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ORIGINAL PAPER

Effective access to justice through accessible and competent mediation services.

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Abstract:
This article identifies the causes determining mediation's limited popularity among prospective users, whether public institutions, private sector companies, individual citizens, or civil society organizations. With such causes identified, the article then proposes a few options for the next steps that can lead to possible solutions for an increased understanding of, respect for, and use of mediation in Romania.
The approach and analysisare structured around three main pillars – the demand for mediation, the supply for mediation, and the factors influencing the mediation activity. Specifically, the author maps out various means for recourse to mediation and analyses the components of the quality assurance mechanisms before looking at numerous entry points in the system that should be considered.
A set of options for the next steps is offered, including the top-down Italian model based on the first mandatory meeting, setting up data gathering mechanisms, developing the supply side of mediation, conducting effective mediation promotion, implementing sector-specific mediation programs, and, most importantly, planning for and implementing mediation public policies and three to five years action plans.
Finally, the article proposes a blueprint for breaking the deadlock in the field of mediation in Romania and moving it forward in implementing the best international standards and practices.

Keywords: *Mediation, access to justice, competencies, mediation centers.*

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Introduction

Frank Sander's address at the 1979 Pound Conference in St. Paul, Minnesota, represented a key moment for establishing the modern field of Alternative Dispute Resolution. He said, "*There seems to be little doubt that we are increasingly making greater and greater demands on the courts to resolve disputes that used to be handled by other institutions of society. Much as the police have been looked to "solve" racial, school, and neighborly disputes, so, too, the courts have been expected to fill the void created by the decline of church and family*" (Sander, 1979: 68).

Twenty-nine after, the European Union set a courageous policy for mediation development around the EU Member States. According to the first article of the EU Mediation Directive, the goal is to reach a balanced relationship between mediation and judicial proceedings (European Parliament, 2008).

However, where are we today in Romania and the European Union, after almost 50 years since Frank Sander's speech and 15 years after the Directive? Mediation is used in less than one percent of the cases pending in the courts of European Union Member States (De Palo, 2014: 1). One can often wonder why.

It may be the lack of awareness around mediation benefits, although there are many public awareness programs in the European Union(see the European Justice Portal) and all other continents. It may be that the demand side is strictly dependent on a top-down approach, specifically, the establishment of the first required effort to mediation where allparties, their lawyers, and a mediator together in one room are more likely to agree to engage in a full mediation process (D'Urso, 2018: 58).

At the same time, it may be that the demand is discouraged by a week's supply of competent mediation services. It is obvious that after trying a product or a service for the first time, any person can appreciate if that particular product or service is beneficial and if its use is comfortable and satisfactory. If not, a prospective user turned into a user because of trying it for the first time will then be turned into an alienated user who is likely to alienate others and lead to a reputational impact for mediators and the field of mediation. The same effect may have mediation services that are not accessible for users, may it be because of high fees, long waiting duration, lack of online availability of services, or few providers of services in the physical or geographical proximity of the parties. One would be inclined to pursue different routes than mediation if the cost, the time, or the efforts to access mediation were unreasonably high.

It may be because the supply and the demand are there, but the mediation users are influenced or orientated towards other dispute resolution routes, may they be litigation or others. For example, more and more people face overweight challenges, although much work is being done around promoting healthy food consumption. This has led to limited regulations and substantive policies related to the actualingredients or how such foods are sold or promoted, considering the consumers' right to be informed timely and properly about the products or services used.

The causes for this limited "popularity" may be cultural, and users may be influenced by their previous experience and how things are done. As many Romanian litigators used to say, "*Whatever the court will say*", the perspective of a process that comes with a fee and requires their effort to convince the other party appears to be far more unlikely to be successful than the alternative to convince a judge that they are right and the other party is not.

This article identifies the causes determining mediation's limited popularity among prospective users, whether public institutions, private sector companies,

individual citizens, or civil society organizations. With such causes identified, the article then proposes a few options for the next steps that can lead to possible solutions for an increased understanding of, respect for, and use of mediation in Romania.

