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MEDIATION - A FORM OF ALTERNATIVE DISPUTE RESOLUTION IN THE REPUBLIC OF SLOVENIA

Sara Ahlin Doljak , Ph.D. in Law degree
Lecturer at the European Faculty of Law (EVRO-PF), Slovenia and lawyer in Law Firm,

ABSTRACT

Due to the crisis in the exercise of the right to justice within a reasonable period (Article 6 of the European Convention on Human Rights - hereinafter referred to as ECHR, which Slovenia ratified on 28th June 1994) which has lasted for a long time, new forms of alternative dispute resolution rapidly arise in many forms and variations, whereby this article only addresses mediation as one of the most successful forms. In 2008, the Republic of Slovenia adopted the Mediation in Civil and Commercial Matters Act (it entered into force on 7th June 2008), while this area was substantially and procedurally unregulated until then. Theory points out that the law must not have organisational and other logistic solutions, since this would only inhibit the production of new forms. It is necessary to take into account the model law of UNCITRAL and the EU Directive and the existing four EU recommendations, including the Green Paper on mediation. Fortunately, these acts do not contradict each other, but rather complement each other. Therefore, it was possible to create legal provisions in the technical aspect, which have already been or are being created (in Slovenia, e.g. the Out-of-Court Resolution of Consumer Disputes Act (the Official Gazette of the Republic of Slovenia, no. 81/15) which entered into force on 14th November 2015).

***KEYWORDS**: mediation, settlement, historical evolution, Court Management.*

Mediation in Civil and Commercial Matters Act (ZMCGZ/2008)

On 23rd May 2008, the National Assembly of the Republic of Slovenia adopted a modern Mediation in Civil and Commercial Matters Act. The purpose of the adopted Act is to promote out-of-court dispute resolution in civil and commercial matters by the use of mediation.

This is the second Act, in addition to the Arbitration Act adopted by the National Assembly of the Republic of Slovenia at the 38th regular session on 25th April 2008, which is to encourage citizens to use the procedures of peaceful dispute resolution and, if possible, resolve the dispute between the parties by an agreement prior to the commencement of court proceedings.

Among all forms of alternative dispute resolution, the mediation is the most widespread in Slovenia; it has been legally regulated for eight years. In the process of mediation, the mediator helps the parties to reach an agreement that would resolve their dispute and newly regulate their mutual relations as a neutral third party - the mediator. The role of the mediator is to help the parties to reach an amicable settlement by themselves, while the mediator has no powers to take a binding settlement of the dispute.

ZMCGZ contains general procedural and substantive provisions and principles of the mediation law, such as:

• the impact of mediation on court proceedings;
• confidentiality of data disclosed in mediation;
• the prohibition of its use for subsequent evidence purposes and
• the impact of mediation on limitation and preclusive periods.

ZMCGZ follows three important objectives:

- Mediation helps the clients to reach an agreement without judicial proceedings by resolving their dispute in order to maintain further personal and business relationships. Such resolution is acceptable to all parties since they create the content of the agreement themselves. Therefore, mediation is suitable for individuals, craftsmen and other economic entities.

- The mediation process is very informal; therefore, it is easy and much faster than judicial proceedings which can last for quite some time.[1] Therefore, this method of dispute resolving is much more friendly to clients.

- For clients, the mediation is much cheaper than court proceedings. Since the clients in the mediation process reach an agreement, no fees are to be paid and also costs of lawyers are significantly lower (smaller), since the payment for lawyers' services does not depend on the success in legal proceedings.

[1] In my legal practice, I have a file older than 8 years. Certainly, the record is held by a file before the ECHR in Strasbourg, when, according to the words of a former President of this Court, Dr. Luzius Wildhaber (Switzerland), the matter before national courts lasted 51 years ...

The reason for the adoption of the Mediation in Civil and Commercial Matters Act was the gradual international harmonisation of legal regulation of mediation. The United Nations Commission on International Trade Law (UNCITRAL), which adopted the Model Law on International Commercial Conciliation in 2002, strives for this harmonisation. At its 57th session, the United Nations General Assembly recommend that states consider the possibility of enacting the Model Law to ensure the unity of the legal system of dispute resolution, considering the specific needs of international commercial conciliation.

