

MEDIATION AS A TOOL FOR ALTERNATIVE DISPUTE RESOLUTION IN THE LEGAL SYSTEM

Nina Kurpios¹

ABSTRACT

In today's society, where conflicts are an inseparable part of our lives, there is a growing need for effective methods of dispute resolution. In this context, mediation as a tool for alternative dispute resolution in the legal system is gaining more and more popularity. Mediation is a process in which an independent and neutral person – the mediator – helps the parties to the conflict to find a solution that meets their needs and interests. Unlike traditional court proceedings, mediation focuses on cooperation and dialogue between the parties, rather than on confrontation and resolution of the case by the court. It is a voluntary process that allows parties to independently and actively participate in solving their problems. Mediation is a voluntary, confidential form of conflict resolution in which the parties, with the help of an impartial, neutral third party, called a mediator, reach a compromise on their own. The concept of mediation comes from the Roman law *mediare*, it was understood as "to be in the middle" or "to mediate" and was closely related to the concept of "conflictus", i.e. events. Roman lawyers rightly noticed that in order to talk about mediation, there must be a conflict that needs to be resolved. Mediation was seen as a process where a neutral person, called a mediator, appeared between the parties to a conflict to help them find a mutual solution. In this article, the author wants to present mediation as an alternative to the court process.

Key words: mediator, law, court process, communication.

1. Introduction

Mediation is possible in any case, as long as the law allows for a settlement, while the issues addressed during mediation depend on the will of the parties to the dispute. The subject of agreement can be any matter, e.g. agreement on the terms of separation, terms of termination of employment. Mediation can be conducted before the action is filed with the court or after the commencement of

¹ University of Warmia and Mazury in Olsztyn, Faculty of Law and Administration, Poland.

the court proceedings. Each party, regardless of the stage of the proceedings, has the right to submit a request for mediation, but the consent of the other party to the conflict is always a prerequisite. Upon receipt of a request for mediation, the mediator shall immediately contact the parties to the conflict to set the date and place of the mediation meeting². The mediation meeting may be held with the participation of both parties at the same time, or the mediator may conduct the dialogue separately. The mediator is obliged to prepare a protocol of the mediation. Importantly, the protocol does not contain any assessments or positions of the parties, but only the result of the mediation proceedings conducted. The result of the mediation may be the conclusion of a settlement between the parties, or leave the dispute without an amicable solution and refer it to an independent, autonomous court for resolution. Importantly, if no settlement is reached, neither the parties nor the court are bound by the proposals made during the mediation. If, on the other hand, the parties conclude a settlement agreement, and the case goes to mediation after the opening of the court proceedings, then the settlement agreement is appended to the minutes, and the mediator is obliged to inform the parties that the moment they sign the settlement agreement is the same as agreeing to apply to the court for its approval. The mediator shall forward the protocol together with the settlement to the competent court and serve the parties with a copy of the protocol. The court shall, without undue delay, conduct proceedings to approve the settlement, to grant an enforceability clause for the concluded settlement, or to refuse to approve the settlement or to grant an enforceability clause in whole or in part. The court has the right to refuse to recognize a settlement worked out during mediation if the settlement is contrary to the law or principles of social intercourse, if it is aimed at circumventing the law, is incomprehensible or contains contradictions.

2. Universal principles of mediation

Mediation proceedings have their own established rules, which are a kind of instruction for both the mediator and the mediation participants, "mediation is a voluntary, confidential process, during which an independent and impartial person with professional training assists the parties in resolving a difficult, conflictual situation. Its purpose is to determine the issues in dispute, reduce communication barriers, jointly prepare proposals for solutions and optimally conclude an agreement that satisfies the parties to the conflict. The basis for the success of mediation is, in addition to the will of the parties themselves, the correct action of the mediator³".

² The place of the mediation meeting.

³ Decision of the WSA in Poznań of 27.11.2018, III SA/Po 336/18, LEX No. 2595635.

First of all, mediation should always be voluntary. This follows directly from the provisions of the applicable law (including Article 183¹ § 1 of the Code of Civil Procedure⁴, Article 96a § 2 of the Code of Administrative Procedure⁵). This means that regardless of the type of case in which mediation is to be conducted, there is no legal possibility to coerce potential participants to participate in mediation proceedings. At the first meeting between the mediator and the participants in the mediation proceedings, the mediator is required to collect consent from the participants to mediate. It should be emphasized that consent to mediation can be withdrawn at any stage of the mediation proceedings by any participant. In addition, in the Polish legal system there is no possibility of coercing the participants to conclude a settlement agreement, "voluntariness also applies to the conclusion of a settlement agreement: each party has the right to refuse to sign it, despite the fact that he previously agreed to all its provisions"⁶.

