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Commercial mediation – mandatory or voluntary?

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Introduction

Where disputes arise between entrepreneurs, mediation makes reaching an agreement quick and relatively inexpensive. It also offers a chance to restore good business relations and thus continue cooperation between contractors. Currently, mediation is voluntary, but this may change due to ongoing legislative works.

Polish law distinguishes two modes of initiating and conducting commercial mediation – namely, based on:

- an agreement between the parties (contractual mediation); or
- a court decision referring the parties to mediation.

Conducting commercial mediation by the parties is possible:

- at the stage preceding the commencement of court proceedings;
and
- in the course of the proceedings.

Mediation in course of proceedings

Pre-judicial mediation is initiated by agreement of the parties, at the initiative of one or both of the parties to the conflict. Then, after commencing proceedings, upon the parties' consent, the court may also refer a case to mediation.

Pursuant to Polish civil procedure, in cases where an amicable agreement is admissible, the court seeks to settle the case amicably at every state of the proceedings – in particular, by inviting the parties to mediation. For that reason, even before the first sitting set for the hearing, the presiding judge assesses whether to refer the parties to mediation and, if necessary, may invite the parties to appear at the hearing in person.

When referring the parties to mediation, the court sets the mediation time limit at up to three months. However, upon the parties' joint request or for other essential reasons, the mediation period may be prolonged if this is conducive to an amicable settlement of the case.

Confidentiality of mediation

Mediation proceedings shall not be public.

The mediator, the parties and other persons participating in the mediation proceedings (eg, professional representatives) are obliged to keep secret the facts of which they become aware in connection with the conduct of the mediation. However, the parties may exempt the mediator and other persons participating in the mediation proceedings from this obligation.

Additionally, in order to protect the confidentiality of mediation, Polish law provides that in the course of proceedings before a court or arbitration court, it is ineffective to refer to settlement proposals, proposals for mutual concessions or other statements made in mediation proceedings.

Voluntary nature of mediation

In the current legal situation, conducting mediation is voluntary, and a party can withdraw from mediation at any time. However, it should be emphasised that discussion has been ongoing on introducing mandatory mediation in commercial cases in Poland.

According to the proposals presented by the Ministry of Justice, filing a statement of claims in a commercial case would have to be preceded by mediation. Further, agreements between entrepreneurs would have to include a clause to the effect that, in the event of a dispute arising between them in connection with or relating to a concluded agreement, they will attempt to resolve the dispute through mediation before taking the matter to court.

The proposed regulations aim to bolster and popularise mediation as a dispute resolution method. A draft law amending the Civil Procedure Code and the Civil Code in this respect is at the consultation stage and has so far provoked much controversy.

New regulation concerning effects of initiating mediation

As of 30 June 2022, a significant change in the provisions regarding mediation is also coming into force.

Previously, the commencement of mediation interrupted the course of the statute of limitations. Therefore, this was an extremely favourable solution for the entrepreneur submitting the claim. This is because, after each interruption of the statute of limitations, it begins its course anew. Therefore, if the statute of limitations was interrupted by initiating mediation, the statute of limitations did not run anew until those proceedings were completed.

According to the new regulation, the initiation of mediation will not interrupt the course of the limitation period. In relation to claims covered by the mediation agreement, it will only result (for the duration of the mediation) in the limitation period:

- not commencing; or
- being suspended.

Conclusion of settlement

A record of the mediation, signed by the mediator, is drawn up, indicating:

- the place and time of the mediation;
- the particulars of the parties and the mediator; and
- the result of the mediation.

If the parties conclude a settlement agreement before the mediator, the settlement agreement signed by them is included in the record or constitutes an annexe thereto.

Moreover, if the provisions of law require a specific form to be maintained for a given legal act (eg, a notarial deed), the settlement agreement must maintain that form.

Court approval of settlement

If a settlement has been concluded before a mediator, the court immediately conducts proceedings for its approval upon the request of a party.

Where the settlement agreement is enforceable by way of execution, the court approves it by appending an enforceability clause thereto; otherwise, the court approves the settlement agreement by way of a decision. The court refuses to enforce or approve the settlement, in whole or in part, if the settlement is:

- contrary to the law or principles of social coexistence;
- aimed at circumventing the law; or
- incomprehensible or contradictory.

Once approved by the court, a settlement reached before a mediator has the legal force of a settlement reached before the court. A settlement concluded before a mediator and certified as enforceable constitutes an enforceable title.

Ease of obtaining settlement of claims

Sometimes, after obtaining a court judgment ordering the debtor to pay a disputed liability, actual enforcement by the creditor is impossible or at least very difficult. Upon the conclusion of many years of court proceedings, the debtor's assets may be significantly different from those at the beginning of the proceedings, either because of a mere deterioration in their economic situation or because they deliberately concealed their assets.

From the creditor's point of view, the conclusion of a settlement with the debtor by way of mediation enables, as a rule, easier and more certain satisfaction of the asserted debt. Commercial mediation is

based on the business integrity of the parties, and one of its primary objectives is to work out a solution to the dispute that is satisfactory to both parties.

Therefore, as a rule, settlements are executed voluntarily. However, this is not always the case. Meanwhile, particularly in the case of settlements made in connection with international trade, the debtor's failure to voluntarily comply with the outcome of the mediation may cause certain difficulties in the effective enforcement of the settlement. A solution to this situation is to be found in the Singapore Mediation Convention, which creates a unified framework for the enforcement of international settlements concluded in mediation. However, Poland, like other EU member states, has not signed the Singapore Mediation Convention.

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