

Considerations about mediation status in Romania, after declaring unconstitutional the mandatory information

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Abstract *In human society has existed, throughout his evolution and development, various conflicts between its members, but regardless of the reason peoples always tried to find the best solution to resolve, peacefully, their problems. In modern society there is an attempt to combine between courts of justice with jurisdiction over the administration of justice and mediation.*

Thus we believe that resolving disputes through mediation is becoming increasingly used in Romania, due to low cost and rapidity with which a solution was obtained. Citizens have the possibility to choose to resolve disputes through mediation, without giving up the opportunity to address to the court, if is not satisfied with the result of mediation.

This study attempts to discover the impact it has on declaring as unconstitutional the compulsory mediation inform about the benefits of mediation.

Keywords: *dispute, the court of justice, mediation, solving through mediation*

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1. Introduction

According Law 192/2006 art. 1 on mediation and the mediator profession mediation is a voluntary way of resolving conflicts amicably, with the help of a third party as a mediator specializing in conditions of neutrality, impartiality and confidentiality.

According art. 3 of European Parliament and Council Directive 2008/52 / EC^[2] on certain aspects of mediation in civil and commercial matters, “mediation” means a structured process, however named or referred to it as, “*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 specialized third party appointed as mediator.

Mediation is based on the parties’ trust to the mediator, as a person able to facilitate negotiations between them and support them to resolve the conflict through to a solution mutually convenient, efficient and sustainable.

The advantages offered by the use of mediation in conflict resolution makes its implementation in the administration of justice in Romania to be an urgent issue.

However, the multitude of legal, financial, psychosocial, and especially on the time court conflict resolution aspects, as well as the emergence of “*mediator institution*” make mediation, as an alternative for Romanian judicial system modernization, to be particularly complex.

May be subject to mediation under Article 2 of Law 192/2006 on mediation and the mediation profession any rights which the parties may dispose by agreement or in any manner permitted by law in some disputes (Radulescu, 2013) in civil, commercial, labor disputes, family (which includes continuing disagreements between spouses on marriage, exercise of parental rights, establishing the children's domicile, the parents' children alimony, as well as any misunderstandings that arise in relations between spouses on the rights they may have under law or in connection with divorce and ancillary applications), criminal matters, as well and consumer protection: if the consumer invokes the existence of damage due to improper purchase of products or services, the contract or guarantees failure, the existence of unfair terms contained in contracts between consumers and businesses, or the violation of other rights provided for under national or EU consumer protection.

Therefore, mediation is applied in all cases where the parties can negotiate solving subject of dispute. It needs to be mentioned that there may not be subject to mediation, according to art. 2 of Law 192/2006, personal right as those relating to personal status and any rights which the parties may not dispose, according to the law or by agreement or in any other manner permitted by law.

The parties may resort to mediation voluntarily after triggering a process including the competent courts, unless the law provides otherwise (art. 2 paragraph 1 Law 192/2006).

A special situation is in criminal law, where mediation is useful in cases where action is initiated upon prior complaint (hitting, rape, etc.) or where reconciliation of the parties removes criminal liability and also in civil actions for resolving criminal cases. Also, mediation may apply to disputes pending judicial authorities: courts, prosecutors and police.

Mediation is based on the cooperation of the parties and use, by the mediator, of methods and techniques, based on communication and negotiation, which should serve exclusively to legitimate interests and objectives of the parties in conflict.

Therefore there is not yet a clear set of rules that apply uniformly to all cases, thing which can create confusion in practice and needs to be regulated through collaboration between practitioners and academics, so the realities faced by mediators to be transposed in a coherent set of rules, understandable and pursued by all concerned parties.

2. Advantages of mediation use.

In Romania, interest in mediation and the mediation profession is still growing, and since the mediation law in 2006 all those interested in this way of resolving conflicts amicably are looking forward to this alternative to traditional justice to work as well as possible so it can relieve the courts of the large number of existing cases (Şandru Radulescu, Calin, 2012).

Socio-economic impacts of using mediation procedure in our society is extremely important, because mediation is a procedure that involves lower costs and a reduced period of time needed to resolve the conflict, unlike endless deadlines and overcrowding in court, not to mention privacy and total flexibility different to court's rigor formalism.

By mediation, each side gets a result closer to its interests and thus trials and sentences considered "unfair" are waived, therefore less to be appealed to higher courts, which involve additional costs and wastage of new material and emotional resources.

