

Bălan, Carmen

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ALTERNATIVE DISPUTE RESOLUTION THROUGH MEDIATION IN ROMANIAN RETAIL BANKING

Carmen Bălan*

Academy of Economic Studies, Bucharest, Romania

Abstract

This article aims at exploring the stage of implementation of mediation as method for the alternative resolution of disputes among consumers and providers of banking services, in Romania. The importance of the topic stems from the increase in the number of customer complaints about banking services in Romania and from the current preoccupation at European level to identify extra-judicial methods for consumer disputes. The main objectives of the research consist in studying: the regulatory framework relative to mediation at the European Union level; the mediation schemes focused on banking services, in the Member States; the present regulatory framework relative to mediation in Romania; the existing mediation schemes and their development level on the Romanian banking service market. The research method applied has an exploratory character. The conclusions clarify the present state of mediation related to banking service disputes in Romania. Within this framework, the recommendations refer, among other aspects, to the organization of a further research phase that may contribute to the substantiation of future decisions aiming to enhance the protection of the rights and interests of consumers.

Keywords: alternative dispute resolution, mediation, mediator, banking services

JEL Classification: G28, K29, L84, M31, M38

Introduction

The importance of the article topic stems from two reasons. The former refers to the Romanian banking market that has witnessed an increasing number of customer complaints during the last two-three years. With an insignificant negotiation power, numerous customers faced ever-greater costs entailed by their contracts with the banks. The latter reason consists in the current trend in the Member States of the European Union (EU) to develop and implement ways of dispute resolution that are more convenient to customers in terms of time and financial resources, compared to the classical judicial system.

In Romania, consumers presented numerous complaints to the banks and to the National Authority for Consumer Protection (NACP). A total number of 4,000 complaints relative to

* Author's contact: e-mail: carmen.balan@mk.ase.ro

the banking services were received by the NACP during the year 2008 (Ştefan, 2009). For the entire year 2009, the total number of complaints reached 3,000 (National Authority for Consumer Protection, 2010). Most complaints referred to the unjustified increases in the bank commissions and in the interest rates for credit contracts that have been already signed by banks and customers, and to other modifications of the clauses after the conclusion of the contract and without customer acknowledgement and agreement. Undoubtedly, not all the complaints are well substantiated and rightful.

The conceptual definition of the alternative dispute resolution (ADR) was the object of numerous international debates. The meanings attached to this concept varied on a continuum between very narrow to very broad perspectives (Cappelletti, 1993, p. 282). On one side, there is a strict technical meaning that refers only to the non-judicial devices that may be used for out-of-court dispute resolution. On the other side, there is a broad definition according to which alternative dispute resolution refers to non-judicial as well as to judicial devices that are an alternative to the ordinary or traditional procedures.

Since the 1970s until the present decade, specific procedures and bodies for the out-of-court settlement of consumer disputes were developed in the Member States of the European Union. At the same time, the EU analyzed the existing national systems and recommended principles with which all the out-of-court bodies responsible for consumer dispute settlement should comply to ensure the confidence of all parties in ADR.

In January 2007, the results of a research made by the Study Centre for Consumer Law – Centre for European Economic Law of the Katholieke Universiteit Leuven (Belgium) were published. The European Commission, Health and Consumer Protection Directorate-General Directorate B – Consumer Affairs commissioned this study that focused on the analysis and evaluation of means of consumer redress other than redress through ordinary judicial proceedings (Stuyck, et al., 2007). According to the study made in 25 Member States of the EU as well as Australia, Canada and the USA, the ADR may be defined as a continuum between no action and reliance on ordinary court procedures. There are five categories of mechanisms to obtain redress (other than individual redress through ordinary court procedures): direct negotiation (between consumer and the merchant); mediation and arbitration; small claim procedures; collective actions for damages; injunctive relief. The report has revealed that each analyzed country has an unique mix of ADR processes and techniques. Based on a thorough analysis of the practice of the 28 countries, the report ended that there is no ideal mix from a consumer perspective.

In the EU, the most recent research in the field is the “Study on the use of alternative dispute resolution in the European Union” (Alleweldt, et al., 2009). The analysis referred to the characteristics, use, procedures and functioning of the ADR schemes, as well as to the conformity with the recommendations of the European Commission and the best practices. A major strength of the report consists in the detailed perspective of the schemes applied by each Member State. The study provides data about all the ADR bodies, by economic sector.

1. Methodological framework of the research

The goal of this article is to explore the stage of implementation of mediation as method for the alternative resolution of disputes among consumers and providers of banking services, in Romania. To achieve this goal, a set of objectives has been specified and refer to the

study of: the regulatory framework relative to mediation at the European Union level; the mediation schemes focused on banking services, in the Member States; the present regulatory framework relative to mediation in Romania; the existing mediation schemes and their development level on the Romanian banking service market. These objectives reflect a specific feature of the research, respectively the fact that a preliminary investigation of the situation of mediation in banking services in the European Union was achieved, to better understand the stage existing in Romania.

