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CONFLICT MANAGEMENT THROUGH MEDIATION – OPPORTUNITIES AND BARRIERS TO MEDIATION

The paper is an attempt to scientifically investigate the issue of conflict resolution through mediation. The benefits of dispute resolution through mediation are discussed in detail. They concern such issues as: reduction of the court proceeding cost, quick resolution of the dispute, parties' responsibility for the arrangements made, mental satisfaction of the parties from the negotiated agreement, maintaining more positive relations between the parties concerned and maintaining friendly long-term relationships, eliminating confrontation and maintaining balance between the parties, saving family members stress and negative emotions, avoiding competition and facilitating parents' cooperation in matters related to childcare. The paper also intends to analyze obstacles that affect mediation negatively. They primarily concerned: too general regulations regarding mediation proceedings, lack of financing of mediation by the State Treasury and the negative attitude of the parties, proxies and judges for mediation. Finally, changes are suggested improve and spread the concept of mediation.

Resolving conflict through mediation is a modern and effective way of reconciliation[1]. However, a very important element on the way to seek agreement, and hence reconciliation, is the will of man. Therefore, man intention to resolve the conflict by mediation is required. Resolving a conflict or at least attempting to clarify a conflict situation through mediation attempting to find a satisfactory solution can and should lead to reconciliation. Although mediation often does

[1] Conflict is one of the most complex interpersonal processes concerning people. More on this subject: R. Jaworski, *Harmonia i konflikty*, Warszawa 2004, p. 137; B.W. Komorowska, *Konflikty wewnętrzne*, in: *Psycholodzy chrześcijańscy wobec problemów człowieka*, ed. M. Hinc, R. Jaworski, Płock 2005, s. 123; S. Bentkowski, *Rozwiązywanie sporów na tle zaspokajania potrzeb społecznych*, in: *Arbitraż i mediacja. Praktyczne aspekty stosowania przepisów*, ed. J. Olszewski, Rzeszów 2007, p. 36; A. Cybulko, *Konflikt*, in: *Mediacje. Teoria i praktyka*, ed. E. Gmurzyńska, R. Morka, Warszawa 2009, p. 51.

not guarantee the achievement of specific results, its outcomes and benefits are substantial.

The resolution of a conflict depends primarily on the parties to the conflict, however, the role of a mediator is indispensable in this respect[2]. Professionally conducted mediation provides considerable profits, not only for the parties to the conflict, but for the whole society[3]. Quick resolution of the dispute seems to be the main benefit of conflict resolution through mediation since it is undoubtedly less time consuming. In case the parties want to settle their lives as quickly as possible, return to relative balance, or resolve specific issues – mediation is desirable as a method that brings results quickly. Mediation time is always shorter than that of judicial proceedings, since in civil cases the court sets its duration for up to three months, and in criminal cases it should not last longer than a month[4]. In addition, the flexibility of appointments with a mediator is incomparably greater than that associated with notification of the date of the hearing. However, above-mentioned goodwill of the parties and the desire to reconcile are crucial in this respect[5]. Currently, as a guarantee of the good will of the parties and, at the same time, the voluntary nature of mediation, is the rule contained in the provision of art. 1838 § 2 CCP, which provides the parties with the right to refuse to participate in mediation[6].

The fact that the parties themselves are responsible for the arrangements made is another benefit of mediation. Nobody suggests or imposes solutions on them which undoubtedly increases the value and durability of the settlement and its enforceability. The parties to the conflict are usually more satisfied with the agreement they have developed together than with the solutions imposed on them by the court or a mediator. Agreements developed by the parties themselves are also much more stabilizing[7]. Consequently, it may be assumed that the parties will also be more willing to comply with the arrangements and fulfill the conditions contained therein in the future. The parties must fully accept their arrangements

[2] Ways to resolve conflicts are described by Wojciech Cwalina, PhD, Jacek Sobek, see: http://nop.ciop.pl/m5-2/m5-2_2.htm (10.09.2019).

[3] The conflict should be included in the basic social interactions, more broadly on this topic: A. Kalisz, *Elementy teorii konfliktu i rozwiązywania sporów*, in: *Mediacja sądowa i pozasądowa. Zarys wykładu*, red. A. Kalisz, A. Zienkiewicz, Wrszawa 2014, p. 15.

