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Mediation in the Polish Insurance Market

Introduction

According to § 2 section 3 of the Statute of Mediation Proceedings of the Mediation Centre at the Polish General Bar Council,¹ mediation is a voluntary, confidential proceeding with the participation of a mediator – an independent, impartial, neutral person who assists the parties in conflict to reach an agreement and conclude a settlement. Various definitions of mediation are formulated in the legal literature, but it is not the aim of the present work to decide which is the best.²

Mediation is not the only alternative dispute resolution method available on the Polish insurance market,³ alternatives include the following:

- complaint proceedings under the Act of 2015 on resolving complaints by financial market entities and the Financial Ombudsman;⁴
- out-of-court proceedings on resolving disputes between clients and financial market entities under the above Act and the Act of 2016 on resolving consumer disputes;⁵
- conciliation proceedings under sections 184–186 of the Code of Civil Procedure;⁶
- arbitration procedure under part five of the Code of Civil Procedure.

The Polish sources of law on alternative dispute resolution referred to above are primarily the result of implementing acts of international law, particularly that of the

¹ Text accessible on [http://panelcm.nra.pl/files/strony/67\(1\).pdf](http://panelcm.nra.pl/files/strony/67(1).pdf) [accessed: 2022.11.31].

² See, for example E. Dragon, *Mediacja jako alternatywna metoda rozwiązywania sporów – przypadek czy konieczność*, EP 2012, no. 1, p. 10; M. Białecki, *Klasyfikacja alternatywnych metod rozwiązywania sporów w polskim postępowaniu cywilnym – charakterystyka ogólna na przykładzie instytucji arbitrażu i mediacji* [in:] *idem, Mediacja w postępowaniu cywilnym*, Warszawa 2012.

³ For alternative dispute resolution (ADR) see also A. Mól, *Pojęcie i znaczenie alternatywnych metod rozstrzygania sporów*, PPH 2001, no. 12, p. 29ff; M. Białecki, *Zagadnienia ogólne* [in:] *idem, Mediacja...*

⁴ The act on resolving disputes by financial market entities and the Financial Ombudsman (amended text: Dz. U. of 2022, item. 187).

⁵ Act on 26 September 2016 on out-of-court consumer dispute resolution (Dz. U., item. 1823).

⁶ Act of 17 March of 1964 – Code of Civil Procedure (amended text: Dz. U. of 2021, item. 1805; hereinafter referred to as CCP).

European Union. The following are among the most important international sources of law referring to mediation:

- UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation adopted in 2002 and amended in 2018;⁷
- the United Nations Convention on International Settlement Agreements Resulting from Mediation of 2019⁸ – to date not ratified by Poland or the European Union;
- Mediation Directive 2008/52/EC;⁹
- Directive on Consumer ADR;¹⁰
- Regulation on Consumer ADR.¹¹

This article refers to mediation *stricto sensu* and in particular to mediation proceedings regulated in articles 183-1–183-15 of the Polish Code of Civil Procedure. With only slight exaggeration, mediation in the Polish insurance market resembles a unicorn: many have heard about it, but very few have seen it. In practice, insurance mediation is conducted mainly by the Mediation Centre of the Arbitration Court at the Polish Financial Supervision Authority (Komisja Nadzoru Finansowego – KNF). In 2022, the center conducted 837 mediations, of which 385 concluded in a settlement, and 12 did not.¹² Considering the total number of court cases involving insurers, the share of disputes settled through mediation is infinitesimal.¹³ The aim of this article is to identify the reasons for this deplorable situation.

In his professional life, the author of the article is a lawyer, who has concluded or tried to conclude numerous settlements with insurance companies. Some of the settlements were concluded in court as a result of conciliation procedure regulated by the Code of Civil Procedure. For example, one of the cases regarded a person who lost a leg as a result of being run down by a garbage truck. The insurer initially refused any settlement despite proposals addressed to him and with pressure from the court. After witnesses revealed the drastic details regarding the amputation, rehabilitation, and all the medical treatments, the insurer agreed to a settlement adequate to the claim, but without interest.

⁷ See https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01363_mediation_guide_e_ebook_rev.pdf [accessed: 2022.10.31].

⁸ See https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf [accessed: 2022.10.31].