The research method applied has an exploratory character. Worldwide, the exploratory research is known as a distinct research design in social sciences. The goal of an exploratory research is to understand what happens in the field under study and to investigate social phenomena without “explicit expectations” (Schutt, 2009). An exploratory research is applied when the study of a phenomenon is necessary to know and understand its nature, in comparison to a descriptive design and a causal design which are carried out to test specific hypotheses, respectively to examine relationships among variables (Malhotra, 2009). While an exploratory design allows the understanding of a phenomenon, a descriptive or causal design facilitates the measurement of that phenomenon. The exploratory approach is recommended when a more precise definition of the research problem, the identification of alternative courses of actions and the gathering of additional information, are necessary, before the confirmation of results through a descriptive or causal research.

Consequently, the exploratory research was selected to facilitate the understanding of the stage of implementation of mediation as method for the alternative resolution of disputes in banking services in Romania. This approach may contribute to setting priorities for further research and may identify potential courses of action. The option for an exploratory research was based on the hypothesis that Romania is only at the beginning of the path towards the ADR by mediators in the sector of banking services.

The investigation of secondary data sources was selected from the range of data collection methods which are specific to the exploratory research design. Examples of secondary data sources that have been studied within the framework of this research, are the following: directives and recommendations issued at the European Union level and laws existing in Romania, in the field of alternative dispute resolution and mediation; codes of conduct relative to mediation; books and articles specialized in alternative dispute resolution and in mediation; reports prepared by consortia of specialists from the consultancy and university environments, relative to the alternative dispute resolution in the EU Member States; articles about mediation in the banking sector in Romania; articles focused on practical aspects of consumer protection in Romania; press releases of organizations that are preoccupied with the development of mediation on the Romanian market of banking services; study relative to the feasibility of the implementation of an ombudsman scheme in Romania.

The conclusions of the exploratory research clarify the present stage of implementation of mediation of disputes related to the banking services in Romania – both from a regulatory and practice perspective – within the larger framework of the situation existing at the EU level. The final recommendations refer to the organization of further research studies based on a descriptive design, which may contribute to the substantiation of future decisions aiming to enhance the protection of the rights and interests of consumers.

2. Mediation in the European Union: the regulatory framework

ADR techniques differ in terms of the type of involvement of the third party. Basically, three major categories of ADR procedures can be identified: conciliation (the third party has a passive role, to allow the negotiation among the parties), mediation (the third party has an active role, to participate in negotiations and sometimes to suggest solutions) and arbitration (the third party specifies the solution that is binding on both parties). However, the practice reflects several specificities in terms of features and outcomes of these ADR procedures in each of the EU Member States.

Mediation is an important category of ADR techniques. The European Commission had several initiatives on mediation. The first stride consisted in the adoption of the Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (Commission of the European Communities, 2001).

In 2004, the Commission expressed its support for a European Code of Conduct for Mediators and introduced a proposal for a directive on mediation. A group of stakeholders, assisted by European Commission, developed the code. The code was officially presented on 2 July 2004 at a conference organized in Brussels to discuss self-regulatory initiatives for mediation in general and to launch the code. The opinion of most of the 100 participants in the conference was that in the preliminary stage, the Code must have only the character of an informal document not being formally adopted by EU institutions. Individual mediators and organizations may voluntarily subscribe.

The European Code of Conduct for Mediators established a set of principles to be applied in civil and commercial matters by the individuals and organizations that subscribe to it (European Commission, 2004). According to the code, mediation means “any structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a third person (mediator)”. The text of the code refers to: (i) competence, fees of mediators and promotion of their services; (ii) independence and impartiality; (iii) the mediation agreement, process and settlement; (iv) confidentiality.

The independence of the mediator is an aspect of utmost importance underlined by the code. The mediator has the obligation to disclose any circumstances that may generate a conflict of interests. Among such circumstances range: any individual or business relationship with one or more of the parties; any financial or other interest, direct or indirect, in the outcome of the mediation; the mediator, or a member of his firm, having acted in any capacity other than mediator for one or more of the parties. On request from the parties and within the limits of his/her competence, the mediator must inform the parties relative to the manner in which they may formalize the agreement and to the possibilities for making the agreement enforceable.

At the middle of the present decade, experts considered that Europe is a long way from establishing a legally binding set of standards for mediation. The initiatives developed show a soft approach to the regulation of mediation (Alexander, 2006). The reason of this trend is the consensus that diversity should be encouraged in the early stages of the mediation development. In this respect, experiments were promoted at national level. A strict regulation of mediation could lower the chances to identify procedures and

mechanisms that suit the needs of consumers for quick, effective, and affordable ways for dispute resolution, as an alternative to court system.

