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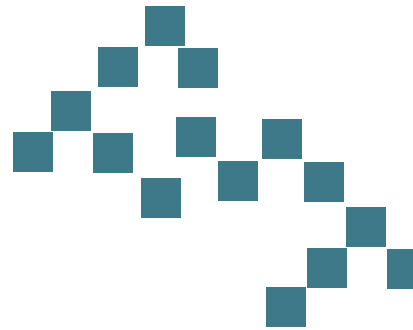

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The Qualifications of Mediators in Civil Matters, Including Employment Disputes, in Poland and Romania

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Abstract: Mediation is increasingly promoted as an effective means of dispute resolution within the European Union, especially in civil cases. However, in Member States that lack a strong tradition of mediation, such as Poland and Romania, mediation has developed slower than expected. In this paper, the authors argue that one reason for this may be the lack of qualified mediators for civil and employment cases in both countries. They claim that legislators should enact higher qualification standards, including requiring specialized knowledge and ensuring that mediator certification is not outsourced to private mediation organizations with low-quality training programs.

1. Introduction

The qualifications of mediators are an important topic of discussion among lawmakers, lawyers, and academics. Mediator quality may be the most important factor in whether or not the mediation will be successful. In parts of the world without a long tradition of mediation, such as Eastern Europe, this is particularly vital. Low-quality mediators may lead parties (individuals and businesses) who are new to mediation to quickly conclude that the entire process is deficient, and not worth trying a second time. A difficult question faced by legislators, however, is exactly how mediator quality may be improved. The state may opt to impose minimum

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qualification standards for mediators, which could cover basic aspects such as age, education, and training. For specialized types of mediation, such as employment matters, the legislator may also require that the mediator possess specific knowledge in that field. While many mediation skills are generic, in the sense that they can be utilized in all types of disputes, a mediator's knowledge of a particular field or law may enhance their ability to resolve these types of specific disputes.

Another option is for the state to effectively outsource mediator training and qualification standards to private mediation associations or organizations. These organizations may develop their own training programs and standards, allowing individuals to join them for a fee. Following such training, these individuals would receive a certificate from the respective mediation organization. Parties may then judge for themselves the value of a mediator certified by one association or another, depending on the training quality and reputation of the certification programs that they offer.

Another option is to leave the area of mediator qualifications either very lightly regulated or virtually unregulated. While mediator qualifications are vital, as noted above, the legislator may decide that the parties' autonomy to choose whomever they want (and trust) to be their mediator overrides concerns about setting higher qualification standards, with the latter potentially excluding numerous people from the field of mediation.

This article aims to present and analyze the choices made by the legislator regarding mediator qualifications in Poland and Romania in civil cases, including employment disputes. Poland has taken the path of regulating mediator qualifications lightly at first, and then adding more requirements over time. Romania has relied heavily on private organizations to certify mediators based on the completion of private training programs which they offer. The number of mediations in Poland has gradually increased over the last decades, including up to the present (2023). The situation is different in Romania where the number of "certified" mediators has increased, but at the same time, the number of mediations has declined. We contend that this demonstrates that the issue of mediator quality should not be entirely outsourced to private organizations, which offer certification for a fee. Instead, the state should take reasonable and balanced steps to ensure the minimum qualifications of mediators, including requiring specialized knowledge for specific fields, including employment and labor disputes.

2. Poland

2.1. Establishing Regulations on Mediation

Mediation in Poland first became a popular issue when the provisions on mediation in civil matters entered into force on December 10, 2005.[1] The introduction of regulations on mediation into the Code of Civil Procedure (CCP) was an important step towards disseminating this method of dispute resolution. The legislator intended to enable the parties in civil cases to use mediation as extensively as possible.[2]

However, despite the interest in this procedure of civil dispute resolution, it is not widely used. While the use of mediation in civil matters is regularly increasing, the growth rate is very slow. Mediation is becoming increasingly popular among disputed parties and courts that have the option of referring the parties to mediation. One of the main goals of introducing mediation in Poland has undoubtedly been the attempt to relieve the caseload of the state judiciary. Mediation is known in the Polish legal system because it is used in resolving collective disputes in the field of labor law, criminal proceedings, juvenile proceedings, and administrative court proceedings. However, there are differences between these proceedings and mediation in civil cases, mainly due to the private law nature of cases subject to civil mediation.

Implementing mediation to the CCP in 2005, (under Art. 183^1–183^{15} CCP) was a way to meet both European and global trends.[3] Recommendation No. 10 of 2002 of the Committee of Ministers of the Council of Europe on mediation in civil matters[4] defines mediation as a dispute resolution process in which the parties, with the participation of one or two mediators, negotiate to reach a settlement. In 2002, the European Commission issued the so-called Green Paper on Alternative Dispute Resolution in Civil

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1 Act of July 28, 2005 amending the Code of Civil Procedure and some other acts, (Journal of Laws of 2005 No. 172, item 1438).

2 Justification of the government's draft act amending the Code of Civil Procedure, the Civil Code and the act on court costs in civil cases, Sejm Print No. 3213.

3 Anna Kalisz and Eliza Prokop-Perzyńska, "Mediacja w sprawach cywilnych w prawie polskim i europejskim," *Europejski Przegląd Sądowy*, no. 11 (2010): 14–24.

4 Council of Europe Committee of Ministers, Recommendation Rec (2002)10 of the Committee of Ministers to Member States on mediation in civil matters, September 18, 2002.

and Commercial Law[5] (Green Paper on ADR), which resulted in a lively discussion on the place of mediation in justice systems. One of the fruits of the discussions launched by the Green Paper is the European Code of Conduct for Mediators, adopted on July 2, 2004,[6] which sets out principles that mediators may voluntarily adopt under their own responsibility and which can be applied to all types of mediation proceedings in civil and commercial matters. Significantly, right at the outset, in Item 1.1, the Code requires that "Mediators shall be competent and knowledgeable in the process of mediation. Relevant factors shall include proper training and continuous updating of their education and practice in mediation skills, having regard to any relevant standards or accreditation schemes." The code does not establish obligatory rules but sets out principles that individual mediators can voluntarily decide to follow, at their responsibility. Organizations providing mediation services can also make such a commitment.

On May 21, 2008, the European Commission adopted Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters.[7] The material scope of the Directive covers civil and commercial matters (Article 1(2)), but the Directive formally applies to cross-border disputes (Article 2). Nevertheless, in accordance with the preamble (Item 8), it is indicated that the application of the provisions of the Directive by the Member States is also permissible for mediation proceedings in domestic cases.

Many countries such as Poland and Romania created regulations for mediations in civil matters before the due date of the Directive, but the Directive also requires that: "Member States shall bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive before 21 May 2011, with the exception of Article 10, for which the date of compliance shall be 21 November 2010 at the latest. They shall forthwith inform the Commission thereof" (Art. 12.1). Therefore,

5 Green paper on alternative dispute resolution in civil and commercial law, Brussels, April 19, 2002, COM(2002) 196 final, www.op.europa.eu.

6 See: European Code of Conduct for Mediators, http://ec.europa.eu/civiljustice/adr/adrec code conduct en.pdf.

7 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (Official Journal EU L 136 of 24.05.2008, p. 3).

preexisting Polish mediation law needed to be revised, where necessary, to comply with the terms of the Directive. In fact, most Polish mediation laws were compliant with the Directive, and only relatively minor changes were made to make them consistent with the Directive.[8]

Nevertheless, the Directive also envisions ongoing obligations for the Member States to ensure mediator quality. This includes such actions as: "1) encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organizations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services; 2) encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties" (Art. 4).

2.2. Regulating Mediator Qualifications

Poland has taken a liberal approach to setting qualifications for mediators in civil matters, i.e., keeping the profession open to almost anyone. As explained by the draft of the Codification Commission of CCP, the key to a successful mediation was the mediator's personality and not their specific knowledge.[9] To some extent this is true. However, as mediations become more complex, there is also value in mediators having specialized knowledge, education, and training. Of course, while appreciating the importance of the mediator's interpersonal skills, it is also noted that they need to be knowledgeable in various fields such as law, psychology, and economics.

This was an intentional decision, consistent with the doctrine of party autonomy in mediation, i.e., the right for the parties themselves to choose an appropriate mediator for their particular dispute.

At the same time, it is important to mention that the legal regulation of mediator status in Poland is dispersed across various legal acts, both of a systemic and procedural nature. It needs to be emphasized that individual

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8 Supplementing Art. 183^{12} CCP with the new Section 2^{1} serves to implement of Art. 6(1) of Directive 2008/52/EC. Under Art. 6(1) of the said Directive, the possibility of applying for an enforcement clause to a settlement concluded before a mediator by one party requires the express consent of the other party.

9 See: Justification of the government's bill amending the Code of Civil Procedure and the Act on Court Costs in Civil Matters, No. 3213, Sejm of the 4th term.

provisions introduce different minimum criteria and requirements for mediators (e.g., in criminal, juvenile, and administrative mediation), and at the same time, the practice of applying the requirements in question varies depending on the authority applying the relevant provisions. This is especially noticeable in the procedure of entry on the lists of permanent mediators and the use of differentiated criteria depending on the particular District Court President.[10]

2.3. Qualifications of Mediators in Civil Cases

Initially, when mediation was added to the Polish Code of Civil Procedure (CCP) in 2005,[11] the requirements for being a mediator in civil cases were set at a minimal level. Specifically, anyone with full legal capacity and rights could have been a mediator in a civil case. Only one exception applied: pursuant to Article 183^2 of the CCP, active judges could not be mediators.

Notably, the development of mediation in Poland is supported by the Civic Council for Alternative Methods of Conflict and Dispute Resolution at the Ministry of Justice, which issues various documents creating mediation standards in Poland. These documents are not laws — they are merely recommendations that are expected to be complied with but are not enforceable. Standard VI (adopted by the Council on June 26, 2006) notes that mediators should ensure they have a high level of professional

[10] This and other important issues involving mediator status in Poland were analyzed in a research report in terms of social needs and expectations concerning the National Register of Mediators (Polish: Krajowy Rejestr Mediatorów – KRM), including competence gaps in mediator training; see: Research report on social needs and expectations regarding the National Register of Mediators and competence gaps in the field of mediator training, prepared by the John Paul II Catholic University of Lublin, research team: W. Bronski, M. Dąbrowski, P. Sławicki, M. Wiechetek. The report on the research conducted between November 1, 2020 and June 18, 2021, was prepared as part of the project: "Dissemination of alternative methods of dispute resolution by improving the competence of mediators, creation of the National Register of Mediators (KRM) and information activities," POWR.02.17 .00-00-0001/20. Włodzimierz Broński et al., *Raport z badań w zakresie potrzeb i oczekiwań społecznych dotyczących Krajowego Rejestru Mediatorów oraz luk kompetencyjnych w zakresie szkoleń mediatorów* (Lublin: Katolicki Uniwersytet Lubelski Jana Pawła II, 2021).

[11] Act of July 28, 2005 amending the Code of Civil Procedure and some other acts (Journal of Laws No. 172, item 1438).

qualifications, constantly strive to develop and improve their skills, and maintain a high level of professional ethics.[12]

Mediation training standards adopted by the Council on October 29, 2007, establish a minimum requirement of completing a course comprising at least 40 hours of theoretical and practical training, which must be confirmed by a course completion certificate. In accordance with these standards, mediation training covers the following topics: (1) Basic principles and components of mediation proceedings; (2) Psychological mechanisms of conflict formation, escalation, and resolution; (3) Training of practical mediation skills; (4) Knowledge of the legal and organizational aspects of mediation procedures.[13] These standards apply to all types of mediation. However, since they are not compulsory, not all organizations providing mediation training fully implement the requirements indicated in the standards. It should also be noted that such training does not specialize mediators in conducting certain types of mediation but only covers the basic aspects of mediation. Therefore, the standards suggest (Standard VI) that since different types of mediation require specific skills, mediators should participate in specialized training in specific fields of mediation: criminal, civil (family and economic), and collective disputes.

2.4. 2015–2016 Legal Changes

The CCP was amended on September 10, 2015 (in force since January 1, 2016),[14] which established new categories of mediators in civil matters, the need to create lists of such mediators, and a mechanism to verify their qualifications. No lists of mediators in civil cases were kept prior to this amendment, except those maintained by "social and professional organizations" which were then provided to District Court Presidents (Art. 183^2(2) CCP).

The new mediator classifications were as follows: *ad hoc* mediator, permanent mediator, and university or non-governmental organization (NGO) mediator. *Ad hoc* mediators are chosen by the parties to mediate

12 Serwis Rzeczypospolitej Polskiej, "Międzynarodowe i Polskie standardy dotyczące mediacji," accessed March 15, 2023, https://www.gov.pl/web/sprawiedliwosc/miedzynarodowe-i--polskie-standardy-dotyczace-mediacji.

13 Ibid.

14 Act of September, 10, 2015 amending certain acts in connection with the promotion of amicable dispute resolution methods (Journal of Laws of 2015 item 1565).

a specific case, typically even before court proceedings have started. Permanent court mediators are individuals included in a list of mediators maintained by the district courts. To qualify as a permanent mediator, such individuals must meet certain minimum requirements: (1) being a natural person; (2) having skills and knowledge in mediation; (3) being at least 26 years old; (4) being fluent in Polish; (5) having no criminal record (of intentional crimes); (6) being entered on the list of permanent mediators by the district court. These requirements are listed in the Act of July 27, 2001 — Law on common courts organization under Title IV "Judicial 'referendaries', probation officers, court employees, permanent mediators, lay judges and auxiliary bodies of courts." The qualifications of permanent court mediators are specified in Art. 157a of Chapter 6a.[15] These regulations are supplemented by the new ordinance of the Ministry of Justice dated January 20, 2016.[16]

University or NGO mediators are individuals who have been included in the relevant list by their respective universities or organizations. They may work at a university or NGO mediation center, handling tasks assigned to them by these entities. While such mediator lists are kept by universities or NGOs and not by courts, list information must be provided to District Court Presidents (Art. 183^2(3) CCP).

It is important to recognize that all three categories of mediators are not necessarily mutually exclusive. It may be possible for a permanent mediator to also be listed as a university mediator, and a university mediator may also perform some *ad hoc* mediations, etc. Despite the changes brought by the 2016 amendment, the required qualifications for permanent mediators in civil cases are still quite low.

Private mediation organizations may establish their own requirements. These may include: (1) required mediation training hours; (2) an internship with a practicing mediator, where the prospective mediator attends and assists in at least four mediations; (3) continuing education obligations; (4) obligations to work *pro bono* for the organization.

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15 Act of July 27, 2001 – Law on common courts organization, consolidated text of Journal of Laws of 2023, No. 117.

16 Ordinance of the Minister of Justice of January 20, 2016 on maintaining a list of permanent mediators, Journal of Laws of 2016 item 122.

Theoretically, setting and maintaining higher qualification standards for mediators may allow private organizations to offer better mediation services and achieve higher settlement rates. However, to date, there have been no scientific studies on this question in Poland.[17]

2.5. Special Qualifications and Rules for Mediators in Labor Law Cases

Polish law does not require mediators to have additional, special qualifications for different types of civil cases such as commercial or employment matters. This may create some problems in mediating these types of cases, since the mediator may not understand the context of the dispute.

Workplace relationships are governed by specific legal regulations which mediators should know.[18] Under employment law, employees are granted extra protection measures. This principle should also be reflected in the content of mediation agreements. If the settlement is not sufficiently protective of workers' rights, the court may not approve it (Art. 183^{14}(1) CCP).[19] However, the legislator has not specified any requirements for mediator qualifications in employment cases in this regard. Indeed,

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17 See: Rafał Morek, "Poland," in *EU Mediation Law Handbook*, eds. Nadja Alexander, Sabine Walsh, and Martin Svatos (Netherlands: Wolters Kluwer, 2017), 616.

18 For more about the specific aspects on labor or employment mediation, see: Grzegorz Goździewicz, *Arbitraż i mediacja w prawie pracy (Arbitration and Mediation in Labor Law)* (Lublin: Katolicki Uniwersytet Lubelski, 2005), 9–28; Krzysztof Wojciech Baran, "Mediacja w sprawach z zakresu prawa pracy," *Praca i Zabezpieczenie Społeczne*, no. 3 (2006): 2; Włodzimierz Broński, "Mediacja w rozwiązywaniu sporów zbiorowych," *Roczniki Nauk Prawnych* 26, no. 4 (2016): 40; Marian A. Liwo and Edyta Nowosiadły-Krzywonos, "Mediacja zamiast sądu w prawie pracy," *Palestra*, no 3–4 (2012): 69–79; A. Marek, "Mediacja – sposób rozwiązywania sporów pracowniczych," *Służba Pracownicza*, no 3 (2008): 11–14; Katarzyna Jurewicz-Bakun, "Mediacja jako jedna z form rozwiązywania sporów indywidualnych w prawie pracy," *Praca i Zabezpieczenie Społeczne*, no. 3 (2021): 41–49.

19 See: Piotr Prusinowski, "Pojęcie wynagrodzenia za pracę a dopuszczalność zawarcia ugody sądowej," *Praca i Zabezpieczenie Społeczne*, no. 7 (2012): 29–35; Dorota Dzienisiuk and Monika Latos-Miłkowska, "Mediacja a specyfika spraw z zakresu prawa pracy," *Praca i Zabezpieczenie Społeczne*, no. 1 (2011): 24; see also: Radosław Flejszar, "Ugodowe rozwiązywanie sporów z zakresu prawa pracy," *Studia z Zakresu Prawa Pracy i Polityki Społecznej*, no. 1 (2010): 315–328; Krzysztof Wojciech Baran and Marcin Wujczyk, "Z problematyki ugód w sprawach z zakresu prawa pracy," in *Pozasądowe sposoby rozwiązywania sporów pracowniczych*, eds. Agnieszka Góra-Błaszczykowska and Katarzyna Antolak-Szymanski (Warsaw: Dom Wydawniczy Elipsa, 2015), 44–63.

the legislator has not formulated any specific, additional requirements regarding the education, professional preparation, qualifications, or experience of mediators in labor law cases.

Art. 183[9](1) CCP states that if the parties fail to appoint a mediator, the court that referred them to mediation shall appoint a mediator with appropriate knowledge and skills in mediating cases of a given type, taking into account permanent mediators in the first place. This means that parties to employment disputes — the employee and employer —may first choose the mediator based on their own preferences. They may select a mediator from a list of court mediators or a list kept by an organization, or a mediator who is not listed anywhere (*ad hoc* mediator) but has full legal capacity and rights (excluding active judges). This may happen where the mediation is based on the parties' agreement to mediate (contract mediation) or where the court directs the parties to mediation (court mediation). In situations where the parties have not selected a mediator and their case is being referred to mediation by the court, the latter shall also appoint a mediator with the appropriate knowledge and skills in mediating cases of a given type. In practice, in such situations, courts appoint mediators who are included in their official lists (permanent mediators). Yet, it is difficult to select a mediator with appropriate knowledge and skills in employment mediation. This problem results from a lack of legal requirements for mediators to specialize in employment matters. To be included in the court's mediator list, it is sufficient for the given person to meet the general requirements listed above (being a natural person with skills and knowledge in mediation, aged 26 or older, fluent in Polish, with no criminal record [of intentional crimes]). The Ordinance of the Minister of Justice of January 20, 2016, on maintaining a list of permanent mediators requires that an application to be included in a list of permanent court mediators shall be accompanied by copies of documents confirming knowledge and skills in the field of mediation, i.e.: information on the number of mediations conducted; a list of published articles or books on mediation; opinions of mediation centers or natural persons on the applicant's mediation knowledge and skills; documents confirming the applicant's education and training in the field of mediation and specifying their specialization (Section 5.1). It is difficult to interpret what "specifying their specialization" actually means because there are no legal requirements concerning specialization in mediation in employment matters.

That the CCP lacks any requirements for labor and employment mediators to have at least basic knowledge of labor law and workplace relations is controversial. The literature widely criticizes the legislator in this regard, suggesting changes and the establishment of good practices.

When including mediators in their lists, mediation centers usually require candidates to have completed some kind of specific training. Another potential requirement may be having experience in mediation or labor disputes. Some have also noted the need to encourage the establishment of mediation centers at law faculties to capitalize on their experienced cadre of employees and graduates.[20] Yet, it would be unreasonable to impose such requirements on *ad hoc* mediators because the mediating parties choose them based on their own preferences. Mediation centers should, however, associate with professional mediators since incompetence may prolong the proceedings, burdening the mediating parties without bringing them the desired outcome. One thing to note is that resolving the problem of training and certificate requirements should not be left to mediation organizations alone. The introduction of common, mandatory criteria for the verification of mediator candidates should also be required by statute.[21]

One may assume that with regard to the group of permanent mediators entered on the lists of court mediators, verifying the qualifications of mediators, including those handling labor disputes, would be the responsibility of the National Register of Mediators. Outcomes of the project "Dissemination of alternative methods of dispute resolution by improving the competence of mediators, creation of the National Register of Mediators (KRM) and information activities" (due to be completed by August 31, 2023) include establishing a public and open ICT system register — National Register of Mediators. This is related to the need to adapt the applicable legal provisions, in particular regarding the transition from the regional system of mediator lists kept by District Court Presidents to a nationwide register. As indicated in the project Report, the purpose of the mediator lists is

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20 see: Jan Olszewski, "Guidelines for the development of arbitration," in *Arbitration and Mediation. Practical Aspects of Using Regulations*, ed. Jan Olszewski (Rzeszów, 2007), 246.

21 Jakub M. Łukasiewicz, "Zasada szybkości postępowania," in *Zarys metodyki pracy mediatora w sprawach cywilnych*, eds. Aneta M. Arkuszewska and Jerzy Plis (Warsaw: Wolters Kluwer business, 2014).

unclear today because they merely confirm someone's registration as a mediator and not their professionalism. As part of the Report, the respondents raised the need to introduce specializations and establish different entry criteria for individual specializations.[22]

3. Romania

3.1. Origins

The institution of mediation as an alternative dispute-resolution method has relatively recent origins in Romania after the historic downfall of the communist regime in 1989. Thus, the year 1996 saw the Foundation for Democratic Changes partner with the Canadian International Institute for Applied Negotiations, the Canadian Embassy in Bucharest, the Association of Universities and Colleges of Canada, and the Delegation of the European Union Commission in Bucharest under the PHARE Democracy program to officially bring this new institution (for Romania) to public attention.

Though without a strong resonance but with growing public support, mediation seemed in the 2000s to be on the right track to truly become an alternative way of resolving disputes. The first national regulation to directly refer to mediation was Law No. 168/1999 on the settlement of labor disputes. Article 26 provided that "if the conflict of interest has not been resolved as a result of the conciliation organized by the Ministry of Labor and Social Protection, the parties may decide, by consensus, to initiate the mediation procedure." In 2003, the foundations for a pilot Mediation Center in Craiova were laid with the involvement of the Ministry of Justice, local courts, and the US Embassy.

Following the above initiatives, the year 2006 saw Romania pass Law No. 192/2006 on mediation and the organization of the mediator profession, which seems to be the moment from which mediation has had all the premises to become widely used, offering the results promoted by its supporters.

Unfortunately, the normative effects have not been as expected, making mediation a seldom-used tool. Through more than 15 amendments/annotations/interpretations to Law No. 192/2006, mediation in Romania has gone through different stages — some resulting in its evolution. The most

[22] Broński et al., *Raport z badań w zakresie potrzeb i oczekiwań społecznych*, 17.

notable ones include the amendment that came into force in early 2013,[23] obliging the parties to contact a mediator prior to initiating a lawsuit before the national courts. Therefore, litigants are "forced" to learn about the advantages of mediation and obtain a relevant certificate to prove this, which is necessary for a lawsuit to not be dismissed as inadmissible before the courts.

The rigorous manner in which the parties are forced to become acquainted with the advantages of mediation only causes frustration among them and many actors involved in the judicial system, effectively turning the procedure into a formality devoid of substance and results. What has gained momentum along with this obligation, however, is the number of authorized mediators, mediator trainers, mediation centers, and other organizations built around the institution of mediation.

3.2. Qualification Standards

To become a professional mediator, the following conditions must be met:
- having full legal capacity;
- having higher education;
- having work experience of at least 3 years;
- being medically fit for this activity;
- having a good reputation and no criminal record of crimes that could damage the prestige of the profession;
- having completed the mediator training courses under the conditions stated by law, or a postgraduate master's degree in mediation accredited according to the law and approved by the Mediation Council;
- being authorized as a mediator under Law No. 192/2006.[24]

The conditions imposed by the law can be considered fair, imposing minimum status and mediation training requirements on the mediator. Nonetheless, the real problem lies not in the regulation of the mediator's status and requirements but rather in the way those are applied. This primarily applies to the mediator training courses, which mostly represent mere formalities, where the only condition to graduate is to pay the required fees.

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23 Emergency Ordinance No. 90/2012.

24 Art. 7 of Law No. 192/2006 on mediation and the organization of the mediator profession.

The body responsible for supervising mediation activity and authorizing the trainers and courses mentioned is the Mediation Council, an autonomous body with a legal personality, established by Law No. 192/2006.

Labor law also includes special provisions on mediator specialization, i.e. Law No. 367/2022 on social dialogue, which was preceded by Law No. 62/2011 (also on social dialogue), the provisions of which expressly mention the possibility of resolving collective labor disputes through arbitration or mediation. At the same time, "In order to promote amicable and expeditious settlement of collective labor disputes, the Office for Mediation and Arbitration of Collective Labor Disputes shall be established at the ministry responsible for social dialogue, hereinafter referred to as the Mediation Office."[25] This entity operates based on a regulation approved by the order of the minister responsible for social dialogue. Unfortunately, while these provisions had been enforced under the previous Law on social dialogue, the new Law does not seem to have been approved, rendering the Mediation Office non-functional.

It is worth mentioning a draft resolution[26] on the organization and functioning of the Office for Mediation and Arbitration of Collective Labor Disputes, which mentions a special qualification of mediators in labor disputes (authorized under Law No. 192/2006). Therefore, not every authorized mediator can work in the field of collective labor disputes — only those who graduate from a specialized professional training program authorized by the Office (and join the Body of Mediators of Collective Labor Disputes) are allowed to do so.

Although this area is still subject to special regulation regarding mediation, some aspects seem to have been overlooked and remain inapplicable due to the lack of implementing regulations and necessary correlated legislation.

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25 Art. 140 and subsequent articles of Law No. 367/2022.

26 "Hotărâre privind organizarea și funcționarea Oficiului de Mediere și Arbitraj a Conflictelor Colective de Muncă," FNSA, accessed March 2, 2023, https://www.fnsa.eu/ctrl/Home/2018/HG_Oficiul_de_mediere_si_arbitra.doc.

3.3. Mediation in Decline

Up-to-date data and statistics on mediation at the national level are not publicly available. The website[27] of the Mediation Council is not being updated (and is often dysfunctional), presenting outdated or irrelevant information for mediation as a conflict resolution measure (e.g. administrative information, elections, committee members, etc.).

Thus, mediation seems to be "suspended" at the national level. Any search, whether in specialized journals, on legal content websites, websites of other entities involved in mediation, or on official websites of institutions or public authorities, produces results dating back several years ago when mediation became accessible due to the mandatory procedures mentioned above. With the abolition of these provisions by their being declared unconstitutional, mediation has faded into obscurity. There have been a few exceptions, however, with some in the online environment (mediators) arguing that the COVID-19 pandemic marked the right moment for the population to resort to alternative methods of dispute resolution.[28] Yet, not even the pandemic seems to have encouraged litigants to turn to such procedures.

We believe that there are multiple reasons why mediation has disappeared almost entirely from the national landscape, including legislative incoherence combined with the lack of monitoring regarding the usage level and satisfaction of mediation service users,[29] as well as the lack of other key performance indicators, inadequate authorized mediator training due to poor quality trainers and courses, the lack of accurate information offered to the public regarding the real advantages of mediation, and over-formalization of professional bodies.

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27 www.cmediere.ro.

28 March 2nd 2023, https://www.juridice.ro/676326/medierea-poate-fi-o-solutie-viabila-pentru-solutionarea-disputelor-in-mediul-online.html, https://www.juridice.ro/678603/solutia-justitiei-de-suspendare-transforma-intr-o-necesitate-posibilitatea-avocatilor-de-a-apela-la-mijloace-alternative-de-solutionare-a-conflictelor-clientilor-lor.html

29 Constantin Adi Gavrilă, interview by Alina Matei, *Juridice.ro*, December 4, 2019, https://www.juridice.ro/666698/constantin-adi-gavrila-mediatorii-trebuie-sa-actioneze-pentru-a-reconstrui-credibilitatea-si-increderea-societatii-in-mediere.html.

In figures (which are not being updated), this failure is highlighted by the existence of more than 10,000 mediators,[30] 140 mediation organizations, and 143 individual trainers,[31] all likely handling fewer than 1,000[32] mediation procedures nationwide.

We believe that a revival of the mediation institution can only be achieved through a fundamental reform, starting with a coherent legislative regulation, and a reconstruction of the public image, and credibility of mediation with the internal help of professional and dedicated mediators. Even in such conditions, we consider the path towards a functional mediation procedure to be a difficult one, especially due to the negative image of mediation built up in the public space and the legal system over the nearly two decades since mediation has been officially regulated in Romania.

4. Conclusions

In both Poland and Romania, there is a lack of empirical studies on whether or not there is a direct link between the introduction of higher qualification standards for mediators and the rise or fall in the number of mediations in each country. Still, some general statistical information on mediation, as well as other circumstantial evidence, exists in both countries that may shed some light on this question.

In Poland, the main regulation introducing basic mandatory qualifications for mediators was enacted in 2016. The years 2015–2016 saw a relatively big rise in the number of mediations; however, the rate of increase remained relatively stable thereafter. Most likely, establishing basic mediator qualifications (particularly for mediators selected from lists maintained by courts) solidified the state of mediation in Poland, creating a stable baseline for the growth of mediation in the country.

With respect to at least one specialized form of mediation — employment mediation — the figures appear to show a greater correlation between the 2016 law and the growth of mediation in that field. Between 2006 and 2015, the annual number of mediations was 33, 74, 107, 252, 195, 65, 284,

30 According to the mediators list available at: https://www.cmediere.ro/mediatori/?page=213.

31 "Trainers list," The Mediation Council, accessed March 15, 2023, https://www.cmediere.ro/tablouri-liste/lista-formatorilor/18/.

32 Estimated figure as there is no official information available for the past 5 years.

324, 297, and 512, respectively. After the 2016 amendment adding certain qualification requirements, the number of employment mediations increased quite dramatically each year. In the years 2016–2021, the number of mediations in each respective year went from 1,409 to 1,751 to 2,099 to 2,651 to 3,501 to 3,636. It can only be assumed that the 2016 change in regulations, including those concerning the criteria to be met by mediators included in court lists, contributed to the development of labor and employment mediation.

However, the number of cases in both civil mediation and specialized employment mediation has plateaued in the last couple of years. This marks the right moment for the Polish legislator to further increase the mandatory mediator qualifications. The standards should not be raised so high as to exclude broad categories of individuals who could potentially serve as mediators but rather focus on the enhancement of mediators' knowledge in specialized fields, including labor and employment matters.[33]

In Romania, basic qualifications for mediators were introduced by law in 2006, somewhat earlier than in Poland. These qualifications included the mandatory completion of a training course authorized by a Mediation Council, and it was this requirement that may have contributed to the undoing of mediation in Romania. The quality of training courses has varied widely, and it has become possible to complete them by simply paying the required fee. This has led to a surge in the number of mediators in Romania, with as many as 10,000 of them in the country, and a commensurate

[33] It is important for both employees and employers that mediation be conducted by a person who has knowledge of labor law. This is also vital from the perspective of ensuring correct settlements in employee disputes, which should take into account compliance with applicable regulations, including labor law, the specificity of which is manifested through employee safeguards. In addition, the relationship between the employee and the employer has its own specific nature related to the fact that the employee is the weaker link in this relationship, and as such, mediation brings a risk of significant inequality of the parties involved. In this regard, understanding the specificity of labor disputes, mediators should be prepared to conduct them in a specific way thanks to specialized training, which should go beyond the mediators' basic knowledge and general skills. Efforts to popularize mediation in matters relating to labor law should focus on providing qualified, neutral labor mediators (i.e., mediators with verified qualifications in labor law, potentially included in a special list of labor mediators), and raising awareness of these qualifications and the process of mediation in general among employers and employees.

reduction in the number of mediation cases, reaching a low of 1,000[34] in recent years. Thus, in Romania's case, the sub-par quality of the mandatory training courses and the ease with which they can be completed has led the public to perceive mediation (and mediators themselves) as a relatively low-quality solution. This, in turn, has led mediation in Romania to spiral downwards, almost to the point of oblivion.

It is recommended that the Romanian legislator create objective quality standards for the mandatory mediation training courses and proceed to enforce these standards in practice. This should be accompanied by a revitalization of the national Mediation Council to ensure that it provides up-to-date information on the state of mediation in the country and fulfills its role to effectively promote the development of mediation.

The lack of determination of mediator qualifications in both Poland and Romania, including the requirements regarding their preparation to conduct mediation, education, professional experience, and above all, mediation quality control mechanisms, raises justified reservations regarding the guarantee of proper mediation proceedings in civil cases. Directive 2008/52/EC of the European Parliament and of the Council of May 2008 on certain aspects of mediation in civil and commercial matters does not introduce specific requirements regarding the minimum qualifications of mediators or their certification, which is decided by national legislators. However, Art. 4(1) and (2) of the Directive state that Member States should ensure effective mechanisms to control the quality of mediation services, and support mediator training in order to guarantee effective, impartial, and competent mediation to the parties.

Therefore, it is important that the national legislators in Poland and Romania further guarantee mediator professionalism in civil and labor disputes, including by introducing additional requirements regarding their qualifications.

[34] Estimated number.

References

Adi Gavrilă, Constantin. Interview by Alina Matei. *Juridice.ro*, December 4, 2019, https://www.juridice.ro/666698/constantin-adi-gavrila-mediatorii-trebuie-sa-actioneze-pentru-a-reconstrui-credibilitatea-si-increderea-societatii-in-mediere.html.

Baran, Krzysztof Wojciech, and Marcin Wujczyk. "Z problematyki ugód w sprawach z zakresu prawa pracy." In *Pozasądowe sposoby rozwiązywania sporów pracowniczych*, edited by Agnieszka Góra-Błaszczykowska and Katarzyna Antolak-Szymanski, 44–63. Warsaw: Dom Wydawniczy Elipsa, 2015.

Baran, Krzysztof Wojciech. "Mediacja w sprawach z zakresu prawa pracy." *Praca i Zabezpieczenie Społeczne*, no. 3 (2006): 2–6.

Broński, Włodzimierz, Marek Dąbrowski, Piotr Sławicki, and Michał Wiechetek. *Raport z badań w zakresie potrzeb i oczekiwań społecznych dotyczących Krajowego Rejestru Mediatorów oraz luk kompetencyjnych w zakresie szkoleń mediatorów*. Lublin: Katolicki Uniwersytet Lubelski Jana Pawła II, 2021.

Broński, Włodzimierz. "Mediacja w rozwiązywaniu sporów zbiorowych." *Roczniki Nauk Prawnych* 26, no. 4 (2016): 35–49.

Dzienisiuk, Dorota, and Monika Latos-Miłkowska. "Mediacja a specyfika spraw z zakresu prawa pracy." *Praca i Zabezpieczenie Społeczne*, no. 1 (2011): 19–27.

Flejszar, Radosław. "Ugodowe rozwiązywanie sporów z zakresu prawa pracy." *Studia z Zakresu Prawa Pracy i Polityki Społecznej*, no. 1 (2010): 315–328.

Goździewicz, Grzegorz. *Arbitraż i mediacja w prawie pracy. Arbitration and Mediation in labor law*. Lublin: Katolicki Uniwersytet Lubelski, 2005.

Jurewicz-Bakun, Katarzyna. "Mediacja jako jedna z form rozwiązywania sporów indywidualnych w prawie pracy." *Praca i Zabezpieczenie Społeczne*, no. 3 (2021): 41–49.

Kalisz, Anna, and Eliza Prokop-Perzyńska. "Mediacja w sprawach cywilnych w prawie polskim i europejskim." *Europejski Przegląd Sądowy*, no. 11 (2010): 14–24.

Liwo, Marian A., and Edyta Nowosiadły-Krzywonos. "Mediacja zamiast sądu w prawie pracy." *Palestra*, no. 3–4 (2012): 69–79.

Łukasiewicz, J. M. "Principle of speed of proceedings." In *Outline of the methodology of mediator's work in civil cases*, edited by A. M. Arkuszewska and Jerzy Plis (2014, Lex).

Łukasiewicz, Jakub M. "Zasada szybkości postępowania." In *Zarys metodyki pracy mediatora w sprawach cywilnych*, edited by Aneta M. Arkuszewska and Jerzy Plis, 77–80. Warsaw: Wolters Kluwer business, 2014.

Marek, A. "Mediacja – sposób rozwiązywania sporów pracowniczych." *Służba Pracownicza*, no. 3 (2008): 11–14.

Morek, Rafal. "Poland." In *EU Mediation Law Handbook*, edited by Nadja Alexander, Sabine Walsh, and Martin Svatos. Netherlands: Wolters Kluwer, 2017.

Olszewski, Jan. "Guidelines for the development of arbitration." In *Arbitration and mediation. Practical aspects of using regulations*, edited by Jan Olszewski, 243–252. Rzeszów, 2007.

Prusinowski, Piotr. "Pojęcie wynagrodzenia za pracę a dopuszczalność zawarcia ugody sądowej." *Praca i Zabezpieczenie Społeczne*, no. 7 (2012): 29–35.

Serwis Rzeczypospolitej Polskiej. "Międzynarodowe i Polskie standardy dotyczące mediacji." Accessed March 15, 2023. https://www.gov.pl/web/sprawiedliwosc/miedzynarodowe-i-polskie-standardy-dotyczace-mediacji.

The Mediation Council. "Trainers list." Accessed March 15, 2023. https://www.cmediere.ro/tablouri-liste/lista-formatorilor/18/.

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Legal Status and Acquisition of Mediator Qualifications. A Legal Comparative Analysis of Regulations in Spain and Poland

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Abstract: The article aims to analyze the legal status and modes of acquiring qualifications by mediators in Poland and Spain. The study uses the legal dogmatic and the legal comparative methods. The research problem lies in the applicable solutions in Polish and Spanish legislation implementing the objective set out by the content of Article 4 of Directive 2008/52/EC, which obliges EU Member States to ensure adequate quality of mediation and enhance the professional status of the mediator. An analysis of the legislation, judicature, and the literature on the subject has shown that the normative regulations which are in force in Spain and Poland are convergent in terms of the objectives set out in Article 4 of Directive 2008/52/EC since they oblige mediators to be adequately qualified to conduct mediation. Notwithstanding the above, significant differences in the legal systems under analysis becomes apparent as concerns an array of legal instruments they apply to implement the Directive. The Polish and the Spanish methodologies display

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disparate procedures for regulating the acquisition of qualifications by mediators. They suffer from a number of shortcomings, resulting from an insufficient level of standardization, including the intra legem gaps in the normative regulations in Poland. The outcomes of the analysis enable the conclusion that the regulations concerning the legal status and qualifications of mediators that are in force in Poland and Spain can complement one another while preserving and respecting the distinctiveness of both legal systems. This complementarity can facilitate the development of an adequate model to enhance the professional status of mediators and improve the regulations so as to achieve the objective set in Article 4 of Directive 2008/52/EC.

1. Introduction

One of the basic functions of the rule of law is to guarantee the judicial protection of citizens' rights, which raises the challenge of implementing a high-quality justice system capable of resolving the various conflicts that arise in modern society. This is why in the 1970s, amicable methods of dispute resolution entered the systems of justice, gaining recognition and importance over time as an instrument complementary and supportive to the core system of justice.

The quality and effectiveness of mediation proceedings to a large extent depend on the "quality" of the mediator, including their professionalism. Therefore, pursuant to Directive 2008/52/EC of the European Parliament and of the Council of May 21, 2008, on certain aspects of mediation in civil and commercial matters,[1] "Member States shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties" (Article 4(2)). Equally vital for member states is to secure "effective quality control mechanisms concerning the provision of mediation services" (Article 4(1)).[2] With this in mind, Spanish Law 5/2012 of July 6, 2012, on

[1] Directive 2008/52/EC of the European Parliament and of the Council of May 21, 2008, on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008, pp. 3–8 – hereinafter: Directive 2008/52/EC.

[2] See: Marek Dąbrowski, "Assessment of the Correct Implementation of Article 4 of Directive 2008/52/EC of May 21, 2008, on Some Aspects of Mediation in Civil and Commercial Matters in the Polish Legal System," *Krytyka Prawa* 14, no. 3 (2022): 6–19.

mediation in civil and commercial matters, establishes the unitary and operative legislation on mediation that is applicable throughout the national territory, although the great majority of the autonomous communities also have their respective regulations.[3] This aforementioned law stipulates that mediation is an intervention of a neutral professional who facilitates dispute resolution by the parties themselves in a fair manner, allowing the parties to protect their relationship and retain control over how the conflict ends (Preamble, I).[4] The regulations governing the requirements for mediators are expressly contemplated in the aforementioned Law on Mediation in Civil and Commercial Matters and the Regulations for the development of the Mediation Law Royal Decree 980/2013, of December 13, developing further certain aspects of Law 5/2012.

In the Polish context, acts that are particularly important for defining the legal status of the mediator and the professionalization of mediation activities and procedures are the amended Code of Civil Procedure[5] and Law on the Common Court System.[6] The amended Code of Civil Procedure was introduced by the Act of September 10, 2015, amending certain acts relating to the promotion of methods of amicable dispute resolution.[7] The Polish regulations define qualification requirements for mediators only in general terms, and the procedural regulations or mediation standards adopted by mediation centers, along with codes of good mediation practice do not fill this regulatory gap.

The subject matter of this article is issues concerning the status of a mediator in Spain and Poland, and the modes of qualification acquisition by mediators. The article concludes with the presentation of the outcomes of the legal comparative analysis of Polish and Spanish regulatory solutions.

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3 Law 5/2012, of July 6, 2012, on mediation in civil and commercial matters, Journal of Laws of 2012, No. 162, as amended – hereinafter: Law 5/2012.

4 Law 5/12, Preamble I.

5 Polish Code of Civil Procedure of November 17, 1964, consolidated text: Journal of Laws of 2021 item 1805 – hereinafter: kpc.

6 Act on Law on the system of common courts of July 27, 2001, consolidated text: Journal of Laws of 2023 item 217 – hereinafter: pusp.

7 Journal of Laws of 2015 item 1595.

2. The Legal Status of the Mediator in Spain

The mediator is the pivotal figure in mediation regulations, hence they require training and skills that are legally established, and they assume the corresponding responsibilities as a third party that brings the positions of the conflicted parties closer.[8]

The first requirement referred to Article 11 refers to the need for mediators to "be natural persons," it expressly denies the possibility of legal persons being able to carry out mediation directly. Legal persons that intend to engage in mediation, whether they are professional companies or any other legal entities provided for by the legal system, must appoint a natural person who meets the requirements set out in the Law, but they cannot provide the service directly. The second requirement to act as a mediator is to be in "full exercise of one's civil rights," for which reason it is necessary to mention the specific rules referred to in this respect in the Civil Code, excluding both minors, even if they are emancipated, and those incapacitated by judicial decision, regardless of the degree of incapacity declared. The third condition refers to the non-existence or concurrence of an impediment due to the "legislation to which they may be subject in the exercise of their profession."[9] The training requirements for mediators are a university degree and one hundred hours of theoretical and practical training, which will be referred to below.[10]

In Spain, there is currently only one category of mediators who can voluntarily register in the Registry of Mediators of the Ministry of Justice. Title III of Law 5/2012 refers to this issue under the heading "Statute of the mediator."

The mediator's function is to arrive at a solution to the conflict between the parties by adapting to the specific situation of each case in a short period

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8 See: María Concepción Rayón Ballesteros, *Out-of-court dispute resolution: the answer for the post-covid-19 era* (Madrid: Dyckinson, 2021), 121.

9 See: Carretero Morales, "El estatuto del mediador civil y mercantil," *Revista de mediación* 7, no. 1 (2014): 15.

10 See: Navas Paús, "La formación del mediador," in *Mediación: experiencias desde España y alrededor del mundo*, ed. Kevin J. Brown and María Concepción Rayón Ballesteros (Madrid: Universidad Complutense de Madrid, Facultad de Derecho. Servicio de Publicaciones, 2016), 201–208.

of time.[11] The mediator's responsibility is to assist the parties through dialogue in finding a solution to the differences that divide them; a solution that is voluntarily desired by the parties. The mediator must maintain a balanced position, respecting the divergent points of view of the parties, and suppressing any measures that could be detrimental to either of them. The mediator must facilitate communication and rapprochement between the parties. The mediator can change the direction of the discourse by reformulating their approach to the problem. The mediator does not act alone in deciding the conflict but leads the parties toward a resolution that is worked out by the parties. The mediator must remain in a neutral position and is therefore obliged to inform the parties of any circumstances that may affect this neutrality. Lack of neutrality can generate a conflict of interest, such as having family, contractual, or business relationships with either or both parties or intervening directly or indirectly in the negotiations on behalf of either party. The mediator must maintain an active position oriented to resolving controversies between the parties, making proposals that can be accepted or rejected by them. In addition, the mediator must ensure that the parties receive the same interventions and advice.[12]

The quality of the mediation process and of the mediating institution itself depends on the fact that the mediators who carry it out are qualified to do so, and professionalism is recognized as a fundamental principle in all international instruments relating to this matter.[13]

As a matter of fact, the remuneration of mediators is governed by the law of supply and demand, without administrative regulation,[14] and is publically announced by mediation institutions. This remuneration will be stated in the constitutive act of the mediation process with a separate indi-

11 See: Pérez-Serrabona González, "El estatuto del mediador," in *Tratado de mediación en la resolución de conflictos*, ed. José Luis Monereo Pérez, Rosa M. González de Patto, Antonio M. Lozano Martín (dir.), and Guillermo Orozco Pardo (dir.) (Madrid: Tecnos, 2015), 137–152.

12 See: Bujosa Vadell, "Estatuto jurídico y capacitación del mediador," in *Los desafíos de la justicia en la era post crisis*, ed. Federico Bueno de Mata, Julio Pérez Gaipo, and Ana Neira Pena (dir.) (Madrid: Atelier, 2016), 351–365.

13 See: Carretero Morales, "El estatuto del mediador civil y mercantil," 10–23.

14 Obviously enough, abusive fees may be denounced, if applicable, in accordance with the ordinary legislation in force.

cation of the fees and potential expenses.[15] Regarding the cost of the mediation, Article 15 of the Mediation Law stipulates that, whether the mediation has been concluded in an agreement or not, the cost shall be divided equally between the parties, unless otherwise agreed.

The liability of mediators in the exercise of their functions is established in Article 14 of the Mediation Law, which states that they shall be liable for any damage caused by them. The injured party shall take direct action against the mediator and, if applicable, the corresponding mediation institution, regardless of the reimbursement measures that the latter may have taken against the mediators.[16] The responsibility of the mediation institution derives from the appointment of the mediator or from the breach of the obligation incumbent upon the mediator.

3. The Legal Status of the Mediator in Poland

Pursuant to Article 3(b) of Directive 2008/52/EC:

> 'Mediator' means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.

The success of the mediation process depends to a large extent on the mediator: the mediation is "as good as the mediator is."[17] This, in turn, entails requirements that mediators must meet such as proper professional training and selection.

While in Spain only one category of mediators is legally defined, under Poland's current legal system, up to four categories of mediators can be distinguished. First, there are so-called *ad hoc* mediators, who are neither officially listed as permanent mediators, nor do they belong to any mediation center. They can only be selected by the interested parties to conduct the proceedings on an *ad hoc* basis. Second, there are mediators listed in

15 Art. 19 of Law 5/2012.

16 The liability of the mediation institution shall be derived from the appointment of the mediator or from the failure to comply with the obligation incumbent upon the mediator.

17 See: Maciej Bobrowicz, *Mediacje gospodarcze* (Warsaw: C.H. Beck, 2004), 33.

mediation centers who have not applied to the president of a district court to be registered on the list of permanent mediators, or who fail to meet the relevant selection criteria. In the literature, this latter category is referred to as non-fixed (non-permanent) mediators. Third, there are permanent mediators, who are officially listed in the wake of a decision by the president of a district court, and whose legal status is most extensively regulated.[18] The fourth group is family mediators, appointed pursuant to Article 436 par. 4 of the Civil Procedure Code.[19]

The minimum criteria relating to all mediator categories distinguished above are regulated in Article 1832 par. 1 of the Civil Procedure Code. The Code provides that the mediator shall be a natural person having full legal capacity and enjoying full public rights.[20] The second criterion is that they have full legal capacity. The third requirement is to have full public rights. This latter criterion is fulfilled insofar as the punitive measure provided for in Article 39(1) of the Penal Code in the form of deprivation of public rights has not been imposed on the person concerned.[21]

The requirements *de lege lata* discussed above do not constitute an exhaustive list of criteria to be met by permanent mediators. Article 157 of pusp provides for additional qualification criteria such as knowledge and skills in mediation, a minimum of 26 years of age, proficiency in the Polish language, no criminal record for an intentional offense or an intentional fiscal offense, and a positive decision of the president of a district court concerning registration on the list of permanent mediators.[22] In the current absence of comprehensive legal regulation of mediation and mediator

18 See: Marek Dąbrowski, *Mediacja w świetle przepisów kodeksu postępowania cywilnego* (Lublin: Wydawnictwo KUL, 2019), 103–116.

19 Dąbrowski, *Mediacja*, 87–88. Some publications distinguish only three categories of mediators in Poland: *ad hoc* mediators, mediators listed at a mediation center and permanent mediators. See: Andrzej Korybski, "Profesjonalizacja czynności mediacyjnych (wybrane zagadnienia w perspektywie polskiego porządku prawnego)," *Annales Universitatis Marie Curie-Sklodowska* 66, no. 1 (2019): 127–128.

20 Active judges cannot become mediators, as provided for in the exemption to in Art. 1832 par. 2 of the Civil Procedure Code.

21 Polish Penal Code of June 6, 1997, consolidated text: Journal of Laws of 2022 item 1138.

22 The range of requirements largely mirrors the criteria that apply to criminal mediators. See: Par. 4 of the Regulation by the Minister of Justice of May 7, 2015, on mediation proceedings in criminal cases, Journal of Laws of 2015 item 716.

status in Poland, the coverage of the status of permanent mediators in a Statutory Law can provide evidence for the growing awareness of judges and stakeholders of a need for enhanced professionalization and transparency of the norms governing both the list of permanent mediators and their professional functioning.[23] At the same time, it should be noted that registration on the list of permanent mediators is no longer a sole key criterion for differentiation between mediator categories. The condition of having necessary "knowledge and skills" has become equally vital.

When analyzing the requirements imposed by the Code on permanent mediators, it is impossible to conclude that the four distinct categories of mediators involve differences in the level of necessary knowledge and skills.[24] Hence, the requirements formulated this way are too general and ambiguous. The legislation does not differentiate between the requirements for permanent mediators and unlisted mediators, and the mere fact of being registered is not a guarantee of more advanced mediator competences. This is all the more so since presidents of district courts – who are the only authority competent for registration on the list of permanent mediators – are required to verify the documents submitted with the enrolment application.[25] However, they do not have practical tools to verify the relevant knowledge and skills, especially in the case of prespective permanent mediators.

As in Spain, mediators in Poland, acting on behalf of individuals, companies, social organizations, offices, or courts, receive a fee for mediation. The scope and amount of the fee depends on the subject matter of the mediation proceedings. In out-of-court mediations, the fee will be freely agreed between the parties and the mediator, and will generally be set out in the mediation agreement. If the parties use the services of a mediator belonging to a mediation center, they may be expected to accept a fee

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23 See: Lidia Mazur, "Ustawa o zawodzie mediatora – czy jest potrzebna?," in *Mediacje w prawie*, ed. Janina Czapska and Maksymilian Szeląg-Dylewski (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2014), 111–123.

24 See: Katarzyna Antolak Szymanski, "Mediation in Polish labour law: comparing its evolution and development to labour mediation in EU and US law," *Review of Comparative Law* 34, no. 3 (2018): 34–35, https://doi.org/10.31743/recl.4510.

25 See: Art. 157b par. 2 pusp and par. 4 of the Regulation by the Minister of Justice of January 20, 2016, on the list of permanent mediators, Journal of Laws of 2016 item 122.

schedule based on the regulations developed by that particular mediation center.[26] There are no overt provisions to regulate mediators' fees or the extent of expenses to be reimbursed in out-of-court mediation. The situation is fairly different when mediation results from a court referral. In such cases, costs of mediation are part of the costs of the court proceedings, and hence, are covered by the State Treasury. Consequently, the amount of mediators' remuneration and mediation-related expenses is provided for in the relevant regulation by the Minister of Justice.[27] The mediator's receipt of mediation fees and reimbursement of mediation expenses is qualified by the relevant tax authorities. Polish regulations do not impose a *de lege lata* obligation that mediators conclude a civil liability insurance contract for damage caused by tort, or one resulting from non-performance or improper performance of a professional obligation.[28]

4. Mode of Qualification for Mediators in Spain

Article 11 of the Law on Mediation in Civil and Commercial Matters establishes the requirements and qualifications necessary to practice as a mediator. To become a mediator, one needs to be a natural person in full exercise of civil rights.[29] Legal entities engaged in mediation, whether they are professional companies or any other entities provided for by the legal system, must appoint a natural person who meets the legal requirements.

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26 Rafał Morek, *Mediacja i arbitraż (art. 1831–18315, 1154–1217 KPC). Komentarz* (Warsaw: C.H. Beck, 2006), 62.

27 See: Pars. 1–5 of the Regulation by the Minister of Justice of June 20, 2016 on the amount of remuneration and reimbursable expenses of a mediator in civil proceedings, Journal of Laws of 2016 item 921.

28 Marzena Myślińska, "Problematyka odpowiedzialności cywilnej mediatora," in *Arbitraż i mediacja. Aktualne problemy teorii i praktyki funkcjonowania sądów polubownych i ośrodków mediacyjnych. Materiały konferencyjne (Nałęczów Zdrój 8–10.5.2009 r.)*, ed. Jan Olszewski (Rzeszów: TNOiK, 2009), 288.

29 See: García Villaluenga, "Artículo 11: condiciones para ejercer de mediador," *Mediación en asuntos civiles y mercantiles: comentarios a la Ley 5/2012*, ed. Carmen Fernández Canales, Leticia García Villaluenga (dir.), and Carlos Rogel Vide (dir.) (Madrid: Editorial Reus, 2012), 152.

The mediator must have a university degree or higher professional training.[30] The degree does not need to relate to social sciences, yet it constitutes a preferable option. The simple requirement for the mediator to have a university degree has been criticized by the doctrine[31] as it is not sufficient to qualify a mediator. It is proposed that the degree studies that are required in advance should involve basic mediation training. Therefore, as the Law does not refer to any specific qualification, it is clear that the status of mediator is extended to all those who hold any of the university degrees officially recognized in Spain, provided that they can prove it by the corresponding qualification.

The mediator must complete specific training in mediation, provided by a duly accredited educational entity. The course must have a minimum duration of one hundred hours. It should be noted that it is essential to attend a course offered by a mediation training center accredited by the Ministry of Justice. Therefore, when applying for registration in the National Registry of Mediators, the candidate has to verify the entity – if it is not accredited, it will not appear in the list of training entities. In this sense, Article 4 of Royal Decree 980/2013 of December 13, developing certain aspects of Law 5/2012 of July 6 on mediation in civil and commercial matters stipulates that the specific mediation training shall provide mediators with sufficient knowledge and skills for the professional practice of mediation. As a minimum, the knowledge and skills must concern the precise area of specialization in which they provide their services, the legal framework, psychological aspects, mediation ethics,[32] processes and techniques of communication, negotiation, and conflict resolution. The specific mediation training shall be developed at both theoretical and practical levels, with the latter corresponding to at least 35% of the minimum duration

30 In some regional autonomic norms that regulate family mediation, preferences for certain qualifications are established. However, Law 5/2012 does not require any specific qualification.