Adopting a win-win solution solves also old emotional "traumas", which resulted in an irrational and destructive social relationship, which acts as a self-destruct mechanism on the participants, causing, by default, economic damage whose consequences cannot be calculated.

Basically we can talk about adopting rational solutions, which can then lead to a public education for a culture of non-aggressive and conciliatory, as seen in Western societies, where there is no culture of conflict, but one of solving misunderstandings in an amicable manner.

3. The impact of mandatory occurrence participation in an information session about the benefits of mediation on Romanian society.

Compulsory information on the advantages of mediation was established by the legislature in the art. 2 of mediation law (article introduced by Law 115/2012, which entered into force on 1 October. 2012, article that has undergone several changes until today) reinforced by provisions of art. 60¹ and art. 60² of the Act.

The purpose of establishing mandatory information on the advantages of mediation is to ensure efficiency of justice, to reduce the costs of processes that could be resolved through mediation and to relieve the courts of less complex cases that can be solved much faster by agreement of the parties, as it does not require debating matters of law, but only solving disputes arising largely from parties' "ambition" and not breaking the law.

Parties, when a dispute or misunderstanding that could lead to a lawsuit shows up, are obliged to inform, as in participating in an information session to find out what are the advantages of mediation (Lisman, 2014), if they choose this way to solve the problems, they have it at the expense of the court.

GEO. 90/2012 subsequently established a penalty that can be applied to the parties that do not inform and cannot prove information, even if the penalty is only possible for the applicant (cf. art. 2 para. (12), namely action as inadmissible admission was made, mentioning that inadmissibility cannot be accepted by the court for failure to inform the defendant, because it has no obligation to do so.

Basically, the interpretation of art. 601, in relation to other pieces of legislation, leads to that the applicant is the only one who must prove information, as only he can be punished with dismissal of the action as inadmissible.

Even more, evidence of information is needed by parties only in relation to the court, and takes the form of a report (issued free of charge to the mediator when only one side is present, usually the applicant and the other party refuses to participate or not present, although it was expressly invited) or a Certified information (prepared free of charge when mediator before it is presented both sides together or separately, to be informed about the advantages of mediation).

We need to mention that, if a certificate of information has been issued, it must be signed by both parties, along with the mediator, even if it was done separately for parties (Lisman, 2014). Interestingly, the methodological offered by the Mediation Council states, that, where it presents only one side, the other party refuses or fails to appear, although it was expressly invited, it cannot inform either party in accordance with the express mention made by the mediator in minutes.

3. The declaration that mandatory participation in an information session about the benefits of mediation is unconstitutional

Constitutional Court of Romania (CCR) ruled that mandatory participation in the briefing on the advantages of mediation, including, if necessary, after the start of a process, is unconstitutional.^[3]

Romanian Constitutional Court has upheld unanimously exception of unconstitutionality and found that art. 2 paragraph (1) and (1²) of Law no.192 / 2006 on mediation and the mediator profession are unconstitutional.

In Article 2, paragraph (1) of Law No. 192/2006 says that, unless the law provides otherwise, any individual or legal persons must attend the briefing on the advantages of mediation, inclusively, if necessary, after the start of a process in the courts competent. In addition, they must attend this meeting to resolve conflicts in this way in civil or family matters, and other nature under the conditions stipulated by law.

The non-compliance penalty for the applicant is to reject the application as inadmissible by the court, according to art. 2 paragraph (12) of Law 192/2006,.

Following this decision of the Constitutional Court, attendance to information briefing about the benefits of mediation became optional.

Romanian Constitutional Court considers it unjustified a special procedure for information on the content of a law, as it must leave from the irrefutable presumption "nemo censetur ignore legem" that the citizen is presumed knowledge of laws.

Unquestionably the obligation imposed in any penalty, not only in that of the inadmissible application for a law suit, is against art. 21 in Constitution, which stipulate that no law may restrict the exercise of free access to justice.

Mandatory participation in learning about the advantages of mediation is a limited access to justice because it is a filter for the exercise of this constitutional right, and adopting the inadmissible application penalty proceedings; this right is not just restricted, but even prohibited.

Free access to justice is the alternative of the individual to apply to a court to defend their rights or legitimate interests.

Any restriction of this right, no matter how insignificant is, it must be duly justified, analyzing to what extent the disadvantages due to it not somehow outweigh the possible benefits.