⁹ 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 L 136, 24.5.2008).

¹⁰ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) (OJ L 165, 18.6.2013).

¹¹ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) (OJ L 165, 18.6.2013).

¹² Data obtained from the Mediation Centre of the Arbitration Court at the Polish Financial Supervision Authority.

¹³ In 2020, approximately 67,000 court proceedings were initiated against insurers. Data available on the Financial Ombudsman's website: <https://rf.gov.pl/o-nas/sprawozdania/> [accessed: 2022.10.31].

The author concluded only one settlement through court mediation proceedings conducted through the Mediation Centre of the Arbitration Court at the KNF. In this case, it was the insurer who initiated the mediation. The extent of damages was disputable, the client, for personal reasons, had lost interest in a prolonged court procedure, and thus a settlement was possible.

The author's experience with the complaint procedure and out-of-court proceedings before the Financial Ombudsman are negative. Insurers very rarely comply with complaints. In one case an insurer deliberately and erroneously calculated compensation for the loss of the right to carry out gainful employment to the detriment of the injured person, the Financial Ombudsman's Office claimed it does not have any measures at its disposal to influence the insurer to change their decision and then refers the claimant to court proceedings. The Report of the Financial Ombudsman regarding out-of-court proceedings revealed that the number of proceedings in 2021 was fewer than those in 2020.¹⁴

In all the cases the author has participated in when alternative dispute resolution was attempted, mediation at the pre-trial stage would have allowed the insurer to achieve much better results than those actually achieved. When questioned by the author, his colleagues and mediators with long-term experience confirmed his observations that insurers' legal counsel rarely agree to mediation even if it is proposed by the courts.

The author's theoretical experience with regard to mediation in insurance stems from his participation in a discussion panel on alternative dispute resolution conducted by Swiss Re during the conference XVII. European Traffic Law Days held in Warsaw and the paper he delivered there "Mediation in Motor Insurance: The Polish Perspective." The papers delivered by other participants, particularly one by a lawyer and mediator from Germany, revealed the much broader application of mediation in insurance cases. In the previous year, the author became a mediator by completing a mediation course organized by the Mediation Centre at the General Bar Council.

The author's observations reveal that settlements with insurers are eagerly concluded primarily by so-called claim offices, for which it is more profitable to collect overestimated commissions from damages obtained from a settlement than to engage in lengthy court proceedings against insurers. The level of benefits obtained from such settlements substantially deviates from those that are possible to win through court proceedings. For this reason, the settlements concluded by claim offices are referred to by some lawyers as "dog settlements."¹⁵

¹⁴ See https://rf.gov.pl/wp-content/uploads/2022/04/Sprawozdanie-z-realizacji-zadania-RF_2021_WRS.pdf [accessed: 2022.10.31].

¹⁵ See *Doradztwo odszkodowawcze w Polsce. Potrzeba regulacji prawnej*, ed. E. Kowalewski, Toruń 2015, *passim*. In my opinion, adopting a law to regulate claims offices is not necessary. Instead, judicial authorities should aim to ban claims offices. See: B. Kucharski, *Dekalog argumentów przeciwko działalności tzw. kancelarii odszkodowawczych* [in:] *Doradztwo odszkodowawcze...*, pp. 124–125, cited above.

General characteristics of mediation

According to the definition quoted at the beginning of this article, mediation is voluntary, confidential, impartial, and neutral. Others features of mediation include the lack of formalism, its speed, non-gratuitousness, and the possibility of concluding a binding agreement.¹⁶ The majority of these characteristics are included in Polish regulations in the Code of Civil Proceedings. The code regulations begin with the proclamation in art. 183-1 that mediation is voluntary.¹⁷ The following articles specifies that mediation shall not commence unless both parties consent to mediation (art. 183-6 § 2 point 4). Also explicitly stated is that consent may be revoked, which stops mediation.

The Polish legislator attaches great significance to the confidentiality of mediation.¹⁸ The code states that mediation shall not be open to the public (art. 183-4 § 1). The mediator, the parties to the mediation, and other persons participating in mediation proceedings shall keep confidential any facts disclosed to them in connection with the mediation. The parties may, however, release the mediator and other persons participating in the mediation proceedings from the foregoing obligation (art. 183-4 § 2). Any proposed settlements, mutual concessions, or other statements made in mediation shall have no effect when invoked in the course of proceedings before a court or a court of arbitration (art. 183-4 § 3).