31 See: Rivera Morales, "La formación del mediador," *Iudicium: Revista de Derecho Procesal de la Asociación Iberoamericana de la Universidad de Salamanca*, no. 1 (2017): 73–102.

32 Ethics in mediation is a very relevant issue which cannot be covered in this short article. For an interesting article that analyzes the training and ethics of the mediator, see: Bolaños Cartujo and José Ignacio, "Formación y ética del mediador," in *Jornadas Internacionales de Mediación Familiar* (Madrid: Unión de Asociaciones Familiares UNAF, 2000), 189–230.

provided for in the Royal Degree for mediator training. The practical training must include practical classes and simulation of cases and, preferably, assisted participation in real mediations. This training is valid to practice as a mediator in the entire national territory.[33] At least every 5 years, mediators must complete one to several activities as part of continuous training in mediation, of an eminently practical character, with a total duration of at least 20 hours.[34]

In Spain, there is no official or regulated process of verification of mediator qualifications, nor is there any state examination for mediators. Simply, dedicated courses are taken, and mediators receive their titles.

Mediators can be registered voluntarily in the Registry of Mediators of the Ministry of Justice, for which they must prove that they have an official university degree or higher professional training, that they have specific training to practice mediation, and that they are insured or have an equivalent guarantee covering civil liability arising from their actions in the conflicts in which they intervene.

The Spanish Ministry of Justice verifies the qualifications issued by mediation institutions which must also register and prove that the qualifications they issue comply with the regulations. The Registry of the Ministry of Justice has two sections: one for mediators and the other for mediation institutions. The regulation of the Register of Mediators and Mediation Institutions should be seen as a factor for confidence and legal certainty,

[33] The specific training for mediators, including their continuous training, shall be provided by public or private training centres or entities, legally authorized to carry out such activities or duly authorized by the Public Administration with competence in the matter, as established in Article 7 of the Regulations of the Mediation Law. The centres that provide specific training for the practice of mediation shall have a teaching staff that has the necessary specialisation in this area and meets, at the minimum, the requirements of an official university degree or higher vocational training. Likewise, those who impart the training of practical character shall fulfil the conditions foreseen in this royal decree for the registration in the Mediators and Mediation Institutions Registry. In the case of mediators acting on behalf of a mediation institution, the coverage of the damage and prejudices that could derive from the mediator's performance may be assumed directly by the mediation institution.

[34] Article 6 of Law 5/2012 imposes a need for continuous training of mediators so that they must take courses periodically to update their competences. The mediators must carry out one or more continuous training activities in mediation, of an eminently practical nature, at least every five years, which shall have a total duration of at least 20 hours.

insofar as registration facilitates the publicity of the mediator and enables the mediator's status as a mediator.[35]

The mediator must obtain civil liability insurance or an equivalent guarantee that covers the civil liability in relation to their performance as a mediator. This insurance or guarantee may be contracted individually by the mediator or within a collective policy that includes the coverage of the liability corresponding to mediation activity. The insurance shall cover all damage, other than the expected results of the mediation, caused by their acts or omissions; such as those derived from the infringement of the principles of impartiality and confidentiality,[36] professional error, or the loss or misplacement of files and documents of the parties; and the sum insured or guaranteed by the facts generating the mediator's liability, per claim and annuity, shall be proportional to the entirety of the matters in which the mediator intervenes. Before the commencement of the procedure, the mediator shall inform the parties of the coverage of the mediator's civil liability, leaving its record in the initial mediation agreement.

It should be noted that mediation institutions must also have in place insurance or an equivalent guarantee covering the liability applicable to them, in accordance with the Mediation Law.

A fundamental aspect of the role of mediator in a mediation process is to try to bring the parties together in order for them to formulate their own agreements to solve the conflict. That requires some training in psychology, sociology, and human relations. This role of facilitator involves a number of aspects of practice and knowledge, for example,[37] empathy, perception of indirect aggressive language, raising the awareness of the parties so that understanding can flourish, managing to minimize psychological harm, and other similar aspects.

35 See: Morales, *La formación del mediador*, 79.

36 See: García Villaluenga, "Artículo 7: igualdad de las partes e imparcialidad de los mediadores," *Mediación en asuntos civiles y mercantiles: comentarios a la Ley 5/2012/*, ed. Carmen Fernández Canales, Leticia García Villaluenga (dir.), and Carlos Rogel Vide (dir.) (Madrid: Editorial Reus, 2012), 109–118.

37 See: Morales, *La formación del mediador*, 80.

5. Mode of Qualification for Mediators in Poland

Polish normative acts offer an exceptional scarctiy of regulations concerning *ad hoc* mediators, who do not have to display any specific qualifications. At the same time, extensive, yet highly imprecise regulations define formal requirements for prospective permanent mediators.[38] It can be argued that this solution is dictated by the desire to raise the professional status of permanent mediators, as indicated by the requirement to have the knowledge and skills necessary to mediate successfully. This requirement is intended to be a guarantee of the proper performance of the mediator's duties, contributing to increased public confidence in mediators and the mediation process.[39] Nonetheless, the experiences of stakeholders and their practical assessment of the current normative regulations unveil the gross ineffectiveness of the regulation in force. The root of the problem is that the criterion for candidates for permanent mediators – to be qualified in terms of knowledge and skills in mediation – is formulated in too general terms,[40] and additionally complicated by unlimited and undefined trajectories toward the acquisition and documentation of such qualifications.[41] The ineffectiveness of the regulations also manifests itself through the undefined level of qualifications required of a permanent mediator. The provisions constructed in this way pose difficulties for presidents of district courts as the authorities that verify the formal requirements for candidates applying for the status of permanent mediator. In practice, this leads to discrepancies in the level of professional training among permanent mediators, contributing to the negative phenomenon of the uncertainty of the law.[42] The lack of provisions setting out minimum competence levels for candidates – like the ones that are in force in Spain – allows for subjective assessment by presidents of district courts, leading to disparities between judicial districts. To

38 See: Dąbrowski, *Mediacja*, 87–108.

39 See: Włodzimierz Broński and Marek Dąbrowski, "Status prawny mediatora w sprawach cywilnych stan obecny i propozycje zmian," *Roczniki Nauk Prawnych* 24, no. 4 (2014): 19.

40 See: Article 158a(2) pusp and par. 4(6) of the Regulation by the Minister of Justice of May 7, 2015, on mediation proceedings in criminal cases, Journal of Laws of 2015 item 716.

41 See: Par. 5(1) of the Regulation by the Minister of Justice of January 20, 2016, on the keeping of a register of permanent mediators, Journal of Laws 2016 item 122.

42 See: Dagmara Kornobis-Romanowska, *Pewność prawa w Unii Europejskiej. Pomiędzy autonomią jednostki a skutecznością prawa UE* (Warsaw: C.H. Beck, 2018), 1–7.

make matters worse, according to a nationwide study on gaps in mediators' competences, the qualification criteria established for permanent mediators are, according to the respondents, too lax, which consequently negatively affects the quality and level of confidence of potential parties and judges in mediation.[43]

In the Polish legal system, the objective of acquiring knowledge and skills to become a permanent mediator can be pursued along three pathways, each of which is optional and independent of each other. First, the qualifications can be acquired at a mediation training course. Second, candidates can document their qualifications that result from their professional experience. This can mean presenting a certificate of completion of mediation training. The third way is to take a validation examination, whose positive result is interpreted as confirmation that the candidate has the knowledge and skills required of a permanent mediator.

In relation to the first pathway, it should be noted that, unlike the current regulations in Spain, training for candidates for permanent mediators in Poland is only an option. What is more, such training courses can be provided in an entirely unregulated manner by organizations that do not have to meet any requirements or obtain accreditation safeguarding their ability to provide quality training. In contrast to the Spanish regulations, in Poland there are no binding laws specifying the requirements for training organizations, the qualifications of trainers, guidelines for the training curricula and programs, or the mandatory number of learning hours. Hence, there is no uniform minimal standard of certification or a certificate confirming the qualifications of candidates for permanent mediators. The lack of quality standards and training guidelines provokes a tendency to acquire qualifications in the least demanding, and often the cheapest and simplest possible ways. This can be less about qualifications, and more about obtaining a certificate confirming the acquisition of knowledge and skills, which makes it possible to successfully apply for registration on the list of

[43] See: John Paul II Catholic University of Lublin, "Raport z badań w zakresie potrzeb i oczekiwań społecznych dotyczących Krajowego Rejestru Mediatorów oraz luk kompetencyjnych w zakresie szkoleń mediatorów," accessed January 20, 2023, https://krm.gov.pl/files/page_files/113/raport-z-badan-w-zakresie-potrzeb-i-oczekiwan-spolecznych-dotyczacych-krm-oraz-luk-kompetencyjnych.pdf.

permanent mediators. In contrast to the equivalent regulations applicable in Spain, the Polish legal system suffers from an *intra-legem* loophole as regards qualification acquisition and training. The gap is caused by regulatory imprecision becase, while allowing for the training, the system fails to care for the adequate regulation of such training. This renders the current regulations in Poland ineffective in terms of the desired objective of ensuring a high level of mediators' qualifications and a guarantee of their due performance.

The second pathway for obtaining, or rather documenting, the qualifications by candidates for permanent mediators in Poland – and not standardized under Spanish law – involves the candidate's submission of documents confirming the qualifications. In the application for registration on the list of permanent mediators, candidates are required to provide information about documents confirming knowledge and skills in mediation, including information on the number of mediations carried out, a list of authored publications on mediation, opinions of mediation centers or individuals on the candidates' knowledge and skills in mediation, documents proving the details of their education. However, candidates can also limit themselves to the presentation of a certificate of completion of a mediation training course – as part of the first trajectory – in order to prove the qualifications acquired by the candidate for a permanent mediator.[44] In contrast to Spanish norms, which do not provide for a separate body to verify mediators' qualifications – since they impose an alternative precondition of compulsory training by accredited training organizations – in Poland, presidents of district courts are burdened with the responsibility for verifying candidates for permanent mediators. The assessment is based on the documents mentioned above, whose merit and relevance – especially in the case of the number of mediations carried out, the list of publications, or optionally submitted opinions – is unreliable and even precludes a reliable, substantive verification of a candidate's knowledge and skills.[45]

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44 Par. 5(1) Regulation by the Minister of Justice of January 20, 2016, on the register of permanent mediators, Journal of Laws of 2016 item 122.

45 See: Marek Dąbrowski, "Criterion of knowledge and skills as a requirement for permanent mediators – a gloss to the judgment of the Voivodeship Administrative Court in Poznań of January 25, 2018, III SA /PO 634/17," *Studia Prawnicze KUL* 79, no. 3 (2019): 217–220; Agata Przylepa-Lewak and Marzena Myślińska, "Zasady wpisu na listę stałych mediatorów

The third pathway for fulfilling the requirement of having knowledge and skills to mediate, which again avoids standardization under Spanish law, is an option to take a (theoretical and practical) validation examination to verify the qualifications of a candidate. Upon passing the examination, a candidate receives a ten-year certificate attesting to their knowledge and skills in mediation. The examination can be held in four separate mediation specializations: civil,[46] commercial,[47] family,[48] or criminal specialization.[49] While a mid-level (high school) education background is sufficient to take an examination for civil mediation, commercial, family, and criminal mediation specializations involve high entry requirements for candidates. In the case of commercial validation, the requirements are a prior qualification (specialization) in civil mediation, the requirement to have a university degree, and a working experience of at least 5 civil mediations conducted in the past five years before the commercial validation procedure.[50] In family cases, however, the prerequisite requirement includes a university degree and experience documented by four mediation protocols, as well as four case studies of family mediations conducted, including at least two with a written mediation settlement and at least two with a minimum of three meetings between the parties in family mediations conducted in the past three years before the validation. As an additional condition for

w Polsce – w kontekście dyskusji nad profesjonalizacją zawodu mediatora," *Krytyka Prawa* 14, no. 1 (2022): 77–80.

46 Announcement of the Minister of Justice of December 4, 2018, on including the commercial qualification "Conducting Judicial and Non-judicial Mediations" in the Integrated System of Qualifications, Official Journal of the Republic of Poland "Monitor Polski" 2018, item 1198.

47 Announcement of the Minister of Justice of December 3, 2018, on inclusion of the commercial qualification "Conducting court and out-of-court mediation in commercial cases" into the Integrated Qualification System, Official Journal of the Republic of Poland "Monitor Polski" 2018, item 1201.

48 Announcement of the Minister of Justice of June 9, 2020, on inclusion of the market qualification "Conducting court and out-of-court mediation in family cases" into the Integrated Qualification System, Official Journal of the Republic of Poland "Monitor Polski" 2020, item 556.

49 Announcement of the Minister of Justice of August 19, 2022, on inclusion of the market qualification "Conducting mediation in criminal and delinquency cases" to the Integrated Qualification System, Official Journal of the Republic of Poland "Monitor Polski" 2022, item 851.

50 Annex to the Announcement of the Minister of Justice of December 3, 2018. Official Journal of the Republic of Poland "Monitor Polski" 2018, item 1201.

taking a validation examination, a self-development report must be submitted in the year preceding the examination application.[51] In contrast, applying for validation in criminal and misdemeanor cases is conditional on the presentation of a certificate confirming participation as an observer, mediator, or co-mediator in a minimum of four mediation meetings. The flaw in the regulations under the third pathway is that the prerequisites they outline do not apply under the first pathway. This is why by completing commercially available training courses, a candidate can obtain their full qualification certificate without any term or validity limit and without the condition of fulfilling the prerequisites of the third pathway. Furthermore, it needs to be emphasized that the prerequisites established for the family, commercial, and criminal specializations can satisfy the requirements indicated under the second pathway, providing a self-contained and sufficient basis for becoming a permanent mediator without having to take a validation examination under the third pathway. This, in turn, renders the qualification acquisition system inefficient and provokes candidates to seek the least demanding and cheapest routes to becoming permanent mediators, ultimately missing the objective of the dedicated regulations, which is to strive for professionalism and high qualifications.

6. Conclusions

Safeguarding the quality of mediation, and ensuring that mediation services are provided to the parties effectively, impartially and competently, undeniably requires the establishment of normative regulations that guarantee an adequate level of mediators' qualifications. This objective, set out in Article 4 of Directive 2008/52/EC, constitutes a minimum obligation binding on all EU Member States. However, the nature of a directive, as a legal instrument requiring implementation, allows EU Member States to freely adapt this legislative solution to their legal system, only binding them to achieve the designated outcome. This, in turn, allows for differences in the way the EU Member States regulate the matter at hand, including the legal status of the mediator and the modes of acquiring qualifications.

[51] Annex to the announcement of the Minister of Justice of June 9, 2020, Official Journal of the Republic of Poland "Monitor Polski" 2020, item 556.

As can be seen from the legal and comparative analysis carried out in this study, the normative regulations in force in Spain and Poland are convergent in terms of the objectives set out in the aforementioned Article 4 of Directive 2008/52/EC, establishing equivalent requirements for mediators as far as knowledge and skills for mediation are concerned. Notwithstanding the above, the two legal systems differ in regulating how qualifications are gained, and in the details of mediators' training. In Spain, the regulatory model is based on training provided by entities accredited by the Ministry of Justice, with a norm regulating the training conditions, but without establishing an additional body to verify mediators' qualifications. In Poland, the system is based on multiple pathways leading to the acquisition of qualifications by candidates for permanent mediators.

Undoubtedly, the Polish solutions cannot be deemed flawed a priori. They are based on a model that, on the one hand, allows for the absence of any mediation qualifications, while at the same time allowing for an authentic path of personal or professional development, complemented through training. On the other hand, it allows for the inclusion of education, experience, and qualifications acquired over the years, making it possible to document them at the stage of applying for mediator status or to verify them in a validation (examination) for a specific mediation specialization. However, the impact assessment of the current regulations in Poland proves that it is burdened with flaws that render them dysfunctional in relation to the intended and desired results. From a legal comparative perspective, it would be adequate to transpose into the Polish legal system the Spanish regulations defining the minimum standard of training for mediators, with the training curricula, their scope, the number of learning hours, and the requirements for training organizations. This would fill the *intra legem* gap that exists with regard to training, and make the best use of the first pathway in the Polish system since it would guarantee an adequate level of professional preparation for mediators. At the same time, the Spanish regulations could potentially be improved by the second and third pathways for the acquisition of qualifications that are in place in Poland. That would expand the Spanish regulatory network by creating broader opportunities and make the best use of candidates' educational backgrounds and working experience acquired before becoming mediators.

References

Antolak Szymanski, Katarzyna. "Mediation in Polish labour law: comparing its evolution and development to labour mediation in EU and US law." *Review of Comparative Law* 34, no. 3 (2018): 21–40. https://doi.org/10.31743/recl.4510.

Bobrowicz, Maciej. *Mediacje gospodarcze*. Warszawa: C.H. Beck, 2004.

Broński, Włodzimierz and Marek Dąbrowski. "Status prawny mediatora w sprawach cywilnych stan obecny i propozycje zmian."*Roczniki Nauk Prawnych* 24, no. 4 (2014): 7–20.

Cartujo, Bolaños, and José Ignacio. "Formación y ética del mediador." In Jornadas Internacionales de Mediación Familiar, 189–230. Madrid: Unión de Asociaciones Familiares UNAF, 2000.

Dąbrowski, Marek. "Assessment of the Correct Implementation of Article 4 of Directive 2008/52/EC of May 21, 2008, on Some Aspects of Mediation in Civil and Commercial Matters in the Polish Legal System." *Krytyka Prawa* 14, no. 3 (2022): 5–19.

Dąbrowski, Marek. "Criterion of knowledge and skills as a requirement for permanent mediators – a gloss to the judgment of the Voivodeship Administrative Court in Poznań of January 25, 2018, III SA /PO 634/17." *Studia Prawnicze KUL* 79, no. 3 (2019): 211–231.

Dąbrowski, Marek. *Mediacja w świetle przepisów kodeksu postępowania cywilnego*. Lublin: Wydawnictwo KUL, 2019.

González, Pérez-Serrabona. "El estatuto del mediador." In *Tratado de mediación en la resolución de conflictos*, edited by José Luis Monereo Pérez, Rosa M. González de Patto, Antonio M. Lozano Martín (dir.), and Guillermo Orozco Pardo (dir.), 137–152. Madrid: Tecnos, 2015.

John Paul II Catholic University of Lublin. "Raport z badań w zakresie potrzeb i oczekiwań społecznych dotyczących Krajowego Rejestru Mediatorów oraz luk kompetencyjnych w zakresie szkoleń mediatorów." Accessed January 20, 2023. https://krm.gov.pl/files/page_files/113/raport-z-badan-w-zakresie-potrzeb-i-oczekiwan-spolecznych-dotyczacych-krm-oraz-luk-kompetencyjnych.pdf.

Kornobis-Romanowska, Dagmara. *Pewność prawa w Unii Europejskiej. Pomiędzy autonomią jednostki a skutecznością prawa UE*. Warszawa: C.H. Beck, 2018.

Korybski, Andrzej. "Profesjonalizacja czynności mediacyjnych (wybrane zagadnienia w perspektywie polskiego porządku prawnego)." *Annales Universitatis Marie Curie-Sklodowska* 66, no. 1 (2019): 125–139.

Mazur, Lidia. "Ustawa o zawodzie mediatora – czy jest potrzebna?" In *Mediacje w prawie*, edited by Janina Czapska and Maksymilian Szeląg-Dylewski, 111–124. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2014.

Morales, Carretero. "El estatuto del mediador civil y mercantil." *Revista de mediación* 7, no. 1 (2014): 10–23.

Morales, Rivera. "La formación del mediador." *Iudicium: Revista de Derecho Procesal de la Asociación Iberoamericana de la Universidad de Salamanca*, no. 1 (2017): 73–102.

Morek, Rafał. *Mediacja i arbitraż (art. 1831–18315, 1154–1217 KPC). Komentarz*. Warszawa: C.H. Beck, 2006.

Myślińska, Marzena. "Problematyka odpowiedzialności cywilnej mediatora." In *Arbitraż i mediacja. Aktualne problemy teorii i praktyki funkcjonowania sądów polubownych i ośrodków mediacyjnych. Materiały konferencyjne (Nałęczów Zdrój 8–10.5.2009 r.)*, edited by Jan Olszewski, 277–288. Rzeszów: TNOiK, 2009.

Paús, Navas. "La formación del mediador." In *Mediación: experiencias desde España y alrededor del mundo*, edited by Kevin J. Brown, and María Concepción Rayón Ballesteros, 201–208. Madrid: Universidad Complutense de Madrid, Facultad de Derecho. Servicio de Publicaciones, 2016.

Przylepa-Lewak Agata, and Marzena Myślińska. "Zasady wpisu na listę stałych mediatorów w Polsce – w kontekście dyskusji nad profesjonalizacją zawodu mediatora." *Krytyka Prawa* 14, no. 1 (2022): 74–91.

Rayón Ballesteros, María Concepción. *Out-of-court dispute resolution: the answer for the post-covid-19 era*. Madrid: Dyckinson, 2021.

Vadell, Bujosa. "Estatuto jurídico y capacitación del mediador." In *Los desafíos de la justicia en la era post crisis*, edited by Federico Bueno de Mata, Julio Pérez Gaipo, and Ana Neira Pena (dir.), 351–365. Madrid: Atelier, 2016.

Villaluenga, García. "Artículo 11: condiciones para ejercer de mediador." *Mediación en asuntos civiles y mercantiles: comentarios a la Ley 5/2012*, edited by Carmen Fernández Canales, Leticia García Villaluenga (dir.), and Carlos Rogel Vide (dir.), 149–162. Madrid: Editorial Reus, 2012.

Villaluenga, García. "Artículo 7: igualdad de las partes e imparcialidad de los mediadores." *Mediación en asuntos civiles y mercantiles: comentarios a la Ley 5/2012/*, edited by Carmen Fernández Canales, Leticia García Villaluenga (dir.), and Carlos Rogel Vide (dir.), 109–118. Madrid: Editorial Reus, 2012.

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How is Mediation Integrated into the Dispute Resolution System of Civil Cases in Hungary?

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civil justice

Abstract: The article deals with the integration of mediation into the Hungarian justice system, with particular attention to its historical aspects, the connection between litigation and mediation and the conditions for becoming a mediator, as well as the two types of mediation.

1. Historical Aspects

In Hungary, mediation was regulated quite early; a comprehensive regulation of mediation is contained in the *Mediation Act*,[1] adopted in 2002, six years before the *European directive*.[2] Therefore, due to the later adopted directive, the Hungarian Mediation Act had to be amended to the greatest extent in 2008. In accordance with Article 12, Member States had to bring into force the laws, regulations, and administrative provisions necessary to comply with this directive. Hungary "complied with its obligation of transposition in 2009. Act LXXV of 2009 amended the Mediation Act, provided for the professional training for mediators, reregulated registration in the mediators' register and the striking off of mediators from the register in the case of a gross breach of duty, and permitted the use of video

1 Act LV of 2002 on Mediation.

2 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008, 3–8.

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conferences."[3] Hungary is characterized by monistic regulation: there are no separate provisions for domestic and cross-border mediation.

The other major modification took place in 2012. Originally, a model of out-of-court mediation was developed; with the latter amendment, the possibility of court-annexed mediation was also introduced. From then on, the parties can choose which of the two possible forms of mediation they wish to use.

In a special area, there was mediation regulation even before this, therefore, the first real mediation in Hungary was introduced by Act CXVI of 2000 on *Mediation in Health Care*. In legal disputes between patients and doctors (hospitals, clinics, and health insurance companies), the parties concerned may choose it instead of legal action on a voluntary basis.[4]

In Hungary, the traditional fields of conciliation and mediation for a long time were *labor law* and *family law*.[5] Typical institutions of the socialist era were arbitration committees proceeding in employment law disputes, the use of which, however, was not based on the principle of voluntariness but on a binding provision of law.[6] Nowadays, its application is already widespread in many other areas, mainly in civil, family, labor, and, most recently, criminal and administrative matters. Mediation is typically employed in legal relationships with a longer time horizon, where cooperation is needed for years.

2. The Role of Mediation in the Hungarian Judicial System

Justice shall be administered by the courts, but an Act may also authorize other organs to act in particular legal disputes (Section 25 new Constitution of Hungary, in force since 2012). Thus, the legislator essentially opened the door to the "privatization of judicial activities" (e.g., arbitration or other

3 Miklós Kengyel, Viktória Harsági, and Zoltán Nemessányi, "Hungary," in *Civil and Commercial Mediation in Europe. National Mediation Rules and Procedures*, vol. 1, eds. Carlos Esplugues, José Luis Iglesias, and Guillermo Palao (Cambridge: Intersentia, 2013), 223; cf.: Tamás Gyekiczky, "A mediációs irányelv," *Európai Jog* 9, no. 6 (2009): 24.

4 Alice Decastello, *Mediáció az egészségügyben* (Budapest: HVG Orac, 2010), 62–128.; eadem, "Mediation in Health," *Hungarian Medical Journal* 2, no. 2 (2008): 193–199.

5 See: Beáta Nagy et al., "Parental mediation in the age of mobile technology," *Children & Society* 37, no. 2 (2023): 426.

6 Kengyel, Harsági, and Nemessányi, "Hungary," 218.

judicial tasks carried out by notaries public). In comparison, the status of mediators may raise interesting questions, given that mediators have no decision-making authority, but due to their "qualification assists the parties in entering into a mutually acceptable settlement." But the agreement reached during mediation is not an obstacle for the parties to bring their dispute before a court.[7]

The mediation procedure can fulfill its role well if it is not overregulated. The matters that must or should be regulated are concentrated mainly around the procedural input and output. In my opinion, the following issues should be determined by the law: a) who can be a mediator and under what conditions; b) how the mediation procedure starts; c) whether mediation can be made mandatory and, if so, in which cases; d) the time frames (end) of the mediation procedure; e) the question of the enforceability of the mediation agreement; f) the relationship between mediation and litigation. However, it is not worth regulating how the mediator conducts the mediation process to a significant extent. Overregulation in this area would be incompatible with the nature of mediation; a high degree of flexibility could be a good solution here.

According to the Mediation Act, the purpose of this law is to facilitate the settlement of civil and administrative legal disputes arising in connection with personal and property rights of natural persons and other persons, in which the parties' right of disposition is not limited by the law. The scope of the law does not extend to other mediation or conciliation procedures regulated in a separate law, as well as mediation to be conducted during arbitration proceedings unless otherwise provided by a separate law or a decree issued on the basis of its authority (Section 1 of the Mediation Act).

Mediation is a specific pre-litigation procedure, conciliation, conflict management, and dispute settlement procedure conducted on the basis of the Mediation Act, the purpose of which is (based on the mutual agreement of the parties to a dispute) facilitating the creation of a written agreement containing a solution to the dispute between the parties, with the involvement of a third party (mediator) not involved in the dispute (Section 2 of the Mediation Act).

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7 Miklós Kengyel, *Magyar polgári eljárásjog (Hungarian Civil Procedure)*, 11th ed. (Budapest: Osiris, 2012), 601; Kengyel, Harsági, and Nemessányi, "Hungary," 217–218.

The duty of the mediator is to contribute impartially, conscientiously, and to the best of their ability in the creation of an agreement resolving the dispute between the parties during the mediation (Section 3 of the Mediation Act). According to the reasoning of the mediation bill, the mediator must conscientiously, impartially, and to the best of their ability, try to reconcile the opposing parties and, by not resorting to the judicial process, create an agreement between the parties. Within this activity, knowledge of people, quick recognition of situations, good communication skills, and conflict management skills are essential, so the people who complete the mediation course can manage and lead the mediation process effectively and efficiently, supplementing the experience gained during the course with the knowledge and practice acquired in their profession.

There is no place for the mediation procedure according to this law in guardianship, maternity, and paternity cases according to the Code of Civil Procedure, in cases related to parental custody (except for those initiated to settle the exercise of parental custody), in cases to dissolve adoptions, to enforce personal rights (except for lawsuits filed for the enforcement of certain personal rights related to belonging to the community), to change a town clerk's decision in a property protection case, and enforcement cases.

In matrimonial cases, the court's decision is required to establish the invalidity, validity, existence, or non-existence of a marriage and to dissolve a marriage. In matters subject to the termination of a registered partnership by a notary public, the notary's decision is required to terminate a registered partnership (Section 1 of the Mediation Act).

3. Who May Be a Mediator?

In Hungary, a mediator may be a natural person or an employee of a legal person, or a so-called business without a legal personality. They should be listed in the register of mediators, which is kept by the Minister of Justice. Upon request, the natural person – who is not under the scope of guardianship affecting the capacity to act or is not under the scope of supported decision-making – who:

a) has a higher education degree and at least five years of certified professional experience linked to the higher education degree,
b) has completed the professional mediation training specified in the ministerial decree,

c) has no criminal record and has not been restrained by a court order from practicing the activities of mediators.

A legal person who satisfies the following criteria must be admitted to the register: a) have the activity of mediation registered in the statutes, and b) have a member, employee, or subcontractor who is licensed to engage in professional mediation and whose license to engage in professional mediation has not been suspended. In addition to these requirements, the applicant should also provide proof of payment of the fee for admission into the register.

The Mediation Act makes it clear that a mediator can only be a natural person who becomes entitled to continue mediation activities by being listed in the register. The employee of the legal person becomes entitled to carry out mediation activities only if they are listed in the register as a natural person, as well as the legal person that employs them. An employee of a legal person may not be instructed by a member or company manager of the legal person regarding their mediation activity (Section 7 of the Mediation Act). According to the reasoning of the mediation bill, the primary reason for this is that the employee acting on behalf of the legal person in the mediation process can remain impartial and neutral.

The applicant must pay a fee for inclusion in the register. The natural person is obliged to prove, in the manner specified by the law, that they have acquired the theoretical and practical knowledge necessary for mediation activity by completing professional mediation training.

From March 2014 on (within the framework of court-annexed mediation), in addition to the persons and organizations listed above, a court secretary, a judge, or a judge placed on the disposition staff as defined in the Mediation Act may also perform mediation activities (Section 5–5/B of the Mediation Act).

4. Training of Mediators

In order to become a mediator, one does not necessarily need to have a law degree. The Mediation Act requires any higher education degree (BA, MA, etc.) and a minimum of five years of experience (see point 3). The ministerial decree[8] No. 63 of 2009 specifies the requirements for the training of

[8] 63/2009. (XII.17) IRM rendelet a közvetítői szakmai képzésről és továbbképzésről.

mediators. According to it, a maximum of 25 persons may participate in group training. The training subject must consist of a theoretical and practical part based on each other.

The theoretical part of the training, which is at least 60 hours long (with a duration of 45 minutes per hour), must include the following elements of knowledge and skills:

a) basic knowledge and skills in conflict theory,
b) basic knowledge and skills in negotiation,
c) mediation technics and methodological knowledge and skills,
d) process management and dynamic knowledge and skills,
e) knowledge and skills in questioning techniques,
f) mediation technical knowledge and skills suitable for various levels of conflict,
g) mediation technical knowledge and skills related to the management of problematic participants,
h) psychological knowledge and skills, and
i) legal knowledge regarding mediation activity.

It can be seen that the training only deals with the legal background of mediation to a lesser extent; it is mainly intended to develop the skills that are indispensable in practicing the activity.

The theoretical training part can be divided into two modules of at least 30 hours. A module is a combination of the knowledge and skill elements that are part of the training, which can be handled independently compared to the other knowledge and skill elements. After mastering the module, the applicant can apply the knowledge and skills contained therein individually.

During the *practical part of the training*, the acquisition of practical experience – at least in relation to a completed mediation case – must be provided in one of the following ways: a) simulated case study, b) mentored case study, c) participation in a case discussion group, d) creating a case study, e) method-specific supervision. The purpose of the simulated case exercise is to reconstruct a mediation case that has taken place and to evaluate the roles of the mediator and the parties, with the participation of the instructor and members of the group organized during the training. During the mentored case study, a real mediation procedure is actually

conducted. The conduct of the mediation procedure and the evaluation of the role of the mediator and the parties are carried out under the continuous supervision of the instructor. Method-specific supervision is a method of gaining practice under the guidance of an instructor. It is used to analyze a mediation case that has taken place to reveal the errors and best methods that were used during it, in group or consultation form. During the method-specific supervision, the investigation of the mediation case is carried out solely on the basis of the correctness of the methods used and not on the content and results of the mediation.

An instructor with at least three years of experience as a mediation instructor must participate in the professional management and delivery of the training. The number of instructors must be adjusted to the number of members of the training group, with at least one instructor for up to 15 people and at least two instructors for groups of more than 15 people.

In order to ensure the appropriate professional level of mediation activity – to continuously maintain and develop the acquired knowledge and skills – the natural person is obliged to participate in further training. Continuing education takes place in consecutive continuing education periods lasting five years (Section 12/A of the Mediation Act).

The continuing education obligation (for the practicing mediators) can be fulfilled by obtaining continuing education credit points. The natural person included in the mediator's register must achieve credit points by completing at least two forms of further education from the following forms of further education: a) a theoretical training module, b) a practical training module, c) conducting a mediation procedure together with an instructor of the institution organizing the training, or d) participation in a mediation-related professional conference.

5. How to Initiate a Mediation?

Based on a mutual agreement, the parties may initiate the request of a natural person or legal person of their choice as a mediator in writing, by fax, or by electronic mail. If only one party initiates the procedure, the mediator can help the other parties join the initiative; no fee can be asked for this contribution. The parties – if the need arises – can initiate the invitation of several natural or legal persons simultaneously. The legal person shall notify the employee acting as a mediator in the case of the request. The request

must include: a) the name, address, place of residence or seat of the parties, b) the name of the natural person invited to mediate or the name of the legal person, c) if the party is represented by any representative, the representative's name and address, d) the subject of the dispute, and e) the foreign language intended to be used by the parties during the procedure. In the request, the parties must declare that, based on their mutual agreement, they wish to settle the dispute between them in the framework of a mediation procedure (Section 23 of the Mediation Act).

According to the reasoning of the mediation bill, the Mediation Act also defines the essential content elements of the application initiating the invitation of the mediator so that the mediator to be invited can decide on the merits of whether to undertake the mediation activity in the disputed matter based on the contents of the request. The request must specify that the parties wish to settle the dispute between them in the framework of a mediation procedure based on mutual agreement.

The Mediation Act allows the parties to indicate the foreign language in which they request the mediation process to be conducted. In the absence of such a designation, the language of the mediation procedure is Hungarian. Given that, based on the request of the parties, the mediator is aware of the language in which the parties wish to conduct the mediation procedure and accepts the request knowing this, it is not necessary to separately regulate the interpreter's participation in the mediation procedure.

The Mediation Act allows the requested mediator to declare in writing whether they accept the request within 8 days of receiving the request to initiate the mediation process. The mediator is obliged to declare in writing, by fax or electronic mail, whether they accept the invitation. The mediator is obliged to refuse the request in case of conflict of interest and may refuse in case of other obstacles (Section 24 of the Mediation Act). If the request is accepted, they are entitled to conduct the mediation process as a mediator. The deadline for making a statement is intended to provide the parties with the opportunity to start the procedure within the shortest possible time, and if the mediator rejects the request, the possibility to invite a new mediator within the shortest possible time. The Mediation Act determines in which cases the mediator is obliged to refuse the request for the sake of the impartiality and objectivity of the mediation process, but the law provides the possibility to refuse the request even if

the mediator to be appointed is prevented from accepting the request for other reasons. In this context, the law does not name the possible reasons for obstruction.

The law clarifies the reasons for conflicts of interest on the basis of which the mediator is obliged to refuse the request and also provides for rules regarding conflicts of interest arising after the completion of the mediation procedure (including the case when the mediator suspends activity). When determining the causes of conflicts of interest, the law sets a strict standard, primarily in order to ensure that the mediators participating in the mediation procedure cannot find themselves in a situation that could jeopardize their impartial position (Reasoning of the bill of the Mediation Act).

The mediator may not act if:

a) the mediator represents one of the parties or is a supporter of one of the parties,
b) the mediator is a relative of any of the parties,
c) the legal person employing the mediator has a majority influence in the relationship with one of the parties,
d) the mediator has an employment relationship with any of the parties, other legal relationships aimed at employment, and a membership relationship,
e) the mediator is otherwise interested or biased in the case.

The mediator is obliged to inform the parties of the fact if they represented any of the parties within five years prior to the request or if they had an employment relationship, other legal relationship for work, or a membership relationship with any of the parties within the five years prior to the request. If the parties do not agree otherwise, the mediator may not act in the case.

Unless the parties agree otherwise, the person who participated in the mediation procedure as a mediator, representative of the parties, or an expert, as well as a mediator who has suspended activity in the legal dispute that was the subject of the mediation procedure, or the one that served as its basis or arising from the related contract or other legal relationship, may not act a) as an arbitrator, b) as a representative of one of the parties or c) as an expert (Section 25 of the Mediation Act).

6. The Course of the Out-Of-Court Mediation Procedure

The Act on Mediation contains only a few regulations on the course of mediation, as it is primarily determined by the parties. The law only defines the framework of the procedure. According to Section 28 of the Act on Mediation, if the mediator has accepted the invitation, the mediator invites the parties to the first mediation meeting and informs them of the possibility of representation. The parties may be represented by a person of legal age or a legal representative based on a power of attorney. The parties, and in the case of a legal person, the person authorized to represent them, must appear in person at the first mediation meeting and when the agreement is concluded and signed. During the initiation, conduct, and completion of the mediation procedure, the requirement of personal appearance does not have to be met if the mediation procedure is conducted using video conferencing (Section 35 of the Mediation Act). The mediator is to hold the mediation meeting in the location indicated in the register for carrying out mediation activities or in another place acceptable to the parties.

If any party does not appear in person at the first mediation meeting, the mediator shall not initiate the mediation procedure (Section 29 of the Mediation Act). If any party does not appear, this presumably means that the decision of the parties or one of the parties has changed after deciding to initiate the invitation to the mediator, i.e., the conduct of the mediation procedure is no longer considered appropriate for the settlement of the disputed case.

The mediator informs the parties at the first mediation meeting about a) the basic principles of mediation, the main stages of the mediation discussion, b) the process leading to the exploration of effective agreement possibilities, c) the costs of the procedure, d) the obligation of confidentiality imposed on the person and the expert possibly involved in the procedure, e) the possibility that the parties can separately agree on the obligation of confidentiality imposed on them, f) the fact that as a mediator in the case – if the nature of the case requires it – the mediator can only present the legal material and professional facts related to the case[9] (Section 30 of the Mediation Act).

[9] Márta Nagy, *Bírósági mediáció* (Szeged: Bába Kiadó, 2011), 182–183.

By signing the declaration, the mediation process starts. According to Section 31 of the Mediation Act, the initiation of mediation proceedings interrupts the limitation. After the successful conclusion of the mediation procedure with an agreement, the limitation is governed by the Hungarian Civil Code[10] on the interruption of limitation, and in the case of ineffectiveness of the mediation procedure, by the Civil Code on the suspension of the limitation.

According to the reasoning of the bill of the Mediation Act, the law does not provide for the rules of a procedure known in civil litigation since the goal is for the mediation procedure to be conducted according to the rules established jointly by the parties and the mediator. The law specifies the main principles of the mediation procedure, e.g., that the mediator listens to the parties in detail; during the procedure, the parties must be present in person at the individual meetings; if possible, the parties can be heard during joint or separate meetings. In addition to taking into account these principles, the conditions and expectations agreed by the parties in connection with the procedure, with the involvement of the mediator, provide the procedure with the necessary content and rules. The law makes it clear that the mediator can communicate the information obtained during the separate meeting to the other party so that the other party can formulate and present its position taking this into account unless the party giving the information declares that the information cannot be brought to the attention of the other party.

Thus, the framework of the procedure is defined in general terms by Section 32. Based on this, in the mediation process, the mediator listens to the parties in detail, ensuring that the parties receive equal treatment. During this, the parties can explain their position based on their interests and present the documents available to them. The parties must be present in person at some of the meetings following the first mediation meeting unless otherwise agreed. Depending on the agreement of the parties, the mediator may conduct the mediation procedure both in the presence of the parties together or in the form of meetings held separately. The mediator may communicate the information received from one party to the other party in order for the other party to develop and present its position

[10] Act V. of 2013 on the Civil Code.

taking this into account unless the party giving the information declares that the information cannot be brought to the attention of the other party.

At any stage of the meeting, the mediators may request or offer the parties the possibility of separate negotiations. Anything said during the special negotiation is strictly confidential, and the mediator may not pass it on to the other party unless the party participating in the special negotiation specifically requests it. This option is most often used when more than five or six people participate in the mediation or when it is a highly complex matter, or when it seems appropriate for married couples to have a female and a male mediator participate.[11]

According to the Mediation Act, the mediator may not conduct an evidentiary procedure (the objective of the mediation procedure is not to reveal the facts in an objective manner), but at the request of the parties, the mediator may involve an expert, if the parties consider that in order to develop the agreement in the disputed matter a person with sufficient expertise on the subject can provide assistance. The use of an expert, who does not necessarily have to be a forensic expert, takes place not on the basis of assignment but on the joint request of the parties. According to Section 33 of the Mediation Act, the expert is obliged to declare within 8 days after receiving the invitation whether they accept the invitation. Therefore, the law ensured the uniformity of the regulation of the mediation procedure by ordering the expert to apply the rules on conflicts of interest and confidentiality obligations of the mediator. As a general rule, the expert must present the expert opinion in writing, but depending on the agreement of the parties, the expert can also participate in mediation meetings in person. There is a fee and reimbursement for the expert's activities; the fee amount is freely agreed upon by the parties and the expert because it depends entirely on the parties' decision whether the expert is used in the procedure or not.

At the request of the parties, the mediator may hear other persons who are aware of the circumstances of the disputed case in the mediation procedure (Section 34 of the Mediation Act).

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11 Zsuzsa Lovas and Mária Herczog, *A mediáció, avagy a fájdalommentes konfliktuskezelés* (Budapest: Wolters Kluwer, 2019), 126.

7. Closing the Mediation Procedure and the Mediation Agreement

The mediation procedure is closed:

a) on the date of signing the agreement,
b) on the day on which one party informs the other party and the mediator that it considers the mediation procedure completed,
c) on the day on which the parties unanimously declare before the mediator that they request the termination of the mediation procedure, or
d) after four months from the date of signing the declaration unless otherwise agreed by the parties.

The Mediation Act does not specify rules on the content of the mediation agreement. It only pronounces that the mediator shall record the agreement in the presence of the parties.[12] The reasoning of the bill only stated that at a mediation meeting, both parties present the main elements of the conflict that they consider essential. Then the parties attempt to resolve the dispute with the help of the mediator, settling it with a mutually agreed upon agreement if possible. A vital element of the mediation procedure is that the mediator ensures during the procedure that the discussion between the parties does not lead to the further escalation of the situation but to the development of a solution to the dispute by agreement. The mediator puts the agreement reached between the parties concerned participating in person into writing without any changes and then signs it with the parties concerned participating in person and the mediator, thereby ending the mediation procedure.

The mediator puts the agreement (concluded during the appearance in person of the parties) in writing in the language chosen for the mediation procedure and hands over the document containing the agreement to the parties. It is signed by the mediator and the parties appearing together in person. If the agreement is not put in writing, its fulfillment – in part or in whole – does not remedy the invalidity (due to the omission of the mandatory formalities). If a notary public, attorney, or legal adviser participated as a mediator in the mediation procedure, based on a written agreement reached during the procedure, they may not prepare a document producing legal effects, and the mediator, as an attorney or legal adviser, is not

12 Kengyel, Harsági, and Nemessányi, "Hungary," 231–233.

entitled to countersign it either. If there is a change of name, incorrect name or number spelling, calculation error, or other similar typographical error in the agreement, the mediator will correct the agreement within 15 days of receiving the request based on the joint request of the parties (Section 35 of the Mediation Act).

The mediator is obliged to keep an annual, continuously numbered record of the mediation procedures conducted. By January 31 of each year following the current year, the mediator is obliged to provide the minister with data on the number of mediation procedures undertaken in the current year, the number of agreements reached during the procedures, the number of unsuccessful procedures (indicating the reason), and the nature of the disputes (Section 14–15 of the Mediation Act).

8. Enforceability

Mediation is fundamentally based on the principle of voluntariness, therefore, the mediation agreement does not lead to a writ of execution. In principle, they are not enforceable (an exception to this is an agreement concluded during healthcare mediation). "The mediation agreement is a contract, so it does not have, of course, res judicata effect. Participation in a mediation process does not hinder the parties from turning to court, even if the mediation was successful."[13] If the parties still want the mediation agreement to become enforceable, then either the agreement must be recorded in a notarial deed, or the court must approve it (similarly to litigation settlements; see point 12).

9. Costs of the Out-Of-Court Mediation

There is a fee for the activity of the mediator, and the mediator can claim reimbursement of the incurred and verified expenses, as well as an advance payment of the fee and expenses. The amount of the fee to be charged in each case is freely agreed upon by a natural person or legal entity and the parties (Section 27 of the Mediation Act). If, at the first mediation meeting, the parties still request mediation, this fact shall be recorded in a written statement signed by both parties and the mediator. In the declaration, the parties and the mediator agree on the method of advance and payment of costs and

[13] Ibid., 232–233.

fees arising during the procedure, including the cases of withdrawal and termination, and the parties can also agree on the confidentiality obligation imposed on them and on other issues they consider necessary. Unless otherwise agreed, the parties bear the costs incurred by participating in the procedure (e.g., travel) as well as the costs of any person invited to a hearing. The mediation fee and costs of the mediator, as well as the fee and costs of the expert, shall be borne equally by the parties unless otherwise agreed (Section 30 of the Mediation Act).

With regard to legal assistance, support can be provided to the party in the event that they participate in out-of-court mediation aimed at concluding the legal dispute, and legal advice is necessary for them before signing the agreement concluding mediation.[14] For the fee of the mediator, legal assistance is not available.[15]

10. Court-Annexed Mediation

For about ten years, only the out-of-court mediation model existed in Hungary. In addition, court-annexed mediation was introduced, as an alternative, in 2012. Court-annexed mediation activities may be carried out by court clerks, judges, and judges placed on the disposal staff. During their activities related to court mediation, they use the designation "court mediator." If the parties and the court mediator agree, one or more mediators or court mediators may also participate in the proceedings (Section 38/A of the Mediation Act).

The parties to a litigious or non-litigious court proceeding may submit a joint request for court mediation to a competent court. The court shall inform the parties within 8 days of the name of the person acting as a court mediator, the date of the first information meeting, and the possibility of representation in the proceedings. During the mediation process, a judge acting in a litigious or non-litigious court proceeding may not act as a mediator in the same case. The court keeps the documents created during court mediation and ensures that copies are issued (Section 38/B of the Mediation Act).

14 Section 3 of the Act on Legal Aid.

15 Kengyel, Harsági, and Nemessányi, "Hungary," 234.

Court mediation is essentially free of charge; there is no fee to be paid to the court or an hourly rate to the acting court mediator. Many of the rules of out-of-court mediation detailed above do not apply to judicial mediation regarding its registration, control of the mediation activity, the request and fee of the mediator, the invitation of the parties, and the location of the mediation.

11. Mandatory Mediation

In certain family cases, the new Civil Code (Section 4:172 and 4:177) made it possible for the courts and the guardianship authorities to oblige to the mediation procedure. Therefore, it was necessary to amend the rules of mediation. In the case of a mandatory mediation procedure, the court or the authority obliges the parties to cooperate with at least one mediator in order to resolve their dispute – in whole or in part – by agreement; within the framework of this cooperation obligation, the parties are to a) jointly contact a mediator (with an invitation or request) and b) participate in the first mediation meeting (Section 38/C of the Mediation Act). The legislator simultaneously limited the fee for the first mediation session in these cases (Section 38/D of the Mediation Act). The parties are obliged to jointly initiate the mediation procedure by invitation, request, or in the manner specified by law within 15 days after the communication of the decision containing the obligation. The mediator is obliged to accept the invitation to conduct the mandatory mediation procedure unless there is a conflict of interest or the subject of the legal dispute does not belong to the mediator's field of expertise (if the mediator previously agreed to do so in a statement to the minister). The party obliged to use the mediation procedure proves the fulfillment of this obligation by submitting the certificate issued by the mediator to the court or the authority. The part of the agreement concluded during the mandatory mediation procedure, which is not the subject of the court or official procedure, can be written down separately (Section 38/E-G of the Mediation Act).

According to Section 124 of the Code of Civil Procedure, if the court obliges the parties to use a mandatory mediation procedure, it suspends the litigation at the same time. In order to start the mandatory mediation procedure, a suspended litigation procedure must be continued if a) either party proves that the mediation procedure has been completed,

b) either party proves that they participated in the first mediation meeting, but the mediation procedure has not started, or c) two months have passed since the notification of the mandatory decision to use the mediation procedure.

If the agreement reached in the mandatory mediation procedure complies with the law, and a party does not reach a settlement in the litigation, the party will reimburse part of the legal costs of the opposing party incurred in the mediation procedure, regardless of the outcome of the lawsuit. If the agreement reached in the mandatory mediation procedure does not comply with the law and in the absence of an agreement, the litigation must be continued on its merits, the party will reimburse half of the litigation costs incurred in the mediation procedure, regardless of the outcome of the lawsuit. In the case of a mandatory mediation procedure, if the party proves that it initiated the request for a mediator or appeared at the first mediation meeting and the request for the mediator or the initiation of the mediation procedure failed due to the other party's fault, the party's legal costs will be reimbursed by the other party. The defaulting party must prove the absence of fault (Section 86 of the Code of Civil Procedure).

12. The Relationship of Mediation to Litigation

The agreement reached in the mediation process does not affect the right of the parties to bring their claim to court or arbitration. If the law does not provide otherwise and the parties have not agreed otherwise, in court or arbitration proceedings initiated after the completion of the mediation procedure, the parties may not refer to the position or proposal expressed by the other party in the mediation procedure in connection with the possible resolution of the dispute or any declaration of recognition and waiver of rights made in the mediation procedure by the other party (Section 36 of the Mediation Act). According to Section 167 of the Code of Civil Procedure, if an agreement has been reached between the parties in a mediation procedure, in order to approve it as a settlement, either party may request a summons for an attempt at a settlement before the start of legal action.

Pursuant to Section 26 of the Mediation Act, in mediation proceedings – unless otherwise provided by law – the mediator is bound by a duty of confidentiality both during and after the proceedings. This makes it possible to create an atmosphere of trust during the mediation meeting,

in which the parties can honestly reveal their true interests and needs, and critical information can come to the surface. Therefore, according to Section 290 of the Code of Civil Procedure, a mediator or expert acting in a mediation procedure in a case affected by a legal dispute may refuse to testify.

If mediation has not yet taken place during the trial, the court has an obligation to inform about the possibility of mediation. The court may attempt during the proceedings to steer the parties toward a settlement. By this, the law encourages courts to promote the making of a court settlement between the parties.[16] In this context, according to Section 195 of the Code of Civil Procedure, before closing the pre-trial phase of the litigation, the court – if there is a chance of its success – attempts to persuade the parties to reach an agreement. The court provides information on the possibility of using mediation, its methods and advantages, the possibility of including an agreement reached in a court settlement, and the rules for suspending the proceedings. According to Section 238 of the Code of Civil Procedure, at any later stage of the trial, the court may attempt to have the parties settle the dispute or part of the disputed issues by settlement. In this way, the court can also inform the parties about the possibility of mediation. If the parties reach an agreement during mediation, they can submit it to the court for approval as a settlement. In this case, the court continues the procedure.

If the parties have taken part in a mediation procedure (regulated by law) after the closing trial admission (pre-trial) stage of the litigation, and the court subsequently approves the settlement, only 50% of the otherwise payable litigation fee should be paid, and this amount will be reduced with the mediator's fee plus VAT (but no more than HUF 50,000), provided that the mediation procedure is not excluded by law; however, the amount of the fee to be paid in this case cannot be less than 30% of the fee for the litigation procedure (Section 58 (4) of the Act XCIII of 1990 on Duties). If, despite the agreement reached during mediation, a party to the agreement takes legal action regarding the legal dispute settled by the agreement, the defendant's legal costs will be reimbursed by the plaintiff. The general rules for bearing legal costs apply if the plaintiff files a lawsuit solely for

[16] Nagy, *Bírósági mediáció*, 187.

non-fulfillment of the terms of the agreement (Section 86 of the Code of Civil Procedure). According to the general provision on the bearing of court costs, the losing party covers the expenses of the successful party.

References

Decastello, Alice. *Mediáció az egészségügyben*. Budapest: HVG Orac, 2010.

Decastello, Alice. "Mediation in Health." *Hungarian Medical Journal* 2, no. 2 (2008): 193–199.

Gyekiczky, Tamás. "A mediációs irányelv." *Európai Jog* 9, no. 6 (2009): 24–31.

Kengyel, Miklós, Viktória Harsági, and Zoltán Nemessányi. "Hungary." In *Civil and Commercial Mediation in Europe. National Mediation Rules and Procedures*, vol. 1, edited by Carlos Esplugues, José Luis Iglesias, and Guillermo Palao, 217–238. Cambridge: Intersentia, 2013.

Kengyel, Miklós. *Magyar polgári eljárásjog (Hungarian Civil Procedure)*, 11th ed. Budapest: Osiris, 2012.

Lovas, Zsuzsa, and Mária Herczog. *A mediáció, avagy a fájdalommentes konfliktuskezelés*. Budapest: Wolters Kluwer, 2019.

Nagy, Beáta, Kitti Kutrovátz, Gábor Király, and Márton Rakovics. "Parental mediation in the age of mobile technology." *Children & Society* 37, no. 2 (2023): 424–451.

Nagy, Márta. *Bírósági mediáció*. Szeged: Bába Kiadó, 2011.

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Mandatory Mediation in Family Disputes – An Emerging Trend in the European Union?

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Abstract: The Mediation Directive (2008) obliged the Member States of the European Union to promote the use of mediation through their own means. A decade later, the results of several studies revealed that national efforts to foster mediation were not as effective as planned in most cases. Despite some scholars' concerns about restricting mediation voluntariness as means for increasing its application, Italy introduced a mandatory mediation scheme which proved that forcing parties to mediate results in high numbers of mediation procedures with favorable success rates. This led other Member States to reconsider the role of the State in fostering mediation. This article tackles the prevalence of mandatory mediation in family disputes, as an area widely recognized as most suitable for it. The co-authors raised the research question of whether the introduction of

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mandatory mediation in family disputes is an emerging trend in the European Union. A short overview of the mandatory mediation concept and the existing doctrinal models was presented as a theoretical background of this research. Based on the review of the scientific literature, four prevailing models were identified and briefly described. Secondly, the map of mandatory mediation within the European Union was updated with the latest data collected from the most recent legislative amendments and testimonies of the corresponding national mediation experts. Thirdly, a brief examination of the current mandatory mediation models in the Member States was conducted. The in-depth analysis of the obtained results shows that introducing mandatory mediation in family disputes is a prevailing trend in fostering mediation in the European Union. Consequently, it was identified that the variety of implemented models went far beyond the existing doctrinal classification, which needs to be reconsidered by future research in this field.

1. Introduction

Mediation has been part of Europe's policy on cooperation in civil and commercial matters since 2000. Starting with the Green paper on alternative dispute resolution in civil and commercial law,[1] the European Union (hereinafter: "EU") Commission has pledged its interest in promoting alternative dispute resolution as a tool for improving general access to justice in daily life. Various measures have been adopted to promote new quasi-judicial mechanisms for settling conflicts such as Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters[2] (hereinafter: "Mediation Directive") – the pilar that has led to the elevated status of mediation across the EU. Ten years after its adoption, the EU Commission[3] and the EU

1 "Commission Green paper on alternative dispute resolution in civil and commercial law (COM(2002)196), 19 April 2002," Publication Office of the European Union, accessed January 14, 2023, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX-%3A52002DC0196.