Effective access to justice

Access to justice is a fundamental dimension of the rule of law and democracy and contributes to the safeguarding of the right to a fair trial (Bucureanu, 2006: 63), as set out in the European Convention on Human Rights (Council of Europe, 1950) and according to which "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*"

The rule of law is based on the affirmation of the primacy of the individual within society, which implies maintaining the state as an instrument affected by the individual's self-realization and not transforming it, nor the law, into an end in itself, thus limiting the former through subjectivizing the second one. Human rights are at the heart of the construction of the rule of law. These are the limit of power action. The purpose of social organization is not order, but the protection of the natural and imprescriptible rights of the individual, for which order and, therefore, the positive law are only *means* (Dănișor, 1999: 142).

Access to justice has to exist effectively, and *simple* access to courts is insufficient, as provided by the EU Charter of Rights (European Commission, European Parliament, and the Council of the European Union, 2010).

The Romanian Constitution refers to access to justice as "free access to justice" (Constitution of Romania, 2003). According to the 21st article of the Romanian Constitution, any person can turn to justice to defend the rights, freedoms, and legitimate interests he/she has, and any law cannot limit this right.

The constitutive elements of the right of access to justice are (1) the right to an effective remedy before a court of law; (2) the right to a fair trial, public and within a reasonable time before an independent and impartial court, established in advance by law; (3) the person's right to be advised, defended and represented; (4) and the right to free legal aid for those who do not have sufficient resources, to the extent that this is necessary to ensure their effective access to justice (Gavrilă, 2019: 80).

Actually, the European Council encouraged the Member States to establish extra-judicial or "alternative" dispute resolution procedures in 1999 (European Council, 1999) to facilitate access to justice. This goal is reflected repeatedly in Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters. One particular instance relevant to this article that can be reflected here is Article 5, para 2 of the Directive2008/52/EC,according to which the Member States' mediation legislation should not prevent the parties from exercising their right of access to the judicial system.The full text of Article 5, Recourse to mediation, is: *"(1) A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. (2) The court may also invite the parties to attend an information session on the use of mediation if such sessions This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.*"

However, the Directive was not very "directive" concerning the balance between recourse to mediation through mandatory requirements, as allowed by Article 5,

and how this could be achieved in consideration of not limiting access to justice. Unfortunately, the pursuit for this balance turned into tension, with most Member States still looking at very few mediation cases, although legal frameworks have been established for mediation in most countries. Unfortunately, the mere existence of such frameworks failed to create a reality, and as a result, public sector institutions, private companies, citizens, and civil sector organizations are not using mediation (Gavrilă, 2022: 22).

Before exploring a few options for the next steps, let us look at the demand and supply sides of mediation and see where some of the causes contributing to the current situation. Alternatively, let us see if they exist in the context of influencing factors for mediation, such as academics, policy-makers, mass media, the judiciary, or other influencing stakeholders.

The demand side of mediation. What is in it for users?

Mediation, alternative dispute resolution, and any efficient means for collaborative decision-making benefit the government and the judiciary. They help decrease the high caseload on the court dockets and support the shift away from the focus on the quantitative criteria of the number of cases processed toward the quality of the outcomes. Moreover, an efficient "filter" of "pressure valve" in the system can address cases timelier and locally, emphasizing the parties' social relationship before the conflict occurs. So, while judges, lawyers, and other judiciary stakeholders can benefit from mediation, the most important beneficiaries are the parties themselves. In addition to the increased privacy, mediation is usually faster and more cost-effective than litigation.

The mediation benefits are to be observed from many other non-judicial angles. For example, mediation can certainly be used as an internal or external service in organizations to prevent, manage and resolve employment disputes effectively.

However, to enable all these benefits for prospective users, there has to be a demand for mediation, and this sidehas two components. The first one, the natural or organic demand, refers to voluntary requests for mediation that flow from the parties'genuine interests and desires to settle a dispute peacefully. The second one that we refer to as "artificial" consists ofexternal motivations to engage in a mediation process, whether from legislation, organizational policies, or referral to mediation.

