Are mediation clauses binding and mandatory?

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Abstract

This study analyses the legal force of mediation clauses in the common law systems and civil law systems with a main focus on the Romanian approach. First, the introductory section illustrates the paradox between the concept of binding and mandatory effect and the mediation mechanism, a voluntary manner to settle disputes. Notwithstanding, the possibility to coerce the parties to engage into a mediation, the voluntary character of the process is illustrated by the parties' freedom to decide whether they settle or not. Second, the role of mediation clause is analysed and its advantages are briefly described. Third, the non-compliance of the prior mediation mechanism is presented, the starting point of the discussion being represented by the manner in which the parties drafted the mediation clause. A carefully drafted mediation clause, reflecting the parties' consent, can determine a court or an arbitral tribunal to enforce such clause. Fourth, the study ends by mentioning the approach adopted by different national courts, emphasizing the Romanian legal perspective.

Keywords: *mediation clause, mandatory, non-compliance, voluntary process.*

JEL Classification: K12, K40, K41

1. Preliminary considerations

The question whether mediation clauses are binding and mandatory may seem strange at first because mediation is essentially a voluntary method to settle a dispute[3] and its purpose is to avoid lengthy proceedings and even reduce the number of issues that may eventually have to be decided by a state court or by an arbitral tribunal[4]. Therefore, a few explications are necessary.

As with any other civil or commercial contract, the parties may be in dispute about the existence or the length of their obligations that arise from their agreement. In this case, it may be considered even natural to refuse to engage in a mediation procedure once first negotiations between the parties have failed. In fact, the only difference between an attempt of one of the parties to negotiate and

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[3] Hanks, Melissa, *Perspectives on mandatory mediation*, University of New South Wales Law Journal, Vol. 35, No. 3, 2012, p. 929.
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mediation is that a third person joins the negotiation table[5]. Therefore, in this exact situation, one of the parties might feel tempted to skip the contractual provisions under which the parties are bind to a prior step – mediation – and immediately file a request for arbitration or initiate proceedings in the state courts. In many cases, the respondent will not hold the reluctant party to what had been agreed. In other words, both parties decide to waive the benefit of the clause under the *mutuus consensus – mutuus dissensus* principle.

However, if the respondent insists on having the agreed mediation, the state court or the arbitral tribunal will have to decide whether a proceeding in its forum is premature. The question of prematurity determines the lack of jurisdiction of the state court or arbitral tribunal or the inadmissibility of a claim brought before a state court or arbitral tribunal[6]. A possible lack of jurisdiction or the inadmissibility of the claim may result due to the non-compliance with the pre-mediation dispute settlement mechanism which requires that the dispute shall be decided by mediation as a condition precedent to litigation or arbitration. Thus, the mandatory nature of the mediation clause is put to test.

This article will focus on and analyse whether common as well as civil law courts have held the contractual parties to what they have agreed. The comparative analysis will show that mediation clauses have generally binding force even though mediation is, as previously said, essentially a voluntary process.

2. The role of mediation clauses

In the modern society, where rapid and frequent changes and interactions take place, conflicts arise. The modality to solve these conflicts must depart from the apparent unique way to end a lawsuit - establishing a winner - and must head towards a more balanced mechanism of settling a dispute.

Mediation is generally perceived as being the rule, the state of normality, by contrast with litigation which is often perceived as a last option for settling the dispute[7]. In order to prevent an offensive mechanism such as litigation, the contracting parties who wish to have future disputes referred to mediation can insert a mediation clause. In some cases, the parties may conclude an additional agreement to the initial one, obliging to resort to mediation before commencement of any litigation. This enables the parties to maintain their autonomy of will and full freedom, but they are obliged to resort to a third party mediator before

[5] Răzvan-Lucian Andronic, Ioan Ștefu, Camelia Olteanu, *Mediation in Romania – context and principles of action*, Procedia – Social and Behavioural Sciences, Vol. 84, 2013, p. 1129.

[6] Alexander Jolles, *Consequences of Multi-Tier Arbitration Clauses: Issues of Enforcement*, (2006) 72 Arbitration 4, Sweet & Maxwell, London, 2006, pp. 335-336.