The mediator must be impartial and neutral. Impartiality means that the mediator may not favor or act detrimentally toward any of the parties. The mediator shall remain impartial in conducting mediation and shall promptly disclose to the parties any circumstances which raise doubts as to their impartiality (art. 183-6 § 2 point 4). Mediator neutrality refers to their neutral attitude toward the case. This feature is essential to mediation and is not disputed even if it is not expressed directly by the code. It seems that insurers' doubts as to the neutrality and impartiality of possible mediators, in addition to the lack of particular legal requirements for mediators, may be the reason why insurance mediation is, in practice, nearly to that conducted by the Mediation Centre of the Arbitration Court at the KNF.

The speed of mediation is set forth in art. 183-10 of the code, according to which the court referring parties to mediation shall determine a period of mediation of up to three months, which may be extended only exceptionally. Mediation generally finishes with the first meeting, but it is also possible to organize a virtual meeting, and even, if

¹⁶ The catalog of mediation features is formulated variously. See: M. Białecki, *Mediacja w postępowaniu cywilnym...*, p. 44; J. Derlatka, *Zasady mediacji w postępowaniu cywilnym – uwagi prakseologiczne i prawnoporównawcze*, PPC 2018, no. 3, p. 81.

¹⁷ The voluntariness of mediation happens to be contested in the cases of the new formal requirement of a complaint, namely the information that parties attempted mediation or another out-of-court method of dispute resolution (art. 187 § 1 point 3 CCP). See: J. Szwaja, K. Jasińska, *Mediacja w postępowaniu cywilnym: wciąż dobrowolna?*, MP 2017, no. 7, p. 353.

¹⁸ According to P. Sobolewski, mediation as a legal construct is facultative (voluntary), confidential, and informal, and the speed and low cost of it are just the result of the first three basic features. See P. Sobolewski, *Mediacja w sprawach cywilnych*, PPH 2006, no. 2, p. 33.

the parties agree, to conduct mediation without any kind of meeting (art. 183-11). The informality of mediation contravenes the basic principle of formalism in civil procedure.¹⁹ The formal elements of mediation consist of the necessity to draft a mediation report and a settlement in writing. The code briefly indicates the basic requirements of the mediation report and the settlement. By signing a settlement, the parties consent to apply to the court for its validation, of which the mediator advises the parties (art. 183-15 of the code).

The non-gratuitousness of mediation is set forth in art. 183-5 of the code, which states that a mediator shall have the right to receive remuneration and reimbursement of expenses related to mediation, unless they have agreed to conduct mediation without remuneration.²⁰ Remuneration and expenses shall be charged to the parties. The mediator collects the receivables referred to in § 1 directly from the parties. The court determines their amount and awards them to the mediator only when a party is exempt from court fees. In comparison with the costs of court proceedings, mediator remuneration is relatively low. Remuneration may be set by the mediator only in cases of mediation agreed to by parties without the participation of courts.

It is crucial to add that mediation may lead to a legally binding agreement. This is confirmed by art. 183-15 of the code that stipulates that a settlement reached before a mediator, once validated by the court, has the binding effect of a settlement reached before the court. A settlement reached before a mediator that is validated by issuing a writ of execution is an enforceable title.

The provisions of the Code of Civil Procedure do not set forth any formal requirements for the mediator stating only that they shall have full capacity to perform acts in law and enjoy full civil rights, and that a judge (with the exclusion of a retired judge) may not be a mediator (art. 183-1). The code distinguishes between regular mediators and ad hoc mediators. Regular mediators are those that are enrolled on the lists kept by Presidents of Regional Courts.²¹ Nongovernmental organizations and institutions of higher education may also keep lists of regular mediators and establish mediation centers (art. 183-2 § 2).

As for the substantive qualifications of a mediator, the legislator states only that if the parties do not choose a mediator, the court, when referring the parties to mediation, shall designate a mediator with appropriate knowledge and skills related to the conduct of mediation in cases of a given type, taking permanent mediators into consideration first (art. 183-9). In practice, it is the judge in charge of the case who freely decides on the mediator. As far as out-of-court mediations are concerned, there are no legal criteria a person must fulfill if they want to pursue the profession of mediator.