2 Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters (OJ L136/3, 24 May, 2008), accessed January 10, 2023.

3 Commission report to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2008/52/EC of

Parliament[4] recognized that the goals set out in the Directive were not achieved. This conclusion was based on the numerous studies conducted by the EU Commission and EU Parliament to evaluate the implementation of the Mediation Directive.[5] It was found that, on average, less than 1% of cases that went to court[6] were mediated, except for Italy, where a mandatory mediation model was introduced. Following up on the above, several measures and incentives were proposed as a means to promote more widespread use of mediation to reach *break-even points* where even low success rates

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the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters (COM(2016)0542); European Parliament resolution of 12 September 2017 on the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (2016/2066(INI)).

4 Giuseppe De Palo, "A Ten–Year–Long 'EU Mediation Paradox' When an EU Directive Needs to Be More.... Directive," *European Parliament Briefing* 1, no. 6 (2018), accessed January 26, 2023, https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL_BRI(2018)608847_EN.pdf.

5 The EU Commision's conclusion that the Mediation Directive objectives were not met was based on the following: "Study for an evaluation and implementation of Directive 2008/52/EC, 24 May 2016," Publication Office of the European Union, accessed January 10, 2023, https://op.europa.eu/en/publication-detail/-/publication/bba3871d-223b-11e6-86d0-01aa75ed71a1/language-en?fbclid=IwAR0Wkx5aQpzwIZnJY1-3PHTyTXlZZm3qFNoFDAiI3SLEQd905uDo91rhlTM; "The implementation of the Mediation Directive. 29 November 2016. PE 571.395," European Parliament, accessed January 10, 2023, https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/571395/IPOL_IDA%282016%29571395_EN.pdf; Rebooting the Mediation Directive: Assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU, 15 January 2014, PE 493.042, accessed January 10, 2023, https://www.europarl.europa.eu/thinktank/en/document/IPOL-JURI_ET(2014)493042; "European Implementation Assessment on the Mediation Directive by the Ex-Post Impact Assessment Unit of the European Parliamentary Research Service (EPRS), December 2016, PE 593.789," European Parliament, accessed January 10, 2023, https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/593789/EPRS_IDA(2016)593789_EN.pdf; "Quantifying the cost of not using mediation – a data analysis, April 2011, PE 453.180," European Parilament, accessed January 10, 2023, https://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19592/20110518ATT19592EN.pdf.

6 Giuseppe De Palo and Ashley E. Oleson, "Regulation of dispute resolution in Italy: The bumps in the road to successful ADR," in *Regulating Dispute Resolution: ADR and Access to Justice at the crossroads*, eds. Felix Steffek and Hannes Unberath (UK: Hart Publishing, 2013), 239–268.

can increase the efficiency of the judiciary and generate consistent savings. At the same time, a preliminary ruling was issued by the Court of Justice of the European Union (CJEU) in the joined cases of *Rosalba Alassini and Others* which confirmed that subjecting a dispute to an out-of-court settlement procedure before trial was not precluded by the EU law.[7] This landmark decision then served to pave the way for the EU to adopt a wide range of different mandatory mediation models to promote amicable dispute resolution[8] and thus achieve the high-level objectives set out in the Mediation Directive.

Encouraged by CJEU's approval, some Member States have started implementing certain models of mandatory mediation as a means for increasing the annual number of mediations and advocating for their use,[9] especially in the field of family disputes.[10] This trend is likely to have been encouraged by the successful example of non-EU countries and the efforts to respond to the European Parliament's call on the Commission, which was encouraged to carry out a "review of the rules, to find solutions in order to extend effectively the scope of mediation (…) however, that special attention must be paid to the implications that mediation could have on certain social issues, such as family law."[11] This article argues that the adoption of mandatory models of family mediation is a new trend in fostering mediation – a method particularly valid in the field of family disputes

7 CJEU Judgment of 18 March 2010, Joined cases Rosalba Alassini v Telecom Italia SpA, Case C-317/08, Filomena Califano v Wind SpA, Case C-318/08, Lucia Anna Giorgia Iacono v Telecom Italia SpA Case C-319/08) and Multiservice Srl v Telecom Italia SpA Case C-320/08, ECLI:EU:C:2010:146.

8 Machteld W. de Hoom, "Making Mediation Work in Europe: What's Needed Is a New Balance between Mediation and Court Proceedings," *Journal of Dispute Resolution Magazine* 20, no. 2 (Spring 2014): 22–27.

9 Roman Rewald, "Mediation in Europe: The Most Misunderstood Method of Alternative Dispute Resolution," *The Wail World Arbitration Report*, (2014).

10 Celine Jaspers, "Mandatory Mediation from a European and Comparative Law Perspective," in *Plurality and Diversity of Family Relations in Europe*, eds. Katharina Boele-Woelki and Dieter Martiny (UK: Intersentia, 2019), 341–369, http://hdl.handle.net/1942/30415.

11 EU (2017) Resolution of the European Parliament resolution on the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (2016/2066(INI)) 12 September 2017.

in the EU. The co-authors justify their proposition through an analysis of the different regulations on mandatory mediation in family disputes across the EU.

This article aims to provide a high-level overview of the EU Member States' regulation concerning mandatory mediation. To achieve this, the co-authors carried out theoretical research on the mandatory mediation concept and its models, accompanied by a scientific literature review. Afterward, empirical research was conducted to update the officially available data on the use of mandatory mediation in the EU and to map the relevant mandatory family mediation schemes, followed by a systematic analysis of mandatory mediation models currently in place in some EU Member States.

2. Theoretical Background: Concept and Models of Mandatory Mediation

Mediation, as defined in the Mediation Directive, is a structured process whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement to settle their dispute with the assistance of a mediator. This process may be initiated by the parties, suggested or ordered by a court, or prescribed by the law of a Member State[12] or the contract concluded by and between parties. Therefore, one of its key principles is the voluntary nature of mediation regardless of how it was initiated. Notwithstanding the above, there is an increase in the adoption of national legislation introducing mandatory mediation,[13] i.e., a tendency for the process to be imposed upon the parties as a requirement for initiating a trial or continuing with litigation. This is visible both in the EU Member States[14] and across the Atlantic. However, there is no uniform definition of

12 All of the above options for initiating the mediation process are provided for in the Mediation Directive.

13 Neil Andrews, "Mediation: International Experience and Global Trends," *Journal of International and Comparative Law* 4, no. 2 (December 2017): 217–252.

14 See generally, P.C.H. Klaus J. Hopt Chan and Felix Steffek, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013), https://doi-org.skaitykla.mruni.eu/10.1017/S1566752912001322; see also: International Comparative mediation: legal perspectives, 2009. Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (Alphen aan den Rijn: Kluwer Law International, 2009).

mandatory mediation as the term varies from one jurisdiction to another,[15] highly depending on the specific model adopted.[16] While the procedure may be defined differently in individual schemes, its common characteristic is to compel parties to participate without mandating a specific outcome. Such participation can be limited to the requirement to take part in a short mediation information and assessment meeting to learn about the positive aspects of mediation in the given case.[17] Even though most mandatory mediation schemes do not explicitly provide for their proactive participation, participants are expected to conduct themselves in good faith and to be cooperative.[18] Failure to comply with such expectations may result in the non-cooperative party being charged adverse costs – yet another measure that has triggered heated discussions on the admissibility of mandatory mediation, which, however, is excluded from the current study.

All in all, the idea of mandatory mediation has been the subject of diverging assessments and opinions for some time, both from the academic community and legal practitioners. It was first introduced in 1976 by Professor Frank Sander from the University of Harvard during the famous R. Pound Memorial Conference, held to commemorate the dean of the Harvard University Law School, and dedicated to the future development of justice.[19] The vision developed by Sander hinges on different approaches to justice. This is reflected in his metaphor of justice as a building that can be entered through many doors, one of which is mediation. His principal understanding is the need for a preliminary assessment to define the resolution method that should apply to a specific dispute without necessarily

15 Anna Shtefan and Yurii Prytyka, "Mediation in the EU: Common Characteristics and Advantages over Litigation," *InterEULawEast: Journal for the International and European law, economics and market integrations* 8, no. 2 (2021): 175–190.

16 C.H. van Rhee, "Mandatory Mediation before Litigation in Civil and Commercial Matters: A European Perspective," *Access to Justice in Eastern Europe*, no. 4 (November 2021): 7–24.

17 Giuseppe De Palo and Romina Canessa, "Sleeping – Comatose – Only Mandatory Consideration of Mediation Can Awake Sleeping Beauty in the European Union," *Cardozo Journal of Conflict Resolution* 16, no. 3 (2014–2015): [xii]–[xiv].

18 Ulrich Boettger, "Efficiency Versus Party Empowerment – Against a Good-Faith Requirement in Mandatory Mediation," *Review of Litigation* 23, (2004): [vii]–[viii].

19 Art Hinshaw, Andrea Kupfer Schneider and Sarah Rudolph Cole, "Frank Sander: Father of Court-based Dispute Resolution," in *Discussions in Dispute Resolution: The Foundational Articles* (Oxford: Oxford University Press, 2021), 337.

referring it to the court in all cases. This leads to the so-called "privatizing" of judicial justice, a trend that involves directing matters to judicial intervention only in cases where the parties cannot reach an out-of-court settlement.[20] The concept of obligatory referral of a dispute to mediation has spread across several US states, which have established some forms of mandatory court mediation.[21] The specifics of such court-mandated approaches are rooted in the different legal traditions and the goals they are to achieve. Because of the latter, even if court-mandated mediation started as a purely US idea, it has already spread across various jurisdictions that have adopted and modified it to match their specific needs.[22]

The development of mandatory mediation in the EU has its origins in Art. 5 of the Mediation Directive and *Rosalba Alassini and Others* (C-317/08 and C-320/08),[23] which, upon joint interpretation reaffirms the notion that mandatory mediation in no way contradicts EU law and which has encouraged Member States to adopt various mandatory mediation schemes.[24]

Though it is classified into certain models depending on the degree and source of its mandatory nature, mandatory mediation may take the following forms in the legal doctrine[25]: categorical mandatory mediation,

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20 Arlin R. Thrush, "Public Health and Safety Hazards versus Confidentiality: Expanding the Mediation Door of the Multi-Door Courthouse," *Journal of Dispute Resolution*, no. 2 (1994): 235–258.

21 Nadja Alexander, *Global trends in mediation: riding the third wave*, 2nd ed. (Kluwer Law International, 2006).

22 Leonardo D'Urso, "Italy's 'Required Initial Mediation Session': Bridging the Gap between Mandatory and Voluntary Mediation," *Alternatives to the High Cost of Litigation. The Newsletter of the International Institute for Conflict Prevention proszę zrobić normalne & Resolution*, no. 36 (April 2018): 57–58, https://doi.org/10.1002/alt.21731.

23 CJEU Judgment of 18 March 2010, Joined cases Rosalba Alassini v Telecom Italia SpA, Case C-317/08, Filomena Califano v Wind SpA, Case C-318/08, Lucia Anna Giorgia Iacono v Telecom Italia SpA Case C-319/08) and Multiservice Srl v Telecom Italia SpA Case C-320/08, ECLI:EU:C:2010:146.

24 Michal Malacka, "Multi-Door Courthouse established through the European Mediation Directive?," *International and Comparative Law Review* 16, no. 1 (2016): 127–142.

25 Daniel Kaufman Schaffer, "An Examination of Mandatory Court-Based Mediation," *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 84, no. 3 (May 2018): 229–238.

discretional mandatory mediation, quasi-mandatory mediation, and contractual mandatory mediation.[26]

2.1. Categorical Mandatory Mediation

Categorical mediation is a type of mandatory mediation where the disputed parties are forced to participate in out-of-court mediation and try to reach any settlement before the trial. This obligation is provided for in the applicable legislation, obliging the parties to participate in the mediation procedure with little room for exceptions. Such models are often criticized by scholars as the compulsion to participate in the process is often seen as expanding to the compulsion to settle which may ultimately lead to unfair outcomes.[27] Here, examples include the Australian court systems of South Australia, Victoria, and New South Wales where the applicable civil procedure rules impose mediation on the parties regardless of whether they want it or not.[28] In this regard, the academic debate is split between the view that this merely aims to promote mediation and that it is excessively intrusive and against the will of parties.[29] This model is also criticized for not being flexible enough to offer exceptions on reasonable grounds. Due to such arguments, there has been a partial reform of the categorical mandatory mediation model in some jurisdictions through the introduction of an opt-out model if certain conditions are met. Examples of categorical schemes include the mandatory

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26 Contractual mandatory mediation is not analyzed in depth in the conducted research as this model is rarely relevant to family disputes.

27 Julian Sidoli del Ceno, "Compulsory mediation: civil justice, human rights and proportionality," *International Journal of Law in the Built Environment* 6, no. 3 (October 2014): 286–299.

28 Australian Supreme Court, General Civil Procedure Rules, 2005, § 50.07, accessed February 5, 2023, http:// www.austlii.edu.au/au/legis/vic/consol-reg/sccpr2005433/s50.07.html; Supreme Court Amendment (Referral of Proceedings) Act, 2000, c. 36, § 110K (Austl.), accessed February 5, 2023, http://www.austlii.edu.au/au/legis/nsw/num-act/scaopa2000n36488.pdf; Supreme Court Act, 1935, c. 4, § 65(1) (Austl.), accessed February 5, 2023, http://www.austlii.edu.au/au/legis/sa/consol-act/sca19351831s65.html; District Court of Queensland Act, 1967, c. 7, § 97, accessed February 5, 2023, http://www.austlii.edu.au/au/legis/qld/ consolact/dcoqa1967308/s97.html.

29 Dorcas Quek, "Mandatory Mediation: An Oxymoron – Examining the Feasibility of Implementing a Court Mandated Mediation Program," *Cardozo Journal of Conflict Resolution* 11, no. 2 (Spring 2010): 479–510.

mediation models developed in some Australian states[30] which provide for the categorical referral to mediation of claims explicitly listed in the law.[31] As a response to the critics of such mandatory schemes, exceptions to the mandatoriness[34] have been introduced.[32] The mandatory mediation program in Ontario, Canada also refers all civil cases, except family cases, to mediation, but provides the parties the option of seeking exemption by way of motion.[33] Such changes in the categorical nature of the mandatory mediation are perceived as positive as they are deemed to better fit into the parties' needs without putting them at risk or forcing them to settle.[34]

In summary, categorical mandatory mediation is a model, where parties are coerced to apply mediation by a direct rule in legislation indicating that certain categories of disputes are subject to mandatory mediation.[35] An intrinsic part of this model is the obligation for the parties to attend a mandatory initial mediation session while not being required to proceed with the mediation should they choose not to, thus retaining the ability to opt out of it.[36]

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30 Farm Debt Mediation Act 1994 of New South Wales (NSW), Retail Leases Act 1994 (NSW), Legal Profession Act 2004 (NSW) and Strata Schemes Management Act 1996 (NSW), the Motor Accident Insurance Amendment Act 2000 (Queensland, Australia) and the Personal Injury Proceedings Amendment Act 2002 (Qld).

31 Alan Limbury, "Compulsory Mediation – The Australian Experience," Kluwer Mediation Blog, October, 22, 2018, accessed February 5, 2023, https://mediationblog.kluwerarbitration.com/2018/10/22/compulsory-mediation-australian-experience/.

32 As for example the Australian Family Act 2006, which provides an exception for cases with reasonable ground to believe there is domestic violence or a child is put at risk.

33 Adele Kent, "A Behind-the-Bench Look at the Canadian Judicial System," *Judges' Journal* 50, no. 3 (Summer 2011): 8–13.

34 Miglė Žukauskaitė-Tatorė, "Problems of the relationship between mandatory mediation in civil disputes and the right to judicial protection" (PhD diss., Vilniaus Universitetas, 2021).

35 The Greek legislation, with its mandatory mediation information and assessment sessions similar to the Italian model, is an example of the categorical mandatory mediation whereby attending those sessions is a pre-condition to continuing trial. For a critical analysis of the Greek model, see: Anna Plevri, "Mandatory Initial Mediation Session in the Legal Order of Greece: A Step Forward for a Balanced Relationship between Mediation and Judicial Proceedings?," *Yearbook on International Arbitration* 7, (2021): 209–222.

36 Giuseppe De Palo, "Mediating Mediation Itself: The Easy Opt-out Model Settles the Perennial Dispute between Voluntary and Mandatory Mediation," *Cardozo Journal of Conflict Resolution* 22, no. 3 (Spring 2021): 543–568.

2.2. Discretional Mandatory Mediation

Discretional referral to mediation[37] is typically construed as the referral to mediation upon the motion of a judge.[38] This name was coined by Prof. Sander who argued that it should be entirely up to the judges to decide whether to compel parties to enter into mediation or not.[39] This system is distinguished from purely categorical mandatory mediation by the fact that it vests power in the judiciary to decide and compel parties to the pending proceedings to mediate. However, it opens the debate whether the court orders imposing mandatory mediation comply with the principle of access to justice.[40] Notwithstanding the above, the discretionary mandatory referral to mediation is viewed positively because of the extensive power of the courts to compel parties to participate in mediation if it is deemed that such participation may stimulate settlement. Many public policy factors support such models as they serve to address the backlog of court cases by channeling those that have the potential to be resolved in mediation. The results from such an application are not only aimed at the reduction of the number of cases pending in court but also at increasing parties' satisfaction with the process outcomes while preserving their ongoing relationship and offering a wide range of potential solutions.

To conclude, discretional mandatory mediation is a form of mediation that compels parties through a court order to try and resolve their disputes amicably. The power to decide whether to mandate mediation is entirely vested in the judges, who are most suitable to evaluate the situation and decide on the viability and possible effectiveness of the mediation in the given case.

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37 Melisa Hanks, "Perspectives on mandatory mediation," *University Of New South Wales Law Journal* 35, no. 3 (2012): 929–952.

38 Australian National Alternative Dispute Resolution Advisory Council report: "The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction: A Report to the Attorney-General," Attorney-General's Department (Australia), (15 September 2009), accessed February 5, 2023, https://apo.org.au/sites/default/files/resource-files/2009–09/apo-nid67039.pdf.

39 Frank E.A. Sander, "Another View of Mandatory Mediation," *Dispute Resolution Magazine*, no. 13 (2007).

40 Bret Walker and Andrew S. Bell, "Justice according to compulsory mediation: Supreme Court Amendment (Referral of Proceedings) Act 2000 (NSW)," *Bar News: Journal of the NSW Bar Association Spring issue*, no. Spring 2000 (2000): 7.

2.3. Quasi-Mandatory Mediation

While mediation remains entirely optional under the quasi-mandatory mediation model, it is perceived as mandatory since the legal costs are charged to the party that unreasonably refused to participate or was non-cooperative. An example of such an approach is Australian regulations in the state of New South Wales and the Civil Dispute Resolution Act 2011, whereby the party that does not make "reasonable" efforts to settle the dispute is forced to bear all legal costs. The latter stimulates the parties to mediate under the threat of potential financial consequences. The exact definition of "reasonable efforts" within the mediation process has been debated over the years[41]; the conclusion has been that "reasonable" means good faith actions that are customary to such proceedings, in which the participants have not rejected an optional settlement including clauses essentially contained in the subsequent court decision.[42] Thus, the final court decision itself serves as a criterion for determining whether the party's behavior was reasonable. Proponents of mandatory mediation argue that such an approach, though not strictly regulated in the applicable legislation, goes a long way toward stimulating the parties to both mediate and genuinely seek settlement where possible.[43] On the other hand, its opponents believe that the practice of judges acquiring additional information on the content of the discussions held is tantamount to a breach of confidentiality.[44] Details of this model, however, were not the subject of the current study and therefore are not examined in greater detail in this paper.

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41 Alexandria Zylstra, "The Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled," *Journal of the American Academy of Matrimonial Lawyers* 17, no. 1 (2001): 69–104; John Lande, "Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs," *UCLA Law Review* 50, no. 1 (October 2002): 69–142.

42 Kimberlee K. Kovach, "New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation (Georgian Text)," *Alternative Dispute Resolution Yearbook 2012*, (2012): 139–173.

43 Philip McNamara, "Mandatory and quasi-mandatory mediation," *Australian bar review* 47, no. 3 (2019): 215–245.

44 Hanks, "Perspectives on Mandatory Mediation," 930.

2.4. Contractual Mandatory Mediation

This mandatory mediation model applies to disputes between parties that had already agreed on a mediation clause that obliges them to attempt to settle their conflict amicably through mediation before referring it to a court or other tribunal but then failed to comply with this commitment.[45] In such cases, the dispute should reach court only when the parties have evidence that they have complied with their contractual obligation to mediate.[46] The basis for this is a mediation clause that the parties have voluntarily and contractually agreed to, according to which they are forced to refer the dispute to mandatory out-of-court mediation.

It is argued that mediation clauses form the basis of the fourth type of mandatory mediation whereby admissibility of the court proceedings is only allowed if the parties prove that they have attempted to settle their dispute through mediation. Since contractual relations are less relevant to family law, further research will not include analyzing the application of this model within the EU.

Whether viewed positively or negatively, mandatory mediation is by no means defined uniformly and concisely across jurisdictions. On the contrary, there are fundamental differences between the main types of mandatory mediation and each national legal system includes nuances resulting from its specific socio-cultural context.[47] Therefore, it can be stated that mandatory mediation is a form of mediation where parties to the dispute are required to mediate by law, court order, contract, or under the threat of potential procedural or economic sanctions.

3. Current Mandatory Family Mediation Trends in the EU

To explore the variety of mandatory family mediation schemes across the EU, this chapter aims to provide an overview of how the above theoretical models of mandatory mediation have developed in practice after the adoption of the Mediation Directive.

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45 Pierre Bienvenu, "The Enforcement of Multi-Tiered Dispute Resolution Clauses in Canada and the United States," Annual Convention, International Bar Association (2002).

46 Miruna Constantinescu and Monica Simona Corchis, "Are Mediation Clauses Binding and Mandatory," *Juridical Tribune* 7, no. 1 (June 2017): 53–63.

47 Rhee, "Mandatory Mediation before Litigation in Civil and Commercial Matters: A European Perspective," 7–24.

While there are some sources of official data on the application of mediation in the EU,[48] no up-to-date study reflects the recent changes in the applicable regulations. Hence, the co-authors went on to interview mediation experts from 27 EU countries[49] to ensure that their review and conclusions are based on relevant information.

A total of 27 Mediation experts were invited to answer the following questions: 1) does the national legislation imply mandatory application of mediation in family disputes in your country?; 2) if yes, what model is adopted?; 3) if no, are there any considerations or preparations to introduce mandatory family mediation provisions in the nearest future or any other ongoing discussions on this topic?

The interviews were conducted in January and February 2023 by direct emails and/or Zoom calls. All interviewed experts were selected based on the criterion of having at least 5 years of professional experience in mediation. Interview data were transcribed and analyzed using the MAXQDA program, with qualitative content analysis based on axial coding. The text was read and subcategories were identified and combined into categories.

By analyzing the research data, it was established that as many as 20[50] (74%) out of the 27 EU countries have already applied at least one of the theoretical models of mandatory family mediation presented in Chapter 2 and have adapted it to their national legal systems. In some Member States, the models adopted apply only to certain family disputes (e.g., issues

48 As of January 23, 2023, the European e-Justice Portal offers information on a range of issues regarding family mediation, including the cross-border context, principles and costs. For more, see: "Family mediation," European E-Justice, https://e-justice.europa.eu/521/EN/family_mediation.

49 Belgium, Bulgaria, Czech Republic, Germany, Denmark, Estonia, Ireland, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Malta, the Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, Finland, Sweden.

50 Czech Republic, Germany, Estonia, Ireland, Greece, France, Croatia, Italy, Cyprus, Lithuania, Luxembourg, Malta, the Netherlands, Hungary, Austria, Poland, Portugal, Slovakia, Finland, Sweden.

relating to the custody of a minor in Austria[51] and France[52]), while others provide that mandatory mediation applies to all civil disputes, hence including family disputes (e.g., Ireland[53]). Further, it was found that several countries have adopted more than one model of mandatory mediation (e.g., Lithuania[54]).

3.1. Development of Categorical Mandatory Family Mediation Model in the EU

Specific forms of categorical mandatory family mediation, where litigants are forced to mediate prior to filing their petition, are applied in 6 Member States: Lithuania,[55] Greece, Croatia, Malta, as well as Estonia in child access cases, and Italy in family business disputes.

Generally, mandatory mediation deals with family disputes relating to child support, custody during or after divorce, child arrangements, division of property, divorce (except for Greece, where mediation deals not specifically with divorce itself but rather with divorce-related issues[56]), or similar matters. However, the content of mandatory family mediation models differs considerably in these six countries.

The Lithuanian model of mandatory mediation is rather liberal due to a legal framework that gives the defendant an exclusive right to refuse to participate in mediation.[57] The model has been established by the Law on

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51 Federal Act on Judicial Procedure in Legal Matters Other than Disputes (*Außerstreitgesetz – AußStrG)* StF: Federal Law Gazette I No. 111/2003 (NR: GP XXII RV 224 AB 268 S. 38. BR: AB 6895 S. 703.), Section § 107, as amended.

52 The Civil Code of France, Article 373–2-10, accessed February 5, 2023, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000042193469/2020–08–01.

53 Mediation Act 2017, Number 27 of 2017, Section 16 (1), accessed February 5, 2023, https://www.irishstatutebook.ie/eli/2017/act/27/enacted/en/print.

54 Agnė Tvaronavičienė et al., "Mediation in the Baltic States: Developments and Challenges of Implementation," *Access to Justice in Eastern Europe* 5, no. 4 (2022), p. 72–76, https://doi.org/10.33327/ajee-18–5.4-a000427.

55 Except for issues that are typically handled by courts, e.g., adoption and paternity issues, etc. As such, this applies to cases that parties may not settle through mutual agreement.

56 The Law No. 4512/2018 on Arrangements for the Implementation of the Structural Reforms of the Economic Adjustment Programs and Other Provisions, Official Gazette on January 17, 2018, Article 182 (d), accessed February 5, 2023, https://www.wipo.int/wipolex/en/text/464101.

57 Tvaronavičienė, "Mediation in the Baltic States: Developments and Challenges of Implementation," 75.

Mediation of the Republic of Lithuania, which provides that "Mandatory mediation shall be applied in resolving family disputes considered in dispute proceedings in accordance with the procedure laid down in the Code of Civil Procedure, except for the cases where the dispute is sought to be brought to court by a person who has been subject to domestic violence (…)."[58] The parties may approach a private mediator or the State Guaranteed Legal Aid Service upon mutual request or on the initiative of one of the parties. However, unlike the categorical model described in the doctrine, parties in Lithuania are not forced to participate in the mediation session, but rather to initiate it, i.e. to offer the opposing party to resolve their dispute amicably. Thus, the obligation to initiate the procedure is on the claimant, while the defendant may refuse to accept the offer to mediate and thus bear the procedural and economic sanctions if the refusal was unjustified. Unless the claimant provides the court with a certificate confirming that he or she have duly proposed mediation to the other party and which has refused to participate, the court will not administer the claim.[59] The claim will be accepted if the issued documents indicate that mediation has taken place but without settlement. This liberal model of mandatory mediation has been repeatedly criticized for its alleged inefficiency.[60] Nonetheless, a 2022 study[61] has shown that the Lithuanian model has been successful in achieving the objectives set by the Mediation Directive.

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58 Republic of Lithuania Law on Mediation of 15 July 2008, *Valstybės žinios*, 2008–07–31, Nr. 87–3462, No X-1702, Vilnius, Article 20 (1), as amended, accessed February 6, 2023, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/a1214b42d40911eb9787d6479a2b2829?jfwid=10mfejbvlt.

59 Except for domestic violence cases, as stated in Republic of Lithuania Law on Mediation of 15 July 2008, Art. 20(1).

60 Agnė Tvaronavičienė and Odeta Intė, *Mandatory Mediation in Family Disputes in Lithuania: Model and First Year Application Experience* (Wrocław: Wydział Prawa, Administracji I Ekonomii Uniwersytetu Wrocławskiego, 2021) 48.

61 "Report on the *ex-post* evaluation of the impact of the legal regulation on mandatory mediation in family disputes" as of 30 December 2022, conducted by Order of the Minister of Justice of the Republic of Lithuania No 1R-219 of 30 May 2022: "On Approval of the Plan for Ex Post Impact Assessment of the Current Legal Regulation on Mandatory Mediation in Family Disputes," Ministry of Justice of the Republic of Lithuania, accessed February 12, 2023, https://tm.lrv.lt/lt/teisine-informacija/galiojancio-teisinio-reguliavimo-poveikio-ex-post-vertinimas.

Another example of a mandatory family mediation model is the Greek one, which, however, does not refer the parties to mediation, but rather to a mandatory information session with a mediator. Participants are also obliged to be assisted by lawyers.[62] In these mandatory information sessions, the parties must decide whether to proceed and engage in mediation. In contrast to the Lithuanian model, non-compliance with the Greek mandatory requirements would not lead to the inadmissibility of the court proceedings but would merely delay them until such time that the parties provide evidence of completing the mandatory procedure.[63] Such an approach is very similar to the Italian mandatory mediation model, which has been praised by the EU institutions and repeatedly held up as an example.[64] However, this model does not include one of the main advantages of the Italian model – the "opt-out" principle, where the parties are obliged to participate in an initial information meeting but have the freedom to withdraw from further mediation without any sanctions. The Greek model merely envisages that if a party does not show up to a pre-mediation session the judge will continue with the hearing but is entitled to fine that party up to €500.[65]

As already mentioned, the Italian model of mandatory mediation has been repeatedly recognized as the most successful in Europe because it has brought a sharp increase in the results of mediation use in the country.[66]

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62 The Law No. 4512/2018 on Arrangements for the Implementation of the Structural Reforms of the Economic Adjustment Programs and Other Provisions, Official Gazette of January 17, 2018, Art. 183(1).

63 Koumpli Vassiliki, "Greece: Institutionalizing Mediation Through Mandatory Initial Mediation Session (Law 4640/2019)," Kluwer Mediation Blog, January 20, 2020, accessed February 6, 2023, https://mediationblog.kluwerarbitration.com/2020/01/20/greece-institutionalizing-mediation-through-mandatory-initial-mediation-session-law-4640–2019/.

64 'Rebooting' the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU, requested by the European Parliament's Committee on Legal Affairs, (2014), 164, accessed February 6, 2023, https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf; Giuseppe De Palo, "A Ten–Year–Long 'EU Mediation Paradox' When an EU Directive Needs to Be More.... Directive."

65 LAW NO. 4640 Government Gazette A' 190/30.11.2019, Art. 7 para 6, as of January 26, 2023. Access here: https://www.kodiko.gr/nomothesia/document/580509/nomos-4640-2019.

66 'Rebooting' the Mediation Directive, (2014), 6.

Surprisingly, however, the requirements of categorical mandatory mediation in family disputes are exclusively applied in family business cases and not in other types of family disputes. This has been retained in the latest legislative amendments from late 2022, maintaining the view that parties to family disputes, other than business ones, can only be mandatorily referred to mediation by a motion of the judge (discretionary model).

In the case of Malta, the categorical model of mandatory family mediation is combined with a discretionary mandatory court referral to mediate. Notwithstanding that family mediation is mandatory under the law, the court summons the parties to appear before a mediator prior to proceeding with separation or divorce.[67] There is no exception to the mediation procedure even in cases of domestic violence.[68] The court first invites the parties to appear before a judge prior to deciding whether it is in their best interests to mediate.

In the Republic of Croatia, the New Family Act[69] mandates that parties be referred to mandatory counseling and family mediation. While parties to a family dispute are primarily obliged to participate in mandatory counseling, a systematic assessment of the statutory provisions leads to the conclusion that the first family mediation meeting prior to initiating divorce proceedings is mandatory in cases where the spouses have a minor child.[70] In other words, parties who are involved in family disputes and have a child must participate in a mediation information session before bringing a claim to a court in Croatia.

Estonia has only recently introduced mandatory mediation provisions for certain family disputes. Although the obligation to attempt mediation in child access disputes is not directly expressed by law, since

67 The Civil Court (Family Section), the Civil Court (General Jurisdiction) and the Court of Magistrates (Gozo) Superior Jurisdiction (Family Section) Regulations on 16th December 2003, Article 4 (3), as amended. Access here: https://legislation.mt/eli/sl/12.20/eng/pdf.

68 Ibid.

69 The Family Act the Republic of Croatia (Obiteljski zakon; Narodne novine) (Official Gazette, No 103/15 and 98/19), Zagreb, September 22, 2015. Access here: https://narodne-novine.nn.hr/clanci/sluzbeni/2015_09_103_1992.html.

70 Ibid., Art. 54(3).

September 1, 2022, Article 560[1] of the Code of Civil Procedure[71] states that "The petition that is filed with the court must be accompanied by a certificate of unsuccessful mediation mentioned in §13 of the Act on State-funded Family Mediation Services or by a certificate of unsuccessful conciliation mentioned in §12 of the Conciliation Act."[72] Hence the parties are obliged to try to amicably resolve child access disputes before going to court but are allowed to choose between mediation and conciliation for such attempts. This is quite a novel practice for Europe as it presents parties with the right to choose the manner through which settlement is reached. Further statutory provisions stipulate that where the court petition is not accompanied by a certificate of unsuccessful mediation or conciliation and there is no indication of domestic violence, the court accepts the petition and is obliged to direct the parents to undertake the mediation procedure provided for in the Act on State-funded Family Mediation Services, thus prioritizing mediation over conciliation.[73] Hence, not only does Estonia apply the categorical mandatory mediation model, but the courts are now obliged[74] to direct the parties to undertake family mediation.

In conclusion, a pure categorical mandatory mediation model, whereby parties are required to participate in an out-of-court mediation to avoid litigation, has not been found in any EU Member State. However, the wide discretion given by the Mediation Directive for introducing various mediation models into the national legislation has enabled Member States to adapt the mandatory family mediation to the specific features of their national legal systems. The models applied by all 6 countries discussed above feature more differences than similarities. The essential common characteristic of those models is that they all provide for out-of-court mediation before a trial. Access to the court then is secured by the requirement to furnish a certificate that evidences an appropriate attempt to mediate (Croatia), the fact

71 Code of Civil Procedure of Republic of Estonia of 20th of April 2005, as amended. Access here: https://www.riigiteataja.ee/en/eli/502122022001/consolide.

72 Ibid., § 560[1] (1).

73 Ibid., § 560[1] (2), (3), (4).

74 "Which they regularly use" according to a respondent: "In this case, we see that not all families use the service, but most are willing to try. Although the efficiency of family mediation in these cases is yet to be researched, the first overview will most likely be available in early spring 2023, after receiving the first results."

of initiating mediation (Lithuania), or participating in a mediation information session (Italy). If the parties do not comply with the pre-litigation dispute resolution procedure, the court may order them to mediate or take part in an informative mediation session (Greece, Malta, Estonia).

The models discussed above are mostly used in combination with the judge's discretion to re-refer the participants to mediation if they had failed to comply with their statutory obligation or to impose sanctions for unreasonable withdrawal from the mediation procedure. In addition, one may conclude that categorical mandatory family mediation is implemented in two ways in the EU, with one involving directing parties to mediation and the other obliging them to participate in a mediation information session.

3.2. Development of the Discretionary Mandatory Family Mediation Model in the EU

While the idea that mediation, a mechanism voluntary by design, can be mandated by court order is still an anathema to many scholars,[75] the application of this model in some EU countries is quite widely established and no less diverse.[76] Discretionary mandatory referral to mediation exists in 17 (62%)[77] of the Member States.

As noted above, in some cases the referral to mediation or mediation information session does not apply to all family disputes but is limited to a certain defined category. For example, judges in Austria are allowed to "order" such measures as participation in an initial mediation information session as part of child custody or access proceedings to safeguard the welfare of the child vis-à-vis the parties.[78] The court's ability to refer the parties

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75 Quek, "Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program," 484–487, accessed February 4, 2023, https://ssrn.com/abstract=2843509.

76 Odd Tjersland, Wenke Gulbrandsen, and Hanne Haavind, "Mandatory Mediation outside the Court: A Process and Effect Study," *Conflict Resolution Quarterly* 33, no. 1 (2015): 23–28.

77 Czech Republic, Germany, Greece, France, Italy, Cyprus, Lithuania, Luxembourg, Malta, the Netherlands, Hungary, Austria, Poland, Portugal, Slovakia, Finland, Sweden.

78 Federal Act on Judicial Procedure in Legal Matters Other than Disputes (Außerstreitgesetz – AußStrG) StF: Federal Law Gazette I No. 111/2003 (NR: GP XXII RV 224 AB 268

to mediation or a mediation information session is frequently accompanied by free access to mediation services (Portugal, Czech Republic).

The number of Member States, where judges are empowered to refer parties to mediation information sessions is increasing. Such regulations have recently been introduced by the Czech Republic, Germany, Austria, Cyprus, France, and Hungary. Furthermore, discretionary mandatory referral to family mediation features elements of the much-vaunted "opt-out" model, allowing parties to withdraw from mediation without facing any sanctions.[79]

In summary, discretionary mandatory referral to family mediation is the most widely used mandatory mediation model in the EU Member States. One may assume that following Italy's example and recognizing the advantages of the "opt-out" model courts are increasingly empowered to refer parties to mediation or mediation information sessions.

3.3. Development of Quasi-Mandatory Family Mediation in the EU

The quasi-mandatory mediation model exists in 4 Member States. It is mostly used in combination with other mandatory mediation models, serving as somewhat of a safeguard for them. Usually, the party that refuses to mediate or is non-cooperative faces economic sanctions, which may involve a fine (Greece[80], Ireland[81]) or departure from the usual rules of legal costs allocation (Lithuania[82]), i.e., bearing both parties' litigation expenses. Unfortunately, there is insufficient information to confirm that courts indeed exercise this right. Respondents from Greece and Lithuania noted that courts do not employ this option since it is difficult, and sometimes impossible, to

S. 38. BR: AB 6895 S. 703.), Section § 107, accessed January 28, 2023, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=2000304.

79 Except for the additional burden for the claimant in Germany.

80 The Law No. 4512/2018 on Arrangements for the Implementation of the Structural Reforms of the Economic Adjustment Programs and Other Provisions, Official Gazette on January 17, 2018, Art. 182.

81 Mediation Act 2017, Section 16 (1).

82 The Law on Approval, Entry into Force and Implementation of the Civil Procedure Code of the Republic of Lithuania. Code of Civil Procedure", No IX-743, Valstybės žinios, 2002–04–06, No. 36–1340, Art. 93(4), accessed February 1, 2023, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.162435.

prove that a party has been acting in bad faith during mediation without breaching mediation confidentiality.

Claimants in Germany face additional procedural burdens. They must state whether they had attempted mediation before filing the claim or explain the reasons for not doing so. Even though refusal to mediate before the litigation does not cause any direct sanctions, the claimant is obliged to state their grounds, which may affect the court's consideration and decision in the given case.

To sum up, quasi-mandatory family mediation is rarely used in the EU and is mostly viewed as a safeguard for the successful application of other mandatory mediation models.

3.4. General Overview of the Implemented Models and Latest Discussions on Mandatory Family Mediation in the EU

The study results showed the great diversity of the applied models and the trend of Members States combining them into yet different ones. It can be concluded that the EU countries have followed the general guidelines of the Mediation Directive and have introduced and promoted family mediation in their national legislation under various mandatory schemes, including the implementation of certain classical or hybrid models of mandatory mediation.

At the outset of this research, Bulgaria and Denmark were the only Member States that had entirely voluntary recourse to mediation without any additional measures to use or promote the procedure in family matters. Nevertheless, in February 2023 amendments to the Mediation Act and the Civil Procedure Code of Bulgaria were published in the State Official Gazette;[83] this will see Bulgaria transition towards a hybrid model of mandatory mediation, with categorical mediation applicable mainly to six types of cases,[84] all of which exclude family matters, starting from July 1, 2024.

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[83] Bulgarian Official Gazette, issue 11, 2023 (February 2, 2023), access: https://dv.parliament.bg/DVWeb/fileUploadShowing.jsp?&idFileAtt=550352&allowCache=true&openDirectly=false.

[84] Categorical mandatory mediation may be used in the following cases: 1) allocation of the use of jointly owned property according to the Property Act; 2) monetary claims arising from co-ownership; 3) division of property; 4) condominium disputes; 5) payment of company share value upon withdrawal from a limited liability company under Art. 125(3)

The upcoming changes will implement the discretional mandatory mediation model in family cases, allowing judges to decide whether to refer disputed family members to mandatory mediation at the relevant court centers, which will be managed by mediators with legal education and special training provided by the Supreme Judicial Council.

In Belgium, Latvia, Spain, Romania, and Slovenia, where it is up to the parties to decide whether to mediate in family disputes, certain incentives are offered to encourage mediation. Moreover, such countries as Ireland, Croatia, the Netherlands, Hungary, Portugal, Slovakia, and Finland all use additional incentives despite applying at least one mandatory family mediation model. In Belgium, Latvia, and Romania, judges hearing family cases must inform parties about the possibility of resolving their dispute through mediation, as well as the advantages of choosing to do so. In contrast, judges in Ireland, Spain, France, Croatia, the Netherlands, Portugal, and Slovenia may suggest or recommend trying to reach an amicable solution through mediation. Courts in Slovakia may invite parties to attend an information session with a mediator to discuss the advantages of mediation. In Ireland, lawyers may be legally obliged to advise parties to consider using mediation as a means of dispute resolution.[85] Another incentive is offering mediation free of charge thanks to public finance involvement (Spain,[86] Finland,[87]Slovenia[88]), or at least introducing state-regulated mediator fees (Luxembourg[89]). Using family mediation is also encouraged by imposing additional qualification requirements on family mediators

of the Commercial Act; 6) liability of a manager or controller of a limited liability company for damage caused to the company under Art. 142(3) and Art. 145 of the Commercial Act.

85 Mediation Act 2017 of I, Section 14 (1) (a), Section 15.

86 European e-Justice Portal, Spain, accessed February 1, 2023, https://e-justice.europa.eu/64/EN/mediation_in_eu_countries?SPAIN&member=1.

87 European e-Justice Portal, Finland, accessed February 2, 2023, https://e-justice.europa.eu/372/EN/family_mediation?FINLAND&member=1.

88 The Act on Alternative Dispute Resolution in Judicial Matters (Zakon o alternativnem reševanju sodnih sporov - ZARSS; UL RS Nos 97/09 and 40/12 - ZUJF), Article 22(1), accessed 1 February 2023, http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO5648.

89 Grand-Ducal Regulation of 25 June 2012, Art. 4, accessed February 1, 2023, https://legilux.public.lu/eli/etat/leg/rgd/2012/06/25/n4/jo.

(Poland,[90] Luxembourg,[91] Finland[92]), thus increasing public confidence in mediation.

For a better understanding of the way different models of mandatory mediation in family disputes, including combinations of several models, are applied in each EU Member State, see the Map of EU Mandatory Family Mediation Models (Fig. 1).

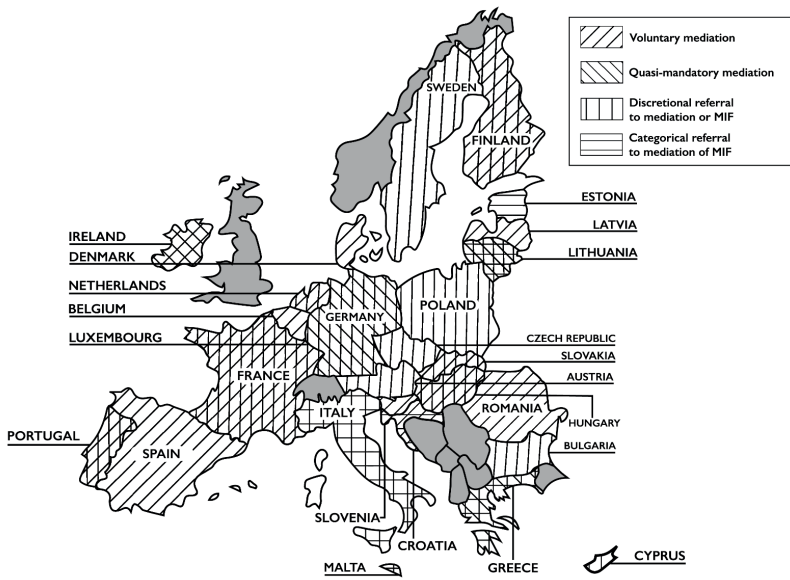

Fig. 1. Map of EU Mandatory Family Mediation Models.

Since this study has highlighted a tendency for discussions on mandatory mediation in the EU Member States, the above map is highly likely to

90 The European e-Justice Portal, Poland, accessed February 1, 2023, https://e-justice.europa.eu/64/EN/mediation_in_eu_countries?POLAND&member=1.

91 New Code of Civil Procedure, Mémorial, Partie A, 2018–07–12, n° 589, ISN: LUX-2018-L_107472, Art. 1251–3, accessed January 18, 2023, https://legilux.public.lu/eli/etat/leg/code/procedure_civile/20210916.

92 The European e-Justice Portal, Sweden, accessed January 18, 2023, https://e-justice.europa.eu/372/EN/family_mediation?SWEDEN&member=1.

change soon. Active debates on the introduction of categorical mandatory mediation are ongoing in Cyprus.[93] In other Member States, legislative amendments have already been drafted (Poland[94]) and are currently awaiting to be voted by the Parliament or have just been adopted and will enter into force shortly (Bulgaria[95]). Though somewhat less intense, the debates in other countries are no less promising: Slovakia is running a pilot project to test the effect of judges referring child disputes to mediation[96]; Latvia is testing the impact of family mediation in the context of NGO projects[97]; the Swedish Forum for Mediation[98] and Conflict Management and the Swedish Bar Association[99] have expressed[100] the need to offer mediation before

93 As of November 16, 2022, "Regulations on Transparency Authority and Mediation in Family Disputes to be voted on," accessed February 2, 2023, https://www.kathimerini.com.cy/gr/politiki/pros-psifisi-oi-kanonismoi-gia-arxi-diafaneias-kai-diamesolabisi-se-oikogeneiakes-diafores;

94 As of 2nd February, 2023, in „Pravo.pl" website listed „Boom na szkolenia dla mediatorów, MS chce profesjonalizować zawód", accessed February 2, 2023, https://www.prawo.pl/prawnicy-sady/krajowy-rejestr-mediatorow-juz-w-polowie-2023-roku,503516.html.

95 Amendments in the Mediation Act of 2017, Bulgarian Official Gazette, issue 11, 2023 (2 February, 2023), accessed February 13, 2023, https://dv.parliament.bg/DVWeb/fileUploadShowing.jsp?&idFileAtt=550352&allowCache=true&openDirectly=false.

96 Listed on the official website of the Ministry of Justice of the Slovak Republic as "Mediácia odporúčaná súdmi je cestou k vyriešeniu sporov mimosúdne," accessed February 2, 2023, https://www.justice.gov.sk/tlacovespravy/tlacova-sprava-3768/.

97 Listed on the European e-Justice Portal as of January, 22, 2023, accessed January 22, 2023, https://e-justice.europa.eu/372/EN/family_mediation?LATVIA&member=1; listed on the official website of Council of Certified Mediators in Latvia as of February 3, 2023, accessed February 3, 2023, https://sertificetimediatori.lv/2023-gada-sertificetu-mediatoru-padome-turpina-istenot-programmu-mediacija-gimenes-stridos/.

98 The Referrals of the Swedish Bar Association have been listed on the official website of the Government of Sweden since January 27, 2023, accessed February 5, 2023, https://www.regeringen.se/490533/contentassets/74007bc5352148c288fc585d51b7005a/sveriges-advokatsamfund.pdf.

99 The Referrals of the Swedish Forum for Mediation and Conflict have been listed on the official website of the Government of Sweden since May 29, 2017, accessed February 5, 2023, https://www.regeringen.se/49df9f/contentassets/d9c66d32fac040848e5d1b48fe07c5f0/064-barns-rattsskydd.pdf.

100 The State's public investigations on "all times of parenthood (SOU2022:38 part 1)" and "See the child! (SOU2022:38 part 2)" have been listed on the official website of the Government of Sweden since June 30, 2022, accessed February 5, 2023, https://www.regeringen.se/rattsliga-dokument/statens-offentliga-utredningar/2022/06/sou202238/.

the court is involved and called for mediators to be appointed early during the court process,[101] though this is not yet regulated by Swedish law. Some studies have recently revealed the positive effects of mandatory mediation and the impact of such legislative solutions on the development of a culture of peaceful dispute resolution (Czech Republic,[102] Lithuania[103]). Even in Italy, which for over a decade has been considered the European benchmark for mandatory mediation due to its skyrocketing use of mediation, the year 2022 has brought further actions to expand the range of disputes that will be subject to mandatory mediation starting from early 2023.[104]

It is evident that classifying mandatory mediation implementation levels into four distinct categories, as proposed in previous studies,[105] is no longer sufficient as regards family cases. The mediation categories distinguished by the academia, i.e., full voluntary, voluntary with incentives and sanctions, required initial mediation session, and full mandatory mediation, do not adequately reflect the range of mandatory family mediation models implemented by EU countries. Thus, the co-authors of this paper believe it is necessary to expand this distinction and propose a new classification (see Fig. 2.).

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101 The "DEBATT – Om medling och rättsskydd" has been listed on the "Dagens Juridik" website since January 5, 2023, accessed February 5, 2023, https://www.dagensjuridik.se/debatt/debatt-om-medling-och-rattsskydd/; The "Sverige sämst i Norden på medling mellan föräldrar" has been listed on the "Dagens Juridik" website since January 16, 2023, accessed February 5, 2023, https://www.dagensjuridik.se/debatt/sverige-samst-i-norden-pa-medling-mellan-foraldrar/.

102 Dagmar Brožová and Jan Zouhar, "The effect of court-mandated mediation on the length of court proceedings in the Czech Republic," *European Journal on Law and Economy* 53, (2022): 485–508, https://doi-org.skaitykla.mruni.eu/10.1007/s10657-022-09729-6.

103 "Report on the *ex-post* evaluation of the impact of the legal regulation on mandatory mediation in family disputes" of 30 December 2022, conducted by Order of the Minister of Justice of the Republic of Lithuania No. 1R-219 of 30 May 2022 "On Approval of the Plan for Ex Post Impact Assessment of the Current Legal Regulation on Mandatory Mediation in Family Disputes."

104 "Legislative Decree No. 149 of 10 October 2022," Italian Official Gazette, S.O, accessed January 20, 2023, https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2022-10-17&atto.codiceRedazionale=22G00158&elenco30giorni=false;

105 Giuseppe De Palo, "A Ten–Year–Long 'EU Mediation Paradox' When an EU Directive Needs to Be More.... Directive."

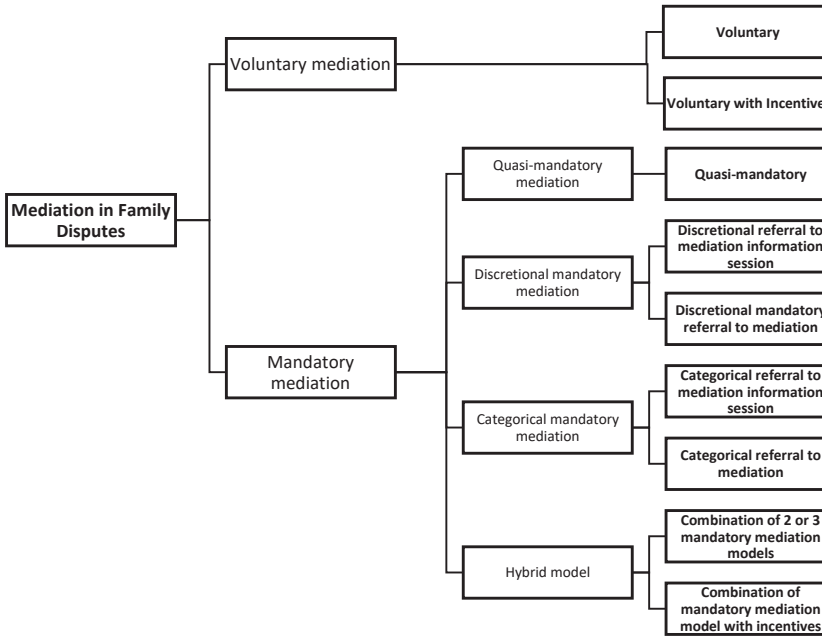

Fig. 2. Mandatory Family Mediation Models in the EU.

Firstly, a distinction needs to be made between the models that provide for incentives to promote mediation and sanctions for parties unreasonably refusing to mediate or acting in bad faith during mediation. In light of the doctrinal proposal, sanctions should be considered a separate model of mandatory mediation – quasi-judicial mediation. By 2024, following the entry into force of Bulgaria's legislative amendments introducing mandatory mediation, Denmark will remain the only EU country with a fully voluntary mediation model. Furthermore, following the observed tendency to refer parties not only to mediation but also to a mediation information session, both by law and by a judge's decision, it is necessary to expand the categorical and discretionary models of mandatory mediation by breaking them down into two sub-categories. It is also suggested that a new hybrid model of mandatory family mediation should be defined, which would include cases where two or three existing mandatory

mediation models are combined or at least one model of mandatory mediation is supplemented with incentives for the use of mediation. Countries that should be viewed as following the hybrid model include Lithuania, Greece, and Germany, where three models of mandatory mediation are combined, as well as Italy and Malta, where a combination of two mandatory mediation models is used. Others, like Ireland, France, Croatia, Finland, the Netherlands, Portugal, and Slovakia, combine at least one model of mandatory mediation with incentives to encourage the voluntary use of mediation.

4. Conclusions

Although the Mediation Directive (2008) has obliged the Member States to foster mediation through the means they deem suitable for their national legal systems, many studies conducted by the EU institutions and a recent ex-post study in Lithuania have shown that the aims of the Directive were fulfilled only in those countries that introduced mandatory mediation.

Mandatory mediation is a form of mediation where disputed parties are required to mediate by law (categorical), court order (discretional), contract (contractual), or potential procedural or economic sanctions (quasi-mandatory). The application of these four doctrinal models in the EU has increased dramatically over the last decade.

The co-authors' assumption that mandatory mediation in family disputes has become an EU-wide trend has been confirmed by analyzing empirical data. Indeed, 20 out of the 27 EU Member States already use one or more models of fostering mediation in its mandatory form. Moreover, at least 9 Member States are actively considering or have already drafted legislative amendments to adopt certain forms of mandatory family mediation.

Reviewing the categorical, discretional, and quasi-mandatory models of mandatory mediation, which are most relevant to family mediation, makes it evident that they have evolved into multiple forms. Adapting theoretical models to the needs of specific states has resulted in significant differences across the Member States. Today, the existing national models of mandatory mediation are impossible to classify if viewed through the lens of previous doctrinal classification. This leads to the need to re-consider the doctrinal models, as well as analyze, compare, and distinguish those new models to suggest a new classification, which may better reflect the existing variety

of mandatory mediation models and be more helpful to other countries seeking good practices to adopt.

The study indicates that the discretional model, which empowers the judge to refer the parties to mediation or a mediation information session, is the most frequently used mandatory mediation model in family disputes, or at least in child disputes. Meanwhile, there is a noticeable rising trend in the use of categorical referrals to mediation and mediation information sessions for parties involved in family disputes; however, these are adapted and tailored to the national legal framework and social environment of each country. Furthermore, an increasing number of Member States are applying hybrid models of mandatory mediation, combined with financial or procedural incentives to encourage the use of mediation in family disputes.

Bearing in mind the overall tendency of mediation mandatoriness in family disputes, one can identify new horizons for future research. The wide employment of various mandatory family mediation models across the Member States may bring many supranational challenges to the EU. Issues like the legal movement of family mediators and their different qualification requirements, as well as recognition of certificates of unsuccessful mediation procedures, and the risk of forum shopping, are only some of them. Resolving these problems will require deeper systematic analyses and proposing solutions to the EU legislative bodies.