[7] Clifford Chance, *International Mediation Guide*, 2013, p. 20 – consulted last time on October 25, 2016 at https://www.cliffordchance.com/briefings/2016/06/international_mediationguide-secondedition.html .

submitting the dispute to arbitration or court[8]. The agreement fully belongs to the parties, being grounded upon their interests and needs, not just on their rights and obligations. Therefore, they are in full control during the entire process, the solution being negotiated and unanimously accepted[9]. The final solution reflects a durable, efficient and a mutually convenient result. This enables both parties in maintaining and creating contractual relations and settling disputes in a neutral and impartial manner.

Even though mediation is being considered a very useful and even an available tool for individuals who wish to prevent or resolve a certain dispute, this alternative mechanism[10] it is not a miraculously procedure which grants reconciliation. Put in other words, mediation is rather a complex manner of involving the parties in a negotiation process. Furthermore, by opting for mediation, a conflictual state between the parties can be often transformed into a harmonious one from which all the parties involved can benefit.

Among the advantages that a mediation clause encompasses, is that this type of clause allows the parties to identify potential conflicts and to settle them before their position becomes too delicate or too divergent to be settled outside the scope of litigation. Moreover, this kind of clause does not establish a material or territorial jurisdiction, unlike the law which clearly settles who has prerogatives for solving the dispute in cause, which means the parties are not bind to resort to a specific mediator based on a certain jurisdiction.

Another reason for which parties are interested into inserting a mediation clause is the confidentiality of the disputes[11] and the resulting solution following the procedure of mediation. In commercial matters, time means money and, therefore, by resorting to mediation the parties can quickly resume their economic affairs without losing precious time and resources.

Generally, mediation presents advantages for the entire judicial system and not only for the conflicting parties. Thus, it mainly increases the quality of justice due to the fact that the courts are not overburden from the large number of cases. Moreover, the costs required by a judicial procedure are reduced and this offers the possibility to reinvest or redirect for other purposes outside the courts[12]. Regarding the benefits which mediation offers to lawyers it can be said that since there is guaranteed a rapid success, for one or both parties, reduced costs and no strict procedural deadlines, the mediation procedure represents a comfortable and elegant way of settling a conflict.

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[8] Carlos Esplugues, Louis Marquis; *New Developments in Civil and Commercial Mediation – Global Comparative Perspectives*; Springer International Publishing; Ius Comparatum – Global Studies in Comparative Law, Switzerland, 2015, p. 684.

[9] Manuela Sârbu, Alina Gorghiu, Diana Monica Croitoru-Anghel, *Medierea conflictelor*, Universul Juridic Publishing, Bucharest, 2013, p. 11.

[10] Crenguţa Leaua, *Metode alternative de soluţionare a disputelor (ADR), cu privire specială asupra medierii*, Revista Dreptul, no. 3, 2006, pp. 120-123.

[11] Petronela Stogrin, *Mediation versurs Court*, Acta Universitatis George Bacovia. Juridica – Volume 2, Issue 2 2013, p. 4.

[12] *Idem*, p. 5.

3. Jurisdiction of state courts and non-compliance with the dispute settlement mechanism

When one of the contractual parties fails to comply with the agreed mediation mechanism, state courts may intervene to give effect to the dispute settlement agreement. Nevertheless, the state courts are limited by the parties' agreement. Therefore, a carefully drafted mediation clause could make a difference.

Generally, most jurisdictions give effect to mediation clauses. This international trend is also reflected by the provisions of Article 13 of the 2002 UNCITRAL Model Law on International Commercial Conciliation which state:

„*Where the parties have agreed to conciliate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to conciliate or as a termination of the conciliation proceeding.*"

Inspired by these provisions, in principle, state courts recognize the legal force of the mediation clauses if their wording is clear enough[13] and reflects the parties' intention only to proceed to litigation or arbitration as a last resort only after mediation has been attempted[14]. Due to this fact, the contractual parties have to pay attention to the way in which the mediation clause is drafted.