Second, the mediation proceedings and all the terms of the settlement are kept secret⁷. This means that only the participants in the mediation proceedings and the mediator know what issues were raised during the mediation proceedings, and they are obliged to keep this information confidential. In practice, this means that when a settlement is not reached in the event of a court proceeding, they cannot refer to the arrangements that were proposed in mediation, as this will be ineffective, "the court does not examine the content of the mediation arrangements, because according to Article 183⁴ § 1 of the Code of Civil Procedure, mediation proceedings are not public"⁸. In addition, the mediator may not be questioned by the court on the circumstances arising during the mediation proceedings, "the mediator is obliged to keep secret the facts he learned in connection with the mediation"⁹ nor disclose to the other participants in the mediation proceedings the facts he learned in the course of individual discussions or to any other persons unrelated to the mediation proceedings in question, "it should be considered prohibited not only to disclose the information to a third party, but also to use it in one's own or someone else's interest, in particular in connection with other activities conducted by the mediator or a third party"¹⁰. The exclusion of the

⁴ Article 183¹ § 1 of the Act of November 17, 1964, Code of Civil Procedure (i.e. Dz. U. of 2021, item 1805, as amended; hereinafter: the "Code of Civil Procedure"), "mediation is voluntary".

⁵ 96a § 2 of June 14, 1960, Administrative Procedure Code (i.e., Dz. U. of 2023, item 775, as amended; hereinafter: the "Administrative Procedure Code"), "mediation is voluntary".

⁶ Jurewicz-Bakun K., *Mediation as one of the forms of resolving individual disputes in labor law*, PiZS 2021, No. 3, pp. 41–49.

⁷ This is stipulated by the provisions of, among others, Article 96j § 1 of the Code of Administrative Procedure "mediation is not public", Article 183⁴ § 1 of the Code of Civil Procedure "mediation proceedings are not public".

⁸ Judgment of the SR in Lodz of 23.12.2020, XIII GC 1820/20, LEX No. 3189034.

⁹ Judgment of the SA in Gdansk of 15.10.2018, V ACa 398/18, LEX No. 2634970.

¹⁰ Koszowski M., *Legal and ethical aspects of exercising the profession of mediator taking into account European standards*, St.Pr.-Ek. 2008, No. 77, pp. 29–47.

openness of the mediation proceedings reinforces in the participants a sense of security and allows for greater sincerity of claims, and thus can lead to a satisfactory settlement from the point of view of all participants. This is an unquestionable advantage of mediation over court proceedings, which, in accordance with Article 45(1) of the Constitution¹¹ as a rule, are open to the public, and consequently all issues raised during the trial can be publicly available, which undoubtedly affects the privacy of the parties to the proceedings.

Thirdly, the mediator has a duty of impartiality¹². The principle of impartiality is a guarantee for the participants in the mediation proceedings that the mediator does not advocate for any of the participants, equally supports each of them in resolving the conflict. The mediator is obliged to take care of the comfort of each participant in the mediation proceedings individually and collectively. The mediator does not subject the views, behavior or claims of the parties to judgment; he is only supposed to help the participants work out a compromise that satisfies each of them. The mediator also must not allow his personal views to influence his perception of the conflict, and thus, in accordance with his own beliefs, persuade the parties to a solution that is in accordance with his conscience, "the mediator shall endeavor to ensure that his views, beliefs or prejudices do not influence his perception of the subject of the dispute and do not determine his attitude towards possible solutions¹³". The mediator is obliged to promptly disclose circumstances that potentially impinge on his impartiality¹⁴.

3. Advantages of mediation in economic terms

One of the main advantages of mediation is the speed. Unlike lengthy litigation, mediation can be conducted in a short period of time, often with only a few meetings being enough to find a satisfactory solution. According to

¹¹ Article 45(1) of the Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws, No. 78, item 483, as amended; hereinafter: "the Constitution") "everyone has the right to a fair and public hearing without undue delay by a competent, independent, impartial and independent court."

¹² This is stipulated by the provisions of, among others, Article 183³ § 1 of the Code of Civil Procedure "the mediator should maintain impartiality when conducting mediation," Article 96g § 1 of the Code of Administrative Procedure "the mediator should maintain impartiality when conducting mediation and immediately disclose circumstances that could raise doubts about his impartiality, including, respectively, the circumstances referred to in Article 24 § 1 and 2."