[4] Art. 18310 § 1 of the Act of November 17, 1964 – Code of Civil Procedure, Journal Of Laws of 2019, item 1460, as amended and art. 23a § 2 of the Act of 6 June 1997 – Code of Criminal Procedure, Journal of Laws of 2018, item 1987 as amended.

[5] For more on the parties' lack of motivation to reach an agreement, see: M. Kaźmierczak, J. Kaźmierczak, *Mediacja rodzinna. Praktyczny poradnik*, Warszawa 2015, p. 125.

[6] Art. 1838 § 2 Code of Civil Procedure states that „mediation shall not be conducted if a party does not agree to mediation within a week of the day of announcing or delivering the order directing the parties to mediation".

[7] A. Cybulko, *Konflikt*…, p. 194.

in a mediation settlement, not only when submitting a declaration of intent in the form of a signature under the settlement, but also after the mediation[8]. High degree of enforceability of such agreements may be attributed to the fact that the conflict resolution meets the needs of the parties and is adapted to their situation[9]. Such solutions generally persist for a long time, and in the event of new conflict circumstances the parties once again prefer to resolve dispute issues jointly, i.e. amicably with a mediator rather than in a court.

Another beneficial aspect of mediation that seems to be underestimated is mental satisfaction of the parties. This factor is not taken into account during court proceedings at all, while the possibility to be in charge for decision-making process has impact on the sense of mental satisfaction in the parties. The agreement reached as a result of mediation also includes procedural and psychological issues that cannot always be resolved in court. In mediation, the parties can adjust the content of the settlement to the specificity of their situation. From the psychological perspective, mediation primarily shapes the desired traits and attitudes of the parties to the conflict and satisfies their internal needs in the form of respect, listening, appreciation, acceptance, apology, understanding, tolerance and discharge of negative emotions[10]. Mediation allows to discover hidden interests of the party and offers a space for the exchange of views, which in the court building is largely limited. During the mediation meeting, each party has the unique opportunity to ascertain the motives for the other party's actions. The parties to the conflict happen to get a brand new perspective during mediation that allows to look differently at the other party or the entire conflict and makes it easier to reach a settlement. Mediation develops the parties 'awareness of the need to create various solutions, also reduces the parties' attachment to their positions and creates solutions using a tender that takes into account the interests of the parties. The entities participating in the mediation procedure can participate more actively and effectively in achieving their goals and tasks[11].

Mediation empowers the parties to negotiate the agreement themselves. The parties that have themselves set the terms of the agreement have more control over the final outcome of the settlement. The fact that court as an entity with arbitrary features does not interfere in the settlement process significantly reduces

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[8] For more on satisfaction with mediation, see: J.M. Łukasiewicz, *Naczelne zasady mediacji*, in: *Zarys metodyki pracy mediatora w sprawach cywilnych*, ed. A.M. Arkuszewska, J. Plis, Warszawa 2014, p. 87.

[9] On the feasibility of agreements concluded in mediation, see C. Kulesza, D. Kużelewski, *Efektywność mediacji w procesie karnym w perspektywie prawnoporównawczej*, in: *Mediacja*, ed. L. Mazowiecka, Warszawa 2009, s. 127.

[10] More on this subject: A. Kalisz, *Elementy teorii konfliktu*…, p. 44.

[11] *Sztuka skutecznego prowadzenia mediacji – zagadnienia prawne i ekonomiczne*, ed. A. Binsztok, Wrocław 2012, p. 15.

antagonisms and increases the natural need for agreement[12]. Mediation facilitates reaching agreement through negotiation by gradually aligning positions and developing principles accepted by both parties, which is never the case this in court. In mediation, losses and profits are more predictable compared to when the case is referred to court. Consequently, the sense of parties' self-competence and capabilities is strengthened, unlike when entrusting the representation of ones interests to the third parties. The most importantly, however, during mediation the parties to the conflict themselves are looking for solutions that are right for them – not mediators, proxies or the court. This, in turn, allows the parties to learn how to solve problems independently in the future. The parties as the "owners" of the conflict have the right to choose the style of response to the conflict and to control its course and end[13]. However, the mediator's confidentiality rule in art. 1834 of the Code of Civil Procedure, strengthens the comfort during meetings held and activates the parties to be proactive freely expressing their own views, which is frequently impossible during court proceedings, where the parties are paralyzed by stress.

