

Mediation – Voluntary or Mandatory Procedure

Senior Lecturer Angelica ROȘU, PhD
Danubius” University of Galați
rosuangelica@univ-danubius.ro

Abstract: Part of modifications brought through 370/2009 Act to the 192/2006 Law concerning mediation and structure of mediator profession have been interpreted as establishing a preliminary mediation procedure before intimating the courts of law, in civil and commercial matters. This interpretation is in excess of operative legal provisions. Although the law in modified form stipulates the compulsoriness of judicial authorities and other jurisdictional bodies to inform the parties about the possibility and the advantages of using mediation procedure and the obligation to guide the parties to resort at mediation, this circumstances does not affect the mediation particular voluntary nature.

Keywords: mediation, judicial authorities, arbitral authorities, mandatory law, the European Parliament and European Council Direction no. 2008/52/CE

Under the circumstances of recent modifications brought by the 192/1996 Law, concerning mediation and structure of mediator profession,¹ it has been held that “from 2010 March the 3-rd, mediation will become obligatory.”² Usually, the

¹The 192 / 2006 Law concerning mediation and structure of mediator profession was published in the Official Gazette of Romania, Part I, no. 441 / 2006. This Law started to operate at the immediately after publishing, but its provisions become applicable a month after elaboration of the Authorized mediators board. On April 21st, Mediation Council has endorsed the first Board of Mediators, thus making possible the implementation of legal provisions, according with the 73rd art. 1st paragraph of the 192/2006 Law that provides: “The provisions of this law will become applicable in one month from the endorsement of the Authorized mediators board. The Board was published in the Official Gazette of Romania, no. 357 from the 8 of May, 2008. The 192 / 2006 Law was lately modified and completed through the 370/2009 Act, which was published in the Official Gazette of Romania, 1st part, no. 831 from 2009 3rd of December and through Government Ordinance no. 13 from 2010 January the 29 for modifying and completion some provisions before transposing the 2006/123/CE Direction of European Parliament and Council regarding services in internal market. This last normative was published in the Official Gazette of Romania, 1st part, no. 30 from 2010 30th of January.

² Also see: „*Medierea devine obligatorie din 3 martie 2010*”, article available on-line at: <http://www.legalis.ro/2010/02/10/medierea-devine-obligatorie-din-3-martie/>; “*Medierea – obligatorie din 3 martie 2010*”, article available on-line: <http://lorylex.wordpress.com/2010/02/09/medierea->

information offered by the media referring to a judicial institution must be regarded with infinite limitations, because sometimes the people who offered it are not specialists in this field.

Nevertheless, two are the motives for which we will take this information into discussion. First of all, on related internet sites, they try to accredit the idea that mediation will become an obligatory procedure. Second, having in mind that promoting mediation as alternative disputes resolution mean has encountered serious difficulties (generated by the legislator slowness, the two years delay in publishing the first Authorised mediators board, the distrust of both citizens and magistrates beside the possibility to solve a litigation other than by trial), one misinterpretation could jeopardise from the very beginning the whole meaning of this institution.

For us to be able to give an answer to this question, we take into consideration that in doctrine, depending of mediation source criteria, it has been classified in voluntary mediation and mandatory mediation. (Păncescu, 2008, pp. 5-6) The mediation can be called voluntary when parties resort to this kind of procedure at will. If legislation stipulates that the parties can be also obliged to submit mediation, then we will be talking about mandatory mediation.

But in reality, it has been alleged that mediation can be only voluntary¹, (Beha (II), September 2002, p. 11) this aspect has been insisted over in almost all legal definitions concerning mediation, since this feature represents the essence of this procedure. The essentially voluntary character of mediation is also emphasized in 1st paragraph of European Parliament and European Council Direction no. 2008/52/CE² concerning some aspects of mediation in civil and commercial matters, in which it is shown: „The mediation stipulated in this Direction should constitute a voluntary procedure, meaning that parties are themselves responsible of the

[obligatorie-din-3-martie-2010/](http://www.e-juridic.ro/articole/medierea-devine-obligatorie-in-romania-din-3-martie-4327.html); “*Medierea devine obligatorie din 3 martie*”, article available on-line: <http://www.e-juridic.ro/articole/medierea-devine-obligatorie-in-romania-din-3-martie-4327.html>.

