MANDATORY CLAUSES IN MEDIATION CONTRACTS

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Abstract
The mediation contract – a contract by which conflicting parties agree, in conjunction with a mediator, upon conflict resolve in an amiable manner through the agency of mediation, under due efforts on the mediator's part, in exchange for payment of a fee by the parties – must contain a set of mandatory clauses in compliance with legal provisions, Article 45 of Law no. 192/2006. In the absence of one of said clauses, sanction by absolute annulment is imposed.

Keywords*: mediation contract, mandatory clause, mediation agreement, mediant, mediator.*

Introduction

In a society where conflicts[1] are increasingly numerous and complex, and their resolve does not yield solutions compatibile to the developmental degree of our society, enforcing a law that create prerequisites for improvement of judicary activity and ensure the nascence of a space of liberty and security for citizens becomes imperative. Accordingly, by dint of Law nr. 192/2006[2], the legislator considered that, via mediation, dialogue should be brought back into society and solutions in differences found according to a win-win type, not a win-lose type of scenario. One of such modalities to solve extant conflicts between two parties is constituted by mediation, that presents itself under the form of a contract[3] legalising the will of parties to prevent or extinguish a conflict.

Presentation

The mediation contract is a contract by which the parties at conflict agree, in a presence of a mediator, to resolve the differences in an amiable way, under assistance of a mediator, under due diligence on the mediator's part, in exchange for payment of a fee by the parties.

Any contract, therefore, also a mediation contract, is subject to several types of legal rules: some are general, notwithstanding the contract category, whereas others pertain to a specific contract category[4]. The Civil Code includes a corpus of rules applicable to contracts in general (Book III, Title III, Art. 942 and following), and, accordingly, to mediation contracts, setting forth the valid

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[1] Romania is currently faced with over 4 million law suits, with an increase rate of 30% per annum, at a population of over 20 de million citizens, and a judiciary system spending 250 million euro per annum on pending law suits in courts of justice;

[2] Law nr. 192/2006 and Law nr. 192/2006 on mediation and mediator's activity organisation, issued in The Official Gazette no. 441 of 22.05.2006, as amended and completed by Law no. 370/2009 , issued in The Official Gazette no. 831 of 3.12.2009 (aimed at setting up the legal framework in accordance with Directive 2008/52/C.E. of the European Parliament and the European Council, with a view to introducing the character of enforceability of mediation contracts between parties, expressedly guiding seekers of justice towards an amiable resolve of differences or antagonisms emergent between contracting parties) and by *Emergency Government Ordinance no. 13/2010* on amendment and completing laws in the area of justice, with a view to implementation of Directive 2006/123/C.E of the European Parliament and Council of 12.12. 2006 on inland market services, issued in The Official Gazette no. 70 of 30.01. 2010. *We shall herein refer to Law no. 192/2006 as the Law*;

[3] If nearly anything can be solved by dint of a contract, it follows that "we are living in an increasingly contractual manner" (L.Josserand, Aperçu général des tendances actuelles de la théorie des contrats, R.T.D. civ. 1937, p.1);

[4] *see* Ph. Malaurie, L.Aynes, Ph. Gautier, *Special Contracts*, Wolters Kluwer Publishing House, 2009 (coord. of Romanian version: M.Şcheaua, Att.at-Law), pp.3 ;

form (consent, capacity, object, cause, formal conditions). Concurrently, Law no.192/2006 covers rules exclusively applicable mediation contracts

Article 45 in the Law imperatively ennumerates the clauses to be mandatorily included in mediation contracts.

The first clause to be included in a contract is in reference to the identity of the conflicting parties or, as is the case, their representatives (Article 45 letter 'a' in the Law). Accordingly, mention must be made of the following: last name, first name, domicile (registered office, should one of both parties be a legal person), as well as any other data deemed by parties as necessary or an aid to assure celerity and efficiency in conflict resolution. We notice that the lawmaker only makes reference to the "identity of the parties at conflict", not to the person assisting in conflict resolve, i.e. the mediator, who, in his/her turn, is a party to the contract. As a result, albeit not provided by the law, identification data of the latter must be included[5]. There are situaitons where one of the parties is unable to physically attend mediation; in such cases, the Law allows for representation via proxy[6]; in this case, personal data of the representing party must be included.[7].