¹⁹ See, for example *ibid.*; M. Białecki, *Mediacja...*, p. 43; A. Arkuszewska, *Postępowanie mediacyjne elastyczne czy sformalizowane? Zagadnienia wybrane*, "Kwartalnik ADR. Arbitraż i Mediacja" 2014, no. 4, p. 21; J. Derlatka, *Zasady mediacji...*, p. 76; E. Gmurzyńska, *Kierunki rozwoju mediacji sądowej w sprawach cywilnych w USA i w Europie*, EPS 2006, no. 11, p. 15.

²⁰ For example, this is pointed out by J. Derlatka, *Zasady mediacji...*, p. 82.

²¹ Art. 157a of the Law on the Structure of General Courts.

This situation is criticized in the doctrine,²² and it may also be one of the reasons for the unpopularity of mediation in insurance.

It is the mediator themselves who decides how mediation is conducted (the style of the mediation). The attitude of a mediator may be facilitative or evaluative.²³ In facilitative mediation a mediator adopts the position of moderator, does not formulate any opinions, does not advise the parties, and does not intervene substantially in the course of mediation or in the content of the settlement. In evaluative mediation, the mediator acts additionally as an adviser that may participate substantially in preparing the agreement. The legislator seems to observe both kinds of mediation stating in art. 183-4 of the code that a mediator shall conduct mediation using various methods with the aim of an amicable settlement of dispute, including the provision of support to the parties in the elaboration of settlement proposals. The mediator may also indicate manners for settling the dispute only at the joint request of the parties, and without binding effect for the parties.

In addition to the above, the literature presents many other kinds of mediation and ways to conduct it.²⁴ In particular, the distinction between transformative mediation and problem-solving mediation are popular.²⁵ This division is, to some extent, coincident with narrative mediation and mediation based on the parties interests. To simplify, in transformative (narrative) mediation, the mediator listens to the stories told by the parties and tries to help them understand the origin of the conflict and to develop an alternative story to create a foundation for commitment. In problem-solving mediation (based on the parties' interests), emphasis is placed on the ultimate aim of the mediation, which is reaching a settlement taking into account the interests of the parties.

Parties to mediation may make contact through direct or indirect mediation. As a rule, direct mediation requires the parties to meet before the mediator once or more if required. The mediator may also meet with parties individually (also referred to as a caucus). According to art. 183-11 of the code, a mediator shall promptly set the date and venue of a mediation meeting. Scheduling a mediation meeting shall not be required if the parties agree for mediation to be conducted without a mediation meeting.

²² See also M. Białecki, *Instytucja mediatora w sprawach cywilnych* [in:] *idem, Mediacja...*

²³ E. Gmurzyńska, R. Morek, *Mediacje. Teoria i praktyka*, Warszawa 2018, p. 111, 179ff; A. Daniszewska-Zujko, *Rodzaje mediacji* [in:] *Mediacja w praktyce mediatora i pełnomocnika*, eds. C. Roguła, A. Zemke-Górecka, Warszawa 2021; W. Żukowska, *Modele mediacji w Polsce i na świecie*, Warszawa 2012, p. 4ff.

²⁴ E. Gmurzyńska, R. Morek, *Mediacje...*, pp. 111–112; A. Daniszewska-Zujko, *Rodzaje mediacji...*; W. Żukowska, *Modele...*, p. 7.

²⁵ E. Spangler, *Transformative mediation*, https://www.beyondintractability.org/essay/transformative_mediation [accessed: 2022.12.30]; E. Gmurzyńska, R. Morek, *Mediacje...*, p. 183ff; A. Daniszewska-Zujko, *Rodzaje mediacji...*; W. Żukowska, *Modele...*, p. 11.