¹ In doctrine, there were some reserves regarding the existence of the voluntary access to mediation in the situation when legislation command it or is very insistent to impose it.

² The European Parliament and European Council Direction no. 2008/52/CE concerning some aspects of mediation in civil and commercial matters was endorsed at Strasbourg, on 21st of May 2008, published in the European Union Official Journal no. L136/3 on 24th of Mai 2008, available at: <http://eur-lex.europa.eu/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:RO:PDF>. The Direction must be transposed by member states until 21st of May 2011. This Direction applies in cross-border litigations, civil and commercial, excepting those rights and obligations that parties cannot possess, according with the corresponding applicable legislation, not being applicable in fiscal, custom or administrative matters and neither in state responsibility for mistakes or omissions in exercitation of public authority. The 192 / 2006 Law concerning mediation and structure of mediator profession applies in equal measure, also in cross-border litigations.

procedure, they can organise it as they wish, and they also can conclude it in any moment. Nevertheless, the 14th paragraph of this European Union settlement stipulates that „ none of those provisions must interfere with the national legislation which provides that resorting mediation is obligatory or is subject of incentives or penalties, provided that such legislation doesn't hinder the parties' wrights to access the judicial system”.

The Romanian legislator has initially established, in 1st article of the 192/2006¹ Act, the particular optional character of mediation. We previously stated (Roşu, 2009, p. 170) that it has been imposed to be taking into consideration the possibility of establishing an obligatory character to resort to mediation in specific stipulated cases and for certain litigation categories, as the legislator stipulates in the Civil Procedure Code 720th art., which even though is referring to conciliation, it has at its base the same principles and provides the same purpose.

It is sure that it could be objected in the meaning that the chances of mediation success, an eminently voluntary procedure, could be compromised *ab initio*, since parties must freely decide upon this manner of solving their dispute, without being forced in any way, including through legal provisions. There are studies which demonstrate that, if mediation is imposed, it can produce some agreements that are not necessarily the fruits of a consensual decision. Such agreements are more susceptible to be less durable, and so failing to materialize the purpose of mediation. (Baiaş & Belegante, 2000, p. 85)

Even so, at least until awareness of the potential justice appellants regarding the advantages of such a procedure, we've considered (Roşu, 2010, p. 224) that the obligatory character of crossing this procedure should be appropriate, priority in lower value, civil and commercial, patrimonial issues.

However, we observe that, out of the new legal definition of mediation, as it appears after modification brought by the 370/2009 Law (art. I, 1st pt.), the word „optional” have been removed; yet we ascertain that the legislator doesn't fail to specify that such a modality cannot take place otherwise that „having the free consent of the parties”. In our opinion, although the mediation optional character is no longer acknowledged in legal definition of this alternate dispute resolution modality, it

¹ According to this article, mediation was definite as “an **optional** modality of solving conflicts amiable, with the help of a third party, specialized in mediation, in neutral, impartial and confidential conditions.”

existence cannot be questioned. All this because, this time due to a completion brought to the 192/2006 Law thought the 43rd article of the 370/2009 Act, it is being stipulated that “in commercial and civil petitions and lawsuits, before process petition, the parties may try to solve their dispute through mediation.”¹

The intervention of legislator in this modality is both useless and uninspired. First of all, the insertion of this indented line in the content of 43rd article of the 192/2006 Law, which settles the preliminary procedure before contracting mediation, doesn't fit.

