

# The Impact of Declaring Unconstitutional the Mandatory procedure to inform about the Advantages of Mediation

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## Abstract

Human society has known, throughout its development conflicted between its members for various reasons, but have always sought solutions that they be defused capable, irrespective of the causes and reasons they generated.

Currently, we are witnessing at a combination of its own methods of state institutions competent in the administration of justice and the institution known as mediation. In this context, we can say that alternative conflict resolution methods classic act of justice is becoming increasingly attractive and searched in Romania, due not so great a financial aspect, but especially for speed solving cases. People have the possibility to choose to resolve their conflicts by using the mediation, without abandoning the option of the courts of justice.

This study attempts to discover the impact that have the declared as unconstitutional the mandatory compulsory informing about mediation.

**Keywords:** Conflict, Justice, Mediation, Advantages of Mediation

## Introduction

Mediation can be defined as a structured process in which two or more parties to a dispute attempt by themselves initiative to reach an agreement on the settlement of their dispute with the assistance of a mediator.

Mediation is based on the trust that the parties in the mediator, the person able to facilitate negotiations between them and support them to resolve the conflict by obtaining a solution mutually convenient, efficient and sustainable.

The advantages offered by the use of mediation in resolving conflicts make the implement of this method in the administration of justice in Romania a pressing aspect.

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However, the multitude of legal, financial and psychosocial problems, as well as the appearance of "the institution of mediator" do the mediation, as an alternative to modernize Romanian judicial system to be a particularly and difficult process.

May be subject to mediation under Article 2 of Law 192/2006 on mediation, any rights which the parties may provide by agreement or in any manner permitted by law in disputes (Ignat, Sustac, Danilet, 2009) in civil, commercial, labor disputes, family (including disagreements between spouses on marriage continued, parental rights, the establishment of children's residence, contribution of parents to children's education, as well as any disagreements that arise in relationships between spouses concerning rights they may have under the law, respectively divorce and the ancillary requests), criminal, and consumer protection: if the consumer invoke the existence of an injury due to the acquisition of defective products or services, the contract failure or guarantees granted, the existence of unfair terms contained in contracts concluded between consumers and undertakings or the violation of other rights provided by national or EU consumer protection rules.

Therefore, mediation is applied in all cases in which the parties can negotiate solving problems that are the subject of dispute.

Specifying that do not can be mediation, according to art. 2 of Law 192/2006 strictly personal rights, such as those concerning personal status and any rights which the parties may not dispose by law or by agreement or any other way permitted by law.

Parties may voluntarily use mediation even after the triggering of a trial before a competent court, unless the law provides otherwise (art. 2 para 1 Law 192/2006). Also, mediation can be applied in disputes pending before the judicial authorities: law courts, Prosecutors, Police.

### **The mandatory procedure to inform about the advantages of mediation.**

Purposes of setting this requirement is to ensure judicial efficiency, to reduce costs of processes that could be resolved through mediation, in other words, to relieve courts of less complex cases.

Parties then they have a conflict have an obligation to inform and participate in an information session to find out what are the advantages of mediation (Radulescu, 2012).

In other words, the legislature established a mandatory task for all parties in a conflict to be informed about the benefits of mediation and make a decision in choosing mediation as the way they want to resolve the conflict between them.

Therefore, the legislature wanted to make mediation more widely known and established mandatory participation in a briefing on the "advantages of mediation" for all those who are at a point in a conflict.

Because the obligation to be effective and measurable results required a corresponding penalty which the legislature and subsequently instituted by Government Emergency Ordinance 90/2012, penalty can not be applied to parties inform, not provide proof information (Şandru, Rădulescu, Călin, 2013).

Specifically, the only penalty is only possible for the applicant (cf. art. 2 para. (1 ^ 2) because inadmissibility can not be accepted by the court for failure to inform the defendant, given that the plaintiff did not return any express obligation.

Given that no special provisions are not explicit art. 60 ^ 1 reproducing the text of Article 2 of the Law again using the plural, without making any distinction between the parties and without any obligation to establish any of them in relation to each other, we conclude

that, actually, the applicant is to be to prove the information, it can only be sanctioned so drastically dismiss the action as inadmissible.

The plaintiff is the one who has to prove participation in the information meeting so that his complaint not be rejected as inadmissible. The proof of inform about the advantages of mediation is required only for the parties in there relation with the court of justice.

When parties come together to mediator for information on the advantages of mediation, the proof of participation to the meeting is the Certificate of information where will be specified and the option of the parties to continue the process or solve the dispute by mediation.

Regarding the situation on both sides are inform, that might be in joint session or separately, depending on the circumstances, but in both cases both parties signing Certificate of information.

When come only one side, usually the plaintiff, and the other party refused to attend the meeting of information on the advantages of mediation, the proof of participation is the Minutes who specifying the existing situation.

Regarding the situation in which only the plaintiff presents, there are two situations. In the first case the defendant refused to submit in writing, while in the second case the defendant does not respond to an invitation to attend the information meeting about the advantages of mediation.

In both cases it is observed that the mediator can not make the informing of the parties, and he must specify this in the Minutes.