References

"Commission report to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters (COM(2016)0542)." Accessed January 10, 2023. https://www.europarl.europa.eu/doceo/document/A-7–2011–0343_EN.html.

Alexander, Nadja. *Global trends in mediation: riding the third wave*, 2nd ed. Kluwer Law International, 2006.

Alexander, Nadja. *International and Comparative Mediation: Legal Perspectives*. Alphen aan den Rijn: Kluwer Law International, 2009.

Andrews, Neil. "Mediation: International Experience and Global Trends." *Journal of International and Comparative Law* 4, no. 2 (2017): 217–252.

Attorney-General's Department (Australia). "The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction: A Report to the Attorney-General." September 15, 2009. Accessed February 5, 2023. https://apo.org.au/sites/default/files/resource-files/2009–09/apo-nid67039.pdf.

Bienvenu, Pierre. "The Enforcement of Multi-Tiered Dispute Resolution Clauses in Canada and the United States." Paper presented at Annual Convention of the International Bar Association, 2002.

Boettger, Ulrich. "Efficiency Versus Party Empowerment – Against a Good-Faith Requirement in Mandatory Mediation." *Review of Litigation* 23, (2004): [vii]–[viii].

Brožová, Dagmar, and Jan Zouhar. "The effect of court-mandated mediation on the length of court proceedings in the Czech Republic." *European Journal on Law and Economy* 53, (2022): 485–508. https://doi-org.skaitykla.mruni.eu/10.1007/s10657-022-09729-6.

Ceno, Julian Sidoli del. "Compulsory mediation: civil justice, human rights and proportionality." *International Journal of Law in the Built Environment* 6, no. 3 (October 2014): 286–299.

Chan, P.C.H. Klaus J. Hopt, and Felix Steffek. *Mediation: Principles and Regulation in Comparative Perspective*. Oxford: Oxford University Press, 2013. https://doi-org.skaitykla.mruni.eu/10.1017/S1566752912001322.

Constantinescu, Miruna, and Monica Simona Corchis. "Are Mediation Clauses Binding and Mandatory." *Juridical Tribune* 7, no. 1 (June 2017): 53–63.

D'Urso, Leonardo. "Italy's 'Required Initial Mediation Session': Bridging the Gap between Mandatory and Voluntary Mediation Alternatives to the High Cost of Litigation." *The Newsletter of the International Institute for Conflict Prevention & Resolution*, no. 36 (April 2018): 57–58. https://doi.org/10.1002/alt.21731.

De Palo, Giuseppe, and Ashley E. Oleson. "Regulation of dispute resolution in Italy: The bumps in the road to successful ADR." In *Regulating Dispute Resolution: ADR and Access to Justice at the crossroads*, edited by Felix Steffek and Hannes Unberath, 239–268. UK: Hart Publishing, 2013.

De Palo, Giuseppe, and Romina Canessa. "Sleeping – Comatose – Only Mandatory Consideration of Mediation Can Awake Sleeping Beauty in the European Union." *Cardozo Journal of Conflict Resolution* 16, no. 3 (2014–2015): [xii]–[xiv].

De Palo, Giuseppe. "A Ten–Year–Long 'EU Mediation Paradox' When an EU Directive Needs to Be More... Directive." *European Parliament Briefing* 1, 6 (2018). http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL_BRI(2018)608847_EN.pdf.

De Palo, Giuseppe. "Mediating Mediation Itself: The Easy Opt-out Model Settles the Perennial Dispute between Voluntary and Mandatory Mediation." *Cardozo Journal of Conflict Resolution* 22, no. 3 (Spring 2021): 543–568.

European E-Justice. "Family mediation." https://e-justice.europa.eu/521/EN/family_mediation.

European Parliament. "'Rebooting' the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU, requested by the European Parliament's Committee on Legal Affairs, (2014)." Accessed February 6, 2023. https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf.

European Parliament. "European Implementation Assessment on the Mediation Directive by the Ex-Post Impact Assessment Unit of the European Parliamentary Research Service (EPRS), PE 593.789 (December 2016)." Accessed January 10, 2023. https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/593789/EPRS_IDA(2016)593789_EN.pdf.

European Parliament. "Quantifying the cost of not using mediation — a data analysis, PE 453.180 (April 2011)." Accessed January 10, 2023. https://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19592/20110518ATT19592EN.pdf.

European Parliament. "The implementation of the Mediation Directive. PE 571.395 (November 29, 2016)." Accessed January 10, 2023. https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/571395/IPOL_IDA%282016%29571395_EN.pdf.

Hanks, Melisa. "Perspectives on mandatory mediation." *University Of New South Wales Law Journal* 35, no. 3 (2012): 929–952.

Hinshaw, Art, Andrea Kupfer Schneider, and Sarah Rudolph Cole. "Frank Sander: Father of Court-based Dispute Resolution." In *Discussions in Dispute Resolution: The Foundational Articles*, 336–337. Oxford: Oxford University Press, 2021.

Hoom, Machteld W. de. "Making Mediation Work in Europe: What's Needed Is a New Balance between Mediation and Court Proceedings." *Journal of Dispute Resolution Magazine* 20, no. 2 (Spring 2014): 22–27.

Jaspers, Celine. "Mandatory Mediation from a European and Comparative Law Perspective." In *Plurality and Diversity of Family Relations in Europe*, edited by Katharina Boele-Woelki and Dieter Martiny, 341–369. UK: Intersentia, 2019. http://hdl.handle.net/1942/30415.

Kent, Adele. "A Behind-the-Bench Look at the Canadian Judicial System." *Judges' Journal* 50, no. 3 (Summer 2011): 8–13.

Kovach, Kimberlee K. "New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation (Georgian Text)." *Alternative Dispute Resolution Yearbook 2012*, (2012): 139–173.

Lande, John. "Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs." *UCLA Law Review* 50, no. 1 (October 2002): 69–142.

Limbury, Alan. "Compulsory Mediation – The Australian Experience." Kluwer Mediation Blog. October, 22, 2018. Accessed February 5, 2023. https://mediationblog.kluwerarbitration.com/2018/10/22/compulsory-mediation-australian-experience/.

Malacka, Michal. "Multi-Door Courthouse established through the European Mediation Directive?." *International and Comparative Law Review* 16, no. 1 (2016): 127–142.

McNamara, Philip. "Mandatory and quasi-mandatory mediation." *Australian bar review* 47, no. 3 (2019): 215–245.

Ministry of Justice of the Republic of Lithuania. "On Approval of the Plan for Ex Post Impact Assessment of the Current Legal Regulation on Mandatory Mediation in Family Disputes." Accessed February 12, 2023. https://tm.lrv.lt/lt/teisine-informacija/galiojancio-teisinio-reguliavimo-poveikio-ex-post-vertinimas.

Plevri, Anna. "Mandatory Initial Mediation Session in the Legal Order of Greece: A Step Forward for a Balanced Relationship between Mediation and Judicial Proceedings?." *Yearbook on International Arbitration* 7, (2021): 209–222.

Publication Office of the European Union. "Commission Green paper on alternative dispute resolution in civil and commercial law (COM(2002)196), 19 April 2002." Accessed January 14, 2023. https://op.europa.eu/en/publication-detail/-/publication/61c3379d-bc12–431f-a051-d82fefc20a04.

Publication Office of the European Union. "Study for an evaluation and implementation of Directive 2008/52/EC, (May 24, 2016)." Accessed January 10, 2023. http://bookshop.europa.eu/en/study-for-an-evaluation-and-implementation-of-directive-2008–52-ec-the-mediation-directive-pbDS0114825/.

Quek, Dorcas. "Mandatory Mediation: An Oxymoron – Examining the Feasibility of Implementing a Court Mandated Mediation Program." *Cardozo Journal of Conflict Resolution* 11, no. 2 (Spring 2010): 479–510.

Rewald, Roman. "Mediation in Europe: The Most Misunderstood Method of Alternative Dispute Resolution." *The Wail World Arbitration Report* (2014).

Rhoades, Helen. "Mandatory mediation of family disputes: reflections from Australia." *Journal of Social Welfare & Family Law* 32, no. 2 (September 2010): 183–194. https://doi-org.skaitykla.mruni.eu/10.1080/09649069.2010.506313.

Sander, Frank E.A. "Another View of Mandatory Mediation." *Dispute Resolution Magazine*, no. 13 (2007).

Schaffer, Daniel Kaufman. "An Examination of Mandatory Court-Based Mediation." *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 84, no. 3 (2018): 229–238.

Shtefan, Anna, and Yurii Prytyka. "Mediation in the EU: Common Characteristics and Advantages over Litigation." *InterEULawEast: Journal for the International and European law, economics and market integrations* 8, no. 2 (2021): 175–190.

Thrush, Arlin R. "Public Health and Safety Hazards versus Confidentiality: Expanding the Mediation Door of the Multi-Door Courthouse." *Journal of Dispute Resolution*, no. 2 (1994): 235–258.

Tjersland, Odd, Wenke Gulbrandsen, and Hanne Haavind. "Mandatory Mediation outside the Court: A Process and Effect Study." *Conflict Resolution Quarterly* 33, no. 1 (2015): 23–28.

Tvaronavičienė, Agnė, and Odeta Intė. *Mandatory Mediation in Family Disputes in Lithuania: Model and First Year Application Experience*. Wrocław: Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego, 2021.

Tvaronavičienė, Agnė, Natalija Kaminskienė, Dana Rone, and Rea Uudeküll. "Mediation in the Baltic States: Developments and Challenges of Implementation." *Access to Justice in Eastern Europe* 5, no. 4 (2022): 68–86. https://doi.org/10.33327/ajee-18-5.4-a000427.

UNCITRAL. "UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018." Accessed February 8, 2023. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01363_mediation_guide_e_ebook_rev.pdf.

van Rhee, C.H. "Mandatory Mediation before Litigation in Civil and Commercial Matters: A European Perspective." *Access to Justice in Eastern Europe*, no. 4, 2021: 7–24.

Vassiliki, Koumpli. "Greece: Institutionalizing Mediation Through Mandatory Initial Mediation Session (Law 4640/2019)." Kluwer Mediation Blog, 20 January 2020. Accessed February 6, 2023. https://mediationblog.kluwerarbitration.com/2020/01/20/greece-institutionalizing-mediation-through-mandatory-initial-mediation-session-law-4640–2019/.

Walker, Bret, and Andrew S. Bell. "Justice according to compulsory mediation: Supreme Court Amendment (Referral of Proceedings) Act 2000 (NSW)." *Bar News: Journal of the NSW Bar Association*, no. Spring 2000 (2000): 7–8.

Žukauskaitė-Tatorė, Miglė. "Problems of the relationship between mandatory mediation in civil disputes and the right to judicial protection." PhD diss., Vilniaus Universitetas, 2021.

Zylstra, Alexandria. "The Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled." *Journal of the American Academy of Matrimonial Lawyers* 17, no. 1 (2001): 69–104.

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Criminal Mediation in Polish and Bosnian Legislation – Similarities, Differences, and Challenges in the 21st Century

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Abstract: Worldwide, mediation is one of the most used mechanisms of alternative dispute resolution across many fields of law and one of the most common forms of restorative justice. Although it brings advantages to criminal law, some criticize its potential application for certain types of crimes. However, its benefits seen through effectiveness, efficiency in reaching conflict solutions, and the positive impact on victims and perpetrators are irrefutable. Having that in mind, this article aims to conduct comparative research, discuss the functioning of mediation in criminal cases in Polish and Bosnian criminal law and present similarities and differences between their legal regulations.

1. Introduction

Mediation[1] is an alternative to judicial conflict resolution, allowing judicial confrontation to be replaced by consensual action, which aims at the welfare and interest of the disputing parties, toning down the conflict and preventing it from escalating, as well as helping in life after the trial. Mediation, as provided for by law, is a means of regulating and restoring correct relations

[1] Lat. *Mediare* – to interfere, to go in-between.

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in society and between specific individuals. Mediation offers an opportunity to reach an agreement that is fair and satisfactory from the standpoint of the parties involved in its establishment. While court judgments that end a legal case are lawful and compatible with the public interest, they are not always in line with the expectations of the parties, i.e., those directly involved in or affected by the crime, and thus may often fail to resolve the problem that exists between them. Mediation is an opportunity for the parties to work together instead of arguing in the courtroom. Mediation meetings allow the parties to calmly discuss the conflict, and outline expectations and concerns, avoiding the additional stress of being in court. Mediation makes it possible to find a long-lasting solution to their conflict, with the process itself being efficient and possible to finalize in a few weeks (compared to judicial procedures that may last for years).[2]

Mediation aims to try to resolve conflicts between parties who are unable to do so themselves. This is exactly why the role of the mediator who moderates the whole process, ensuring equality between the parties so that they can agree and reach a settlement under the most favorable conditions, is so crucial here. The fact that the parties formulate the provisions themselves makes mediation more attractive and increases the solidity and acceptability of their agreement.

In Poland, criminal mediation has over 25 years of tradition, so it is reasonable to assume that society has had time to become accustomed to this institution. Unfortunately, statistics show that the application of this consensual tool is still extremely rare in Polish society. This issue will be presented in juxtaposition with the legal regulations in Bosnia and Herzegovina. Such an approach will result in a comparative work juxtaposing two, at times different and at times similar, legal systems. The choice of these two countries and their legal systems is linked to the fact that both shared a similar history of rebuilding their identity and independence in the past and transitioned to democracy, which may have left traces of similarity in their present legal approach.

This article is broken down into four sections. Apart from the introduction and concluding remarks, the second and third sections are similarly

[2] Dragan Golijan and Dijana Šoja, "Medijacija u Bosni i Herecegovini," *Svarog- Časopis Za Društvene i Prirodne Nauke* 2 (2011): 262.

organized in terms of structure, as they examine the legal framework, personal and real scope of mediation, principles, application, and costs of mediation in the positive criminal law in Poland and Bosnia and Herzegovina, respectively.

2. Criminal Mediation in Poland

The socio-political changes that took place in the 1980s demonstrated the need for democratization, increased public participation in important aspects of civic life, and self-governance at the local level. New solutions began to be considered, and new directions in the law were sought, including learning about regulations in force in other countries and considering the possibility of implementing them into the national legal system.[3] As a result, restorative justice and mediation in criminal proceedings began to be recognized in the early 1990s.

Mediation appeared in Polish criminal procedure on September 1, 1998, the day the Code of Criminal Procedure of June 6, 1997, came into force.[4] In establishing the possibility of resolving disputes through mediation, the Polish legislator drew on German models. Due to Soviet influence, criminal mediation did not exist in the previous CCP of 1969.[5] At the time the CCP entered into force, mediation was introduced under Art. 320, Section VII "Preparatory proceedings." In its original form, mediation proceedings were primarily used in preparatory proceedings and aimed at alleviating conflicts caused by a crime at the initial stage of criminal proceedings.[6] The Act of January 10, 2003, repealed Art. 320 of the CCP while simultaneously adding Art. 23a to Section I "Preliminary Provisions" of the Code, which completely changed the way mediation in criminal cases is regulated, perceived,

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3 Beata Czarnecka-Dzialuk, "Wprowadzanie mediacji między ofiarą i sprawcą – polskie doświadczenia i perspektywy," in *Mediacja*, ed. Lidia Mazowiecka (Warsaw: Wolters Kluwer business, 2009), 90.

4 Act of June 6, 1997 (Journal of Laws 2022 item 655, as amended), hereinafter referred to as the CCP.

5 Act of April 19, 1969 – Code of Criminal Procedure; Journal of Laws 1969 No. 13, item 96, as amended.

6 Grzegorz A. Skrobotowicz, "Wykonalność ugód mediacyjnych w sprawach karnych po 1.7.2015," in *Konsensualizm i kompensacja a podstawy odpowiedzialności karnej*, ed. Iwona Sepioło-Jankowska (Warsaw: C.H. Beck, 2016), 309.

and used.[7] This change has allowed mediation to be used at any stage of the proceeding.[8] The outcome of mediation can be taken into account during the judicial sentencing, which is why mediation applies in principle to the preparatory and judicial stages, but also in the application of probation measures in the form of conditional early release from the remaining part of the sentence at the executive stage. Considering the duration of the investigation or inquiry, the new regulations must assume that the duration of the mediation proceedings shall not count towards the duration of preparatory proceedings.[9] The amendment of mediation rules aimed to facilitate the practical application of mediation and to guarantee the best possible procedural conditions for the mediating parties.[10] Today, Art. 23a provides general rules for the initiation of proceedings, indicates who can conduct them, specifies their duration, and obliges the mediator to draw up a report on them.[11] This provision simultaneously implements Art. 12 of Directive 2012/29/EU. Detailed rules concerning the course of mediation proceedings are regulated in an implementing act – the Regulation of the Minister of Justice of May 7, 2015, on mediation proceedings in criminal cases.[12]

2.1. Personal and Material Scope

Since the CCP sets out no subject matter criteria indicating which offenses must or may be referred to mediation, law enforcement, and judicial authorities have broad discretionary power in this regard.[13] As rightly noted

7 Act of January 10, 2003, amending the Act – Code of Criminal Procedure, the Act – Provisions introducing the Code of Criminal Procedure, the Act on the crown witness and the Act on the protection of classified information; Journal of Laws 2003 No. 17, item 155.

8 Skrobotowicz, "Wykonalność ugód mediacyjnych w sprawach karnych po 1.7.2015," 309–310.

9 Cezary Kąkol, "Dlaczego kieruję sprawy do postępowania mediacyjnego?," *Prokuratura i Prawo*, no. 1 (2011): 133–134.

10 Sławomir Steinborn, *Commentary on Art. 23(a) of the Code of Criminal Procedure*, Lex No. 493619, accessed November 10, 2022.

11 Katarzyna Liżyńska and Justyna Żylińska, "Prawne i psychologiczne skutki mediacji w sprawach karnych," in *Mediacje w społeczeństwie otwartym*, eds. Magdalena Tabernacka and Renata Raszewska-Skałecka (Wrocław: GASKOR, 2012), 146.

12 Journal of Laws 2015 item 716, hereafter referred to as the Regulation on mediation.

13 Cezary Kulesza, "Prawa podmiotowe pokrzywdzonego a instytucja mediacji w sprawach karnych," in *Mediacja dla każdego*, ed. Lidia Mazowiecka (Warsaw: Wolters Kluwer business, 2010), 64.

by C. Kąkol,[14] the type, nature, and circumstances of the act and the criminal threat are not relevant when referring a case to mediation. The only requirement is that the parties to the conflict must voluntarily agree to use this ADR instrument.

Pursuant to Art. 23a(1) of the CCP, entities entitled to refer a case to mediation at the preparatory stage include public prosecutors or other authorities leading it, and at the jurisdictional stage, the court and the court referendary. The above division is mutually exclusive at the relevant stages of the proceedings. The court and the referendary cannot refer a case to mediation while the preparatory proceedings are still pending, even if the court is performing judicial acts such as hearing a complaint against the prosecutor's refusal to discontinue the proceedings. The article in question also imposes an obligation to instruct the parties on the possibility of mediation, as well as its objectives and principles, including the content of Art. 178a of the CCP.[15]

Pursuant to Art. 23a(2) of the CCP, mediation proceedings shall not last longer than one month and their duration shall not be added to the overall time of preparatory proceedings. This is also intended to encourage law enforcement agencies, which are held accountable for the timeliness of their actions, to use mediation at the preparatory stage. The duration of the mediation shall be counted from the date on which the order of referral to mediation is communicated to the mediator. If the mediation lasts longer than one month, the additional time shall not count towards the duration of the preparatory proceedings since there are no obstacles to mediation lasting longer than one month in justified cases, especially when there is a good chance that the parties may reconcile and reach a settlement. If the mediation is not completed within the time limit indicated in the order of referral to mediation and the parties agree to continue with the proceedings, the mediator shall draw up a status report to the authority that referred the case to mediation. At the mediator's request, this authority may extend the duration of the mediation proceedings.[16]

14 Kąkol, "Dlaczego kieruję sprawy do postępowania mediacyjnego?," 135.

15 See also: Art. 300 of the Code of Criminal Procedure.

16 Art. 17(2) of the Regulation on mediation.

Art. 23a(3) of the CCP indicates what persons are prohibited from conducting mediations. These include: "an active judge, a prosecutor, an associate prosecutor, as well as a trainee of the aforementioned professions, a juror, a court referendary, an assistant judge, an assistant prosecutor and an officer of an institution authorized to prosecute crimes." With the amendment of the Code, barristers and legal advisers were removed from this list, enabling them to apply for registration as mediators. The amendments to this provision were formal, aiming to define persons prohibited from applying to register as mediators.[17] Mediation may not be conducted by persons to whom the circumstances of Articles 40 and 41 of the CCP apply. Excluding mediators from leading the same case more than once is also justified: since the parties had failed to reach an agreement in the earlier proceedings and the mediator may already have some understanding of and views on the matter at hand, the new proceedings should be led by a mediator unburdened by this knowledge. However, this does not apply to different cases involving the same parties – there are no obstacles for the same mediator to conduct their proceedings.

2.2. Guiding Principles of Mediation

Although it is a highly flexible instrument, criminal mediation also has certain guiding principles that establish its framework. The basis of mediation proceedings is the principle of voluntariness. Once the objectives and rules of the proceedings have been explained to the parties, the agreement to participate must be accepted by the body referring the case to mediation or the mediator. There are no exceptions to the principle of voluntariness; mediation is only possible if the parties consent to it and want to participate. The parties may withdraw their consent to participate in the mediation up until the conclusion of a settlement agreement or the end of the last mediation meeting, after which the mediator shall draw up a report. No specific form of withdrawing consent has been established, and the party does not have to justify its decision to do so.[18]

Art. 23a(7) of the CCP introduces the principle of impartiality and confidentiality, which requires mediators to be neutral toward the matter

[17] Skrobotowicz, "Wykonalność ugód mediacyjnych w sprawach karnych po 1.7.2015," 313.
[18] Art. 23a(4) of the CCP.

and impartial toward the parties. Mediators cannot advocate for any participant in the proceedings, nor can they impose their views and solutions on them. The mediator's role is to help the parties to reach an agreement and resolve the conflict by creating an atmosphere of confidentiality and security. Moreover, the mediator's impartiality is implicit in the Code of Ethics of Polish Mediators, which prohibits mediation where the mediator cannot be impartial or prove their impartiality.[19]

The amendment of September 27, 2013, introduced Art. 178a into the CCP, which stipulates that the mediator may not be questioned about the facts they learned from the parties during the mediation proceedings. This rule shall not apply to hearings regarding information on offenses under Art. 240(1) of the Penal Code.[20] This serves to implement the requirements of Section 30 of Recommendation No. R (99) 19 of the Committee of Ministers [of the Council of Europe] to Member States concerning mediation in penal matters – "Notwithstanding the principle of confidentiality, the mediator should convey any information about imminent serious crimes, which may come to light in the course of mediation, to the appropriate authorities or to the persons concerned."[21] The enactment of this provision was necessary to ensure proper and convenient mediation.[22] Nonetheless, it is argued in the literature that there is no such exemption as regards the parties to the mediation themselves; thus, when applying a strict interpretation of this article, it is possible to question the mediation participants as to the facts disclosed during the mediation proceedings. This seems hardly realistic, as such problems did not occur in practice even before the amendment, at a time when the rules did not provide for confidentiality or exclude the questioning of mediators. Thus, it is unlikely that the ban on questioning

19 Olga Sitarz, *Metodyka pracy mediatora w sprawach karnych* (Warsaw: Wydawnictwo DIFIN, 2015), 30.

20 Act of June 6, 1997, (Journal of Laws 2022 item 1855, as amended), hereinafter referred to as the Penal Code.

21 Tomasz H. Grzegorczyk, *Commentary on Art.178, art.178(a) of the Code of Criminal Procedure*, Lex No. 428734, accessed November 10, 2022.

22 Skrobotowicz, "Wykonalność ugód mediacyjnych w sprawach karnych po 1.7.2015," 310–311.

will bring this issue to the forefront.[23] Another amendment to the CCP changed the regulation on allowing mediators to access prosecution files. Since July 1, 2015, under Art. 23a(5) of the CCP, such files shall be made available to the extent necessary for the proper conduct of the mediation. In deciding to refer a case to mediation, the judicial body shall determine the method of access, taking into account the specifics of the case, including its circumstances. This can be done by allowing mediators to review files at the body's headquarters, but also providing them with copies of the relevant documents. Mediators shall be given access to the files to such an extent as to enable them to contact the parties, learn about the facts, and determine the source of the conflict and the damage or harm caused.[24] The mediator shall not be given access to documents containing classified information or information covered by professional secrecy.

2.3. Course of Mediation

Upon receipt of the order of referral to mediation, the mediator shall immediately make contact with the accused and the victim, setting a date and place for a meeting with each of them. At a time and place convenient to them, they shall hold individual or joint preliminary meetings with the parties to explain the objectives and principles of the mediation procedure and instruct them that they may withdraw their consent to participate in the mediation procedure before it is completed. They shall also obtain the consent of both the accused and the victim to participate in the mediation procedure if it has not been obtained by the authority referring the case to mediation. Subsequently, they shall conduct a joint mediation meeting with the accused and the victim at a place and time convenient for the participants and, if necessary, help them formulate the content of the settlement agreement to be concluded by and between the accused and the victim, informing them, in particular, that the mediation agreement may be made enforceable.[25]

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23 Krzysztof Piasecki, "Przyczyny niskiej popularności polskiej mediacji karnej," in *Mediacja – nowa przestrzeń zarządzania konfliktem wyzwania, strategie, rozwiązania*, eds. Sebastian Morgała and Edyta Stopyra (Warsaw: Wydawnictwo Uniwersytetu Warszawskiego, 2014), 145.

24 § 12 of the Regulation on mediation.

25 § 14 of the Regulation on mediation.

The penultimate stage of mediation may be the conclusion of a settlement agreement by the parties, which is primarily to address the manner and extent of redressing damage and compensating any harm done, and which may include a provision on enabling the victim to file for discontinuance of the proceedings or state that the victim shall not oppose such a conclusion of the criminal proceedings. Indeed, where the mediating parties consent to draw up an agreement and formalize the concessions made, this must be viewed as successful mediation.[26] Unfortunately, one of the parties may subsequently refuse to comply with its commitments, despite their voluntary nature. Where this is the case, it is necessary to enforce the mediation agreement. Pursuant to Art. 107 of the CCP, a mediation agreement shall be declared enforceable at the request of an entitled person.[27] The person entitled to apply to the court or court referendary for an enforcement order shall be the victim in whose favor an obligation to make reparation, pay compensation or compensatory damages has been issued. Entitled persons shall also include the victim's next of kin and dependants who have been awarded a compensatory measure under Art. 46(1) of the CCP or the victim's legal successors.[28] Where a settlement is reached before a mediator, the victim may apply for an enforcement order before the criminal proceedings have become final.[29]

Art. 107(4) of the CCP contains a limitation under which the court or referendary may refuse to issue an enforcement order if "the settlement is contrary to the law or principles of social co-existence or is aimed at circumventing the law."[30] Enforcement orders may only be issued with regard to admissible settlements, i.e., ones that are not contrary to the law and principles of social co-existence, or aimed at circumventing the law.[31] Following the conclusion of the mediation, a report on its results shall be drawn up by the institution or person authorized to do so (the mediator).

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26 Skrobotowicz, "Wykonalność ugód mediacyjnych w sprawach karnych po 1.7.2015," 310.

27 Sławomir Steinborn, *Commentary on Art. 107 of the Code of Criminal Procedure*, Lex No. 493715, accessed April 18, 2017.

28 Ibid.

29 Ibid.

30 Skrobotowicz, "Wykonalność ugód mediacyjnych w sprawach karnych po 1.7.2015," 316.

31 Steinborn, *Commentary on Art. 107 of the Code of Criminal Procedure*, accessed November 5, 2022.

The report shall only concern the results of the mediation and shall not contain any information concerning the course of the proceedings, e.g., the positions of the parties, their arguments, views, or other elements that would breach mediation confidentiality. Therefore, the mediator's report shall specify whether the parties have reconciled, reached an agreement, or signed a settlement. Annexed to the report shall be the settlement agreement, if the parties have entered into one.[32]

2.4. Impact of Mediation on the Conclusion of Criminal Proceedings

Art. 53(2) and (3) of the CCP list specific directives for judicial sentencing, though only the general ones. A new regulation with respect to the 1969 Criminal Code, this provision is related to the legislator's focus on the victim's situation, in the sense that it is the victim and their loved ones who directly suffer from and experience the harm caused by the crime. Therefore, if the victim and the offender reach a mutually satisfactory agreement setting out how the damage is to be redressed or compensation paid, either through mediation or through an agreement made before a court or prosecutor, this is bound to affect the court sentence. Art. 53 is an important provision from the standpoint of the functioning and development of restorative justice, as it points directly to mediation, which is an indispensable element of the overall idea of restorative justice. The function of Art. 53 of the CCP is to provide a substantive legal basis for the court to consider the settlement agreement in its final decision. This regulation is important for the function of criminal law as far as the elimination of interpersonal conflicts is concerned and for the compensatory function of the sentence imposed. Art. 53 is linked to a directive concerning the offenders themselves, their behavior immediately after the offense, as well as their attempts to make amends for the damage caused, as it is mediation that is the means of compensation on the part of the offender.

One example of the importance of mediation in the resolution of a case in Polish judicial practice can be found in the judgment of the Court of Appeal in Krakow of May 17, 2000, which reads: "Forgiveness by the crime victim offered to the perpetrator of the harm they have suffered

[32] Art. 23a(6) of the CCP.

is a particularly substantial mitigating circumstance, eliminating the individual harm and therefore justifying mitigation of the punishment to the farthest limits."

Compensation for the damage and harm done is a circumstance that improves the victim's situation. It is therefore important for it to be taken into account in favor of the offender when determining the penalty. At the same time, it is justified that it is not indicated how this should affect the sentence imposed, since this issue is an accumulation of many different circumstances, and the final decision should always rest with the court. Particularly noteworthy is the phrase that "the court shall take into account positive results of mediation," meaning, a contrario, that negative results of mediation, i.e., failing to conclude a settlement agreement, is not a circumstance taken into account by the court. The failure to conclude a mediation with an agreement cannot be detrimental to the accused, especially by imposing a more severe sentence. Failure to settle can sometimes be due to the reluctance or uncooperative behavior of the victim.

It seems reasonable for the court to consider not only the positive outcome of the mediation, i.e., concluding a settlement agreement, but also the mere fact that the offender chose to participate in the mediation since this expresses their attitude towards the case and the act committed. The provision in question mentions two different issues to be taken into account by the court. It is therefore important to clarify the notion of "positive results of mediation" and the nature of the "settlement reached in proceedings before a court or prosecutor." The mere fact of drawing up a settlement agreement or signing and implementing it can be considered a positive outcome of mediation. It is accepted in the literature, though not without reservations, that the mere fact of settlement is sufficient for the outcome of the mediation to be considered positive. As stated by E. Bieńkowska, a positive outcome is "any result of mediation that the parties to the conflict, especially the victim, have accepted." One may imagine a situation where the parties are satisfied with the outcome of the mediation despite failing to settle because, for example, the discussions during its course might have had a positive impact on the offender's attitude. In this provision, the legislator seems to have deliberately distinguished between a positive mediation outcome and a settlement. Therefore, the sentence and sentencing rationale should be influenced not only

by the agreement itself but also by any other positive outcome of the mediation that satisfies both parties and, above all, the victim.

For the purposes of mediation, a settlement is conceptually broader than a civil law agreement and may also include other forms, such as a written apology and its acceptance or expression of forgiveness by the victim, which are not directly associated with any obligation to make reparation or compensation. As the above-mentioned provision equates a mediated settlement with a "settlement reached before a court or a public prosecutor," it seems reasonable for the court to be able to consider the various forms of mediation settlement invoked by the parties in its judgment.

2.5. Costs of Mediation

Pursuant to the applicable provisions on criminal mediation, the costs of mediation shall be borne by the State Treasury and shall be a flat-rate amount (Art. 619(2) of the CCP).[33] This means that the parties may participate in mediation at no cost. The principle of the State Treasury bearing the costs of the mediation proceedings is not conditional on the need for a settlement. Where the parties fail to settle, the State Treasury shall still bear the costs. This is to encourage the parties to use mediation and to avoid situations where the parties do not take advantage of mediation or do not agree to refer the case to mediation for the sole reason that they are unsure of the effectiveness of the potential mediation and therefore do not want to incur additional costs. Thus, the parties must be informed at the introduction meeting or in the meeting invitation that mediation is free of charge. Such a regulation leaves the issue of travel expenses to attend mediation meetings to the parties, meaning that both the victim and the offender cover their own travel expenses. In exceptional cases, however, separate arrangements may be made between the parties to a criminal mediation regarding travel expenses.

[33] Art. 4(1) of the Regulation of the Minister of Justice of 18 June 2003 on the amount and method of calculating the expenses of the State Treasury in criminal proceedings (Journal of Laws 2013 item 663) states that "The costs of mediation proceedings shall include: a flat-rate fee for conducting the mediation proceedings and a lump sum for the service of letters related to the mediation. Item 2. The flat-rate fee for mediation proceedings shall be PLN 120."

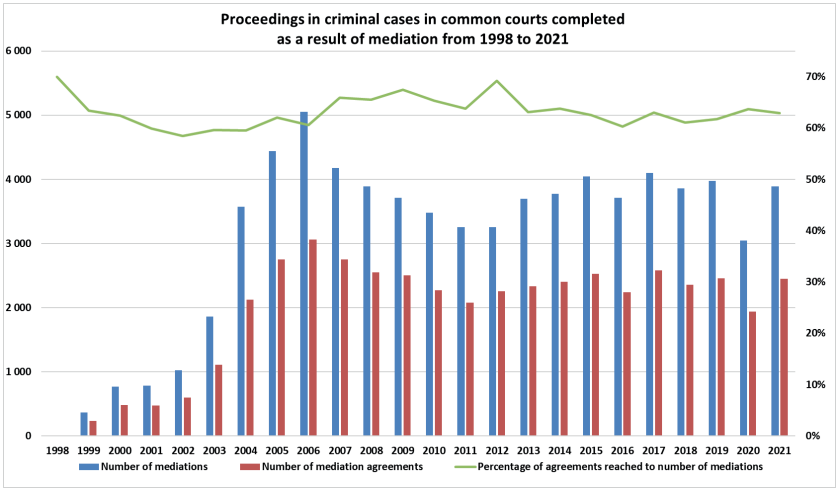

Fig. 1. Proceedings in criminal cases in common courts completed as a result of mediation from 1998 till 2021.[34]

The graph presents a summary of criminal cases between 1998 and 2021 that were concluded as a result of mediation proceedings. The above figures relate to cases at the litigation stage. Cases in which the institution of mediation was used are marked blue, and those in which a mediation settlement was reached are marked red. The green line shows the percentage of mediated settlements reached relative to all cases mediated.

The beginnings of mediation in Polish criminal law were difficult. Over the 20-plus years analyzed, after a period of growth between 1998 and 2006, a negative trend was observed between 2007 and 2011/2012. In this period, the number of mediated cases steadily declined, from a peak of 5,052 mediations (2006) to 3,254 mediations (2011 and 2012), representing a reduction of more than 35% in the number of cases mediated. The decline in the number of cases referred to mediation over the period indicated is a puzzling trend. On the one hand, the reasons for this can be legislative changes, though no such changes have been made in the area of criminal

[34] "Mediacje karne w latach 1998–2021," Ministerstwo Sprawiedliwości, accessed November 10, 2022, https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/.

mediation.[35] On the other hand, the reason can be the lack of nationwide awareness or promotional campaigns to encourage mediation, as well as the somewhat transient novelty of this tool of restorative justice.

Subsequent years, i.e. 2013–2021, saw two distinct phases. The first one shows a slow increase in the number of cases submitted to criminal mediation at the litigation stage (from 3,696 in 2013 to 4,046 in 2015); the second one (2016–2021) brought a stabilization in the number of mediation proceedings, which remained at a virtually unchanged level of about 4,000 cases per year. Due to the global COVID-19 pandemic caused by the SARS-CoV-2[36] coronavirus, the year 2020 should be disregarded when assessing the extent of the use of mediation since the scale of restrictions introduced in many areas of daily life, especially across state institutions, disrupted the regularity, speed, and efficiency of the functioning of the state and its organs, including the judicial ones.

The graph also includes data on mediation settlements. Analyzing the statistical material for the entire period, i.e., between September 1, 1998 (marking the introduction of mediation into the Polish penal system) and December 31, 2021, it can be seen that the share of criminal cases involving mediation and a settlement remains practically unchanged at about 63%. This value should be deemed acceptable — it means that almost two in three mediation proceedings conclude with an agreement satisfactory to both conflicted parties. The unchanged level of mediation settlements reached means that the trend is stable with no significant shifts in either direction. Even in 2020, a level of over 60% was maintained.

3. Criminal Mediation in Bosnia and Herzegovina

Compared to Poland, mediation in criminal cases is a newer legal institution in Bosnia and Herzegovina, as its legal framework was established in 2003 with the new criminal codes of Bosnia and Herzegovina. Namely, due to the particular constitutional division of jurisdictions in that country, criminal law area is regulated by substantive, procedural, and executive criminal codes which are implemented at four levels of authority: state actors

35 Amendments to Art. 23a of the CCP came into force on July 1, 2003, and July 1, 2015.

36 "Koronawirus," Serwis Ministerstwa Zdrowia i Narodowego Funduszu Zdrowia, accessed May 22, 2022, https://pacjent.gov.pl/koronawirus.

(Federation of Bosnia and Herzegovina and Republika Srpska) and district (Brčko District BH). Once the criminal procedure codes of Bosnia and Herzegovina had been established and entered into legal force in 2003,[37] Bosnia and Herzegovina introduced mediation in criminal cases into its legal system.[38] Although the codes are not harmonized for many items, they all regulate the issue of mediation in a very similar manner; this has been done through only one section of one article, referring to mediation as a potential, voluntary path for a property claim. Therefore, with this general law, mediation in criminal cases in Bosnia and Herzegovina is limited only to the issues of achieving damage compensation.

According to Art. 198(1) of the Code on Criminal Procedure of Bosnia and Herzegovina:

> The court may propose to the injured party and the accused, i.e. to the defense counsel, conducting the mediation procedure through a mediator[39] in accordance with the law, if it evaluates that the property claim is such that it is expedient to refer it to mediation. Proposal for mediation may be submitted by either the injured party or the accused until the completion of the main trial.[40]

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37 Criminal Procedure Code of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, No: 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13, 65/18); Criminal Procedure Code of Brčko District of Bosnia and Herzegovina (Official Gazette of Brčko District of Bosnia and Herzegovina, No: 10/03, 48/04, 6/05, 14/07, 19/07, 21/07, 2/08, 17/09, 9/13); Criminal Procedure Code of Federation of Bosnia and Herzegovina (Official Gazette of Federation of Bosnia and Herzegovina, No: 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09, 12/10, 8/13, 59/14); Criminal Procedure Code of Republic of Srpska (Official Gazette of Republika Srpska, No: 53/12, 91/17, 66/18, 15/21).

38 Udruženje medijatora u BiH, "Vodič kroz medijaciju u Bosni i Herzcegovini," n.d., 4.

39 According to Article 3 of the Law on Transfer of Mediation to the Association of Mediators, the mediation procedures are conducted through the Association of Mediators of Bosnia and Herzegovina. Established in 2002, the Association is tasked with: "providing mediation services, providing training services for mediators and certifying mediators, providing special training programs for judges, lawyers, mediation users and other interested groups, monitoring achievements in the development of mediation in the region and the world and connecting with similar organizations." See: Dragan Golijan and Dijana Šoja, "Medijacija u Bosni i Herecegovini," 264.

40 Article 212(2) of the Criminal Procedure Code of Federation of Bosnia and Herzegovina, Article 198(1) of Criminal Procedure Code of Brčko District BH, Article 108 (2) of the Criminal Procedure Code of Republika Srpska.

Based on this general provision, it is evident that mediation is a voluntary option of remediation for property claims for which the judge finds mediation suitable. Mediation is characterized by the active involvement of the injured party in proposing the solution to the property claim, coupled with the active and equal decision-making power of the defendant in the mediation process, and is a form of restorative justice available in Bosnia and Herzegovina.[41]

Following the introduction of mediation through a legi generali, a legi speciali was also established to make mediation more understandable and applicable. To that end, 2004 saw the entry into force of the Law on Mediation, which, along with the procedural criminal code, is the most important legal basis for mediation. The Law on Mediation regulates the process of mediation in Bosnia and Herzegovina.[42]

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41 However, only traces of restorative justice exist in Bosnia and Herzegovina. The term restorative justice is never used in the criminal codes of Bosnia and Herzegovina. Instead, individual cases are analyzed to determine whether they enable restorative justice. Through this, together with mediation, the world's most prominent form of restorative justice, Bosnia and Herzegovina recognizes educational recommendations, police warnings, suspended sentences (through additional obligations) and community service as other forms of restorative justice, because they include either the injured party or the community in the decision on the punishment. See: Ena Kazić and Rialda Ćorović, "Restorative Justice Within Legal System of Bosnia and Herzegovina," in *Restorative Approach and Social Innovation: From theoretical Grounds to Sustainable Practices*, ed. Giovanni Grandi and Simone Grigoletto (Padua: University Press, 2019), 171–180; Ena Kazić and Rialda Ćorović, "Is Restorative Justice an appropriate legal remediation for Sexual Violence," *Review of European and Comparative Law* 37, no. 2 (June 2019): 82–83, https://doi.org/10.31743/recl.4774.

42 Murtezić notes correctly that this code applies in the entire territory of Bosnia and Herzegovina, in contrast with most of substantive and procedural criminal codes which are applicable at four authority levels. See: Arben Murtezić, "The Interlinkage of Justice and Mediation in Bosnia and Herzegovina. Assessment and Recommendations," accessed December 16, 2020, https://www.balkanmediation.org/2020/12/dr-arben-murtezic-the-interlinkage-of-justice-and-mediation-in-bosnia-and-herzegovina-assessment-and-recommendations/. In order to make that code implementable, additional bylaws have been established, including: Law on the transfer of mediation tasks to the retention of mediators (Official Gazette of Bosnia and Herzegovina, No. 52/05), Rulebook on the register of mediators (Official Gazette of Bosnia and Herzegovina, No. 21/06), Rulebook on the list of mediators (Official Gazette of Bosnia and Herzegovina, No. 21/06), Rulebook on referral to mediation (Official Gazette of Bosnia and Herzegovina, No. 21/06), Code of mediator ethics (Official Gazzette of Bosnia and Herzegovina, No. 21/06), Rulebook on the liability of mediators for damage

Mediation may apply in cases involving both adults and juveniles. Moreover, it has been prescribed by the juveniles-related legi speciali. Indeed, Art. 26 of the Code on Protection and Dealing with Juveniles in Criminal Procedure in the Federation of Bosnia and Herzegovina,[43] which is the special criminal procedure code related to juvenile perpetrators, prescribes the potential use of educational recommendations. Educational recommendations are alternative measures that can be imposed on a juvenile as a remedy for milder criminal offenses, once the objective and subjective criteria for their use are fulfilled.[44] Two of them are of a restorative justice nature: an apology to the victim and damage compensation.[45] This article also states that mediation in such cases is led by a social work center, and in cases where the center does not employ a mediation specialist, by a mediation organization. Through the provisions of this particular code, the potential for the use of mediation in criminal cases related to the property claim process is expanded to cover mediation as part of the process of applying educational recommendations for victim apology and restitution.

caused in the course of mediations (Official Gazette of Bosnia and Herzegovina, No. 21/06), Performing mediation book of proceedings (Official Gazette of Bosnia and Herzegovina, No. 21/06), Rulebook on disciplinary responsibility of mediators (Official Gazette of Bosnia and Herzegovina, No. 21/06), Rulebook on rewards and compensation of mediation costs (Official Gazette of Bosnia and Herzegovina, No. 21/06), Rulebook on the training program for mediators (Official Gazette of Bosnia and Herzegovina, No. 21/06).

43 Official Gazette of Federation of Bosnia and Herzegovina, No. 7/14.

44 According to Art. 24(2) of the Code on Protection and Dealing With Juveniles in Criminal Procedure in Federation of Bosnia, the objective criteria are that the criminal offence be punishable with imprisonment of up to three years or with a monetary fine, with the subjective criteria being as follows: the juvenile plead guilty, the plea was voluntary, there is enough evidence that the crime had been perpetrated, the juvenile expresses their readiness to make up with the victim in written form, both victim and juvenile give their written approval for the use of the educational recommendation.

45 Other educational recommendations, which do not represent restorative justice, are: "regular school attendance or regular work attendance; work without compensation at humanitarian organizations or jobs of social, local or environmental nature; treatment in a suitable health institution (hospital or outpatient); involvement in individual or group treatment at educational, psychological or other counseling centers;" Article 26(1) of the Code on Protection and Dealing With Juveniles in Criminal Procedure in Federation of Bosnia.

3.1. Criminal Offenses for Which Mediation is Available

Damage compensation (property claim) is the right of victims of all criminal offenses. However, the Criminal Procedure Code stipulates that the court shall recommend mediation if it deems that the property claim in the particular case is suitable for mediation.[46] That provision gives discretion to the court to screen every case of property claim and to decide whether or not mediation would be acceptable. Thus, the decision to apply mediation is up to the court in each case. Mediation in the application of educational recommendations is subject to the same legal limits that are prescribed for educational recommendations themselves, in the sense that they can be used in the case of criminal offenses for which a fine or imprisonment of up to three years has been prescribed (and additional subjective conditions are met).[47]

Theoretically, the application of mediation in the case of serious criminal offenses and criminal offenses of sexual and domestic violence can be challenged. Serious criminal offenses involve the risk of potential re-victimization, making it inappropriate for the perpetrator and the victim to meet, and many authors such are Drost et al.[48] challenge its application in domestic and sexual violence cases as their nature and ethio criminalis conflict with the idea of mediation. More precisely, mediation as a process requires the equality of powers and fearlessness of the parties, yet cases of

[46] The following criteria indicate that the case is not suitable for mediation: "The parties do not have the right of disposal, that is, it is prohibited by compulsory regulations; The parties refuse mediation; The conflict has escalated too much, the parties are not talking to each other; The verdict seeks revenge or confirmation of rights that have not been exercised in court practice so far; There is a risk of violence or abuse; One or more parties are addicted to alcohol, drugs, etc.; There is an obvious and insurmountable imbalance of the parties to the dispute; If it is considered that private or public interests will be better served by a decision made by the court; The parties show their intention to prolong the procedure, to use mediation for collection more information in the case or obstruction of court proceedings; Criminal and family matters except where mediation is possible by law." Aleksandar Živanović and Obren Bužanin, *Priručnik za stručne saradnike u sudovima* (Sarajevo: Centar za edukaciju sudija i tužilaca, 2009), 65.

[47] Article 24 of the Code on Protection and Dealing With Juveniles in Criminal Procedure in Federation of Bosnia. The same article of the the Code on Protection and Dealing With Juveniles in Criminal Procedure in Republika Srpska and the Code on Protection and Dealing With Juveniles in Criminal Procedure of Brčko District BH.

[48] Lissane Drost et al., *Restorative Justice in Cases of Domestic Violence. Best Practice Examples between Increasing Mutual Understanding and Awareness of Specific Protection Needs* (Utrecht: Verwey-Jonker Instituut, 2015), 9.

domestic and sexual violence are caused by the initial inequality of powers of parties, which may continue in their confrontation during the mediation. Further, the potential fear of the perpetrator may persist, so the agreement of the victim and even the acceptance of an apology can be due to the fear of the perpetrator and not genuine acceptance of the apology or agreement to the given case solution. Therefore, many judges decide not to propose property claim mediation in the case of such criminal offenses.

3.2. Definition of Mediation and its Principles

According to the Law on Mediation,[49] mediation is "a procedure in which a third, neutral person (mediator), assists parties in their aim of achieving a mutually acceptable solution to their dispute." The important element of this definition is the verb "to assist" and it truly illustrates the essence of mediation. The task of the mediator is not to solve the dispute for the parties but to assist them in doing so themselves.

> The role of the mediator is to help parties in negotiation through their expertise of posting questions and directing parties to different aspects of their conflict, establishing dialogue, listening and understanding their common interests which may result in a better solution to their dispute. Parties usually have different views of their dispute and conflicting, contradictory aims as regards the ideal solution.[50]

Therefore, mediators play an important role in helping them find ways to overcome differences and find an acceptable way to resolve the dispute. Parties can jointly choose a mediator[51] from a list of mediators;[52] typically,

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49 Mediation, apart from criminal affairs, is possible in other fields of law, such as labor, commercial, etc. This code is universally referring to mediation, regardless of the fields of law it may be applied in.

50 Dragan Uletilović et al., *Mogućnost Primjene Medijacije u Sistemu Maloljetničkog Krivičnog Pravosuđa* (Banja Luka: Save the Children Norway, 2008), 8.

51 According to Art. 31, of the Mediation Code, there are several cumulative criteria for being a mediator: meeting general criteria for employment, having a high level of education, completing mediator training organized by the Association of Mediators and being entered into the Mediators' Registry. Mediators can be foreigners if a principle of reciprocity has been established with their respective country and if they are approved by the Ministry of Justice and the Association of Mediators.

52 In cases where they are unable to agree on the mediator, the mediator is appointed by the Association of Mediators.

only one mediator is involved in a mediation process[53] (unless the parties agree to appoint more than one).[54]

Principles of mediation are prescribed by the Code and are as follows: voluntariness, confidentiality, equality of rights, and neutrality.[55]

Voluntariness is one of the most important principles of mediation, since the potential restoration of the broken ties between the perpetrator and the victim, in terms of restorative justice, can only be achieved if both parties approach this process and participate in it voluntarily. Therefore, the judge can only suggest that they solve the property claim in the process of mediation, but that is entirely optional for the parties. They may accept the suggestion or reject it and opt for the traditional adjudication to resolve the given property claim. The same approach applies to mediation in applying the aforementioned educational recommendations, in which both parties participate voluntarily.

Confidentiality shall be ensured throughout the entire mediation process. All statements by the parties shall be confidential and may not be used as evidence in any other procedure. Moreover, all information delivered by one party during individual meetings shall be kept secret and shall not be disclosed to the other party.[56]

Parties shall have equal rights in the mediation process. Therefore, they shall be treated equally, shall be heard with the same attention and respect, and shall be granted the same motions throughout the process. Equality of their rights derives from the equality of their powers, as they are both needed in order to reach an agreement.

Finally, mediators shall act neutrally, in an unbiased manner, without any prejudice towards the subjects and the object of the mediation. Their role is neither to judge, nor to solve the dispute, but to offer options for

53 According to Golijan and Šoja, the characteristics mediators should have include "active listening skills, ability to express one's needs without sounding accusatory, criticizing and labeling others, negotiation skills that direct the process towards the positive outcome and the rebuilding of trust, procedures and rules that bring order to the behavior and relationships between parties in the mediation process." See: Golijan and Šoja, "Medijacija u Bosni i Herecegovini," 268.

54 Articles 3 and 5 of the Mediation Code.

55 Articles 6–9 of the Mediation Code. Also see: Udruženje medijatora u BiH, "Vodič kroz medijaciju u Bosni i Herzcegovini," n.d., 9.

56 Article 7 of the Mediation Code.

dispute resolution and to lead the parties to their own solution to the conflict. Moreover, mediators may not provide any guarantees as to the outcome of mediation.[57]

3.3. Mediation Process

The mediation process begins with both parties and the mediator signing a mediation agreement, a formal legal act whose form and content are set out in the Mediation Code. It shall contain the following: "information about the parties to the agreement and their legal representatives (if any), description of the dispute, statement of acceptance of the mediation principles, place of mediation, provisions on procedure costs and mediator's fee."[58] Once the agreement is concluded, the judge shall be informed about the mediation. At the same time, the mediator agrees with the parties on the time and place of mediation. Attending mediation meetings is obligatory for parties who are natural persons. Nonetheless, parties may also be represented by their legal representatives. The meetings may be attended by third parties with the consent of the mediating parties.[59] At the very onset of the mediation process, the mediator shall inform the parties about the aim of the mediation, the course of the procedure, and the role of the parties and the mediator in it. Either party may request that the mediation be terminated at any stage of the procedure. Additionally, the mediator may choose to terminate the mediation upon establishing that it is not suitable in the given case or if there are reasons preventing them from remaining neutral and unbiased. However, if such difficulties do not appear, the mediator shall bring the procedure to its conclusion without undue delay. Once the parties reach an agreement, they shall draw up and sign a written settlement agreement.[60] According to Uzelac, "the Law sets forth that the settlement agreement has the power comparative to the valid court decision, i.e. that it has the force of enforcement document, pursuant which, if necessary, enforcement can be directly required."[61]

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57 Articles 22–23 of the Mediation Code.

58 Articles 10–11 of the Mediation Code.

59 Articles 15–17 of the Mediation Code.

60 In that sense articles 18–25 of the Mediation Code.

61 Alan Uzelac et al., *Paths of Mediation in Bosnia and Herzegovina* (Sarajevo: IFC, World Bank Group, 2009), 50.

Below is a diagram showcasing how mediation meetings work in practice.

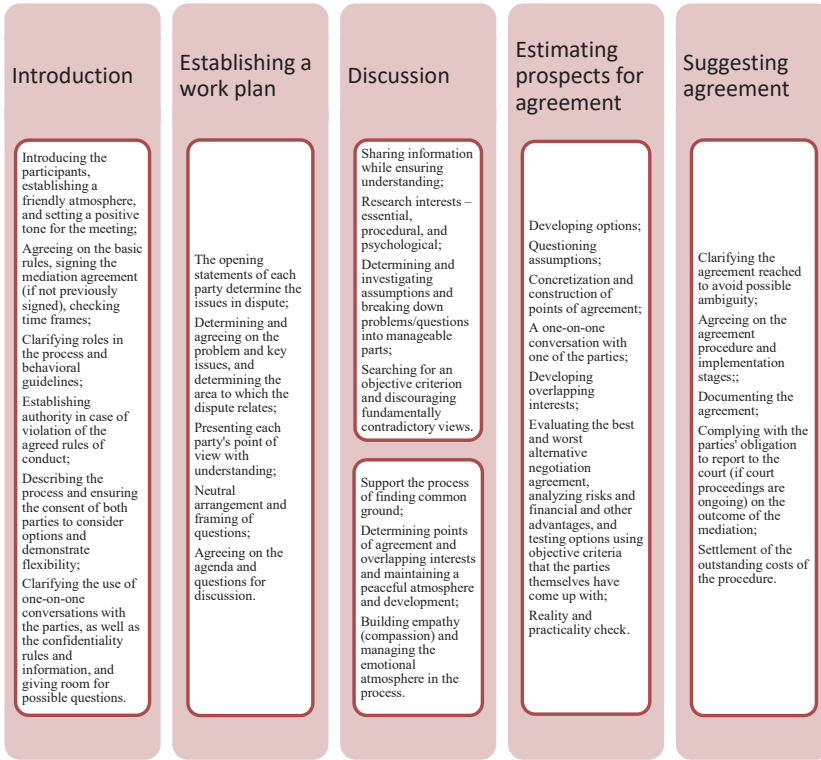

Fig 2. Mediation meeting stages. (Aleksandar Živanović and Obren Bužanin, *Priručnik za stručne saradnike u sudovima* (Sarajevo: Centar za edukaciju sudija i tužilaca, 2009), 56–57).

3.4. Mediation Costs

The costs of mediation shall be borne equally by the mediating parties (unless they agree otherwise). According to the Rulebook on mediation costs, the costs of mediation include a fee for requesting mediation, administrative costs necessary for carrying out the mediation procedure, and reimbursement of the costs of the mediator.[62] Where no agreement is reached,

[62] Article 2 of the Rulebook on mediation compensation.

the party who requested mediation shall pay 50 KM (25 euros).[63] The mediator's remuneration is calculated per hour of mediation. Mediation meetings may last no more than four hours (one hour of preparation and three hours of mediation). One hour costs 100 KM (50 euros). An additional hour of preparation costs 25 euros.[64] The costs of mediation and the need for the parties to cover these costs themselves may put into question the accessibility and impact of mediation since it may discourage parties from opting for it in the first place.