Both the Constitutional Court and the European Court of Human Rights states that "*mere legal consecration, even at the highest, constitutionally, is not likely to ensure its real effectiveness, as long as in practice the exercise faces obstacles. Access to justice must be ensured, therefore, effectively and efficiently*"^[4].

It is clear that the mediation procedure cannot replace the court, is a voluntary process, as stipulated in the preamble to Directive 2008/52 / EC: "*mediation should be a voluntary process in the sense that the parties are themselves responsible for the procedure and may organize it as they wish and terminate it at any time.*"

Even more, art. 5 (1) entitled "Recourse to mediation" provides that "*a court in which an action was brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily accessible.*"

Therefore, the disposals of this Directive relate only to the possibility, not the obligation of the parties, to attend mediation procedure, so nothing compulsory about mediation.

As such, the Court considers that the prior procedure on mandatory information session on the advantages of mediation appears to be a disincentive to citizen regarding obtaining his rights in court. Furthermore, a procedure consisting in information on the existence of a law appears undoubtedly as a violation of the right of access to justice, which puts undue burden on litigants, especially since the procedure is limited to a duty to inform, and no actual attempt to resolve the conflict through mediation, so the stakeholder briefing before the mediator is a formal character.

In the context of the above retained, the Court finds that the obligation imposed on the parties, individual or legal persons, to participate in the briefing on the advantages of mediation, otherwise inadmissible application for summons, is an unconstitutional measure, contrary to the provisions Article 21 of the Constitution.

In this context, the Court considers that art.601 of Law no.192 / 2006 must be viewed in light of the effects of declaring as unconstitutional the provisions of Article 2 paragraph (1) and (1²) of Law no.192 / 2006. Thus, if the parties opt for mediation to resolve disputes between them, they will present at the information meeting on the benefits of mediation only if they will consider participating in such a meeting necessary, for details and clarification of the advantages of mediation.

On this occasion, the mediator is required to give any explanation to parties regarding mediation activity, so that they understand the purpose, limitations and effects of mediation, especially on the subject related to conflict.

Participation in the information meeting no longer will be an obligation for the parties, but more a voluntary option to interested persons to resort to such voluntary dispute resolution alternative. That is, the Court finds that the objection of unconstitutionality of the provisions of art.601 of Law. 192/2006 is unfounded.

4. Conclusions and proposals for veranda law.

Taking into consideration the declaration of unconstitutionality of art. 2 paragraph 1 and 1² of Law no. 192/2006, it is necessary to observe the effects of CCR's decision after finding that admission of unconstitutionality.

Based on to art. 147. 1 of the Constitution, "*The provisions of laws and ordinances in force and the regulations found to be unconstitutional, cease their legal effects within 45 days of the publication of the decision of the Constitutional Court if Parliament or the Government in this period, if applicable, don't agree the unconstitutional provisions with Constitution. During this time the provisions declared unconstitutional are suspended by law.*"

Also, according to art. 147. 4 of the Constitution, "*Constitutional Court decisions are published in the Official Gazette. On publication, decisions shall be generally binding and effective only for the future.*"

Remain in force for the court to guide and advise the parties to amicably settle the case, according to art. 227 of the New Code of Civil Procedure, "*Personal presence of the parties to resolve the dispute amicably*" and the following provisions:

Throughout the trial, the judge will attempt reconciliation, giving them guidance required by law. To this end, it will require the personal appearance of the parties, even if they are represented. Art. 241 paragraph (3) provisions shall apply.

In disputes which, by law, may be subject to mediation procedure, the judge may invite the parties to attend an information session about the advantages of using this procedure.

When deemed necessary, given the circumstances of the case, the judge will advise the parties to use mediation in order to settle the dispute amicably, at any stage of the proceedings. Mediation is not binding.

If the judge recommends mediation, the parties shall submit to the mediator, to inform them of the advantages of mediation. After informing, the parties decide whether to accept the dispute through mediation.

By the deadline set by the court, which shall not be less than 15 days, the parties submitted the report prepared by the mediator on the outcome of the briefing.

Paragraph (3) provisions do not apply in case the parties previously tried to resolve the dispute through mediation.

If the parties reconciled, as to paragraph (1) or (2), the judge will determine their covenant in the judgment he will. Art. 440 provisions are applicable ^[5].

