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Legal Bulletin

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Conflict Mediation

Name of the enactment	Law No. 370/2009 amending and supplementing Law No. 192/2006 on mediation and organization of the profession as mediator ("Law No. 370/2009")
Publication	Official Gazette of Romania, Part I, No. 831 of 3 December 2009
Entry into force	6 December 2009
Connections with other enactments	- Law No. 192/2006 on mediation and organization of the profession as mediator; - Government Emergency Ordinance No. 51/2008 on the public judicial aid in civil matters.
Connections with other community enactments	- Directive of the Council of the European Union 2003/8/CE to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes; - Directive of the European Parliament and of the Council of the European Union 2008/52/CE on certain aspects of mediation in civil and commercial matters.
Main provisions	Despite the major interest for settling disputes by the alternative fashion of mediation, and for the profession as mediator, current Law No. 192/2006 proved to have many shortcomings hindering the access to mediation and, thus, the reduction of the duties of the courts of law. Law No. 370/2009 brings a series of amendments to and supplements the former regulation, implementing the provisions of Directive of the European Parliament and of the Council of the European Union 2008/52/CE (with implementation deadline for the Member States – November 2010), and with respect to the enforceable nature of the mediation agreement between the parties, consolidation of the provisions on directing the litigants towards mediation, organization of the Mediation Council and of the profession as mediator, and the insertion of the institution of mediation in new fields. As a result, please find below a series of legislative novelties inserted by Law No. 370/2009 in the field of mediation: - Judicial and arbitral authorities and other authorities holding

jurisdictional powers must act proactively in informing the litigants of the possibility and advantages of using mediation, and in providing instructions to resort to mediation for conflict settlement. The promotion of mediation is thus aimed as an actual alternative institution of settling disputes and thus taking a series of cases from the courts of law, easing their activity.

- Express provisions are inserted with respect to the freedom to provide services and the right of establishment concerning the profession as mediator. Thus, citizens of other European Union Member States or of the European Economic Area' states holding a document proving their qualification as mediator, obtained in one of such States or in Romania, acquire the capacity as mediator in Romania. To the same extent, mediators acquiring such capacity in Romania may perform the mediation activity on a permanent basis in one of the Member States of the European Union or of the European Economic Area, if such States do not regulate the achievement of such capacity based on the document attesting that such profession is lawfully performed in Romania.

- A series of amendments on the organization and operation of the profession as mediator were inserted. Among such amendments, the most significant concern the Mediation Council and the professional training of the mediators. In this respect, the members of the Mediation Council shall enjoy a 2-year term of office which may not be extended. Within one month from the entry into force of Law No. 370/2009, elections for the Mediation Council are scheduled. At the same time, a provision is inserted with respect to the fact that authorized mediators may be employed with an individual employment agreement only in the organization forms expressly provided by law.

- Provisions regarding the conclusion of the mediation agreement, development and finalization of the mediation process were, at their turn, subject to certain amendments and supplements. Generally, the mediation agreement shall have the effect of a deed under private signature. Should the dispute subject to mediation aim at the transfer of the private ownership right over real estates, the parties shall submit the agreement prepared by the mediator to the

notary public or to the court of law so that the substance and form requirements provided by the law be complied with, subject to the sanction of absolute nullity. In addition, this also applies to all cases in which the law requires, subject to the sanction of nullity, the compliance with the substance and form conditions. Moreover, mention should be made that the parties' understanding, arising subsequent to the mediation process, may be subject to the certification by the public notary, or to the approval by the court of law, as the case may be. The judgment passed by the court of law to this end shall be deemed as a writ of enforcement.

- Mediation procedure shall also apply to disputes of rights that the parties may settle in labor conflicts, which field was expressly excluded from the mediation area until publication of Law No. 370/2009.

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Corporate Law

Name of the enactment

Government Emergency Ordinance No. 116/2009 implementing certain measures regarding the activity of registration with the trade registry ("GEO No. 116/2009")

Publication

Official Gazette of Romania, Part I, No. 926 of 30 December.2009

Entry into force

14 January 2010

Connections with other enactments

- Company Law No. 31/1990, republished, published in Official Gazette, Part I No. 1066 of 17 November 2004 (**"Law No. 31/1990"**);
- Law No. 26/1990 on the trade registry, published in Official Gazette, Part I No. 49 of 4 February 1998 (**"Law No. 26/1990"**);
- Law No. 359/2004 on the simplification of formalities upon registration with the trade registry of individuals, family associations and legal entities, fiscal registration thereof and authorization of legal entities' operation, published in Official Gazette Part I No. 839 of 13 September 2004 ("**Law No. 359/2004**").