ZMCGZ has transposed the Directive of the European Parliament and of the Council of the EU on certain aspects of mediation in civil and commercial matters to the national legislation. This directive was adopted on 23rd April 2008 and is one of the achievements of the Slovenian Presidency to the EU Council.[2]

The beginning of the court connected mediation in Slovenia date back to 2001 when the programme at the Ljubljana District Court started, initially in the form of a pilot project. The programmes of court connected mediation, which we have today, are successful. A minimalist regulatory approach to this segment of alternative dispute resolution should also prevail in the future. However, it seems to be too risky for some issues, such as the principles of prohibition of evidence and confidentiality, to depend on the autonomy of the clients. Although international documents bind states to be proactive in the management and direct financial support to operators of mediation, the relationship of keys players in the judicial policy, in particular the Ministry of Justice, to the court connected mediation has been ambivalent until now. When considering the vision of an autonomous regulation, in particular the questions about the possibility of an external contractor (court connected mediation) and payments for services in mediation arise.[3]

Legal basis for the court connected mediation (Slovenia)

The court connected mediation in Slovenia had a scant normative basis until 2008, namely:

- Article 60 of the Courts Act (Official Gazette of the Republic of Slovenia, no. 45/95 et seq.), or Article 171 of the Court Rules (Official Gazette of the Republic of Slovenia, no. 35/98 et seq.) that stipulate that, if there is an increased number of pending cases or the statistics show a court backlog the president of the court must adopt a programme for solving these matters;
- Paragraph 4 of Article 305 of the Civil Procedure Act (ZPP)[4] as a procedural rule that provides that the court may, on application of the parties who agree to carry out an alternative dispute resolution, suspend civil proceedings for a period not longer than three months.

Court connected mediation in practice

The beginning of the court connected mediation in Slovenia date back to 2001 when the programme at the Ljubljana District Court started, initially in the form of a pilot project. The programme is implemented in civil, labour and family matters and commercial disputes.

[2] The Directive was signed on 21st May 2008 and published on 24th May 2008 (the Official Gazette of the Republic of Slovenia, no. 136).
[3] Thus also the supreme judge of the Republic of Slovenia, mag. Betetto N. (2008) in "Tendencies of the development of court connected mediation in Slovenia," Pravna praksa, 15th May 2008, p. 8 et seq.
[4] Official Gazette of the Republic of Slovenia, no. 73/07 - OCT with amendments

The court ensures the implementation of mediation services through mediators who were largely involved in the training programme (basic and advanced) which was organised and its minimum standards set by the court (some mediators have been "trained" already (later) in the context of education organised by the Slovenian Association of Mediators and the Slovenian Bar Association).

According to the programme requirements, the status of the mediator maybe only obtained by lawyers, while this is not a prerequisite for co-mediators (co-mediation is a regular practice in family matters and, if necessary, also in other matters). Most active mediators are lawyers, followed by retired judges and lawyers in the economy, some are notaries and (also retired) judges (their number has dramatically reduced since the beginning of the programme when they represented the majority of mediators). Co-mediators are psychologists, social workers and other non-lawyers.

There are two main ways of referral to mediation:

1. the clients are informed about the possibility to resolve the dispute in the mediation process by a brochure which is routinely sent to both parties at the stage of sending the charges to the defendant;
2. parties are informed about the possibilities to resolve the dispute in the mediation process at the hearing when the information on the programme and mediation as a method of alternative dispute resolution is given to them by the judge to whom the case is assigned.

The programme is based on the principles of voluntariness, free of charge and efficiency (agreement is written in the form of enforceable court settlement).

Programme management and administrative tasks (including the informing of clients, performance monitoring of the programme and proactive publicity) are implemented by the Service of alternative dispute resolution.

Programmes following the example of the Ljubljana District Court, which are less "intense" and, therefore, at least quantitatively less successful, are implemented in 44 local courts in the Republic of Slovenia, all eleven District Courts in the Republic of Slovenia and four Higher Courts in the Republic of Slovenia.

Courts finance the programmes from their own (material) resources, the country has not financed any programme yet (author's note) by budgetary means ... (sic!).