In 2008, the Directive on certain aspects of mediation in civil and commercial matters was adopted (European Parliament & Council of the European Union, 2008). The main goal of the Directive 2008/52/EC was to facilitate the access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship among mediation and judicial proceedings. The provisions of the Directive refer to the cross-border disputes. However, Member States may apply these provisions to the internal mediation processes.

The definition that Directive gave to the concept of mediation is similar to that presented in the Code of Conduct for Mediators. The mediation process may take place due to one of the following reasons: the initiative of the parties; a suggestion or order of a court; the provisions of the law of an EU Member State. The Directive refers to aspects such as: ensuring the quality of mediation; recourse to mediation; enforceability of agreements resulting from mediation; confidentiality of mediation; mediation effect on limitation and prescription periods.

According to this Directive, parties may render enforceable the agreement concluded following mediation, giving it a status similar to a court judgment. The access of parties to justice is preserved should mediation not succeed. The provisions relative to the periods of limitation and prescription ensure that parties are not prevented to go to court.

An aspect that requires further debate is the independence of mediators. While the Code of Conduct for Mediators has dedicated a substantial paragraph to it, the directive did not address this issue.

3. Mediation in the sector of banking services in the EU Member States

In the EU Member States, there is a diversity of mediation schemes for the commercial disputes, in general, and for the banking service sector, in particular. To facilitate the access of consumers to ADR systems in financial services, the EU has established FIN-NET (Financial Services Complaints Network) that complements the EEJ-Net (Network for Extra-judicial Settlement of Consumer Disputes). In essence, FIN-NET is a communitywide network that links the national ADR schemes relative to financial services. This initiative may have a favorable impact on cross-border disputes.

There is no single definition of mediation accepted in all the countries. In the EU Member States, the types of outcomes provided by the ADR schemes that include in their denomination the word “mediation” vary including not only the consensual agreement but also the non-binding recommendation. Sometimes, some of these schemes do not have as outcome a consensual agreement, but recommendations/decisions. In addition, as a distinct outcome among others, the consensual agreement may be specific not only to the schemes that include the word “mediation” in their denomination, but also to other schemes.

In the sector of financial services, ADR schemes that include in their denomination the word “mediation” have been established in the following EU Member States: Belgium, France, Italy, Luxembourg, Portugal, Romania, and Slovenia. Few of these mediation schemes in financial services have been notified to the European Commission (EC). This

situation is similar to the overall trend (irrespective of economic sector), in the EU Member States, because 750 ADR schemes relevant to business-to-consumer disputes were identified, out of which only about 60% are notified (Alleweldt, et al., 2009, p. 8). More precisely, in the sector of financial services, 18 mediation schemes were identified, out of which only seven (respectively 26%) are notified to the EC (Table no. 1). The reason may be the fact that many are in their initial stage of development or that there is no perceived benefit of the notification.

Table no. 1: Mediation schemes focused on financial services and notified to the EC

Name of the mediation scheme	Nature of the scheme	Adherence by the industry	Funding	Average cost for consumers (Euros)	Outcome of the procedure				Average duration in 2008 (days)
					NbR	DBoB	DBoB&C	CA	
BELGIUM									
Service de Médiation Banques-Crédit-Placements	Pv	V	I	-	x	-	-	-	91-180
FRANCE									
Médiateur de la Fédération Française des Sociétés d'Assurances	Pv	V	I	-	x	-	-	-	31-90
Médiateur du Ministère de l'Économie, des Finances et de l'Industrie	Pb	n/a	n/a	-	x	-	-	-	31-90
ITALY									
Conciliatore Bancario Finanziario	Pv	V	I	>500	-	-	-	x	31-90
LUXEMBOURG									
ACA/ULC Médiateur en Assurances	n/a	n/a	n/a	-	x	-	-	x	n/a
PORTUGAL									
Centro de Informação, Mediação e Arbitragem de Seguros Automóvel (CIMASA)	O (Pb & I)	V	I & Pb	51-100	-	-	x	x	91-180
Investor and Mediation Office of the Securities Market Board (CMVM)	Pb	O	O	-	-	-	-	x	n/a

Source: Based on Alleweldt, et al., 2009.

Note: NbR = non-binding recommendation; DBoB = decision binding on business only; DBoB&C = decision binding on business & consumer; CA = consensual agreement mediated by scheme; Pv = private; Pb = public; V = voluntary; I = industry; O = other; n/a = data not available.

The nature of the notified mediation schemes is private, public or mixed (as for CIMASA from Portugal). Generally, the members of the financial sector may voluntarily adhere to the schemes. In most cases, they finance the mediation schemes. Out of the seven notified schemes, only two (one from Italy and one from Portugal) entail costs for consumers. In Belgium and France, the outcome of the mediation by notified schemes consists only in non-binding recommendations. The consensual agreement mediated by scheme is an outcome that may be obtained in Italy, Luxembourg, and Portugal. There are notified schemes that generate two types of results (in Luxembourg and Portugal). In 2008, the duration of mediation by a notified scheme ranged between one and six months. Out of the seven notified schemes in financial services, only two refer to the banking sector (the schemes from Belgium and Italy).