Advantages of mediation in insurance cases

Saving time and costs are among the most common advantages of mediation. According to data from the Polish Ministry of Justice, which appear to be overoptimistic to any legal practitioner, in 2021 the average length of court proceedings in district courts was seven months, whereas in regional courts it was ten months.²⁶ The length of proceedings are much longer in commercial courts. It should be added that, since 2011, the average length of court proceedings has increased continuously. Consecutive reforms aimed at shortening the length of court proceedings have been elaborated so incompetently that they usually lengthen them.²⁷ As noted above, the length of mediation determined by the court may not exceed three months, and many cases are resolved during the first mediation meeting. Theoretically, the speed of mediation should influence the popularity of this method of dispute resolution. This is particularly so in insurance cases in which ascertaining the adequate sum of pecuniary compensation or damages is often connected with lengthy evidence proceedings in which opinions of experts of various specialisation are necessary.

The cost savings of mediation is obvious since the court fee to adjudicate a case is 5% of the value of the dispute. The parties also incur costs for legal counsel, which depend on the value of the dispute, and there are also expenditures for taking evidence. Mediator remuneration for either civil or commercial cases is 1% of the value of the matter of issue and may not exceed 2,000 PLN. In other cases, mediator remuneration is even lower. Obviously, the relatively low costs of mediation in comparison to court proceedings should also increase the popularity of mediation in insurance cases. Insurance disputes commonly concern relatively large sums of money, which alone impacts the costs of proceedings. Additionally, the precise estimate of pecuniary compensation or damages to be paid by the insurer depends on evidence proceedings that generate additional costs, especially for the remuneration of experts.

The confidentiality of mediation is another advantage and one of its most important features. Confidentiality may be of considerable significance for all parties to insurance disputes because of the obligation of insurance secrecy. For insurers, insured persons, and injured persons in liability insurance disputes, mediation safeguards the secrecy of information concerning personal secrets or substantial property interests, which is not something guaranteed by court proceedings. For insurers, on the other hand, it prevents information concerning market practices they employ of questionable legality and court decisions that are unfavorable for them from being leaked to the public. This may have significant marketing value for insurers.

Another obvious advantage of mediation is that it enables parties to determine the outcome. Instead of relying on unpredictable court judgements, the parties elaborate

²⁶ Data of the Polish Ministry of Justice https://ciekaweliczyby.pl/sprawnosc_sadow_2021/ [accessed: 2022.10.30].

²⁷ This refers particularly to the sweeping reform of the civil procedure introduced by the Act of 4 July 2019 (Dz. U. of 2019, item. 1469, in force from 7 November 2019).

a settlement that is acceptable to each of them. This is how parties can mitigate the risk of an unfavorable settlement. Also worth underscoring is that settlements concluded through mediation are highly efficient in comparison to court judgements and decisions. A debtor who approves a settlement and considers it acceptable is naturally more willing to execute it than one imposed upon him by the court that is often totally unfavorable and ultimately requires the intervention of bailiffs. In insurance cases, the amount of compensation or damages awarded is often at the discretion of the court, which should also influence the popularity of insurance mediation.

Furthermore, contrary to proceedings settled by a court, which usually antagonize the feuding parties further, mediation enables the preservation or restoration of good relations between the parties. Amicable conclusion an insurance case may enable the insurer to retain his client. Other advantages of mediation also include the lack of problems with jurisdiction *ratione materiae* and territorial jurisdiction. By signing a mediation contract, the parties agree to the mediator and the mediation venue. The possibility of suing the insurer in the court competent for the place of residence of the insuring party²⁸ renders this last advantage of mediation somewhat less important in insurance cases.

Reasons for unpopularity of mediation in insurance cases

Mediation is voluntary, and, according to all authors, it should be. The introduction of a formal requirement of a lawsuit (bill of complaint) to include information as to whether the parties attempted mediation or any other out-of-court settlement method, and, if not, an explanation as to why no such attempts were made, (art. 187 § 1 point 3 of the code) does not change in any way the usual practice of legal counsel in the pre-trial stage. The basic purpose of the amendment is to popularize ADR methods, in particular mediation, and to unburden the courts, but this was not achieved. The legal requirement is fulfilled by proving that another party received a pre-trial summons. Such summonses were also sent earlier usually to start the period of calculating interest for delay. Currently, not attaching a summons to a bill of complaint may be treated as a formal default lawsuit resulting in its return from the court.²⁹ The postulate arises for the courts to treat more strictly the requirement of attempting mediation or any other out-of-court settlement method before bringing a lawsuit.