The natural component for the mediation demand side is generally sustained by education, whether public awareness, pre-academic and academic education, and continuous professional development of professionals like mediators, lawyers, judges, and academic ADR professors. The mediation contract clauses are also an authentic means of recourse to mediation that require parties' voluntary decisions. Most importantly, users with previous mediation experiences that were satisfactory in terms of both process and outcome are very likely to use it voluntarily. In this category are, for example, mediation advocates or lawyers who use mediation regularly and are always interested in getting connected with competent mediators.

The second side of the demand for mediation is "artificial". It refers to external referral to mediation, such as court referral, organizational policies, legal incentives, or pre-action protocols included in the legislation, often within the civil procedure rules, like the first mediation meeting. The model based on this meetingis very popular in Italy, Turkey, Azerbaijan, and other countries for generating significant numbers of mediation proceedings (D'Urso, 2021: 51).

Policy-makers from Romania enacted the recourse to mediation in the initial version of the mediation law through both organic and artificial means (Romanian Parliament, 2006). The law included significant incentives, such as the full refund of the court stamp tax in case of a full settlement, including in the case of real estate. Otherwise, the recourse to mediation was essentially voluntary. Also, a reference to the mediation contract clause was made in the mediation law, but without adding language to the Civil Procedure Code to provide the needed legal force, such as the arbitration clause. Later, the modifications brought with the Governmental Emergency Ordinance no. 90/2012 for the modification and completion of Law no. 192/2006 regarding the mandatory information session created an "artificial" recourse. Unfortunately, the legal solution was not properly implemented, given that the sanction enacted for the plaintiffs that started litigation without attending the mandatory mediation meeting – case inadmissibility – failed the constitutionality check regarding access to justice. (Gavrilă, 2022: 27).

The figure below describes the most important means to generate recourse to mediation, both organic and artificial.