Mediation schemes focused on banking services that have not been notified to the EC exist in France (Médiateur de BNP Paribas; Médiateur de la Fédération Bancaire Française; Médiateur du Groupe Crédit Agricole; Médiateur de la Caisse des Dépôts; Médiateur de la Société Générale; Médiateur de la banque Le Crédit Lyonnais; Médiateur du Groupe Caisse d'Épargne), in Romania (the Union of Banking Mediators) and in Slovenia (Mediation Centre of the Bank Association of Slovenia).

The mediation schemes existing in the EU Member States may be classified according to the outcome of the procedure (Alleweldt, et al., 2009). *Stricto sensu*, mediation refers to solutions based on the consensual agreement between the parties to the dispute. However, practice shows that mediation schemes may have as outcomes non-binding decisions (recommendations) and decisions binding on both parties. Many schemes provide a combination of possible outcomes.

There are also schemes focused on both mediation and arbitration, such as the Financial Services Complaints Institute (Kifid) from Netherlands, with the outcome consisting in consensual agreement between the parties to the dispute and decisions binding on both parties. In addition, there are schemes that do not include in their denomination the word "mediation" and generate a mediated consensual agreement. The activities of the ombudsman in the financial service sector lead not only to binding or non-binding solution, but also to consensual agreement mediated by the scheme. Such examples are the ABSL Service Insurance Ombudsman (in Belgium), Financial Sector Supervisory Committee (in Luxembourg), Insurance Ombudsman and Banking Ombudsman (in Poland), Financial Service Ombudsman (in the United Kingdom).

At present, the ADR schemes that lead to consensual agreement by mediation are in an early development stage. Most of the times, there is no strict frontier among mediation and other types of ADR schemes. Mediation may be provided by both schemes specialized in mediation and schemes focused on other ADR procedures applied generally to the financial field and specifically to the banking sector.

4. Mediation in Romania: the regulatory framework

The analysis of mediation as system for the alternative resolution of the consumer disputes must start from the regulatory environment that creates the framework for this specific practice. In Romania, the first law on mediation was adopted in 2006, respectively Law no. 192 relative to mediation and the organization of the mediator profession. In 2009, this law

was modified and completed by Law no. 370. In 2008, the Council of Mediation has modified the Standard relative to the training of mediators, which was approved in 2007 (Council of Mediation, 2008). In addition, the Council of Mediation has adopted the Code of Ethics and Professional Deontology of Mediators (Council of Mediation, 2007).

The provisions of the Law no. 192/2006 modified and completed by the Law no. 370/2009 refer to the profession of mediator, the organization of the activity of mediators, the rights and responsibilities of mediators, the mediation procedure, the mediation of family conflicts and of criminal causes.

According to the Article 1 of the Law no. 192/2006 modified and completed by the Law no. 370/2009, mediation is defined as a way to solve the conflicts on a conciliatory base, with the support of a specialized third party as mediator, within a framework of neutrality, impartiality, and confidentiality and with the free consent of the parties. This approach is in line with the content of the Directive 2008/52/EC. However, the definition provided by the Romanian law states the condition of neutrality of the third party that provides assistance to those in dispute. This condition is not formally mentioned in the Directive 2008/52/EC. Nevertheless, the European Code of Conduct for Mediators (that has an informal value) states as requirement the independence of mediators.

Romanian law defines the mediator as a person trusted by the parties and that is able to facilitate the negotiations among them and support them to solve the conflict through the identification of a mutually convenient, efficient, and sustainable solution. The mediation process is based on the cooperation of the parties to the dispute. The mediator cannot impose a solution relative to the dispute among parties.

The relevance of the Law no. 192/2006 modified and completed by the Law no. 370/2009, to the commercial disputes, is based on Article 2. According to this article, the provisions are also applicable to conflicts in consumer protection, when the consumer claims a damage following the purchase of defective goods or services; the non-observance of contractual clauses or warranties provided; the existence of abusive clauses within the contracts concluded between consumers and economic operators; the infringement of other rights stipulated by the national or EU legislation in the area of consumer protection.

According to Law no. 370/2009, only the person that has obtained the quality of authorized mediator may practice the profession of mediator. In principle, the profession of mediator is compatible with the practice of other activities or professions. Article 12 of the Law no. 192/2006 modified and completed by the Law no. 370/2009 stipulates that authorized mediators are registered in the Table of Mediators, drawn up by the Council of Mediation, and published in the Official Journal of Romania, Part I.

