based on the conviction that a third impartial party will help the parties involved to reach an acceptable finalization.

1.2. A short history of mediation

The actual mediation activity occurred in the Antiquity. The historians consider that the mediation was used in the Phoenician trade (but I suppose using it in Babylon, too). The practices developed in Ancient Greek (where the non-marital mediator was known as proxenertas), then by the Roman civilisation

[3] Source https://wcd.coe.int/wcd/ViewDoc.jsp?id=1408187&Site=COE

(Roman law, starting with Iustinian's Digests (530-533) recognised the institution of mediation. The Romans called the mediators with a variety of terms, including: internuncius, medium, intercessor, philantropus, interpolator, conciliator, interlocutor, interpres and finally mediator[4].

Confucius considers that the best way to solve a conflict is by understanding and moral conviction, rather than by constraint. There exists a certain natural harmony in the human relations that does not have to be interrupted. Peace and harmony were central aspects of his philosophy, as the Confucianism influenced strongly the Asian mediation style. At the same time, the Buddhist traditions encouraged solving conflicts by compromises and not by exercising the coercion. In these cultures, the trial is a last solution and this way of solving a conflict involves a lost for that person. In our days, as well, in the People's Republic of China, using the mediation for solving disputes has a special importance. At present, the Mediation Centre in Beijing, set up in 1987 is very active and involved in promoting the mediation at an international level. For the Chinese people, using the mediation as an alternative method for solving litigations is deeply rooted in the popular Chinese culture and traditions, the proof being a well-known Chinese saying that proves this fact: "harmony is health". In China, a big stress is on conciliation and mediation, as alternative methods for solving conflicts, as there exist at present approximately six million local mediators.[5]

1.3. The mediation – an assisted negotiation

The mediation is considered an "extension of negotiations, where the parties are looking for assistance or accept help from a third party not involved directly in the conflict, in order to solve the disagreements, without invoking the

[4] Sustac Zeno,Ignat Claudiu, *Modalitati alternative de solutionare a conflictelor (ADR*) ("Alternative Methods for Solving Conflicts"), Univeristara Publishing House, Bucharest, page 102

[5] Zeno, Sustac , Ignat Claudiu, op.cit., page 103

courts of law"[6], a trilateral negotiation, where the mediator negotiates its authority and the terms of the mediation process, with each party and, at the same time, it starts effectively to teach the parties in conflict to negotiate between themselves.

1.4. Principles of mediation

The mediation is mainly structured on the principles that form the foundation of this institution, each of the principles of mediation contributes inherently to the value and good functioning of the mediation and to building the trust that the parties and, implicitly, the broad public grant to this way of conflict management.[7]

The principles that the negotiation is based on are *the voluntary work* (no party can be obliged, by any other person or authority, to participate in the mediation procedure), *the self-determination* (the understanding belongs to the parties, any term stipulated by this understanding has to be proposed and accepted by the parties), *the confidentiality* (the mediator, as well as all the other parties undertake to keep the confidentiality of all aspects discussed in the mediation), *the neutrality* (means that the mediator remains outside the conflict between the parties, that it does not get involved in this conflict, except for the limits imposed by the procedure), *the impartiality* (the mediator has a middle position towards the parties, it does not want at all that a party or the other win or be favourised during the mediation procedure), as well as *the previous information of the parties* of the process, their duties and rights.

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[6] Bercovitch, J., Jackson, R., *Negotiation or Mediation?: An Exploration of Factors Affecting the Choice of Conflict Management in International Conflict* *http://www.cadair.aber.ac.uk/.../**Negotiation**%20or%20**Mediation**,%20Jackson.pdf*

[7] Alain, PEKAR LEMPEREUR, SALZER, Jacques, COLSON, Aurelien, *Methode de Mediation.Au coeur de la conciliation,* Dunod Publishing House, Paris, 2008, page 61.

1.5. Approaching the mediation process

Broadly speaking, the mediation occurs as a concentrated form of inter-human communication, where two or more parties in disagreement aim at reaching an understanding that solved a common issue or reached a common purpose. The understanding of the parties can be a simple verbal agreement, consolidated by a handshake, it can be a tacit consensus, a report, a letter of intent or a protocol, it can be a convention or a contract, drafted by observing the common procedures and practices, but it can also mean a truce, a pact or an international treaty, drawn up by observing certain special procedures and practices.