Main provisions

- **Need to enhance the settlement of the applications registered with trade registries**

Taking into account the economic crisis, GEO No. 116/2009 implements a set of measures required to remedy the gridlock existing at the offices of trade

registries, which results in the failure to comply with the rights of the traders, which has serious consequences on the commercial circuit.

Consequently, the congestion in the judicial activity has to be relieved by taking dynamic steps to remedy the overburden of courts, and to render the business activity related procedures more fluent, to secure compliance with the terms of issue of registration certificates, certificates for registration of amendments and related documents settling the registration with the trade registry.

- **Amendments regarding the competence to settle the applications for registration filed with the trade registry**

By way of derogation from the provisions of Law No. 26/1990 and of Law No. 31/1990, the competence to settle the applications for registration with the trade registry and, as the case may be, of other applications that the delegated judge can settle shall belong to the Director of the Office of the Trade Registry attached to the tribunal and/or to the person(s) appointed by the General Director of the National Office of the Trade Registry throughout a 6-month term from the entry into force of this emergency ordinance.

Applications for registration filed with offices of the trade registry prior to the entry into force of this emergency ordinance shall be settled by the director of the office of the trade registry attached to the tribunal and/or by the appointed person(s), and the settlement terms previously given shall be taken into account.

- **Applications filed with the trade registry, remaining in the competence of the commercial division of the tribunal in whose jurisdiction the trader is located**

The following applications shall remain in the competence of the commercial division of the tribunal in whose jurisdiction the trader is located:

- Applications filed by the National Office of the Trade Registry through the offices of the trade registry attached to tribunals which, prior to the entry into force of GEO No. 116/2009 were in the competence of the delegated judge, shall be submitted to the commercial division of the tribunal in whose jurisdiction the trader is located, and shall be settled immediately and with priority;
- Acknowledgement of the *de jure* dissolution according to Art. 30 of Law No. 359/2004, and upon the authorization of the legal entities' operation, shall be performed by the commercial division of the

tribunal in whose jurisdiction the trader is headquartered;

- Deregistration from the trade registry as a result of the dissolution by virtue of Art. 237 of Law No. 31/1990, and of Arts. 30 and 31 of Law No. 359/2004, shall be ordered by the commercial division of the tribunal;
- Appointment of the liquidator in the situations provided under Art. 237 para. (7) of Law No. 31/1990, and under Art. 31 para. (4) of Law No. 359/2004, shall be performed by the commercial division of the tribunal;
- In case of merger, including cross-border merger, and in case of spin-off, the person liable for the verification of lawfulness of the decision regarding the merger/spin-off, and as the case may be, of the articles of incorporation or of the amending act and for ordering the registration thereof with the trade registry shall be the commercial division of the tribunal.

- **Procedure to register the applications in the database of the trade registry by the director of the office of the trade registry attached to the tribunal and/or appointed person(s)**

Upon the settlement of applications, the director of the office of the trade registry passes resolutions ordering the authorization of the business entity's establishment, performance of all registrations with the trade registry, registration, and registration of standard affidavits and data thereof with the trade registry, as the case may be, according to the legal provisions in force.

Resolutions passed by virtue of this enactment shall be *de jure* enforceable.

Complaints may be filed against the resolution of the director and/or appointed person(s) within 15 days from the issuance of the resolution in the case of the parties, and from the publication of the resolution or act amending the articles of incorporation in Official Gazette of Romania, Part IV, in the case of any other interested persons.

The complaint filed against resolutions shall be settled immediately and with priority, according to the provisions of the law.

The procedure to settle the applications for registration previously provided is not of a contradictory nature and is not held in public session.

Should this be expressly requested by the party filing the application or by the

representative thereof, public hearings shall be organized to support the application for settlement.

Should the applications for registration and documents filed in support thereof fail to comply with the conditions required by law, a postponement term of maximum 15 days shall be given, without considering the day the term started and the day the term ended. Upon the justified request of the applicant, the 15-day term may be extended once, by maximum 15 days.