In Romania, Council of Mediation organizes the mediation activity. This body is an autonomous legal person of public interest. Among the main responsibilities of the council range the following promotion of the mediation activity and representation of the interests of the authorized mediators; development of training standards relative to mediation based on the international best practices; authorization of the initial and continuous professional training, as well as of the specialization training; authorization of mediators; supervision of the compliance with the training standards in the field of mediation; development of the Code of Ethics and Professional Deontology; making proposals to improve regulation of mediation.

The Code of Ethics and Professional Deontology approved by the Council of Mediation reflects the provisions of the Law no. 192/2006. The code guarantees the fulfillment of the mediators' mission, based on its free acceptance by them. The non-compliance with the deontological norms specified by the code incurs the application of disciplinary sanctions by the Council of Mediation. The general principles to be applied by mediators are the following: the freedom of parties to apply to mediation and to make a decision; non-discrimination; independence, neutrality and impartiality of the mediator; trust and moral integrity; professional secret, confidentiality; conflict of interests; fee setting; responsibility of mediators; incompatibilities; quality of the mediation process.

In Romania, the regulatory framework relative to mediation and mediator profession was adopted relatively recently. The profession of mediator was legally created in 2006. Both civil matters and commercial matters are the object of the same provisions relative to mediation and the organization of the profession of mediator.

5. Mediation in the sector of banking services in Romania

At present, the Table of Mediators includes numerous authorized mediators in all the counties of Romania. Some of the mediators that have been authorized by the Council of Mediation had the initiative to create a body specialized in the sector of banking services. On 11 November 2009, the Union of Banking Mediators from Romania (UBMR) was created. The stated goal is to promote mediation and to mediate conflicts and litigations from the banking, leasing and insurance sector (Union of Banking Mediators from Romania, 2009a). The basic principles of mediation applied by the UBMR are legality, neutrality, impartiality, confidentiality, and mutual respect.

The UBMR is Romanian legal person of private law, established as a professional non-profit body. The activities of the UBMR should comply with the Law no. 192/2006 and the Law no. 370/2009, with the norms and instructions of the Council of Mediation. UBMR will comply with code of conducts such as those of the American Bar Association (ABA), Association for Conflict Resolution (ACR), American Arbitration Association (AAA), as well as with the European Code of Conduct for Mediators and the Code of Ethics and Professional Deontology of Mediators from Romania.

The activity of UBMR will include: among others making proposals for the improvement of the regulatory framework relative to conflict mediation in the banking system; organization of a permanent dialog and good cooperation with institutions such as Council of Mediation, professional associations of authorized mediators, Romanian National Bank, Romanian Banking Association, Romanian Banking Institute, commercial banks, Ministry of Justice, National Authority for Consumer Protection, Government of Romania and Parliament of Romania, Union of the Liberal Professions, National Association of the Romanian Bars, Association of Business People, Association of Banks' Customers, Ministry of Public Finance etc.

The authorized mediators that are members of the UBMR may provide mediation services to assist in solving conflicts such as: (i) conflicts claimed by customers; (ii) conflicts claimed by bank; (iii) conflicts among bank employees at all levels; (iv) other conflicts that do not refer to the relationships bank – employee – customer and are under the incidence of the Law no. 192/2006 (Union of Banking Mediators from Romania, 2009b). Examples of

conflicts claimed by customers (being either legal or natural persons) are those related to: incorrectly calculated interest rates; unjustified increase in the interest rates that were supposed to be fixed during the contract period; unjustified commissions; errors in processing transactions with cards; errors in processing online banking transactions; incomplete or unclear information; unauthorized operations in the accounts; banking frauds; unjustified registration as bad debtor with the Central of Banking Risks and with the Credit Bureau; abusive clauses inserted in the credit contracts; no communication from the bank relative to the increase in the interest rate; changes in the clauses of the convention without the consultation and agreement of contractual parties and without registration in an additional act signed by both parties; damages for customers due to the late processing of money orders etc. Examples of conflicts claimed by banks are those related to: non-payment with ill will by bank's customers of their money debts to the bank; late payment after debt deadline by customers; unjustified refusal of the customer to pay the interest and legally calculated penalties; threatening, insulting, slandering or striking of bank employees by the debtor customers; denigration of bank in mass-media by customers; registration of unjustified complaints relative to banks with the National Authority for Consumer Protection and National Bank of Romania.

The Romanian Banking Association (RBA) also recognized the need for ADR schemes in the area of banking services. In December 2006, a background study relative to the establishment of a bank ombudsman in Romania was presented to the (Public-Private) Special Projects Initiatives Committee (SPI Committee) which is involved in the modernization of the financial sector in Romania. The study includes the recommendation that an independent and effective Bank Ombudsman scheme be established modeled after the European schemes analyzed by the study (Cani, 2006, p. 38). In July 2007, the SPI Committee approved the documents relative to the setting-up of the banking ombudsman. In 2008, the National Bank of Romania approved the proposal of the RBA relative to the creation of "mediator bancar". According to the documents submitted, "mediatorul bancar" will give verdicts, establishing whether the customer or the bank is right, in the case of a conflict (NewsIn, 2008). The RBA registered the brand "Mediatorul Bancar" with the State Office for Inventions and Trademarks (SOIT).