When the parties are prepared for mediation, the mediator should know very well what this process implies, it should be familiarised with the specific strategies and tactics, so that, using its qualities, be capable of helping the conflict parties in important or dead-end situations. On the other hand, in mediation, it is very important that one determine the steps to be followed. They would also be applicable to mediation, as to classic negotiation:

- *planning and training* (the agreement on the mediation subject, defining it and its limits)

- *discussion*,

- *proposition*,

- *actual negotiation*

- *agreement* (finalising).[8]

During these stages, the mediation will progress sequently, gradually or suddenly, it will experience a quick progress or stagnation periods, correlated and inter-dependent stages, as well as an orderly succession of discussions. At

[8] The Mediation Centre Association Craiova, Mediator Training Course, 2010,www.mediere.ro

the same time, „within the process, antagonist or conciliate behaviours will be manifested, and key moments, followed by new perspectives will occur." [9]

The researchers in the field reached the conclusion that the international mediation, as well as the negotiation, can be approached from more perspectives: cultural, racial, religious, ethical or gender-oriented.

The religion and history influence the mediation process, as well. For example, the persons coming from certain religious or ethnical environments tend to get involved more easily in the negotiation-bargain processes, while others despise the mart, considering it indecent or even immoral [10].

Bercovitch and Jackson define the negotiation as being „a process by which the states or other actors communicate or exchange opinions in the attempt to reach an agreement concerning the conditions for conflict cease and the future relation between them." [11] The negotiation tends to be used within relatively simple conflicts, of low intensity or where the parties are relatively equal as concerns the power. On the other hand, the mediation is used within the disputes characterised by a large complexity, intensity or duration, unequal and fractioned parties, where the conflict parties do not manifest a clear wish to solve the conflict amicably. The success of the mediator consists of succeeding to bring the disputants in a point where the communication channels are open and optimised and, according to the trust and understanding built along the process, they manage to negotiate in a cooperating manner, so that the result be reciprocally advantageous and durable.

The nature of the conflict, depending on the different branches of law, classifies litigations, including the international ones, when there intervene elements of extraniety, in the criminal, civil, commercial or business conflicts, family disputes, labour conflicts, etc. There also exists in the speciality

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[9] Marret, Jean-Luc, *La Fabrication de la Paix*, Ellipses Edition Marketing S.A., 2001, page 64.

[10] Benjamin, Robert, D., *Practice Hints*, Mediation Quarterly, vol.15, no. 3, Spring 1998, Jossey-Bass Publishers, San Francisco, Calif, sursa: http://www.rbenjamin.com/5-1%20Practice%20Hints.pdf.

[11] Bercovitch, J., Jackson, R., *International conflict: A chronological encyclopaedia of conflicts and their management 1945-1995*, Washington: Washington Quarterly, 1997.

literature, an agreement over the fact that „the success or failure of mediation is determined mainly by the nature of dispute" [12]. The importance that the adversaries grant to the issue in dispute will naturally affect the options for conflict management and the success chances of the mediation process.

As concerns the international conflicts, besides the above classification, the most important and often issues that formed the basis for their occurrence were connected to the suzerainty, security, independence, ideological and ethical or religious issues, considered by every nation as representing vital interests. „The conflicts concerning prominent issues seem to be longer and tend to use coercive methods as a means for obtaining a result. Other aspects, such as the number of issues in conflict, the rigidity they are perceived with, the possibility of connecting them to tangible interests (for example Conflict on resources) may also affect the finalisation duration and method." [13]

1.6. Electing the mediator

Elmore Jackson considers that it is very difficult for a mediator that the parties do not trust, to be able to perform its activity in any way. The parties' trust in the mediator is also influenced by its prestige, the originality of its ideas, as well as by the ability to act without any restriction.

If we were to continue the list of the attributes necessary for a good mediator, besides intelligence, energy, patience, vigour, many knowledge on the conflict situations and their management, communication abilities, abilities of active listening and parties understanding, there exist also moments in which the mediator has to prove sense of humour.

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[12] M., C., Ott, *Mediation as a method of conflict resolution – International Organization*, 1972, p.597.

[13] Morton, Deutsch, Constructive Conflict Management for the World Today, în **The International Journal of Conflict Management** No. 5, April 1994, p. 111-129.

