



ONLINE MEDIATION IN SPAIN AND THE NEW CHALLENGES POSED BY COVID-19

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Abstract. *This article examines the impact that COVID-19 pandemic is having on mediation processes in Spain. For that purpose, the guiding principles that feed mediation are analyzed together with the problems arising from the implementation of the use of new technologies and electronic media in the online mediation area. This assessment is delimited by the Spanish legislative framework and the legal and social consequences that COVID-19 has generated during 2020.*

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Introduction

The “Covid-19” coronavirus crisis has provoked a series of conflicts at a global level which affect all the economic and financial levels, as well as the legal and social ones. However, the most common conflicts are the ones affecting familiar environments, whose common elements are the mobility restrictions and prohibitions in order to fight against the pandemic.

Mediation is a tool that, despite not being new, throughout these last years has gained relevance in all kinds of sectors, from the business one to the family one. In the current circumstances, and specifically with regard to the Spanish situation after various months of lockdown and state of alarm, mediation has become a necessary complement of the judicial system, with no aim of substituting it, although the slowness and the bureaucracy itself of the legal system discourage the citizens from resolving their conflicts in courts [1] Royal Decree 463/2020, 14th march, declaring the state of alert for the management of the health crisis situation caused by COVID-19.

This is why extra-judicial mediation must take a step forward and, together with the use of new technologies, solve those disputes that cannot be lost due to that discouragement. The implementation of these new technologies, including video-conferencing systems, real-time translation and the creation of the online mediator figure, should help under the present circumstances.

Literature Review

Mediation is defined as a procedure or a process that assumes the existence of a conflict or dispute between two or more persons or bodies. These parties try to reach an agreement, through

mediation, able to provide a solution to the difficulties deriving from the conflict and to resolve it. At a restorative justice level, the dimension of the aims and the scope of the agreements affect the structure, because the restorative process generally aims not only to the pacification of the conflict and to satisfying the interests of the parties, but also to the strengthening of the community bonds, the reconciliation between the parties and the possible prejudices deriving from the criminal trial [2. pp. 145-146]. Vilalta Nicuesa, A.E. (2011), “El marco jurídico: derecho comparado”.

The guiding principles of mediation constitute the structure for the establishment of the legal provision that will derive from the mediation process, since this process aims at becoming a system for the resolution of conflicts even at the height of the pandemic. We will point out some of these principles:

- The principle of freedom or willingness is established as the main pillar since mediation, as a consensual institution, requires that the process and the adopted agreements comply only and exclusively with the parties' will. One of the keys to the success of mediation consists precisely in the fact that the parties freely decide to use this system for the resolution of conflicts in order to reconcile positions and achieve an agreement that is satisfactory for both, and that the parties are totally free to start the procedure and they can withdraw from it at any time, with no need to state any reason [3. p. 8]. Ortiz Pradillo, J.C. (2011) “Análisis de los principios informadores de la mediación en materia civil y mercantil”.

- The principle of impartiality establishes that the mediator is not required to act independent-



ly in the sense of not being submitted nor subordinated to nothing nor anyone apart from the legal system, but rather with regard to his/her impartiality towards the parties. If the conflicts describe a series of circumstances and situations that may raise doubts regarding the independence of the mediator, he/she may be obliged to renounce [4. p. 156]. Alexander, N. (2013), "Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulatory Re-form".

- The principle of confidentiality is a guarantee of success for mediation, because it contributes to guaranteeing the frankness of the parties and the sincerity of communications during the process; together with willingness, it composes the essence itself of mediation, since it derives from a clearly privatistic conception. On some occasions, however, it is implicit in the definition, since it is also identified with discretion, privacy and with the professional secret, but the principle of confidentiality is not binding in those mediations or issues in which the parties expressly agree so [5, pp. 258-259], Coben, J. & Harley, P. (2004), "Intentional conversation about Restorative Justice, Mediation and the Practice of Law".

- The principle of physical presence is one of the other principles that characterise mediation procedures, since the dynamic of conflict resolution itself is based on giving back to the parties the role of protagonists in the achievement of an amicable settlement of their differences, listening to them and recovering channels of dialogue between them so that they can express, in an environment of trust and tranquillity, their problems in order to find a solution [6, pp. 436-437], Lasheras Herre-ro, P. (2008). "Mediación Familiar: oralidad y principios del procedimiento". Orality necessarily requires immediacy, seen as the personal and direct contact between the mediator and the parties, and such principles have been defined in Spain through different laws with different expressions such as physical presence or personal nature. This principle precisely is the one that is most affected by the current circumstances since, in remote mediation, parties and mediators communicate through electronic devices and, although in principle it was only foreseen in Spain in case of cross-border conflicts, these rules have changed [3. pp. 30-32]. Ortiz Pradillo, J.C. (2011) "Análisis de los principios informadores de la mediación en

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Aims

The aim of this article is the qualitative analysis of the effect that COVID-19 pandemic is having on mediation processes in Spain, highlighting the importance of mediation and its usefulness for the future challenges of restorative digital justice.