Secondly, out of the content of the 192/1996 Law results that mediation applies to all fields², with the only condition that the wrights that makes subject of mediation must be wrights which parties can possess. More than that, such a possibility of solving civil and commercial disputes through mediation, prior of intimating the court (arbitral tribunal we ad) was specifically acknowledged in the 2nd art. 1st paragraph of the 192/2006 Law (article that remained unmodified) according to which “if the law doesn't stipulate otherwise, parties, natural persons or legal entities, **may** resort to mediation voluntarily, including after starting a law suit before qualified courts, agreeing to solve in this manner all civil and commercial litigations...”. The phrase “including after the start of a law suit before the courts” cannot be interpreted otherwise than as meaning that any time before the start of a process, mediation is possible. We believe that removing the word “voluntary” from the legal definition of mediation is a first step that led legislature to hold that in some areas, mediation can become a mandatory preliminary procedure. Besides, even the previous text stated (the 2nd article (1) of Law no. 192/2006) contains along with faculty granted to the parties to use mediation, the condition that “the law does not provide otherwise”. Another amendment brought to the 192/2006 Law (which seems to be generated, in fact, the confusion about the nature of the mediation process) refers to the establishment in charge of judicial and arbitral bodies, but other authorities with jurisdictional powers also, of an obligation to inform³ the parties regarding the possibilities and the advantages of using mediation procedure

¹ Art. 43 paragraph (2)¹, like it was introduce through the 21st pt., 1st paragraph.

² Less in case of solving labour conflicts of interests. În this meaning, see Șt. Beligrădeanu, *Corelații între Legea nr. 192/2006 privind medierea și organizarea profesiei de mediator și dreptul muncii*, in „Dreptul” magazine no. 10/2006, p. 87; for the doctrine before endorsement of the 192/2006 Law, also see I. T. Ștefănescu, *Considerații referitoare la aplicarea art. 38 din Codul muncii*, in „Dreptul” magazine nr. 9/2004, pp. 79-83.

³ Regarding the content of the duty of disclosure and how this can be achieved, see C. Danileț, *Ghid de mediere pentru magistrați*, available on-line:

<http://www.unjr.ro/upload/files/Ghid%20mediere%20pt%20magistrati%2006.02.2009.pdf>.

and an obligation to guide the parties to use this way to resolve conflicts between them¹. The text leaves no room for any interpretation, the stated bodies having an obligation to inform and to guide the parties, without compelling them to go through this mediation procedure and without penalizing them if, while being aware and guided to the amicable conflict resolution, the parties refuse to use it.

The law does not specify, however, which is the penalty that occurs when mandatory duties imposed by art. 6 of Law no. 192/2006 haven't been met. If the respect of the courts and arbitral bodies' obligation can be seen in the light of the 129th article, align. (2) Civ. Proc. C.² and. Civ. Proc. C. 131st article³, respectively the 720th article, paragraph (7) Civ. Proc. C.⁴, regarding the other authorities with jurisdictional powers, obligation the legislator does not provide the procedure in which will be amended the non-compliance.

To assess, however, that the failure of judicial and arbitral bodies and other authority with judicial powers to inform and guide the parties will draw absolute nullity of the documents produced, respectively of the judgments or arbitration awards given, represents, in our opinion, an excessive solution. This is because the bad faith party, which was never willing to seek an amicable settlement, will have nothing to do but to rely on any failure to meet these obligations in order to obtain the annulment of the documents made, respectively the change or the annulment of the court's decision rendered. Article 6 of the 192/2006 Law may be, thus, in the hands of the interested party a powerful tool apt to cause delay in the settlement of a case, coming so that the effect is contrary to those expected at the time that was provided such an obligation.

The sanction for the failure of the 6th article of the 192 / 2006 Law, it is, in our opinion, the relative invalidity, being necessary that the party who it claims to make proof of the existence of a damage.

¹ Article 6 of Law no. 192/2006 has been amended by Law no. 370/2009 art. I, section 2 – in sense that the information of the parties and their direction was before a faculty for the aforementioned bodies. The text in the new form shall take effect 3 months from the date of publication of Law no. 370/2009 in the Official Gazette of Romania, Part I, so on 2010, March the 3-rd.

² “The judge will make aware the parties of their rights and obligations in their quality of process and will insist in all phases of the trial for the amicable settlement of the dispute”.

³ “In the first instance judges have a duty to try to reconcile the parties. For this purpose they may require personal appearance of parties, even if they are represented

⁴ Applicable to the commercial disputes which reads as follows: “During the trial on the merits trial, the court will insist on solving it, in whole or in part, by common agreement”.

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