1.7. Steps of mediation

An especially important element that has to be taken into account within the mediation procedure, is represented by the steps it has to go through. One if the propositions existing in the speciality literature is that belonging to the author Christopher W. Moore, who determines a series of steps that the mediation process has to go through, so that it leads to the wanted results. [14]:

1.7.1 Determining a relation connection with the conflict parties

1.7.2. Selecting a strategy for performing the mediation

1.7.3. Gathering information and their analysis

1.7.4. Creating a detailed mediation plan

1.7.5. Building trust and cooperation

1.7.6. Beginning the mediation session

1.7.7. Identifying the conflict aspects and determining a way to operate

1.7.8. Discovering the hidden interests of the parties

1.7.9. Generating options to reach an understanding

1.7.10. Evaluating the options to reach an understanding

1.7.11. Final negotiation

1.7.12. Obtaining and concluding the agreement concerning the understanding of the parties

[14] Christopher, W., Moore, *The Mediation Process: Practical Strategies for Resolving Conflict,* **Jossey-Bass Inc Pub,** 2003.

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1.8 Stages of mediation

Taking into account the above elements, the mediation process will be divided into stages [15]:

The first stage is **preparing the mediation meeting** or the preliminary arrangements. The mediator is the one always in charge with the preliminary aspects of the mediation, especially because the success of the process depends to a certain level by it. It will take care of these arrangements for the purpose of insuring an optimal and legal framework for the discussions. It takes the first contact with the parties, it gathers information, is verifies their authority, it informs the parties in clear terms of the rights they have, it explains to them the role of the mediator, the way of performing the procedure, the advantages of the mediation in relation to other methods for solving conflicts, it concludes the mediation contract, it determines the date, place and framework for performing the mediation.

The second stage is **the meeting in common session**, when the mediator meets the disputants and present supporters, bearing preparation discussions that lead to levelling and opening the communication channels.

The mediator draws up a declaration in the beginning, conceived as original, as agreeable and as comprising as possible, that contains the definition, as well as the purpose and advantages of the mediation, its principles, stages, the role of the mediator and the conduct rules. It determines the time framework, it requests and answers to the parties' questions. It listens to the parties carefully; it keeps the visual contact, watching the non-verbal behaviour and their reactions. It builds and maintains a trust, positive atmosphere, always clarifying fears and suspicions. It identifies the needs and expectations of the persons involved in using special techniques such as summary, rephrasing, using open questions, favouring the communication and active listening, that is especially

[15] *Manual – Mediators Training Course, The Mediation Centre Association,* Craiova, 2007, page 8, www.mediere.ro

important in mediation. This has an information role, but also the role of comforting, involving the extraction of the maximum of information from the parties.

At the right time, *the next stage* will be initiated, i.e. **separate sessions.** Taking into account the fact that in conflict, the message sent by one of the parties is modified, amplified or wrongly interpreted or even ignored by the other party, and an efficient way for solving conflicts is to facilitate the research of the fundamental interests of the parties, we can say that the role of these separate sessions is clarifying the interests and needs of a party, in opposition to the wishes and positions of the other party, identifying the terms diminishing the conflict and increasing communication, outlining option proposals that are based, as much as possible, on the parties' needs and not on their wishes. The purpose of these meetings is to determine the passing from "I-against-you" to "we-against-the-problem", i.e. that the parties learn to fulfil their own needs without neglecting the needs of the others, thus avoiding the frustration or resignation, facilitating the consequent passing of the path to understanding.

The mediator will have as many separate sessions as necessary, before passing to the *fourth stage*, **of the final joint session**, where the mediator considers that it is time that the parties negotiate personally. This final joint stage may be the same as **the mediation closing**, as final stage of the process, where four similar situations may occur: the parties reach an understanding; they reach a partial understanding; one of the parties denounces the mediation contract; or the parties do not reach any agreement. The happiest situation is reaching an agreement, but, even if the parties do not reach such an ending, the simple fact that they have tried to make it, is a winning for them and a step forward on the way to knowledge and mutual understanding, to amicably solving the conflict.

A basis for the mutual trust in everyone's good intentions, rationality and negotiability creates an arena for the progressive mediation of the type "to give

and to take". Therefore, going through these stages in mediation is essential as concerns building the basis for mutually understanding the needs, as well as the reasons that determine these needs. If the mediator advances too quickly through the mediation process, and the credibility and trust are not consolidated and settled out, this could lead to the parties' refusal to continue the mediation or to a result that is not durable.

