

## Legal Framework of Mediation and the Mediator Status under Bulgarian Law

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**Abstract:** *The study outlines the legal framework of mediation and the legal status of mediators under the Bulgarian law. It also comments on some of the European acts concerning mediation and implementation of the Directive 2008/52/EC requirements in the Bulgarian legislation system. The paper clarifies certain possibilities for applying mediation in cases of civil and administrative disputes.*

**Key Words:** *Mediation; Legal Framework of Mediation in Bulgaria; Alternative Dispute Resolution; Directive on Certain Aspects of Mediation in Civil and Commercial Matters; Bulgaria.*

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### Introduction

As part of the policy of the European Union to create an area of freedom, security, and justice, citizens of the EU member countries have now access to judicial as well as extra-judicial means of dispute resolution. The importance of these alternative methods is increasing in modern society and they include the Ombudsman, reconciliation, negotiation, arbitration, and mediation. Originally, these methods were considered new, dating back to the last decades of the 20<sup>th</sup> Century.<sup>1</sup> Actually, they have existed for a very long period of time and have played an important role in many cultures throughout the world. Their origins can be traced back to the traditional societies.<sup>2</sup>

Mediation can offer parties a faster and more cost-effective resolution of disputes. In some countries it is a well-known procedure and a considerable number of disputes are resolved precisely through it. Although it is regulated by law in Bulgaria, mediation is still not very popu-

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<sup>1</sup> See for example MANEV, M. *Mediation and the Civil Litigation*. 1<sup>st</sup> ed. Sofia: Flyorir, 2004, p. 9. ISBN 954-8226-78-2 [МАНЕВ, М. *Медияцията и гражданският процес*. 1. изд. София: Фльорир, 2004, стр. 9. ISBN 954-8226-78-2].

<sup>2</sup> See also BARRETT, J. T. and J. BARRETT. *A History of Alternative Dispute Resolution: The Story of a Political, Cultural, and Social Movement*. 1<sup>st</sup> ed. San Francisco: Jossey-Bass, 2004, p. 2. ISBN 0-7879-6796-3.

lar and the disputes resolved through it are rather few compared to the numerous legal proceedings. However, its popularity is gradually increasing due to various reasons, including the Ministry of Justice which supports a public register (electronic and paper) of mediators and organizations which are authorized to provide mediator trainings.

With reference to this, the aim of the presented paper is to provide characteristics of the legal framework of mediation in Bulgaria and some of the possibilities of applying it, such as procedures and mediator status.

## Legal framework of mediation in Bulgaria

### *General characteristics of mediation according to the Bulgarian legislation*

The Committee of Ministers of the Council of Europe adopted four recommendations on mediation and other alternative means of dispute resolution, with the purpose of dissemination and efficient application of the principles set out in these recommendations.<sup>3</sup> The member countries are recommended to introduce in their legislation systems alternatives to judicial proceedings that will provide the European citizen with a better access to justice, which is in line with the requirement of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

In Bulgaria mediation was legally regulated for the first time with the Mediation Act of 2004 (MA), and until this the adoption was an almost unknown procedure. According to this act, mediation is a voluntary and confidential procedure for out-of-court resolution of disputes, where a third party mediator assists the disputants in reaching a settlement. The MA settles the relationships connected with mediation and the procedure itself as well as the form and content of reached agreements.

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<sup>3</sup> They are: *Recommendation No. R (98) 1 of the Committee of Ministers to Member States on Family Mediation* [1998-01-21]. Recommendation of the Council of the European Union, No. R (98) 1; *Recommendation Rec (2002) 10 of the Committee of Ministers to Member States on Mediation in Civil Matters* [2002-09-18]. Recommendation of the Council of the European Union, Rec (2002) 10; *Recommendation No. R (99) 19 of the Committee of Ministers to Member States Concerning Mediation in Penal Matters* [1999-09-15]. Recommendation of the Council of the European Union, No. R (99) 19; and *Recommendation Rec (2001) 9 of the Committee of Ministers to Member States on Alternatives to Litigation between Administrative Authorities and Private Parties* [2001-09-05]. Recommendation of the Council of the European Union, Rec (2001) 9.

