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A further step towards institutionalization of mediation in Greece: Recent developments after Law 4512/2018

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Abstract

In January 2018, the new Mediation Act (MA) was enacted, replacing all former legislation and constituting now the sole legal instrument regulating mediation in Greece. The MA repeats and enhances the pre-existing legal framework whereas, at the same time, it introduces two significant innovations: a) the establishment of the Central Mediation Committee and b) a mandatory initial mediation session for limited categories of cases. Such provisions, to the extent that they contain mandatory elements and, in effect, particularize the process, signal a further step towards institutionalization of mediation. Following the current international trends, mediation in Greece is being gradually transformed from an inherently voluntary and informal process to a pure regulatory tool aiming at saving resources in the administration of justice.

Keywords

Mediation, ADR, institutionalization, Central Mediation Committee, mandatory mediation, Greek Mediation Act

I Introduction

Almost eight years after the enactment of Law 3898/2010,[1] which was the first piece of legislation to regulate mediation in Greece in compliance with Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters,[2] a radical reform of the mediation regime took place earlier this year. Law 4512/2018[3] (the new Mediation Act, hereafter: MA) was published in January 2018 and replaced former Law 3898/2010 as well as the secondary legislation accompanying this, constituting now the sole legal instrument regulating mediation in Greece.

Chapter B of the MA (Articles 178-206), exhaustively deals with all issues pertaining to mediation in both cross-border and domestic civil and commercial disputes. The said Chapter is divided into three Subchapters: a) Subchapter A (Articles 178-177) is titled ”Provisions on the Institution of Mediation”; b) Subchapter B (Articles 188-197) is titled ”Mediators Qualifications – Code of Conduct – Disciplinary Law”; and c) Subchapter C (Articles 198-206) is titled ”Training Organizations – Mediators Accreditation”.

The new MA repeats and enhances the pre-existing legal framework whereas, at the same time, it introduces two significant innovations: a) the establishment of the Central Mediation Committee and b) a mandatory initial mediation session for limited categories of cases. Such provisions, to the extent that they contain mandatory elements and, in effect, particularize the process, signal a further step towards institutionalization of mediation. Following the current international trends, thus, mediation in Greece is transformed from an inherently voluntary and informal process to a pure regulatory tool aiming at saving resources in the administration of justice.

Bearing this in mind, this paper should be considered as the continuation of the one published in Volume V of the Yearbook on International Arbitration and ADR,[4] which contains a comprehensive analysis of the historical and legal underpinnings of mediation in Greece.[5] The primary purpose of the present paper, hence, is to provide a succinct illustration of innovative provisions of the new mediation regime. In this sense, it cannot avoid being descriptive to a certain degree; it offers, however, to non-Greek jurists the opportunity to familiarize with the legal framework currently in force and to comprehend the problematic points of this reform.[6]

1 Law 3898/2010. Mediation in civil and commercial matters, Government Gazette A 211.

2 Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ C 286, 17 November 2005, 1.

3 Law 4512/2018. Provisions on the implementation of the structural reforms of the economic adjustment program and other provisions, Government Gazette A 5.

4 Vassiliki Koumpli, The regulation of mediation in cross-border disputes: The model of Greece, in: Marianne Roth/Michael Geistlinger (eds.), Yearbook on International Arbitration and ADR – Volume V, Zurich/Vienna 2017, 269-284.

5 For a thorough analysis one can also refer, among others, to Georgios Diamantopoulos/Vassiliki Koumpli, On mediation law in Greece, Revue hellénique de droit international, 67 (2014) 2, 361-394; Georgios Diamantopoulos/Vassiliki Koumpli, Mediation: The Greek ADR Journey Through Time, in: Carlos Esplugues/Louis Marquis (eds.), New Developments in Civil and Commercial Mediation, Switzerland 2015, 313-343.

6 An assessment of the new mediation regime in Greek language can be found in

To this end, after this short introduction (I.), the paper analyzes the main organizational and functional aspects of the new mediation regime focusing on the establishment and the competence of the Central Mediation Committee (II.) and the introduction of the mandatory initial mediation session for certain categories of disputes (III.), respectively, and ends with some concluding remarks of the author (V.).