1.9. Mediation strategies, policies and techniques

Within the international mediation, J. Bercovitch identified three types of strategies:

communication strategies, where the mediator has a more passive role (it enlarges only the framework of communication, exercising too less control over the way of performing the mediation);

procedural strategies, where the mediator has a more active role (it determines the environment where the mediation will be performed, the number and type of meetings, as well as distributing the information and the resources to the parties);

direct strategies, where the mediator has the most active role.

Caught in the confrontations and fights, we control with difficulty the impulsive reactions we have already talked about. If we use a few negotiation tactics, techniques, tricks and schemes, learned and exercised on time, the chances to have control increase considerably. They help us take initiative, but also recognise the tactics of the adversary, in order to administer the proper antidote.

The tactic is the practical procedure used for applying the strategy, as it has a less stable, punctual strategy, being used depending on the context. „Within a negotiation it is very important that the strategy to be followed is outlined precisely, and the technics and tactics to be used have to be as well defined and prepared, as possible, before starting the negotiations.

Thus, selecting and making the tactics more effective depend on the given circumstances, but they result from the type of strategy approached by the negotiator, in the sense that, if it has a cooperative or confrontation orientation, the tactics will have, in general, the same note. We will analyse the following tactics:

The cooperative tactics, have as a specific feature the need of the existence of an understanding and cooperation climate between the partners, the majority aiming at insuring the quality of interpersonal relations, opening this way the road to obtaining the agreements. A few of the tactics of this kind would be [16]:

Example: *Creating a environment proper to negotiations, Insuring the proper conditions for negotiations, Indicating the rules of the game, Insuring reciprocity, Manifesting tolerance, Using brackets, Accomplishing joint actions, Constructive use of interruptions, Complete revealing, "But if ...", „Golf club", „Yes ...., but",*

The confrontation tactics are based on the idea of exercising psychological pressures on the adverse party, as well as on the attempt to debilitate its position. The purpose is one of manipulation, of determining the other to go into a certain direction. A few of the tactics of this type are: *the threat, the bluff, „All or nothing", Good guy / bad guy, „Putting down one's foot", „Ben Franklin Manipulation" or the technique of „Withdrawal after refusal", Irrevocable one-sided engagement, fulfilled deed, raising claims, limiting the mandate, creating stressful conditions, withdrawal from destructive communication.*

Tactics for time use

Some of them, by using time in their own interest, aim at using and destabilising the opponent by:

-*Frequent interruptions of negotiations;*

[16] Scott, Bill, op.cit.

-*Unfolding marathon meetings*, of great wear;

-*Abuse of false objections*, that hinder the negotiation;

-*Temporary withdrawal* from the table of negotiations (tactic of „the empty chair");

-*Coming back* to the issues that have already been clarified;

-*Miming ignorance;*

-Using *prolonged silences;*

-*The ultimatum*

The negotiation techniques in mediation, presented within the Ph.D. thesis are the following:

- Technique of adjustment;
- Technique of the science of commodities;
- Technique of elusion;
- Technique of involvement;
- Technique of ceasing authority;
- Technique of „small steps";
- „time out" technique;
- Question technique;
- Technique of sterile negotiation
- Paraphrasing technique.

CHAPTER II: INTERCULTURAL MEDIATION

2.1 The concept of culture in mediation

The international conflict is, without any doubt, one of the most comprising processes that intervenes in the international environment. At the same time, it can be one of the most destructive and dangerous processes if it is lead defectively, being able to lead to common satisfactions and violence. Because of this, one has to study not only the causes of the conflict, the most

important being studying the ways and methods by which the conflict can be solved positively and the destructive consequences can be minimised.

Regardless of the result obtained, the conclusion was reached that the following factors influence not only the way of performing the mediation procedure, even its result. The most important factors are: the political context existing between the parties, the powers hold by these parties, the previous relations between the parties, the nature of the conflict, the duration and time of intervention, the conflict intensity upon intervention time, the issues arising, the specific features – abilities of the mediator, the rank of the mediator, the mediation procedure beginning with the mediation initiation, the environment of the mediation and the mediation strategies [17].

The mediation can and, most of the times, brings an important contribution for solving conflicts occurred within the international relations. The mediator, regardless it is an individual, a group or organisation, to be able to solve the conflict has to look, essentially, for the real problem at the basis of the conflict.