The Mediation Council approved a program to amend the Law no. 192/2006, so as to become a compulsory mediation procedure for some cases, as shown in CCR motivation and "*a procedure consisting in information on the existence of a law appears undoubtedly as a violation of the right of access to justice, ...*"

especially since the procedure is limited to a duty to inform and not to attempt to resolve the conflict through effective mediation”⁶¹.

The Union Mediation Centers in Romania (UCMR) came up with a proposal to amend and supplement art. 2, art. 58 and art. 601 of Law no. 192/2006 on mediation and the mediator profession, considering that the proposed amendment, meaning that all disputes concern the areas covered by the art. 601 of Law no. 192/2006, and trying their resolution through mediation is a prerequisite for bringing proceedings in the competent courts, defends the rights, freedoms and legitimate interests of individuals, does not reach the heart of the right of access to justice and there is sufficient reason to justify this rule.

Furthermore, to encourage and facilitate mediation by the state is an aspect of the proper administration of justice and active management of cases, which in turn is an aspect to achieve the main objective, especially in cases involving public money, unduly.

Thus, access to justice is not obstructed by setting the test precondition for resolving disputes through mediation provided by art. 601 of Law no. 192/2006 for not prevent the interested party to assert its rights or refute the opponent’s allegations and does not affect the right to hire a lawyer; parties are not required to reach an agreement, but can always, if mediation fails, attempt to turn freely and directly to the court - the procedure out-of (any party may waive mediation during the course of it).

The proposed regulation is intended to provide and guarantee the right and opportunity of citizens to a fast and convenient financial procedure whereby they even actually resolve their dispute - thus serving the collective interest of the proper administration of justice, by relieving the courts and reduce costs.

Mandatory presence of lawyers / legal advisors in these mandatory procedures is likely to ensure the security protection of the rights of the parties.

Establishment of sanction to the called party that does not meet the particular invitation or appear twice in a row in the data set for settlement through mediation attempt, within 15 calendar days from notice to pay the costs incurred in settlement conflict by the competent court, even if it has obtained a favorable judgment, is likely to avoid delay in solving the case and is also within the jurisprudence of the Constitutional Court of Romania - decision no. 126/2000, that "*regulating the exercise of procedural law, including required achievement of certain terms and conditions, does not mean that right’s infringement where, for lack of diligence by the interested party, terms and conditions have not been met*".

Parts’ acquaintance of this obligation may be relevant in terms of cost, because when exercising discretion on costs, the court must consider all the circumstances, including the conduct of all parties.

Moreover, the enforceable effect covered by the proposal for mediation agreements whose legality has been verified by lawyers or legal advisors, establish an instrument to facilitate the proper administration of justice, protecting the higher collective interest.

The Law motion on amending Law 192/2006 on mediation and the mediator profession of Union Mediation Centers in Romania (UCMR) includes the following:

Art. 2 are amended to read as follows:

- Unless the law provides otherwise, the parties, individual or legal persons may resolve disputes through mediation procedure whatsoever, even after the onset of a trial before a court.
- A judge, prosecutor, clerk, bailiff, legal adviser and lawyer will advise the parties or the party that represents the amicable settlement of the dispute or conflict through mediation procedure, according to the special law.
- In all disputes concern the areas covered by the art. 601 the attempt of resolution through mediation is a prerequisite for bringing proceedings in the competent courts and the parties will be mandatory assisted by lawyers or legal advisors.

- Attempt and / or browsing the mediation procedure proof is done through a report issued by the mediator which respectively parties addressed to, according to Art. 43 of this Law.
- In any proceedings pursuant to art.601, if the calling party to attempt settlement through mediation expressly does not answer the call or appear twice in a row in the data set to attempt settlement through mediation within 15 days the communication will be required, at the request of the interested party, to pay the costs incurred by the competent court conflict resolution, even if it has obtained a favorable judgment.
- Cannot be subject to mediation strictly personal rights, such as those concerning the status of the person and any other rights of the parties under the law, not by the Convention or has any other manner permitted by law.
- When the warring parties have reached an agreement, it shall prepare a written agreement, which will contain all the terms agreed by them. Typically, the agreement is drawn up by the mediator, unless the parties and the mediator agree otherwise.
- The parties' agreement shall not contain provisions contrary to law and order. Since the law requires that certain conditions substantive and procedural legality of the mediation agreement will be verified and certified either by lawyers or lawyers of the parties, where they were assisted during the mediation process, or a another lawyer mediator chosen by agreement of the parties.
- The mediation agreement is binding on the parties.
- In the event of non-performance of obligations voluntarily or of the terms set by the mediation agreement certified by a lawyer or legal adviser, the interested party may request to bailiff to enforce the mediation agreement.
- Understanding agreement may include, under the law, the express terms and conditions of fulfillment of mutual obligations.
- If the dispute concerns transfer of ownership on real estate and other real rights, share and inheritance cases, under penalty of nullity, mediation agreement certified by a lawyer or legal advisor will be presented to the notary public or court, so that they, under the mediation agreement, issue an authentic instrument or a court paper where appropriate, pursuant to legal proceedings. The provisions of par. (8) shall apply accordingly to the mediation agreements reached between the parties with respect to the establishment, modification or termination of any immovable property.
- Where the law requires that the conditions for advertising, public or court clerk will ask logged enrollment agreement or the judgment in the Land.

