# MEDIATION IN COMMERCIAL CONFLICTS

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**Abstract:**
*Mediation is an used procedure among the commercial dispute resolution in the United States and many other common law jurisdictions. On the other side, the state of development of the alternative dispute resolution and mediation in continental Europe is not even and has not such a wide experience as the United States. The European Union rules provide a framework for Member States to set their own legal paths and institutions in order to promote and efficiently use this way of solving conflicts. Encouraging the use of mediation facilitates the resolution of disputes and helps to avoid the worry, time and cost associated with court-based litigation, in this way citizens are enabled to secure their legal rights in an efficient way.*

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## 1. INTRODUCTION

Alternative Dispute Resolution (ADR) refers to processes and techniques of resolving disputes that fall outside of the judicial process (formal litigation – court). Some courts now require some parties to utilize ADR of some type, usually mediation, before permitting the parties' cases to be trialed. ADR is generally classified into at least four subtypes: negotiation, mediation, collaborative law, and arbitration. Sometimes a fifth type, conciliation, is included as well.
ADR is useful in a wide range of conflicts, such as commercial disputes, professional liability cases, personal injury matters, insurance problems and family and divorce matters.

It is proved that disputes can be solved without going to court. If somebody is in dispute with a firm, a tradesperson, the employer, even a member of the family, in the own country or abroad and is unable to settle the dispute by themselves, they can go to court, of course, but they can also consider alternative dispute resolution techniques such as mediation.

The use of mediators in business is fragmented and uneven and it could have more meanings. For example in the United States, where the mediation is more developed than in Europe, the usage of it has a wide diversity. If one defines a mediator broadly as a third person who helps the parties negotiate an agreement, then their use in deal-making is fairly extensive. Their use in deal-managing seems to be growing, particularly in the international construction industry, but in deal-mending, where the parties to a transaction are embroiled in a genuine conflict, the use of mediators is relatively rare. In all three types of negotiations, mediators participate only because the parties have specifically sought them out and invited them into the process. It is extremely rare for persons to volunteer their services as mediators in business transactions. In all cases, mediators in business are private individuals, rather than organizations, institutions, or governmental officials. Institutions such as the Chambers of Commerce only facilitate the search for an appropriate mediator or conciliator. They do not themselves participate in mediation. Once on the job, the mediator works independently of these organizations, is not their representative, and does not operate under their direction.

Like any mediation, effective business mediation requires three things: disputant motivation, mediator opportunity, and mediator resources, including skills. No mediation can take place unless the parties to the business conflict want or at least acquiesce in the presence of a mediator. In the case of a broken deal, at least one of the parties will lack motivation so long as it believes that it can obtain compensation or secure enforcement of its version of the deal in the

courts or in commercial arbitration. In short, that party does not see the failure to mend a deal through mediation as an absolute loss. So long as it considers litigation or arbitration as an acceptable alternative to a mediated agreement, it will have little motivation to accept the presence of a mediator. Unfortunately, most of the time, one of the parties to a business dispute does in fact believe that it will gain more in litigation or arbitration than it could through the services of a mediator.

Mediators have an opportunity to mediate business disputes only if both parties invite them into the process. Parties to business transactions can enhance mediator opportunity by agreeing at the time they make their contract to use third persons, a mediator. To a certain extent, the low degree of disputant motivation to use mediators in business disputes is also caused by the general lack of knowledge by businesses and their lawyers of the potential value of mediation and their belief that mediation will be used by one of the parties merely to stall and delay the inevitability of a law suit or arbitration case.

To be effective, mediators in commercial, like mediators in other domains, must possess certain resources, including skills. The essence of their resources resides in their ability to influence the parties to arrive at an agreement. Mediators in business transactions derive their power to influence the parties from various factors. Unlike some mediators in the political arena, business negotiators generally have no coercive power. The basis of their power first and foremost resides in their expertise. Mediators may also have power because of their relationships with the disputants. This referent power is particularly present in deal-making mediation in international business.

Encouraging the use of mediation facilitates the resolution of disputes and helps to avoid the worry, time and cost associated with court-based litigation, thus enabling firms to secure their legal rights in an efficient way.