Referring to the advantages of mediation described above, a question arises why so few insurance cases are subject to mediation and finish with an amicable settlement. Obviously, the popularity of mediation in Poland may be influenced by some issues

²⁸ Art. 10 of the Act of 11 September 2015 on Insurance and Reinsurance Activity (consolidated text: Dz. U. of 2022, item. 2283).

²⁹ See further: J. Jasińska, *Mediacja w rozumieniu art. 187 § 1 pkt 3 kpc – przywilej skutkujący odciążeniem sądów czy wadliwie skonstruowany obowiązek poprzedzający proces cywilny?*, PPP 2018, no. 1, pp. 66–68.

of a general nature that are not restricted just to the insurance market. Belligerence, brawling, stubbornness, and distrust are among the national characteristics ascribed to the Polish people.³⁰ If this stereotype is true to any extent, and the Polish people just enjoy arguing, it is easy to understand their reluctance to mediate. On the other hand, mediation is exceptionally popular, for example, in Japan where such virtues as belligerence, service, loyalty, and honor are equally important. However, in Japan various widely understood conciliation methods have their own long histories and are considered to serve the protection of social harmony and Japanese traditions.³¹

In addition to the above, there are many reasons for the unpopularity of mediation in insurance cases. Some of these refer to insurers, while others refer to insureds and their lawyers. As far as insurers are concerned, the basic reason can be reduced to the observation that the most common of insurer tactics can be described as “deny to the end,” and it apparently works well statistically. For the average client, engaging in a court dispute is an additional problem that can be very stressful. Many people who suffer though some occurrences that are disadvantageous to them and face the insurer’s refusal to pay will give up exercising their rights even at the pre-trial stage, and some of them may surrender during the course of court proceedings, but this happens less often. The insurers long ago learned to use and exploit this tendency.

Furthermore, insurance companies are better prepared for court disputes than are their clients. Involvement in court disputes is an inherent part of the insurance business and is part of the daily functioning of all insurers, which employ large cadres of legal advocates specializing in this field of law. These professionals know better conducting court disputes than mediating, and they are rewarded by insurers for the results of their work. An amicable settlement when the insurer had already denied the claim totally or a settlement that is in excess of a certain amount will both be seen as a defeat for the insurers’ lawyers.

Paying insurance damages after initially denying responsibility requires somebody taking a decision. Insurers’ loss adjusters are also rewarded for their work. It is reasonable to assume that the adjusters who generate the smallest expenses can expect promotions or other benefits. Taking a decision to pay requires justification, and a court judgement justifies any insurer’s counsellor perfectly. There can be no discussion with a final, legally-binding ruling of a state authority, but the same is not true when it comes to amicable settlements.

Other reasons insurers are reluctant to mediate are related to the risk of meeting a mediator who favors the client. Many mediators are independent counsellors or psychologists. These mediators primarily assist insureds in their disputes with insurers, and cooperate less frequently with insurers who employ full-time legal counsel. Psychologists may seem from the essence of their profession empathetic and inclined to

³⁰ See for example P. Tarasiewicz, *Specyfika Polaków jako narodu*, “Cywilizacja” 2011, no. 37, p. 41ff and works cited therein.

³¹ B. Jelonek, *Alternatywne sposoby rozwiązywania sporów w Japonii ze szczególnym uwzględnieniem charakterystyki rozwodu koncyliacyjnego*, “Kwartalnik ADR. Arbitraż i Mediacja” 2020, no. 4.

have compassion for people affected by disadvantageous occurrences. Additionally, they may have had their own bad experiences with insurers. Thus, it is easy to understand why the majority of Polish insurance mediation is conducted by the Mediation Centre of the Arbitration Court at the KNF. However, about one third of mediators on the list kept by them are independent lawyers, many of whom have experience working in financial institutions especially banks, insurers, insurance funds, and official state agencies. It must be also underscored that, in general, it is the parties who choose the mediator. The judge referring the case for mediation does so only when the parties do not want to or cannot agree on this subject.