The above-mentioned aspects call for in-depth analysis and clarifications. The text of the feasibility study was elaborated in English and referred in its entirety to the establishment of a banking ombudsman. All the information provided to the mass-media channels as well as the trademark registered with OSIT use the term "mediator bancar" as equivalent translation to "banking ombudsman". In fact, the project of RBA refers to a banking ombudsman, not to a banking mediator. The two concepts belong both to the ADR area. However, even if both act as third parties, experts make a clear distinction between an ombudsman and a mediator. The major reasons are the following:

- *Role.* In the case of an ombudsman, the role consists in identifying a solution under the form of a decision that is binding to the trader. The consumer that is dissatisfied with the decision may go to court. On the opposite, the role of the mediator is to assist parties to identify themselves a mutually beneficial solution by dialog and cooperation. The mediator does not formally express and impose own opinion on the possible solution to the dispute. According to article 4(2) of the Law no. 192/2006 relative to mediation and to the profession of mediator and modified and completed by the Law no. 370/2009, the mediator

does not have decision power relative to the content of the agreement that will be reached by parties, but may guide them to verify the legality of agreement (according to article 59).

- *Type of outcome.* Article 1(2) of the law Law no. 192/2006, modified and completed by the Law no. 370/2009, stipulates that the mediator assists parties in solving the conflict by obtaining a solution that is mutually beneficial to these parties, efficient and sustainable. On the opposite, the ombudsman is not responsible to ensure such characteristics of the outcome.

- *Neutrality, impartiality, and confidentiality.* According to Article 1 of the Romanian Law no. 192/2006 modified and completed by the Law no. 370/2009, neutrality, impartiality, and confidentiality are conditions to be fulfilled by mediators. At the same time, according to article 30(2), the mediator must lead the mediation process in an impartial way and ensure a permanent balance between parties. Article 32 stipulates that a mediator has the obligation to keep the confidentiality of the information and of the documents elaborated or submitted by parties during the mediation process, even after the cessation of his/her function. Consequently, a person that has a relationship with a bank, for example as employee, collaborator, or member of an association of banks, may not be the mediator of a banking dispute. The conflict of interests should be avoided, to ensure a professional and ethical assistance to the parties.

- *Choice of a mediator.* According to the law, the parties may freely choose themselves the mediator. Consequently, an institution or an association does not appoint the mediator. The mediation is based on the trust placed by the parties in the mediator.

- *Research.* A mediator does not make research relative to the dispute, like an ombudsman.

Consequently, if no changes will be made in the terminology used (more specifically in the translation of the term “ombudsman” from English to Romanian), there is a lot of room for errors among customers and all those who are not very knowledgeable of ADR.

The president of RBA estimated that until the end of 2008, the banking mediator might become functional. However, the intentions and the efforts deployed to set up a mediation entity did not materialize until December 2009 when the UBMR was created. On 18 January 2010, the board of directors (BoD) of the RBA has published a two-paragraph press release on its site, relative to the own project relative to mediation and to the UBMR (Romanian Banking Association, 2010). In this press release, the BoD acknowledges the customers (natural or legal persons) of the credit institutions, as well as the media channels, that the recently created UBMR is not the result of the project supported by RBA and by the banking community. The BoD announces that RBA continues its efforts to set up an entity with mediation responsibilities in the banking field that will be accepted and recognized by the banking community. The text specifies that the level of professionalism and knowledge of the banking activities of the entity planned by RBA will represent a warranty for a competent and pertinent analysis of the causes to be mediated and will ensure correct decisions that will meet the expectations of the applicants.

At present, almost all commercial contracts do not include a mediation clause. The Center of Mediation of the Commercial Disputes with the Chamber of Commerce and Industry of Romania and of Bucharest has suggested two possible formulations of such a clause (Neagu, 2009). The former refers to a contract and is formulated as follows: “Every

misunderstanding, dispute or divergence relative to the conclusion, interpretation, implementation or cessation of the present contract will be submitted to the mediator (name of the mediating person/body)...". The latter refers to an extra-contractual relationship and its text is: "Every misunderstanding or dispute relative to the existence, fulfillment or cessation of the extra-contractual obligation of commercial nature for at least one of the parties, will be submitted to the mediator (name of the mediating person/body) ...".

On the Romanian banking market, two associations had the initiative to promote the ADR techniques. Besides the confusion and a slight conflict among the perspectives, that may be inherent to a beginning stage of the development of ADR techniques, two trends have emerged: one towards the establishment of the banking ombudsman and one towards the banking mediator. The question is not which should be chosen out of the two. The correct question is how these two types of ADR may be effectively implemented to benefit both consumers and the institutions providing financial services. In addition, the promotion of mediation requires a specific mediation clause to be embedded in the contracts between banking institutions and consumers.