In common law jurisdictions it is common practice to include in commercial contracts a reference to mediation prior to initiating arbitration. Only after the failure of mediation the parties are able to move on to litigation or arbitration in a designated forum. Some sophisticated clauses call first for negotiations at the chief executive level before mediation can take place. The intention is to create a dispute resolution process that explores in a structured manner the possibility of a negotiated solution before a formal adjudicatory process, like arbitration or litigation, can begin.

## 2. THE PROVISIONS OF THE EUROPEAN DIRECTIVE ON MEDIATION ON COMMERCIAL MATTERS

In May 2000 the Council adopted conclusions on alternative methods of settling disputes under civil and commercial law, stating that the establishment of basic principles in this area is an essential step towards enabling the appropriate development and operation of extrajudicial procedures for the settlement of disputes in civil and commercial matters so as to simplify and improve access to justice.

In April 2002 the Commission presented a Green Paper on alternative dispute resolution in civil and commercial law, taking stock of the existing situation as concerns alternative dispute resolution methods in the European Union and initiating widespread consultations with Member States and interested parties on possible measures to promote the use of mediation.

The objective of this Directive 2008/52/EC is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.

The Mediation Directive applies to cross-border disputes in civil and commercial matters. The provisions of this Directive should apply only to mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions also to internal mediation processes. It covers disputes in which at least one of the parties is domiciled in a Member State other than that of any other party on the date on which they agree to use

mediation or on the date mediation is ordered by a court. The principal objective of this legal instrument is to encourage the recourse to mediation in the Member States.

For this the directive contains **five substantive rules**:

- It obliges each Member State to encourage the training of mediators and to ensure high quality of mediation.
- It gives every judge the right to invite the parties to a dispute to try mediation first if she/he considers it appropriate given the circumstances of the case.
- It provides that agreements resulting from mediation can be rendered enforceable if both parties so request. This can be achieved, for example, by way of approval by a court or certification by a public notary.
- It ensures that mediation takes place in an atmosphere of confidentiality. It provides that the mediator cannot be obliged to give evidence in court about what took place during mediation in a future dispute between the parties to that mediation.
- It guarantees that the parties will not lose their possibility to go to court as a result of the time spent in mediation: the time limits for bringing an action before the court are suspended during mediation. Member States have until 21 May 2011 to comply with the provisions of the Directive.

Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements.

This Directive should apply to cases where a court refers parties to mediation or in which national law prescribes mediation. Furthermore, in so far as a judge may act as a mediator under national law, this Directive should also apply to mediation conducted by a judge who is not responsible for any judicial proceedings relating to the matter or matters in dispute.

The mediation provided for in the Directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time. However, it should be possible under national law for the courts to set time-limits for a mediation process. Moreover, the courts should be able to draw the parties' attention to the possibility of mediation whenever this is appropriate.

Member States should define such mechanisms, which may include having recourse to market-based solutions, and should not be required to provide any funding in that respect. The mechanisms should aim at preserving the flexibility of the mediation process and the autonomy of the parties, and at ensuring that mediation is conducted in an effective, impartial and competent way. Mediators should be made aware of the existence of the European Code of Conduct for Mediators which should also be made available to the general public on the Internet.

Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties. Member States should therefore ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable. It should only be possible for a Member State to refuse to make an agreement enforceable if the content is contrary to its law, including its private international law, or if its law does not provide for the enforceability of the content of the specific agreement. This could be the case if the obligation specified in the agreement was by its nature unenforceable.

The content of an agreement resulting from mediation which has been made enforceable in a Member State should be recognised and declared enforceable in the other Member States in accordance with applicable Community or national law.

Confidentiality in the mediation process is important and this Directive should therefore provide for a minimum degree of compatibility of civil procedural rules with regard to how to protect the confidentiality of mediation in any commercial judicial proceedings or arbitration.

In order to encourage the parties to use mediation, Member States should ensure that their rules on limitation and prescription periods do not prevent the parties from going to court or to arbitration if their mediation attempt fails. Member States should encourage the provision of information to the general public on how to contact mediators and organisations providing mediation services. They should also encourage legal practitioners to inform their clients of the possibility of mediation.

Member States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services. Member States shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties.

A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order 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 available.

Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.

Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:

(a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or

(b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process.