Postponement resolutions shall be communicated by means of posting at the headquarters of the office of the trade registry attached to the tribunal and on the website of the National Office of the Trade Registry.

If the applicant fails to meet its obligations ordered in the postponement resolution of the director of the office of the trade registry attached to the tribunal and/or of the appointed person(s) within the term previously provided, the applications for registration shall be rejected.

If applications for intervention are filed with respect to the applications for registration, the director of the office of the trade registry attached to the tribunal and/or the appointed person(s) shall send the file to the commercial division of the tribunal in whose jurisdiction the trader is located, where such shall be settled immediately and with priority.

Within 6 months from the entry into force of this emergency ordinance, the Government shall adopt, at the proposal of the Ministry of Justice, the bill regarding the establishment, organization and operation of the profession as commercial registrar.

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Finance

Name of the enactment	Government Emergency Ordinance No. 114/2009 on certain financial and budgetary measures ("GEO No. 114/2009")
Publication	Official Gazette of Romania, Part I, No. 919 of 29 December.2009
Entry into force	29 December 2009
Main provisions	GEO No. 114/2009 adopted a series of economic measures intended to secure compliance with the commitments undertaken by Romania through the execution of the loan agreements with international financial authorities.

In this respect, local and central public institutions are not entitled to give meal

vouchers to its staff. In addition, local and public central institutions' budgets prepared for 2010 provide no funds for giving gift vouchers or holiday vouchers to their staff.

Also, the new enactment adopted by the Government provides amendments concerning the maximum number of positions to be financed in the State pre-university education system in 2010, which positions decreased from 339,688 in 2004 to 321,677 throughout 1 January – 31 August 2010, and respectively 306,677 throughout 1 September – 31 December 2010.

At the same time, GEO No. 114/2009 repealed the provisions of Government Emergency Ordinance No. 71/2004 on the award of certain facilities to retired families which provided the possibility for retired persons to obtain cash in exchange for railway travel vouchers which were not used.

Also, GEO No. 114/2009 brought a series of amendments to several enactments extending certain terms for the enforcement of certain provisions of such enactments.

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Insolvency/Bankruptcy

Name of the enactment

Law No. 381 dated 10 December 2009 on the insertion of the preventative composition and ad-hoc mandate ("**Preventative Composition Law**")

Publication

Official Gazette of Romania, Part I, No. 870 of 10 December 2009

Entry into force

11 January 2010

Main provisions

The Preventative Composition Law inserts the possibility of concluding pre-insolvency arrangements between a debtor in distress and a part or all of its creditors. Thus, legal entities are given the possibility to safeguard the business by means of an amicable renegotiation of receivables or by conclusion of a preventative composition, without resorting to the insolvency proceedings.

The following persons cannot benefit from the procedure regulated by the Preventative Composition Law:

- Debtors against which an irrevocable judgment convicting them for economic offenses was passed;
- Debtors against which insolvency proceedings were initiated 5 years prior to the preventative composition offer;
- Debtors which benefited from a preventative composition 3 years

prior to the preventative composition offer;

- Debtors which and/or whose shareholders/limited partners or directors were finally convicted for fraudulent bankruptcy, fraudulent administration, breach of trust, fraud, embezzlement, false testimony, forgery or other offenses provided under Competition Law No. 21/1996, republished as amended, in the last 5 years prior to the initiation of the proceedings as provided under this law;
- Debtors whose members of management and/or supervisory committees were held liable under Law No. 85/2006 on the insolvency proceedings, as amended and supplemented, for causing the insolvency, including the case when the insolvency proceedings were initiated against them 5 years prior to the preventative composition offer;
- Debtors registered in the fiscal records, according to Government Ordinance No. 75/2001 on the organization and operation of the fiscal records, republished as amended and supplemented.

For starters, Preventative Composition Law regulates the institution of the ad-hoc mandate, which aims at the conclusion through the ad-hoc attorney-in-fact, within 90 days from the appointment thereof, of a settlement between the debtor and one or more of its creditors, in order to overpass the distress of the debtor's business, safeguard the business, maintain the work places and cover the receivables held against the debtor. The ad-hoc attorney-in-fact shall be appointed by the president of the tribunal upon the request of the debtor and shall have to be an insolvency practitioner. The ad-hoc mandate shall cease by unilateral termination, upon achievement of or failure to achieve the goal. Its termination shall be acknowledged again by the president of the tribunal. Mention should be made that the procedure is confidential. The effective utility of such institution is debatable, taking into account the application of the above provisions.