	CONSENTS		***MEDIATION COMPLETED***				
YEAR	Number of cases offered in mediation	Consent given by both parties	Successful	Unsuccessful	TOTAL	Successful associated matters	**TOTAL**
2015	3641	714 (19.6 %)	417 (53.0 %)	370	787	61	478 (60.7 %)

Table: statistical data for the year 2015 for all matters together in the Ljubljana District Court[5]

[5] See Statistical report on the court connected mediation programmes for the year 2015, URL: http://www.sodisce.si/mma_bin.php?static_id=20160503152334, 10.12.2016

In 2001, when the court connected mediation in Slovenia began, the mediation was an unknown and exotic institute for the general public. The programme of court connected mediation mainly has the credit for the interest of media on alternative dispute resolution[6], demand for mediation by potential users in and out of court and "raise of awareness" of the population of the existence and benefits of alternative dispute resolution in general.

For the procedures of mediation in courts, Paragraph 3 of Article 305b of the Civil Procedure Act (Official Gazette of the Republic of Slovenia, no. 73/2007-OCT3 and amendments) is important as it stipulates that the court may, on application of the parties who agree to carry out an alternative dispute resolution, suspend civil proceedings for a period not longer than three months.

Regulatory framework and judicial policy measures

Minimalist legislative and regulatory regime in Slovenia has proved to be an advantage ("less is more") since it has given courts the freedom to design programmes adapted to the needs of users. Although such an approach should prevail in the future, it seems too risky that some issues depend on the autonomy of the clients. This particularly applies to the content of the principle of confidentiality in mediation and prohibition of evidence, which is determined by the Directive of the European Parliament and of the Council of the EU on mediation and the UNCITRAL Model Law on International Commercial Conciliation. In Slovenia, it should be regulated by the procedural legislation.[7] Regarding the precise definition of other ethical standards and rules (e.g. the question of impartiality and competence of the mediator, conflict of interest), the priority could be given to autonomous organisation (e.g. by codes of conduct).[8]

The question is whether the courts should continue to provide the implementation of mediation by themselves (thus is now provided by all programmes that take place in Slovenia) or referral of clients, who agree with the mediation, to an external service provider (court connected mediator) could be considered. It is clear that constant maintenance of "infrastructure" needed if a court wants to provide the implementation of mediation itself is demanding. On the other hand, there is no doubt that the quality control is much simpler than in the case of referral to an external provider. In the Slovenian mediation space, there are not many providers that meet strict quality criteria which should be effective in programmes of court connected mediation; it could be changed in the normal course of things. Then, there seems to be no obstacles, at least not principle ones, [9] for the programme of court connected mediation which would rely on an external provider.

So far, the mediation, which is free of charge for the clients, has been an important attribute of the programmes of court connected mediation, which has contributed to their success and has had a strong promotional effect. However, it cannot be denied that a payable system creates a picture of a certain "value" of services in a client and thus encourages the client to play a more active role. A sensitive question is whether and to what extent the customer demand would reduce if the clients had to pay for the services in mediation? It is reasonable to expect that the elasticity of demand is largest in commercial disputes. The

[6] See the White Paper on mediation, DMS, June 2008, p. 117.
[7] Obviously, this issue has been regulated by the Mediation in Civil and Commercial Matters Act (ZMCGZ/2008) but only on a formal level.
[8] The Code of Ethics of the Slovenian Association of Mediators was adopted in 2007.
[9] It is true that the decision for an external provider of mediation services in the absence of direct budget support would call into question whether the mediation is free of charge for clients.

clients in these disputes are also the most skilled to carry out the analysis of the economic viability of mediation ("cost-benefit") which is based on a comparison of the costs of legal proceedings and mediation. The above reasons have been compelling enough that the completely free of charge mediation in commercial disputes (of course, upon strict insisting on the voluntary nature of mediation) has been replaced by payable mediation.[10] In 2009, the Act on Alternative Dispute Resolution in Judicial Matters (ZARSS, Official Gazette of the Republic of Slovenia, no. 97/2009) was adopted which introduced the mediation in all Slovenian courts. The Act also stipulates that mediation in disputes arising from relationships between parents and children is still free of charge for the clients. The clients only cover the costs of their own participation and lawyer's costs if they decide to cooperate with a lawyer in mediation; in mediation in commercial disputes, clients, in addition to their own costs and lawyer's costs, also bear the reward for hours of mediation, successfully completed mediation and travel expenses of the mediator in equal parts, if not agreed otherwise; the first three hours of mediation in all other cases are free of charge for clients. The clients only cover the costs of their own participation and lawyer's costs if they decide to cooperate with a lawyer in mediation. If mediation takes more than three hours, the reward for the mediator for the fourth and subsequent hours of mediation, reward for the agreement in the event that the mediation is successful and travel expenses of the mediator shall be borne by the clients.