3.5. Application of Mediation in Criminal Cases

The data about the application of mediation in criminal cases is not readily available. The general statistics published by statistics agencies contain no such data. The deconcentration of the statistics agencies and different statistics checklists imposed by courts make it challenging to establish a clear picture of how mediation is applied. However, the report of the Council of Europe entitled "Evaluation of judicial systems (2018–2020): Bosnia and Herzegovina" establishes that in that period considered there were no mediations in criminal cases.[65] Murtezić finds that in practice, mediation in criminal cases is "out of focus"[66] as judges have shown no interest in mediation and educating about it in the last decades. Yet, he finds that education and raising awareness about mediation are crucial points for its further development.[67] Transitioning to mediation means embracing new motions in criminal law, and leaving the traditional approach behind. Therefore, comprehensive education of the representatives of judicial power and the wider

63 Article 5 of the Rulebook on mediation costs.

64 Ibid.

65 Apart from mediation in criminal cases, mediation is possible in civil, labor, and commercial law cases. The same report shows the success in the application of mediation in those other fields, as in the period analyzed saw 771 successful cases of mediation. Mediation prevails in civil and commercial issues. See: Council of Europe, "Evaluation of the Judicial Systems (2018–2020): Bosnia and Herzegovina" (The European Commission for Efficiency of Justice, 2020), 84.

66 Arben Murtezić, "The Interlinkage of Justice and Mediation in Bosnia and Herzegovina. Assessment and Recommendations," accessed December 16, 2020, https://www.balkanmediation.org/2020/12/dr-arben-murtezic-the-interlinkage-of-justice-and-mediation-in-bosnia-and-herzegovina-assessment-and-recommendations/.

67 Ibid.

public about the benefits of mediation is an essential step in making the existing laws on mediation in criminal cases applicable.

4. Conclusions

Mediation is a way of moving away from the belief that the only just manner of conflict resolution is through court proceedings and that the only justifiable punishment for an offender is the harshest sentence possible. Such an approach is a remnant of the previous regime; its change is the result of modern sentencing policies as well as the evolution of the justice system and the objectives of the criminal justice process. It can be an opportunity to improve the administration of justice but also to change the perception and treatment of litigants and, above all, the victim. Mediation is not a recently introduced institution; it is not a new construct that has been completely unknown up until now. Throughout history, mediation in its various forms has operated throughout the world, each culture having its own construct that has evolved and adapted to the circumstances, conditions, and particularities of the region. Although mediation has varied from culture to culture, from region to region, and from law to law, there are several elements that all forms of mediation have in common: first and foremost, the desire to reach an agreement and end the conflict, to satisfy both parties equally, the hope of fulfilling the resolutions reached, and using third-party assistance in the discussions. The centuries-old culture of mediation testifies to the fact that every society needs an alternative to judicial means of conflict resolution. Disputes settled in court often result in conflict escalation, while the conclusion of the case by the court is not the end of the conflict itself. The conclusion of an agreement between the parties to the conflict, the development of common provisions, and the fulfillment of obligations is a desirable attitude in society and one that positively influences the functioning of people in a given group.

This comparative research showed that the mediation procedures in criminal cases in Poland and Bosnia and Herzegovina are very similarly regulated. The differences are limited and originate in different constitutional regulation of jurisdictions in those two countries (regarding the number of sources of mediation) and the scope of mediation. Namely, mediation in criminal cases in Bosnia and Herzegovina is restricted to issues of property claim and application of two educational recommendations, whereas

in Poland it is applied in a broader sense as a conflict resolution measure. The countries share the same principles of mediation, the same discretion of the court to decide about mediation, and the course of the mediation itself is very similar. However, the biggest difference is that the conflicted parties can opt for mediation free of charge in Poland, while a mediation fee covered by the parties applies in Bosnia and Herzegovina. That may well be one of the reasons why mediation in criminal cases in Bosnia and Herzegovina has not proven successful, as the data about its application shows negative results. The difference compared to Polish mediation in criminal cases is that parties in Bosnia and Herzegovina hesitate to use it, even though it is by no means a new tool. Raising awareness about its benefits among the wider population and legal experts on one hand, and reducing or waiving fees on the other, are crucial steps that may improve the applicability of mediation in criminal cases in Bosnia and Herzegovina.

References

Council of Europe. "Evaluation of the Judicial Systems (2018–2020): Bosnia and Herzegovina." The European Commission for Efficiency of Justice, 2020.

Czarnecka-Dzialuk, Beata. "Wprowadzanie mediacji między ofiarą i sprawcą – polskie doświadczenia i perspektywy." in *Mediacja*, edited by Lidia Mazowiecka, 78–91. Warsaw: Wolters Kluwer business, 2009.

Drost, Lissane, Birgitt Haller, Veronika Hofinger, Tinka van der Kooij, Katinka Lünnemann, and Annemieke Wolthuis. *Restorative Justice in Cases of Domestic Violence Best Practice Examples between Increasing Mutual Understanding and Awareness of Specific Protection Needs*. Utrecht: Verwey-Jonker Instituut, 2015.

Golijan, Dragan, and Dijana Šoja. "Medijacija u Bosni i Herecegovini." *Svarog-Časopis Za Društvene i Prirodne Nauke* 2 (2011): 260–71.

Grzegorczyk, Tomasz H. *Commentary on Art.178, art.178(a) of the Code of Criminal Procedure*, Lex No. 428734. Accessed November 10, 2022.

Kąkol, Cezary. "Dlaczego kieruję sprawy do postępowania mediacyjnego?" *Prokuratura i Prawo*, no. 1 (2011): 131–145.

Kazić, Ena, and Rialda Ćorović. "Is Restorative Justice an Appropriate Legal Remediation for Sexual Violence." *Review of European and Comparative Law* 37, no. 2 (June 2019): 65–95. https://doi.org/10.31743/recl.4774.

Kazić, Ena, and Rialda Ćorović. "Restorative Justice Within Legal System of Bosnia and Herzegovina." In *Restorative Approach and Social Innovation: From theoretical Grounds to Sustainable Practices*, edited by Giovanni Grandi and Simone Grigoletto, 168–189. Padua: University Press, 2019.

Kulesza, Cezary. "Prawa podmiotowe pokrzywdzonego a instytucja mediacji w sprawach karnych." In *Mediacja dla każdego*, edited by Lidia Mazowiecka, 41–68. Warsaw: Walters Kluwer business, 2010.

Liżyńska, Katarzyna, and Justyna Żylińska. "Prawne i psychologiczne skutki mediacji w sprawach karnych." In *Mediacje w społeczeństwie otwartym*, edited by Magdalena Tabernacka and Renata Raszewska-Skałecka, 135–149. Wrocław: GASKOR, 2012.

Ministerstwo Sprawiedliwości. "Mediacje karne w latach 1998–2021." Accessed November 10, 2022. https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/.

Murtezić, Arben. "The Interlinkage of Justice and Mediation in Bosnia and Herzegovina. Assessment and Recommendations." Accessed December 16, 2020. https://www.balkanmediation.org/2020/12/dr-arben-murtezic-the-interlinkage-of-justice-and-mediation-in-bosnia-and-herzegovina-assessment-and-recommendations/.

Piasecki, Krzysztof. "Przyczyny niskiej popularności polskiej mediacji karnej." In *Mediacja – nowa przestrzeń zarządzania konfliktem wyzwania, strategie, rozwiązania*, edited by Sebastian Morgała and Edyta Stopyra, 139–156. Warsaw: Wydawnictwo Uniwersytetu Warszawskiego, 2014.

Serwis Ministerstwa Zdrowia i Narodowego Funduszu Zdrowia. "Koronawirus." Accessed May 22, 2022. https://pacjent.gov.pl/koronawirus.

Sitarz, Olga. *Metodyka pracy mediatora w sprawach karnych*. Warsaw: Wydawnictwo DIFIN, 2015.

Skrobotowicz, Grzegorz A. "Wykonalność ugód mediacyjnych w sprawach karnych po 1.7.2015." In *Konsensualizm i kompensacja a podstawy odpowiedzialności karnej*, edited by Iwona Sepioło-Jankowska, 308–319. Warsaw: C.H. Beck, 2016.

Steinborn, Sławomir. "Commentary on Art. 23(a) of the Code of Criminal Procedure," Lex No. 493619. Accessed November 10, 2022.

Steinborn, Sławomir. *Commentary on Art. 107 of the Code of Criminal Procedure*, Lex No. 493715. Accessed April 18, 2017.

Udruženje medijatora u BiH. "Vodič kroz medijaciju u Bosni i Herzcegovini," 1–151. n.d.

Uletilović, Dragan, Obren Bužanin, Živanović Aleksandar Živanović, and Džemaludin Mutapčić. *Mogućnost Primjene Medijacije u Sistemu Maloljetničkog Krivičnog Pravosuđa*. Banja Luka: Save the Children Norway, 2008.

Uzelac, Alan, Gašo Knežević, Steven Austermiller, and Mehmed Hadžić. *Paths of Mediation in Bosnia and Herzegovina*. Sarajevo: IFC, World Bank Group, 2009.

Živanović, Aleksandar, and Obren Bužanin. *Priručnik za stručne saradnike u sudovima*. Sarajevo: Centar za edukaciju sudija i tužilaca, 2009.

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When a State Is a Party to a Dispute – (Court-)Administrative Mediation in Poland and in Ukraine (A Comparative Perspective)

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Abstract: Ukraine's status as a candidate country for the European Union membership reinforces the need for comparative analysis between Ukrainian regulations and the laws of other EU Member States, as well as European regulations. One of the fields of comparative law is the development of mediation as a legal institution, also in cases when the state is involved – for disputes covered by administrative law. This has already been a subject of interest and promotion of both the EU and the Council of Europe, as European standards of democracy provide for the state's cooperation with citizens/individuals. The aim of this article is – firstly – to compare the current development of mediation in administrative and court-administrative cases in Poland and in Ukraine, the similarities in successes and challenges, and – secondly – to determine to what extent both countries follow the latest CEPEJ guidelines. Although

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the state of research and literature on this subject is advanced in Poland and slightly less satisfactory in Ukraine, a comparative overview of this type of mediation regulations can be considered a *novum*. As for methodology, the paper is dominated by the logical-linguistic method, although some conclusions were drawn on the basis of both statistics and participant observation, i.e. the authors' own mediation practice. So far – although both legal systems are quite compatible with the CEPEJ guidelines examined and provide for inter-branch solutions – in both countries in question, the development of administrative and court-administrative mediation is not a "success story." *A contrario*: it can be classified as developing in the least resilient manner. To some extent, Poland and Ukraine show similarities and correlations in terms of successes and challenges, as well as social and mental barriers to mediation development.

1. Introduction

Ukraine's status as a candidate country for the European Union (EU) membership[1] reinforces the need for comparative analysis between Ukrainian regulations and the laws of other EU Member States, thereby creating an area for new discussion and introducing a new context to academic reflection and research. One of the fields of comparative law is the development of mediation as a legal institution, also in cases when the state is involved – for disputes covered by administrative law. This type of mediation has already been a subject of interest and promotion[2] of the Council of Europe (CoE) which is another pillar of European integration and to which both Poland and Ukraine have belonged since 1990s.[3]

1 On 17 June 2022, the European Commission issued its opinion on Ukraine's application for EU membership, and on 23 June, the European Council granted candidate status to Ukraine.

2 See: Recommendation R (2001) 9 of 5 September 2001 on Alternatives to Litigation Between Administrative Authorities and Private Parties (https://rm.coe.int/16805e2b59).

3 Poland – since 1991, Ukraine – since 1995. The Russian Federation had been a member since 28 February 1996, was suspended on 25 February 2022, announced its withdrawal from the CoE on 15 March 2022 and was expelled from it on the same day with immediate effect. As for Belarus – it was granted the Special Guest status from 1992 to 1997 and then barred from membership from 1997 due to its lack of progress in the field of democracy, human rights and the rule of law.

Although mediation (in various branches of law) is at different stages of development in signatory-states (there are some states with a solid mediation culture, comprehensive legislation or procedural rules, but there are also some where legislative bodies have shown little interest in regulating mediation), the CoE recommendations and resolutions,[4] despite their soft law nature, apply in all the Member States. European standards of democracy provide for the state's cooperation with citizens/individuals. One form of such cooperation and communication is mediation as a dispute resolution tool.

The aim of this article is – firstly – to compare the current development of mediation in administrative and court-administrative cases in Poland and in Ukraine, the similarities in successes and challenges, and – secondly – to determine to what extent both countries follow the latest CEPEJ guidelines.[5] Although the state of research and literature on this subject is advanced in Poland[6] and slightly less satisfactory in Ukraine,[7] a comparative

4 Restricting only to normative regulations of a *lex generalis* nature, these are recommendations: R (81) 7, referring to (78) 8; R (86) 12 and the resolution no. 1 (2000). As for regulations of a *lex specialis* nature, see recommendations other than R (2001) 9 no.: R (87) 18 concerning the Simplification of Criminal Justice; R (99) 19 concerning Mediation in Penal Matters; R (98) 1 on Family Mediation; R (2002) 10 on Mediation in Civil Matters. See also: "European Code of Conduct for Mediators," European E-Justice, http://ec.europa.eu/civiljustice/adr/adr_ec_en.htm.

5 "CEPEJ (2022) 11 of 7 December 2022," CEPEJ, accessed March 10, 2023, https://rm.coe.int/cepej-2022–11-promoting-administrative-mediation-en-adopted/1680a95692.

6 Ewa Gmurzyńska and Rafał Morek, eds., *Mediacja. Teoria i praktyka* (Warsaw: Wolters Kluwer, 2014); Anna Kalisz and Adam Zienkiewicz, *Mediacja sądowa i pozasądowa. Zarys wykładu* (Warsaw: Wolters Kluwer, 2014); Krzysztof Płeszka et al., *Mediacja. Teoria, normy, praktyka* (Warsaw: Wolters Kluwer, 2017; Martyna Plucińska-Nowak, *Status i oblicza mediacji w społeczeństwie polskim* (Poznań: Wydawnictwo UAM, 2021); Wojciech Federczyk, *Mediacja w postępowaniu administracyjnym i sądowo administracyjnym* (Warsaw: Wolters Kluwer, 2013); Magdalena Tabernacka, *Negocjacje i mediacje w sferze publicznej* (Warsaw: Wolters Kluwer, 2018); Anna Kalisz, "Mediacja administracyjna i sądowoadministracyjna," *Państwo i Prawo*, no. 2 (March 2018): 19–39.

7 Nataliya Mazaraki, "Mediation in Ukraine: problems of theory and practice," *Foreign Trade, Economics, Finance, Law* 84, no. 1 (January 2016): 92–100, accessed June 16, 2023, http://journals.knute.edu.ua/foreign-trade/article/view/533; Tatiana Tsuvina, "National Mechanisms of the Enforcement of Agreements Resulting from Mediation: EU Experience and Ukrainian Perspectives," *Problems of Legality*, no. 158 (2022): 110–123, https://doi.org/10.21564/2414–990X.158.264998; Karyna Rostovska et al., "Mediation as a Means to Resolve

overview of this type of mediation regulations can be considered a *novum*. As far as methodology is concerned, the presented research is based on the referenced literature, internet resources, legal acts, as well as – subsidiarily – mediation statistics. The paper is dominated by the logical-linguistic method, although some conclusions were drawn on the basis of both statistics and participant observation, i.e. the authors' own mediation practice. The leading method, however, is introducing a comparative perspective to the text (given that the part concerning Polish mediation reality is presented here as much shorter).

2. Development of Mediation in Poland and Ukraine – Analysis of Legislation and Practice

2.1. (Court-)Administrative Mediation in Poland

The history of Polish administrative and court-administrative mediation is not a "success story"[8]. In the field of administrative mediation – as a *novum*, and (court-)administrative mediation – as an institution existing since 2004, significant changes have been introduced since 1 June 2017 by the Act amending the Code of Administrative Procedure Act and certain other acts.[9] The solutions contained therein are largely formulated *per analogiam* with the provisions of the Code of Civil Procedure, especially those introduced in 2015. The legislator justified such amendments in administrative field with the need to ensure a "partnership relationship between the administration and the parties [to the dispute – A.K.]." The explanatory statement to the Act pointed out that "administrative proceedings are closely linked to many areas of life and concern the daily affairs of all citizens. The speed with which cases are handled and the quality of the decisions have a substantial direct impact on the assessment of the public administration system and the level of citizen's trust in the state."[10] One of the means to achieve these goals is the institution of mediation.

Administrative Disputes: An Appraisal of the Historical and Legal," *Journal of International Legal Communication* 1, no. 1 (June 2021): 197–204.

8 See: Anna Kalisz, "Mediacja jako forma dialogu w stosowaniu prawa" (Warsaw: Difin, 2016).

9 Journal of Laws of 2017 item 935, as amended.

10 Polish Sejm's paper no. 1183.

Before the amendments, the institution of administrative mediation did not exist and mediation in administrative courts was approaching a *desuetudo* situation. For example, in 2004, regional (voivodeship) administrative courts initiated mediation proceedings in as many as 679 cases, 170 of which were settled under this procedure. At that time, the largest number of requests for mediation were received in cases related to: construction law; tax liabilities and public finances; expropriation of real estate; fees related to the increase in the value of real estate as a result of adopting a local spatial development plan; and the imposition of a fine for performing road transport without paying a toll on national roads. Unfortunately, this number has been gradually decreasing and in 2016 and 2017 no mediation proceedings were conducted in any case.[11]

Currently, administrative mediation is provided by law in both horizontal and vertical aspects, i.e. it is admissible both between the parties to the proceedings (horizontal aspect) and between the parties and the public administration body before which the proceedings are pending and which is hearing the case (vertical aspect).

As regards mediation within court-administrative proceedings, the amending act significantly changed the shape of the procedure which had existed since 2004 and was based on the model of mediation conducted by a judge or court referendary (who has a role not only in moderating but also in controlling the whole process of reaching an agreement) by introducing the classic mediation model which involves a mediator, i.e. a third party, not involved in the resolution of the case and located outside the court structures. As in the case of administrative mediation, the solutions adopted are largely modelled on the provisions of the Code of Civil Procedure. Administrative and court-administrative mediation is based on universal mediation principles, not fully codified, such as the principle of impartiality, confidentiality and voluntariness, the principle of conflict autonomy, the principle of good faith, the principle of respect, the principle of neutrality of the mediator and the principle of de-formalization of the mediation procedure.

[11] "Annual Reports," The Supreme Administrative Court, accessed March 10, 2023, http://www.nsa.gov.pl/sprawozdania-roczne.php.

The scope of (court-)administrative mediation may include cases relating to property issues (i.e. neighborhood disputes; land consolidation; disputes concerning the development conditions or building permits and infrastructural line investments) that may "fit into" this type of mediation. Reconciliation of interests can take place in the area of concessions, permits or business licenses; environmental protection; agriculture and forestry, industrial property, taxation or customs obligations. The field for mediation can also be seen in social welfare disputes or other multi-faceted or long-standing conflicts between parties. Particularly, it will fit cases involving parties with many conflicting (but also partly converging) interests, but also cases involving complex factual and personal situations. In this respect, the administrative judiciary could be at least partially relieved of finicky decision-making processes. However, there is a lack of legal framework that "clearly defines the (…) scope of mediation."

The institution under examination undoubtedly has the potential to help in building an atmosphere of partnership and respect for the legitimate interests of the parties, as well as to speed up the resolution of cases, as conciliatory resolution of disputes may result in a decision not being challenged either administratively or subsequently before an administrative court. Unfortunately, the court statistics[12] show that after 2017 administrative courts passed decisions dismissing or refusing the request for mediation in almost all the cases[13].

Summing up – the overall development of mediation in Poland is progressing rather slowly and is not as vigorous as its enthusiasts would expect, as shown by the mediation statistics available on the website of the Ministry of Justice.[14] What is more, administrative and court-administrative mediation can be classified as developing in the least resilient manner.

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12 Paweł Rochowicz, "Klapa mediacji, ale uproszczenia działają – resort rozwoju ocenia wprowadzone procedury," Prawo.pl, accessed March 10, 2023, https://www.prawo.pl/samorzad/uproszczenia-procedur-administracyjnych-nie-zawsze-dzialaja,516368.html.

13 "Centralna Baza Orzeczeń Sądów Administracyjnych," The Supreme Administrative Court, accessed March 10, 2023, https://orzeczenia.nsa.gov.pl.

14 "Dane statystyczne dotyczące mediacji," Ministerstwo Sprawiedliwości, accessed March 10, 2023, https://www.gov.pl/web/sprawiedliwosc/dane-statystyczne-dotyczace-mediacji.

2.2. (Court-)Administrative Mediation in Ukraine

2.2.1. Brief History and Current Legal Regulations

On August 24, 1991, with the proclamation of Ukraine's independence, the justice system underwent thorough changes – in particular, the principle of separation of powers between the legislative, executive and judicial branches was enshrined. The very next year (1992), the Parliament approved the Concept of Judicial and Legal Reform, which introduced the possibility of resolving disputes between citizens and public authorities (the state) into administrative proceedings. In 1996, the Constitution of Ukraine[15] was adopted, Article 3 of which proclaims, *inter alia*, that human rights and freedoms and their guarantees determine the content and direction of the state's activities; the state is accountable to the individual for its activities and affirming and ensuring human rights and freedoms is its main duty.

It is important to note that administrative justice is legislatively and functionally enshrined in states with a clear division between private and public law, in which administrative law is formalized as an independent branch (of public law). The establishment of the system of administrative courts first took place in 2002 in the Law on the Judicial System of Ukraine.[16] On October 1, 2002, a decree establishing the High Administrative Court of Ukraine (*Верховний Суд України*) was signed by the President. It is believed that from this point on, administrative justice officially began to function.

The final legislative consolidation of the administrative justice system took place with the adoption of the Code of Administrative Procedure (hereinafter referred to as the CAP).[17] On the path to establishing Ukraine as a democratic state under the rule of law and its integration with the European community, many innovations were introduced in the sphere of state–individual relations, including in the judiciary. One of them was the introduction of the institution of administrative justice, which gave individuals and legal entities the opportunity to appeal decisions, actions

15 "Constitution of Ukraine," accessed March 10, 2023, https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text.

16 "Law of Ukraine," accessed March 10, 2023, https://zakon.rada.gov.ua/laws/show/1402–19.

17 "The Code of Administrative Procedure of Ukraine," accessed March 10, 2023, https://zakon.rada.gov.ua/laws/show/2747–15.

or inactions of public authorities to an administrative court, as enshrined in Article 55 of the CAP. Incidentally, it should be noted that at that time it was the only code that contained a provision on the possibility of reconciliation of the parties at any stage of the process.[18]

Within the framework of two pilot projects, financially supported by the European Commission and the Council of Europe ("Procedure for Selection and Appointment of Judges, Their Training, Disciplinary Action, Case Distribution and Alternative Dispute Resolution", 2006–2007 and "Transparency and Efficiency of the Justice System in Ukraine", 2008–2011"), the European model of judicial mediation was piloted by Dutch and German experts, with specially trained judges acting as mediators.[19] Judges of two courts of administrative jurisdiction (Vinnytsia and Donetsk) were trained, and in 2010–2011, judges-mediators of Vinnytsia District Administrative Court conducted 31 mediation procedures, 20 of which resulted in positive outcomes and, eventually, agreements.[20] In 2010, the Donetsk Administrative Court of Appeals held a "mediation week" during which 8 mediations were held, all of which resulted in a positive outcome.[21] Unfortunately, after the projects ended and due to insufficient legislative regulation at that time, mediation within administrative courts did not continue and the tradition was not established.

According to the statistics and case law records, in the period 2008–2016, 6,449,087 cases were pending in local administrative courts, and about 0.05% of them ended in reconciliation. Namely: in 2012 – 0.02%, in 2013 – 0.04%, in 2014 – 0.06%, in 2015 – 0.08%, and in the first half of 2016 – 0.25%.[22] Despite the small percentage, it is possible to observe an increase in interest and in use of the conciliation of the parties in the field of public law disputes.

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18 Article 51(3) of the CAP, as amended on July 6, 2005.

19 A German model of *Güterichter* – conciliation judges.

20 "Vinnytsia District Administrative Court," accessed March 10, 2023, http://voas.gov.ua/work/med-ats-ya/med-ats-ya-efektivne-vir-shennya-konfl-kt-v.

21 "Mediation Week in the Donetsk Administrative Court of Appeals," Judiciary of Ukraine, accessed March 10, 2023, https://apladm.dn.court.gov.ua/sud9102/pres-centr/news/3889.

22 Oleksander Sydelnikov, "The Institution of conciliation of the parties in administrative proceedings" (abstract of a dissertation for the degree of Candidate of Law), https://library.nlu.edu.ua/POLN_TEXT/AVTOREF_2017/Sydielnikov_2017.pdf.

In 2016, amendments were made to the Constitution, namely to Article 124 ("the jurisdiction of the courts extends to any legal dispute and any criminal charge. In cases provided by the law, the courts shall also consider other cases. The law may establish a mandatory pre-trial procedure for dispute resolution"). Such a provision opened the future possibility of introducing a mandatory mediation model in certain categories of cases involving a public authority. In 2017, the procedural provisions were reformed and the institution of dispute resolution with the participation of a judge[23] in civil, commercial and administrative proceedings was introduced,[24] which was undoubtedly another progressive step towards developing Alternative Dispute Resolution (ADR) methods in the judiciary. The adoption of the Law on Mediation on November 16, 2021[25] was, ultimately, one of the most important events in the establishment of the mediation as a legal institution.

Currently, Ukrainian legislation provides for both mediation and the institution of dispute resolution with the participation of a judge in the Code of Administrative Procedure of Ukraine. It is supported by international and European regulations[26] and standards, such as: Directive 2008/52/EC of the European Parliament and of the Council of Europe on certain aspects of mediation in civil and commercial matters,[27] the Council of Europe Recommendations on Mediation for Different Categories of Cases developed by the European Commission for the Efficiency of Justice[28] and the UNCITRAL Model Law on International Commercial

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23 In spite of the pilot project, the judge cannot be a mediator according to Ukrainian law.

24 Law of Ukraine "On Amendments to the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine and Other Legislative Acts," accessed October 3, 2023, https://zakon.rada.gov.ua/laws/show/2147–19#Text.

25 Law of Ukraine "On mediation," accessed October 3, 2023, https://zakon.rada.gov.ua/laws/show/1875–20#Text.

26 Guidelines for Lawmaking in the Field of Mediation – *European Handbook for Mediation Lawmaking*, European Commission for the Efficiency of Justice (CEPEJ), accessed March 10, 2023, https://rm.coe.int/cepej-2019–9-en-handbook/1680951928.

27 OJ L 136, 24.5.2008, p. 3–8.

28 "Guidelines for a better implementation of the existing recommendation concerning family mediation and civil mediation," European Commission for the Efficiency of Justice (CEPEJ), accessed March 10, 2023, https://rm.coe.int/16807475b6; "Guidelines for a better

Mediation and International Settlement Agreements Resulting from Mediation (2018, amending the UNCITRAL Model Law on International Commercial Conciliation, 2002),[29] were certainly taken into account in the Law on Mediation. In addition, a comprehensive analysis was prepared under the Pravo-Justice project with the participation of international and national experts.[30]

Despite the fact that the CAP promotes its use, it is still not a common practice to use mediation as set forth in the provisions of Article 122(6), Article 47(5), Article 180(2) and Article 181. One of the main reasons is the lack of appropriate discretionary powers of public authorities. Part 1 of Article 190 of the CAP requires that "the terms of conciliation must not contradict the law or go beyond the competence of the authority," and according to Part 2 of Article 19 of the Constitution "public authorities and local self-government bodies, and their officials are obliged to act only on the basis of, within the limits of authority and in the manner provided for by the Constitution and laws of Ukraine." At the same time, however, it is worth noting that according to Article 2 of the CAP the task of administrative proceedings is to resolve disputes in the field of public law relations in a fair, impartial and timely manner in order to effectively protect the rights, freedoms and interests of individuals as well as rights and interests of legal entities from violations by public authorities. Sharing the opinion of T. Kyselova within the framework of the Council of Europe project "Support to the Implementation of the Judicial Reform in Ukraine," it is important to ensure that the task of integrating mediation into the judicial system is in progress.[31]

implementation of the existing recommendation concerning criminal mediation," European Commission for the Efficiency of Justice (CEPEJ), accessed March 10, 2023, https://rm.coe.int/1680747759.

29 "UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018," United Nations, accessed March 10, 2023, https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation.

30 Bert Maan et al., "Mediation Gap Analysis Report," Pravo-Justice, accessed March 10, 2023, https://www.pravojustice.eu/storage/app/uploads/public/5f7/435/116/5f743511604ec221015187.pdf.

31 Tatiana Kyselova, *Integration of Mediation into Ukrainian Court System: Policy Paper (October 17, 2017)*, Council of Europe, Kyiv, 2017.

Another key problem is the question of who can be a mediator in such cases. Ukraine envisions a classic model of facilitative mediation,[32] with a fixed definition of who is considered a mediator and requirements for people who can become mediators (Part 2 of Article 8 and Part 1 of Article 10 of the Law on Mediation). This is outside-the-court mediation. T. Tsuvina describes another model that is also possible –internal court-related mediation or integrated mediation as a type of mediation conducted "inside" the court by its employees or mediating judges.[33] However, there is an institution of settlement with the participation of a judge, the law does not allow judges to be mediators . The advantage of judge-conducted mediation is the authority of the judge over the person and the state body, which disciplines the parties and improves the involvement of the public authority in the mediation procedure. It also seems to increase the credibility of such a procedure.

2.2.2. Types of Disputes That Can Be Resolved Through Mediation

Mediation in administrative proceedings can become an essential tool for influencing relations in the resolution of public law disputes by reaching an amicable decision without going through all the mandatory stages of the administrative process, which will increase trust in public authorities, as this is a priority area of state and local government activity – as stated in the ruling of the Constitutional Court of Ukraine of July 9, 2002 (case on pre-trial settlement of disputes).[34]

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32 Bernard Mayer, "Facilitative mediation," in *Divorce and Family Mediation: Models, Methods, and Applications*, eds. Jay Folberg, Ann L. Milne, and Peter Salem (London: Routledge, 2004): 29–52.

33 Tatiana Tsuvina, "Introduction of the Institute of Court Mediation as a Promising Area for Reforming the Civil Procedure Legislation of Ukraine," in *Ukraine on the way to Europe: reform of civil procedural legislation. 36. scientific works. Materials of the International Scientific and Practical Conference (Kyiv, 7 July 2017)*, eds. I.O. Izarova and R.Y. Khanyk-Pospolitak (Kyiv: Dakor Publishing House, 2017): 195–200. https://dspace.nlu.edu.ua/bitstream/123456789/12731/1/Cuvina_195–200.pdf.

34 Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of the Limited Liability Company "Trading House Campus Cotton Club" regarding the official interpretation of the provision of part two of Article 124 of the Constitution of Ukraine (case on pre-trial settlement of disputes), accessed October 3, 2023, https://zakon.rada.gov.ua/laws/show/v015p710–02#Text.

According to Article 3(1) of the Law on Mediation, the law applies to social relations referring to mediation in order to prevent conflicts (disputes) in the future or to resolve any conflicts (disputes), including administrative ones. It should also be noted that an important unifying factor will be the entry into force of the Ukrainian Law "On the Administrative Procedure" (currently undergoing the legislative process).[35]

So far, mediation in administrative disputes has not been successfully implemented. The proposal of a criterion for the possibility of administrative mediation – expressed in the report of the national experts of the above-mentioned Pravo-Justice project – that the relevant authority should have proper decision-making powers and that the category of dispute should be negotiable seems valid.

In order to foresee potential administrative cases in which the mediation procedure could be applied, it is necessary to study cases from both a subject and object perspective, taking into account two conditions: the actors who are inclined to settle the dispute and the matter to be settled within the powers of such actors. Analyzing current legislation and opinions of various scholars on this topic (O. Sydelnikov, M. Blikhar, K. Tokareva, K. Rostovska, N. Hryshyna, O. Melnychuk, A. Pyshna and others), as well as examining these criteria, it is possible to distinguish the following categories of administrative disputes.

Classified by actors: legal professions to which the state functions are delegated; state supervision and control bodies; bodies related to public service; local self-government bodies and tax authorities.

Classified by subject matter: disputes concerning the activities of notaries and private enforcement officers; disputes concerning the adoption of response measures in the form of suspension of operation of educational institutions; disputes concerning obtaining permits from local authorities, appealing against decisions of local authorities, appealing against decisions of local authorities on setting tariffs and transferring municipal property; disputes concerning: the provision of plots of land by local authorities for ownership or lease, appeals against the refusal of a local council to grant a permission to develop a land management project, collection of land

[35] Law of Ukraine "On Administrative Procedure", accessed October 13, 2023, https://zakon.rada.gov.ua/laws/show/2073–20#Text.

fees (with the territorial bodies of the State Land Cadastre regarding approval of the location of a plot of land); disputes concerning the receipt of public information; disputes arising from payments between private individuals and public authorities; certain investment disputes involving the state; disputes concerning public service and dismissal from public service, including dismissal in connection with a reduction of the number of employees of a state body, recovery of outstanding wages , recovery of moral damages caused by the employer; disputes concerning the collection of taxes and fees.

Summing up – at present, there are prerequisites for the use of mediation to resolve administrative disputes in Ukraine. This is confirmed by pilot projects in administrative judiciary, the existence of the institution of dispute resolution with the participation of a judge, as well as the existing legal regulation of mediation, and there is hope to expand the competence of public authorities and their participation in the mediation procedure.

3. CEPEJ Guidelines Against the Background of the Council of Europe Recommendations

As noted, the introduction of ADR methods (including mediation) involving the state and its administrative bodies is in line with the *acquis* of the CoE, since European standards of democracy provide for the state's cooperation with citizens/individuals.

Aforementioned Recommendation no. R (2001) 9 states that law governing alternative means should ensure: that the parties receive appropriate information about their possible use; independence and impartiality of mediators (conciliators and arbitrators); fairness of the proceedings (in particular, by respecting the principles of equality and impartiality); transparency of the use of alternative means and a certain level of discretion and the possibility of effective enforcement of the solutions reached using alternative means.

Recommendations no. R (81)7 and no. R (86) also refer to, *inter alia*, judicial proceedings in administrative matters. The CoE documents point to the need for introducing conciliation and mediation procedures as a means of relieving the courts of their workload by shortening and streamlining the proceedings and recommend the use of mediation both before and during the trial. Recommendation no. (2001) 9 states that "the widespread use

of alternative means of resolving administrative disputes can allow these problems to be dealt with and can bring administrative authorities closer to the public," which can be of strategic importance for Ukraine under war conditions and during the post-war period.

However, according to a research by the CEPEJ Working Group on Mediation (CEPEJ-GT-MED), only a few member states used proper administrative mediation tools (O. Sydelnikov, M. Blikhar, K. Tokareva, K. Rostovska, N. Hryshyna, O. Melnychuk, A. Pyshna and others). Taking into account the findings of the research, CEPEJ-GT-QUAL developed a guide on administrative mediation *Promoting mediation to resolve administrative disputes in Council of Europe member states*.[36] The document contains a section on definitions and principles, and attention is drawn to the novelties, namely the term "administrative mediation" as a type and a new classification of its forms (institutional, conventional and jurisdictional or para-jurisdictional), although it is noted that the mediation process is not specific to administrative disputes. The section on the benefits of mediation in administrative disputes focuses on the importance of establishing a dialogue and improving the quality of relations between citizens and public authorities (the state), brings citizens and the administration or authorities closer together, given that the parties to an administrative dispute are not on equal terms. Mediation is more accessible to citizens and facilitates communication between a citizen and a public authority to prevent the emergence of new conflicts.

The potential scope of mediation in administrative disputes is very broad and can cover all types of administrative disputes (contractual and liability disputes, but also disputes concerning legality) as well as those arising from town planning decisions or documents, such as when several people dispute a planning permit or document, which would not be resolved by legal proceedings, since these are not legal disputes in the *strict* sense. The same applies to social assistance disputes, which generally concern people in precarious situations who, above all, need clarifications of certain decisions that they are unable to understand. Mediation is also a very effective way of resolving disputes arising from contracts concluded

[36] CEPEJ (2022)11 of 7 December 2022, accessed June 16, 2023, https://rm.coe.int/cepej-2022–11-promoting-administrative-mediation-en-adopted/1680a95692.

by public bodies (contracts and concessions); between citizens and local authorities concerning the operation of local public services (water, electricity, internet access, etc.); between insured persons and social security bodies; between the administration and public servants, when the nature of these conflicts affects the normal functioning of the service; disputes requiring technical expertise (e.g., disputes between sports federations concerning the organization of sports events). Mediation is also proving to be an effective process for resolving difficulties related to the non-enforcement of court decisions by the administration. Undoubtedly, such a broad approach to the use of mediation to resolve administrative disputes is a progressive step in building partnerships between citizens and the state, a step that strengthens democracy.

The section on recommendations on measures that can be taken to promote the use of administrative mediation focuses on recommendations in three important "A-aspects," namely availability, accessibility, and awareness.

The aim of strengthening the availability of mediation in administrative disputes is to avoid conceptual ambiguities and be able to include all the existing mechanisms that meet the essential elements of successful mediation. It is also to choose the forms of institutional, jurisdictional or purely conventional mediation. The different forms of processes may coexist to improve efficiency. The document points out the need to develop a legal framework that clearly defines the rules and scope of mediation in administrative matters and that constitutes a common base for all types of administrative mediation and also to introduce mediation at the earliest possible stage, starting from the pre-trial (pre-litigation) phase. An important element is providing fora register of mediators who are qualified and specialized in resolving administrative disputes, given the availability of professionals in this field.

Financial support is an important factor to ensure the accessibility and development of mediation. The document contains provisions contributing to the training of mediation actors: judges, administrations, lawyers and people who are to become mediators, as well as ensuring that legal aid is accessible in all mediation procedures. Attention should be paid to two important aspects: establishing a link between court-administrative proceedings and the mediation, and developing procedural legislation on the suspension and interruption of the appeal and limitation periods.

As for awareness (consciousness) – the development of mediation is possible only if public authorities, courts, lawyers, and state-owned companies and all the actors involved have quality information on mediation. The fact is that public administration is still not quite ready for a dialogue with citizens; lawyers still do not sufficiently understand the essence of the mediation process and show a certain reluctance and distrust towards it, which, of course, hinders the spread of mediation. Therefore, social policy should provide for measures to widely disseminate the culture of mediation, such as information and communication campaigns for all mediation actors.

4. Administrative and Court-Administrative Mediation in Poland and Ukraine – Comparative Conclusions

There is no doubt that mediation is more in line with the nature of private law, where what matters is the autonomy of the will, the individual interests of the parties to the dispute, and the balance between them, as well as the adversariality or the principle of *volenti non fit iniuria*, derived from Roman times. However, it is an institution which combines the resolution of various types of disputes and therefore works "across" the boundaries between different branches of law and irrespective of the differences between them, but which at the same time emphasizes private elements in certain legal disputes. In the sphere of state and public administration, the presence of mediation is associated with the increasing role of the state and its bodies in social life, but at the same time with the democratization and the "flattening" of relations in contemporary society. This is why administrative and court-administrative mediation is recommended by the CoE (and the EU). Polish and Ukrainian legal systems are both supported by international and European regulations within this area.

However, it should be noted that there is still much to be done – both in the case of Poland and Ukraine. In spite of the promotion efforts, mediation, particularly administrative and court-administrative mediation, is not sufficiently used either by citizens, public authorities or judges. Suck lack of popularity is also coupled with the lack of legislative regulations facilitating, in particular, the referral of parties to mediation, as well as the lack of an information policy. All the factors create a rather unfavorable climate for spreading the culture of a civilized, amicable way of resolving administrative disputes.

The development of mediation in general and (court-)administrative mediation in particular in Poland and in Ukraine to some extent shows similarities and correlations in successes and challenges. We share the experience of being initially sponsored by Western donors (first the US then the EU) and then having grassroots evolution of mediation emerging from a growing civic society. In both countries, current legislation is favorable to the possibility of settling disputes at any stage of the judicial process, including enforcement proceedings, but mediation practice shows a certain reluctance. In Poland, however, the legislator followed social innovations up to the point when mediation is overregulated in some branches, while in Ukraine mediation was underregulated for a long time; proper regulation was delayed until a year before the war, which is naturally a suppressing factor in many areas of civic life.

In both legal systems, mediation covers a wide range of cases: disputes arising from criminal acts, disputes concerning civil and family, and – last but not least – disputes between state authorities or authorities and citizens. We also share common social and mental barriers to mediation development (such as: lack of knowledge, awareness and habit; social mentality which is not favorable to amicable dispute resolution and a lack of confidence in ADR institutions; a society-wide lack of trust, including trust in each other and in the potential mediator; the conviction of the litigants that their case will ultimately go to court anyway; lawyers' reluctance towards mediation due to misunderstanding of the nature of mediation or fear of losing financial remuneration; low rates of remuneration for mediators that render it a side occupation rather than a professional career) as well as the need to raise public awareness about mediation. In this sense, part of Polish experience can be useful to Ukraine, but this statement does not apply to the title matter, since Polish (court-)administrative mediation seems to suffer from the same barriers and imperfections in legislation.

Nevertheless, it worth pointing out that both legal systems are quite compatible with the CEPEJ guidelines examined and provide for inter-branch solutions (except for the fact that, as Ukrainian mediation is still not integrated into the judicial system, there is no unified register of mediators), even though Ukraine is mentioned in its provisions once and Poland – not at all. There is a legal notion and regulations for "administrative mediation" (although there is a lack of definition, which seems to be

preferably given at European level, just as in the case of commercial mediation) and there is, unquestionably, a wide range of mediation in administrative disputes that are of negotiable nature (but also – as mentioned in Guidelines – concerning the issue of legality). As for the three "A-aspects" – availability, accessibility and awareness, they make it possible to meet requirements such as: the coexistence of different forms of processes (mediation, conciliation, procedure of dispute resolution with the participation of a judge); the possibility of mediation at the earliest possible stage from the pre-trial (pre-litigation) phase; as well as training for mediation actors: judges, administrations, and lawyers. However, it is worth repeating that the public administration in both Poland and Ukraine is still not quite ready for a dialogue with citizens; lawyers still do not sufficiently understand the essence of the mediation process and show a certain reluctance towards it; additionally, there is a certain level of distrust, which, of course, hinders the development of (court-)administrative mediation.

The "law in books" in Poland and in Ukraine provides sufficient potential for administrative and court-administrative mediation, but, nonetheless, "law in action" presents difficulties and obstacles. The research of figures and numbers emerging from the statistics, which give an idea of the practice of administrative mediation and the difficulties encountered in its implementation, does not paint a very optimistic picture. In all probability, the requirement to "develop a legal framework that clearly defines the rules and scope of mediation in administrative matters" shall be implemented more fully.

References

"Vinnytsia District Administrative Court." Accessed March 10, 2023, http://voas.gov.ua/work/med-ats-ya/med-ats-ya-efektivne-vir-shennya-konfl-kt-v.

Federczyk, Wojciech. *Mediacja w postępowaniu administracyjnym i sądowo administracyjnym*. Warsaw: Wolters Kluwer, 2013.

Gmurzyńska, Ewa, and Rafał Morek, eds. *Mediacja. Teoria i praktyka*. Warsaw: Wolters Kluwer, 2014.

Judiciary of Ukraine. "Mediation Week in the Donetsk Administrative Court of Appeals." Accessed March 10, 2023. https://apladm.dn.court.gov.ua/sud9102/pres-centr/news/3889.

Kalisz, Anna, and Adam Zienkiewicz. *Mediacja sądowa i pozasądowa. Zarys wykładu*. Warsaw: Wolters Kluwer, 2014.

Kalisz, Anna. „Mediacja administracyjna i sądowoadministracyjna," *Państwo i Prawo*, no. 2 (March 2018): 19–39.

Kalisz, Anna. *Mediacja jako forma dialogu w stosowaniu prawa*. Warsaw: Difin, 2016.

Kyselova, Tatiana. *Integration of Mediation into Ukrainian Court System: Policy Paper (October 17, 2017)*. Council of Europe, Kyiv, 2017.

Maan, Bert, Remco van Rhee, Luiza Romanadze, Aliana Serhieieva, Svitlana Sergeyeva, and Volodymyr Rodchenko. "Mediation Gap Analysis Report." Pravo-Justice. Accessed March 10, 2023. https://www.pravojustice.eu/storage/app/uploads/public/5f7/435/116/5f743511604ec221015187.pdf.

Mayer, Bernard. "Facilitative mediation." In *Divorce and Family Mediation: Models, Methods, and Applications*, edited by Jay Folberg, Ann L. Milne, and Peter Salem, 29–52. London: Routledge, 2004.

Mazaraki, Nataliya. "Mediation in Ukraine: problems of theory and practice." *Foreign Trade, Economics, Finance, Law* 84, no. 1 (January 2016): 92–100. Accessed June 16, 2023. http://journals.knute.edu.ua/foreign-trade/article/view/533.

Ministerstwo Sprawiedliwości. "Dane statystyczne dotyczące mediacji." Accessed March 10, 2023. https://www.gov.pl/web/sprawiedliwosc/dane-statystyczne--dotyczace-mediacji.

Plucińska-Nowak, Martyna. *Status i oblicza mediacji w społeczeństwie polskim*. Poznań: Wydawnictwo UAM, 2021.

Płeszka, Krzysztof, Janina Czapska, Michał Araszkiewicz, and Michał Pękala. *Mediacja. Teoria, normy, praktyka*. Warsaw: Wolters Kluwer, 2017.

Rochowicz, Paweł. "Klapa mediacji, ale uproszczenia działają – resort rozwoju ocenia wprowadzone procedury." Prawo.pl. Accessed March 10, 2023. https://www.prawo.pl/samorzad/uproszczenia-procedur-administracyjnych-nie-zawsze-dzialaja,516368.html.

Rostovska, Karyna, Nataliia Hryshyna, Olesia Kaidash, and Marharyta Syromiatnikova. "Mediation as a Means to Resolve Administrative Disputes: An Appraisal of the Historical and Legal." *Journal of International Legal Communication* 1, no. 1 (June 2021): 197–204.

Sydelnikov, Oleksander. "The Institution of conciliation of the parties in administrative proceedings." Abstract of a dissertation for the degree of Candidate of Law. https://library.nlu.edu.ua/POLN_TEXT/AVTOREF_2017/Sydelnikov_2017.pdf.

Tabernacka, Magdalena. *Negocjacje i mediacje w sferze publicznej.* Warsaw: Wolters Kluwer, 2018.

Tatiana Tsuvina, "Introduction of the Institute of Court Mediation as a Promising Area for Reforming the Civil Procedure Legislation of Ukraine." In *Ukraine on the way to Europe: reform of civil procedural legislation. 36. scientific works. Materials of the International Scientific and Practical Conference (Kyiv, 7 July 2017)*, edited by I.O. Izarova and R.Y. Khanyk-Pospolitak, 195–200. Kyiv: Dakor Publishing House, 2017. https://dspace.nlu.edu.ua/bitstream/123456789/12731/1/Cuvina_195–200.pdf.

The Supreme Administrative Court. "Annual Reports." Accessed March 10, 2023. http://www.nsa.gov.pl/sprawozdania-roczne.php.

The Supreme Administrative Court. "Centralna Baza Orzeczeń Sądów Administracyjnych." Accessed March 10, 2023. https://orzeczenia.nsa.gov.pl.

Tsuvina, Tatiana. "National Mechanisms of the Enforcement of Agreements Resulting from Mediation: EU Experience and Ukrainian Perspectives." *Problems of Legality*, no. 158 (2022): 110–123. https://doi.org/10.21564/2414-990X.158.264998.

United Nations. "UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018." Accessed March 10, 2023. https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation.

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ADR in Sport on the Example of Association Football in Poland and Ukraine

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Abstract: The subject of this article is the use of ADR in sports disputes in association football under the Polish and Ukrainian law. Professional and amateur sport generates various types of disputes related to both disciplinary and civil cases, an example of which may be disputes arising during the execution of contracts binding players and football clubs. In the first part, the scope of disputes that are subject to ADR in association football is outlined. The next part presents legal solutions adopted under the Polish law in this respect, of which the activity of the Football Arbitration Court of the Polish Football Association is a particular example. The last chapter is devoted to the Ukrainian perspective on the resolution of disputes in association football.

1. Introduction

Alternative dispute resolution methods are a commonly known tool for resolving legal disputes which is widely applicable in civil, labor, and criminal law cases. Because of their advantages,[1] they are increasingly used in

[1] For more information on the advantages and disadvantages of sports arbitration, see: Andrzej Wach, "Zalety i wady arbitrażu sportowego," in *System prawa handlowego. Arbitraż handlowy*, vol. 8, ed. Andrzej Szumański (Warsaw: C.H. Beck, 2010), 837–839.

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disputes of a particular type, including sports law disputes,[2] which is related to their specific nature, due to which they can range from civil disputes concerning the performance of a sports contract to issues related to disciplinary liability of players and sports officials.[3]

Being one of the world's most popular sports, association football has an extensive organizational structure at the global, regional and national levels. This is also reflected by the large number of internal legal instruments governing the disciplinary responsibility, the organization of sports competitions and, finally, issues related to the rights and obligations of the players and clubs themselves. This often leads to disputes which are attempted to be resolved using union procedures.

The specific nature of sports disputes lies in the autonomy of sports associations and the specific rules of participation in the structures of a particular sports association. Membership in these structures is voluntary, however one needs to comply with the rules of a given sports association, also in terms of dispute resolution, to actually engage in sports at the professional or amateur level.

The resolution of sports disputes is particularly important in the case of international competitions or the organization of the Olympic Games. At the global level, the primary institution set up to settle sports disputes is the Court of Arbitration for Sport in Lausanne (CAS).[4] Individual sports

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2 For the nature of disputes in the field of sport, see: Eligiusz Jerzy Krześniak, "Wybrane elementy z problematyki rozstrzygania sporów w obszarze sportu na drodze arbitrażu," in *Usus magister est Optimus. Rozprawy prawnicze ofiarowane Profesorowi Andrzejowi Kubasowi*, ed. Barbara Jelonek-Jarco, Rafał Kos, and Julita Zawadzka (Warsaw: C.H. Beck, 2016), 696–698.

3 Sports disputes also aply to e-sport, see: Łukasz Klimczyk, "E-sport – odpowiedzialność dyscyplinarna i rozstrzyganie sporów w aspekcie krajowym i międzynarodowym," in *E-sport. Aspekty prawne*, eds. Łukasz Klimczyk and Michał Leciak (Warsaw: C.H. Beck, 2020), 115–123. On the place of e-sport in the traditional dispute, see: Michał Biliński, "Problemy prawne działalności z zakresu e-sportu," in *E-sport. Aspekty prawne*, eds. Łukasz Klimczyk and Michał Leciak (Warsaw: C.H. Beck, 2020), 4–8.

4 See: Paweł Cioch, "Trybunał Arbitrażowy ds. Sportu w Lozannie," *Kwartalnik ADR. Arbitraż i Mediacja* 8, no. 4 (2009): 72–88; Elżbieta Bogucka and Piotr Nowaczyk, "Sąd Arbitrażowy przy Krajowej Izbie Gospodarczej na tle najważniejszych instytucji arbitrażowych w Europie," *Kwartalnik ADR. Arbitraż i Mediacja* 14, no. 2 (2011): 10; Eligiusz Jerzy Krześniak, "The Court of Arbitration for Sport at the Polish Olympic Committee v The Court of Arbitration for Sport (CAS) – Background, Powers and Authority," *Arbitration Bulletin.*

associations autonomously regulate their internal dispute resolution procedures, FIFA being an example of this.[5] Certain countries have established national or regional institutions to resolve disputes at the national or local level.

Despite the increasing popularity of amicable dispute resolution and the high level of interest in sports, the issue of sports dispute resolution has not been the subject of a significant analysis in legal sciences. Taking the prospect of the development of ADR into consideration, in particular sports arbitration, it is reasonable to present the basic legal solutions in this field. In order to provide a broader context for the issue being discussed, a comparative approach in the form of an analysis of the basic sports law regulations in this area in Poland and Ukraine will be employed.

The purpose of this study is to demonstrate that alternative dispute resolution methods are used to resolve sports disputes on the example of association football. In the first chapter, the analysis deals with the range of disputes in football that can be subject to ADR. The next section presents the dispute resolution as governed by the Polish law, in particular in the operations of the Polish Football Association. The last chapter focuses on the legal regulation of the amicable resolution of football disputes against the background of Ukrainian solutions.

2. The Scope of ADR in Association Football

The discussion should start from outlining the scope of the subject and analyzing the disputes resolved using alternative methods in association football. Experience has shown that both civil law claims and issues concerning disciplinary liability are the subject of sports disputes. While the use

Young Arbitration, no. 24 (2016): 200–203; Jakub Tartak, "Alternatywne metody rozwiązywania sporów w świecie sportu na przykładzie działania sądu koncyliacyjnego w Lozannie," *Forum Prawnicze* 52, no. 2 (2019): 54–64; Andrzej Wach, "Sportowe sądownictwo polubowne," *Biuletyn Arbitrażowy*, no. 4 (2007): 74–76; Rafał Piechota, "Pozasądowe formy rozwiązywania sporów sportowych," *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego* 4, (2006): 36–45; Magdalena Jaś-Nowopolska, "Międzynarodowy sąd arbitrażowy – CAS," in *Arbitraż sportowy*, eds. Michał Biliński and Magdalena Jaś-Nowopolska, and Olga Zinkiewicz (Warsaw: C.H. Beck, 2019), 69–101.

5 For dispute resolution within FIFA, see: Eligiusz Jerzy Krześniak, "Prawne mechanizmy zabezpieczenia realizacji zasady autonomii sportu na przykładzie struktury i sposobu funkcjonowania Międzynarodowej Federacji Piłki Nożnej (FIFA)," *Przegląd Prawa Handlowego*, no. 2 (2016): 17–20.

of ADR in the former case seems natural and uncontroversial, using out-of-court methods in the case of disciplinary proceedings may raise some doubts. In view of these doubts, it should be pointed out that the jurisdiction of common courts is excluded in the case of disciplinary disputes and that these disputes can be settled by internal bodies expressly under regulations on the functioning of these entities as exemplified by the provisions of the Polish Sports Act.[6] Hence, it must be emphasized that the internal procedure for resolving disciplinary disputes does not violate the constitutional right to a trial.[7]

Moving on to the presentation of the scope of the subject matter of sports disputes that can be the subject of amicable methods, it should be pointed out that the doctrine identifies five categories of disputes: civil law disputes, disciplinary disputes,[8] strictly sports disputes, administrative and financial disputes and inter-institutional disputes.[9]

Undoubtedly, civil disputes that arise from contractual claims, both related to contracts between sports clubs and players, as well as sponsorship, advertising or television rights contracts, are particularly relevant from the perspective of the sports law.[10] Issues related to disputes over infringement of personal rights, membership in a sports association or employment issues may also arise in this area.

The second major group of disputes are disciplinary disputes. They constitute an important part of the jurisprudential activity of the jurisdictional bodies of trade unions. A particular subject of disciplinary responsibility are cases involving the use of doping by athletes.[11] However, these types of disputes are not the domain of the amicable dispute resolution

6 Article 45b of the Act on Sport of June 25, 2010, Journal of Laws 2022 item 1599 – hereinafter Polish Sports Act.

7 Court of Appeal in Warsaw, Judgement of June 27, 2018, Ref. No. VII AGa 386/18, Legalis no. 1874700.

8 For disciplinary liability, see: Piotr Sławicki and Paweł Sławicki, "Odpowiedzialność dyscyplinarna w sporcie w świetle nowej ustawy," *Państwo i Prawo* 67, no. 4 (2012): 67–77.