The contractual parties have the possibility to choose between a very precise manner to draft the mediation clause and a very general contractual provision. The difference is important, because a carefully drafted and clearly defined mediation clause that includes the nomination of a mediator and broadly establishes other specific aspects regarding the dispute settlement mechanism in a short time reflects the express and serious intention of the parties to resort to this procedure. However, a broad obligation simply to engage into mediation prior to commencing court proceedings will most likely lack the legal force, notwithstanding the express contract law duty of good faith and the *pacta sunt servanda* principle (*e.g.* Articles 14 and 1270 of the Romanian Civil Code[15], Articles 7 and 1258 of the Spanish Civil Code[16]).

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[13] *Flight Training International v. International Fire Training Equipment Ltd, [2004] EWHC 721 (Comm); Hooper Bailie Associated Ltd v. Natcon Group Pty Ltd (1992) 28 N.S.W.L.R. 194; Pierre Bienvenu, The Enforcement of Multi-Tiered Dispute Resolution Clauses in Canada and the United States, Annual Convention, International Bar Association (2002).*

[14] Robert N. Dobbins, *The Layered Dispute Resolution Clause: from Boilerplate to Business Opportunity*, Hastings Business Law Journal, April 2005, p. 159.

[15] Law no. 287/2009 regarding the New Civil Code, published on 17th July 2009 in the Romanian Official Monitor, Part I, nr. 505/2011.

[16] Real Decreto adopted on July 24, 1889, the text of the Civil Code (Código Civil), Published in GACETA on July 25, 1889.

In the Romanian legal system, according to Article 2 from the Law no. 192 /2006 regarding mediation and the organisation of the profession of mediator[17], the parties can insert a mediation clause in a contract regarding rights they can dispose of. This is the conventional form of mediation, under which the parties undertake, as a result of the *binding force of the contract* principle, to mediate prior submitting a request for litigation or arbitration. „*The settlement agreement reached through mediation is a valid contract between the parties*"[18] and, thus, the court, summoned by the parties to uphold their settlement, can render the agreement definitive and enforceable without any other formalities. Even though it is not distinctly regulated in the Romanian Civil Procedure Code[19] in Article 193 (entitled Preliminary proceeding), the mediation is still a prior-procedure the parties should complied with before commencing court proceedings if they agree to resort to it. If the parties fail to comply with, this can be invoked by the respondent's counterclaims and not *ex officio* by the court.

4. Legal force of mediation clauses

When a conflict between the contractual parties arises, they usually seek justice by submitting a request to arbitration or national courts, notwithstanding the contract's provisions demanding a prior mediation procedure. In this type of situation, national courts have the power to decide whether the mediation clause is binding and mandatory. The approach can be similar or even opposite in function of the type of legal system, a common law system or a civil lay system (**A**). In fact, the decision to consider or not a mediation clause binding and mandatory is strongly influenced by the perception of this alternative mechanism called mediation which is used to resolve disputes[20]. In the Romanian legal system, mediation is not considered to be an attractive manner to settle disputes[21] and, therefore, the issue of giving effect of the mediation clauses remains an aspect that is difficult to certainly assess since is still a debatable one (**B**).

A. Legal force of mediation agreements in common law and civil law systems

American and British Courts share a similar point of view regarding the mandatory legal force of mediation agreements. The main reason for embracing

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[17] Law no. 192 /2006 regarding mediation and the organisation of the profession of mediator, published on 22th May 2006 in the Romanian Official Monitor, Part I, nr. 441/2006.

[18] Clifford Chance, *International Mediation Guide*, 2013, p. 20 – consulted last time on October 25, 2016 at https://www.cliffordchance.com/briefings/2016/06/international_mediationguide-secondedition.html.

[19] Law no. 134/2010 regarding Civil Procedure Code republished, republished in the Romanian Official Monitor, Part I, nr. 247/2015.

[20] Hanks, Melissa, *Perspectives on mandatory mediation*, University of New South Wales Law Journal, Vol. 35, No. 3, 2012, p. 952.