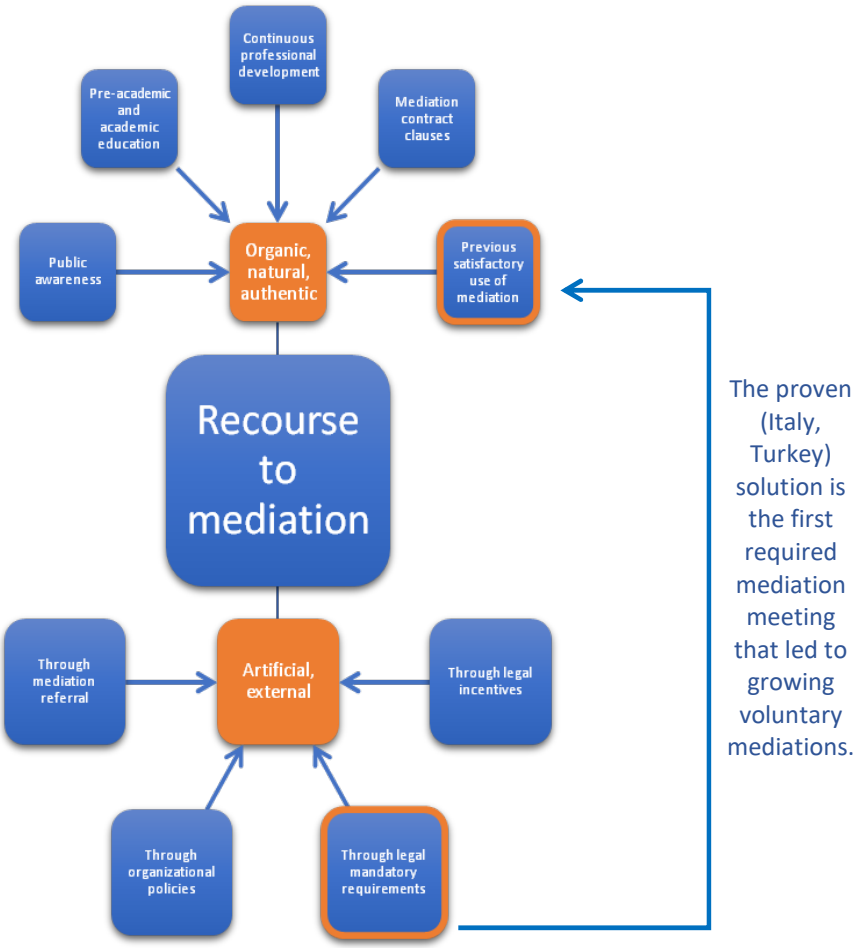

Figure 1 - Types of recourse to mediation

Although the principle of informed consent and voluntary recourse to mediation is fundamental, international studies demonstrate that the most efficient recourse to mediation is actually "artificial", not mandatory, but based on *nudging* the parties and their lawyers together in one room with a professional mediator. This is, at least for a while, until a critical number of users is educated through satisfactory mediation experiences. (D'Urso, 2021: 103).

Now, the question is what went wrong with mediation in Romania, as there are no mediation statistics available 15 years after the adoption of the law, but anecdotally the dimensions of the practice are at their lowest levels ever, maybe even lower than before 2006. It is to be noted that mediation was practiced before 2006 by various donor-funded programs, including the Pilot Mediation Center from Craiova established by the Minister of Justice by Order 1391/C/2003.

The supply side of mediation. Competent mediation services.

The first Romanian Mediation Council has built a mediation quality assurance system based on standards and competencies for mediators, trainers, and training service providers. Also, a Code of ethics and professional deontology, a complaint management system, and other relevant documents were adopted (see www.cmediere.ro). Moreover, in a report of the European Parliament from 2011, "*successful results of the mediation law in Romania were noted: the provisions regarding financial incentives, the establishment of the Mediation Council and its activity; the development of training standards, the training of training providers, the issuance of documents certifying the professional qualifications of mediators, the adoption of the code of ethics, etc.*" (see https://www.europarl.europa.eu/doceo/document/A-7-2011-0275_EN.html for the full report).

To date, twenty-four providers of mediation training services are accredited by the Romanian Mediation Council (the latest update is April 2021 at https://www.cmediere.ro/tablouri-liste/lista-furnizorilor-de-formare/19/).At some point, more than 20.000 participants attended basic mediation training courses, and more than 10.000 received the Mediation Council's authorization to provide mediation services.

Leaving aside the quality levels in the system – of training programs, trainers, etc. – we assess that, just like for any other activity, without repeated practice opportunities, the quality of the service and the competence of the mediators will not be at their highest levels. As explained above, there are almost no statistics related to the practice of mediation, except for the number of court cases settled through mediation reflected in the annual reports of the Superior Council of Magistracy related to the state of the judiciary (see http://www.csm1909.ro/PageDetails.aspx?PageId=267&FolderId=3570&FolderTitle=Raportare-privind-starea-justi%C5%A3iei). The highest number of cases settled through mediation reflected in the 2013 report didn't reach 1500, unfortunately.

In this context of apparently limited practice, one has to wonder if the supply of mediation in Romania is prepared to respond to the demand for services and if this is not one of the factors leading to a legal framework for mediation, a theoretical idea, but not a practical reality.

The relationship between the demand for and the supply of mediation services is very similar to the chicken and egg paradigm. According to the research studies, a top-down approach is needed to create an artificial demand that will build awareness and education about mediation with efficient and practical means to break this virtuous chain. The solution can be implemented while observing all the safeguards for access to

justice by regulating the costs, the time and the monitoring process. (Gavrilă, 2022). This was proven with data and statistics from public institutions like the Italian Ministry of Justice.

But who and what isinfluencingthe prospecting mediation users?

To understand who and what influences the prospective mediation users' decision to engage or not in mediation, we need to map out the mediation stakeholders in different categories and try to understand the relationships between various stakeholders.