2.2. The importance of approaching the mediation process in the intercultural context

The international conflict is one of the most complex processes that the mankind faces and can be one of the most destructive and dangerous processes, if managed defectively, leading to common dissatisfactions and violence. The conflicts can develop at an individual, group, organisation, society, as well as international level. The latter can exist between the states, between non-governmental organisations, between international organisations and states or state societies, can be diplomatic or military.

Diagnosing the sources and types of conflict is made by three actions[18]:

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[17] Ibidem.

[18] *Manual – Mediators Training Course, The Mediation Centre Association* Craiova, 2007

1. ***Identifying the conflict sources*** has as a purpose revealing the reasons behind them, the reasons representing, actually, the types of conflict, that may vary as intensity or frequency. For example, the conflicts based on the communication deficiency are more frequent and can be easily solved, while the conflicts starting from different expectations occur rarely and are more difficult to be solved.
2. ***The analysis and evaluation of the context factors*** aim at identifying the main situation factors that may influence, one way or the other, the conflict, as they concern the issue discussed, the relation between opponents, the power supported by the parties in conflict, etc.
3. ***The analysis and evaluation of the conflict styles*** by which we find out what is the individual style of each party involved, the way in which the individual styles were changed during the conflict, the way the parties involved perceived the styles of the opponents, in what way the style of one of the parties determined in the other party the need to amplify the conflict, from an external perspective, which were the advantages and disadvantages of each style within the conflict and finally, which is the opinion of the parties about their relation, in general.

2.3 Regulating the mediation in international documents

The Conventions in Hague of 1899 and 1907 approach the laws in the field of armed conflicts and solving the conflicts and are based on the international right, being two of the first international instruments that regulate the role of mediation in the international plan.

The Conference in Hague concerning the private international right is an international organisation comprising over 60 states, that draw up international conventions concerning family law, child protection, property right, litigations and international and commercial law.

One of the most important international institutions, ONU (United Nations Organisation) has an important role in regulating the mediation, as well as in implementing it in different states.

ONU has an immense experience in maintaining peace, so that a series of lessons and teaching about the peace operations can be drawn. The pieces of advice and the indications given by ONU employees and ONU peace mediators have led to solving many conflict situations.

2.4 Regulations of the European Council as concerns the mediation activity

Promoting the alternative solving methods represents a constant preoccupation on the international level, the main recommendations of the European Council concerning the mediation activity, broadly presented in the paper are the ones concerning: ***international family mediation, international civil mediation, international criminal mediation and international commercial mediation.***

2.5 Specific features of the intercultural mediation

If there exists a power imbalance between the parties involved in the conflict, it is very important to restore a balance between them, at least during the mediation process. If the parties are on different levels of power, the mediation efforts will be greater. This balance will have to be maintained during all stages of negotiations. The mediator can be a sufficient filter to balance the imbalances of verbal, personal or interactional abilities or, if not, the process may need a careful structure, to balance the dynamics, so that both parties can fulfil their needs equally.

For example, if the disputants belong to different religions or ethnics, solving the conflict becomes more complicated, and the process for peace construction more difficult, because these issues affect the parties' identity. If

the religious disagreements are stronger and cannot be solved, there exists the possibility of the occurrence of the conflict. In case of ethnic conflicts, the groups involved aim at keeping the historical patrimony and the cultural values, certain ethnical groups tend to dominate others, and if these groups acquire political and economic powers, the minority groups can be undermined or neglected. The inequalities caused by such regimes may also bring along dissatisfactions within these groups that, feeling thus disadvantaged or not favoured, may determine the occurrence of conflicts that may degenerate event to rebellion.

CHAPTER III: THE INTERNATIONAL MEDIATOR

3.1. The specific features of the international mediator

In history, the individuals, groups, communities and, more recently, the states, as actors of mediation, looked for methods for solving conflicts by more constructive and peaceful means than the ways of weapon. [19]

3.1.1. The actors of mediation

The individual

The traditional image of the mediator is the one of a certain person, who tries to understand the parties, to restore the communication between them and to help solving the conflict. This image is only partially correct. Most of the times the mediator is a person not holding an official role and who does not represent the state directly.

[19] One of these ways was ingenious (such as the singing of whistling contest occurred in certain communities).

The states

Nowadays, there are 198 equal and sovereign states having different capacities, regimes and interests interacting on the international location. They are generally the actors of international mediations and often they have to meditate the conflicts that could threaten their interests. The big or small states have often reasons to mediate the conflicts, especially when they are in their region or where there exist interests to be promoted or protected.