[21] Daniel Mihail Șandru, *Medierea în România. O introducere, Medierea în România. Legislație și jurisprudență*, University Publishing House, Bucharest, 2012, p. 5.

this approach cannot be limited to the fact that both, the United Kingdom and the U.S., represent the common law system. In fact, alternative dispute resolution such as mediation is strongly encouraged[22] to the detriment of litigation due to its advantages.

In the *Cecala v. Moore*[23] case it was stated that „*(...) when a party contracts to use mediation prior to the commencement of arbitration (or litigation), the contractual agreement cannot be bypassed without a valid defence, e.g. waiver or estoppel (...)*"[24]. In other words, the national jurisdiction used the U.S. contract law principles in order to give effect to a multi-tiered dispute resolution clause and, therefore, considered mediation as a mandatory mechanism.

British Courts[25] have also recognized the principle that courts or arbitral tribunals should stay proceedings if two conditions are fulfilled: (a) the claim was brought in breach of a multi-tiered dispute resolution clause which required the parties to enter into a mediation procedure before initiating arbitration or court proceedings; and (b) when there is a clear intention of the parties to be bound by a previous mandatory mediation procedure. But this reasoning can be applied only when there is sufficient certainty of the engagement concluded by the parties. Consequently, a prior mediation procedure can be considered mandatory only when the parties have gone beyond a simple intention to negotiate in good faith.

Furthermore, the English courts have shown support for mediation in their application of the pre-requisite. This support shown is illustrated in the *Dunnett v. Railtrack*[26] case when the court made a costs order against the successful party for refusing to mediate. The court's power to make a costs based on an unreasonable refusal to resort to mediation was confirmed by the English Court of Appeal in *Halsey*[27] case which remains the leading case on court powers regarding mediation.

In the *Halsey* case, Dyson L.J. noted that mediation can benefit parties by reducing the cost of the proceedings, offering a range of solutions that are not available to the courts, such as an apology, and the potential for greater party satisfaction at the outcome of the process. Also, a non-exhaustive list of the factors to be considered when determining whether a party's refusal to mediate is unreasonable was established[28], as follows: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e)

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[22] Lucy V. Katz, *Enforcing an ADR clause- Are good intentions all you have?*, American Business Law Journal, Vol. 26, Issue 3, September 1988, p. 575.

[23] Joseph J. Cecala, et al. v. Edward F. Moore, et al., 982 F.Supp. 609 (ND III 1997).

[24] Citing *Cecala v. Moore* case, Kathleen Scanlon, *Enforcement of Multi-Tiered Dispute Resolution Clause - United States*, Arbitration and ADR Newsletter of the IBA, Vol. 6, No. 2, October 2001, p. 24.

[25] Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd., [1992] Q.B. 656 (C.A.); Cable & Wireless Plc. v. IBM United Kingdom Ltd., [2002] All E.R. (D) 277.

[26] Susan Dunnett v. Railtrack Plc, [2002] 2 All ER 850.

[27] Lilian Halsey v. Milton Keynes General NHS Trust, [2004] 4 All ER 920.

[28] Hanks, Melissa, *Perspectives on mandatory mediation*, University of New South Wales Law Journal, Vol. 35, No. 3, 2012, p. 941.

whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success.

In civil law countries, the courts usually give effect to the clauses providing for an ADR procedure, including here mediation. This approach embraced by courts in the civil law system is considered by some authors to be a trend[29].

In the *Tripier* case[30], the parties inserted in their contract a dispute resolution clause that required the resort to mediation prior to commencing legal proceedings. The provisions of the clause were very specific stating that any conflict between the parties should be submitted to mediators designated by the parties; and that the mediators shall attempt to resolve the conflict arose within a period of two months form their designation. When the dispute arose, notwithstanding the contractual provisions, Mr. Poiré commenced court proceedings. Without entering into the issue regarding the breach of the mediation clause inserted in the contract concluded by the parties, the Court of First Instance rendered a decision on the merits. The Court of Appeal of Paris upheld the appeal and dismissed Mr. Poiré's claim and the French Cour de Cassation upheld the lower court judgement stating that „*a contractual clause establishing a mandatory mediation procedure prior to court proceeding constitutes an obligatory bar to proceedings if invoked by the parties*".