Methods

A theoretical methodological approach has been carried out using documentary sources, including: scientific publications, public initiative guides, legislation and jurisprudence.

An essential aspect of the information used comes from legislative analysis conducted by experts in procedural law, which also contributes for a critical vision of the problems presented. This information was analyzed and interpreted in order to get a global perspective of the subject and possible solutions.

These concepts and descriptions will allow us to know the implementation of new technologies and to shape hypotheses with the purpose of overcoming the problems faced by online mediation, all within the framework of Spanish social characteristics and legislation.

Results

The progress in electronic communication allowed a substantial change in personal, professional and consumer relations, which are now possible at any time and with people from different parts of the world. In Spain there was a delay in the assimilation of ADR techniques; however, with the creation of Law 5/2012, of 6 July, mediation in civil and business matters has become more relevant, being mediation one of the techniques that can entail more advantages. As we know, the impact of Covid-19 entails that the management of these conflicts must be carried out through electronic devices, but this resolution of conflicts through the creation and use of a virtual environment was already foreseen in the Spanish Law on mediation in civil and commercial matters (LMACM - Ley de mediación en asuntos civiles y mercantiles) This electronic use has given the possibility to carry out mediation even through automatized systems in which the figure of the mediator is completely replaced by computer programmes that do not only provide guidance and offer alternatives of agreement to the parties (such as the blind bidding system), but also write the agreement that is finally reached and



later send it to the parties, with no intervention at all from the mediator at any phase of the procedure. This regulation, as it is obvious, gives rise to doubts and questions regarding the problems it may cause [7, pp. 6-8], Talavera Hernández, J.A. (2015), “La figura del mediador en la mediación online”.

We must bear in mind that online mediation is a structured and confidential procedure in which two or more conflicting parties voluntarily request the participation of a neutral third party to help them achieve a joint agreement, without the possibility, for the mediator, to impose any solution. In this case, the neutral third party communicates with each party, sometimes through caucuses or during joint sessions. Thanks to the technological element, these acts of communication can be carried out through a series of means ranging from e-mail or electronic blackboards to videoconferences or IP telephony services. All the phases of the mediation process that are carried out online can count on functionalities that allow to file a claim or respond to it through an online form and even to use a discussion forum for the acts of communication between the mediator and the parties, or to eventually use videoconferencing services. In the most paradigmatic cases, the platform itself can be designed so that it even has the configuration and trademark of the licensee. In other services, the bodies offer the use of virtual rooms to carry out an online mediation process after paying the corresponding amount (these rooms include a set of communication tools such as private and public chats, videoconferences, etc., so that both the parties and the mediator can use them) [8, p. 7], Poblet, M. et al. (2011), “Tecnologías para la mediación en línea, estado del arte, usos y propuestas”.

The crisis provoked by Covid-19 has offered, somehow, unlikely futures, as we may call them: scenarios in which it would be possible to break the resistance to the use of technology in certain areas of the administration of justice, something that we saw as culturally and technically unlikely, but that was proved possible thanks to the plans, aimed at reducing the effects caused by the suspension of courts activity, proposed by the Spanish General Council of the Judiciary (Consejo General del Poder Judicial) [9], Agreement of the Permanent Commission of the Council of the Spanish Judiciary, 14/03/2020.

Within these scenarios we can think about the extension of remote restorative justice to carry out processes in a completely digital form. We must consider the context of the COVID-19 crisis in terms of the unfavourable conditions due to the psychological impact of the pandemic and, specifically, of the lockdown, with feelings and emotions related to fear, anguish, anxiety, stress, sadness, loneliness and lack of concentration. At the same time, in those conditions, the desire to connect with others and the desire for solidarity and humanity are awakened. In this sense, the experts of the World Health Organisation underlined that, in general, the response to these challenges must be to show affection and care towards others by “taking into account the recommendations for social distancing, and projecting closeness through a phone call, a postcard or a videoconference”. Since the appearance of the COVID-19 crisis, various organisations that promote and carry out restorative processes discussed on how to continue them while in a condition of lock-down and social distancing, through debates and proposals that fall within the scope of what we have described as familiar futures [10, p. 21], Varona Martínez, G. (2020), “Justicia restaurativa digital, conectividad y resonancia en tiempos del COVID-19”.