Article 45 letter 'b' of the above Law provides a further mandatory clause on contract type or object. Mediation addresses any type of conflict[8] lending itself to this manner of resolve, thus the parties must, in conjunction with the mediator, clear the aspects in the case that shall be subjected to mediation procedure. The contract shall include the actual state of conflict, accurately described in order to allow for identification of main aspects, to prevent, should confusion or doubt arise, interpretations that could jeopardize the resulting solution.

A further clause to be included in the mediation contract is in regard to "a statement of the parties ascertaining prior information on the mediator's part on mediation, the effects thereof and the applicable rules thereto." (Art. 45 letter 'c' in the Law). This clause is aimed at constituting a guarantee to the fact that parties have freely opted for mediation and that the mediant has met his/her obligation to inform the parties. To this end, the mediator is under obligation of granting clarifications to the parties regarding the act of mediation, i.e. to offer information as to the aim, rules and effects of mediation, on the relations constituting the object of mediation.[9] With regard to the effects of mediation, the scope must be significantly extended than in the case of trial, due to the fact that, as a result of mediation, the parties may resume or cease their relations in an amiable and mutually advantageous manner. In addition, the mediator must explain the principles and procedures

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[5] To exemplify: Office for Mediation….. founded by Decision of Mediation Council No.……of ….. with a registered office in ……street…no....bl…..county…. Tax Code No.….and bank account ……..opened at…..via mediator….;

[6] The situation commonly arises in conflicts where one or both parties are legal persons;

[7] A party's proxy is not to be confused with a person allowed to be present in mediation, along with the parties (Art.52 in the Law);

[8] Types of conflicts that may be extinguished by resort to mediation procedures are, as follows: mediation of insurance conflicts (e.g. interpreting and seeing through an insurance contract, cautions in absence of payment, conflicts between insurance companies), mediation in the area of consumer protection, relevant should the consumer claim the existence of damages following purchase of e.g. flawed products or services; mediation in the labour area (co-worker relations, employer-employee relations); mediation in the family area (divorce, child custody); mediation in the business environment, in the sphere of intellectual property, in the educational area (relationship teacher-student), in criminal litigations, in the medical area. It must be mentioned that, in mediations involving children, mediators should primarily have the prevalent interest of the child at heart, which a.o. implies the right to benefit from protection by mediation. The European Network of Mediators founded in 1997 is aimed at the implementation of the Convention of Childrens' Rights in Europe.

[9] Expert literature makes reference to "informed consent" , i.e. consent granted by a person in order to facilitate an event; it is based on a selective presentation of facts needed to consciously take a decision (G.Falk, G. Koren, Kommentar zum ZivMediatG, Verlag Ősterreich, Wien, 2005, p. 537);

surrounding mediation, his/her and the parties' role in the procedure, highlighting the parties' right to decide decide in a mediation process[10].

The fourth clause included in the Law makes reference to "the obligation of the mediator top safeguard confidentiality and the decision of the parties on keeping confidentiality, if need be" (Art. 45 letter 'd'). By the very nature of his/her profession, the mediator is a repository of the conflicting parties' "secrets" subject to mediation, and, at the same time, is the "addresee" of comunications of a private nature. Incidentally, a relationship of trust must be established between the mediator and the parties; in the absence of a confidentiality guarantee, trust cannot persist. As a result, the professional secret is acknowledged as a fundamental right and duty of a mediator; this obligation must not extinguish at the time of mediation cessation and is permanent (Art. 32 of Law no. 192/2006). The same confidentiality obligation rests with the parties, bearing in mind that they are for the first time confronted in order to identify the roots of their conflict; thus, the lawmaker must allot increased attention to the patries' private lives.