### **Declaring as unconstitutional the mandatory procedure to inform about the advantages of mediation**

Constitutional Court of Romania (CCR) ruled that mandatory participation to a meeting to inform about the advantages of mediation, including, if necessary, after the start of a trial, is unconstitutional.

Constitutional Court of Romania (CCR) upheld unanimously exception of unconstitutionality and found art. 2 para. (1) and (12) of Law nr.192/2006 on mediation and the mediator profession are unconstitutional.

In Article 2, para. (1) of the Law nr.192/2006 write that, unless the law provides otherwise, individuals and legal persons to attend the meeting to inform about the advantages of mediation, including, if necessary, after the start a trial in the courts of justice. In addition, they must attend this meeting in order to resolve the conflict in this way in civil, family, and other materials, as provided by law.

The penalty for non-compliance by the applicant, according to art. 2 para. (1 ^ 2) of Law 192/2006, is to dismiss the application as inadmissible by the court.

Following this decision of the Constitutional Court, attending the information meeting on the advantages mediation has become optional.

Romanian Constitutional Court does not consider it justified a special procedure for informing the content of a law, because it must to start from the presumption irrebuttable "*nemo censetur ignore legem*" that the citizen enjoys a presumption of knowledge of the law.

Unquestionably the obligation imposed under any sanction, not only in that of inadmissibility application for summons, contrary to art. 21 of the Constitution, which states that no law may restrict the exercise of free access to justice.

Mandatory participation to inform about the advantages of mediation is a limited access to justice, because it is a filter for the exercise of this constitutional right, and the

sanction of inadmissibility application for summons, this right is not only restricted, but even prohibited.

Access to justice is the faculty of each person to apply to a court to defend their rights or legitimate interests capitalization.

Any limitation of this right, no matter how insignificant it must be duly justified, analyzing to what extent the disadvantages that it is 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 supreme level, constitutionally, is not likely to ensure its real and effective as long as in practice the exercise to face obstacles.

Access to justice must be ensured, therefore, effectively and efficiently. " It is clear that the mediation procedure can not replace the court, is a voluntary process, as it provides the preamble to Directive 2008/52/EC: "*mediation should be a voluntary process in the sense that the parties are themselves responsible for Procedure and may organize it as they wish and terminate it at any time.*"

More Articles 5 para. (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 resolve the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are organized and easily accessible.*"

As such, the provisions of this Directive covers only the possibility, not the obligation of the parties to attend mediation procedure, so nothing on mediation mandatory.

As such, the Court finds that the mandatory procedure prior information on the advantages of mediation appears to be an obstacle to achieving and obtaining citizen of his rights in court. Moreover, a procedure consisting of inform on the existence of a law appears undoubtedly a violation of the right of access to justice, which puts undue burden on litigants, especially since the procedure is limited to a duty of information, and no actual attempt to resolve the conflict through mediation, so the participation of the parties to the information meeting before the mediator is a formal nature.

The context of the above withheld, the Court finds that the obligation imposed on the parties, natural or legal persons to attend the meeting on the benefits of mediation, under penalty of inadmissibility application for summons is an unconstitutional measure, the contrary to Article 21 of the Constitution.

In this context, the Court considers that Article. 60<sup>1</sup> of the Act must be viewed in light of the effects nr.192/2006 declared unconstitutional the provisions of Article 2 para. (1) and (12) of Law nr.192/2006.

Thus, if the parties opt for mediation to resolve disputes between them, they will present the meeting to inform on the advantages of mediation only where they consider it necessary to participate in such a meeting, for information and explanations on the advantages of mediation.

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

Participating in the information meeting will not be but an obligation for the parties, but a voluntary option to interested persons to use voluntary such an alternative method dispute resolution.

**Conclusions.**

With the declaration of unconstitutionality of art. 2 para. 1 and 12 of Law no. 192/2006, must be seen the effects of the admission decision of unconstitutionality.

According to art. 147 para. 1 of the Constitution, "*The provisions of laws and ordinances in force and the regulations declared unconstitutional, ceases legal effect 45 days after publication of the decision of the Constitutional Court if within this Parliament or the Government, as appropriate, agree with the unconstitutional provisions of the Constitution. During this period, provisions declared unconstitutional shall be suspended de jure.*"

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

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

In disputes according to law, may be the mediation procedure, the judge may invite the parties to attend an information session on the advantages of using this procedure.

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

If the judge recommended 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 can not be shorter than 15 days, the parties shall submit the report prepared by the mediator on the outcome of the briefing

The provisions of paragraphs. (3) does not apply where the parties have attempted mediation dispute before the introduction of the action. If, under par. (1) or (2) the parties are reconciled, the judge will find them in the judgment on the deal that will give.

Also the Mediation Council approved a modification of the Law nr. 192/2006, so becoming one mandatory mediation procedure for some cases, as shown in motivating CCR and "*a procedure consisting of inform on the existence of a law appears undoubtedly a violation of the right of access to justice, ... especially since the procedure is limited to a duty to inform, and not to attempt actual settlement through mediation.*"

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