The normative regulation of mediation is done under item 16 of the Strategy for Reform of the Bulgarian Judicial System as an alternative to court proceedings and in accordance with the harmonization of the Bulgarian legislation with that of the EU countries. With reference to this, Directive 2008/52/EC of the European Parliament and of the Council was adopted. The directive concerns certain aspects of mediation in civil and commercial matters whose requirements were introduced in the Bulgarian law by amending the MA of April 1<sup>st</sup>, 2011. The subject of mediation can be both legal and non-legal disputes. According to article 3 of the MA, it is applicable to civil, commercial, labour, family, and administrative disputes, related to consumer rights and other disputes between physical and/or legal persons, including any cross-border disputes and the ones provided for in the Criminal Procedure Code. In this sense, the disputes are differentiated according to their subject. Mediation shall not be conducted if a law or another statutory instrument provides for another procedure for concluding agreements. In Bulgaria, mediation is not mandatory and it is completely voluntary. The court may also invite the parties to attend an information session on the use of mediation as a means of dispute resolution. These rules are set out in the Civil Procedure Code (CPC), in force since March 1<sup>st</sup>, 2008.<sup>4</sup>

In civil proceedings, the court may invite the parties to use mediation or other means for amicable settlement before the dispute is heard at an open hearing (according to art. 140, par. 3, sent. 2 CPC). In addition, art. 145, par. 3 of the Civil Procedure Code provides for the obligation of the court during the first hearing of the case to invite the parties to agree on a settlement. This can be achieved by using one of the alternative methods of dispute resolution. If the parties agree to undertake mediation procedures, the case is to be suspended. The case can be resumed within a period of six months at the request of each party (art. 231 CPC). In case the parties do not agree to undertake mediation or during the mediation procedure itself they do not reach an agreement, there are grounds to continue the legal proceeding without any negative consequences for the two parties.<sup>5</sup>

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<sup>4</sup> *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters* [2008-05-21]. Directive of the Council of the European Union, No. 2008/52/EC.

<sup>5</sup> In England and Wales, for example, the court may penalize the party who does not engage in alternative dispute resolution by paying litigation cost even when it wins the case. In other cases the successful party might receive an adverse costs order if it agreed to mediate, but delayed unreasonably in doing so. See Court Decision *Nigel Witham Ltd. v. Robert*

The court is obliged to invite the parties to mediation or another alternative method in divorce proceedings before court hearings (art. 321, par. 3 – 5 CPC). According to art. 49, par. 2 of the Family Code (effective of October 1<sup>st</sup>, 2009), the court guides spouses to reconciliation through mediation or another method of reaching an amicable settlement. With reference to this, mediation replaces the mandatory conciliation proceedings under the repealed Family Code (active from 1985 to October 1<sup>st</sup>, 2009), but conducting it, according to the new Family Code, is not mandatory. Divorce itself cannot be terminated by mediation. If agreement is reached, it is private, contractual in nature and cannot change the civil status of the person. When agreement is reached, depending on its contents, there are different effects. For example, the parties may agree not to terminate their marriage because they have clarified the misunderstandings that have upset their marital relationship. In this case the divorce proceedings should be terminated. It is possible to continue the divorce proceeding, but to transform the case into a divorce by mutual consent, namely non-contentious proceedings without an inquiry, if the parties have reached an agreement on the consequences of the divorce. In this case they have to agree on custody rights and residence of the children, personal relationships, and financial support of children as well as on the use of the family home, spousal maintenance, and the family name. In divorce cases, agreement has legal effect only after it is approved by the court.