9 Andrzej Wach, *Alternatywne formy rozwiązywania sporów sportowych* (Warsaw: LIBER, 2005), 52.

10 Ibid.

11 For changes in the settlement of doping-related disputes, see: Andrzej Wach, "Ewolucja w zakresie trybu rozstrzygania sporów dopingowych," *Przegląd Sądowy*, no. 5 (2022): 27–41. For doping in e-sports, see: Michał Rynkowski, "Prawne problemy dopingu

methods, which is highly important in terms of sports law. Consequently, they can be subject to an arbitration procedure, the best example of which is the activity of the Court of Arbitration for Sport in Lausanne. At this point, it should be pointed out that the disciplinary disputes are linked to disputes of a strictly sports nature which concern violations of technical rules relating to the course of a sports competition. Essentially, they are the subject of proceedings before bodies operating within the structures of a specific sports association, an example of which are the disciplinary committees operating in provincial football associations in Poland, usually associated with the assessment of the disciplinary liability of a person who has breached sports rules. Hence, these kinds of disputes are subject to amicable methods to the same extent as disciplinary disputes.

Disputes of an administrative nature or competence-related disputes, in the scope of jurisdiction of individual bodies, are resolved in the course of relevant proceedings.[12] It is not excluded that they will be subject to arbitration or mediation proceedings, however, due to the framework of this study, they remain outside the scope of interest.

3. ADR in Association Football under Polish Law

The basic legal act governing the sports law in Poland is the Sports Act. It sets out the principles for practicing and organizing sports.[13] In detail, this regulation covers provisions concerning sports clubs and associations,[14] rules of operation of Polish sports associations,[15] supervision over Polish sports associations,[16] rules of support of the national Olympic movement[17] and of sports by public authorities,[18] safety rules in sports,[19] professional qualifications in sports[20] and penal provisions related to infringements of sports

w e-sporcie," in *E-sport. Aspekty prawne*, eds. Łukasz Klimczyk and Michał Leciak (Warsaw: C.H. Beck, 2020), 107–111.

12 See: Wach, *Alternatywne formy rozwiązywania sporów sportowych*, 54–60.

13 Article 1 of the Polish Sports Act.

14 Articles 3–6 of the Polish Sports Act.

15 Articles 7–15 of the Polish Sports Act.

16 Articles 16–23 of the Polish Sports Act.

17 Articles 24–26 of the Polish Sports Act.

18 Articles 27–36 of the Polish Sports Act.

19 Articles 37–38 of the Polish Sports Act.

20 Article 41 of the Polish Sports Act.

law.[21] As far as the subject of this study is concerned, the legal solutions contained in Chapter 9A, "Disciplinary responsibility and dispute resolution in sports", are of particular interest.[22]

The Polish legislator has assigned a fundamental role in resolving sports disputes to the Court of Arbitration for Sport of the Polish Olympic Committee.[23] The Court is a permanent arbitration court operating under the rules set out in the provisions of the Act of November 17, 1964 – Code of Civil Procedure,[24] but it is not a court exercising justice in the constitutional sense.[25] The proceedings are organized and held and fees and costs of the proceedings are incurred as set out in the statute of the Court adopted by the Board of the Polish Olympic Committee.[26]

The Court is composed of 24 arbitrators appointed by the Board of the Polish Olympic Committee for a 4-year term of office.[27] An arbitrator of the Court may become a person who: 1) enjoys full civil rights; 2) is of impeccable integrity and by the record of his or her conduct gives a guarantee of proper performance of the function of arbitrator; 3) has not been convicted by a final and binding ruling for an intentional offence or an intentional fiscal offence; 4) has a university degree in law and has passed a judge's, prosecutor's, solicitor's, barrister's or notary's exam or holds

21 Articles 46–52 of the Polish Sports Act.

22 Art. 45a–45e of the Polish Sports Act.

23 Article 45a(1) of the Polish Sports Act; the original version of the Sports Act did not contain a regulation concerning the Court of Arbitration for Sport of PKOl [Polish: Polish Olympic Committee]. See: Paweł Cioch, "Rozstrzyganie sporów sportowych w świetle ustawy o sporcie," *Kwartalnik ADR. Arbitraż i Mediacja* 14, no. 2 (2011): 20–24.

24 Article 45a(2) of the Polish Sports Act. See: Michał Biliński, "Stałe sądy arbitrażowe w Polsce," in *Arbitraż sportowy*, eds. Michał Biliński, Magdalena Jaś-Nowopolska, and Olga Zinkiewicz (Warsaw: C.H. Beck, 2019), 104–105.

25 Polish Supreme Court, Judgement of December 18, 2014, Ref. No. III PK 47/14, OSNP Journal 2016 No. 7, Pos. 85.

26 Article 45a(8) of the Polish Sports Act. See: the Statute of the Court of Arbitration for Sport of the Polish Olympic Committee adopted by a resolution of the Board of the Polish Olympic Committee on June 20, 2017, accessed June 13, 2023, https://www.trybunalsport.pl/userfiles/download/14_1.pdf – hereinafter the Statute of the Court of Arbitration for Sport of PKOl.

27 Article 45a(4) of the Polish Sports Act. See: Marek K. Kolasiński, "Bezstronność i niezależność sportowych sądów polubownych," *Państwo i Prawo* 76, no. 6 (2021): 69.

a degree of a Doctor of Science in Law.[28] The term of office of an arbitrator of the Court expires in the event of 1) death; 2) resignation from office; 3) illness making it permanently impossible to perform the function; 4) conviction by a final and binding ruling for an intentional offence or an intentional fiscal offence; 5) a final and binding ruling depriving one of public rights as a punitive measure; 6) limitation or loss of legal capacity.[29]

The subject matter of the Court's proceedings includes cases concerning the review of disciplinary decisions[30] as well as other cases that may be subject to proceedings before common courts, such as labor courts.[31] In order to initiate proceedings before the Arbitration Court, it is necessary to draw up an arbitration clause[32]; however, regardless of the drawing up of such a clause, the Court resolves disputes arising from appeals against final decisions in disciplinary cases.[33] As regards the modes of proceedings before the Court, the Court conducts proceedings: a) in the arbitration mode; b) as a dispute resolution body.[34] One is not entitled to file a complaint to the Court in cases concerning the technical rules of the game.[35]

A complaint may be filed to the Court by a party to the proceedings or – under the rules applicable in a given association – by other entities.[36] A complaint is submitted to the Court within 14 days from the date of delivery of the decision.[37] An entry fee is paid for a complaint filed to the Court, the amount of which may not be higher than twice the average monthly

28 Article 45a(5–6) of the Polish Sports Act.

29 Article 45a(7) of the Polish Sports Act.

30 Article 45a(3) of the Polish Sports Act.

31 See: Eligiusz Jerzy Krześniak, "Specyfika arbitrażu sportowego i przydatność stosowanych w nim reguł przy konstruowaniu regulaminów innych sądów polubownych," *Przegląd Prawa Handlowego*, no. 7 (2017): 27.

32 See: Court of Appeal in Warsaw, Judgment of June 27, 2018, Ref. No. VII AGa 386/18, Legalis no. 1874700.

33 Article 1(2) of the Statute of the Court of Arbitration for Sport of PKOl; it is pointed out that this is an example of compulsory arbitration by virtue of the act, see: Karol Wach, "Konstrukcja arbitrażu przymusowego," *Przegląd Prawa Handlowego*, no. 6 (2018): 28.

34 Article 27 of the Statute of the Court of Arbitration for Sport of PKOl.

35 Article 45c(3) of the Polish Sports Act.

36 Article 45c(1) of the Polish Sports Act.

37 Article 45c(2) of the Polish Sports Act.

remuneration for work in the national economy in the previous year announced by the President of Statistics Poland.[38]

The Court may overturn a disciplinary decision of a Polish sports association and send the case back for reconsideration if it is necessary to conduct an evidentiary hearing in whole or in substantial part to resolve the case.[39] One may file a cassation appeal against a disciplinary ruling of the Court to the Supreme Court in the event of a gross breach of the law or obvious injustice of the ruling.[40] The cassation appeal is lodged through the Court within 30 days from the date of delivery of the ruling with the statement of the grounds for judgement to the applicant.[41] The Court forwards the cassation appeal within 14 days from the date of its receipt together with the case file to the Supreme Court.[42] The Supreme Court hears the cassation appeal against the Court's ruling under the rules provided for in the Code of Civil Procedure.[43]

The Court of Arbitration for Sport of PKOl is an arbitration court with jurisdiction over sports disputes concerning both association football and other sports activities. An example of an autonomous arbitration court whose activity is limited to matters related to association football is the Football Arbitration Court[44] which is a permanent arbitration court operating within the Polish Football Association.[45] It is appointed to hear any property disputes or non-property rights disputes that may be the subject of settlement, including those concerning the contractual stability of players, as well as complaints against final decisions of the Appeals Committee

38 Article 45c(4) of the Polish Sports Act.

39 Article 45d(1) of the Polish Sports Act.

40 Article 45d(2) of the Polish Sports Act.

41 Article 45d(3) of the Polish Sports Act.

42 Article 45d(4) of the Polish Sports Act.

43 Article 45d(5) of the Polish Sports Act.

44 For more information on the historical formation of the Football Arbitration Court, see: Marek Kwiecień, "Piłkarski Sąd Polubowny – część I," *Kwartalnik ADR. Arbitraż i Mediacja*, no. 1 (2021): 51–52.

45 § 1(2) of the Rules of the Football Arbitration Court, accessed June 13, 2023, https://www.pzpn.pl/public/system/files/site_content/635/3840-REGULAMIN%20PIŁKARSKIEGO%20SĄDU%20POLUBOWNEGO%20PZPN%20STAN%20PRAWNY%2023%2003%202021.pdf.

for Club Licenses of PZPN[46] on the refusal to grant a license, to suspend it or revoke it – arising from the practice, organization, popularization and development of association football as a sport, which may be settled in the course of arbitration proceedings under the statutes or rules of FIFA, UEFA and PZPN.[47] Players and football clubs operating in the professional football sector may bring separately asserted claims to the Football Arbitration Court concerning the conclusion, determination of the existence, validity, performance and termination of a professional football contract, other non-property claims concerning the assurance of contractual stability and the solidarity mechanism as well as property claims asserted along with them.[48]

The competences of the Football Arbitration Court include, in particular, cases concerning: a) property relationships existing between players, clubs, sports associations and other sports organizations and individuals under the civil law, including those arising from membership, licensing and other relationships related to the qualification of entities to compete in the sport of association football; b) the determination of the amount of compensation for the training or promotion of a player in relation to a change of club affiliation (permanent or temporary); c) disputes concerning the conclusion, determination of the existence, validity, performance or termination of professional or amateur contracts of football players; d) sponsorship, management and agency contracts in the sport of association football; e) contracts between organizers of football events and their partners specialized in the sale of television, advertising and promotion rights; f) all other contracts concluded and performed in connection with the organization and execution of football competitions; g) contracts with technical sponsors concluded in connection with the practice of association football; h) contracts for specific work, mandate contracts or contracts for provision of services under art. 750 of the Civil Code concluded with football coaches and instructors and other entities of the sports movement, including self-employed coaches; i) insurance in the sport of association football; j) requests to determine the existence or non-existence of a legal

46 PZPN – Polski Związek Piłki Nożnej [English: Polish Football Association].

47 § 4(1) of the Rules of the Football Arbitration Court.

48 § 4(2) of the Rules of the Football Arbitration Court.

relationship or right.[49] In principle, the Football Arbitration Court is not entitled to review decisions of sports organizations taken in disciplinary and intra-organizational proceedings provided for by union or club regulations.[50]

The Football Arbitration Court consists of 32 arbitrators appointed and dismissed by the Board of PZPN.[51] The Board of PZPN appoints the Chairman, Vice-Chairman, Secretary and 2 members of the Presiding Committee of the Court, one of whom is recommended by the community of league clubs and the other by the community of league players, followed by 9 arbitrators, each proposed by the community of league clubs, the community of league players and the Chairman of the Court.[52] The term of office of the Football Arbitration Court is 4 years and it is equal to the term of office of the Board of PZPN.[53] Arbitrators may be reappointed for further terms.[54] A member of the Arbitration Court cannot be a state judge, however, this does not apply to retired judges.[55] The Arbitration Court and the Adjudication Panel perform the activities related to the arbitration proceedings with due diligence. They should counteract the protraction of the proceedings and strive to ensure that the settlement is made at the first meeting, if possible without detriment to the clarification of the case, and that the ruling is effective and enforceable.[56]

In principle, the three-member Adjudication Panels are responsible for the recognition and settlement of disputes submitted to the jurisdiction of the Arbitration Court.[57] Disputes are subject to resolution by a single arbi-

49 § 4(3) of the Rules of the Football Arbitration Court.

50 § 5(1) of the Rules of the Football Arbitration Court. See: Adam Makosz, "Spory klubów i zawodników rozstrzygnie piłkarski sąd," *Gazeta Prawna*, October 4 (2011), accessed February 27, 2023, https://prawo.gazetaprawna.pl/artykuly/553013,spory-klubow-i-zawodnikow-rozstrzygnie-pilkarski-sad.html.

51 § 11(1) of the Rules of the Football Arbitration Court.

52 § 11(2) of the Rules of the Football Arbitration Court.

53 § 11(5) of the Rules of the Football Arbitration Court.

54 § 11(6) of the Rules of the Football Arbitration Court.

55 § 11(7) of the Rules of the Football Arbitration Court.

56 § 11(9) of the Rules of the Football Arbitration Court.

57 § 22(1) of the Rules of the Football Arbitration Court; for more information, see: Marek Kwiecień, "Piłkarski Sąd Polubowny – część II," *Kwartalnik ADR. Arbitraż i Mediacja*, no. 2 (2021): 34–35.

trator if: a) the value of the matter in dispute does not exceed PLN 10,000; b) the Presiding Committee of the Court has decided so due to a justified request of a party, which was not objected to by the other party within the time limit not exceeding 7 days; c) the case concerns the determination of the amount of the training compensation for a player, irrespective of the value of the matter in dispute.[58] In factually and legally complex cases, the Presiding Committee of the Court may decide that the case be considered by a three-member Adjudication Panel.[59] If a dispute is to be resolved by an Adjudication Panel composed of three arbitrators, it is to be formed in such a way that each party nominates one arbitrator and, in the event of an impediment, one substitute arbitrator, and the arbitrators so selected, excluding the substitute arbitrators, elect the Chairman of the Adjudication Panel (Umpire) from among the Chairman, Vice Chairman and Secretary of the Court or arbitrators selected at the request of the Chairman of the Court. Minutes of the selection of the Umpire are drawn up. They should be signed by the Secretary of the Court and, in his/her absence, by the Chairman of the Court, and be immediately attached to the case file.[60] A single-member Court is formed in such a way that the draw includes arbitrators recommended by the Chairman of the Court, taking into account their current workload regarding cases of this type (considered on a single-member basis), as at the date of the draw, so that the workload of the arbitrators after the draw is at a comparable level.[61]

Proceedings before the Court of Arbitration for Sport of PKOl and before the Football Arbitration Court are principally aimed at issuing a ruling binding the parties. This is because these are adjudication proceedings, the result of which is a resolution of a dispute between the parties. It must be emphasized that in sports disputes it is also possible to use amicable methods of dispute resolution, which aim at reaching a settlement. An example is the admissibility of mediation proceedings in cases subject to the jurisdiction of the Court of Arbitration for Sport of PKOl.[62] Furthermore, in

58 § 22(2) of the Rules of the Football Arbitration Court.

59 § 22(4) of the Rules of the Football Arbitration Court.

60 § 22(5) of the Rules of the Football Arbitration Court.

61 § 22(9) of the Rules of the Football Arbitration Court.

62 Article 1(7) of the Statute of the Court of Arbitration for Sport of the Polish Olympic Committee.

cases where settlement is permissible, the Arbitration Court should seek to reach an amicable settlement at every stage of the proceedings.[63] If the parties conclude a settlement, its substance is included in the minutes and signed by the parties.[64] At the request of a party, the Court may give the settlement the form of a judgement.[65]

Similarly, in the course of the proceedings before the Football Arbitration Court, a conciliation procedure may be carried out with the consent of the other party to reach a settlement between the parties.[66] The Chairman of the Court or another member of the Presiding Committee of the Court acting on his or her behalf is responsible for setting the date and conducting the conciliation procedure.[67] Should the parties fail to reach a settlement through the conciliation procedure, an adversarial procedure is initiated at the request of the claimant.[68] If the claimant does not submit a request for the initiation of adversarial proceedings within 7 days of the conclusion of the conciliation proceedings, the action is deemed not to have any legal effects on the filing of the action.[69] The settlement reached by the parties in the conciliation proceedings is recorded in the minutes and signed by the parties and the arbitrator conducting the proceedings. Every settlement agreement should end with the phrase: "Podpisano i zobowiązano się realizować w dobrej wierze obowiązki wynikające z niniejszej ugody." [English: Signed and agreed to perform the obligations under this settlement in good faith.].[70] If the parties have reached a settlement before the Arbitration Court, the Arbitration Court discontinues the proceedings.[71]

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63 Article 46(1) of the Statute of the Court of Arbitration for Sport of the Polish Olympic Committee.

64 Article 46(2) of the Statute of the Court of Arbitration for Sport of the Polish Olympic Committee.

65 Article 46(3) of the Statute of the Court of Arbitration for Sport of the Polish Olympic Committee.

66 § 56 of the Rules of the Football Arbitration Court; regarding the previous legal regulations, see: Tomasz Cyrol, "Mediacja sportowa w Polsce," *Kwartalnik ADR. Arbitraż i Mediacja* 20, no. 4 (2012): 27–28.

67 § 57 of the Rules of the Football Arbitration Court.

68 § 58(1) of the Rules of the Football Arbitration Court.

69 § 58(2) of the Rules of the Football Arbitration Court.

70 § 59(1) of the Rules of the Football Arbitration Court.

71 § 59(2) of the Rules of the Football Arbitration Court.

The above-mentioned provisions confirm the admissibility of the use of out-of-court methods of resolving sports disputes, with noticeable insufficient regulation of mediation methods, since special importance has been attributed to arbitration courts. Undoubtedly, the specific nature of disputes arising in association football speaks in favor of delegating them to arbitration courts, however, an increased role of mediation can be reasonably argued for both at the pre-arbitration stage and after the initiation of proceedings before an arbitration court.

4. ADR in Association Football under Ukrainian Law

Each sports association, regardless of the type of sport, has its own system of sports dispute resolution bodies. In the case of professional football in Ukraine, the system of dispute resolution bodies is currently provided for in the Charter of the Public Association "Ukrainian Association of Football"[72] in section 11 "Implementation of justice in football," where such football judicial bodies as the UAF Control and Disciplinary Committee[73] and the UAF Appeals Committee[74] are listed, and the UAF Dispute Resolution Chamber[75] is established as a body separate from the football justice bodies under the aforementioned Charter.

The UAF Control and Disciplinary Committee[76] hears and settles cases as a first instance authority and directly supervises other authorities' decisions and their implementation. The CDC is elected from among 7 persons.[77] It monitors the compliance of persons involved or working in association football with Ukrainian legislation and the UAF statutory and regulatory documents as well as investigates issues related to violations thereof. Furthermore, it imposes disciplinary sanctions for violations of statutory and regulatory documents when it is not under the jurisdiction

72 Charter of the Public Association "Ukrainian Association of Football", accessed June 13, 2023, https://uaf.ua/files/Статут%20УАФ%202020.pdf – hereinafter UAF.

73 UAF, "Control and Disciplinary Committee," accessed June 13, 2023, https://uaf.ua/about-uaf/justice/2.

74 UAF, "Appeals Committee," accessed June 13, 2023 , https://uaf.ua/about-uaf/justice/4.

75 UAF, "UAF Chamber of Dispute Resolution," accessed June 13, 2023, https://uaf.ua/about-uaf/justice/3.

76 Hereinafter – ADC.

77 Article 50 of the UAF Charter.

of another body and determines the presence or absence of facts of legal significance.[78]

The exclusive competence of the CDC as the body of first instance includes the following:

1) matters relating to the settlement of cases within the jurisdiction of the Bodies where such matters concern football activities;
2) on its own initiative, it may commence and examine disciplinary proceedings and impose disciplinary sanctions for infringements which have not come to the attention of the referees and of which the CDC has become aware from publicly accessible sources (television broadcasts, video transmissions, statements made by referees, players, coaches and other persons involved or working in association football etc.). Such proceedings may be commenced within seven days following the day on which the CDC became aware of facts indicating a possible infringement;
3) giving an opinion on a referee's decision to impose a disciplinary sanction in terms of the legal consequences of such a decision and only if such a decision has resulted in an evident error (i.e. misidentification of the football player on whom the disciplinary sanction has been imposed; continued participation in a match by a football player who has received a second yellow card (in one match) or a red card; wrongful exclusion of a player for a second yellow card (in one match) in cases where it was the first yellow card). All other decisions of the referee are final. The legal effects of a review of the referee's decision only apply to the future and have no effect on the course and results of the match during which it was made. Issues covered by this clause are examined subject to the expert opinion of the UAF Referees Committee. Matters relating to the interpretation of the current IFAB Laws of the Game are not subject to examination by the CDC;
4) extension of a match suspension that is automatically triggered by removal from the football field;
5) imposing of additional disciplinary sanctions (with the exception of a personal penalty imposed by the referee).[79]

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78 UAF, "Article 41 of the UAF Disciplinary Rules," accessed June 13, 2023, https://uaf.ua/files/biblioteka/referee/docs/Дисциплінарні%20правила%20УАФ.pdf.

79 Article 41 of the UAF Disciplinary Rules.

The CDC has the right to supervise the legality of the decisions taken by the Bodies of legal entities and may itself commence proceedings to review them in the event of non-compliance with the Rules. Such proceedings may be commenced within one month from the day on which the decision of the legal entity's body was taken. The Committee also controls and supervises the implementation of the decisions taken by the UAF Chamber and may independently commence proceedings in the case of their non-implementation or incomplete/improper implementation. All decisions taken by the UAF Chamber are communicated to the CDC within 10 days following the date when they were made. The decisions taken by the bodies of legal entities are communicated to the CDC within 10 days after the date of the CDC's call. The CDC approves settlement agreements concluded at the stage of implementation of the UAF Chamber's decisions.[80]

The Chairman of the CDC may independently take the following decisions (under a summary procedure without sending a decision to initiate the proceedings in the case and accepting explanations from the parties):

1) issue a warning;
2) suspend persons for up to and including three matches or for a maximum period of two months;
3) impose a mandatory monetary penalty of up to and including 25,000 hryvnyas;
4) settle disputes arising from objections brought against members of the CDC.[81]

The UAF Appeals Committee[82] gives its opinion on appeals against the decisions of the CDC and disciplinary bodies of legal entities.[83] The AC is elected from among 7 persons.[84] The Chairman of the AC may independently take decisions concerning:

1) appeals against an order to extend a disciplinary penalty;
2) settlement of disputes arising from objections brought against the AC members;

80 Ibid.
81 Article 42 of the UAF Disciplinary Rules.
82 Hereinafter – AC.
83 Article 43 of the UAF Disciplinary Rules.
84 Article 51 of the UAF Charter.

3) appeals filed for violation of procedural standards in a decision taken by the CDC on the non-implementation of decisions taken by the UAF Chamber or other football judicial bodies.[85]

An appeal may be made:
1) against a decision of the CDC and the disciplinary body of a given legal entity within 10 days of receiving the text of the decision with the justification;
2) against the decision of the CDC and the disciplinary body of a given legal entity to refuse to initiate proceedings, to suspend the proceedings, to close the proceedings in the case – within 5 days of receiving the appealed resolution.[86]

The UAF Dispute Resolution Chamber[87] is an independent body set up in accordance with the requirements of FIFA to examine and resolve disputes arising between football entities.[88] The Chamber is composed of 12 members.[89] The Chamber's decision may be appealed to the Court of Arbitration for Sport in Lausanne within 21 days of the party's receipt of the full specimen of the decision.[90] It has the exclusive competence to examine and settle disputes relating to football activities, in particular:
1) between professional clubs and football players and between professional clubs and coaches that relate to employment matters and contractual disputes arising from employment relationships;
2) between professional clubs regarding the implementation of transfer-related obligations;
3) between professional clubs and amateur clubs or children's and youth sports establishments concerning the calculation and payment of compensations for the training of football players and the solidarity mechanism;

85 Article 44 of the UAF Disciplinary Rules.
86 Article 80 of the UAF Disciplinary Rules.
87 Hereinafter – Chamber.
88 UAF, "Article 1 of the UAF Chamber Rules," accessed June 13, 2023, https://uaf.ua/files/biblioteka/Регламент–2018%20(style2).pdf.
89 Article 52 of the UAF Charter.
90 Article 60 of the UAF Chamber Rules.

4) between clubs and football players regarding any contractual disputes arising from contracts for the training of football players;
5) disputes involving intermediaries within the meaning of the Rules of the Federal Financial Supervision Service concerning the activities of intermediaries.[91]

Clubs, players, coaches and other football entities under the jurisdiction of the UAF whose rights and interests have been violated, while it is the exclusive competence of the Chamber to examine disputes between them, have the right of appeal to the Chamber. If the player or coach under the authority of another association, the Chamber is only competent to hear the dispute if all parties to that dispute consent to it being settled by the Chamber. Such consent may be given in writing or be tacit (if a party does not actually object to the dispute being settled by the Chamber). In the absence of a written agreement by the parties to the dispute, a party has the right to object to the Chamber's examination of the dispute within 10 days of becoming aware of the dispute pending in the Chamber. Failure to comply with this time limit deprives a party of the right to raise such an objection.[92]

Concluding the above, it should be pointed out that in Ukraine there is no definition of a sports dispute at the legislative level; when accepting an application, the courts determine precisely whether or not the dispute falls within the exclusive competence of the UAF. For example, one can point to the case of a confrontation between teams FC Karpaty and Volodymyr Hudima in which a player wanted to recover a debt of USD 73,800.00 from the club. Initially, the UAF Chamber made a decision in favor of Volodymyr Hudima and obliged the club to pay the debt while the CDC fined the club and closed the transfer window for not complying with the Chamber's decision. Then, FC Karpaty appealed to the Frankivskyi District Court of Law in Lviv with a lawsuit which the court fully upheld and overturned all the sanctions that had been previously imposed. Following the court's positive ruling, the club referred the complaint to the Chamber but the Chamber refused to re-examine the footballer's case based on

91 Article 2 of the UAF Chamber Rules.
92 Article 3 of the UAF Chamber Rules.

the newly discovered circumstances. Ultimately, the CAS in Lausanne in case no. 145/05/2014 in its decision found the refusal of the UAF PVA to be justified, the club's debt to the footballer was paid and the dispute was thus resolved.[93]

5. Conclusions

Undoubtedly, alternative dispute resolution methods are widely applicable, hence their use in the sports law may not come as a surprise. Based on the example of the solutions employed in association football in Poland and Ukraine, it can be pointed out that out-of-court dispute resolution can be successfully applied not only in disputes of a civil nature (e.g. with regard to claims arising from sports contracts), but also in disciplinary cases which constitute one of the core areas of activity of the jurisdictional bodies of sports associations. It can be noted that arbitration is of particular interest in both national and international aspects, although mediation proceedings are also a tool used in such disputes.

References

Biliński, Michał. "Problemy prawne działalności z zakresu e-sportu." In *E-sport. Aspekty prawne*, edited by Łukasz Klimczyk and Michał Leciak, 3–13. Warsaw: C.H. Beck, 2020.

Biliński, Michał. "Stałe sądy arbitrażowe w Polsce." In *Arbitraż sportowy*, edited by Michał Biliński, Magdalena Jaś-Nowopolska, and Olga Zinkiewicz, 103–114. Warsaw: C.H. Beck, 2019.

Bogucka, Elżbieta, and Piotr Nowaczyk. "Sąd Arbitrażowy przy Krajowej Izbie Gospodarczej na tle najważniejszych instytucji arbitrażowych w Europie." *Kwartalnik ADR. Arbitraż i Mediacja* 14, no. 2 (2011): 5–12.

Cioch, Paweł. "Rozstrzyganie sporów sportowych w świetle ustawy o sporcie." *Kwartalnik ADR. Arbitraż i Mediacja* 14, no. 2 (2011): 13–24.

Cioch, Paweł. "Trybunał Arbitrażowy ds. Sportu w Lozannie." *Kwartalnik ADR. Arbitraż i Mediacja* 8, no. 4 (2009): 71–94.

[93] See: Court of Arbitration for Sport, Award of November 24, 2017, LLC CPF Karpaty v. Volodymyr Hudyma, No. 2017/A/5133, available at https://jurisprudence.tas-cas.org/Shared%20Documents/5133.pdf.

Cyrol, Tomasz. "Mediacja sportowa w Polsce." *Kwartalnik ADR. Arbitraż i Mediacja* 20, no. 4 (2012): 25–32.

Jaś-Nowopolska, Magdalena. "Międzynarodowy sąd arbitrażowy – CAS." In *Arbitraż sportowy*, edited by Michał Biliński, Magdalena Jaś-Nowopolska, Olga Zinkiewicz, 69–101. Warsaw: C.H. Beck, 2019.

Klimczyk, Łukasz. "E-sport – odpowiedzialność dyscyplinarna i rozstrzyganie sporów w aspekcie krajowym i międzynarodowym." In *E-sport. Aspekty prawne*, edited by Łukasz Klimczyk and Michał Leciak, 115–123. Warsaw: C.H. Beck, 2020.

Kolasiński, Marek K. "Bezstronność i niezależność sportowych sądów polubownych." *Państwo i Prawo* 76, no. 6 (2021): 59–71.

Krześniak, Eligiusz Jerzy. "Prawne mechanizmy zabezpieczenia realizacji zasady autonomii sportu na przykładzie struktury i sposobu funkcjonowania Międzynarodowej Federacji Piłki Nożnej (FIFA)." *Przegląd Prawa Handlowego*, no. 2 (2016): 12–21.

Krześniak, Eligiusz Jerzy. "Specyfika arbitrażu sportowego i przydatność stosowanych w nim reguł przy konstruowaniu regulaminów innych sądów polubownych." *Przegląd Prawa Handlowego*, no. 7 (2017): 23–33.

Krześniak, Eligiusz Jerzy. "The Court of Arbitration for Sport at the Polish Olympic Committee v The Court of Arbitration for Sport (CAS) – Background, Powers and Authority." *Arbitration Bulletin. Young Arbitration*, no. 24 (2016): 199–209.

Krześniak, Eligiusz Jerzy. "Wybrane elementy z problematyki rozstrzygania sporów w obszarze sportu na drodze arbitrażu." In *Usus magister est Optimus. Rozprawy prawnicze ofiarowane Profesorowi Andrzejowi Kubasowi*, edited by Barbara Jelonek-Jarco, Rafał Kos, and Julita Zawadzka, 691–704. Warsaw: C.H. Beck, 2016.

Kwiecień, Marek. "Piłkarski Sąd Polubowny – część I." *Kwartalnik ADR. Arbitraż i Mediacja*, no. 1 (2021): 51–70.

Kwiecień, Marek. "Piłkarski Sąd Polubowny – część II," *Kwartalnik ADR. Arbitraż i Mediacja*, no. 2 (2021): 33–40.

Makosz, Adam. "Spory klubów i zawodników rozstrzygnie piłkarski sąd." *Gazeta Prawna*, October 4 (2011). Accessed February 27, 2023. https://prawo.gazetaprawna.pl/artykuly/553013,spory-klubow-i-zawodnikow-rozstrzygnie-pilkarski-sad.html.

Piechota, Rafał. "Pozasądowe formy rozwiązywania sporów sportowych." *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego* 4, (2006): 33–54.

Rynkowski, Michał. "Prawne problemy dopingu w e-sporcie." in *E-sport. Aspekty prawne*, edited by Łukasz Klimczyk and Michał Leciak, 107–111. Warsaw: C.H. Beck, 2020.

Sławicki, Piotr, and Sławicki, Paweł. "Odpowiedzialność dyscyplinarna w sporcie w świetle nowej ustawy." *Państwo i Prawo* 67, no. 4 (2012): 67–77.

Tartak, Jakub. "Alternatywne metody rozwiązywania sporów w świecie sportu na przykładzie działania sądu koncyliacyjnego w Lozannie." *Forum Prawnicze* 52, no. 2 (2019): 46–65.

Wach, Andrzej. *Alternatywne formy rozwiązywania sporów sportowych*. Warsaw: LIBER, 2005.

Wach, Andrzej. "Ewolucja w zakresie trybu rozstrzygania sporów dopingowych." *Przegląd Sądowy*, no. 5 (2022): 27–43.

Wach, Andrzej. "Sportowe sądownictwo polubowne." *Biuletyn Arbitrażowy*, no. 4 (2007): 73–78.

Wach, Andrzej. "Zalety i wady arbitrażu sportowego." In *System prawa handlowego. Arbitraż handlowy.* Vol 8, edited by Andrzej Szumański, 837–839. Warsaw: C.H. Beck, 2010.

Wach, Karol. "Konstrukcja arbitrażu przymusowego." *Przegląd Prawa Handlowego*, no. 6 (2018): 25–31.

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Do the Rules of Europe's Leading Institutional Arbitration Courts and the UNCITRAL Arbitration Rules Need to Be Revised? Assessment from the Perspective of 2023

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Abstract: While some issues (e.g. the principles of service, the expedited procedure for resolving cases and the admissibility of securing a claim before initiating proceedings) are regulated in a manner that satisfies the requirements of 2023, other issues (e.g. the rules of holding remote hearings or the consequences of failing to meet deadlines in arbitration, in particular the deadlines for issuing an award) would require a number of modifications and improvements. This suggests that a postulate should be presented for a broader discussion within the community – both in Poland and abroad – on the shape of the regulations in this area that would be the most comfortable for the parties to the proceedings, the arbitral tribunals and the arbitral institutions, while respecting the basic (universal) arbitration rules.

1. Preliminary Remarks

Recent years have doubtlessly been extremely unsettled. The world was shaken in late 2019 by the rapidly spreading Covid-19 pandemic and then – in February 2022 – by Russia's unprecedented aggression against Ukraine. The reality around us changed beyond recognition almost in the blink of an eye. While the course and effects of the pandemic can already be considered relatively predictable (at the beginning of 2023), the consequences of Russia starting the first war of such a scale in Europe in almost 80 years will remain unknown for a long time. However, it is already clear that

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the Russian invasion has not only caused tragedy and suffering for millions of innocent people in Ukraine, but has also destabilized markets, disrupted supply chains, prevented the appropriate performance of thousands of previously concluded contracts and caused a huge amount of economic turbulence.

All of these circumstances have a direct impact on the assertion of claims by parties to contractual relations and, therefore, also on the organization of both institutional and *ad hoc* arbitration courts. The broadly understood judiciary (encompassing both state and arbitration courts) has faced entirely new challenges that need to be dealt with in order to ensure that disputes are resolved as efficiently and as fairly as possible.

The adaptation of the state judiciary to the new challenges is a relatively long-term process because it requires not only the adoption and implementation of legislative changes, but also a change in the organization and functioning of the courts of all instances. However, the process of adaptation of the arbitration courts to the new challenges is much faster: it can often be sufficient to make only minor modifications to the rules of handling the proceedings by the arbitrator or the tribunal resolving the dispute. Meanwhile, even if modifications need to be made to the rules of the arbitration court, this can be done quickly, without a lengthy legislative process.

The objective of this article is to attempt to consider whether the UNCITRAL Arbitration Rules (which are the leading international regulations for dispute resolution by *ad hoc* arbitration courts) and the rules of selected institutional arbitration courts remain appropriate to the challenges that have arisen in recent years, or whether they need to be amended and supplemented. A positive answer to the latter question will, of course, also require the identification of the areas in which such changes are particularly important and urgent.

2. Subject matter of the article

This article presents an analysis of the UNCITRAL Arbitration Rules[1] and the rules of the leading European arbitration courts, namely the Rules of

[1] "UNCITRAL Arbitration Rules," United Nations, https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration.

the London Court of International Arbitration ("LCIA"),[2] the Rules of the International Court of Arbitration of the International Chamber of Commerce ("ICC"),[3] the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC")[4] and the Rules of the Deutsche Institution für Schiedsgerichtsbarkeit ("DIS"),[5] as well as the rules of the leading Polish institutional arbitration courts, i.e. the Lewiatan Court of Arbitration ("SAKL")[6] and the Court of Arbitration at the Polish Chamber of Commerce in Warsaw ("SAKIG").[7] The objective of this article is not to provide a detailed analysis of individual (all) provisions of each of these rules (as such a task would require the preparation of a separate monograph), but to attempt to identify key issues which play (or could play) a particularly important role in handling and resolving disputes in arbitration in accordance with these rules.

In the author's subjective view, it is primarily the following issues that should be included in this category: the principles of holding remote hearings, the principles of service of pleadings and procedural correspondence, the deadlines to be met by the parties to the arbitration proceedings (and the arbitral tribunal) and the consequences of failing to meet them, the principles of applying the expedited procedure, and the admissibility of requesting security for a claim before arbitration proceedings are initiated.

The choice of the key issues proposed above is, in fact, subjective (and is limited by the modest amount of space allocated to the article), which can consequently give rise to comments from other arbitration theorists or practitioners. The author's intention is for there to be as many

2 "LCIA Arbitration Rules," London Court of International Arbitration, https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx.

3 "Arbitration," International Chamber of Commerce, https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration.

4 "Arbitration Rules," Arbitration Institute of the Stockholm Chamber of Commerce, https://sccarbitrationinstitute.se/sites/default/files/2022–11/arbitrationrules_eng_2020.pdf.

5 "Arbitration," DIS. German Arbitration Institute, https://www.disarb.org/en/arbitration-and-alternative-dispute-resolution/arbitration.

6 "Rules of the Court of Arbitration," Court of Arbitration at the Confederation of Lewiatan, https://sadarbitrazowy.org.pl/en/arbitration/rules-of-the-court-of-arbitration.

7 "Rules," Court of Arbitration at the Polish Chamber of Commerce in Warsaw, https://sakig.pl/en/regulations-and-tariff/arbitration/rules.

such comments as possible because any modifications and improvements to the legal institutions provided for in the respective rules of arbitration should be preceded by the broadest possible discussion within the community.

3. Remote Hearings

In March 2020, together with the implementation of lockdowns throughout the world related to the spread of the Covid-19 pandemic, the whole arbitration world was confronted – virtually overnight – with the need to immediately change the organization of its arbitration proceedings, which resulted in the emergence of a number of procedural and organizational problems that were previously completely unknown in arbitration.[8] Although the change was not as painful as in the case of the ordinary courts, which – both in Poland and abroad – were usually unsuited to conduct proceedings in a procedure other than in the courtroom, it still required the rapid introduction of new systemic solutions.

Videoconferencing was already frequently used in arbitration proceedings, primarily in connection with holding organizational meetings (where participants agree on the procedure and details of the proceedings) and procedural meetings (at which selected procedural issues are resolved), whereas it was used far less frequently for holding hearings.[9] Meanwhile, the different from the customary and applied method of proceeding

8 See, among others: "Announcement of Particular Procedural Features for the Administration of Arbitrations in View of the Covid-19 Pandemic," DIS. German Arbitration Institute, https://www.disarb.org/fileadmin/user_upload/Ueber_uns/Second_Edition_-_DIS_Announcement_Particular_Procedural_Features_Covid-19.pdf, p. 1 et seq.; P. Sołowij, "Wpływ pandemii COVID-19 na fuknc jonowanie arbitrażu," in *Polski i amerykański wymiar sprawiedliwości w czasie i po pandemii Covid-19*, ed. (Toruń: , 2022), 15 et seq.; "2021 International Arbitration Survey: Adapting arbitration to a changing world," Queen Mary University of London, https://arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/; "International Arbitration in the Time of Covid-19: Navigating the Evolving Procedural Features and Practices of Leading Arbitral Institutions," Cleary Gottlieb Steen & Hamilton LLP, https://www.clearygottlieb.com/-/media/files/alert-memos-2020/international-arbitration-in-the-time-of-covid19.pdf.

9 Sabina Kubsik and Zbigniew Drzewiecki, "Rozprawy zdalne – nowa rzeczywistość polskiej i międzynarodowej praktyki arbitrażowej," *Monitor Prawniczy* (supplement), no. 20 (2020): 98–99.

required and requires the reconciliation of differing legal traditions (especially in international arbitration), as well as the unconditional assurance of equal treatment of the parties, so that the award does not then encounter difficulties in its later recognition or declaration of enforceability (cf., for instance, Article V, sec. 2 (b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York in 1958), and that there are no grounds for an action being filed later for its annulment (cf. Article 1206, para. 2, item 2 of the Polish Civil Procedure Code – CPC). In this light, both the existing regulatory framework in this respect in the individual institutional arbitration courts, as well as the scale of their possible (necessary) amendments need to be examined. At the same time, it should be emphasized that – as is sometimes aptly argued in the international literature – although the right to be heard (to present one's case) is one of the key principles of arbitration, it is not equivalent to the right to be heard in person.[10] In other words, it should therefore be assumed that the acceptance by the arbitration court (under the relevant provisions of the Rules) or by the arbitral tribunal (under the relevant order) that the hearing, or part thereof, will be conducted remotely does not limit the procedural rights of the parties to the proceedings in any way.

Article 28.4 of the UNCITRAL Arbitration Rules stipulates that "the arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference)." However, these Rules do not settle whether the physical presence of the parties and their attorneys is necessary throughout the proceedings (at the hearings) or whether hearings and sessions may be held remotely.

Article 32 of the SCC Rules has a relatively similar structure in this respect. Although Article 32.1 limits the purposefulness of holding a hearing in any proceedings ("a hearing shall be held if requested by a party, or if the Arbitral Tribunal deems it appropriate"), Article 32.2 stipulates that (if a hearing is ordered), "the Arbitral Tribunal shall, in consultation with the parties, determine the date, time and location of any hearing and shall

[10] See more in: Bjorn Arp and Edwin Nemesio, "The Practice of Virtual Hearings during Covid-19 in Investment Arbitration Proceedings," in *The Impact of Covid on International Disputes*, ed. Shaheeza Lalani and Steven Shapiro (The Hague: Brill, 2022).

provide the parties with reasonable notice thereof." It should be accepted on this basis that, since the arbitral tribunal is authorized to (among other things) freely specify the place of the hearing, it can also order the hearing to be held remotely (although this conclusion can give rise to doubts because of the reference in Article 32.2 *in fine* of the SCC Rules to the "location," and in the case of a remote hearing it is difficult to speak of a "location" *per se*).

A conservative legal solution has also been adopted in the ICC Rules, which, while allowing case management conferences to be held "through a meeting in person, by video conference, telephone or similar means of communication" (Article 24.4), do not allow the free choice of the form in which the case management proceedings are to be conducted (unless by consent of the parties – first sentence of Article 22.2). However, this regulation has been made slightly more flexible by the provision in Appendix IV, sec. f), which allows "using telephone or video conferencing for procedural and other hearings where attendance in person is not essential and use of IT that enables online communication among the parties, the arbitral tribunal and the Secretariat of the Court," as one of the case management techniques.

A different solution is adopted in Article 19.2 of the LCIA Rules, which states that:

> The Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, including its date, duration, form, content, procedure, time-limits and geographical place (if applicable). As to form, a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form).

Therefore, such a regulation does not, in principle, restrict the arbitral tribunal in conducting the arbitration as it deems fit (assuming that this is in compliance with the Arbitration Agreement).

In turn, the DIS Rules do not contain any provisions regarding this issue. However, given the regulation contained in Article 21.3 thereof (stating that "when the Rules are silent as to the procedure to be applied in the proceedings before the arbitral tribunal, such procedure shall be determined by agreement of the parties, in the absence of which the arbitral

tribunal in its discretion shall decide upon the procedure, after consultation with the parties"), it can be concluded that the arbitral tribunal is awarded a reasonably far-reaching right to freely shape the rules for conducting the proceedings. It should be accepted that – within this right – the arbitral tribunal may also consider it advisable to hold the hearings (or parts thereof) remotely, although, under no circumstances may this breach the equal treatment of the parties, including their right to be heard (Article 21.1 of the DIS Rules).

A similar solution is adopted in § 22.2 of the SAKL Rules, according to which "unless the parties agree otherwise, the arbitral tribunal shall conduct proceedings in accordance with the Rules and in such manner as it considers appropriate, provided that the parties should be treated with equality and each party is given an opportunity to present its case." This type of legal structure – as in the case of the regulation of the DIS Rules mentioned above – gives the arbitral tribunal extensive discretion with regard to the method of organizing the arbitration proceedings (and the rules for holding hearings).

A relatively archaic solution – compared to those analyzed above – is the regulation adopted in the SAKIG Rules. While these Rules do not contain provisions on the principles of holding remote hearings, they do contain the second sentence of Article 31.2, according to which "an organizational session may also be conducted using telecommunications." Consequently, it should be concluded that – *a contrario* – no other sessions (including a hearing) can be conducted remotely. Such a concept is also supported by an analysis of § 34 of the SAKIG Rules (which lays down the rules for holding a hearing), which only states that "the Arbitral Tribunal shall consider the dispute at a hearing," but does not specify the form in which the hearing should be held.

The above comparison of the rules on remote hearings adopted in the individual rules of the institutional arbitration courts leads to several conclusions. Firstly, in the current state of affairs, essentially none of the rules examined contain a comprehensive regulation of the issue in question. Secondly, basically none of the rules examined has been significantly modified (updated) so far with respect to the solutions adopted and applied before the Covid-19 pandemic. Thirdly, however, the Rules that grant (sanction) the arbitral tribunal the freedom as to the choice of the form

in which the proceedings are conducted (such as the LCIA Rules, the DIS Rules and the SAKL Rules) allow the proceedings (or their substantial part) to be conducted remotely.

In view of the above, it seems reasonable to formulate a proposal to make appropriate modifications to the Rules under review so that they not only directly allow (possibly – in the absence of the express objection of the parties) proceedings to be conducted remotely, but also lay down the detailed rules of conducting them, including technical and organizational solutions that ensure that they are conducted properly.[11] It appears that such a solution would relieve the arbitral tribunals of the burden of regulating this issue in detail every time (for each case handled), but would also ensure that the rules for resolving disputes before institutional arbitration courts would be made more flexible. A regulation of this kind would also prevent disputes on how the hearing is to be conducted (i.e. remotely or in person) in cases where there is no agreement in this respect between the parties to the proceedings, or between the parties and the arbitral tribunal.[12] It is also crucial for the arbitral tribunals to be provided with an appropriate set of instruments that will ensure a flexible approach to the expectations of the parties and the circumstances of the given case, and which could be appropriately used in individual cases.[13]

4. Principles of Service

The rapidly changing reality calls into question the advisability of maintaining the principles of service of pleadings and procedural correspondence in arbitration proceedings, which have been generally applied to date. While

[11] This applies, in particular, to ensuring that evidence from the testimony of witnesses is taken in such a way as to prevent third parties, who may be in contact with the witnesses, from influencing the content of their testimony. See more in: Małgorzata Judkiewicz, "Wady i zalety zdalnego postępowania arbitrażowego," *Biuletyn Arbitrażowy*, no. 6 (2020): 3 et seq. In contrast with the earlier preparation of the witness for testifying at a hearing, such a situation should be considered inadmissible. See also: Piotr Bytnerowicz and Emanuel Wanat, "Admissibility of Witness Preparation in Arbitration Proceedings – international and Polish perspectives," *Arbitration Bulletin*, *Young Arbitration*, no. 24 (2016): 38.

[12] See also the comments on this topic presented by: Kubsik and Drzewiecki, "Rozprawy zdalne," 107 et seq.

[13] Cf. Christopher Chinn, "Some Reflections on Arbitration Hearings in the Covid-19 Era," *Arbitration Bulletin*, no. 6 (2021): 4–5.

just a dozen or so years ago, pleadings had to be served by the parties and all awards and orders (including organizational orders) had to be served by the arbitral tribunal in the form of hard copies, increasingly more attorneys and arbitrators are currently reducing their use of printouts or abandoning it altogether. This trend is in line with the Campaign for Greener Arbitrations,[14] the signatory of which in Poland is the Lewiatan Court of Arbitration.[15]

In this light, the question arises as to whether the regulatory framework of the institutional arbitration courts is appropriately adapted to allow document flow to be exclusively electronic.[16] A general solution in this respect can be found in the UNCITRAL Arbitration Rules, in Article 17.1, which stipulates that:

> Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.[17]

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14 "Driving sustainable change in arbitration," Campaign for Greener Arbitrations, https://www.greenerarbitrations.com/.

15 "Sąd Arbitrażowy przy Konfederacji Lewiatan sygnatariuszem Green Pledge," Sąd Arbitrażowy przy Konfederacji Lewiatan, https://sadarbitrazowy.org.pl/blog/2021/04/sad-arbitrazowy-przy-konfederacji-lewiatan-sygnatariuszem-green-pledge/.

16 An award issued by an arbitration court, which – in order to enable the party (parties) to the arbitration to use it further – must be issued in paper form in any case, is outside the scope of this analysis.

17 In this context, attention is drawn in the literature to the fact that the arbitral tribunal is bound by the rules of arbitration agreed upon by the parties (including – as should be accepted – the principles of service), which is a right that exists at all times during the proceedings and not just until the arbitral tribunal is constituted; cf. Andrzej Szumański, in *Regulamin Arbitrażowy UNCITRAL. Komentarz,* eds. Piotr Nowaczyk, Andrzej Szumański, and Maria Szymańska (Warsaw: Wydawnictwo C.H. Beck, 2011), 273, nb. 16, together with the quotation therein of; Justyna Szpara and Maciej Łaszczuk, "Czy autonomia stron w ustalaniu reguł postępowania przed sądem polubownym jest ograniczona w czasie?," in *Księga pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie*, ed. Józef Okolski (Warsaw: Sąd Arbitrażowy, 2010), 280–292.

At the same time, according to Article 17.4 of the UNCITRAL Arbitration Rules, "all communications to the arbitral tribunal by one party shall be communicated by that party to all other parties. Such communications shall be made at the same time, except as otherwise permitted by the arbitral tribunal if it may do so under applicable law." Therefore, on this basis, it can be accepted that – if such an order (procedural order) is issued by the arbitral tribunal – service during the proceedings may be limited to electronic service. A similar solution is also provided for in the first sentence of Article 22.2 of the ICC Rules, which states that "in order to ensure effective case management, after consulting the parties, the arbitral tribunal shall adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties" – which also provides far-reaching discretion regarding the subject matter to the arbitration court.

A much more precise (and unambiguous, in terms of the principles of electronic service) regulation is contained in Article 4.1 of the LCIA Arbitration Rules, according to which:

> the Claimant shall submit the Request under Article 1.3 and the Respondent the Response under Article 2.3 in electronic form, either by email or other electronic means including via any electronic filing system operated by the LCIA. Prior written approval should be sought from the Registrar, acting on behalf of the LCIA Court, to submit the Request or the Response by any alternative method.

The LCIA Arbitration Rules therefore adopt the principle of electronic service as the prevailing principle, only allowing service in a different form in special circumstances and if the arbitral tribunal agrees.

A similar legal structure is contained in Article 4.1 of the DIS Rules, which provides that:

> all Submissions of the parties and the arbitral tribunal to the DIS shall be sent electronically, by email, or on a portable storage device, or by any other means of electronic transmission that has been authorized by the DIS. If electronic transmission is not possible, the Submission shall be sent in paper form.

Here, too, service in a form other than electronic was considered an exception to the generally accepted rule.

A different solution has been adopted in Article 5.2 of the SCC Rules, which states that "any notice or other communication shall be delivered by courier or registered mail, e-mail or any other means that records the sending of the communication." However, it should be accepted that – even in this case – the arbitral tribunal has the power to order the exchange between the parties of pleadings filed in the case exclusively in electronic form.

The most flexible solution can be considered that stipulated in § 3.1 of the SAKL Rules, according to which:

> any written communications, including requests, submissions, correspondence from or to the Lewiatan Arbitration Court or the Arbitral Tribunal, should be delivered in person or by registered mail or courier, by e-mail or by other means of remote communication, which make it possible to obtain a material proof of sending a letter. The Secretary General may order the delivery of all pleadings and correspondence in the proceedings only by electronic means.

A decidedly more traditional solution is adopted in the first sentence of § 11.6 of the SAKIG Rules, as it provides that "during the course of the proceeding, a party shall file a written communication with the Court of Arbitration with copies for the arbitrators and shall serve a copy of the written communication with enclosures directly on the opposing party." At the same time, however:

> the Arbitral Tribunal may order service of written communications during the course of the proceeding in some other way. More specifically, the Arbitral Tribunal may order that written communications be served additionally, or at the consent of the parties exclusively, by email. Service using telecommunications such as email or fax may be made only to the address indicated for such service" (§ 11.7 of the SAKIG Rules).[18]

[18] Electronic communication – as a supplementary form of communication during the proceedings – was widely used in international arbitration even before the Covid-19 epidemic. See more in: Rafał Morek, in *Regulamin Arbitrażowy Sądu Arbitrażowego przy KIG. Komentarz*, eds. Maciej Łaszczuk and Andrzej Szumański (Warsaw: C.H. Beck, 2017), 145, nb. 23 et seq.

The above analysis of the regulations adopted in the individual rules of the institutional arbitration courts with regard to the principles of service of submissions in the course of proceedings therefore indicates a rather diverse approach in this respect on the part of the individual arbitral institutions. However, the majority of the rules analyzed enable submissions to be limited to just the electronic form, although, in some cases (e.g. LCIA and DIS) this is the basic rule, whereas in other cases (e.g. SAKIG) such a solution constitutes a derogation from the principle of serving hard copies. Consequently, it should be accepted that – other than the presentation of a proposal to make the solutions adopted, e.g. in the SAKIG Rules, more flexible – the regulation under review does not require any significant changes and (while retaining the differences related to the specific nature of individual arbitral institutions) remains adapted to the conditions in 2023.[19]

5. Deadlines

The matter of deadlines is undoubtedly of fundamental importance in proceedings before the state courts, primarily for the parties to the proceedings and their attorneys (to a lesser extent for the court).[20] The possible failure to meet a deadline (either procedural or judicial) usually has unequivocally negative procedural consequences for the party that missed the deadline, and it is only possible to reinstate a deadline in special cases.

This aspect is somewhat less important in arbitration proceedings, primarily because of their de-formalization. Similarly, the priority in the case of proceedings before the arbitration courts is for the proceedings to end

[19] Although doubts have been raised in the literature as to the appropriateness of accepting the structure of admissibility of filing pleadings in electronic form, provided that they are later filed as hard copies (cf. Jan Gąsiorowski, "Ograniczenia, możliwości i funkcjonowanie sądownictwa powszechnego i stałych sądów polubownych w sprawach cywilnych podczas trwania epidemii w Polsce," *ADR. Arbitraż i Mediacja*, no. 2 (2020): 62), especially in light of the general (regardless of the conditions related to the Covid-19 epidemic) trend of allowing (also exclusively) electronic service, these doubts can hardly be considered justified.

[20] As rightly emphasized, the speed of the proceedings may even be considered the most attractive feature distinguishing arbitration from proceedings before state courts. See more in: Krzysztof Stefanowicz, in *Postępowanie przed sądem polubownym. Komentarz do Regulaminu Sądu Arbitrażowego przy Konfederacji Lewiatan*, ed. Beata Gessel-Kalinowska vel Kalisz (Warsaw: Wolters Kluwer, 2016): 519, nb. 1.

as quickly as possible,[21] which, however, may give rise to the temptation for arbitral tribunals, acting on the basis of the relevant rules of the institutional arbitration courts, not to observe the specified deadlines. Such practice can raise legitimate concerns, if only because of the associated risk of unequal treatment of the parties to the proceedings. The role of the arbitral tribunals is therefore to ensure that the proceedings are conducted in such a way that – also from this perspective – the procedural decisions made while resolving a case cannot later constitute the basis for challenging the award that has been issued, whether by way of a complaint submitted to a state court or a plea in proceedings for its recognition or the declaration of its enforceability.