¹³ Journal of Laws, item 921.

¹⁴ This is stipulated in the provisions of, among others, Article 183³ § 2 of the Code of Civil Procedure "the mediator shall immediately disclose to the parties the circumstances that could raise doubts about his impartiality", Article 96g § 2 of the Code of Administrative Procedure "the mediator shall refuse to conduct mediation in case of doubts about his impartiality and shall immediately notify the mediation participants and the public administration body if he is not a mediation participant".

a report by the mediation center, on average, mediation takes up to 42 days, while a trial takes an average of 480 days¹⁵.

As a rule, mediation is paid for, but its costs are much lower than the costs of litigation. According to the Regulation of the Minister of Justice of June 20, 2016 on the amount of remuneration and reimbursable expenses of the mediator in civil proceedings¹⁶, in cases for property rights the mediator's remuneration is 1% of the value of the subject of the dispute, but not less than PLN 150 and not more than PLN 2,000 for the entire mediation proceedings. In cases involving property rights, where the value of the subject matter of the dispute cannot be determined, and in cases involving non-property rights, the mediator's remuneration for conducting mediation proceedings is PLN 150 for the first session, and PLN 100 for each subsequent session, not more than PLN 450 in total. On the other hand, litigation costs in civil cases are regulated by the Law of July 28, 2005 on court costs in civil cases¹⁷. In cases involving property rights, a fixed fee is charged for the writings, determined according to the value of the subject of the dispute or the value of the subject of the appeal, which is:

- 1) up to PLN 500 – in the amount of PLN 30;
- 2) over PLN 500 to PLN 1500 zlotys – in the amount of PLN 100;
- 3) over PLN 1,500 to PLN 4,000 – in the amount of PLN 200;
- 4) over PLN 4,000 to PLN 7,500 – in the amount of PLN 400;
- 5) over PLN 7,500 to PLN 10,000 – in the amount of PLN 500;
- 6) more than PLN 10,000 to PLN 15,000 – in the amount of PLN 750;
- 7) more than PLN 15,000 to PLN 20,000 – in the amount of PLN 1,000.

In cases involving property rights, if the value of the subject matter of the dispute or the value of the subject matter of the appeal exceeds PLN 20,000, a relative fee of 5% of this value is charged on the letter, but not more than PLN 200,000. The costs of mediation in administrative cases are similar. According to the Decree of the Minister of Internal Affairs and Administration of June 2, 2017 on the amount of remuneration and reimbursable expenses of the mediator in administrative proceedings¹⁸, in cases of monetary dues, the mediator's remuneration is 1% of the value of such dues, but not less than PLN 150 and not more than PLN 2,000 for the entire mediation proceedings. However, in cases concerning:

- 1) concessions, permits or business licenses,
- 2) construction and architecture,
- 3) land use,
- 4) environmental and nature protection,

¹⁵ <https://www.centrummediacji.sadowych.pl/wpis/5,sredni-czas-postepowan-mediacyjnych-oraz-sadowych-w-polsce> [accessed 27.06.2023].

¹⁶ Journal of Laws, item 921.

¹⁷ i.e. Dz. U. of 2022, item 1125, as amended.

¹⁸ Journal of Laws, item 1088.

- 5) water management,
- 6) real estate,
- 7) agriculture and forestry,
- 8) industrial property

The mediator's fee is PLN 150 for the first meeting, and PLN 100 for each subsequent meeting, not more than PLN 2,000 in total. For comparison, according to the Decree of the Council of Ministers of December 16, 2003 on the amount and detailed rules for collecting entry fees in proceedings before administrative courts¹⁹. The relative entry fee depends on the amount of the monetary claim covered by the challenged act and amounts to:

- 1) up to PLN 10,000 – 4% of the value of the object of the appeal, but no less than PLN 100;
- 2) over 10,000 zlotys to 50,000 zlotys – 3% of the value of the subject of the appeal, but no less than 400 zlotys;
- 3) over 50,000 zlotys to 100,000 zlotys – 2% of the value of the subject of the appeal, but no less than 1,500 zlotys;
- 4) over 100,000 zlotys – 1% of the value of the object of appeal, but not less than 2,000 zlotys and not more than 100,000 zlotys.