Mediation is conducive to maintaining a more positive relationship between the parties, unlike the procedure that brings victory to one of the parties. Mediation helps maintain friendly long-term relationships. An important benefit of mediation is, therefore, that the parties maintain their relationship or end them in a calm atmosphere, free from aggression and hostility. Mediation always offers a win-win situation i.e. mutual win. Mediation results in an agreement that satisfies both parties who have accepted it themselves[14]. Thanks to mediation, confrontation and the desire to win by either party are eliminated. What is even more important in case of a family where winning means most often a loss for other family members (including children), and in many cases it is a loss for everyone. Disputes in a court result in imbalance between the parties dividing them into winners and losers, and causing further crisis in the family, even after it breaks down. Emotions characteristic of losers appear including: regret, a sense of victimization, anger, helplessness, a desire to retaliate, sabotaging the terms of a court order, etc. The power of these emotions is usually huge enough to disable the durability of court decisions. Matters return on the agenda and the whole story of the fight for winning repeats[15]. In the event of conflicts related to divor-

[12] K. Flaga-Gieruszyńska, *Kilka uwag o mediacji jako instrumencie efektywnego rozstrzygania sporów gospodarczych* in: *Arbitraż i mediacja. Praktyczne aspekty stosowania przepisów*, ed. J. Olszewski, Rzeszów 2007, p. 86.

[13] A. Kalisz, *Elementy teorii konfliktu*…, p. 59.

[14] For more on satisfaction with mediation, see: J.M. Łukasiewicz, *Naczelne zasady mediacji*…, p. 87.

[15] H. Przybyła-Basista, *Proces mediacji rodzinnych – od teorii do praktyki*, „Mediator" 2002, nr 21, p. 11.

ce, mediation allows to avoid competition in court proceedings and facilitates parents' cooperate in terms of childcare. Family mediation for conflicting family members is a chance that by resigning from the court procedure, they will be able to resolve their disputes amicably, in a less formal atmosphere, seeking solutions tailored to the specific needs of their families[16]. In such cases, mediation serves to reduce or extinguish the conflict between the parties, which is even easier to achieve because those who have remained in conflict so far are equal partners in the conversation in search of a solution to discontinue their dispute[17]. Whenever family conflicts are found in court, the conflict situation gets even more complicated. The judicial procedure tends to make those involved in the conflict become enemies rather than allies seeking a joint solution. Searching for answers to the evidence thesis of the court often causes spouses to fight with each other, becoming enemies, and parents testify against each other. Such circumstances hinder the process of finding solutions required to regulate mutual contacts in the future. Therefore, mediation in family matters, especially those regarding separation and divorce, can save family members – which is particularly important in the case of children – of many stress and negative emotions. Adults, however, can limit the destructive effects of parting and help to make arrangements for the future[18]. People only after some separation realize how much pain they have caused and how much time they have lost unnecessarily for long and stressful legal proceedings. Mediation, much more than formal court proceedings, enables conflict subjects to express their feelings, clarify disputed issues, and reach real sources of conflict, which are often emotional in nature, e.g. in many family matters.

Focus on the future should not be undermined as a feature of mediation. The mediators do not judge or agree with any of the parties. They intend to focuses on identifying the parties 'interests, focus the conflict parties' attention on the problem, and focus on maintaining balance of power. Even if the parties fail to reach an agreement, the mediators nevertheless highlight what has been achieved and indicate the remaining difficulties and possibilities. Parties who have not reached a settlement before a mediator and entered the courtroom are generally more likely to conclude an agreement before a court. Mediation allows the participants of the dispute to endure existing communication barriers. It identifies contentious issues and facilitates developing proposals for solutions aimed at concluding a sa-

[16] On the effectiveness of the family mediation process, see: H. Przybyła-Basista, *Mediacje rodzinne w konflikcie rozwodowym. Gotowość i opór małżonków a efektywność procesu mediacji*, Katowice 2006, p. 161.

[17] A. Pietrzkiewicz, *Mediacje rodzinne w polskim systemie prawnym*, Ostrowiec Świętokrzyski 2016, p. 237.

[18] More on this subject: A. Gójska, R. Boch, *Obligatoryjna mediacja w sprawach rodzinnych – refleksje praktyków*, „Mediator" 2006, nr 37, p. 3.

tisfactory agreement[19]. However, the settlement is not necessarily signed at the stage of mediation.