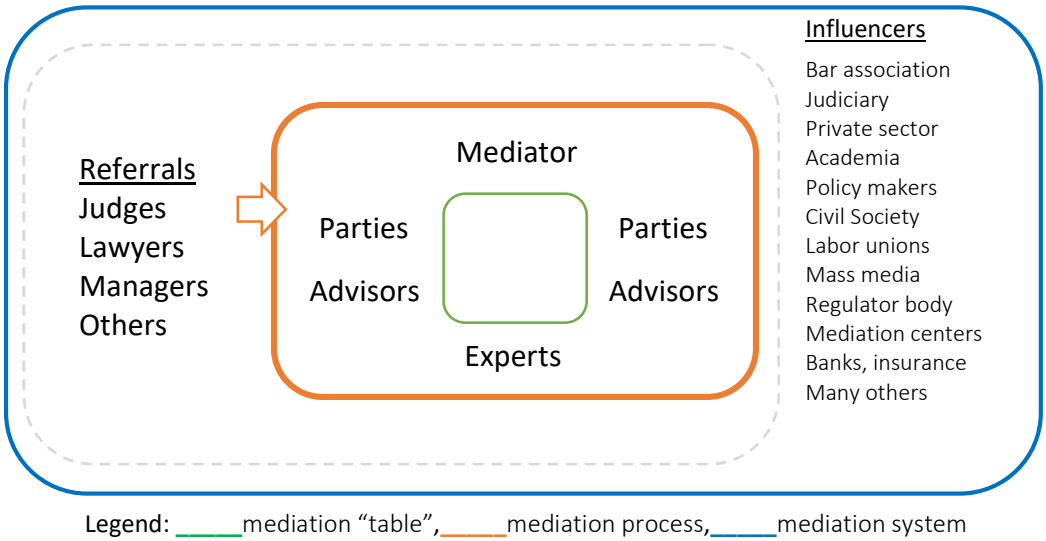

Figure 2 - Mediation stakeholders

As shown in the figure above, it is difficult for mediation to become a reality because this would require a paradigm shift or a cultural change in the mindset of numerous stakeholders. A "simple" mediation requires the prior agreement to engage between two parties (or more), their advisors, and the mediator, all with their interests. This is a difficult exercise for many reasons, including pessimism caused by previous failed negotiations, lack of understanding around mediation, or preference to avoid the discomfort created by direct communication. Another important reason why the decision to mediate is counter-intuitive is the fact that when in conflict, parties often focus too much on proving the other party wrong than focusing on the solution and moving on.

At the same time, experts can be involved in the mediation process upon the parties' prior agreement to bring objective perspectives. If facilitated properly by the mediator, such a process, often called "joint fact-finding," can effectively break the deadlock and move the process toward peaceful and sustainable resolution. By way of example, joint fact-finding (JFF) can be defined as "*a collaborative process that requires parties and experts to share information, work in close collaboration, and communicate effectively, both as the JFF process unfolds and as findings are communicated. Representatives of both parties should be involved and well informed when making the initial decisions about selecting experts, framing research questions and the scope of the process, designing and carrying out the technical inquiry, and*

identifying, generating, analyzing, and interpreting the technical information." (Compliance Advisor Ombudsman, 2018, 9).

If we "stay" in the mediation process for another moment, we must highlight the parties' attorneys' critical role in the process's success. Without trusted advisors, most parties cannot make informed choices regarding entering the mediation process and engaging effectively. However, the lawyers' skills needed to assist their clients in mediation are very different from the skills needed in the courtroom. The related knowledge and skills are also known as mediation advocacy. According to the international standards for mediation advocates, "*Mediation is most successful when the parties' advocates/advisors are knowledgeable and skilled in the principles of the mediation process and negotiation theories. Mediations can fail when party representatives act as if they were in a courtroom rather than in a negotiation. Mediation presents unique problem-solving opportunities in which representatives can assist their clients to reach faster, cheaper and/or better outcomes with the assistance of a mediator. They can help their clients achieve outcomes that may be unattainable in a courtroom or arbitration tribunal. But to do that, they need a different set of knowledge and skills"* (International Mediation Institute, 2013: 3)

The judges, the lawyers, the managers, and many others can refer parties to mediation in appropriate cases. Hence, the abilities to understand what mediation is, what cases are appropriate, and how the referral could be effectively made are critical for an effective referral. Most importantly, the referral is likely facilitated by previous successful experiences. If previous referrals led parties to unsuccessful outcomes and dissatisfactory processes, future referrals are less likely.