Member States shall encourage, by any means which they consider appropriate, the availability to the general public, in particular on the Internet, of information on how to contact mediators and organisations providing mediation services.

Not later than 21 May 2016, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Directive. The report shall consider the development of mediation throughout the European Union and the impact of this Directive in the Member States.

Member States shall bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive before 21 May 2011.

## 3. PICTURE OF PRACTICING MEDIATION IN COMMERCIAL CONFLICTS IN EUROPE

Mediation is at varying stages of development in Member States. There are some Member States with comprehensive legislation or procedural rules on mediation. In others, legislative bodies have shown little interest in regulating mediation. However, there are Member States with a solid mediation culture, which rely mostly on self-regulation.

More and more disputes are being brought to court. As a result, this has meant not only longer waiting periods for disputes to be resolved, but it has also pushed up legal costs to such levels that they can often be disproportionate to the value of the dispute.

Mediation is in most cases faster and, therefore, usually cheaper than ordinary court proceedings. This is especially true in countries where the court system has substantial backlogs and the average court proceeding takes several years.

This is why, despite the diversity in areas and methods of mediation throughout the European Union, there is an increasing interest for these means of resolving disputes as an alternative to judicial decisions.

The term „mediation" does not have the same significance in continental Europe as it does in the United States and the United Kingdom. This can now be expected to change given the EC's Proposed European Directive.

Some European jurisdictions have longstanding procedures intended to facilitate the settlement of civil and commercial disputes, which are often called „conciliation" procedures. Many lawyers consider this term more or less interchangeable with mediation, but in fact conciliation has a history in Europe that differs substantially from the modern U.S. concept of mediation.

A procedure closer to mediation, most of the times framed by law in commercial disputes is conciliation.

The experience of conciliation at the International Chamber of Commerce (ICC) in Paris is illustrative of the different attitudes. The ICC is an international arbitral institution, although since its inception in 1923, it has also provided conciliation services. Prior to World War II, 80% of the cases submitted to the ICC were settled by conciliation. However, in more recent decades, conciliation has fallen into disuse. In November 1994, ICC secretary-General Eric Schwartz reported that since the ICC Rules of Optional Conciliation entered into force on January 1, 1988, fewer „than 60 requests for conciliation (as opposed to more than 2,000 requests for arbitration) [were] received by the ICC." The Secretary-General went on to describe some features of the few cases that actually proceeded to conciliation:

In practice ICC conciliation proceedings have until now tended to take the form of mini-arbitrations, the main differences being that relatively short deadlines have been fixed for submissions, and the „hearing" has been conducted as a discussion culminating in a settlement proposal.

In some cases, the settlement proposals of the conciliator have been submitted to the parties in writing with an analysis of the relevant facts and law, much in the manner of an arbitration award. These features-formality, legality, an adversarial mentality, evidence and hearings-differ fundamentally from the U.S. conception of mediation as a consensual process in which the mediator assists the parties in exploring their wider interests (rather than just their rights) in search of opportunities to create value and reach a collaborative „win-win" outcome that is not dictated by rules of law or precedents.

Spain provides a good European example of established experience with conciliation and lack of experience with mediation. For a long time in Spain there was a requirement to attend a compulsory conciliation hearing prior to continuing with litigation. Many Spanish commentators complained that the conciliation process was useless. Parties to a dispute went through it as a mere formality in order to be able to continue with their litigation. The major overhaul of Spanish civil procedure in 2000 retained a weak obligation to make an effort at conciliation at

the parties' first appearance before the judge, but made no mention of „mediation." Few arbitration institutions in Spain offer mediation services, and of those that do, the practice is to select mediators from the list of arbitrators. The result is that Spain has a moribund practice of conciliation. Since it has taken virtually no steps towards developing a mediation culture in the modern sense, there is little understanding there of the techniques of mediation.