International documents[11] oblige countries to be proactive in the management and direct financial support of mediation providers. The starting point of legal policy, which strives for wider access to justice, should be the support to the system the centre of which is not the judicial settlement of conflicts as the only option for clients but the range of other customised options available to clients in a dispute among which they can choose (arbitration, mediation, early neutral evaluation of the dispute, court decision).

Since the concept "access to justice" is wider than the concept of access to the court,[12] the next step should be the promotion of equal access to court connected mediation for everyone. The Directive, which in Article 3 provides that courts may, where appropriate, invite the clients to try to settle the dispute in mediation or informs them about mediation at an information meeting, encourages Member States to take this step.

The concepts of accessibility of mediation and the duty of courts to introduce the programmes of court connected mediation relate to the obligation of a (social) state to allocate resources to programmes of court connected mediation and thus, on the one hand, ensure the conditions for the work of mediation or courts and, on the other hand, prevent the financial situation to hinder the realisation of the right to justice.

[10] This point of view, with which I fully agree, is summarised after Betetto N. (2008), ibid.

[11] See, e.g. Item 32 of the Directive for better implementation of the recommendations of the Council of Europe in civil and family mediation.

[12] Courts have the task to provide various procedures adjusted to the diversity of individual cases for resolving the dispute. For example, the European Council at its meeting on 15th and 16th October 1999 in Tampere required that Member States develop alternative judicial proceedings to facilitate better access to justice.

Autonomous regulation

When considering the vision of development (at this point only) of the court connected mediation, it should be emphasised that the quality of services in mediation processes must remain a fundamental postulate and conditio sine qua non of all programmes. The court connected mediation is not the same as mediation outside the court. It takes place in the "shade of the court" and is connected with the court proceedings although it is not a part of it. Therefore, clients reasonably expect that certain standards and principles shall be respected also in mediation. Therefore, courts must ensure the fairness of the mediation procedures which can only be done by paying constant attention to professional standards of mediators, their continual training, supervision, training of judges and court staff and by monitoring the performance of the programme by various indicators. The current (sufficient) situation should be upgraded by improved integration of courts where the programmes of court connected mediation are implemented, with the aim of harmonising standards and exchange of experience.

Conclusion

First, it should be emphasised that courts must retain their leading role in promoting further use of mediation and raising the demand of it. It is not enough that the programmes exist, but potential users and the general public should be familiar with their content. Information and continuous training of judges and lawyers, whose role is the referral to court connected mediation, is essential and therefore very important.

The number of mediators - active judges and lawyers is in inverse proportion to the duration of the programme of court connected mediation.

The programmes of court connected mediation in Slovenia are successful. This can be inferred from the analysis of satisfaction of clients who have participated in mediation processes. The following factors have contributed to this:

- quality of services in the mediation process;
- free of charge services;
- enforceability of agreements;
- intertwining of alternative dispute resolution and judicial decision-making in the process of "case management";
- good promotion;
- relatively high support of lawyers;
- motive of clients for faster resolution of dispute through mediation, compared with a judicial decision.

The role of judges and lawyers - mediators in the introduction period of programmes of court connected mediation has proved crucial. The judges were the ones who have overcome the "gap" between the judicial decision-making and mediation as a method of alternative dispute resolution.

They have given the initial push to the programmes and, thanks to them, clients trust the system today. Nevertheless, I agree with those who argue that judges should mobilise their knowledge, experience and energy primarily for judicial adjudication. Thus, judges should not be excluded as potential mediators in the

future,[13] but they can have a leading role only in the initial period of implementation of the programmes; later, their place must be taken by other lawyers.