There are also many reasons why insureds' lawyers are reluctant to mediate. As lawyers, they are by training more skilled in conducting court proceedings than mediation. They trust themselves and do not want to rely on a mediator who may have less legal experience than they do or even may not be a lawyer at all. This refers particularly to older lawyers who acquired their professional qualifications at a time when mediation in Poland did not exist in practice and was not regulated at all.

Furthermore, the insured's legal counsel is, by definition, the defender of their interests, a kind of mercenary who is expected to win the battle with the insurer. The counsel wants to impress their client and show them that they are able to fight to the end. Such lawyer often think that honorable defeat win him a better reputation among clients than does the surrender of part of a dispute. The financial dimensions are also important. An amicable settlement regardless of how it is concluded is usually less profitable for the lawyer than winning a case, even in part. The costs of proceedings in court judgements are governed by the so-called principle of responsibility for the outcome of a case, which means that the losing party covers all the costs proportionally to the extent of their loss. In an amicable settlement, unless it has been agreed otherwise, the costs of the proceedings are not adjudicated at all. If a lawyer does not formulate the contract with his client suitably, his remuneration may be significantly lower than if he win a court case. Considering the principle of responsibility for the outcome of the case, it is even difficult to frame a contract with a client in a way that provides for remuneration for an amicable settlement that is the equivalent to that due for winning a court case.

Additionally, among lawyers insurance case settlements are associated with the business of so-called claim offices, which are grossly unpopular within the legal community. These businesses are considered to be unprofessional and generally dishonest, and they are thought to deprive lawyers of clients. Lawyers are often disgusted by the "dog settlements" concluded by claim offices thus desiring to differentiate themselves from these businesses especially since both lawyers and claim offices often charge clients a commission of the compensation awarded. The legal representation fee for compensation won in court is viewed by lawyers and their clients as an honest gain in contrast to fees deducted from the compensation awarded from a settlement.

Another reason why mediation remains unpopular in insurance cases appears to be the opaqueness of regulations concerning various dispute resolution methods in insurance cases (complaint proceedings under the Act of 2015 on resolving com-

plaints by financial market entities and the Financial Ombudsman and the Act of 2017 on insurance distribution, out-of-court proceedings and resolving disputes between clients and financial market entities under the Act of 2015, and the Act of 2016 on resolving consumer disputes). Parties that do not understand the relationships among the various methods of pre-trial proceedings in insurance disputes or were unable to reach settlements despite exploiting some of the methods mentioned may come to believe in the futility of dispute resolution when faced again with commencing time-consuming proceedings aimed at reaching a settlement without the participation of the courts.

On the other hand, perhaps the accessibility of the special form of insurance claim settlement that is the *ex gratia* payment should not influence the unpopularity of mediation. There are no obstacles to *ex gratia* payment in settlements achieved through mediation. For an individual client it is generally irrelevant whether the legal right determines their right to compensation. From the point of view of the insurer, admitting such a premise to the client may be more difficult, which, accordingly, supports performance in the form of an *ex gratia* payment. Consequently, *ex gratia* payment should be viewed as a sort of added value in insurance cases that should increase the popularity of mediation.

Conclusions

The characteristics of mediation described in this article, particularly its relative brevity and low costs, make it more advantageous than traditional court proceedings. An economic analysis of the law suggests that increasing the popularity of mediation could provide relief for the courts while lowering the social costs of legal dispute resolution. In addition to the brevity and low costs of mediation, which are universal dimensions, some of its other characteristics particularly confidentiality and the opportunity for parties to shape settlements while maintaining good relations may support its popularity, particularly in insurance cases.

Popularizing mediation must obviously involve disseminating knowledge about mediation equally among insurers and their clients. In Poland there seems to be no culture of dispute resolution through dialog, and the prevailing win/lose mentality suggests that any compromise is unprofitable by its nature because it assumes concessions to be made in favor of the other party. Changing this attitude will be difficult and will require time. This creates a particularly important obstacle to resolving through dialog disputes that are initiated by people who feel they were seriously harmed, which is a significant feature of many cases for redressing damage resulting from bodily harm and/or a permanent disability. Another fundamental obstacle in popularizing mediation for resolving insurance claims is the observation that “denying to the end” tactic is profitable statistically for insurers even if it involves losing some cases. Overcoming this obstacle requires a more profound analysis of each case by the insurer with the aim of estimating the inevitability of a court dispute and the probability of losing. It is

suggested that such a probability exists in a vast number of cases in which insurers decide to embroil themselves in lengthy court disputes. Educating insurers of the purely economic efficiency of mediation should be the best way to popularize this method among them.