In contrast, regardless of the subject matter of the challenged act or action fixed entries exemplarily amount to:

- 1) complaints against decisions issued in administrative, enforcement and security proceedings – PLN 100;
- 2) complaints against acts or actions of public administration concerning powers or duties under the law – PLN 200;
- 3) complaints against acts of local law of local government bodies and local government administration bodies – PLN 300;
- 4) complaints against acts of local self-government bodies and their unions, other than acts of local law, undertaken in matters of public administration – PLN 300;
- 5) complaints against acts of supervision over the activities of local government bodies – PLN 300;
- 6) complaints about the inaction of public administration bodies – PLN 100.

The fixed entry in cases of complaints concerning licenses, permits or permits to conduct business activities in the field of, amount to, in particular examples:

- 1) construction and operation of toll highways and expressways – PLN 10,000;
- 2) energy – PLN 10,000;
- 3) air, rail and sea transport – PLN 10,000;
- 4) radio and television – PLN 10,000;

¹⁹ OJ. U. of 2021, item 535.

- 5) public securities trading – PLN 10,000;
- 6) banking activities – PLN 10,000;
- 7) manufacture of spirits and tobacco products – PLN 8,000.

Fixed entry in cases of complaints, not covered by the relative entry, from the scope of the example is:

- 1) construction and architecture – PLN 500;
- 2) spatial development – PLN 500;
- 3) environmental and nature protection – PLN 200;
- 4) water management – PLN 300;
- 5) real estate – PLN 200;
- 6) agriculture and forestry – PLN 200;
- 7) industrial property – PLN 1,000.

Again, mediation compares much more favorably in financial terms. In mediation in criminal cases, according to Article 618 § 1(8)²⁰ and Article 619 § 2²¹ of the Code of Criminal Procedure, the state treasury bears the cost.

4. Advantages of mediation in social terms

In mediation proceedings, the parties have more control over the outcome, as they make their own decisions on how to resolve the dispute. The mediator acts as a neutral intermediary who helps the parties identify problems, discover common interests, and find creative and lasting solutions. In mediation proceedings, the parties have the opportunity to actively participate and express their needs, concerns and priorities. The mediator supports them in communication, helps them to develop an agreement and stimulates dialogue based on mutual understanding. The parties are in control of what solution is most satisfactory to them and consistent with their needs. Unlike the court process, where a judge makes the final decisions, mediation gives the parties the opportunity to jointly develop a solution that takes into account their individual interests. The mediator helps them identify common points of convergence and seek *win-win* solutions that satisfy the needs of both parties.

Another benefit of mediation proceedings is the opportunity to rebuild relationships between the parties. The mediation process promotes openness,

²⁰ Article 618 § 1(8) of the Act of June 6, 1997, the Code of Criminal Procedure (i.e., Dz.U. of 2022, item 1375, as amended; hereinafter: the "Code of Criminal Procedure") "the expenses of the State Treasury include, in particular, payments made for: mediation proceedings."

²¹ Article 619 § 2 of the Code of Criminal Procedure "the costs of mediation proceedings shall be borne by the State Treasury."

respect and cooperation, which fosters a better relationship between the parties. The parties have the opportunity to listen to each other, express their emotions and come up with solutions that take their perspectives into account. This is often impossible during litigation, which often leads to deepening divisions and tensions between the parties. Mediation proceedings also have beneficial effects for the legal system as a whole. It reduces the burden on the courts, allowing them to focus on more complex cases. In addition, mediation proceedings promote dialogue and cooperation between the parties, which fosters a more cohesive and harmonious society.

5. Summary

In conclusion, in the author's opinion, mediation as a tool for alternative dispute resolution in the legal system has many advantages. It is an effective, faster, cheaper and more flexible method of conflict resolution compared to the traditional court process, which gives the parties more control over the outcome and enables them to rebuild relationships. The introduction of mediation as a common practice can improve the efficiency and accessibility of the legal system, reduce the burden on courts, and promote solutions based on dialogue and cooperation. According to the author, it is worth investing in promoting awareness and educating the public about mediation in order to increase awareness and confidence in the process. In the author's opinion, it is also crucial to involve the state and administrative bodies in promoting mediation as an alternative dispute resolution tool. The government can introduce financial incentives, such as tax exemptions or subsidies, to encourage parties to use mediation. It can also introduce legislation that recognizes agreements reached through mediation as legally binding and enforceable. Finally, it is important that mediation be conducted by qualified and experienced mediators. Those acting as mediators should have adequate communication skills, empathy, conflict resolution skills and neutrality. Regular training and certification for mediators is essential to ensure the highest possible quality of service.

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