II Organizational aspects of mediation

The administration of the institution of mediation is thereon entrusted to a new body, the Central Mediation Committee. Articles 186 and 187 MA provide for the establishment (A.) and the competence (B.) of the Central Mediation Committee as follows:

A The establishment of the Central Mediation Committee

The Central Mediation Committee consists of the following members, appointed by the Minister of Justice, Transparency and Human Rights: a) five judges or prosecutors of civil and criminal justice; b) two university professors experienced in mediation, coming from more than one educational institution, but at least one from a law school; c) two representatives of the plenary of the Bar Associations of the country; d) three representatives of the Ministry of Justice, Transparency and Human Rights; e) one mediator representing professional agencies; and f) two mediators following a call for interest.[7]

The most senior of the judiciary serves as chairman of the Central Mediation Committee. The term of office of the chairman and the members of the Committee shall be three years and may be renewed once. The members of the committee shall be prohibited from maintaining any cooperation or relationship with the mediators training bodies.

The importance that the legislator gives to the Central Mediation Committee is depicted in the fact that it is composed of persons of recognized standing equipped with guarantees of independence in the performance of their duties.

B The competence of the Central Mediation Committee

The Central Mediation Committee is a body with wide competences to deal with any matter concerning the implementation of the institution of mediation in Greece.

Its main duties are as follows: a) it is responsible for keeping the mediators register and for collecting the mediators' annual progress reports; b) it is responsible for the compliance of mediators with the obligations arising from the MA and for the implementation of the disciplinary law and the imposition of discipli-

Athanassios Georgiadis et al. (eds), Mandatory mediation and emerging issues, Etaireia Nomikon Voreiou Ellados 74, Athens/Thessaloniki 2018; Haris Meidanis, Legislative adventures of mediation, Synigoros, 125 (2018), 30-32; Panayiotis Yiannopoulos, The attempt of extrajudicial dispute settlement through mediation as a condition for the admissibility of the hearing under Law 4512/2018, Athens/ Thessaloniki 2018.

7 For each full member of the Central Mediation Committee a substitute shall be appointed under the same procedure.

nary sanctions; c) it is responsible for all matters concerning the mediators training bodies; d) it is responsible for conducting the written and oral examinations of the mediation accreditation candidates.

Moreover, if no agreement can be reached between the parties on the person of the mediator and/or the place of the mediation, the Central Mediation Committee shall appoint the mediator and/or determine the place of the mediation by a reasoned decision upon request of either party. To this objective, the committee shall take into account the nature of the dispute brought to mediation, the procedural provisions on local jurisdiction, the specific skills of the mediator and the number of mediations he has conducted.[8]

Obviously, the role of the Central Mediation Committee is of the utmost importance and decisive for the management of institutional issues of mediation across the country. It could be argued, nevertheless, that the appointment of the mediator and the determination of the place of the mediation by the committee are, in particular, incompatible with the voluntary character of mediation. In the event that the parties are unable to agree on the choice of one of the approximately 2000 accredited mediators or of the place of the mediation one can, however, hardly expect that such parties will be able to negotiate in good faith and resolve their dispute by reaching an agreement.[9]

III Functional aspects of mediation

The parties can submit their dispute to mediation at any stage before or even after their recourse to the court. As a general rule, a dispute can be submitted to mediation only if the parties wish so. The MA exceptionally provides that, with regard to particular disputes, a mandatory initial mediation session is required constituting a formal condition for the admissibility of the hearing of court proceedings. In both cases, however, the parties remain in the mediation process only if they wish so and their dispute is similarly resolved only if they wish so, i.e. by written agreement.

A The innovation: Voluntary mediation and mandatory initial mediation session

1 Voluntary mediation

Civil and commercial law disputes can be voluntarily submitted to mediation as long as the parties have the authority to dispose of the subject of the dispute, namely, where the law does not require a court judgment for its resolution. Such disputes are: disputes between employees and employers, corporate and commercial disputes, maritime disputes, banking disputes, property disputes, car accident disputes, leasing disputes as well as disputes arising from the execution of technical works, contracts etc.[10]

8 Article 183 para. 2 MA.

9 See also Haris Meidanis, Legislative adventures of mediation, Synigoros, 125 (2018), 31.

10 Article 180 MA.

There may be one or more mediator(s) appointed by the parties' mutual consent.[11] As stated above, if no agreement can be reached between the parties on the person of the mediator and/or the place of the mediation, the Central Mediation Committee shall appoint the mediator and/or determine the place of the mediation by a reasoned decision upon request of either party.[12] The procedural details of the conduct of the mediation shall be determined by the mediator in agreement with the parties, otherwise, the mediator may conduct the mediation in a manner he deems fit, taking into account the particular characteristics of the dispute.[13]

The MA stresses the importance of the principle of impartiality of the mediator and the principles of good faith and honesty that shall govern the actions of the parties during the mediation. It also underlines the confidential nature of the mediation process.[14] Before the process is initiated, all participants shall agree in writing whether the process shall be confidential or not. The parties may also agree to observe confidentiality as regards the content of the agreement that they may reach unless the disclosure of its content is necessary for its execution or is required for reasons of public policy.[15] The parties are required to attend the mediation accompanied by their lawyers[16] (with the exception of consumer disputes and small claims).[17]

