

Kluwer Mediation Blog

Pros and cons of compulsory mediation bill

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In the Romanian Parliament there has been submitted a draft to amend the legislative framework regarding mediation.

Thus, according to the draft, prior to referring the case to the court of law or the criminal pursuit body, Parties or any of these are bound to try and settle the conflict by mediation, under penalty of prematurely filing the lawsuit or the precursory pursuit.

The interested Parties and/or the interested Party, as the case may be, are bound to provide evidence of the fact that they had tried to settle their litigation by mediation within conflicts arisen in the following fields:

- a) In the field of consumers' safety, if a consumer claims damages as result of having purchased a vicious product or service, of non compliance with contractual provisions or granted warranties, of existence of certain abusive clauses included in the contracts concluded between consumers and economic agents, or of breaching other rights as provided by the national of the European Union legislation in the field of consumers' safety;
- b) In the family law matter;
- c) In the field of professional responsibility in which professional responsibility can be engaged, respectively malpractice cases, to the extent to which another procedure is provided under special laws;
- d) In labor litigations arising out of the conclusion, the execution and the cease of both individual and collective labor agreements;
- e) In civil litigations of which amount is under 50.000 lei, except litigations in which it had been pronounced an enforceable decree to open the insolvency proceedings of a trading company or to set a motion regarding the Register of Commerce.
- f) In case of law-breakings for which the criminal prosecution is set in motion on precursory pursuit of the injured person and Parties' reconciliation removes criminal prosecution and/or in the case of law-breakings investigated upon the precursory pursuit, after having filed the lawsuit, if the law-breaker is known or was identified.

The Party that does not appear in mediation shall fully bear the trial expenses required by the state and those settled by the opponent Party, regardless of the solution to be pronounced on the case merits.

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In the list of grounds, the promoter states that the Romanian society has recorded an increase as no other in the past with regard to the number, the complexity and the seriousness of litigations and conflicts, regardless if it is about conflicts between natural persons, conflicts between legal entities or both.

The Romanian legal system faces financial and human resources trouble, decentralization of administrative and financial decisions, therefore costs cut is a necessity.

In this context, the use of alternative methods to settle disputes has become peremptory required, being a priority so as to assure justice efficiency, burdened over this period by the files overloaded (in the year 2010 there were over 4.000.000 files on the courts dockets, managed by a personnel chart from the level of the year 1989). Costs incurred by the state with regard to these trials can be considerably lowered by mediation consolidation which provides alternatives to the state's justice.

Romania's Government has submitted to the Parliament a perspective by which they do not support the pass of this law draft. I will stress out a few of the Government's arguments:

Law no. 192/2006 regarding mediation and organization of a mediator's profession establishes the optional status of mediation. Law maker's option had in view basic principles of mediation, accredited by the international instruments existing in the matter, taken over also by regulations regarding mediation from other European states, principles within which the volunteer status of mediation occupies a central place, having to do with the essence of this alternative to justice. By extensive use it is admitted that mediation is an alternative method of conflicts settlement that each Party shall freely choose, without any coercion of any kind (including pursuant to regulations by law).

In case mandatory status of mediation would be required for a series of cases, both in the civil and the criminal matters it would be required the evaluation of current possibilities of mediators' panel so as to be able to manage all enactment requests for mediation procedure filed as result of adopting solutions proposed by the legislative initiative. This evaluation shall take into account aspects such as the total number of authorized mediators, the number of cases which are currently settled by the judicial bodies and which, pursuant to legislative draft, would be settled by the mandatory mediation procedure, the district split of authorized mediators' office etc. These evaluations are strictly required so that the effective implementation of a mandatory procedure should not be detrimental to citizens' legitimate rights and interests.

Resorting to the mediation procedure implies bearing costs by Parties that is mediator's fee and costs incurred by the mediation procedure development. Pursuant to the current legislation, Parties resorting to mediation voluntarily undertake the payment of the mentioned costs; moreover, both Parties start with the hypothesis of

an actual settlement of their conflict by this procedure. Under the circumstances, binding Parties under the laws to try and settle their conflict by this method can actually have as result additional costs and delays in settling the conflict, which is against mediation institution principles (celerity, flexibility, accessibility by low costs), as well as restriction of Parties' access to settle their case with a judicial body, against the very Parties.

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