As the primary players involved in the preventative composition procedure are concerned, the Preventative Composition Law briefly provides the powers of the syndic judge, of the conciliator and of the meeting of composition-related creditors, and formal issues concerning the activity thereof in the preventative composition procedure.

The draft preventative composition shall have to include:

- Analytical statement of the debtor's assets and liabilities, certified by an accountant, or audited, as the case may be;
- The causes of the financial distress and the steps taken by the debtor to overcome the same until the submission of the preventative composition offer;
- A forecast of the financial and accounting development in the following 6 months;
- Turnaround plan, including at least: (a) reorganization of the debtor's activity, (b) ways the debtor intends to overcome the financial gridlock, (c) forecasted percentage with respect to payment of receivables, which may not be less than 50%, (d) deadline for the payment of the receivables established under the composition may not exceed 18 months from the conclusion of the preventative composition (the term may be extended once, upon its expiry, subject to all creditors' consent, for a maximum 6-month term).

Briefly, the initiation of the preventative composition procedure takes into account the following steps:

- The debtor files to the syndic judge the application for initiation of the procedure, together with the proposal of appointment of the temporary conciliator;
- The syndic judge appoints the temporary conciliator;
- Within 30 days from appointment, the conciliator, together with the debtor, prepares the list of creditors and composition offer, including the draft preventative composition, and fulfills registration and opposability formalities with respect thereto (notices, registration with the special registry of the tribunal's clerk office, specification in the trade registry);
- Any of the parties involved may request the negotiation of the draft composition;
- Within 30 days, at the most, from the receipt of the offer, creditors have to vote the preventative composition, which shall be deemed approved by the positive vote of the majority representing 2/3 of the value of the accepted and unchallenged receivables (without taking

into account the positive votes of certain categories of creditors, such as affiliates of the debtor or of its management, etc.);

- Within minimum 30 days from the rejection of the draft composition, the debtor may make a new preventative composition offer;
- Subsequent to the approval, the syndic judge shall acknowledge the preventative composition, which, once approved, has to be notified to the creditors and registered with the trade registry.

The acknowledged composition may be made opposable to all creditors, subsequent to its homologation by the syndic judge, at the conciliator's request, if:

- The debtor's business is undergoing a financial gridlock;
- The value of the receivables subject to challenges and/or disputes does not exceed 20% of the list of creditors;
- The preventative composition is approved by the creditors representing at least 80% of the total value of receivables.

Prior to the creditors voting the composition, the debtor may request the temporary suspension of the enforcements, until the publication of the approved preventative composition or rejection thereof – the syndic judge shall be the relevant authority in making such decision.

Starting with the communication of the composition's acknowledgment, any enforcement initiated by the composition-related creditors, run of the prescription of the right to request the enforcement of their receivables and run of interest, penalties and any expenses related to receivables of the composition-related creditors shall be *de jure* suspended.

Homologation of the composition shall entail the suspension of all enforcement proceedings and, throughout its term, the insolvency proceedings may not be initiated against the debtor.

Throughout the procedure, the debtor shall continue its day-by-day activity under the supervision of the conciliator and of the meeting of creditors, subject to the conditions provided under the preventative composition.

The procedure of the preventative composition may be closed:

- By cancellation;

- By rescission, for a serious breach of the composition by the debtor, subject to the creditors receiving liquidated damages, according to common law;
- By termination without any fault of the debtor, in case of failure of achievement acknowledged by the syndic judge, at the request of the conciliator.

The preventative composition may be opposable to the budgetary authorities, provided that the applicable legislation in the State aid field is complied with, subject to approval of the National Tax Administration Agency (which may be presumed) and to the approval of the inter-ministry committee.

From a practical perspective, hindrances are expectable in the application of the Preventative Composition Law, due to the lack of certain necessary definitions for some of the terms thereof, to the inconsistencies of certain terms and the subsequent interpretation difficulties caused by such deficiencies/inconsistencies.

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