A great benefit of mediation is the reduction of court costs. It is a cost-effective conflict resolution method compared to the costs associated with a lawsuit. Often, conflicting parties lead costly and lengthy disputes in court. In contrast, mediation costs are small. In civil cases, including family, economic and labor law, they are regulated by the Regulation of the Minister of Justice of 20.06.2016 on the amount of remuneration and reimbursable expenses of the mediator in civil proceedings[20]. Whereas in criminal matters art. 619 § 2 of the Act of June 6, 1997 – Code of Criminal Procedure, which is charged to the State Treasury for mediation proceedings[21].

Undoubtedly, the benefits of mediation outweigh its barriers. However, apart from the advantages, there are also some disadvantages arising from mediation. Obstacles that have a negative impact on mediation are, above all, too vague regulations on mediation proceedings, including modest implementing provisions in the field of mediation. The legislation lacks even information on who is to cover the costs of mediation, in case only one party appears at the mediation meeting appointed by the mediator. There is also no regulation regarding proxies of parties in mediation. In accordance with the basic principles of the Code of Civil Procedure, proxies may represent the parties in all proceedings, however the provisions on mediation provide that mediation is to be conducted by the parties before a mediator. It is unclear, therefore, whether the mediator is obliged to notify the legal representatives about the date of the mediation meeting or not and whether they can interfere in the settlement negotiations of the parties. There are no provisions based on which mediators could request proxies an additional power of attorney – special to represent a party in mediation proceedings or to make declarations of will on behalf of the parties. Most often, however, the problem arises when the party does not participate in mediation in person, and sends their representative to them. Then mediation with the attorney of the party, which turns out to be only a power of attorney, is pointless, because they are unable to make any declaration of will in the name of their principal. This, in turn, only affects the prolongation of the proceedings, and the case must still be referred to the court. Another aspect that might discourage from mediation is the fact that neither the provisions of the Code of Civil Procedure nor any other contain automatism allowing the mediator appointed by the court to read the case files. Admittedly, art. 1839 § 2 of the Code of Civil Procedure, stipulates that the mediator has the right to become acquainted

[19] M. Jurgilewicz, A. Dana, *Mediacja jako sposób rozwiązywania sporów prawnych*, Warszawa 2015, p. 47.

[20] Journal of Laws of 2016, item 921, as amended.

[21] Journal of Laws of 2018, item 1987, as amended.

with the files of the case referred to mediation, but it is still necessary to obtain the consent of both parties, which within a week of the announcement or delivery of the order directing the parties to mediation may not agree to familiarize the mediator with the files. Therefore in a situation where the court decides to transfer the dispute to mediation in camera, without the parties' participation, it cannot withdraw such consent from them. Consequently, the mediator will schedule a meeting faster and meet the parties rather than read the files, because the opposite would significantly extend the proceedings instead of shortening them.

Another circumstance hindering the use of mediation is the fact that the current criminal law regulations mean that the prosecutor cannot offer the injured party any procedural benefit resulting from mediation. The only perks in this respect are guaranteed to the suspect. Therefore, from the victim's perspective, such regulation, or rather its absence, is unfavorable and discouraging from mediation[22].

One of the main barriers to mediation is the lack of financing by the State Treasury. It would be reasonable to allow the parties to benefit from free mediation in at least all family matters, which would probably increase interest in this institution and open access to this procedure for poor parties. Repeatedly, the reason for refusing to participate in mediation is the necessity to bear the costs of the party, and the amendment to the provisions on the remuneration of mediators on August 21, 2019 has further tightened the requirements in this regard, and at present the court is no longer able to transfer these costs to the State Treasury, except for except when at least one of the parties referred to mediation by the court was exempted from court costs to the extent of the mediator's receivables and the other parties did not pay the mediator those debts in full[23]. This change will result in a decrease in the number of mediations and, consequently, greater occupancy of courts and a longer waiting time for court hearing.

The negative attitude of the parties, proxies and judges to mediation is also an obstacle to mediation. Namely, in order to convince reluctant parties to mediation proceedings, the judge himself must pay a lot of attention to the parties in the courtroom, as well as his own energy, to convince them of the right decision to undergo mediation. Therefore, the judge must be friendly towards the mediation institution. The situation is similar in the case of professional representatives of the parties – they themselves must be positive about mediation. Unfortunately, the opposite happens frequently. However, the question arises whether the courtroom is the right place for this, and above all, is this the role of a judge or a representa-

[22] For more on this topic, see: T. Błaszczyk, P. Mysłowski, *Mediacja w teorii i praktyce. Kilka spostrzeżeń na temat stosowania instytucji mediacji w postępowaniu karnym* in: *Mediacje w społeczeństwie otwartym*, ed. M. Tabernacka, R. Raszewska-Skałecka, Wrocław 2012, p. 45.