The institutions and organisations

The complexity of international conflicts can determine the states not to be able to fulfil all requirements necessary for mediation and not to be able to reach an understanding when the conflicts are lasting and intense. As a subclass, we could mention, on one hand, the non-governmental mediators (such as Amnesty International, International Alert, Carter Center), and, on the other hand a variety of religious, civic and humanitarian organisations (Islamic Conference Organization[20], the Community of Sante Egidio[21], the Red Cross[22], Center for Humanitarian Mediation[23], Oxfam[24]) whose main preoccupation is to solve the basic issues in a conflict, to conciliate, to change attitudes and not to solve a conflict.

3.2. The mediator in an intercultural context

The mediation can be accomplished between the states, within the states and between the state groups, organisations or individuals. The rules and strategies specific to each context, beliefs, attitudes, behaviours and symbols that form an international conflict influence the behaviour adopted by the mediator and, in a broader context, it explains the success and failure of mediation. Thus, we can say that there exists a reciprocal relation between the

[20] Source : http://www.oic-oci.org/page_detail.asp?p_id=52
[21] Source: http://www.santegidio.org/index.php?&idLng=1064
[22] Source: http://www.icrc.org/
[23] Source: http://www.hdcentre.org/mediation
[24] Source: http://www.oxfam.org/

nature of the conflict, the mediator's performance and the result of the conflict. Ott considers that „the success or failure of a mediation are determined in the greatest part by the nature of the conflict"[25], and the authors Raymond and Kegley estimate that „the changes for the mediation to be successful decrease as far as the cultural, ethnical, political or economic differences between the disputing parties increase"[26].

3.3 Styles of mediators

Our individual style dictates the way in which we will react regarding other persons we interact with. Most of the time, we tend to react emotionally and even viscerally, to respond to the first soul impulses and only later to come back to the rational part. A mediator should make all efforts to leave the emotional baggage outside the situations it has to solve. It is almost impossible for an individual with emotional-rational thinking to neglect its own nature.

Stephen R. Marsh identified five styles in ***Negotiation and Mediation***[27], they are the following:

1. The attack or fight. This type of negotiator is often called aggressive negotiator.

2. The tranquillity or attempt to convert. This type of negotiator is also known as cooperative negotiator.

3. Running or the attempt to avoid the problem. This type of negotiator is also called avoiding.

4. Dispersing or analysing the problem. This type of negotiator is called analyst.

5. Searching for the truth. In this case, the negotiator is an idealist.

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[25] M., C., Ott, op.cit., p.597.

[26] G., A., Raymond, C., W., Jr. Kegley, *Third party mediation and international norms: A test of two models*, Conflict Management and Peace Science, no. 9, 1985, p.33-51.

[27] Marsh, Stephen, R, *Negotiation Styles in Mediation*, Mediation Monthly, Vol. 2, No. 11 (1996), sursa*:* http://adrr.com/adr1/essayb.htm

CHAPTER IV: STYLES OF MEDIATION AND STYLES OF NEGOTIATION IN THE INTERNATIONAL MEDIATION

Turning mediators into professionals and identifying certain techniques in the mediation procedure lead to a first classification of the following mediation styles:

4.1 The facilitative mediation is the first mediation style, used starting with the 60-70's, being at the same time, the most common style. In this case, the mediator leads a procedure that it assists and helps the parties reach a mutual agreement accepted by them. The mediator does not make recommendations, gives no advice, does not express its opinion over the discussed solutions and does not express what was decided in the court of law. Thus, it can be said that the mediator controls the procedure, while the disputants control possible solutions that they can make into an understanding.

4.2. The evaluative mediation occurred in the 80's and is based on the expertise capacity of the mediator, either in the field concerning the conflict nature, or in the legal field concerning the solutions given by the court of law. The mediator, besides the procedure control, gets involved more and more in developing the solutions for reaching an understanding. In the evaluative mediation, the legal rights of the parties and the idea of equitable solution are more important.

4.3 The transformation mediation is based mainly on the interaction and communication between the parties. The purpose is that the parties and relations between them are transformed during the mediation, and this transformation leads implicitly to ceasing the conflict. Accomplishing the communication between the parties is made usually in common sessions, where the mediator encourages the parties to exchange opinions, intervening only to underline the key moments.