An issue, as it seems, of even greater importance in this context is the question of the deadlines that are applicable to the arbitral tribunals (arbitrators) for ending the arbitration proceedings and for issuing an award in the case, as well as the consequences of the possible failure to meet them. The regulations on this – albeit highly varied – essentially contain all of the rules examined here.[22]

The UNCITRAL Arbitration Rules only set a deadline for issuing an award in expedited proceedings. Article 16.1 of the UNCITRAL Expedited Arbitration Rules requires that "the award shall be made within six months from the date of the constitution of the arbitral tribunal unless otherwise agreed by the parties." At the same time, "the arbitral tribunal may, in exceptional circumstances and after inviting the parties to express their views, extend this period of time. The extended period of time shall not exceed a total of nine months from the date of the constitution of the arbitral tribunal" (Article 16.2). The possible failure to meet the deadlines may only result in the case being considered in the course of the ordinary procedure.[23]

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21 Cf. more in: Marcin Asłanowicz, *Pozycja prawna arbitra w arbitrażu handlowym* (Warsaw: C.H. Beck, 2019), 55–56.

22 The exception is the LCIA Rules, which do not provide for a deadline for issuing an award (conducting the arbitration proceedings).

23 Cf. Article 16.3 of the UNCITRAL Expedited Arbitration Rules (according to which "if the arbitral tribunal concludes that it is at risk of not rendering an award within nine months from the date of the constitution of the arbitral tribunal, it shall propose a final extended time limit, state the reasons for the proposal, and invite the parties to express

The SCC Rules and the ICC Rules introduce a similar regulation, as, in proceedings conducted in accordance with them, an award should be issued within 6 months. However, the start of the countdown to the deadline is calculated slightly differently: while according to Article 43 of the SCC Rules it starts "from the date the case was referred to the Arbitral Tribunal pursuant to Article 22," while, in accordance with Article 31.1 of the ICC Rules:

> such time limit shall start to run from the date of the last signature by the arbitral tribunal or by the parties of the Terms of Reference or, in the case of application of Article 23(3), the date of the notification to the arbitral tribunal by the Secretariat of the approval of the Terms of Reference by the Court.[24]

In both cases examined here, the said deadline may be extended (by the Board of the SCC and the ICC, respectively), while the said Rules do not provide for any sanctions for their breach and for issuing an award after the applicable deadline.

Slightly different rules are provided for in the first sentence of Article 37 of the DIS Rules, according to which "the arbitral tribunal shall send the final award to the DIS for review pursuant to Article 39.3, in principle within three months after the last hearing or the last authorized Submission, whichever is later." However, particular attention should be drawn to the second and third sentences of Article 37, authorizing "the Arbitration Council, in its discretion, to reduce the fee of one or more arbitrators based upon the time taken by the arbitral tribunal to issue its final award. In deciding whether to reduce the fee, the Arbitration Council shall

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their views within a fixed period of time. The extension shall be adopted only if all parties express their agreement to the proposal within the fixed period of time") and Article 16.4 of the UNCITRAL Expedited Arbitration Rules (according to which "if there is no agreement to the extension in paragraph 3, any party may make a request that the Expedited Rules no longer apply to the arbitration. After inviting the parties to express their views, the arbitral tribunal may determine to continue to conduct the arbitration in accordance with the UNCITRAL Arbitration Rules").

[24] In proceedings before the ICC, the punctuality of processing by the arbitral tribunal, including meeting the deadline for issuing an award in the case, is of key importance. See more in: Jason Fry, Simon Greenberg, and Francesca Mazza, *The Secretariat's Guide to ICC Arbitration*, International Court of Arbitration 2012, 121 et seq., https://2go.iccwbo.org/icc-secretariat-s-guide-to-the-new-rules-of-arbitration-config+book_version-eBook.

consult the arbitral tribunal and take into consideration the circumstances of the case." Therefore, only the DIS Rules (of the rules of the foreign arbitral institutions analyzed here) explicitly lay down potential sanctions for the arbitral tribunal for failing to meet the deadline for issuing an award in a case, although the SAKL Rules – in Poland – contain a similar solution stipulating that "the award shall be issued within 6 months following the constitution of the arbitral tribunal" (the first sentence of § 39.1) and that "the President of the Lewiatan Arbitration Court may, at the request of the arbitral tribunal, extend the time limit for issuing the award in accordance with the circumstances of the case" (the second sentence of § 39.1), while providing that "if the award was not issued within this time limit due to reasons for which the arbitral tribunal or some of its arbitrators are responsible, such default may affect the level of the arbitrators' fees" (§ 39.2).

Meanwhile, the SAKIG Rules introduce a slightly more "liberal" solution, providing in § 40.2 that:

> the award shall be issued within 9 months after commencement of the proceeding and no later than 30 days after closing of the hearing. At the Director General's own initiative or upon application of the presiding arbitrator, the Director General may extend either of these periods if justified by the complexity of the issues in the dispute or other important considerations.

Therefore, the analysis of the arbitration rules in question demonstrates a significant diversity in the standards regarding deadlines for issuing an award and ending of the initiated arbitration proceedings. Although most of the Rules specify a (6-month, as a rule) deadline for issuing an award (which, however, starts to be counted from different points), only the DIS and SAKL Rules admit the introduction of sanctions (or rather certain inconveniences) for the arbitral panel (arbitrators) for failing to meet them. Meanwhile, such a solution should be considered a model solution, which can constitute a certain point of reference for the other Rules. This is because it would seem that this is the only way of ensuring – in the event of tardiness in the proceedings on the part of the arbitral tribunal (arbitrators) – the fulfillment of the obligation to resolve the dispute arising from the *receptum arbitrii*,[25] without the arbitral institution interfering at the same time

[25] Cf. Karol Zawiślak, *Receptum arbitrii* (Warsaw: C.H. Beck, 2012), 262 et seq.

with the content of the award issued. However, experience shows that there are cases in which this is the only way to "discipline" passive arbitrators.[26]

6. Expedited Procedure

Certain types of cases, especially those with a relatively low dispute value, require particularly fast and efficient resolution. This is due both to the need to ensure cost-effectiveness of conducting them and to various business or organizational considerations arising for the entity asserting its claims in arbitration. That is why it is so important for the applicable arbitration rules to provide a legal framework for an expedited resolution of the dispute in the given case. At the same time, not all of the rules analyzed provide for the ability to apply an expedited (simplified) procedure for hearing specific cases: neither the LCIA Rules,[27] nor the SCC Rules do.

The Rules that provide for the admissibility of applying the expedited procedure vary widely. According to Annex 4 of the DIS Rules, in a situation of "the parties' specific interest in accelerating the proceedings," a simplified procedure is permissible, and in such a case "the arbitral tribunal shall hold only one oral hearing, including for the taking of evidence. An oral hearing may be dispensed with if all parties so agree," although the Rules do not define the circumstances that can justify hearing the case in this procedure.

The Annex to the UNCITRAL Rules – UNCITRAL Expedited Arbitration Rules – gives the parties far-reaching freedom with regard to the application of the expedited procedure. According to its Article 1:

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[26] In the literature – both Polish and foreign – it is often pointed out that the very fear of losing reputation ensures (should ensure) that arbitrators conduct the proceedings properly. See: Andrzej Szumański, in *Arbitraż handlowy. System Prawa Handlowego*, vol. 8, ed. Andrzej Szumański (Warsaw: C.H. Beck, 2015), 420 et seq.; Asłanowicz, *Pozycja prawna arbitra w arbitrażu handlowym*, 55 et seq. However, this principle is not always applied in practice because there are some arbitrators who do not perform the tasks entrusted to them anyway.

[27] However, the LCIA Rules provide for an expedited procedure for choosing the arbitral tribunal, because, according to Article 9.1, "in exceptional urgency, on or after the commencement of the arbitration, any party may apply to the LCIA Court for the expedited formation of the Arbitral Tribunal, including the appointment of any replacement arbitrator under Articles 10 and 11 of these Rules."

> Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Expedited Arbitration Rules ('Expedited Rules'), then such disputes shall be settled in accordance with the UNCITRAL Arbitration Rules, as modified by these Expedited Rules and subject to such modification as the parties may agree.

Article 30.2 of the ICC Rules provides for the admissibility of the expedited procedure (regulated in detail in Annex VI) in the case where: "a) the amount in dispute does not exceed the limit set out in Article 1(2) of Appendix VI at the time of the communication referred to in Article 1(3) of that Appendix; or b) the parties so agree" – and thus, in principle, primarily in cases of a relatively low dispute value. A similar regulation is contained in § 5.1 of the SAKL Rules, according to which "a dispute shall be settled in expedited proceedings if the amount in dispute does not exceed PLN 50,000, unless the parties agree otherwise, in particular by deciding that the dispute is to be settled by an arbitral tribunal composed of three arbitrators," as well as in § 53.1–2 of the SAKIG Rules, according to which "where the amount in dispute does not exceed PLN 80,000.00, a fast-track procedure shall apply to dispute resolution unless the parties have agreed otherwise or unless they have not given consent to it." Furthermore, "the parties may agree that the dispute shall be resolved within the fast-track procedure also where the amount in dispute exceeds PLN 80,000."

Although, as presented above, this regulation differs significantly between the various Rules, it should rather be considered as corresponding to the requirement of the arbitrators. This is because it would not be particularly advisable to admit an expedited procedure in the consideration of cases other than at the express will of the parties in this respect, or in cases of a relatively low dispute value.

7. Securing a Alaim before Initiating Proceedings

The inability to secure a claim before the initiation of the proceedings often calls into question the purpose of the later assertion of claims, as satisfaction may ultimately – after the end of the proceedings – prove to be impossible or much more difficult. Although, despite the arbitration clause, the party initiating the proceedings can usually apply to the state court for security, it is fully reasonable to expect that a party will be able (whether in advance,

in parallel or exclusively) to apply for security (also) to the competent arbitration court. Therefore, this issue seems to be all the more important in this era of current economic turbulence and increased risk of insolvency of debtors caused by both the consequences of the Covid-19 epidemic and the war in Ukraine.

The analysis of the selected Rules shows that all of them allow for security before the initiation of the proceedings, as the appropriate basis is contained in Article 26.1 of the UNCITRAL Arbitration Rules, Article 37.1 of the SCC Rules, Article 25.1 of the LCIA Rules, Article 25.1 of the DIS Rules, Article 28.1 of the ICC Rules, § 36.1 of the SAKL Rules and § 30.1 of the SAKIG Rules. Although, understandably, the procedural aspects differ in individual cases,[28] it is admissible to obtain appropriate security in any case in arbitration proceedings. It should therefore be acknowledged that, in this respect, there is no need for systemic changes or additions to the regulation in question.

8. Conclusions

The analysis of selected arbitration rules (albeit conducted only to a limited extent for the reasons stated at the beginning) shows that, while some issues (e.g. the principles of service, the expedited procedure for resolving cases and the admissibility of securing a claim before initiating proceedings) are regulated in a manner that satisfies the requirements of 2023, other issues (e.g. the rules of holding remote hearings or the consequences of failing to meet deadlines in arbitration, in particular the deadlines for issuing an award) would require a number of modifications and improvements. This suggests that a postulate should be presented for a broader discussion within the community – both in Poland and abroad – on the shape of the regulations in this area that would be the most comfortable for the parties to the proceedings, the arbitral tribunals and the arbitral institutions, while respecting the basic (universal) arbitration rules.

[28] Procedural issues related to proceedings regarding security, including primarily the issue of the admissibility or inadmissibility of the appointment of an emergency arbitrator, will not be examined here, because of the limited amount of space for this article.

References

Arp, Bjorn, and Edwin Nemesio. "The Practice of Virtual Hearings during Covid-19 in Investment Arbitration Proceedings." In *The Impact of Covid on International Disputes*, edited by Shaheeza Lalani and Steven Shapiro. The Hague: Brill, 2022.

Asłanowicz, Marcin. *Pozycja prawna arbitra w arbitrażu handlowym*. Warsaw: C.H. Beck, 2019.

Bytnerowicz, Piotr, and Emanuel Wanat. "Admissibility of Witness Preparation in Arbitration Proceedings – international and Polish perspectives." *Arbitration Bulletin*, *Young Arbitration*, no. 24 (2016): 22–40.

Campaign for Greener Arbitrations. "Driving sustainable change in arbitration." https://www.greenerarbitrations.com/.

Chinn, Christopher. "Some Reflections on Arbitration Hearings in the Covid-19 Era." *Arbitration Bulletin*, no. 6 (2021): 4–5.

Cleary Gottlieb Steen & Hamilton LLP. "International Arbitration in the Time of Covid-19: Navigating the Evolving Procedural Features and Practices of Leading Arbitral Institutions." https://www.clearygottlieb.com/-/media/files/alert-memos-2020/international-arbitration-in-the-time-of-covid19.pdf.

Fry, Jason, Simon Greenberg, and Francesca Mazza. *The Secretariat's Guide to ICC Arbitration*. International Court of Arbitration, 2012. https://2go.iccwbo.org/icc-secretariat-s-guide-to-the-new-rules-of-arbitration-config+-book_version-eBook.

Gąsiorowski, Jan. "Ograniczenia, możliwości i funkcjonowanie sądownictwa powszechnego i stałych sądów polubownych w sprawach cywilnych podczas trwania epidemii w Polsce." *ADR. Arbitraż i Mediacja*, no. 2 (2020).

Judkiewicz, Małgorzata. "Wady i zalety zdalnego postępowania arbitrażowego." *Biuletyn Arbitrażowy*, no. 6 (2020): 5–13.

Kubsik, Sabina, and Zbigniew Drzewiecki. "Rozprawy zdalne – nowa rzeczywistość polskiej i międzynarodowej praktyki arbitrażowej." *Monitor Prawniczy* (supplement), no. 20 (2020): 98–99.

Morek, Rafał. In *Regulamin Arbitrażowy Sądu Arbitrażowego przy KIG. Komentarz*, edited by Maciej Łaszczuk and Andrzej Szumański. Warsaw: C.H. Beck, 2017.

Queen Mary University of London. "2021 International Arbitration Survey: Adapting arbitration to a changing world." https://arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/.

Sąd Arbitrażowy przy Konfederacji Lewiatan. "Sąd Arbitrażowy przy Konfederacji Lewiatan sygnatariuszem Green Pledge." https://sadarbitrazowy.org.pl/blog/2021/04/sad-arbitrazowy-przy-konfederacji-lewiatan-sygnatariuszem-green-pledge/.

Sołowij, P. "Wpływ pandemii COVID-19 na funkcjonowanie arbitrażu." In *Polski i amerykański wymiar sprawiedliwości w czasie i po pandemii Covid-19*. Toruń: 2022.

Stefanowicz, Krzysztof. In *Postępowanie przed sądem polubownym. Komentarz do Regulaminu Sądu Arbitrażowego przy Konfederacji Lewiatan*, edited by Beata Gessel-Kalinowska vel Kalisz. Warsaw: Wolters Kluwer, 2016.

Szpara, Justyna, and Maciej Łaszczuk. "Czy autonomia stron w ustalaniu reguł postępowania przed sądem polubownym jest ograniczona w czasie?." In *Księga pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie*, edited by Józef Okolski, 280–292. Warsaw: Sąd Arbitrażowy, 2010.

Szumański, Andrzej. In *Regulamin Arbitrażowy UNCITRAL. Komentarz*, edited by Piotr Nowaczyk, Andrzej Szumański, and Maria Szymańska. Warsaw: Wydawnictwo C.H. Beck, 2011.

Zawiślak, Karol. *Receptum arbitrii*. Warsaw: C.H. Beck, 2012.

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The Right to Self-Determination of Peoples through Examples of Åland Islands and Quebec: Recommendations for a Peaceful International Legal Order

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Abstract: In contemporary public international law, it is increasingly common that in many countries of the world and Europe, political representatives of the peoples are calling for an inalienable right to the external self-determination of the peoples involving secession to try to achieve their independence and autonomy, forming their national states to the detriment of already existing countries in which they are currently living. However, this may cause destabilization and wars in many complex multiethnic states and the European Union. Therefore, the Åland Islands and Quebec cases are extremely important for today's understanding of the exercise of the right to self-determination of the people in contemporary public international law, in particular as the International Court of Justice in The Hague and the domestic courts invoke them as precedents to address all future cases of reference to the right of the people to external self-determination involving secession. Based on those cases, it has developed that the issue of secession is the question of the internal legal order of each sovereign country, which should deal with this issue through its constitutional legal order, and contemporary public international law should deal with its consequences. In connection with this, it is necessary to investigate and offer answers that will highlight possible abuses of the right to self-determination of all peoples as a collective human right in contemporary

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public international law. Such unlawful conduct may result in adverse legal consequences, in particular, the violation of basic principles of public international law, including the principles of territoriality and sovereignty of the states, the distortion of world peace and order, economic progress, the rule of law and the pursuit of basic human rights and freedoms, as well as other collective human rights, which may ultimately be the cause of provocation and lead to international and civil wars.

1. Introduction

This article aims to explain, through the cases of the Åland Islands and Quebec, that the internal self-determination of people is a more acceptable form of realizing this collective human right, which should be done through broad constitutional and legal reforms in every multiethnic state (a certain degree of autonomy or decentralization), and that the external form of self-determination, which includes secession, is possible only exceptionally in the case of grave violations of human rights and freedoms, war crimes, repression, and systematic oppression, and only as a *sui generis* case that excludes the creation of a precedent (for example, Kosovo). Only with this approach can we prevent abuse of the right to self-determination (external self-determination that includes secession) and establish lasting peace in the world, as well as a balance between the realization of this right and the principle of territorial integrity. The scientific methods used in this article are theoretical, normative, historical, comparative-legal, and dogmatic methods, including a case study as a separate method applied during the legal analysis of judgments and opinions of national and international courts regarding the right to self-determination of all peoples.

The right to self-determination of people in contemporary public international law appears in two forms: *external (offensive)* and *internal (defensive)* self-determination. We will briefly talk about the former and its legal and political influence in contemporary public international law through examples of the Åland Islands[1] and Quebec.[2] As its name implies, this right

[1] See more: Patricia O'Brien, "The Åland Islands Solution A Precedent for Successful International Disputes Settlement" (speech, United Nations Headquarters, Delegates Entrance Lobby, January 17, 2012).

[2] See more: "Reference Re Secession of Quebec – SCC Cases," Supreme Court of Canada, accessed February 3, 2023, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do.

unquestionably belongs to the peoples; they are the holders of the right to self-determination, which necessarily includes the element of territory, taking into account the principle of *uti possidetis iuris*.[3] It is necessary to emphasize that contemporary public international law, in an affirmative manner, regards the internal exercise of the right to self-determination of all peoples. The external aspect of the right to self-determination often leads to the separation of territories and conflicts with the principle of *uti possidetis iuris*. Its secondary negative manifestations include a conflict with certain international instruments, in particular with the UN Charter.[4] Generally, the right to self-determination nowadays is applicable as customary law and is recognized in that form by international legal literature. It is normatively ensured in Article 1[5] of both Covenants of Human Rights[6] that the right to self-determination becomes the fundamental principle of contemporary public international law with *erga omnes* effect. Here, it is stipulated that all peoples are entitled to self-determination based on which they decide about their political status.[7] Political status[8] represents a constitutional status within the meaning of the establishment of the internal arrangement, while the external arrangement constitutes an international positioning and obtaining recognition. There is no doubt that the right to self-determination of the people is nowadays recognized as a common rule of public international law, shown by international judicial practice. In the case of East Timor, the International Court of Justice in The Hague (ICJ)[9]

3 See more: "Uti Possidetis Juris," LII/Legal Information Institute, accessed February 3, 2023, https://www.law.cornell.edu/wex/uti_possidetis_juris.

4 See more: "UN Charter," United Nations, accessed February 3, 2023, https://www.un.org/en/about-us/un-charter.

5 Edin Šarčević, "Pravo Naroda Na Samoopredjeljenje Sa Otcjepljenjem," May 8, 2022, https://edinsarcevic.wordpress.com/2022/05/08/pravo-naroda-na-samoopredjeljenje-sa-otcjepljenjem/.

6 See more: "International Covenant on Economic, Social and Cultural Rights," OHCHR, accessed February 3, 2023, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights.

7 Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2007), 16.

8 Šarčević, "Pravo Naroda Na Samoopredjeljenje Sa Otcjepljenjem."

9 See more: "East Timor (Portugal v. Australia)" International Court of Justice, accessed February 3, 2023, https://www.icj-cij.org/en/case/84.

confirmed that the right to self-determination is *erga omnes* binding right. In the case, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the right to self-determination was interpreted as a "binding right of the people." It means that it is *ius cogens* rule of public international law.[10] The external self-determination of the peoples includes the right to decide their international status, i.e., to create a sovereign and independent state or to join with the existing sovereign state.[11] This form of self-determination is the most common subject matter of abuse in contemporary public international law involving secession and thus directly undermines the territorial integrity and sovereignty of the existing state. Requests for the self-determination of peoples in the external sense may be established, so they constitute an exception that is rare but still accepted in contemporary public international law (the case of Kosovo) and unfounded under the influence of economic, cultural, religious, and ideological reasons, which may indicate the abuse of this right. However, such a setting of self-determination of the people was not considered an abuse of law in the 1960s, and it was considered the right to be a country where people would be free from foreign interference and cease to be under foreign occupation or domination. This issue was particularly recent at the time of the drafting of the texts of international human rights covenants, i.e., at the time of the condemnation of colonialism. It signified the emergence of an indispensable anticolonial wave in international public policy. Internal self-determination is stipulated in Art. 1(1) of the International Covenant on Civil and Political Rights as a right of the people to "freely determine their political, economic, social and cultural development." Antonio Cassese considers "the right of every member of the community to choose, in full freedom, the authority that will enforce the true will of the people."[12] It is further explained that the internal view of the right to self-determination presupposes the existence and free exercise of other rights and freedoms

10 Hurst Hannum, "Rethinking Self-Determination," *Virginia Journal of International Law* 34, no. 1 (1993): 13.

11 Slobodanka Bursać, "Pravo Na Samoopredeljenje Naroda," *Međunarodni Problemi* 62, no. 2 (2010): 279.

12 See more: Antonio Cassese, "The Approach of the Helsinki Declaration to Human Rights," *Vanderbilt Journal of Transnational Law* 13, no. 2 (2021), 275–291.

by which is expressed the will of the people, e.g., freedom of association and the right to vote. Here we want to point out that internal self-determination should be affirmatively understood and considered as a solution in complex multiethnic communities, such as the decentralization of government within a country aimed at affirming political, economic, and cultural self-determination. The same reasoning followed the Supreme Court of Canada in the case of the Quebec secession by defining the internal self-determination of the peoples as "achieving one's political, economic and cultural development within the framework of the existing state."

2. The Short Historical Development of the Right to Self-Determination of Peoples

The historical development of the right to self-determination of the people is important for explaining the origins and application of this right established in several stages. The first phase is national and constitutive; it took place between the end of the 18th and the beginning of the 19th century in North America and Western Europe, characterized by the fight against foreign domination and the creation of modern European nation-states. Then, self-determination represented the basic political principle of civil revolution. The second phase is anti-imperial and represents the period after World War I. The Versailles Conference recognized the right to self-determination of peoples who lived in the areas of the empires that lost the war: The Austro-Hungarian Monarchy and the Ottoman Empire. This period is marked by the proclamation of the principle of self-determination throughout Woodrow Wilson's *Fourteen Points*.[13] After each war, *great powers*[14] were actively involved in the reorganization of Europe, most commonly through peace conferences.[15] One of these was held in Paris and publicly or secretly addressed many state matters: issues of reorganization of Europe, questions of the old and new state's boundaries, issues of protection of minorities, and

[13] See more: "Milestones: 1914–1920 – Wilson's Fourteen Points, 1918," Office of the Historian, accessed February 3, 2023, https://history.state.gov/milestones/1914–1920/fourteen-points.

[14] See more: Daniel Costa, "Great Power," Britannica, accessed February 3, 2023, https://www.britannica.com/topic/great-power.

[15] Allen Lynch, "Woodrow Wilson and the Principle of 'National Self-Determination': A Reconsideration," *Review of International Studies* 28, no. 2 (2002): 419.

the right to self-determination of the peoples. After the war, self-determination was presented indirectly through a mandate system by the League of Nations and Article 22 (4) of the Covenant of the League of Nations.[16] Some national groups did not get their new state based on peace treaties, but they achieved mandate protection through treaties on minorities, otherwise adopted by the winning powers. These treaties are presented in three categories: treaties that regulate relations with the defeated states: Austria, Hungary, Bulgaria, and Turkey; treaties establishing new states: Czechoslovakia, Greece, Poland, Romania, and Yugoslavia; and treaties establishing special international regimes: Åland Islands, Danzig, Memel, and Upper Silesia. Such treaties do not have the power to solve issues related to self-determination, so President Wilson suggested that the Covenant of the League of Nations should specifically regulate the issue of self-determination. He suggested:

> The Contracting Parties united to guarantee each other political independence and territorial integrity, give the possibility to exercise certain territorial concessions based on the self-determination and all for the best interests of a particular people. The Treaty Powers confirm that the preservation of peace in the world is the most important ideal.[17]

The third stage in the development of this right is crucial, and we call it the anticolonial stage; it played out between World War II and the end of the 1960s. At this stage, the former colonies achieved their independence and freedom peacefully through nonviolent means or the national liberation struggle. The last stage in the development of this right is called anticommunism and includes the period from the fall of the Berlin Wall until today. It is imperative to explain that contemporary public international law looks at the principle of self-determination as a legal principle that grows into the right to self-determination of the people. This stage ends the political character of this principle and begins its legal character through

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16 See more: "Papers Relating to the Foreign Relations of the United States, The Paris Peace Conference, 1919, Volume XIII – The Covenant of the League of Nations (Art. 1 to 26)," Office of the Historian, accessed February 3, 2023, https://history.state.gov/historicaldocuments/frus1919Parisv13/ch10subch1.

17 Bojan Gavrilović, "Istorija Prava Na Samoopredeljenje, (R)Evolucija Prava Na Samoopredeljenje," 2013, 8.

the adoption of the *UN Charter*, and finally takes shape with the adoption of the *Declaration on the Granting of Independence to Colonial Countries and Peoples (1960)*,[18] the *International Covenants on Human Rights (1966)*, and the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States following the Charter of the UN (1970)*.[19]

3. Brief Review at Legal Sources on the Self-determination of Peoples

The right to self-determination at the outset is mentioned in Articles 1 and 55 of the *UN Charter*. According to Article 1 of the Charter, one of the aims of the United Nations is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." The very mention in the *UN Charter* of the self-determination of peoples, in the opinion of Malcolm Shaw, enabled the establishment of subsequent interpretations that incurred the rule of public international law on the self-determination of peoples. The *Declaration on the Granting of Independence to Colonial Countries and Peoples*, according to the International Court of Justice in The Hague, represents the most important segment in the development of public international law concerning non-self-governing territories[20] and the basis for the decolonization process. Article 1 of the *International Covenants on Human Rights* states that "1. All peoples have the right to self-determination, to freely realize their political, economic, social and cultural development and 2. to freely dispose of their natural resources and sources on the basis of public international law."[21] The former Soviet Union countries wanted to restrict the application of this right only to colonial

18 See more: "Declaration on the Granting of Independence to Colonial Countries and Peoples," OHCHR, accessed February 3, 2023, https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-granting-independence-colonial-countries-and-peoples.

19 See more: "UN General Assembly (25th Sess.: 1970): Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States following the Charter of the United Nations, 1971," United Nations Digital Library, https://digitallibrary.un.org/record/202170.

20 See more: "Non-Self-Governing Territories," The United Nations and Decolonization," accessed February 3, 2023, https://www.un.org/dppa/decolonization/en/nsgt.

21 Gavrilović, "Istorija Prava Na Samoopredeljenje, (R)Evolucija Prava Na Samoopredeljenje," 16.

peoples,[22] although, in the final version of this Article, it is confirmed that this right belongs to all peoples and those who already have their own countries, and all in terms of achieving internal self-determination that we want to affirm by this paper. We want to give an impulse to reform the complex multiethnic states through their internal legal order, to improve their constitutions, and try to enable all peoples to equally participate in the exercise of their political, economic, social, cultural, and any other forms of affirmation, such as talks on possible government decentralization that would allow equal participation, presence, and visibility in the state administration to all peoples.

The *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (1970)* confirms the right to self-determination of the colonial peoples and peoples that have been subjected to a different subjugation, dominance or exploitation. For all countries of the European continent, and in particular to those expressing their aspirations to full membership in the European Union, the *Helsinki Final Act (1975)*[23] proclaims the protection of territorial integrity and the inviolability of European borders, does not prevent their change amicably and with a consensual amending of borders, which is following contemporary public international law. All unilateral moves towards external self-determination involving secession without probable cause may mean the abuse of this right. Numerous voices in the international community claim that self-determination would lead to the Balkanization of the European continent if it came true.[24] This may also apply to the United States of America if, for example, Long Island or California wanted to secede, referring to self-determination. The right to self-determination, as well as any other law, is subject to abuse and, if it is not limited, might lead to disintegration processes

22 Yahia H. Zoubir, "The United States, the Soviet Union and Decolonization of the Maghreb, 1945–62," *Middle Eastern Studies* 31, no. 1 (1995): 58.

23 See more: "Milestones: 1969–1976 – Helsinki Final Act, 1975," Office of the Historian, accessed February 3, 2023, https://history.state.gov/milestones/1969–1976/helsinki.

24 Mladen Karadzoski and Goran Ilik, "Will the European Union Europeanise the Balkans to Avoid the Balkanisation of Europe?," *Studia Europejskie – Studies in European Affairs* 23, no. 4 (December 23, 2019): 66.

in Europe. Instead of secession, we should insist on cooperation between countries, which is also the basic goal of the *Helsinki Final Act*.[25]

4. The Right to External Self-Determination of Peoples

In the time of integration, the external self-determination of peoples in terms of secession is a disintegration process. Secession involves the use or threat of force, which may constitute a direct motive for war.[26] Professor Thomas Franck points out, "There is no right to secession in an international legal system, except in the minds of those who enjoy adventurous journeys through international practice."[27]

There are also cases where it is possible to exercise the right to self-determination (the external form that includes a change in sovereignty over the territory), which are undisputed and confirmed in practice. The first is the case of self-determination of the colonial peoples, and the second is the self-determination of peoples subjected to different subjugation, domination, or exploitation. These cases are linked to the content which is regulated by the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (1970)*, which introduced the *safeguard clause* concept. This clause prohibits "any action that would have the aim of destroying or jeopardizing, complete or partial, territorial integrity and political independence of each state, which respects the principle of equality and self-determination of peoples (changed final part of the 1993 Vienna Declaration clause)."[28] Not every external form of self-determination of peoples that reaches for secession is illegal and an abuse of that right. It is possible if certain conditions are fulfilled which would justify the exercise of such rights or possibilities, also known as "remedial secession,"[29]

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25 Gavrilović, "Istorija Prava Na Samoopredeljenje, (R)Evolucija Prava Na Samoopredeljenje," 2013, 16.

26 Aleksandar Pavković and Peter Radan, *Creating New States: Theory and Practice of Secession*, 2nd ed. (Aldershot, Hampshire, England; Burlington, VT: Ashgate Publishing, 2013), 6.

27 Gavrilović, "Istorija Prava Na Samoopredeljenje, (R)Evolucija Prava Na Samoopredeljenje," 16.

28 Bursać, "Pravo Na Samoopredeljenje Naroda," 298.

29 Jure Vidmar, "Remedial Secession in International Law: Theory and (Lack of) Practice," *St Antony's International Review* 6, no. 1 (2010): 37.

in the event of denial of the right to part of the people to be represented in government authorities. This condition is not the only one which must be satisfied to reach secession. The Supreme Court of Canada, in the case *Reference re Secession of Quebec*, refrained from concluding in this regard, and A. Cassese follows up on and considers that this right exists, but as the exception from the general rule that the territorial integrity and political independence of states are protected by international law and must be interpreted narrowly and subjected to strict conditions.[30] It can be concluded that any introduction of secession as a generally accepted rule in exercising the right to self-determination of peoples is nothing but a classic abuse of that right.

A. Cassese lists three conditions that must be fulfilled to exercise the right of secession: "1. The central government of the state must insist on refusing the group (people) the participation in the government; 2. The group (people) must undergo mass and systematic violation of human rights; 3. Any finding of a peaceful solution within the state must be ruled out."[31] These statements suggest that non-representation of the group (people) cannot produce the right of secession, but additional conditions that justify such a derogation from one of the basic principles of international law – the principle of the territorial integrity of the states must be fulfilled. In the words of Eleanor Roosevelt, "as the concept of individual human freedoms led to its logical extremes would mean anarchy, the principle of self-determination would also result with chaos if it were given the possibility of unlimited application."[32] We see there are reasons for prudence when it comes to requests for external self-determination of the people. Historically, there are not many examples, such as Czechoslovakia; most declarations of independence have encouraged conflicts and refugee crises, including some with long-term consequences. The reason for this lies in too much tension between two fundamental principles: the territorial integrity of the state and the liberal-democratic principle of the doctrine[33]

30 Bursać, "Pravo Na Samoopredeljenje Naroda," 299.

31 Ibid.

32 Ibid., 311.

33 Erika Harris, "Paradoks, Kontroverza i Nacionalno Samoodređenje," *Politička Misao* 52, no. 1 (2015): 200.

of the external self-determination of peoples involving secession. It is apparent that the external self-determination of peoples stands in contrast with the principle of state sovereignty and territorial integrity: sovereignty requires the preservation of the territorial *uti possidetis iuris*; self-determination is at least potentially focused on its modification. In this contrast is the central antinomy that brings the right to self-determination: without the right to secession, there is no right to self-determination. If the right to self-determination, in any case, would entail the possibility of secession, it would, however, undermine self-determination as a separate right. The answer is in the internal (domestic) law known as the internal (definable) right to self-determination, as it opens the possibility of reactions that do not affect territorial integrity under the conditions of the exercise of this right. It is about different types of autonomy ensuring adequate legal[34] and factual status to the right-holder of the right to self-determination: territorial, personal, and functional autonomy. Finally, the doctrine of the external self-determination embodied in the *UN Charter* may undermine the Charter itself from which self-determination draws its normative power because while the *UN Charter* undertakes to "maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace" (Article 1 (1)), the doctrine of the external self-determination of peoples requires a secession that can threaten the sovereignty of the countries on which the international system of peace and security lies.[35]

Professor of international law P. Nanda says the following:

> When we talk about the external self-determination of the peoples, the requirement to secession and independence of a country, it is important to know that no member state of the United Nations supports requests for unilateral secession. The latest developments, particularly those of Bangladesh[36], East Timor and Kosovo, and in the light of the statement made by the Supreme Court of Canada, provide a possibility of exceptional circumstances that could justify a unilateral secession. One such exception around which there was a wider international consensus in the past was a process of decolonization,

34 Šarčević, "Pravo Naroda Na Samoopredjeljenje Sa Otcjepljenjem."

35 Harris, "Paradoks, Kontroverza i Nacionalno Samoodređenje," 199.

36 Pavković and Radan, *Creating New States: Theory and Practice of Secession*, 7.

which included secession. And the other only possible exception justifying the secession is the existence of non-democratic regimes, which are not "representative", and which do not allow the "people" to participate in political and economic activities within the state, especially where there is a gross violation of human rights.[37]

5. The Åland Islands Case

One of the best examples to support everything forward has been said is the case of the Åland Islands. It concerns a dispute about the authority over the Åland Islands, a small archipelago of islands in the Baltic Sea off the Swedish coast. In 1809, the Islanders and Finns were assigned to Russia by Sweden. During that period, there was a Bolshevik euphoria in connection with the idea of self-determination during the Russian Revolution, which Finland used and declared independence. This campaign of Finland, assisted by the idea of self-determination that gripped during that time, encouraged the Ålanders to join Sweden. Of course, Sweden supported the intentions of the inhabitants of the Åland Islands, and Finland sent troops to Åland, and that was the beginning of the war in the peaceful area of the Baltic Sea. During that period, in 1920, the Council of the League of Nations appointed a three-member Committee of Jurists to investigate whether the League of Nations should be involved or if this was only an internal matter. It should be noted that the inhabitants of the Åland Islands had Swedish nationality, culture, and language. Sweden insisted that this matter should be resolved through a plebiscite and that the inhabitants of the Åland deserved the opportunity to express their free will and to decide on their direction (to separate themselves from Finland and to incorporate into the Kingdom of Sweden). On the other hand, Finland emphasized that this was a purely internal matter to be taken care of and dealt with within its national jurisdiction.[38] Subsequently, the Committee of Jurists declared its lack of competence regarding Finland's relations vis-à-vis the Åland Islands

[37] Frederick V. Perry and Scheherazade Rehman, "Secession, the Rule of Law and the European Union," *Connecticut Journal of International Law* 123, no. 31 (2015): 73.

[38] Joshua Castellino and Jérémie Gilbert, "Self-Determination, Indigenous Peoples and Minorities," *Macquarie Law Journal*, no. 3 (2003): 161.

with the claim that Finland was not a "definitely established state"[39] and assigned to the League to appoint the Commission of Rapporteurs tasked to determine further actions which the League of Nations should take in this regard.[40] The Commission of Rapporteurs noted that the Committee of Jurists' opinion was not correct and considered Finland "an established state." Then, it was pointed out that the Ålanders had no right to self-determination. The Commission of Rapporteurs, however, subsequently decided that if Finland could not guarantee a certain degree of autonomy in expressing the cultural identity of the people living on the Åland Islands, the secession may be justified. In all these cases, a court or any other commission had always taken a stand that a unilateral declaration of independence in some area, region, or province should always be the last option, and any other action taken would be contrary to the *UN Charter*, which protects the sovereignty, territorial integrity, and political independence of each country.[41]

6. The Quebec Case

Quebec is one of the ten provinces in Canada that expressed and continues to express hopes for secession. French Canadians support Quebec's right to secession. They believe that historically this right had belonged to them since the time when they first settled in the 17th century. Their view of English Canadians is such that they consider that they have "continued loyalty to England." Their desire is to create a state that will reflect their French heritage. The referendum in Quebec was crucial for achieving independence. The first independence referendum was held in 1980 and had little support; only 40.4% of Quebec's population voted "in favor." The subsequent referendum received 49.4% support and was an important basis for achieving independence in 1995. These referendums are important because of the Canadian government's stance on the issue of secession, which was subsequently decided by the Supreme Court of Canada. The Supreme Court considers that "the success of the referendums creates a moral obligation for the Canadian government regarding the issue of secession and the future

39 James Crawford, *The Creation of States in International Law*, 2nd ed. (Oxford: New York: Clarendon Press; Oxford University Press, 2006), 24.

40 Hannum, "Rethinking Self-Determination," 26.

41 Ibid., 28.

of the Quebec province."[42] The majority of the votes had to be 51%, a percentage not yet reached in the province. Ultimately, "the Supreme Court did not accept Quebec's unilateral secession and declaration of independence." The support for the independence of Quebec was not strong enough to allow the negotiations.

In the years to come, the independence movement had many problems, which lasted until 2005, when an informal referendum was held that showed support for the independence of 54%, a good sign for some future Quebec independence.[43] The Supreme Court of Canada, in 1998, was asked to deliver an opinion on the right to external self-determination of Quebec. The Supreme Court of Canada took the position in the case *Reference re secession of Quebec* that "the secession of one province from Canada must be considered, from the legal side, and through amendments to the Constitution, to allow the negotiation of a possible right to external self-determination." With this opinion of the Supreme Court, Canada considers Quebec its autonomous province, which is subject to constitutional restrictions on the pursuit of external self-determination, i.e., secession. That makes any secessionist action of Quebec, without the approval of Canada, unconstitutional. The Supreme Court of Canada considers that Quebec already enjoys high autonomy within Canada and has achieved its internal self-determination. Therefore, any reference to a unilateral secession will be regarded as an abuse of the right to self-determination and unconstitutional action.[44]

The international community is opposed to unilateral secession, arguing that "public international law has not been laid down or approved by the constituent parts of a sovereign state to be legally entitled to unilateral secession from its mother country." Regarding the issue of self-determination, the Supreme Court of Canada considers "that this right must not be exercised contrary to the principle of territorial integrity and calls for reforms that will support the principle of internal self-determination."[45] Self-determination for Quebec would be *internal*, and as such, Quebec would "best

42 Angelina M. Sasich, "The Right to Self-Determination and Its Implication on the Sovereign Right of States: The Inconsistent Application of International Standards for Independence concerning Kosovo," *Michigan State International Law Review* 20, no. 2 (2012): 511.

43 Ibid.

44 Ibid.

45 Ibid., 512.

achieve its political, economic, social and cultural development" within Canada. In the case that Canada derogated or limited by the constitution the guaranteed rights, the Supreme Court of Canada leaves the possibility for Quebec to achieve "negotiated secession."[46] Furthermore, Quebec cannot be allowed unilateral secession for reasons that Quebec is not "exposed to external submission, dominance or exploitation." The Canadians outline that Quebec was not "denied access to the government," and that does not represent a submission. Quebec's participation in the government of Canada appears to be partially worthy of mention because history shows that Quebec has offered numerous ministerial positions in the Canadian government. Thus, the opinion of the Supreme Court of Canada is that Quebec can enjoy freedom without unilateral secession.[47] The view of the Supreme Court of Canada on the issue of Quebec independence is very significant and serves as a precedent for the conduct of all future similar cases around the world. The Supreme Court of Canada guarantees territorial integrity. The Supreme Court protected the constitutional legal order of Canada and concluded that there is no legal right to unilateral secession of Quebec.

7. Conclusions

The concept of secession embodies external self-determination, and the whole world fears potential destabilization and threat to peace. External self-determination, as we have proven, is easy to abuse with a skillful legal game with the notion of a people which as such is not even defined in contemporary public international law and with the false vulnerability of political, economic, cultural, and linguistic rights of peoples. In addition, it arouses separatist movements worldwide and supports disintegration processes, which is opposed to the idea of a united Europe, which, after World War II, seeks to integrate all European states. Secession is not defined in contemporary public international law, although it is not permitted by the international community as well. Secession includes the separation of a certain part of the sovereign state's territory, which is only allowed in exceptional cases through the "remedial secession theory" and when a particular people have been subjected to repression and systematic violations of human rights

46 Ibid.

47 Ibid.

(the example of Kosovo is *sui generis* case in contemporary public international law). Calls for unilateral secession (examples of the Åland Islands, Quebec, and Catalonia) are unlawful and cannot be tolerated in contemporary public international law.

Thanks to the activities of the International Court of Justice in The Hague, the domestic courts of individual states, and the Badinter Commission[48] have also developed a theory of *negotiated secession*, which calls on states to issue legal solutions through comprehensive constitutional and legal reforms[49] in agreement with the authorities of their countries (examples of this approach are the Åland Islands, Quebec, and Scotland). The Supreme Court of Canada used the precedent of the Åland Islands case to make a decision that precludes the possibility of secession for Quebec and to support the internal self-determination of the peoples but also presented the form of *negotiated secession* in case the state of Canada exclude or restrict the constitutionally guaranteed rights of peoples. Contemporary public international law has accepted the right of non-colonial peoples to secession from the existing state as a form of external self-determination "when a group is collectively deprived of civil and political rights and when a group is exposed to outrageous abuses." This right to secession has become known as *remedial secession* and finds its origin in the 1920 Åland Islands case.[50] Secession undermines the Westphalian system of states, which includes: equality of states, non-interference in the internal affairs of states, territorial integrity, and inviolability of international borders of states.[51] Currently, according to Coppieters, there are between twenty and twenty-five "significant" separatist movements in Europe. Secession most commonly causes wars and represents an ongoing threat to international peace and security. The best example of building the concept of protecting the highest human ideals of life, solidarity, peace, security, and prosperity is the European Union. This

48 See more: Alain Pellet, "The Opinions of the Badinter Arbitration Committee A Second Breath for the Self-Determination of Peoples," *European Journal of International Law* 3, no. 1 (1992): 178–185, https://doi.org/10.1093/oxfordjournals.ejil.a035802.

49 Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, 19.

50 Milena Sterio, "On the Right to External Self-Determination: Selfistans, Secession, and the Great Powers' Rule," *Minnesota Journal of International Law* 19, no. 1 (2010): 143.

51 Ibid., 154.

is also the best example of the development of integration processes against disintegration processes in the contemporary world.[52]

It should be said that when seeking secession, secessionists betray, Weiler considers, the ideals of solidarity and human integration that form the foundations of modern Europe. Secessionist movements are a lasting problem of the international community and a phenomenon in legal and political terms. Existing norms of contemporary public international law on self-determination are insufficient and incomplete. We should work more carefully on the adoption of new laws and/or giving new interpretations to existing international laws within international and regional organizations. The institutionalization and normalization of self-determination, including the particularly sensitive issue of secession, is not easily enforceable in the United Nations. However, it could be somewhat easier to implement within the European Union.[53]

References

Buchanan, Allen. *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*. Oxford: Oxford University Press, 2007.

Bursać, Slobodanka. "Pravo Na Samoopredeljenje Naroda." *Međunarodni Problemi* 62, no. 2 (2010): 276–313.

Cassese, Antonio. "The Approach of the Helsinki Declaration to Human Rights." *Vanderbilt Journal of Transnational Law* 13, no. 2 (2021): 275–291.

Castellino, Joshua, and Jérémie Gilbert. "Self-Determination, Indigenous Peoples and Minorities." *Macquarie Law Journal*, no. 3 (2003): 155–178.

Costa, Daniel. "Great Power." Britannica. Accessed February 3, 2023. https://www.britannica.com/topic/great-power.

Crawford, James. *The Creation of States in International Law*, 2nd ed. Oxford: New York: Clarendon Press; Oxford University Press, 2006.

Gavrilović, Bojan. "Istorija Prava Na Samoopredeljenje, (R)Evolucija Prava Na Samoopredeljenje." 2013, 1–26.

Hannum, Hurst. "Rethinking Self-Determination." *Virginia Journal of International Law* 34, no. 1 (1993): 1–69.

Harris, Erika. "Paradoks, Kontroverza i Nacionalno Samoodređenje." *Politička Misao* 52, no. 1 (2015): 191–202.

52 Ibid.

53 Ibid.

International Court of Justice. "East Timor (Portugal v. Australia." Accessed February 3, 2023. https://www.icj-cij.org/en/case/84.

International Court of Justice. "Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)." Accessed February 3, 2023. https://www.icj-cij.org/en/case/53.

Karadzoski, Mladen, and Goran Ilik. "Will the European Union Europeanise the Balkans to Avoid the Balkanisation of Europe?." *Studia Europejskie – Studies in European Affairs* 23, no. 4 (December 23, 2019): 41–72.

LII/Legal Information Institute. "Uti Possidetis Juris." Accessed February 3, 2023. https://www.law.cornell.edu/wex/uti_possidetis_juris.

Lynch, Allen. "Woodrow Wilson and the Principle of 'National Self-Determination': A Reconsideration." *Review of International Studies* 28, no. 2 (2002): 419–436.

O'Brien, Patricia. "The Åland Islands Solution A Precedent for Successful International Disputes Settlement." Speech presented in the United Nations Headquarters, Delegates Entrance Lobby, January 17, 2012.

Office of the Historian. "Milestones: 1914–1920 – Wilson's Fourteen Points, 1918." Accessed February 3, 2023. https://history.state.gov/milestones/1914–1920/fourteen-points.

Office of the Historian. "Milestones: 1969–1976 – Helsinki Final Act, 1975." Accessed February 3, 2023. https://history.state.gov/milestones/1969–1976/helsinki.

Office of the Historian. "Papers Relating to the Foreign Relations of the United States, The Paris Peace Conference, 1919, Volume XIII – The Covenant of the League of Nations (Art. 1 to 26)." Accessed February 3, 2023. https://history.state.gov/historicaldocuments/frus1919Parisv13/ch10subch1.

OHCHR. "Declaration on the Granting of Independence to Colonial Countries and Peoples." Accessed February 3, 2023. https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-granting-independence-colonial-countries-and-peoples.

OHCHR. "International Covenant on Economic, Social and Cultural Rights." Accessed February 3, 2023. https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights.

Pavković, Aleksandar, and Peter Radan. *Creating New States: Theory and Practice of Secession*, 2nd ed. Aldershot, Hampshire, England; Burlington, VT: Ashgate Publishing, 2013.

Pellet, Alain. "The Opinions of the Badinter Arbitration Committee A Second Breath for the Self-Determination of Peoples." *European Journal of Interna-*

tional Law 3, no. 1 (1992): 178–185. https://doi.org/10.1093/oxfordjournals.ejil.a035802.

Perry, Frederick V., and Scheherazade Rehman. "Secession, the Rule of Law and the European Union." *Connecticut Journal of International Law* 123, no. 31 (2015): 61–91.

Šarčević, Edin. "Pravo Naroda Na Samoopredjeljenje Sa Otcjepljenjem." May 8, 2022. https://edinsarcevic.wordpress.com/2022/05/08/pravo-naroda-na-samoopredjeljenje-sa-otcjepljenjem/.

Sasich, Angelina M. "The Right to Self-Determination and Its Implication on the Sovereign Right of States: The Inconsistent Application of International Standards for Independence concerning Kosovo." *Michigan State International Law Review* 20, no. 2 (2012): 495–519.

Sterio, Milena. "On the Right to External Self-Determination: Selfistans, Secession, and the Great Powers' Rule." *Minnesota Journal of International Law* 19, no. 1 (2010): 137–76.

Supreme Court in Canada. "Reference Re Secession of Quebec – SCC Cases." Accessed February 3, 2023. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do.

The United Nations and Decolonization. "Non-Self-Governing Territories." Accessed February 3, 2023. https://www.un.org/dppa/decolonization/en/nsgt.

United Nations Digital Library. "UN General Assembly (25th. sess.: 1970): Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States following the Charter of the United Nations, 1971." https://digitallibrary.un.org/record/202170.

United Nations. "UN Charter." Accessed February 3, 2023. https://www.un.org/en/about-us/un-charter.

Vidmar, Jure. "Remedial Secession in International Law: Theory and (Lack of) Practice." *St Antony's International Review* 6, no. 1 (2010): 37–56.

Zoubir, Yahia H. "The United States, the Soviet Union and Decolonization of the Maghreb, 1945–62." *Middle Eastern Studies* 31, no. 1 (1995): 58–84.

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Municipal *Lex Contractus* – Effectiveness of the Terms and Conditions for the Sale of Real Estate from the Municipal Real Estate Stock in Shaping the Real Estate Development Process

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Keywords:
sale of real estate, local self-government unit, municipality

Abstract: The municipality, acting in the sphere of dominium, independently decides on the use and manner of use of individual assets. However, the trade in real estate constituting the subject of ownership of this local self-government unit requires compliance with a number of legal regulations, the most significant of which is the Act of August 21, 1997 on Real Estate Management (consolidated text Journal of Laws of 2021 item 1899, as amended). However, none of the provisions of the law refers explicitly to the freedom and limits of shaping by the municipality of the terms and conditions for the disposal of real estate, which in the case of a non-tender route are determined in negotiations conducted with the buyer, while in the case of a tender they are announced in the contract notice. The content established in this manner is then included in the protocol, which forms the basis for the conclusion of the contract, and thus directly affects the shape of the contractual legal relationship. The purpose of the publication will therefore firstly be to set out the legal framework for the municipality's determination towards the future buyer of the real estate of the specific manner, in which the investment is to be carried out, as well as to answer the question as to the real possibility of the former owner (municipality) co-shaping the investment process on the sold real estate after the buyer has signed the contract.

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The importance of the issue under consideration is expressed in the decision as to whether the creation by the municipality of its own *lex contractus* by means of the terms and conditions for the disposal of the real estate relating to specific deadlines for the commencement and completion of the investment process, the manner of use and development of the real estate, as well as the liability of the new owner towards the previous owner for their violation, is legally effective and can actually be enforced by the municipality.

1. Introduction

The basic instrument for shaping the spatial policy by the municipality is the adoption of the local spatial development plan. Already in Article 6 of the Act of March 27, 2003 on Spatial Planning and Development,[1] it is explicitly indicated that the provisions of the local spatial development plan are one of the factors shaping the manner of exercising the ownership right to real estate. In the doctrine and jurisprudence, there are no greater doubts that the said Act, together with the acts of local law issued pursuant thereto – local spatial development plans, constitute one of the limitations to the rights arising from the ownership right (Article 140 of the Civil Code of April 23, 1964[2] – hereinafter the CC or the Civil Code). Therefore, their level of detail must correspond to the constitutional principles of the rule of law, proportionality, equality and the protection of property, as it translates into the degree of interference of the municipality's planning authority in the private interests of real estate owners located in the areas covered by the local spatial development plans.[3] Determining directions for new development and guaranteeing the efficient management of space and the preservation of the economic value of this space on the scale of a specific land real estate is also possible using civil law instruments. The basic legal relationship that limits a private entity's right to land is perpetual usufruct. The specific elements of the contract on the handover of real estate for perpetual

1 Consolidated text Journal of Laws of 2022 item 503, as amended.

2 Consolidated text Journal of Laws of 2022 item 1360, as amended.

3 See the judgments of the Supreme Administrative Court of: March 17, 2022, Ref. No. II OSK 831/21, LEX No. 3338063; June 18, 2016, Ref. No. II OSK 478/16, LEX No. 2107247; November 14, 2012, Ref. No. II OSK 2226/12, LEX No. 1291967; March 17, 2022, Ref. No. II OSK 884/21, LEX No. 3352194; February 16, 2022, Ref. No. II OSK 754/21, LEX No. 3342365.

usufruct, which affected the use of the land by the holder, were the work commencement and completion dates, the type of buildings or facilities and the obligation to maintain them in a good condition, the conditions and dates for reconstruction in the event of the destruction or demolition of buildings or facilities during the term of perpetual usufruct (Article 239 of the CC). As of January 1, 2019, pursuant to the Act of July 20, 2018 on the Transformation of the Right of Perpetual Usufruct of Land Developed for Residential Purposes into the Ownership of Such Land (consolidated text Journal of Laws of 2022 item 1495), the right of perpetual usufruct of land developed for residential purposes is transformed into the ownership of such land. As a result, local self-government units disposing of municipal land have lost the possibility to influence the manner of development and construction of real estate intended for housing. It is only fair to point out that it is precisely on such real estate that there is a great deal of abuse on the part of investors that, hoping to make a substantial profit from the sale, exploit the real estate development to the limit of legality. In the language of the real estate trade, a new term has already become established that is known as "patodevelopment" (pathological development), meaning a development that formally conforms to the lowest criteria, conditions and parameters of the construction law, but which, in terms of its use for residential purposes, the standard of the area and the quality of life in this area, leaves much room for controversy.[4] Special attention should be paid to the fact that local self-government units and the State Treasury are obliged to manage real estate in a manner consistent with the principles of sound economy (Article 13 of the Act of August 21, 1997 on Real Estate Management[5] – hereinafter REM). Furthermore, the management of real estate, in particular municipal real estate, is linked to the exercise of particular care in performing the management in accordance with the purpose of that real estate and its protection (Article 50 Act of March 8, 1990 on Municipal Self-Government – hereinafter MSG[6]). It can therefore be concluded that

4 For a summary of 2021 in terms of the lack of quality by new developments, see: Michał Bachowski, "10 najgorszych przejawów polskiej patodeweloperki," NOIZZ, accessed June 10, 2022, https://noizz.pl/design/10-najgorszych-przejawow-polskiej-patodeweloperki-w-2021-r/6ex1hpl.

5 Consolidated text Journal of Laws of 2021 item 1899, as amended.

6 Consolidated text Journal of Laws of 2022 item 559, as amended.

public entities are obliged to exercise their property rights in a manner that corresponds to the indicated regulations.[7] The special nature of the municipality and the tasks it has to perform makes it necessary to pose the question of the possibility of influencing the manner of development and use of land intended for housing by the new owner (investor) that acquired the real estate from the municipality.