The mediator(s), the parties, their lawyers and those involved in any way in the mediation process shall not be considered as witnesses and discussions, proposals and any statements made by the parties in the mediation process as well as the mediator's views shall not constitute evidence before courts or in arbitration proceedings, except where justified on grounds of public policy, the protection of minors or physical integrity and mental health of a person or where a criminal offence has been committed.[18]

2 Mandatory initial mediation session

a The MA provisions

Submission to a mandatory initial session with the mediator is for the first time introduced for specific disputes enumerated in the MA.[19] The requirement of an initial mediation session is fulfilled if all parties appear before the mediator, even if they agree not to proceed to mediation.[20]

Disputes submitted to a mandatory initial mediation session are: a) disputes between landlords; disputes between the administrators of condominium and landlords; disputes concerning neighbouring properties; b) disputes relating to

11 The mediator is not obliged to accept his appointment (see Article 183 para. 8 MA).
12 Article 183 para. 2 MA.
13 Article 183 para. 3 MA. The parties may, in any case, opt for the application of more specific rules laid down by mediation centres (see Article 183 para. 3 MA).
14 Articles 183 para. 4, 189, 190 and 192 MA.
15 Article 183 para. 5 MA.
16 Article 182 para. 4 MA.
17 See infra, at III.A.2. and note 26.
18 Article 183 paras 6 and 7 MA.
19 Article 182 MA.
20 Article 182 para. 4C MA. This means that the parties are only obliged to attend the initial session with the mediator; they are not obliged, however, to even begin the mediation, i.e. to sign the agreement of submission of their dispute to mediation.

compensation claims resulting from road traffic accidents, as well as claims arising from motor insurance contracts, unless the harmful event resulted in death or personal injury; c) disputes concerning professional fees; d) family law disputes (care of child, maintenance, participation in acquisitions etc.); e) disputes arising from medical malpractice; f) disputes concerning trademarks, patents and industrial designs; and g) disputes concerning stock exchange contracts.[21] Trials solely on enforcement and interim measures are excluded from mandatory mediation.[22] The selection of these categories of disputes, which admittedly have little in common and their submission to mediation is not essentially justified, clearly shows that – at least at the current moment – mediation is primarily used as a tool to reduce court workload.

In case of the above enumerated disputes – with the exception of the case where the involving litigants are of unknown residence –[23] the lawyer of the claimant shall submit a request for recourse to mediation to an accredited mediator included in the register of the Ministry of Justice, Transparency and Human Rights.[24] The mediator shall notify the other party (or parties) of the request and arrange the date and place of the initial mediation session. The session takes place no later than fifteen days from the day following the notification of the claimant's request to the other party (or parties), and the mediation must be completed within the next thirty days. The parties may agree to extend this thirty-day period for a period of up to another thirty days.[25]

The parties are required to attend the mediation accompanied by their lawyers (with the exception of consumer disputes and small claims).[26] If the physical presence of both parties and the mediator cannot be achieved at the same place and time, the mediation session may be carried out by a teleconferencing system accessed by all parties.[27] The mediation process cannot last for more than twenty four working hours, unless the parties agree otherwise.[28]

As regards the mediation process and the principles governing it once the parties agree to submit their dispute to mediation, the general provisions of the MA are, of course, applicable, as described above in relation to the voluntary mediation.

It is to be noted that the provision on the mandatory initial mediation session has not been applied yet, but it shall take effect on 16 September 2019.[29]

21 Article 182 para. 1 MA.
22 Article 182 para. 2A MA.
23 Article 182 para. 5 MA.
24 If the parties agree to submit their dispute to mediation and do not agree on the person of the mediator chosen by the claimant, they can appoint another accredited mediator (or, ultimately, resort to the Central Mediation Committee to appoint the mediator).
25 Article 182 para. 4 MA.
26 Article 182 para. 4 MA. However, consumer disputes are not included in the categories of disputes where the requirement of the mandatory initial mediation session applies. This may be, thus, a drafting inaccuracy.
27 Article 182 para. 4 MA. The teleconferencing process can also take place via an electronic platform, which shall be approved by joint decision of the Ministers of Economy and Development, Finance and Justice, Transparency and Human Rights, regulating all relevant technical and administrative issues.
28 Article 182 para. 6 MA.
29 Article 206 MA, as amended by Article 19 of Law 4566/2018. Integration into Greek legislation of Council Directive 2015/637/EU of 20 April 2015 (EEL 106/24.4.2015) and other provisions, Government Gazette A 175.