A further clause that must be a mandatory part in a mediation contract is relative to "the commitment of conflicting parties to observe the rules appliocable to mediation" (Art. 45 letter 'e'). The conclusion of a mediation contract is based on agreement of parties to resort to said procedure and, accordingly, to abide by the rules imposed under law in amiable conflict resolve, in order to reach a solution convenient to both conflicting parties.

The next clause that constitutes due part of a contract covers "the obligation of conflicting parties to pay due fee to the mediator and the expenses incurred by him/her on behalf of the parties, as well as the ways of deposit and payment of said amounts, including cases of mediation forfeit or insuccess, as well as the ratio to be covered by the parties, considering their social standing, if possible. If not agreed upon otherwise, the amounts under issue shall be covered by parties in equal amounts".

The mediator is entitled to receiving payment of a fee[11], fixed in negotiation; this fee must be reasonable[12] and take into account the following criteria: the nature, the novelty and the object of the conflict subject to mediation, time alloted by the mediator to the mediating sessions[13], the importance of interest under question, the results obtained to the parties' benefit; this must unfold relative to the number of parties, upon consensual agreement therewith. As a consequence, a mediator's activity is lucrative; to this end, the contractual parties must agree with the mediator upon his/her due fee. However, concurrently, other expenses incurred in the process of mediation must be provided for[14], as well as ways of deposit and payment of said amounts. Under law, the parties are given leeway in establishing the quantum of the fee to be payed by that each one; if the parties have not agreed therein, the fee shall be paid in equal amounts. The right to receive a fee is guaranteed under

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[10] In the The Code of Ethics and Deontology, under 2.1.3 it is shown that: "The mediator shall inform the parties, at the onset, of the scope and nature of his/her activity and on the fact that the final decision lies exclusively with the parties; in addition, the parties are allowed towithdraw from mediation procedure at any time."

[11] In actuality, the right to receipt of fee is regulated under provisions of Art. 26 in the Law: "The mediator in entitled to payment of a fee fixed with the parties via negociation, as well as to refund of expenses incurred during mediation";

[12] In *The Mediator's Code of Ethics and Deontology* under 2.7 it is stipulated that: "Mediators shall inform the parties with regard to their fee, whereas the total value of the fee and expenses incurred during mediation procedures must be fair and justified. They shall explain to the parties the manner of calculation and the value of the fees, as well as the refund of expenses.";

[13] By way of example, Art. III.10 of *Recommendation (2002) 10 on Mediation in civil matters by The Minister's Committee of the Council of Europe*: "Should mediation imply expenses, then these expenses must be reasonable and on a par with the importance of disputed matters; at the same time, they must take heed of the work load on the part of the mediator.";

[14] Thus, added expenses incurred in the act of mediation shall be covered by the parties (phone, fax, means of transportation), based on receipts, whereas contingencies (hiring experts), payed to the parties' benefit and on their approval, and shall be presented in detail, e.g. in an annex to the contract;

provisions of Article 48 in the law; according to this article, with regard to the parties' obligation to pay the due fee, the mediation contract has an imperative character, which allows for the legal exercise of force in the absence of voluntary delivery of obligation. We deem that, in order to increase the dimension of an act of justice and of the citizen's trust[15], mediation - in order to receive wider recognition - should, at least in the beginning, be partly free of charge, or the fees lower, to encourage a justice seeker to gain more courage in resorting to this procedure.

Should mediation be forfeited or terminated, payment must be partly refunded, under conditions stipulated in the mediation contract, and not in direct ratio to the undergone mediation stages, as provided under the prior law, that has seen no amendments under Law nr. 370/2009.

A further clause that must be included in a mediation contract is with regard to "agreement of the parties on the language of the emerging mediation" (Art. 45 letter 'j' in the Law). The lawmaker has included said clause into the category of mandatory clauses, given the option that some of the differences (commonly, in the field of family law or commercial law) bear an international trademark, bestowed by the nationality of the legal person or by the citizenship of the natural person; as a result, mediation must take place in a language known both to parties and mediator. This is imperative, as, in mediation, a resolve convenient to all conflicting parties implied must be reached.