Discussion

Despite pressure from COVID-19 pandemic to embrace technological change, the truth is that the judicial systems are not responding to COVID-19 crisis as expected. Historically, judicial practice has always been associated to the creation and exchange of paper documents; although the use of technology is not something completely new, the truth is that the use of digital tools in courts is further remote than it seems. These deficiencies can also be applied to the same Alternative Dispute Resolution (ADR) and Online Dispute Resolution (ODR) systems, since the coronavirus crisis showed the difficulty of using in a proper manner all these new technologies. A series of innovations are necessary to ensure security and confidentiality, since videoconferencing systems such as Zoom and Skype favour, on some occasions, opening and viability over privacy and safety, for which these systems that were so widely used during the pandemic may be inadequate for legal issues [11, pp. 29-32], Sourdin, T. & Zeleznikow, J. (2020), “Courts, Mediation and Covid 19”.



Facing the insufficient institutional compromise, it is necessary the persuasion and support of the judicial bodies and of the competent Administrations, who will have to carry out an adequate management of the change with organisational measures that will make its progressive implementation easier, with due regard for the principle of legality. The achievements made, as well as the existing challenges, are many, but today we can affirm that, in the Spanish legal system, mediation constitutes a necessary reality that is complementary to the judicial path, aimed at the search for a satisfying solution to the conflict, thus allowing to reduce the excess of judicial litigiousness, which will inevitably increase due to the crisis caused by COVID-19, after the resume of the official bodies' activity [12, p. 45], Avilés Navarro, M. (2020), "La mediación en el orden jurisdiccional contencioso administrativo en España".

Despite all this, is it obvious that these alternative forms of conflict resolution through the use of new technologies and, specifically, electronic or online mediation, entail a progress and a way to bring justice closer to the individual, and to reduce pressure, at the same time, on the jurisdictional bodies. And the fact that it has been adopted, by the European Union, as a meaningful element of the common space of safety and justice in Europe makes mediation, and online mediation in particular, an adequate mechanism to simplify the life of citizens and companies, by providing a fast and effective solution to litigations, not only national ones but also cross-border ones [7, pp. 35-37], Talavera Hernández, J.A. (2015), "La figura del mediador en la mediación online".

That said, will it really be the solution to avoid the judicial bottleneck in Spain? Will it really bring the citizens closer to justice? Mediation, and even more online mediation, is a valid and useful tool to solve conflicts in a civilised way, and it will be effective as long as there are good mediators, good regulating norms and, mainly, as long as a culture aimed at finding agreements is created. These conditions do which does not exist nowadays and that we see them as something difficult to reach, is created. Only once we will be able to see the judicial or arbitral litigation as the last resort to

be used and not as the first one, things will start to change [13] Pérez Marcos, E. (2020), "Métodos alternativos de resolución de conflictos en tiempos de COVID-19: la gran oportunidad de la mediación".

Conclusions

2020 has been a period of judicial paralysis, and it has been proven that the extra-judicial paths are a fast and effective method. The exceptional nature of the situation has allowed to negotiate the new situations and to reach satisfying agreements that provide guarantees to the parties involved in these processes.

Due to the health emergency caused by COVID-19 pandemic, the alternative methods of conflict resolution have become the ultimate tool in order to face the judicial collapse and to avoid, for once and for all, excessive judicialisation in Spain. Many initiatives emerged to promote negotiation, arbitration and mediation, figures that had existed from many years but to which it seems we now want to give a decisive boost during these times of pandemic.

Mediation, specifically, is acquiring the shape of a great opportunity to face the COVID-19 situation. The development of online or electronic mediation presents itself as one of the most advantageous solutions in conflict resolution. This electronic form of carrying out mediation can comply with all the mediating needs and principles thanks to the existence of specific norms regulating the detailed mechanisms to guarantee the security of the electronic means used, the identity of the parties (through electronic signature), and confidentiality.

In these times of crisis that we are experiencing, it is necessary to make the most of COVID-19 pandemic to make a decisive bet on mediation and the rest of alternative methods for the resolution of conflicts in order to make mediation, for once and for all, a part of the Spanish culture, because beyond the judicial collapse or the temporary situation of the pandemic, extra-judicial agreements entail a benefit for everyone.

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