In other civil law countries like Spain, an obligation to appoint a representative for the purpose of negotiating or an obligation to refer the matter to a designated mediator as a precondition to arbitration will have the consequence that the obligation to arbitrate does not arise until the pre-arbitral phase has been exhausted (Articles 1125 and 1227 of the Spanish Civil Code). Thus, there is no reason that prevents the use of this reasoning in the case of litigation.

Consequently, it seems that national courts representing the civil law system will recognize the legal force of a mediation clause and give effect to it if the undeniable consent of the parties can be established.

B. Legal force of mediation agreements in the Romanian legal system

The evolution of commercial and contractual relations has brought in attention the need for a more reliable and facile manner of settling a dispute. Hence, in the Romanian judicial system, the procedure of mediation, established through a specific clause or recommended by the court[31], knows a distinct regulation – Law no. 192/2006 regarding mediation and the organisation of the mediator profession. According to the legal provisions, the parties have the possibility to insert a mediation clause in their contract or simply resort to

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[29] Cristopher R. Seppala, *International Construction Contract Disputes: Second Commentary on ICC Awards Dealing Primarily with FIDIC Contracts*, ICC International Court of Arbitration Bulletin Vol. 19, No. 2, November 2008, p. 54.

[30] Poiré c. Tripier et autres, Cour de Cassation, Chambre mixte, Judgement no. 217, February 14, 2003, juris-data no. 2003-017812.

[31] Ioan Leş, *Medierea şi împăcarea părţilor în concepţia Noului Cod de procedură civilă*, Curierul Judiciar, no. 11, 2011, p. 581.

mediation, in a civil or commercial matter[32], before making an application for litigation.

Generally, inserting in a contract a multi-tier resolution clause or a mediation clause, which imposes a prior procedure, gives the parties and the courts the possibility to interpret the mandatory or the optional character of the clause and the preliminary procedure itself. It appears that the Romanian legal system approach is to consider a mediation clause mandatory if the parties' consent is unequivocally manifested. None of the less, it is interesting to see what the courts' approach is when the parties have failed to comply with a mandatory prior procedure requirement.

In the Civil Sentence no. 49 from 2010[33] the Cluj Court of Appeal, which like any court of appeal has overall jurisdiction to settle any disputes concerning arbitral awards, has been seized with the action for setting aside the arbitral award based on the argument that the Arbitral Tribunal was not constituted in accordance with the arbitration agreement. In this case, the parties have entered into a contract which stipulated that the respondent was bind to rehabilitate a number of buildings. In the contract, among other provisions, the parties inserted a clause stating that in the case of disagreement, the parties had to resort to a preliminary procedure for settling the dispute and, if one of them was not satisfied with the result, they could resort to international arbitration.

The conflict arose and the parties failed to comply with the mandatory prior-procedure requirement. The dispute was settled by an Arbitral Tribunal „*legally empowered to solve the case, the parties having agreed on the arbitration institution and naming each an arbitrator*" [34]. The respondent opposed to the entire arbitration procedure which was conducted by violating all rules agreed by the parties and of the rules regarding the establishment of the Arbitral Tribunal. Notwithstanding respondent's arguments stating that the preliminary procedure was not complied, the Arbitral Tribunal considered it was legally invested and competent to solve the dispute.

First, the Court of Appeal ascertained the lack of consent to arbitration. The national Court considered that in order to give the consent to arbitration proceedings a written agreement was required, and, in this case, such agreement was never completed.

Second, the Court states that the Arbitral Tribunal was not legally composed and empowered in accordance with the arbitral agreement and, as a matter of fact, with any agreement between the parties, since the respondent has constantly refused to acknowledge the whole arbitration proceedings.

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[32] Angelica Roşu, *Concilierea. Mijloc alternativ de soluţionare a litigiilor de comerţ internaţional*, Revista de Drept Comercial, no. 1, 2006, pp. 64-73.

[33] Action for annulment of the arbitral award, Cluj Court of Appeal, Section of Commercial, Contentious, Administrative and Fiscal, Sentence no. 49, February 3, 2010.

[34] Action for annulment of the arbitral award, Cluj Court of Appeal, Section of Commercial, Contentious, Adminitrative and Fiscal, Sentence no. 653, October 10, 2008.