The penultimate mandatory clause in a mediation contract is with regard to "the number of copies in which the agreement shall be drafted, ahould this agreement be in a written form, corresponding to the number of signatory parties to the mediation contract".

Should the conflicting parties reach a consensus via mediation, this may assume the form of a written agreement, to comprise all the clauses agreed upon; these clauses shall not touch upon the rule of law and public order. The agreement is commonly drafted by the mediator and has the value of a writ under private signature. Moreover, the agreement represents the result of common efforts on behalf of the parties opting for mediation procedure, who, with the competent aid of the mediator, have reached a negociated and unanimously accepted agreement. The agreement shall be drafted in a number of copies tantamount to the number of parties involved in the mediation process.

The last mandatory clause in a mediation contract refers to "the obligation of parties to sign the procesul verbal drefted by the mediator, noywhjistanding the way in which a mediation is concluded". In observance in the Law of symmetry, a mediation procedure ceases as it has commenced, i.e. by an consent of will of parties and mediator. The minutes constitute a distinct writ of potential agreement between parties. Altough not provided by the law, the minutes must contain the data of parties, the mediation result, expressed will of parties to end the mediation process, as well as the parties' signatures. The minutes must be issued in a minimum of as many copies as the number of signatory parties.

As is apparent a.o. from the contents of Article 45 of the Law, the absence of one of the afore-mentioned clauses in a mediation contract is sanctioned by relative annulment. By amendment in the Law no. 192/2006, the lawmaker has offered a more amiable solution, by mention of the sanctioned compared to absolute annulment previously stipulated; we deem the prior sanction excessive; absolute annulment is meant to safeguard the general interest and therefore allows the opportunity for a vast number of persons seek cessation of the concluded legal act by defeating norms created to protect this interest. By contrast, relative annulment may be cited, as a rule, solely by the person in the interest of whom the legal sanction has been ruled. Wee deem the enforcement of the latter sanction as more natural, as the very reason behind the act of annulment is safeguarding a private interest. The affected contract party is the most knowledgeable to ascertain whether his/her interest has or has not been affected as a result of unobservance of legal provisions created for his/her protection and thus, is the person of the utmost competence to ask for protective annulment.

[15] Thus, if a large number of conflicts is solved by way of mediation, it follows that the courts of justice face a smaller file load, thus enabling magistrates to allot more time to the case study and, as a result, rule with significantly increased chances of committing legal errors.

Conclusions

As a conclusion, the mediation contract must formally observe both general conditions dictated the Civil Code, mandatory in any legal act, and certain specific conditions imposed by the regulating Law. Such conditions are meant to highlight the peculiarities of the mediation contract, a distinct legal form aimed not solely at engendering social relations but also at predecessing the extinguishment of a legal conflict relation through a third party agency. Under consideration of the fact that the conflicting parties wish to settle their conflict in resorting to negotiation via mediator, it has to be made clear that they have neither forfeited, nor intend to forfeit a private interest, which lends a markedly personal character to rights nascent of their voluntary agreement. Thus, the necessity of mandatory clauses to individualise the mediation contract arises (e.g. the mediator's obligation to safeguard confidentiality, and the parties' decision on safeguarding confidentiality, if this be the case, Article 45 letter 'd' of the Law). Moreover, the involvement of a mediator in resolving a difference can not be deplete of legal consequences.

The mediator, a legal expert, does not have to play an active role in the mediation activity; thus, the necessity of further specific mandatory clauses in individualising a mediation contract arises (e.g. a parties' statement ackowledging prior information on the part of the mediator, with regard to mediation, its effects and applicable rules, Article 45 letter c'' of the Law).

Imposed under reservation of annulment, these clauses are mandatory and meant to induce to the parties circumventing legal dispute the confidence that resort to mediation is an apt, efficient and convenient means to protect and meet personal a interest.

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