Conclusions and recommendations

The European practice reveals the *need for ADR* as an alternative to judicial settlement of consumer disputes, especially for cross-border transactions, fact reflected by the development of various types of bodies and procedures in the EU Member States. Presently, the ADR schemes are in an *early development stage in the EU* in general and in banking services in particular. The reasons supporting such a statement, are the following: the increase in the number of public and private schemes in the Member States; uneven development of ADR among Member States; lack of a standardized approach relative to the types of schemes and outcomes; relatively general EU regulations that established mostly the principles of ADR. The *diversity* of the applied techniques is because each Member State has approached and regulated differently the ADR.

The mediation in the banking sector has lately evolved as ADR scheme in several EU countries. At present, financial mediation schemes that are notified to the EC exist in Belgium, France, Italy, Luxembourg and Portugal. Out of these, only two schemes focus on banking services (one in Belgium and one in Italy). Non-notified schemes dedicated to the banking services exist in France, Romania, and Slovenia. In addition, in the financial sector, there are schemes that are not focused on mediation but provide the outcome of a consensual mediated agreement, like in Belgium, Luxembourg, Netherlands, Poland and the United Kingdom. Compared to the broader concept of ADR (that incorporates more procedures than mediation and that is in the early development stage in the EU), *mediation* in the banking service sector has reached only an *emerging stage* in the EU. However, in *Romania*, mediation in banking services is just in a *pre-emerging stage*. This statement is based on the absence of any mediation schemes specialized in financial services until 2009. Since November 2009, there is only one such scheme. However, without mediation schemes, numerous complaints relative to banking services were submitted by consumers to the NACP in Romania.

The pre-emerging stage of mediation in the banking sector in Romania seems to be *competitive* and characterized by a slight *conflict* between the two main initiators of mediation schemes: the UBMR and the RBA. The neutrality and independence of

mediators from the banking organizations and association represent an issue that may generate further informal and formal debates. Mostly the professionals and organizations that have voluntarily subscribed to the European Code of Conduct for Mediators support the independence of mediators. At the EU level, until present, there is no directive to support formally the independence of the mediators relative to the parties to the dispute. In Romania, the Law no. 192/2006 modified and completed by the Law no. 370/2009 underlines neutrality, impartiality, confidentiality, and free consent of the parties as conditions to be met by mediation. In Romania, a potential *confusion*, between mediator and ombudsman, is due to the registration by the RBA of the “Mediatorul Bancar” with the SOIT. In fact, the RBA has already deployed substantial efforts to develop an ADR scheme of *ombudsman* type, similar to those existing in the United Kingdom and Greece.

Several recommendations may be drawn on this exploratory study. *First*, specialists and decision-makers *must avoid placing limitations* in the path of the *diversified development* of ADR schemes in banking services. The significant number of complaints on banking services received by NACP is a reason to promote various ADR schemes among which range mediation. The EU experience shows that in the early development stages, a standardized approach may hinder innovativeness and the ability to identify solutions that are better suited to the customer needs for quick, effective, affordable, and impartial settlement of disputes. Consequently, in this stage, Romania should encourage the development of different ADR techniques and bodies, in general and in banking services specifically. *Second*, the promoters of the various ADR schemes should make a *difference* between ombudsman and mediator and should acknowledge customers and mass media about the content of this difference. *Third*, the *experimentation* of mediation and other ADR schemes may be beneficial to test and further improve them to fulfill better their role. The question is not which ADR scheme is the best, but how to develop each scheme to provide consumers with a reliable alternative dispute resolution. *Fourth*, another recommendation is to organize a *descriptive research* able to analyze the mediation in the banking service sector, to achieve a comparison with other ADR schemes and to substantiate future decisions relative to the improvement of consumer protection by appropriate dispute resolution. A detailed research may provide a perspective of Romania and of the EU Member States that have a significant experience in the field. The study of the best practices in ADR generally and in mediation specifically may facilitate a more rapid and relevant development of such schemes in the banking sector, in Romania. The following research objectives are a priority: comparative analysis of the types of disputes that are the object of mediation in banking services in Romania and in other countries of the EU; study of the effectiveness of mediation and of other ADR schemes applied in the banking service sector in Romania and in other EU Member States; identification of best mediation practices from the EU Member States; evaluation of consumer satisfaction relative to the outcomes of mediation and of other ADR schemes; duration and costs for consumers; the outcomes and activities specific to each type of scheme.

The implementation of these recommendations may facilitate the access to a superior development stage of mediation in banking services that will contribute to the enhancement of the protection of the rights and interests of consumers.