Except for the above mentioned provision, the Family Code does not refer explicitly to mediation, but its application is possible in many hypothetical cases in which the spouses could resolve their disagreements by an agreement. Through mediation it is possible to reach an agreement concerning the conclusion and contents of a prenuptial agreement (the signature and contents must be certified by a notary). As mentioned above, the consequences of a divorce can be determined with agreements under article 49, par. 4 and article 5 of the Family Code (depending on whether the divorce is by claim or by mutual consent).

Parents can agree on the place of residence of the child, the custody rights, the personal relations they would have with the child, and their

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Smith and Others [No. 2] [2008] EWHC 12 (TCC), quoted in ODDY, A. J., A. PHILLIPS and M. McCLURE. Mediation Country Report England and Wales. In: *ADR Center* [online]. 2014. 7 p. [cit. 2014-07-14]. Available at: [http://www.adrcenter.com/jamsinternational/civil-justice/Mediation\\_Country\\_Report\\_England\\_and\\_Wales.pdf](http://www.adrcenter.com/jamsinternational/civil-justice/Mediation_Country_Report_England_and_Wales.pdf).

financial support, etc. when they do not live together (the agreement is also approved by the district court).

### *Form and contents of agreements reached through mediation*

In certain cases parties would prefer to settle a legal dispute whose purpose is to reach an agreement of contractual nature. This agreement could be formal as well as informal. The law determines the method of concluding the agreement. The form may be oral, written, or written with notary certification.

The contents of the written agreement, which may be approved by the court in order to have the effect of a court settlement, are explicitly determined. Such agreements must contain the following details: the place and date where the said agreement was reached; the names and addresses of the parties; the content which was agreed on; the name of the mediator; the date when the procedure was started; and the signatures of the parties. The content of the agreement may include information concerning penalties for failure to fulfill obligations, such as compensations, defaults, etc.

According to article 417, paragraph 3 of the Civil Procedure Code, the applicant may obtain an order for immediate execution and issue a writ of execution when a deed, agreement, or another contract with notarized signatures containing obligations to pay cash or other fungible items as well as obligations to submit certain items.

In implementation of article 6 of the Directive 2008/52/EC, the Bulgarian Mediation Act was amended in 2011 (see State Gazette, issue 27 from 2011, effective of April 1<sup>st</sup>, 2011), when the requirement to ensure the ability of the parties or of one of the parties with the explicit consent of the others, to request to make enforceable the content of a written agreement reached through mediation was introduced. The court can approve the agreement after it is confirmed by the parties and does not violate the law and contradict morality. The opinion of the Prosecutor is also heard if he participates as a party. The court settlement has the meaning of an enacted court decision. This court settlement is a court enforcement order on the basis of which a writ of execution can be issued. The approval of the settlement can be done during pending legal proceedings and, since the amendments from 2011, with separate contentious proceedings, according to article 18 of the Mediation Act.

The settlement resulting from mediation which has been made enforceable in a member state should be recognized and declared enforceable in the other member states on the basis of the Council Regulation (EC) No. 44/2001 of December 22<sup>nd</sup>, 2000, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters or the Council Regulation (EC) No. 2201/2003 of November 27<sup>th</sup>, 2003, Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility.

### ***The mediation procedure and the limitation periods***

According to article 8 of the Directive 2008/52/EC, member states are obliged to ensure that parties who choose mediation are not subsequently prevented from initiating judicial proceedings or arbitration in reference to the same dispute by the expiry of limitation or prescription periods during the mediation process. This requirement is implemented in the Mediation Act, and it is exclusively regulated that during the mediation proceeding there are no limitation periods, i.e. the beginning of the mediation procedure suspends the limitation periods.

The maximum length of mediation procedures in Bulgaria could be 6 months.