Article 58 is repealed.

Art. 601 are amended to read as follows:

Disputes the law, trying their resolution through mediation is a prerequisite for initiating actions to the competent courts and the party / parties are required to provide evidence in this regard are:

- the consumer, when the consumer invokes the existence of damage as a result of purchasing a defective product or service, the contract failure or guarantees granted, the existence of unfair terms contained in contracts between consumers and traders or breach other rights provided for in national legislation or the European Union in the field of consumer protection;
- family law in the situations referred to in art. 64;
- possession of litigation, division, the displacement of borders, and any other matters regarding relations of the neighborhood;

- the area of professional liability which may be incurred professional liability or malpractice cases, as far as not covered by special laws other proceedings;
- labor disputes arising from the conclusion, execution and termination of individual employment contracts;
- civil disputes whose value is below 50,000 lei, except disputes which issued an enforceable judgment opening insolvency proceedings, of actions relating to the commercial register and the cases in which parties choose to resort to the procedure laid down in Article 1.013-1.024 or to that referred to in art. 1.025-1.032 of Law. 134/2010, republished, amended and supplemented.

Selected references

[Lişman F. Invitation to mediation and mandatory information, 03/04/2014, <http://mediere.infojust.ro/2014/04/03/invitatie-la-mediere-si-informarea-obligatorie/>](http://mediere.infojust.ro/2014/04/03/invitatie-la-mediere-si-informarea-obligatorie/)

[Lişman F. Invitation to mediation and mandatory information. Part II. Information required - what is the obligation to inform, who can inform, under what conditions and who certify 15/04/2014, <http://mediere.infojust.ro/2014/04/15/invitatie-la-mediere-si-informarea-obligatorie-partea-a-ii-a-informarea-obligatorie-in-ce-consta-obligativitatea-informarii-cine-poate-face-informarea-in-ce-conditii-si-cine-o-atesta>](http://mediere.infojust.ro/2014/04/15/invitatie-la-mediere-si-informarea-obligatorie-partea-a-ii-a-informarea-obligatorie-in-ce-consta-obligativitatea-informarii-cine-poate-face-informarea-in-ce-conditii-si-cine-o-atesta)

Rădulescu D.M. (eds), Chiţiba C., Jura C., Smith AM, embraced NE, Gagu C.- alternative to court mediation. Place mediation in Romanian judicial system. Vol. I, Pro Universitaria Publishing House, Bucharest, 2013

Rădulescu D.M. *The impact of declaring unconstitutional the mandatory procedure to inform about the advantages of mediation*, Journal of Academic Research in Economics and Management Science, Volume 3, Issue 4, July, 2014

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[2] 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, published in the Official Journal of the European Union L 136 of 24 May 2008

[3] Decision of the Constitutional Court of Romania 266 of 7 May 2014 regarding the exception of unconstitutionality of the provisions of article 200 of the Code of Civil Procedure, as well as those of art. 2 (1) and (12) and art.601 of Law 192/2006 on mediation and the mediator profession, published in the Official Gazette nr.464 from 06.25.2014

[4] Constitutional Court Decision no. 670 of 18 May 2011, published in the Official Gazette of Romania, Part I, nr.421 of 16 June 2011

[5] Rădulescu D.M. *The impact of declaring unconstitutional the mandatory procedure to inform about the advantages of mediation*, Journal of Academic Research in Economics and Management Science, Volume 3, Issue 4, July, 2014.

[6] <http://www.cmediere.ro/page/1054/comunicat>