This entire mediation system is highly influenced by numerous stakeholders, including bar associations, judiciary, private sector companies, academia, government, policy-makers, civil society, labor unions, mass media, the mediation regulator body, mediation centers, the banking and insurance industry, and many others. Each of these stakeholders gets to influence and be influenced by the mediation activity, which leads to the conclusion that any model used for mediation should be discussed with all stakeholders for sustainable design and implementation. This is a very complex process and requires patience, long-term planning, and resources to test, gather data, monitor, and improve continuously. Equally important, it requires political commitment and realistic goals.

Options for next steps

So, given all these complexities, the question is, what can be done to increase access to justice by making mediation more popular and enabling all those benefits summarized above?

While this is the question and the discussion around it deserves proper bandwidth, we are going to offer a few options for consideration for the next steps below.

First, as presented above, the short and mid-term solution is based on a top-down approach to enable mediation benefits in the long run. The first mandatory mediation meeting that should have a solid design can lead to a "mass education" exercise or a "mass testing area". Based on the experience from other countries, this would generate two main benefits – immediate practice and more voluntary cases. For a successful implementation, the lawyer's role should be recognized in the process, and bar associations and chambers of commerce should be able to establish mediation centers, as per the successful experience in Italy.

While the demand would be generated artificially through the first required meeting, the government and the judiciary should work together with the Mediation Council and IT experts to set up a state-of-the-art mechanism to gather data and consolidate statistics. Without such a mechanism that should automatically track down every case from the request stage, it would be impossible to monitor the effectiveness of mediation policies being implemented. It would be essential for the data gathering tool implemented to capture qualitative data, specifically satisfaction levels related to the delivery of mediation services. Automatic reports should ideally be available publicly for obvious transparency reasons.

With the right policy and data gathering mechanism in place, the Mediation Council should reassess the quality of the service and the characteristics of all the quality assurance mechanisms in place. This should include the content, the implementation, and the monitoring of the mediation basic training standard, the complaint recourse mechanisms available at different levels, national and organizational.

At this point, public awareness and outreach activities should be prioritized to reflect the use and benefits of the first mandatory meeting. Experience shows that focusing the promotion activities on such mediation policyis more effective than preaching mediation benefits theoretically. For sustainable long-term effects, the promotion component should include mandatory academic education. No student studying law, business, economics, psychology, and other topics should finalize her/his studies without, at minimum, understating what mediation is and where it sits in a continuum of dispute resolution options. Ideally, academia should develop students' proper mediation skills and competencies. Of course, this would require ensuring that the professors responsible for this process have the necessary knowledge, skills, and experience. One simple tool that can be used to ensure such experiences is to establish mediation clinics in universities with students working closely with professors to support parties in conflict and build peace and consensus.

Finally, the fifth option is to look for entry points for mediation in communities, sectors, and industries. This may include establishing sector-specific mediation schemes, incorporating mediation in organizational dispute resolution policies, setting up ombudsperson offices with dialogue-based functions, and so on. Sectors like telecommunication, agriculture, tourism, art, and others can incorporate mediation clauses in the standard contracts to mainstream mediation as a dispute resolution tool to be used before traditional litigation.

All the above are better designed and implemented in the context of a public policy on mediation with realistic goals and three to five years implementation action plans. Unless all these efforts are mapped out in collaboration with mediation stakeholders, the Romanian mediation will maintain its "Sleeping Beauty" state, and all the reasons presented before the Romanian Parliament with the draft mediation law in 2006 before the adoption of the law will remain wishful thinking or a checkbox in the country's EU accession process.

We close with a final word of caution for the Romanian Mediation Council and the Ministry of Justice. The mediation system needs more checks and balances, as there are no reporting mechanisms for the Mediation Council, which holds the entire management responsibility. This is while the Ministry of Justice is anything but active in taking the lead to convene conversations around the design, implementation, and monitoring of effective mediation policies that can benefit the judiciary, otherwise still

burdened by millions of cases, just like in 2006, when the mediation law was proposed for adoption.

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