I advocate for the forms of alternative dispute resolution, especially mediation, to be established as the primary method of resolving disputes and conflicts in society not only as an alternative and complement to judicial settlement of disputes. It is wrong to interpret that mediation is to replace the judicial system. I came to the conclusion that mediation cannot completely replace the judicial system. Pluralism and diversity of relationships which clients enter ("volens - nolens") every day, differentiation of clients in these relationships and their diversity require the plurality and diversity of methods and techniques of dispute resolution. This must and can be an advantage (priority) concerning the choice, type, procedure, method and means of dispute resolution (including mediation), which should be given primarily to clients and their will (animus). Exceptions can only be set by law (in case of prohibition of disposal of claims opposing compulsory regulations (e.g. trade in explosives, poisons) or moral (such reasonable provision is included in the Paragraph III. of Article 3. of the Slovenian ZPP). Clients can settle their dispute in a completely informal way considering their interest or they can entrust its resolution to a certain natural or legal person (private or institutional arbitration). Today, clients have (unfortunately) the most confidence in the judicial way of settling disputes. Therefore, their right and access to the courts (Article 23 of the Constitution of the Republic of Slovenia and Articles 6 and 13 of the ECHR, for example) must not be obstructed or prevented. Therefore, to me mediation represents the primary form, rather than an alternative or complementary possibility of judicial dispute resolution.

It is necessary to deepen and strengthen the awareness of the suitability and usefulness of all forms of non-judicial dispute resolution (mediation, arbitration, conciliation, etc.) in a broader society, whereby I note that social consciousness is still too weak in Slovenia and therefore the situation is not satisfactory. Each novelty (including forms of alternative dispute resolution that came to Europe only 40 years ago) needs at least a generation or two to be accepted. However, it is true that especially mediation can contribute significantly to the achievement and provision of social peace and reduction of disputes among the population.

In any society, mediation "via facti" cannot be successful if it does not receive a full and affirmative support particularly from judges and lawyers and also other professions that can benefit from mediation procedures (e.g. social workers, psychologists, etc.). Positive attitude of judges and lawyers to the peaceful dispute resolution can significantly contribute to the cohesion between people, duration and complexity of reached (mediation) agreements and also to the relief of the judiciary system (the so-called elimination of court backlogs).

People only need to be informed about its advantages and skilled mediators trained; the state (legislator) should ensure a legal framework (national strategy and finance) which must not be over-regulated. Hereby, I note and warn against over-regulation of mediation procedures. I have found that in most countries (European or non-European) and also in Slovenia the prevailing opinion is that mediation as a generic term should be regulated cogently as little as possible and that each state can select and regulate what its citizens need and encourage those ways of alternative dispute resolution that are close to the society and are necessary. The fact is that "legal sources" only govern mediation in "legal disputes". Based on many years of

[13] In this case, I see no reasonable grounds for differentiating between mediators - judges, who work pro bono, and other mediators whose work is paid; states mag. Betetto N., with which I do not agree. It simply has to be said: "For honest work - fair pay! (sic.)." To everyone!

work with clients and mediating, I came to the conclusion that often the "interest" dispute with which they will continue to live (e.g. in family disputes, disputes arising from commercial and labour law where they will still be business partners, etc.) is more important to clients. Therefore, I prefer the "win - win" method where both parties (although they have mutually indulged and eventually reached a compromise) feel that they have successfully completed mediation. Based on years of experience and study of psychotherapy, socialising with mediators from non-governmental organisations and mediators "non-lawyers", some more lucid authors [14] note that "lawyers", who (consciously or unconsciously) try to convert procedures and ways of alternative dispute resolution to new "judicial" proceedings in which the lawyers (as mediators) shall help people to decide as it is (legally) best for them, are the most "dangerous" to the idea of mediation. This has no direct link to the idea of mediation and is a "so-called theft of the conflict."

The idea of mediation (which only has real future) means to give (by the state or wider society) people the possibility to choose the method that is the most suitable for the resolution of their dispute through the assistance of a neutral third party.

[14] e.g. Ristin G. (2002), ibid., p. 1333

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Legal sources

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2. INTERNATIONAL TREATIES, Conventions and Recommendations;
3. ACTS
   - related to the subject matter in the Republic of Slovenia
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5. OFFICIAL REPORTS ON THE WORK OF STATE BODIES (courts)
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