„There exist very many resemblances between this type and the facilitative mediation, and the basic principle is to encourage each conflict party to recognise and to understand the needs, interests and points of view of the opposite party."[28]

4.4 The narrative mediation starts from the premises that each party involved sees the conflict differently, being involved in its story, and the mediation tries to determine the parties to narrate these „stories" about the conflict. Starting from a common basis formed by them, the narrator creates, with the help of the parties, a sumum, a new „alternative story". Most of the times this „common story" forms the basis of the understanding that satisfies the disputants.

On the other hand, depending on the elements involved in the mediation process (the number of involved mediators, the conflict parties, the conflict nature, the way in which the conflict reached the mediation), other secondary classifications were identified.

Thus, depending on the number of mediators, there exits *the simple mediation* (involving a single mediator) or *the co-mediation* (actively involving two or more mediators).

Depending on the parties' representation in the conflict, there exists *the mediation with attorneys-at-law* and *with partial assistance from the attorneys-at-law.* The conflicts reaching the mediation can be subjected to a trial or they can avoid reaching this level.

In an article [29] published in 2002, J.Bercovitch and Ayse Kadayifci ascertain that, although the individual mediation presents a greater variety and

[28] Mitroi, Mugur, *Guide of the Professional Mediator,* Consensus Publishing House, 2010, page 22.

[29] Bercovitch, Jacob, Kadayifci, Ayse, *Relevance and Contribution of Mediation to Peace Building*, Peace and Conflict Studies, December 2002, Vol. 9, no.2, a se vedea la: http://www.lifeservant.com[PDF]

experimentation than the other forms of mediation, „it is characterised, mainly, by two types: formal and informal."

The informal mediation, they say, refers to the efforts of the experienced mediators that are deeply involved in solving the international conflict (for example Jimmy Carter in North Chorea, in the year 1994) or to the efforts of the recognised specialists, whose training, attitudes and professional experiences give them the opportunity to get involved in mediations with conflict parties (Burton, 1968; Doob, 1971; and Kelman, 1992). Such individuals approach the conflict as individual persons, not as official representatives. They use their academic competencies, the credibility and experience, in order to facilitate the communication, obtaining a better understanding of the conflict, following to solve it.

The formal mediation, on the other hand, is made when a holder of political functions, a governmental representative or an important decision factor acts individually to mediate a conflict between the official representatives of other states. Here, we could mention the example of Dennis Ross, in his position as Special Coordinator for the Middle East of the Department of State, Richard Holbrooke in Bosnia or in the more recent case of the President of the United States, Obama.

Thus, there exists a series of differences between the different ways of negotiations, depending on the culture the negotiators come from and, implicitly, the international mediators, and Bill Scott manages to show in its work, The Art of Negotiations, the main specific features of the negotiators belong to different cultures, identifying, depending on these, the following styles of negotiations in mediation, broadly presented in the paper:

- The **American** negotiation style.
- The **English** style**,**
- The **French** style**,**
- The **North-European** style

- The **German** style
- The **Russian** style
- The style of the **Islamic countries,**
- The **Asiatic** style of negotiation **(Japan, China),**
- The **Latin-American** style
- The **Romanian** style**.**

The purpose of using the CASE STUDIES analysed in the Ph.D. thesis is to offer examples of actors of the international mediation, to apply in practice the definitions presented.

CHAPTER VI - CONCLUSION

The 20th century meant for the international community an evolution from the point of view of the vision over international conflicts, as well as a major change of the way of reaction towards them. The construction and maintenance of peace has become a main concern of the present-day leaders and of the influence organisms internationally. In this context, the mediation, as alternative method for solving international litigations, represents a more and more common phenomenon, being used successfully outside the international relations.

APPENDAGES:

Appendix 1 Directive 2008/52/CE OF THE European Parliament and Council concerning certain aspects of the mediation in the civil and commercial law

Appendix 2 Law No. 192/2006 concerning the mediation and organising the profession of mediator

Appendix 3 Law 202/2010 concerning certain measures for accelerating the process solving. Important changes concerning the mediation

Appendix 4 Presentation report

Appendix 5 Petition for mediation

Appendix 6 Pre-mediation contract

Appendix 7 Questionnaire

Appendix 8 Mediation contract

Appendix 9 Invitation to mediation

Appendix 10 Report for concluding the mediation

Appendix 11 Mediation agreement

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