Since the mid-1990s, there have also been some private initiatives to encourage mediation in continental Europe. The Centre de Mediation et d'Arbitrage de Paris (CMAP) and the Netherlands Mediation Institute were both established in 1995. In 1996 the CPR Institute for Dispute Resolution, which recently changed its name to the International Institute for Conflict Resolution and Prevention, published Model European Mediation Procedures, and in 2004 initiated a European Business Mediation Congress. The ICC replaced its 1988 Rules of Optional Conciliation with the ADR Rules effective July 1, 2001, which cover a range of dispute resolution techniques, including mediation, neutral evaluation, mini-trial, and other settlement techniques or combination of techniques agreed by the parties. The American Arbitration Association has opened an office of the International Centre for Dispute Resolution in Dublin, Ireland, which offers international arbitration and mediation services. In addition, the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center in Geneva has been actively promoting mediation for international dispute resolution, and regularly offers workshops for mediators with distinguished U.S. teachers. WIPO's mediation caseload is larger than its arbitration caseload, mediation predominating due to its success in eliminating the need for arbitration."

## 4. TODAY FRAMEWORK FOR MEDIATION IN COMMERCIAL CONFLICTS IN ROMANIA

Law 192/2006 provided the legislative framework for the introduction of mediation, within which the mediation profession operates.

The Mediation Council, established by Law 192/2006 on mediation, is responsible for supervising mediation in Romania. It is an autonomous legal entity which acts in the public interest and has its headquarters in Bucharest. The members of the Mediation Council are elected by the mediators and approved by the Ministry of Justice of Romania.

The main responsibilities of the **Mediation Council** are to adopt decisions in the following areas:

- To set the **training standards** in the field of mediation, on the basis of best international practice and to supervise their adherence by the professionals;
- To **authorise** mediators and to maintain and update the List of Mediators;
- To **approve** the **training curricula** for mediators;
- To **adopt** the **Ethical and Deontological Code** for authorised mediators, as well as the regulations regarding their disciplinary liability;
- To adopt **regulation** on the organisation and functioning of the Mediation Council;
- To initiate **proposals** to amend or to correlate legislation on mediation.

The Mediation Council has established the National Register of Mediator's Professional Associations. This Register lists the non-governmental organizations which promote mediation and represent mediators' professional interests.

In accordance with Article 12 of Law 192/2006, **authorised mediators are registered in the "Panel of Mediators"** managed by the Mediation Council and published in the Romanian Official Journal, Part I. The **"Panel of Mediators"** is also available from the official websites of the Mediation Council and of the Ministry of Justice. The list of **authorised mediators** contains information on:

- Their membership to professional associations,
- The institution from which they graduated,

- The mediation training programme they followed,
- Foreign languages in which they are able to conduct mediation services,
- Their contact details.

The companies interested in resolving their dispute through mediation can contact a mediator within 1 month of the date of publication of the "panel (list) of mediators" on the premises of the courts and on the website of the Ministry of Justice. The Mediation Council is legally obliged to regularly update – at least once a year – the **Panel (List) of mediators**, and to communicate updates to the courts, to local government authorities, and to the Ministry of Justice.

Article 2 of Law 192/2006 allows parties to seek mediation in **disputes relating to civil, including commercial matters, penal matters**, **family matters** and other fields of law subject to the legal provisions. **Consumer disputes**, and other **disputes subject to renounceable rights**, can also be resolved using mediation. However, matters relating to personal rights and to non-renounceable rights cannot be the subject of mediation.