An impediment for popularizing mediation is also the existence of a few parallel regulations for pre-trial proceedings. It is difficult to understand why broadly-defined resolution proceedings must be regulated by various legal acts (Act of 2015 on resolving complaints by financial market entities and the Financial Ombudsman, Act of 2017 on out-of-court proceedings on dispute resolution before the Financial Ombudsman, the Act of 2016 on resolving consumer disputes, and the Act of 2017 on Insurance Distribution).

Of course, voluntariness is inherent feature of mediation, but it is suggested that, at least in some cases, the courts could treat this more as a strict requirement with regards to the evidence of an attempt of out-of-court dispute resolution before taking a court action (art. 186 § 1 point 3 of the code). This attitude cannot be introduced, however, without guaranteeing consistent, speedy, efficient complaint procedures, which, as is suggested, has not yet been achieved. Common inefficiencies of all kinds of complaints for insurer decisions meant that both parties to the proceedings treat it as unnecessary burden and a waste of time rather than a way to resolve disputes.

The absence of legal requirements for pursuing the profession of mediator might be viewed as another obstacle for popularizing mediation. With regard to out-of-court mediations, there are no statutory requirements at all with regard to court mediation, art. 157a of the Act on General Court Structure includes only a general statement regarding the knowledge and experience of mediators in conducting mediation, and it leaves to the discretion of the presidents of regional courts to evaluate the knowledge and experience of candidates. If the parties to mediation fail to choose a mediator themselves, there are no precise criteria for choosing an appropriate mediator from among those enrolled on the list kept by presidents of regional courts. As long as the Polish legislator does not implement comprehensive regulations for mediators by specifying the mode of conferring qualifications accompanied by a regime of consistent certification and verification, such as exists in foreign legal systems, parties to disputes, particularly insurance companies that employ qualified legal personnel, will continue to doubt the general knowledge and qualifications of mediators.

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Summary

Bartosz Kucharski

Mediation in the Polish Insurance Market

The article describes mediation as one alternative dispute resolution method (ADR) available on the Polish insurance market. The author positions mediation among other ADRs on the market and describes the major features and advantages of mediation over traditional court proceedings. According to the author, mediation is very rarely used on the Polish insurance market. The vast majority of insurance mediation is conducted by the Mediation Centre of the Arbitration Court at the Polish Financial Supervision Authority. The author discusses the reasons for this including the relative newness of mediation as an ADR in Poland and a general lack of knowledge of it, the lack of system of comprehensive regulations for the profession of mediator, insurers' attitude of "deny to the end" with regard to settling claims, and the mentalities the customs of their lawyers.

Keywords: contract of insurance; insurance market; insurance disputes; ADR, mediation.

Streszczenie

Bartosz Kucharski

Mediacja na polskim rynku ubezpieczeniowym

Artykuł dotyczy mediacji jako jednej z alternatywnych metod rozstrzygnięcia sporów na polskim rynku ubezpieczeniowym. Autor umiejscawia mediację wśród innych alternatywnych metod rozstrzygnięcia sporów ubezpieczeniowych, przedstawia jej cechy oraz zalety w porównaniu do procesu sądowego. Wskazuje, że w Polsce mediacja jest niezwykle rzadko wykorzystywana do rozstrzygnięcia sporów ubezpieczeniowych oraz że większość mediacji z zakresu ubezpieczeń prowadzona jest przez Ośrodek Mediacyjny Sądu Polubownego przy Komisji Nadzoru Finansowego. Przyczyn takiego stanu rzeczy autor upatruje m.in. w relatywnej nowości mediacji oraz braku wiedzy o niej, taktyce ubezpieczycieli polegającej na negowaniu swojej odpowiedzialności do końca, jak również w mentalności ubezpieczających i przyzwyczajeniach ich pełnomocników.

Słowa kluczowe: umowa ubezpieczenia; rynek ubezpieczeniowy; spory ubezpieczeniowe; alternatywne metody rozwiązywania sporów; mediacja.