### **Mediation in administrative disputes**

As of 2006 in Bulgaria operates the Administrative Procedure Code (APC) which, unlike the Civil Code of Proceedings (CCP), does not refer explicitly to mediation or other methods of alternative disputes resolution. Despite this there is a possibility for parties to use them in cases of administrative disputes by agreeing with the help of mediators. For example, article 20 with reference to article 9, paragraph 4 of the APC determines the right of parties to stop the dispute by reaching an agreement. It has an extra-judicial nature and is concluded between the administration and the parties to the proceedings or only between the parties to the proceedings. In this case the agreement must be approved in writing by the administrative authority. The agreement may be concluded prior to the entry into force or to challenge the administrative act before the court. In this case upon reaching or upon approval of the agreement, the administrative act is invalidated and the agreement supersedes the administrative act. According to the practice of the Supreme Administrative Court, the agreement has the nature of an administrative contract

(Decision No. 4108/2010-03-29 of the Supreme Administrative Court adm. case 16167/2009).

The provision of article 178, paragraph 6 of the APC provides for the possibility to conclude a judicial settlement. Settlement confirmed by the court has the significance of an effective court judgment.

The Ministry of Justice has used the mediation process to resolve administrative disputes – between the ministry and its former employee. The dispute has been settled out of court particularly through this method.<sup>6</sup>

There are cases in which mediation cannot be applied. For example, administrative acts, through which the foreign policy, defense, and security of the country are immediately implemented, are not subject to judicial appeals. Therefore, the parties cannot reach agreements concerning these matters through mediation. In addition, mediation cannot be applied in cases referring to the contestation of secondary legislative administration acts under chapter X, section III of the APC.

### **Legal status of mediators in Bulgaria**

After the Mediation Act has entered into force, the Minister of Justice issued an ordinance under article 8, paragraph 4 of the MA (Ordinance No. 2 from 2007, State Gazette No. 26/2007) regulating the terms and conditions for the approval of the organizations which deliver training to mediators; the requirements of mediation training; the order of entry, removal, or deletion of mediators from the Uniform Register of Mediators (URM); and the procedural and ethical rules of mediator conduct.

This ordinance defines the basic training requirements that have to be met by people who would like to acquire qualification as mediators. The training should consist of minimum 60 academic classes that provide both theoretical knowledge and practical experience, with the practical training occupying minimum the half of the classes.

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<sup>6</sup> MALEVA, V. The Contribution of the Ministry of Justice for the Introduction and Development of the Institute of Mediation in Bulgaria. *European Integration and Law Journal*. 2007, no. 3, p. 24. ISSN 1312-5524 [МАЛЕВА, В. Приносът на Министерството на правосъдието за въвеждане и развитие на института на медиацията в България. *Европейска интеграция и право*. 2007, н. 3, стр. 24. ISSN 1312-5524].

In Bulgaria mediators have the status of private entities while in some other EU member states they depend on public organizations.<sup>7</sup> Mediators have to meet a number of requirements of professional and ethic nature.

According to the MA, a mediator may be only a legally capable person who meets the following requirements: has not been prosecuted or convicted for committing crimes; has successfully undergone a course for mediators; has not been deprived of the right to exercise a profession or conduct an activity; has a permit for permanent residence in the Republic of Bulgaria in the case the person is a citizen of a foreign country (this requirement does not apply to nationals of the European Union member states, other countries of the European Economic Area and Switzerland); and has been entered in the Uniform Register of Mediators by the Minister of Justice.

Mediator candidates submit a sample application form in electronic and paper formats at the Uniform Register of Mediators. In case they do not meet the regulatory requirements, the Minister of Justice denies by order entry in the Register. The order may be appealed before the Supreme Administrative Court of Bulgaria under the Administrative Code.

For certain specific disputes, such as these related to copyright and related rights, the Law on Copyright and Related Rights regulates the additional requirements that mediators must meet. For example, in cases of disputes between organizations for collective management of copyrights and a user and/or a users' organization concerning the conclusion or execution of a contract between them (e.g. publishing contract, etc.), mediators must possess specialized knowledge in the sphere of copyright and related rights. In addition, they must be included in a special list of mediators under the supervision of the Minister of Culture.