b The justification

As the preamble to Article 182 MA explains, CJEU preliminary reference rulings in the *Alassini*[30] and *Menini*[31] cases served as the basis for providing compatibility of the mandatory initial mediation session provisions with the protection of the fundamental right of the parties to have effective recourse to justice. The ability of the parties to leave the mediation process at any time and to seek judicial recourse, the limited costs related to the mandatory initial mediation session, the provision of a short period within which mediation shall be concluded as well as the suspension of prescription periods of the rights pending the mediation process[32] confirm such compatibility. The right of recourse to justice might be affected by the introduction of mandatory mediation; the restriction in question, however, was considered by the Greek legislator as permitted, since the aim sought by the relevant provisions, namely the speedier and less expensive settlement of disputes and the lightening of the burden of the judicial system, to the benefit of general interests, was considered proportionate to the restriction imposed on fundamental rights.[33]

Arguably, a particular feature of the mandatory mediation regime in Greece providing that the parties are required to attend the mediation process with their respective lawyers gives rise to costs together with the additional mediator's fees and may constitute a barrier to the access to justice.[34] The exclusion of consumer disputes from the scope of the requirement of a mandatory initial mediation session as well as the exclusion of both consumer disputes and small claims from the scope of the requirement to attend with a lawyer currently appear to speak for the compatibility of the Greek mediation regime with the relevant case law of the CJEU.

3 Lawyers' duty to inform

Also for the first time it is provided that, prior to bringing the case to court, lawyers are obliged to inform their clients in writing about the mediation option as a dispute resolution mechanism as well as whether their dispute is subject to the

30 CJEU, *Rosalba Alassini v Telecom Italia SpA*, C-317/08, *Filomena Califano v Wind SpA*, C-318/08, *Lucia Anna Giorgia Iacono v Telecom Italia SpA*, C-319/08, and *Multiservice Srl v Telecom Italia SpA*, C-320/08, judgment of 18 March 2010, ECLI:EU:C:2010:146.

31 CJEU, *Livio Menini and Maria Antonia Rampanelli v Banco Popolare – Società Cooperativa*, judgment of 14 June 2017, C-75/016, ECLI:EU:C:2017:457.

32 See infra, at III.B.

33 As the CJEU has confirmed in *Menini*, the voluntary nature of mediation does not lie in the freedom of the parties to choose whether or not to use that process but in the fact that the parties are "in charge of the process", may "organize it as they wish" and "terminate it at any time" (see CJEU, *Livio Menini and Maria Antonia Rampanelli v Banco Popolare – Società Cooperativa*, judgment of 14 June 2017, C-75/016, para. 50). Besides, in view of the CJEU in *Alassini*, an optional out-of-court settlement procedure is not as efficient to achieve such objectives as is a mandatory one (see CJEU, *Rosalba Alassini v Telecom Italia SpA*, C-317/08, *Filomena Califano v Wind SpA*, C-318/08, *Lucia Anna Giorgia Iacono v Telecom Italia SpA*, C-319/08, and *Multiservice Srl v Telecom Italia SpA*, C-320/08, judgment of 18 March 2010, para. 65).

34 See in this respect Panayiotis Yiannopoulos, The attempt of extrajudicial dispute settlement through mediation as a condition for the admissibility of the hearing under Law 4512/2018, Athens/Thessaloniki 2018, 27-30.

rule of the mandatory initial mediation session. The form of the informative document shall be drawn up by the Central Mediation Committee and shall be completed and signed by the party and his lawyer. Eventually, it shall be filed with the action or any other remedy before court, also constituting a condition for the admissibility of the hearing of the case.[35]

B The embodiment: Mediation as part of the civil procedural system

With the enactment of the MA a further step towards the embodiment of mediation in the civil procedural system is taken. As a matter of fact, many of its provisions introduce new regulations and significant amendments to the Greek Code of Civil Procedure (CCP).[36] For this reason, it could be argued that many of the MA provisions should be included in the CCP, and not in a separate piece of legislation. The following can be considered as the most crucial stipulations among them in this respect:

First, as already analyzed, the mandatory initial mediation session[37] as well as the lawyer's duty to inform his client in writing about the mediation option[38] constitute a condition for the admissibility of the hearing of the case before court. In the event of a successful outcome of the mediation, the respective minutes have to be signed by the mediator, the parties and their lawyers and a certified copy has to be submitted before the secretariat of the competent first instance court in order to become an enforceable exequatur.[39] In case of mandatory mediation proceedings, if the mediation is unsuccessful, the parties are entitled to refer the case to court submitting thereto simultaneously the minutes proving the attempt and failure of the mediation in order to establish the admissibility of the hearing of the case.[40]

