

MEDIATION CLAUSE IN COMMERCIAL CONTRACTS

(THE ADVANTAGES OF MEDIATION CLAUSE IN COMMERCIAL CONTRACTS)

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Abstract

*It often happens that the end of the contracts to be existing commercial relationships and a new contract has already *intuitu personae* character. But not always the case, that those who enter into legal commercial forcing consideration to the benefits and under commercial contracts, know the dealer or individual that established commercial relations. These traders resort to contractual conditions which states precisely the extent of the obligations assumed by each party, setting rules, deadlines, penalties and even ways of interpretation of contracts. Contracting Parties, namely traders aware that the law is the contract parties by special *caluze invest* (to settle disputes concerning the interpretation or punishment for failure and even termination obligations) tribunalule arbitration courts or the territorial and material .*

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JEL Classification: K12, K22

I. Regulation of commercial contracts

Regulation of commercial contracts is applicable not only to contracts concluded between traders but also between retailers and third party contracts are aimed at profit. Forasmuch as by their conclusion and performance targets offenders traders trade.

Commercial contracts regardless of their subject, whether by sale, rental, office leasing, chartering etc., are mutually binding contract because their conclusion arise through mutual obligations between the contracting parties.

Most commercial contracts are contracts for pecuniary interest, meaning that all contracting parties pursue a proprietary interest, a Contracting Party receiving a price as an equivalent for his service counter and the other contracting party receives the goods, or the performance or any other equivalent according to terms set by the co-contractors.

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Contracting Parties, namely traders aware that the law is the contract parties by special *caluze invest* (to settle disputes concerning the interpretation or punishment for failure and even termination obligations) arbitration courts or the territorial and material courts.

Based on this principle, the law of parties, traders can insert a mediation clause in commercial contracts, dispute resolutions on the implementation contacts already met both requirements and for future ones.

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II. Advantages of mediation clause

According art.alin 5 of Law 192/2006, any agreement the parties may have rights to which they may insert a clause on mediation, whose validity is independent of the validity of which the trade agreement. [Law 192 on the organization and the profession of mediator, art. 2, paragraph 5]

According to article 2, paragraph 3, businesses have the right to settle disputes through mediation both outside and within the statutory procedures for amicable settlement of disputes under the law. This provision entitles parties to have in directly on how they intend to deal with a dispute which, under these provisions, requires not only legal entity to call the court. [Law 192/2006, art. 2, paragraph (3) Natural or legal persons have the right to settle disputes through mediation both outside and within the statutory procedures for amicable settlement of disputes under the law].

Advantages of this clause derives from the fact that mediation does not establish a material or territorial area of responsibility as if the court or arbitral tribunal, where the law states clearly and unequivocally who has jurisdiction on disputes².

Mediation, the mediator applies, is not bound by a jurisdiction area and material , the only condition being that the mediator to operate under Law 192/2006 on the authorization and functioning [192 Law on the Organization and Practicing Mediator, article 7 letter g]. If the trade agreement the parties have expressly stipulated mediation procedure as a means of settling dispute, there is no legal or procedural impediment to resort to mediation. Conversely, even if the contract terms are clear about the institution competency dispute resolution (courts, arbitration, etc.), the parties agree to mediation can call ahead to address one of these institutions. If the parties decide to resort to this alternative form of dispute resolution may provide, by way of an addendum, the mediation clause, the contract is only for changing the method of resolving disputes, other terms remain unchanged.

Another advantage of mediation clause that allows both parties to maintain confidentiality and disputes arising from the agreement reached through mediation.

Confidentiality of the mediation procedure, provided both the principles of mediation and contract terms, keep the image trader has not complied with the contractual obligations.

Mediation allows traders to agree on the scope of rights and obligations under the contract, and the fulfillment of obligations already met the future.

The mediation procedure , given the scope and nature of the contract commercial (for profit as quickly), traders save time and money and the solution is arrived at based on the interests and needs of the environment and immediate. Mediation agreement may be enforced immediately without having in advance , investing it with enforceable.

Short time required for the mediation process to secure a lasting understanding, allows traders to focus on what really interests them, namely the resumption of economic activity. Because of the principle of self-determination by that understanding the parties belongs entirely based on the interests and needs of the parties, not only on legal rights, understanding the parties retain control throughout the mediation process, the solution being negotiated, agreed. Mediation allows traders to keep good relations existing commercial and sometimes creates new ones.

Even if mediation does not reach an agreemen, there is no penalty or legal consequence , the parties being able to continue to seek to resolve the dispute to court or arbitration and other dispute resolution institutions. The only obligation that any disagreement incubated parties being to preserve the confidentiality of information disclosed during mediation.

Moreove, mediation as a non-contentious procedure under Directive 52/2008 of the EU, do not interrupt the limitation period, an important aspect in managing the dispute between traders that because this issue can not invoke the mediation as a way of delaying the flow limitation period. [Directive 52/2008 EC on alternative ways to resolve commercial disputes in member countries of the EU].

² Guide to Mediation, Ignat C Zeno S , Danilet C, University Publishing House , Bucharest, 2010

III. Conclusions on mediation as contractual clause

In the context of the Civil NCP requires certain rules and procedures of the action in court, mediation, as well as contractual clauses can only fill procedure inform [Law 192/2006, Art 2, paragraph (1) If the law provides otherwise, parties, individuals or legal entities are required to attend the briefing on the benefits of mediation, including, if necessary, after the onset of a trial before the courts in order to resolve in this way the conflicts in civil, family, criminal and other matters, as provided by law], which is mandatory, so that the latter no longer needful traveled as mediation procedure is on the one hand required (due to contractual clause) and, on the other hand, can quickly resolve the dispute so that no dispute to court. [Law 134/2010 on Civil NCP].

If the parties have not stipulated any clause relating to the mediation procedure, they are forced to go through mediation procedure under penalty of dismissal by the court as inadmissible. [Law 192/2006, article 2 , para. (1[^] 2) the court shall reject the application for summons for failure inadmissible the applicant's obligation to attend the information meeting on mediation prior to the request for summons , or triggering process by the deadline given by the court to this end, the material litigation referred to in art. 6[^]1 paragraph (1) a) - f)] stating this clause on mediation, this information session is not mandatory.

Article 21, paragraph 1 of the Civil NCP, allows the court to refer parties to mediation so as to resolve the dispute amicably until the next hearing. [Article 21 of the NCP Civil (1) The judge will advise the parties of the dispute amicably through mediation, special law]

Furthermore both the judiciary and arbitration , and other authorities having jurisdiction shall inform the parties of the possibility and advantages of using mediation procedure and directs them to use this opportunity to resolve conflicts between them [Law 192/2006, art. 6].

Although mediation agreement , by law 192/2006 , does not have the character and strength of enforceable Community law by Directive 52/2008 EU sets out clearly and unequivocally that the mediation agreement or negotiation, is enforceable understanding of mediated or negotiated by traders to the litigation. [Directive 52/2008 EC on how alternative commercial dispute resolution EU countries].

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2. Law no. 192/2006 on the organization and the profession of mediator;
3. Directive 52/2008 EC on alternative ways of resolving commercial disputes in the EU Member States;
4. Law no. 134/2010 on the Code of Civil Procedure.