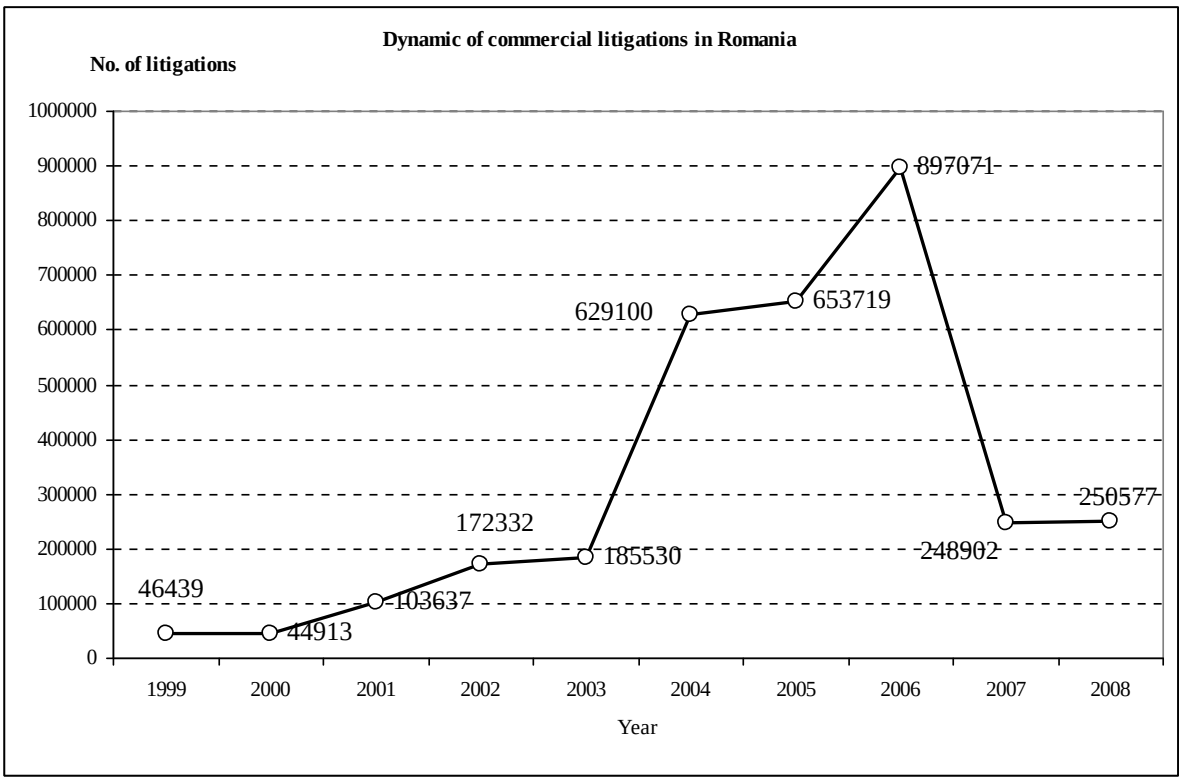
Recourses to mediation is **voluntary**. There is no obligation for parties to look for mediation services, and they may opt out of mediation at any stage. In other words, parties are free to seek other means of dispute resolution at any point: court proceedings, arbitration. Interested parties may contact a mediator before coming to court, and also during court proceedings.

However, various national legal provisions in the field of mediation oblige judges, in certain cases, to **inform parties of the possibility of opting for mediation and the advantages of doing so.** In other cases, a number of **financial incentives** are offered to parties who choose mediation or other alternative dispute resolution proceedings.

The **Mediation Council** website is the main source of information about mediation in Romania.

Mediation is not free of charge; **the level of payment** is subject to agreement between a private mediator and the parties. Currently no legal or financial support to provide mediation services is available from local or national authorities.

An agreement resulting from mediation can be enforced by a notary or by a judge if the mediation process started during a juridical trial.



## 5. CONCLUSIONS

The magnitude, complexity, and duration of business transactions creates a substantial and continuing risk of conflict. The commercial arbitration, the primary dispute settlement mechanism designed for international business, has proven itself to be expensive, destructive, time consuming, and in some cases lacking in finality. Mediation of varying types offers international business executives a possible attractive alternative, an alternative that they should explore at the time they negotiate their transactions. They might include in their contracts from the outset mechanisms such as dispute advisors to help in the problem of deal management, and they might also commit themselves to try mediation or conciliation before they take the usually irrevocable step of submitting their disputes to arbitration.

The following activities can be useful in order to promote and increase the importance of mediation in commercial disputes:

1. The development of a network of mediators who support the goal of advancing the field and the professional practice of commercial mediation.
2. The implementation of projects in different regions that endorse the principles of mediation (impartiality, confidentiality, rule of consensus, interest based process design) and dialogue processes. This includes the facilitation of communication between parties through the mediator, the support of and moderation during the negotiation process, the holding of roundtable discussions and the joint search for solutions to a specific conflict.
3. The design and implementation of training which can provide for a more peaceful business conflict culture.
4. The cooperation with state and non-state actors in the community with the goal of effectively implementing mediation and dialog processes.

**Mediation is a good short term and long term investment** for a number of reasons:

- Reduced time to dispute resolution;
- Reduced cost to dispute resolution;
- Business relationships maintain or improve as disputes are settled amicably;
- Helps educate parties in avoiding disputes by making them more familiar with the obstacles to resolution, i.e., knowing what to avoid in future.

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