Second, the summons to the mandatory mediation proceedings suspends the statute of limitations,[41] all deadlines regarding the exercise of the claims and rights in question, as well as the procedural deadlines, during the mediation process. All deadlines[42] continue counting again three months following either the drafting of the minutes proving the failure of the mediation or the withdrawal statement from the mediation proceedings by any of the parties to the other party and the mediator or from the completion or annulment in any way of the mediation proceedings.[43]

Third, if a party, who has been invited by email, fax or registered mail, fails to attend the mediation session, the mediator will draft the relevant minutes and the

35 Article 182 para. 3 MA.
36 Code of Civil Procedure. Presidential Decree 503/1985, Government Gazette A 182.
37 Article 182 paras 1 and 4C MA.
38 Article 182 para. 3 MA.
39 Article 184 MA. This provision applies to both voluntary and mandatory mediation proceedings.
40 Article 182 para. 2B MA.
41 It should be noted that the relevant provision refers only to the summons to the mandatory mediation proceedings as a cause for the suspension, giving, thus, the impression that no suspension shall take place in case of voluntary mediation. This is a drafting inaccuracy expected to be corrected in an upcoming amendment of the MA.
42 As per Articles 261, 262 and 263 CC (Civil Code. Presidential Decree 456/1984, Government Gazette A 164).
43 Article 185 MA.

other party shall submit them to court. The court may then, in addition to its ruling on the merits, impose fines to litigants who were summoned in mediation proceedings, but opted not to attend (ranging from EUR 120,00 to EUR 300,00) and a further penalty of up to 0.2% of the subject matter of the dispute taking into account the overall behaviour of the party as regards their non-attendance at the mediation session and depending on the extent of their defeat.[44]

Fourth, the implementation of mediation proceedings in private disputes does not exclude the filing of an application for interim measures (injunctions) for the same case where "imminent danger" or "urgency" elements exist, in accordance with the CCP.[45]

IV Conclusion

The new Greek MA takes a further step towards institutionalization and embodiment of mediation in the civil procedural system. Mediation is no longer a purely informal and autonomous process, but it constitutes a part of the legal order and an important regulatory tool. The establishment of the Central Mediation Committee as a public body competent to deal with all issues pertaining to the institution of mediation aims to achieve its uniform management in the whole country. The mandatory initial mediation session makes mediation a prerequisite for the hearing of the case bringing it even closer to the legal system. At the same time, this middle way introduced by the newly enacted scheme bridges the gap between mandatory and voluntary mediation in an attempt not to excessively obstruct the parties' right to access to justice.

The reform of the Greek mediation regime was not without criticism by a part of legal practitioners and the judiciary, which is indicative of the cultural hurdles mediation still faces. In this context, it is worth mentioning that on 28 June 2018 Areios Pagos'[46] administrative plenary panel issued an opinion (with a marginal majority of 21-17 votes) holding that the mandatory mediation scheme introduced by the MA is contrary to the Hellenic Constitution and the European Convention on Human Rights. The mediator's fee[47] and the mandatory attendance of the parties' lawyers at the mediation are considered to give rise to high costs and obstruct access to justice. This opinion has been issued in the context of an administrative procedure where the plenary opines on issues of general interest at the request of a bar association. It does not constitute a "court judgment" and is not binding; it is, however, indicative of how the new mediation scheme is perceived at the moment.

Nevertheless, even if one accepts that mandatory elements in mediation may erode aspects of voluntariness and autonomy, there is no doubt that such ele-

44 Article 182 para. 2B MA.

45 Article 181 para. 3 MA.

46 Areios Pagos is the Hellenic Supreme Civil Court.

47 The mediator's fee is freely agreed by the parties by written agreement. If there is no written agreement Article 194 MA sets the mediator's minimum fee at EUR 170,00 for providing his services up to two hours whereas for service of more than two hours the minimum fee is set at EUR 100,00 per hour (no maximum is set); at the same time, even lower fees regarding maintenance disputes, small claims etc. are provided.

ments can be a useful tool to encourage mediation on a wider scale. In this respect, the Greek quasi-compulsory scheme can be considered as a temporary expedient to encourage wider use of mediation in general so that it eventually becomes a "complementary" dispute resolution means.[48]

It remains to be seen whether the new Greek mediation scheme will fulfil its goal, i.e. reduce court workload and save resources in the administration of justice by being seen by the parties and their lawyers as an opportunity to effectively resolve their disputes out of court or it will be regarded as a mere procedural formality.

48 Dropping out the word "alternative" of the famous ADR term.