References

- Alexander, N.M., 2006. *Global trends in mediation*. 2nd ed. Alphen aan den Rijn: Kluwer Law International BV.
- Alleweldt, F. et al., 2009. *Study on the use of alternative dispute resolution in the European Union. Final report*. [Online] Berlin: Civic Consulting of the Consumer Policy Evaluation Consortium (CPEC), 16 October 2009. Available at: http://ec.europa.eu/consumers/redress_cons/adr_study.pdf [Accessed 25 January 2010].
- Anon, 2010. Topul reclamațiilor făcute de români împotriva băncilor în 2009. *Ziarul Financiar*, [Internet] 24 January. Available at: <http://www.zf.ro/zf-24/topul-reclamatilor-facute-de-romani-impotriva-bancilor-in-2009-5432893/> [Accessed 25 January 2010].
- Cani, S., 2006. *Establishing a bank ombudsman in Romania*. [Online], December 2006, p. 38. Available at: http://www.spi-romania.eu/admin/filemanager/files/program2007/c__background_study.pdf [Accessed 25 January 2010].
- Cappelletti, M., 1993. Alternative dispute resolution processes within the framework of the world-wide access-to-justice movement. *Modern Law Review*, [Online]. 56, p. 282. Available at: <http://www.jstor.org/pss/1096668> [Accessed 25 January 2010].
- Commission of the European Communities, 2001. Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes. C(2001) 1016, *Official Journal*, [Online]. L 109, 19/04/2001, Brussels, 4 April 2001, pp. 56-61. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:109:0056:0061:EN:PDF> [Accessed 25 January 2010].
- Council of Mediation, 2008. Decision no. 963 relative to the modification of the Standard of mediators' training, approved through the Council of Mediation no. 12/2007. *The Official Monitor of Romania* no. 357, 8 May 2008.
- Council of Mediation, 2007. *Code of ethics and professional deontology of mediators*, [Online]. 17 February 2007, pp. 1-5. Available at: <http://www.mediere.org.ro/pdf/Codul%20de%20etica%20si%20deontologie%20profesionala%20a%20mediatorilor.pdf> [Accessed 25 January 2010].
- European Commission, 2004. *European code of conduct for mediators*. [Online] Available at: http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf [Accessed 25 January 2010].
- European Parliament & Council of the European Union, 2008. Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, *Official Journal*, [Online]. L 136, 24/05/2008, pp. 3-8. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:01:EN:HTML> [Accessed 25 January 2010].
- Malhotra, N. K., 2009. *Marketing research: An applied orientation*. 6th ed. Upper Saddle River: Prentice Hall.
- Neagu, L., 2009. Negocierea in domeniul bancar si al asigurarilor. *Revista Romana de Mediere*, [Internet]. 13 May. Available at: <http://www.revistademediare.ro/index.php?mid=5&id=20> [Accessed 25 January 2010].

- NewsIn, 2008. *Mediatorul bancar, aprobat de BNR*. [Online] Available at: http://www.standard.money.ro/articol_36131/mediatorul_bancar__aprobat_de_bnr.html [Accessed 25 January 2010].
- Romanian Banking Association, 2010. *Comunicat de presa al Consiliului de Administratie al Asociatiei Romane a Bancilor*. [Online] Available at: <http://www.arb.ro/admin/documents/ARB%20comunicat%20mediere.pdf> [Accessed 25 January 2010].
- Schutt, R. K., 2009. *Investigating the social world: The process and practice of research*. 6th ed. Thousand Oaks (CA): Pine Forge Press.
- Stefan, A., 2009. Agenție destinată protecției financiare a consumatorilor. *Financiarul*, [Internet], 23 October. Available at: http://www.financiarul.com/articol_34609/agentie-destinata-protectiei-financiare-a-consumatorilor.html [Accessed 25 January 2010].
- Stuyck, J. et al., 2007. *An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings. Final report*. [Online] Leuven: Study Centre for Consumer Law – Centre for European Economic Law at the Law Faculty of the Katholieke Universiteit Leuven (Belgium), 17 January 2007. Available at: http://ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf [Accessed 25 January 2010].
- Union of Banking Mediators from Romania, 2009a. *Uniunea mediatorilor bancari, o solutie de mult asteptata pe piata financiar-bancara de catre clientii bancilor, societatilor de asigurare si leasing*. [Online] Available at: http://www.comunicatemia.ro/UNIUNEA_MEDIATORILOR_BANCARI_O_SOLUTIE_DE_MULT_AS_ic31822.html [Accessed 25 January 2010].
- Union of Banking Mediators from Romania, 2009b. *Activitatea noastra*. [Online] Available at: <http://www.mediatorbancar.ro/tipuri-de-conflicte-mediate.htm> [Accessed 25 January 2010].
- ***2006. Law no. 192/2006 relative to mediation and organization of mediator profession. *The Official Monitor of Romania* no. 441, 22 May 2006.
- ***2009. Law no. 370/2009 for the modification of Law no. 192/2006 relative to mediation and organization of mediator profession. *Official Monitor of Romania* no. 831, 3 December 2009.