Third, the Court examined the nature of the preliminary procedure agreed by the parties in their contract. In other words, the question analysed by the national Court was if the mediation procedure could be considered mandatory or not. The conclusion was that when the parties failed to amiably settle the dispute before the Arbitral Tribunal or the Court, the failure to comply with the mediation procedure could not harm in any way the litigants.

Regarding the aspects of the case analysed and the Court's conclusion, a few affirmations need to be made:

a. According to the principle of *Kompetenz-Kompetenz*, acknowledged also in the Romanian legal system, the problem whether prior-arbitration proceedings have been met or not has to be decided by the arbitrators, due to the fact that this is a dispute arising out of and, in some cases, in connection with the agreement containing the arbitration clause. When the dispute arises and the parties have agreed unequivocal to bind in engaging to comply with the prior-proceedings, stating the fact that this is a mandatory provision[35], the Arbitral Tribunal should consider, based on the principle of good faith, a request for arbitration inadmissible[36]. When the parties' consent to mediate is closely linked to their consent to resort to arbitration, the Arbitral Tribunal should, in this case, declare that he has no jurisdiction to settle the dispute.

b. The question was whether the failure to satisfy the preliminary proceedings requirements must be treated as a procedural matter or as a substantive law matter. In the presented case, the Tribunal had a procedural approach considering the issue as a matter of admissibility. The Court ascertained that the respondent and the Arbitral Tribunal wrongly interpreted the provisions regarding the special procedure, considering that resorting to arbitration at that point, without complying with the prior-procedure established, was legal. The legitimate solution would have been to decline to review the case prior to complying with the initial procedure.

Another approach of this matter is treating it as a substantive, material contract law matter, which means that not complying with the pre-arbitral steps would be treated as a breach of contract and the party incurring the damage would have to establish the quantum of damage.

The Court of Appeal admitted the action and annulled the arbitral award. The Court, in this case, considered that, since the parties were not affected by the failure of complying with the mediation procedure, there is no purpose in considering the preliminary mediation procedure to be mandatory if one party could initiate it and later on withdraw from it. A diffrent solution, that would be the

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[35] Frank Spoorenberg, Daniela Franchini, *Failure to comply with mandatory pre-arbitration requirement – Supreme Court Rules on Fidic Pre-Arbitration Steps*, International Law Office, Arbitration&ADR – Switzerland, July 14, 2016, p. 2.

[36] Alexander Jolles, *Consequences of Multi-tier Arbitration Clauses: Issues of Encforcement*, (2006) 72 Arbitration, The Chartered Institute of Arbitrators, Law Publisher Sweet&Maxwell Limited, London, November 2006, pp. 335-336.

optimal one, chosen by the Switzerland Federal Tribunal[37], was to stay the arbitration proceedings pending in order to recourse to mediation.

5. Conclusion

This article has provided an overview of the approaches to mandatory mediation in common law systems and civil law systems, with an accent on the Romanian legal system. Presenting all the ideas, it is necessary to make a few comments.

Firstly, as previously noted, mediation represents a voluntary process and, therefore, mandatory mediation can only raise a question about the nature of the parties' consent. The mandatory character of a mediation clause refers to coercion into a mediation procedure, inconsistent with its voluntary character. In other words, the parties are compelled to enter into the mediation process without being obliged to reach a settlement.

Secondly, the different perspectives shared by the national courts or by the arbitral tribunals on mandatory mediation cannot be interpreted as indicating a right or wrong approach. In fact, the national courts and the arbitral tribunals react in accordance with each country's vision regarding mediation. Also, they are in charged with the mission to fulfil the specific needs of the social and legal environment.

Thirdly, the concept of parties' coercion on the basis of a mandatory mediation clause is bound to the concept of effectiveness of compelling the parties to mediate. This represents an important aspect that surely influences the decision adopted by a national court or by an arbitral tribunal. Thus, similarly with the Romanian perspective, if the Courts believe that parties who are forced to mediate are unlikely to approach the process with a positive attitude, it is likely that the mediation clause will not be given effect.

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