[23] Art. 1835 § 2 of the Code of Civil Procedure of June 6, 1997 – Code of Criminal Procedure, Journal of Laws of 2018, item 1987 as amended.

tive? Is the induction of the parties to mediation a negation of the core business of the court and the lawyers acting as proxies of the parties. The above clearly shows that there are definitely fewer barriers than benefits, but in order to improve and popularize mediation proceedings one should first of all introduce: "obligatory" mediation in family matters, especially if the parties have minor children. This obligation to refer the case to mediation would be binding only in court, i.e. the court would be obliged to refer the parties to mediation prior to designation of such cases, while the parties could, but were not obliged to agree to enter mediation. Such an assumption would guarantee the voluntary principle. Compulsory mediation for parents fighting for childcare and regularization of contacts, was first initiated in California, where mandatory mediation in matters of care and contact with the child was first introduced in 1981[24]. Obligatory mediation was introduced as a result of the observation that the court procedure, setting parents as opponents, did not favor the resolution of most disputes concerning children, and the case caused a lot of stress for children. Parents, mainly engaged in the divorce (separation) process, ceased to engage in seeking an acceptable solution for both parties, often assuming the position of waiting for a court order, while becoming increasingly hostile towards each other[25].

One of the most important issues related to the spread of mediation seems to be the introduction of the possibility for the State Treasury to bear the costs of mediation. Of course, it remains to be considered whether in all cases or in generic ones, but it would be reasonable to allow the parties to benefit from free mediation primarily in all family matters, which would probably increase interest in this procedure and open access to this procedure for poor parties. It would be beneficial, for example, to adopt a model functioning in California, where compulsory court mediation is free of charge, and the costs are covered by fees charged when entering into marriage, divorce or local taxes.

In order to improve mediation, consideration should also be given to imposing an obligation on the chairman to schedule a hearing only after a specified time limit, regardless of whether mediation occurs. Such a solution would probably encourage more people to use this method of resolving the dispute, because the time to wait for the first date of the hearing could be used just for the amicable settlement of the dispute.

Concluding, at present mediation seems to be hope for the judiciary offering reduction in court occupancy while ensuring effective legal protection for persons using mediation. It creates conditions that allow the parties to talk directly in a deformed atmosphere, which in turn favors the development of a joint solu-

[24] A. Milne, J. Folberg, *The theory and practice of divorce mediation: an overview*, in: *Divorce mediation. Theory and practice*, ed. J. Folberg, A. Milne, New York–London 1988, s. 12.

[25] H. Przybyła-Basista, *Proces mediacji rodzinnych*…, s. 15.

tion acceptable to both parties to the conflict. Obviously, qualified and competent mediators who have experience in effective conflict management are necessary precondition for successful mediation.

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Summary

Mediation seems to be hope for the judiciary offering reduction in court occupancy while ensuring effective legal protection for persons using mediation. It creates conditions that allow the parties to talk directly in a deformed atmosphere, which in turn favors the development of a joint

solution acceptable to both parties to the conflict. Obviously, qualified and competent mediators who have experience in effective conflict management are necessary precondition for successful mediation.

Keywords: mediation, judicial proceedings, mediator

ZARZĄDZANIE KONFLIKTAMI POPRZEZ MEDIACJĘ – SZANSE I BARIERY DLA MEDIACJI

Streszczenie

Mediacja wydaje się być nadzieją dla sądownictwa. Oznacza ona ograniczenie obłożenia sądów przy jednoczesnym zapewnieniu skutecznej ochrony prawnej dla osób z niej korzystających. Stwarza to warunki umożliwiające stronom bezpośrednią rozmowę, co z kolei sprzyja wypracowaniu wspólnego rozwiązania akceptowalnego dla obu stron konfliktu. Oczywiście, obecność wykwalifikowanych i kompetentnych mediatorów, którzy mają doświadczenie w skutecznym zarządzaniu konfliktem, jest koniecznym warunkiem wstępnym powodzenia mediacji.

Słowa kluczowe: mediacja, postępowanie sądowe, mediator