Rules of Conduct for Mediators serve as behavior guidelines in carrying out the practical activities of these professional mediators as well as promoting public confidence in mediation as a process of alternative dis-

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<sup>7</sup> With reference to this see the *Report of the Supreme Judicial Council on the 46<sup>th</sup> Meeting of the Contact Persons of the European Judicial Network in Civil and Commercial Matters* [online]. 2013-09-03. 9 p. [cit. 2014-07-14]. Available at: [http://www.vss.justice.bg/bg/evro/ejnccm/Eu\\_lan2013.pdf](http://www.vss.justice.bg/bg/evro/ejnccm/Eu_lan2013.pdf), where it is said that in the Czech Republic and Finland mediators depend on public organizations, while in Bulgaria, Belgium, Greece, Poland, etc. they have the status of private entities; in other countries such as Germany, Hungary, Great Britain, and Portugal mediators can be both private and public entities.



pute resolution. The guiding principles in the work of mediators are as follows:

A. Competence and accountability:

Mediators must possess the necessary qualifications and competences to manage effectively the mediation process and satisfy the expectations of the participating parties. An important part of the mediator's qualifications are skills related to establishing effective communication with each party and the ability to control their own behavior in accordance with the procedural and ethical rules of Conduct for Mediators. The parties, taking part in the dispute, have the right to choose mediators, depending on their experience and qualification.

B. Conscientiousness and impartiality in conducting the mediation process:

Mediation is based on the impartial work of mediators. They agree to conduct the procedure only if they can ensure their independence, impartiality, and neutrality. Mediators sign a declaration of impartiality where they also reveal the circumstances of each procedure for which they are appointed to work on, and present then to the parties to the dispute according to article 13, paragraph 2 of the MA. This principle is further developed in the provision in article 10, paragraph 3 of the MA where it is stated that "A Mediator shall withdraw from the procedure upon occurrence of any circumstances as would cast doubt on the independence, impartiality and neutrality thereof." In this case, the procedure must be given to another mediator. Mediators must work conscientiously to reach mutually beneficial agreements between the parties, and must not allow private prejudices or preferences to affect the mediation process.

At the very beginning of the mediation process, when they introduce themselves to the parties, mediators are obliged to disclose any circumstances that may result in conflict of interests. There is a conflict of interests when mediators have personal or business relations with one of the parties; in the case of direct or indirect material, financial, or other interest based on the consequences of the mediation process; or when mediators act in a capacity other than that of mediators to the advantage of one of the parties to the dispute, namely lawyers, business partners, etc. In case the conflict of interests jeopardizes the impartiality of the mediation procedure, mediators must stop their work. Mediators are obliged to neutralize the attempts of outside institutions or people to cause conflict

of interests and therefore affect the outcome of the mediation process or favour one of the parties to the dispute.

### C. Confidentiality:

During the mediation process, the acquired information about the parties to the dispute and the nature of their disagreement is considered confidential, and mediators do not have the right to disclose the circumstances, facts, and documents related to the procedure. Mediators guarantee the confidentiality of information. They can use the acquired information and make it public with the exclusive consent of the parties to the dispute and in their interest. The provision in article 10, paragraph 4 of the MA is also in accordance with the rule of confidentiality. It states that “the mediator may not communicate to the other participants in the procedure any circumstances concerning solely one of the disputants without the consent of the said disputant.”

An exception to the rule of confidentiality are the cases described in article 7, paragraph 3, points 1 – 3 of the MA – to ensure the protection of public order and the best interests of children; for the purposes of criminal proceedings; to prevent the physical or psychical integrity of a particular person; to implement and enforce an adopted agreement.

## Conclusion

Mediation is becoming a modern and effective method of resolving various types of disputes. Over the last years the number of cases, in which agreement has been reached through mediation, has increased, but it still remains a rather uncommon practice. To achieve the goals of its regulation it is necessary to popularize mediation further. It can be recommended that the government secures funding so that certain disadvantaged groups could take advantage of mediation. The government could also cover the expenses for cases that are forwarded by the court to be solved through mediation in order to encourage parties to choose this method for resolving disputes and facilitate the work of the judicial administration.

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