There is no doubt that a municipality, as a local self-government unit, acting on the basis and within the limits of the law, may establish civil law relationships. It is possible thanks to the fact that regulations of the law acknowledge a municipality as an independent participant in legal relationships by granting it legal personality and equipping it with assets to manage. From solutions included in the Constitution, the Civil Code, to system-related statutes, a municipality, as well as higher-level local self-government units, was granted legal personality.[8] The legal personality of local self-government units, in addition to decentralization of public authority, is also one of the aspects of local self-government – thus being a guarantor of its independence.[9] Granting legal personality to a municipality (and other local self-government units) causes it to gain the status of a hybrid entity in legal transactions. Primarily because it combines the capacity to establish civil law relationship on its own behalf with competences to decide with authority in individual cases (while exercising public authority) and with constituting acts of local law. However, a municipality, while maintaining this multifaceted identity, depending on the type of its operation, cannot cumulate the rights it is afforded. Therefore, while functioning in private law transactions, a municipality is subject to rules binding on all participants, and thus may not authoritatively shape the rights and obligations of

7 Magdalena Habdas, "Komentarz do art. 140 KC," in *Kodeks cywilny. Komentarz. Tom II. Własność i inne prawa rzeczowe (art. 126–352)*, eds. Mariusz Fras, Magdalena Habdas (Warsaw: Wolters Kluwer Polska, 2018).

8 See: Article 165 of the Constitution of the Republic of Poland of April 2, 1997, (Journal of Laws No. 78, item 483) and Article 33 of the CC.

9 Joanna Jagoda, "Podmiotowość prawna jednostek samorządu terytorialnego," in *O czym mówią prawnicy, mówiąc o podmiotowości*, ed. Agnieszka Bielska-Brodziak (Katowice: Wydawnictwo Uniwersytetu Śląskiego, 2015), 347; Lucyna Rajca, "Upodmiotowienie publicznoprawne (polityczne) i cywilnoprawne (gospodarcze) gminy a rozwój lokalny," *Przegląd Sądowy*, no. 2 (2001): 110.

its counterparty, which is admissible in exercising public authority. Nevertheless, a municipality as a civil law entity remains a special entity. Contrary to other – from the perspective of civil law regulations – entities of the law equal to it, it cannot enjoy the same scope of independence in deciding about its intentions and ways to achieve them. The premise that a municipality, as part of a separated state apparatus, is to perform public tasks on its own behalf and on its own responsibility, including satisfying the needs of a self-governing community, still plays a key role in this respect. In this context, therefore, it needs to be assumed that managing municipal assets, though on the basis of civil law measures, will have a purposeful nature to a greater extent. This is why the driving force behind the activities taken in this regard will always involve the performance by municipalities of specific public tasks, which will directly or indirectly impact the degree of the municipality's involvement in civil law transactions. It is postulated that it is a concept sufficient for a private law approach to this issue. Whereas the manner of performing government authority-related tasks, alien to civil law, resulting from the public law nature of these entities, is an open issue.[10] The legal personality is exercised solely in the sphere of property relationships, and does not prove true in the sphere of administrative competences in terms of administrative authority and does not substantiate their independence and separateness from state bodies in terms of implementation of public tasks.[11] In turn, trading in public real estate is one of the best examples of administrative law permeating civil law, as well as excellent substantiation for non-government authority-related forms of activity of public entities. It needs to be added that the existing subjectivity of municipalities and other local self-government units is derived from civil law (mainly because only there this issue is regulated in detail). This does not mean that a public entity which uses private law measures loses this status. It is still bound by public law regulations, which are the basis of

10 Sławomir Fundowicz, "Osoby prawne prawa publicznego w prawie polskim," *Samorząd terytorialny*, no. 3 (2000): 3; Zygmunt Niewiadomski, "Pojęcie samorządu," in *System Prawa Administracyjnego, Tom 6, Podmioty administrujące*, eds. Roman Hauser, Andrzej Wróbel (Warsaw: C.H. Beck, 2011), 119; Piotr Radziewicz, "Kilka uwag w sprawie prawnej przydatności pojęcia osoba prawa publicznego," *Samorząd Terytorialny*, no. 6 (2000): 4.

11 Niewiadomski, "Pojęcie samorządu," 118–120.

its operation in general and, in particular, the use of civil law instruments to achieve a specific goal.[12]

Regardless of the disputes on the approach to legal personality, it needs to be highlighted that as a consequence of granting this attribute to the municipality, it not only becomes a separate entity in the sphere of property relations, but it also becomes equipped with property that forms its facilities to exercise the functions and tasks vested in it, not only of a public nature. The discussed problem lies in finding an admissible manner of protection of the property interest of the municipalities as an entity under civil law, which by establishing civil law relationships may shape the real estate development process. However, the choice of the appropriate measures depends on many issues, which will be discussed below.

2. REM in the Scope of the Dominium (Economic) Sphere and the Imperium (Authority-Related) Sphere in the Activities of the Municipality

As has been highlighted above, it is highly problematic to capture the boundary between exercising public authority and satisfying collective interests of a community in the course of economic activity, especially when the municipality undertakes activities on its own and does not entrust them to third parties (such as for-profit municipal companies).The main criterion allowing a differentiation of the dominium (economic) sphere and the imperium (authority-related) sphere will therefore involve establishing a systemic position of this entity towards the rest of participants of legal transactions in general and civil law transactions in particular. In fact, the indicated criterion will refer to the possibility of deciding about a specific legal situation of an entity by establishing individual or general norms, secured with the possibility of exercising state coercion. As a consequence, the dominium sphere will be free from legislative acts, final and non-revisable court decisions or other final decisions. Therefore, if a local self-government unit cannot exercise public authority towards its counterparties, then it may impact the position of the other party solely in the scope of competences granted on the basis of private law regulations. This is why in the dominium sphere such

[12] Kazimierz Strzyczkowski, *Rola współczesnej administracji w gospodarce (zagadnienia prawne)* (Warsaw: Wydawnictwo Uniwersytetu Warszawskiego, 1992), 148.

an entity has, as a standard, an equal position towards the rest of the participants, and thus may not independently shape the rights and obligations of its counterparties. The only source of establishing legally significant relations will be to perform acts in law. However, contrary to non-public legal entities (other than those exercising public authority), it will not enjoy the same level of autonomy. Violating any of the additional criteria of participation in economic trading causes the acts in law performed contrary to them to lose legal significance. It is because only acts in law which are compliant substantively (content-wise) and formally (manner of performance) with the system of the law may shape civil law relationships in a binding way.[13] It needs to be noted that the scope of admissible acts in law is limited by the scope of the municipality's legal subjectivity determined by the attribute of legal capacity and of the capacity to perform acts in law. A municipality may be a subject only to those civil law rights and obligations, which on the basis of detailed regulations may not be attributed to a legal person in general, or, even more so, associated with entities such as a local self-government unit.[14]

Managing real estate which is the property of the State Treasury and the property of a municipality (and other local self-government units) is subject to separate rules compared to trading in private real estate. The public real estate management is regulated by several legal acts. The most important legal act is REM and secondary legislation, which is *lex specialis* to the CC. This last legal act applies only if other acts have not regulated the issue of the discussed real estate management. A sale of real estate or granting land real estate for perpetual usufruct is carried out through a tender or in a non-tender procedure. The REM imposes an obligation on the bodies representing the State Treasury and local self-government units to manage the real estate in a way which is compliant with the principles of sound economy management. The principles of sound economy management assume the achievement of maximum economic profits from

13 Zbigniew Radwański and Krzysztof Mularski, "Normatywna podstawa skuteczności prawnej," in *System Prawa Prywatnego, Tom 2, Prawo cywilne – część ogólna*, eds. Zbigniew Radwański and Adam Olejniczak (C.H. Beck: Warsaw, 2019), 9–11.

14 Józef Frąckowiak, "Osobowość prawna gminy," *Acta Universitatis Wratislaviensis. Prawo*, no. 219 (1993): 134; Adam Doliwa, *Osobowość prawna jednostek samorządu terytorialnego* (Warsaw: C.H. Beck, 2012), 167.

the point of view of the owner, while maintaining social utility.[15] It fits in a wider concept of good governance principles and their impact on real estate management.[16] The REM by establishing civil law relationships may achieve public goals in the longer run.

3. Formation of the Manner in which a Future Buyer Exercises its Rights under the Ownership Right

3.1. Significance of Terms and Conditions for Disposal of Real Estate in Light of the REM

The only possibility of influencing the way in which the future buyer exercises its rights under the ownership right is the terms and conditions of disposal set by the municipality at the very beginning of the procedure for the disposal of the land. First of all, it should be pointed out that there is a lack of uniformity on the part of the legislator with regard to the permissible legal acts that may comprise the process of disposal of real estate. Article 4 (3b) of the REM defines disposal and acquisition of real estate as a legal transaction based on which the ownership of real estate is transferred or the right of perpetual usufruct of land is transferred or given for perpetual usufruct. Article 13 (1) of the REM, which contains only an exemplary catalogue of legal acts related to real estate transactions, seems to correspond to this definition. Within the scope of actions having a dispositive effect, the legislator indicates in particular sale, exchange and relinquishment, as well as granting for perpetual usufruct. However, when indicating the manner in which the real estate owned by a local self-government unit is to be disposed of, which is to be carried out either through a tender or in a non-tender procedure, it refers to the sale or granting of perpetual usufruct of land (Article 28 (1) of the REM). However, paragraph 2 of this article already refers to the terms and conditions for disposal of the real estate, which should be specified in the invitation to tender or during negotiations conducted

15 Ewa Bończak-Kucharczyk, *Ustawa o gospodarce nieruchomościami. Komentarz aktualizowany* (Warsaw: LEX, 2022), Article 12; Jacek Jaworski et al., *Ustawa o gospodarce nieruchomościami. Komentarz* (Warsaw: Legalis C.H. Beck, 2022), Article 12.

16 Marta Gross, Ryszard Źróbek, and Daniela Špirková, "Public Real Estate Management System in The Procedural Approach – A Case Study Of Poland And Slovakia," *Real Estate Management and Valuation* 22, no. 3 (2014): 63.

with the buyer. It is argued in the literature that, also taking into account the content of Articles 34 (1), 37 (2) and 68 (1) (2) of the REM, it should be considered that Article 28 of the REM only applies to the sale of real estate and the granting of perpetual usufruct.[17] When contrasting the term "terms and conditions for the disposal of the real estate" with the term "terms and conditions of the tender" in Article 38 (2) of the REM, it should be clearly indicated that the latter refers to the determination already in the content of the tender contract notice or in the protocol of the negotiations of the required distribution of rights and obligations, which will correspond to the content of the future contract. In the case of the tender procedure, it is the moment of publication of the tender contract notice that is the key moment of the establishment of the rules binding both parties on the content of the future contract. The impossibility to introduce additional regulations influencing the legal situation of future parties to the contract results directly from Article 28 (3), § 10 of the Regulation of the Council of Ministers of September 14, 2004 on the manner and procedure of conducting tenders and negotiations for the sale of real estate[18] and Article 70 (4) of the CC. The organizer remains bound by the terms and conditions for the disposal of the real estate made available by such organizer and the tender conditions, which imply not only the rules of specific conduct during the tender (rights and obligations of the parties during the tender process), but also after its conclusion (rights and obligations of the parties to the future contract).[19] Therefore, the question must be asked about the extent of

17 Bończak-Kucharczyk, *Ustawa o gospodarce nieruchomościami*, Article 28.

18 Journal of Laws of 2021 item 2213.

19 The literature and case law point to different legal qualifications of the sources of such an obligation, with the prevailing view being that a pre-contractual agreement arises (*pactum de procedendo*) see: Piotr Nazaruk, "Komentarz art. 701," in *Kodeks cywilny. Komentarz aktualizowany*, eds. Jerzy Ciszewski and Piotr Nazaruk, Warsaw: LEX, 2022); Bernard Łukańko, "Komentarz art. 701," in *Kodeks cywilny. Komentarz. Tom I. Część ogólna, cz. 2 (art. 56–125)*, ed. Jacek Gudowski (Warsaw: LEX, 2021); Krzysztof Czub and Maja Maciejewska-Szałas, "Komentarz do art. 701," in *Kodeks cywilny. Komentarz*, eds. Małgorzata Balwicka-Szczyrba and Anna Sylwestrzak (Warsaw: LEX, 2022), with cited literature; Przemysław Mikłaszewicz, "Komentarz do art. 701," in *Kodeks cywilny. Komentarz*, eds. Konrad Osajda and Witold Borysiak (Warsaw: Legalis C.H. Beck, 2022. As regards case law, reference should be made to the judgment of the Supreme Court of July 15, 2007, Ref. No. II CZ 37/07, LEX No. 488947.

the competence of the tender organizer to influence the rights and obligations of the parties to the future contract, and thus the content of the legal transaction. As already indicated, the terminological confusion in the REM, which consists in the use of different terms (sale/disposal) in the same context, does not facilitate the possibility of answering the question thus posed. Moreover, the REM only defines the term of disposal/acquisition of real estate and does not refer to the term of sale,[20] treating such contract only as one of the events leading to the transfer of ownership rights. Therefore, if there are no limitations in the REM other than the manner of determining the price and its reduction, then it should be pointed out that the Civil Code should be applied to assess the competence to shape the content of the contract of sale concluded through tender or non-tender procedure not regulated in the REM and MSG. The duty of economy (Article 13 of the REM) and due diligence (Article 50 of the MSG) is related not only to the property aspect (usually understood as obtaining the highest possible price), but also to the non-property aspect (understood as obtaining the most favorable terms and conditions for disposal).

3.2. Contract of Sale with the Right of Repurchase

Taking into account the raised issue of the contractual predetermination of the manner of development or use of the land by the future owner of the real estate, together with the obligations of the municipality to manage its assets, it should be concluded that the typical content of the contract of sale provided for in Article 535 et seq. of the Civil Code will be insufficient in certain situations. This is also evidenced by the Act of December 16, 2020 on the Disposal of Real Estate with Settlement "Premises for Land,"[21] which sets out the principles for the disposal of real estate from the municipal or district real estate resource with settlement in the price of such real estate of the price of premises or buildings transferred by the buyer of the real estate for ownership to the municipality or district. However, the difference between the analyzed options is that a contract of sale concluded under the "premises for land" settlement serves the purpose of enriching

[20] In contrast to the term "land real estate," which is defined in the REM in Article 4 (1) and is a compilation of Articles 46, 47 and 48 of the Civil Code.

[21] Journal of Laws of 2021 item 223, as amended.

the municipal or district real estate stock with premises or land real estate developed with a building with specific standards and use.[22] In contrast, in this case it is about situations, in which the municipality has no interest in receiving replacement real estate from a future buyer, as this interest will exist in the future use of the real estate by this buyer. First of all, it should be pointed out that in addition to the typical contract of sale regulated in Articles 535–581 of the CC, the legislator distinguished in Articles 583–602 of the CC special types of sale, including sale subject to the right of repurchase and sale subject to the right of pre-emption. However, the dynamics of business transactions and the objectives pursued by the parties have led to the singling out of special types of sale, such as franchise sale[23] or sale subject to exclusivity.[24] Regardless of whether new types of contract of sale have their – even fragmentary – legal regulation,[25] the possibility to create new types of sale or to expand the content of typical contracts of sale is based on the competence of the parties resulting from the principle of freedom of contract (Article 3531 of the Civil Code). In this light, therefore, it will not be very controversial if, in order to secure a certain land use, the subject of the tender is not a classic contract of sale of real estate, but a contract of sale subject to the right of repurchase. It is also not excluded that the parties, in an attempt to establish at the contract conclusion stage the rules for future settlements related to the re-transfer of the real estate as a result of the exercise of the right of repurchase, will introduce a suspensive negative potestative condition making the exercise of the right of repurchase contingent on the real estate not being developed in a specific manner within an agreed period of time. It should also be added that this legal figure is linked to the new view of doctrine and case law as regards the possibility of stipulating a condition in unilateral legal acts serving the purpose of exercising a formative power. A condition in actions of this kind is admissible

22 E.g. buildings with social housing adapted for persons with disabilities or premises prepared for the operation of a municipal crèche or kindergarten.

23 Wojciech. J. Katner and Jerzy Pisuliński, "Szczególne rodzaje sprzedaży poza przepisami Kodeksu cywilnego," in *System Prawa Prywatnego, Prawo zobowiązań – część szczegółowa*, ed. Jerzy Rajski (Warsaw: C.H. Beck, 2018), 7: 25.

24 Wojciech J. Katner, "Umowy w obrocie towarowym," in *System Prawa Handlowego*, ed. Mirosław Stec (Warsaw: C.H. Beck, 2017), 5: 1013.

25 E.g. specification of sale – Article 549 of the CC.

when its fulfilment depends on the behavior of the addressee of this action and does not cause uncertainty in the legal situation of this addressee.[26] Assuming that the mere fact of reserving the right of repurchase introduces a state of uncertainty on the part of the buyer, it is undoubtedly in the interest of the buyer to objectify the circumstances that will induce the seller to exercise the right of repurchase, and in particular when it is the future buyer itself that presents the development concept to which the buyer is committed. It should also be noted that the mere reservation of the right of repurchase does not transform the contract of sale into a contract concluded under a resolutive condition.[27] A contract of sale concluded subject to the right of repurchase still has the character of a definitive contract, as – in principle – it does not limit the buyer's legal rights. However, the awareness on the part of the buyer that, during the term of the right of repurchase, the buyer remains under an obligation to retransfer the real estate gives rise to an obligation on its part to refrain from acts which would prevent this effect from being achieved in the future.[28] It is an obligation that is effective only in an obligatory relationship, and therefore has a relative – *inter partes* – effectiveness.

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[26] See: Supreme Court, Judgment of May 28, 2020, Ref. No. I CSK 547/19, LEX No. 3051743. In literature: Bartłomiej Swaczyna, "§ 4. Zobowiązania," in *Warunkowe czynności prawne* (Warsaw: LexisNexis, 2012), which, among other things, in relation to the right of repurchase, indicates that "It should namely be considered admissible to exercise these shaping powers only under a condition precedent involving the behavior of the addressee of the declaration of will (most often the other party to the legal relationship). A resolutive condition is admissible only if the exercise of the shaping power does not entail the creation of immediately irreversible legal consequences. As already mentioned, an example of such a power is termination by notice." This view is supported in commentary studies on Article 89 of the Civil Code; see: Radosław Strugała, Komentarz do art. 89, in *Kodeks cywilny. Komentarz*, eds. Edward Gniewek and Piotr Machnikowski (Warsaw: Legalis C.H. Beck, 2021); Joanna Kuźmicka-Sulikowska, "Komentarz do art. 89," in *Zobowiązania. Przepisy ogólne i powiązane przepisy Księgi I KC. Tom I. Komentarz*, ed. Piotr Machnikowski (Warsaw: Legalis C.H. Beck, 2022).

[27] Marek Safjan, "Article 593 of the CC," in *Kodeks cywilny. T. II. Komentarz. Art. 450–1088. Przepisy wprowadzające*, ed. Krzysztof Pietrzykowski (Warsaw: Legalis C.H. Beck, 2021).

[28] Article 593 of the CC, even indicates that refraining from actions that could prevent the exercise of the right of repurchase in the future is the essence of the buyer's obligation under the right of repurchase; ibid.

3.3. The New Type of Contract of Sale

Another possibility, which will be based on the use of the sale contract structure, is to incorporate an additional obligation into this obligation structure. It will be charged to the buyer as the new owner and will consist in the implementation of specific land development through on its own.

The municipality's normative personification, anchored i.a. in property independence, allows a separation of this entity's property and non-property interest. The protection or satisfaction of these interests allows the municipality to act autonomously in civil law transactions, which eventually will best solve issues at the local level which lie at the basis of this entity's activity. The possibility to protect these interests for the future is important for ensuring effective operation, especially in the praxeological aspect. The collective interests of a local community may be satisfied by transferring public real estate, and thus by indirectly gaining funding for municipal investment, or by deciding about developing this real estate, which directly influences the investment process by appropriate establishment of the tender requirements and the content of the contract of sale within the limits to which autonomous participants can interact with each other.

Bearing this in mind, one may demonstrate that in trading in real estate, depending on the circumstances, public entities will act as a kind of sellers, who can afford to wait for as long as it is necessary to sell at fair market values or with restrictions in land use, and sellers, who cannot wait, but have to sell more quickly due to various constraints or against market conditions.[29] This is why, taking appropriate decisions about the sale itself and about establishing the tender requirements, including the price, requires a new vision of the public nature of municipal real estate and management of it concentrating on the efficiency, effectiveness and quality of

[29] Omboi Bernard Messah and Anderson M. Kigige, "Factors Influencing Real Estate Property Prices A Survey of Real Estates in Meru Municipality, Kenya," *Journal of Economics and Sustainable Development* 2, no. 4 (2011): 35, 42; Gary E. Heiland writes that selling real estate along with all applicable rights makes a buyer more likely to pay a different price, cf. Gary E. Heiland, II MAI, AI-GRS, "Property Rights Brought to Light: Principles and Misconceptions," *The Appraisal Journal* 87, no. 3 (2019): 191–192, accessed July 15, 2022. http://www.mvginc.com/documents/PropertyRightsBroughttoLight-PrinciplesandMisconceptions_000.pdf.

public services.[30] In this approach the achieved price may not play a major role, if the municipality, as a former owner, achieves a different goal of a much greater value but impossible to measure in monetary terms. This allows an assumption that sometimes the obligations allowing satisfaction of the creditor's interest may be an instrument that serves the achievement of statuses that go beyond the civil law regulations, which are associated with local governance. However, this does not change the statement that these goals are supported by interests that are not necessarily related solely to material values, but relate, for example, to local ecology or the reduction of certain market influences on local community and the environment.[31] This is because sometimes it may involve preserving the terrain or caring for the historic heritage inscribed in the architectural aspect of the development or remains of past constructions.

Due to its special nature and the tasks entrusted to it, the legislator imposes on the municipality, as well as on other public entities, the obligation to exercise the right of ownership, although it is not part of the content and essence of ownership.[32] This is in favor of the existence of a creditor's interest worthy of protection, which will form the basis for the new obligation. Even though in civil law transactions a municipality acts as a real estate owner, it cannot always use and enjoy this right in a similar way towards other entities. This results primarily from the fact that it is a manifestation of the residents' community. Hence its "particular interest" is not detached from the interest of the community, which is echoed in each decision directly proportionately to the consequences it will bring to this community. Trading in real estate, in particular preparing the real estate for transfer is the best exemplification of this phenomenon. Even though sale of the real estate is to be carried out by means of an open tender, due

30 Daniela-Luminita Constantin et al., "Municipal Real Properties and the Challenges of New Public Management: A Spotlight on Romania," *International Review of Administrative Sciences* 84, no. 1 (2018): 123; Kyle J. Mamounis and Walter E. Block write that "Legitimacy of property from its use, rather than its acquisition, is not a workable system of property rights;" Kyle J. Mamounis and Walter E. Block, "The Molecular Basis of Private Property," *Acta Oeconomica* 69, no. 3 (2019): 326.

31 Loka Ashwood, Danielle Diamond, and Fiona Walker, "Property Rights and Rural Justice: A Study of U.S. Right-to-Farm Laws," *Journal of Rural Studies* 67, (2019): 126.

32 Magdalena Habdas, "Komentarz do art. 140 KC."

to this interest it may take the form of an oral or written tender. Sometimes the municipality is not able to manage a given real estate in a way best suited to the established local spatial development plan. Sometimes leaving given land as unused is to the detriment not only to the local community but also the assets of this entity. For this reason, the real estate is sold in order to use its potential in an appropriate way, which is possible only thanks to the potential of a new buyer – a private investor (developer). Thus, the problem arises: how to transfer land at the same time guaranteeing the implementation of the discussed investment, which by default is to satisfy a current need? In order to emphasize the analyzed issue one may use the following example. The progressing problem of industrialization and urbanization of urban agglomerations, caused mainly by the need to satisfy ever greater housing needs of a given community, causes the use of available space to the limits of its development. A direct consequence of such practices involves erecting buildings in proximity that is far from maintaining privacy so much protected today, at best guaranteeing only apparent protection. It is about demonstrating that the right to privacy may be reflected both in the ownership right and in the way real estate is developed as the arena of accommodating both complementary and conflicting social impulses.[33] As a result of such practices it is more and more difficult to satisfy this elementary need of human contact with nature in large agglomerations. Appropriate spatial planning of areas with residential functions tries to prevent such emerging "concrete jungles." These acts of local law determine numerous issues, not only regarding the distance between neighboring buildings and the minimum number of parking places, but also the percentage of the area that is to be devoted only to natural elements. Managing real estate, even rural real estate if located within administrative boundaries of cities, needs to take into account the existing spatial order and the one that will probably appear in the future. As a result, arable lands in urban agglomerations may be and usually are transformed into terrain for single-family or multi-family developments, let alone permitting services-related development. One thing is certain, after transferring the ownership right, a municipality in fact loses the possibility of influencing the development of this

[33] Abraham Bell and Gideon Parchomovsky, "The Privacy Interest in Property," *University of Pennsylvania Law Review* 167, (2019): 871.

land, with the exception of exercising public authority which takes the form of construction administration and shaping the spatial order.
In this approach, the last possibility of influencing the future buyer is to create an obligation which will facilitate the achievement of a goal that cannot be expressed economically and that does not have a direct reference to the property-related situation of both of the parties. A goal which fits within a wider spectrum of municipality's activity as an entity of a dual legal nature, which may use civil law instruments to achieve public goals, though never the other way round.

The existence of a contractual legal relationship is determined by the occurrence of a creditor's interest worthy of protection, which may be both property and non-property interest. The presented types of creditor's interest imply the possibility of employing various measures of contract law, which not only determine the validity of a created obligation, but also allow its effective performance and safeguarding the creditor's interest.[34] It is reasonable, where the transferred land on which a specific investment is to appear or which should be developed in a way suitable to the self-governing community, to create an additional obligation for the buyer to develop or use the transferred land in a manner compliant with the contract of sale. The accuracy of this conclusion is based on obligatory tender procedures for transferring public real estate. One may assume on this basis that a commune's interest worthy of protection is expressed in selling the land to a person who guarantees its best development and also offers the highest price. Determining this premise in public real estate trading is easy in so far that it may clearly result from the tender requirements which each tender participant is obliged to become acquainted. It cannot be ruled out either that the driving force behind preparing the land to be sold, and then to be transferred, involves this very interest. Referring to the above-outlined example, the municipality decides to sell a specific piece of land in order for it not to lie fallow and for it to start fulfilling its function resulting even from applicable planning acts. The participation in a tender procedure – in nature multilateral and involving elimination – proves that an appropriate

[34] Eric Posner, "Economic Analysis of Contract Law after Three Decades: Success or Failure?," *The Yale Law Journal* 112, no. 4, (2003): 833; Malvin Aron Eisenberg, "The Emergence of Dynamic Contract Law," *California Law Review* 88, no. 6 (2013): 1745.

contractor has been selected in the course of the tender procedure and they are capable of undertaking and performing the discussed obligation. This obligation is indeed a result of mutual assent. Such a legal construct which assumes supplementation of a contract of sale of land real estate with an additional obligation may be vulnerable to a challenge about not observing the required equivalence of parties' performances, and thus violation of the principle of the freedom of contract under Article 3531 of the CC, which entails invalidity of such an act as contrary to the nature of the relationship.[35] It is mainly due to the fact that the former owner, who is still a creditor, holds a claim against the debtor, new owner, for which it gets nothing in return. Not to mention potential legal in rem connotations associated with the owner's position and admissibility of setting limits on ownership rights. Nevertheless, it is important for the analyzed issue to be examined only in the aspect of obligation-related rights. It is because from the very outset it is not about the ownership right which is unconditionally transferred on the buyer (the successful tenderer), but about the additional contractual relationship included in the contract of transfer of this real estate, which obliged the buyer to achieve a result specified therein which corresponds with the commune's interest. *Per analogiam* if regulations allow establishing an obligation the subject of which is to limit the entitled entity in managing the transferable right (see Article 57 § 2 of the CC), it is all the more possible to establish a legal relationship which will oblige the entitled person to perform specified factual acts associated with exercising this right (by reason of analogy to solutions associated with regulation of neighborly relations and nuisance, or intensification of activity aiming to achieve a status compliant with the applicable local spatial development plan).

It needs to be mentioned that the equivalence of performances of the parties is a condition necessary for mutual contractual obligations to be valid. One needs to support the view that the equivalence should be referred to the parties' subjective perception of performances as being bilateral. Mainly due to the fact that the parties, while exchanging performances, believe that they will benefit from it since in their belief they receive

[35] See judgment of the Supreme Court of June 28, 2017, Ref. No. IV CSK 511/16, www.sn.pl.

a more valuable performance.[36] It is not about the fact that the performances (even in the opinion of the parties) are to be of equal value; it is about one performance being carried out in exchange for the other, in accordance with the *do ut des* principle. Each performance, therefore, is a counterpart, not an equivalent of the other.[37] When laying the indicated views onto the assumptions of public real estate trading, one may even set forth a thesis about objectification of this element, characteristic to bilateral contracts. One must highlight the fact that a public entity may in no way conceal such an additional obligation from potential participants and even more so, it is not capable of forcing them to accept this additional obligation, which is to be associated with the conclusion of a contract of sale. It is all due to the open nature of the tender procedure and making publically available of all information about the real estate in the tender contract notice itself, which is the first document on the basis of which the participants will take a decision whether they will participate in the procedure. It is because entities that are of equal status and that are free to take decisions both on taking part in the tender procedure and on concluding an appropriate contract on the terms and conditions specified in the tender contract notice. Thus, it is not about limiting the ownership right, but about supplementing the buyer's obligations towards the transferor, which was one of the elements of the legal reason for creating this legal relationship. Moreover, it concerns creating such an obligation which will in no way undermine the effectiveness of transferring ownership. The only consequence of such an additional obligation will be expressed in the consequences of its non-performance by the person who undertook it. The artificial separation of an obligation to develop the real estate from the content of a contract of sale should be considered incorrect. From the very beginning, the contract may be constructed in such a way that the performance of payment of the price and the obligation of specific development of the land is to correspond with the transfer of ownership of the land.

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36 Adam Olejniczak and Zbigniew Radwański, *Zobowiązania – część ogólna* (Warsaw: C.H. Beck, 2018), 125.

37 Maciej Gutowski, "Komentarz do art. 487 KC," in *Kodeks cywilny. T. II, Komentarz do art. 353–626*, ed. Maciej Gutowski (Warsaw: C.H. Beck, 2018), 1160.

4. Conclusions

It is true that the existence of a contractual legal relationship is determined by the existence of a creditor's interest worthy of protection. As a result, it means that a municipality, trying to achieve the intended result in the form of a specific and timely development of the real estate after its sale, must demonstrate the existence of a property and non-property interest which would allow considering the creation of the obligation to develop the sold land in a specific way as valid. The demonstration of a creditor's interest worthy of protection when creating an obligation of a specific real estate development will look different depending on the chosen procedure for concluding the contract and the type of this contract. The requirements imposed by the municipality on potential buyers, which clearly affect the specificity of the terms and conditions for the disposal of the real estate, should be assessed *ad casum*. In the case of a written tender and a non-tender procedure, the imposition of the described obligations on the prospective buyer will be more justified for two reasons. Firstly, in both cases the criterion of the price obtained is not a priority due to other more relevant circumstances. Secondly, the prospective buyer has a real influence in shaping its legal situation, which will directly affect the preservation of equivalence of benefits. The issue under scrutiny will be different in the case of an oral tender, where a similar procedure may be applied only on the condition that the real estate is sold below the market price, which is possible if an appropriate discount is granted under the REM, or the valuation of the real estate takes this fact into account. Due to the obligation to sell public real estate by means of a tender procedure, it may be assumed that a municipality's interest worthy of protection was expressed in selling the land to a person who guarantees its best development, which entails obligations on public entities to manage their assets properly and carefully. The key criterion here is the content of the tender contract notice, which can be read by each tender participant. In turn, the established tender requirements, including a description of an additional obligation associated with the conclusion of the contract, is a basic criterion to take decisions by potential tenderers on whether participation in this procedure is economically rational for them. On this basis one may assume that a suitable contractor is selected through the tender procedure, that is able to undertake and perform the disputed obligation, and most of all, a contractor that agrees to the terms associated with the acquisition of the land real estate.

Creating a unilateral obligation to develop the real estate in a specific way, which constitutes an additional contractual reservation supplementing the contract of sale, is also supposed to serve the achievement of the purpose of the contract. The municipality loses its ownership status but achieves the position of a creditor, while the buyer, upon becoming the new owner, undertakes to assume the obligations of a debtor. It needs to be highlighted that this construct in no way interferes with legal *in rem* aspects of ownership transfer, which is definitive and effective. The discussed construct of a unilateral obligation concerns the manner of using the real estate which does not affect other aspects related to the ownership right, in particular collecting the fruits and other incomes from that real estate and the possibility for dispose of that thing. It is because from the very beginning it does not concern the ownership right, but an additional contractual obligation described first in the tender requirements, and then included in the contract of sale, which obliged the buyer to achieve a result compliant with planning acts applicable to this real estate within the time frame stipulated for in the contract.

Given the above, it needs to be concluded that the discussed construct in the presented approach will be free from the challenge of non-equivalence of performances and of violation of the principle of freedom of contract under Article 3531 of the CC as contrary to the nature of the relationship. The correctness of this conclusion is also based on the fact that regulations allow undertaking an obligation the object of which involves restricting the entitled entity in managing the transferrable right (see Article 57 of the CC), which is why it is all the more possible to establish a legal relationship which will oblige the entitled party to perform specific factual acts (by analogy to the solutions associated with regulation of neighborly relations). It also needs to be mentioned that the equivalence of performances of the parties is a necessary requirement for mutual contractual obligations to be valid, but this equivalence is understood subjectively, and the best proof that the said performance meets this criterion as far as the buyer is concerned and involves the buyer's participation in the tender procedure. Moreover, this potential economic non-equivalence between mutual performances of the parties does not matter greatly as long as both parties agree to it at the time of making the contract. One of the indirect effects of the tender procedure also involves the fact that it makes it impossible to

conceal before potential participants the contractual provisions that are unfavorable to them, and all the more so it excludes the possibility of forcing tenderers to accept additional obligations associated with the conclusion of a contract of sale which are unfavorable to them. It is because the entities that are of equal status and that are free to take decisions both on taking part in the tender procedure and on concluding an appropriate contract on the terms specified in the tender contract notice. Thus, one cannot have reservations as to the facts, which do not concern contractual limitation of the ownership right, but which concern supplementing the buyer's obligations towards the transferor, which became one of the elements of the legal reason for creating this dual-effect legal relationship. Therefore, the additional contractual reservation – concerning an additional obligation safeguarded by liquidated damages – constituted the content of the contract of sale from the very beginning, which was constructed in such a way that the performance of the payment of the price and of specific development of the land was to correspond with the transfer of the land ownership.

Taking the above into consideration, it should be stated that the hypothesis adopted at the beginning has been confirmed. Indeed, a municipality can use obligation structures (*lex contractus*) to shape the real estate development process. However, the key to the correctness of the concept adopted in the publication involves fulfilment of several conditions.

Firstly, acknowledging that satisfaction of a civil law interest does not exclude the simultaneous achievement of a socially useful consequence (e.g. the construction of generally accessible recreational facilities on the sold land). The civil law measures are predominantly of a targeted nature in this approach and the leitmotif for the undertaken activities will always involve the commune's satisfying specific needs of a self-governing community.

Secondly, the application of civil law measures may under no circumstances serve to secure public law issues, such as, for example, an increase in budget revenues from public levies, which, by definition, would be paid by the buyer after specific development of the real estate.

Thirdly, the satisfaction of basic pillars of civil law in the form of: a) autonomy of the will through the transparency of the content of the tender contract notice, which is mainly to allow an economically rational decision to be made by the future buyer; b) maintaining the equivalence of

the parties' performances, even with the buyer's obligation to develop the real estate in a specific way, which will be expressed at the stage of preparing the valuation report by taking into account all rights and encumbrances related to its acquisition in the value of the real estate.

Lastly, the selection of the appropriate conditions (*lex contractus*) for the sale of the land real estate to the chosen procedure for the disposal of that real estate. The more the procedure of disposal deviates from obtaining the highest price, the more the seller (in the case of a tender procedure) or the parties (in the case of a non-tender procedure) have greater freedom to shape the legal relationship of sale to an extent that even goes beyond the Civil Code regulations (see section 3.3).

References

Ashwood, Loka, Danielle Diamond, and Fiona Walker. "Property Rights and Rural Justice: A Study of U.S. Right-to-Farm Laws." *Journal of Rural Studies* 67, (2019): 120–129.

Bachowski, Michał. "10 najgorszych przejawów polskiej patodeweloperki." NOIZZ. Accessed June 10, 2022. https://noizz.pl/design/10-najgorszych--przejawow-polskiej-patodeweloperki-w-2021-r/6ex1hpl.

Bell, Abraham, and Gideon Parchomovsky. The Privacy Interest in Property." *University of Pennsylvania Law Review* 167, (2019): 869–920.

Bończak-Kucharczyk, Ewa. *Ustawa o gospodarce nieruchomościami. Komentarz aktualizowany.* Warsaw: LEX, 2022.

Constantin, Daniela-Luminita, Constantin Mitrut, Rulaca Mariana Grosu, Marius Constantine Profiroiu, and Alina-Elena Iosif. "Municipal Real Properties and the Challenges of New Public Management: A Spotlight on Romania." *International Review of Administrative Sciences* 84, no. 1 (2018): 122–143.

Czub, Krzysztof, and Maja Maciejewska-Szałas. "Komentarz do art. 701." In *Kodeks cywilny. Komentarz*, edited by Małgorzata Balwicka-Szczyrba and Anna Sylwestrzak. Warsaw: LEX, 2022).

Doliwa, Adam. *Osobowość prawna jednostek samorządu terytorialnego*. Warsaw: C.H. Beck, 2012.

Eisenberg, Malvin Aron. "The Emergence of Dynamic Contract Law." *California Law Review* 88, no. 6 (2013): 1745–1813.

Frąckowiak, Józef. "Osobowość prawna gminy." *Acta Universitatis Wratislaviensis. Prawo*, no. 219 (1993): 129–140.

Fundowicz, Sławomir. "Osoby prawne prawa publicznego w prawie polskim." *Samorząd terytorialny*, no. 3 (2000): 3–12.

Gross, Marta, Źróbek Ryszard, and Špirková Daniela. "Public Real Estate Management System in the Procedural Approach – A Case Study of Poland and Slovakia." *Real Estate Management and Valuation* 22, no. 3 (2014): 63–72.

Gutowski, Maciej. "Komentarz do art. 487 KC." In *Kodeks cywilny. T. II, Komentarz do art. 353–626*, edited by Maciej Gutowski. Warsaw: C.H. Beck, 2018.

Habdas, Magdalena. "Komentarz do art. 140 KC." In *Kodeks cywilny. Komentarz. Tom II. Własność i inne prawa rzeczowe (art. 126–352)*, edited by Mariusz Fras and Magdalena Habdas. Warszawa: Wolters Kluwer, 2018.

Heiland, Gary E., II MAI, AI-GRS. "Property Rights Brought to Light: Principles and Misconceptions." *The Appraisal Journal* 87, no. 3 (2019): 190–201. Accessed July 15, 2022. http://www.mvginc.com/documents/PropertyRights-BroughttoLight-PrinciplesandMisconceptions_000.pdf.

Jagoda, Joanna, "Podmiotowość prawna jednostek samorządu terytorialnego." In *O czym mówią prawnicy, mówiąc o podmiotowości*, edited by Agnieszka Bielska-Brodziak, 340–54. Katowice: Wydawnictwo Uniwersytetu Śląskiego, 2015.

Jaworski, Jacek, Arkadiusz Prusaczyk, Adam Tułodziecki, and Marian Wolanin. *Ustawa o gospodarce nieruchomościami. Komentarz*. Warsaw: Legalis C.H. Beck, 2022.

Katner, Wojciech J. "Umowy w obrocie towarowym." In *System Prawa Handlowego*. Vol. 5, edited by Mirosław Stec. Warsaw: C.H. Beck, 2017.

Katner, Wojciech. J., and Jerzy Pisuliński. *Szczególne rodzaje sprzedaży poza przepisami Kodeksu cywilnego*. In *System Prawa Prywatnego, Prawo zobowiązań – część szczegółowa*. Vol. 7, edited by Jerzy Rajski. Warsaw: C.H. Beck, 2018.

Kuźmicka-Sulikowska, Joanna. In *Zobowiązania. Przepisy ogólne i powiązane przepisy Księgi I KC. Tom I. Komentarz*, edited by Piotr Machnikowski. Warsaw: Legalis C.H. Beck, 2022.

Łukańko, Bernard. "Komentarz art. 701." In *Kodeks cywilny. Komentarz. Tom I. Część ogólna, cz. 2 (art. 56–125)*, edited by Jacek Gudowski. Warsaw: LEX, 2021.

Mamounis, Kyle J., and Walter E. Block. "The Molecular Basis of Private Property." *Acta Oeconomica* 69, no. 3 (2019): 321–332.

Messah, Omboi Bernard, and Anderson M. Kigige. "Factors Influencing Real Estate Property Prices A Survey of Real Estates in Meru Municipality, Kenya." *Journal of Economics and Sustainable Development* 2, no. 4 (2011): 34–53.

Mikłaszewicz, Przemysław. "Komentarz do art. 701." In *Kodeks cywilny. Komentarz*, edited by Konrad Osajda and Witold Borysiak. Warsaw: Legalis C.H. Beck, 2022.

Nazaruk, Piotr. "Komentarz art. 701." In *Kodeks cywilny. Komentarz aktualizowany*, edited by Jerzy Ciszewski and Piotr Nazaruk. Warsaw: LEX, 2022.

Niewiadomski, Zygmunt. "Pojęcie samorządu." In *System Prawa Administracyjnego, Tom 6, Podmioty administrujące*, edited by Roman Hauser and Andrzej Hauser, Andrzej Wróbel, 104–129. Warszawa: C.H. Beck, 2011.

Olejniczak, Adam, and Zbigniew Radwański. *Zobowiązania – część ogólna*. Warsaw: C.H. Beck, 2018.

Posner, Eric. "Economic Analysis of Contract Law after Three Decades: Success or Failure?." *The Yale Law Journal* 112, no. 4, (2003): 829–880.

Radwański, Zbigniew, and Krzysztof Mularski. "Normatywna podstawa skuteczności prawnej." In *System Prawa Prywatnego, Tom 2, Prawo cywilne – część ogólna*, edited by Zbigniew Radwański, Adam Olejniczak, 9–22. Warsaw: C.H. Beck, 2019.

Radziewicz, Piotr. "Kilka uwag w sprawie prawnej przydatności pojęcia osoba prawa publicznego." *Samorząd Terytorialny*, no. 6 (2000): 3–18.

Rajca, Lucyna. "Upodmiotowienie publicznoprawne (polityczne) i cywilnoprawne (gospodarcze) gminy a rozwój lokalny." *Przegląd Sądowy*, no. 2 (2001): 98–115.

Safjan, Marek. Article 593 of the CC. In *Kodeks cywilny. T. II. Komentarz. Art. 450–1088. Przepisy wprowadzające*, edited by Krzysztof Pietrzykowski. Warsaw: Legalis C.H. Beck, 2021.

Strugała, Radosław. "Komentarz do art. 89." In *Kodeks cywilny. Komentarz*, edited by Edward Gniewek and Piotr Machnikowski. Warsaw: Legalis C.H. Beck, 2021.

Strzyczkowski, Kazimierz. *Rola współczesnej administracji w gospodarce (zagadnienia prawne)*. Warszawa: Wydawnictwo Uniwersytetu Warszawskiego, 1992.

Swaczyna, Bartłomiej. "§ 4. Zobowiązania." In *Warunkowe czynności prawne*. Warsaw: LexisNexis, 2012.

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Reduction of Contractual Penalty under Polish Law Against the Background of Supranational Legal Regulations

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Abstract: The article discusses the issue of the reduction of contractual penalty according to Polish law against the background of supranational legal regulations. The aim hereof is to determine whether the current regulation of contractual penalty reduction resulting from the provisions of Polish law (Article 484 § 2 of the Civil Code) is consistent with the standards that can be derived from supranational legal regulations, i.e. Resolution (78) 3 Relating to Penal Clauses in Civil Law, the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law, the Draft Common Frame of Reference and the TransLex-Principles, as well as to formulate *de lege ferenda* conclusions. The article uses the logical-linguistic and legal-comparative method. At first, the legal regulation of contractual penalty reduction in Polish law is presented. Next, the reduction of contractual penalty in the aforementioned supranational *soft law* regulations is discussed. Lastly, the conclusions of the analysis performed are formulated. Despite some weaknesses, the regulation of contractual penalty reduction in Polish law seems be in line with the solutions contained in the supranational regulations in question. Some changes are required in the catalog of the prerequisites for the reduction of the contractual penalty and limitation of arbitrariness as to the extent thereof.

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1. Introduction

Generally, a contractual penalty is an additional contractual clause[1] on the basis of which the parties agree that the damage resulting from the non-performance or improper performance of a non-monetary obligation will be

[1] In the interwar period, contractual penalty, which in the legal language was referred to as contractual compensation, was included in the broader editorial unit of the Ordinance of the President the Republic of Poland of October 27, 1933 – Code of Obligations, Journal of Laws 1933 No. 82, item 598, as amended, hereinafter: CO, i.e. in Chapter VI, entitled "Additional contractual reservations", Section I, Title II, Articles 82–85 of the CO. Thus, apart from the deposit (Articles 74–75 of the CO), the contractual right of withdrawal (Articles 76–79 of the CO), the compensation fee (Articles 80–81 of the CO) and the interest (Articles 86–90 of the CO), it was treated as a part of the additional contractual reservations. On the basis of *legis latae*, the Act of April 23, 1964 – Civil Code, consolidated text: Journal of Laws of 2022, item 1360, as amended, hereinafter: CC, does not contain any editorial unit entitled "Additional contractual reservations," hence this term is no longer part of the legal language. Traditionally, however, for historical reasons, it has been used to designate institutions regulated in Art. 394-396 of the CC, in Title III of Book III entitled "General provisions on contractual obligations," i.e. the deposit (Article 394 of the CC), the contractual right of withdrawal (Article 395 of the CC) and the compensation fee (Article 396 of the CC), but also the contractual penalty, which is currently regulated elsewhere, i.e. in Section II of Title VII of Book III of the CC entitled "Effects of non-performance of obligations," in Art. 483-484 of the CC; Witold Czachórski, et al., *Zobowiązania. Zarys wykładu* (Warsaw: Wydawnictwo Prawnicze LexisNexis, 2009), 191; Krzysztof Falkiewicz and Michał Wawrykiewicz, *Kara umowna w obrocie gospodarczym* (Warsaw: Wydawnictwo Difin, 2001), 55; Zdzisław Gawlik, in *Kodeks cywilny. Komentarz. Tom III. Zobowiązania – część ogólna*, ed. Andrzej Kidyba (Warsaw: Wydawnictwo Wolters Kluwer, 2014), 752; Zdzisław Gordon, "Kary umowne w bieżącej praktyce zamówień publicznych," *Prawo Zamówień Publicznych*, no. 1 (2014): 127; Jacek Jastrzębski, *Kara umowna* (Warsaw: Wolters Kluwer Polska, 2006), 178; Anita Lutkiewicz-Rucińska, in *Kodeks cywilny. Komentarz*, eds. Małgorzata Balwicka-Szczyrba and Anna Sylwestrzak (Warsaw: Wydawnictwo Wolters Kluwer Polska, 2022), 889; Adam Olejniczak, "Dodatkowe zastrzeżenia umowne," in *System Prawa Prywatnego. Tom 5. Prawo zobowiązań – część ogólna*, ed. Konrad Osajda (Warsaw: Wydawnictwo C.H. Beck, 2020), 1203–1204; Wojciech Popiołek, in *Kodeks cywilny. Tom II. Komentarz. Art. 450–1088. Przepisy wprowadzające*, ed. Krzysztof Pietrzykowski (Warsaw: Wydawnictwo C.H. Beck, 2021), 97; Zbigniew Radwański, "Dodatkowe zastrzeżenia umowne," in *System prawa cywilnego. Prawo zobowiązań – część ogólna*, t. III, cz. 1, ed. Zbigniew Radwański (Wrocław–Warsaw–Kraków–Gdańsk–Łódź: Zakład Narodowy im. Ossolińskich Wydawnictwo Polskiej Akademii Nauk, 1981), 458; Zbigniew Radwański and Adam Olejniczak, *Zobowiązania – część ogólna* (Warsaw: Wydawnictwo C.H. Beck, 2018), 368; Elżbieta Skowrońska-Bocian, "Kara umowna – kompensacja czy represja?," *Zeszyty Prawnicze UKSW*, no. 3.2. (2003): 180; Hanna Witczak and Agnieszka Kawałko,

remedied through the payment of a specified amount.[2] Contractual penalty plays an increasingly important role in modern business transactions, mainly due to the important functions associated with them. On the one hand, it plays a compensatory role, thus constituting a substitute for a penalty, the reservation of which makes it easier for the creditor to claim damages due to debtor's non-performance or improper performance of their obligation. On the other hand, it has a protective and repressive function, and thus constitutes a contractually agreed civil sanction which strengthens the contractual relationship between the parties and safeguards performance of their obligations.[3] Therefore, despite the considerable body of doctrine and judicature concerning the issue of contractual penalty, the problems relating thereto still remain topical.

The subject matter of this article is a legal analysis of the regulation of contractual penalty reduction in the Polish legal system on the basis of supranational regulations on contractual relationships. This mainly concerns the principles of universal contracts, i.e. the UNIDROIT Principles

Zobowiązania (Warsaw: Wydawnictwo C.H. Beck, 2007), 75; Piotr Zakrzewski, in *Kodeks cywilny. Komentarz. Tom III. Zobowiązania. Część ogólna (art. 353–534)*, eds. Magdalena Habdas and Mariusz Fras (Warsaw: Wydawnictwo Wolters Kluwer Polska, 2018), 925. However, apart from tradition, at present the function of additional contractual reservations is primarily the basis for their determination. This is due to the fact that they affect the degree to which the parties are bound by the obligation relationship, thereby influencing the performance or non-performance of the obligation. Additional contractual reservations should be qualified as *accidentalia negotii* of the content of a legal transaction, but unlike the condition and term, they may only be a component of a legal transaction in the form of a contract; Olejniczak "Dodatkowe," 1205; Radwański, "Dodatkowe," 458; Radwański and Olejniczak, *Zobowiązania*, 368; Witczak and Kawałko, *Zobowiązania*, 75.

2 Paweł Widerski, "Charakter prawny kary umownej według prawa polskiego na tle ponadnarodowych uregulowań prawnych," *Studia Prawa Prywatnego*, no. 2 (2018): 25.

3 Ibid., 28–29. It should be added that apart from the two main functions of the contractual penalty, the literature indicates other functions thereof; Przemysław Drapała, "Dodatkowe zastrzeżenia umowne," in *System Prawa Prywatnego. Tom 5. Prawo zobowiązań – część ogólna*, ed. Konrad Osajda (Warsaw: Wydawnictwo C.H. Beck, 2020), 1285 et seq.; Wojciech Jan Katner, "Odpowiedzialność przedsiębiorcy za niewykonanie lub nienależyte wykonanie zobowiązania," in *System Prawa Handlowego. Tom 5A. Prawo umów handlowych*, ed. Mirosław Stec (Warsaw: Wydawnictwo C.H. Beck, 2020), 637–638; Lutkiewicz-Rucińska, in *Kodeks*, 890–891; Popiołek, in *Kodeks*, 98–99; Janusz Szwaja, *Kara umowna według kodeksu cywilnego* (Warsaw: Wydawnictwo Prawnicze, 1967), 350 et seq.

of International Commercial Contracts,[4] the Principles of European Contract Law PECL,[5] the Draft Common Frame of Reference DCFR[6] and the TransLex Principles,[7] but also the regulation relating solely and exclusively to the contractual penalty, namely the Council of Europe Resolution (78) 3 Relating to Penal Clauses in Civil Law of January 20, 1978.[8] The purpose of this article is to establish whether the current Polish regulations concerning reduction of the contractual penalty (Article 484 § 2 of the CC) are in conformity with the standards that can be derived from supranational legal regulations, as well as to formulate *de lege ferenda* conclusions resulting from the comparison of contractual penalty reduction under Polish law with the Resolution (78) 3 of the Council of Europe, UNIDROIT Principles, PECL Principles, DCFR and TransLex Principles. In the period of continuous modernization of the Polish contract law, in which the contractual penalty is of key importance, it seems that a need arises to address the research problem formulated in this manner. However, this introduction ought to emphasize that the present article does not discuss the contractual penalty in its broadest sense, but the research problem has been narrowed down to the issue of contractual penalty reduction only. As preliminary remarks, it should also be added, for the sake of accuracy, that the present analysis covers the reduction of the contractual penalty by way of court decision referred to in Article 484 § 2 of the CC. Civil law entities

4 *UNIDROIT Principles of International Commercial Contracts* (Rome: International Institute for the Unification of Private Law, 2016), accessed on September 9, 2022, https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-i.pdf, hereinafter: UNIDROIT Principles.

5 Ole Lando and Hugh Beale, eds., *Principles of European Contract Law. Parts I and II* (Hague–London–Boston: Kluwer Law International, 2000), hereinafter: PECL Principles.

6 Christian von Bar and Eric Clive, eds., *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Full Edition. Volume I* (Munich: Sellier. European Law Publishers, 2009), hereinafter: DCFR.

7 *The TransLex-Principles*, accessed September 9, 2022, https://www.trans-lex.org/principles/of-transnational-law-(lex-mercatoria).

8 Council of Europe Resolution (78) 3 Relating to Penal Clauses in Civil Law adopted by the Committee of Ministers on January 20, 1978, at the 281st meeting of the Minister's Deputies, accessed September 9, 2022, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680505599, hereinafter: Resolution (78) 3 of the Council of Europe.

may, however, introduce unnamed contractual provisions into the concluded contracts, constructed on the basis of the principle of freedom of contract (Article 353[1] of the CC), which provide for the possibility of extrajudicial reduction of the contractual penalty stipulated in the contract.

2. Reduction of Contractual Penalty According to the Civil Code

Contractual penalty was already known in the Roman law. As Wiesław Litewski points out, it was a promise, usually stipulative (*stipulatio poenae*), of a benefit, mainly pecuniary, in the event of the promisor's failure to perform a certain act or omission.[9] In good faith trade, it could also take the form of a simple agreement (*pactum*).[10] Although in Polish law, the contractual penalty has its genotype precisely in the Roman penal regulations, which also played both compensatory and repressive function in business transactions,[11] when it comes to the possibility of reducing the amount of the penalty, the Polish legal order breaks with the axiological basis resulting from this penal regulation. As far as contractual penalty is concerned, following the principle of *volenti non fit iniuria*, the Roman law did not provide clear grounds for reducing the amount of the penalty, but it introduced prohibition on excessive interest on pecuniary debts.[12] Under Polish law, the exclusive contractual penalty is treated as a rule, which means that the creditor may claim a specific amount of contractual penalty that does not depend on the existence of damage and its degree (Article 484 § 1, sentence 1 *in fine* of

9 Wiesław Litewski, *Rzymskie prawo prywatne* (Warsaw: Wydawnictwo Prawnicze LexisNexis, 2003), 262; see also: Bartosz Zalewski, "Stipulatio poenae," in *Leksykon tradycji rzymskiego prawa prywatnego. Podstawowe pojęcia*, eds. Antoni Dębiński and Maciej Jońca (Warsaw: Wydawnictwo C.H. Beck, 2016), 353.

10 Kazimierz Kolańczyk, *Prawo rzymskie* (Warsaw: Wydawnictwo Prawnicze LexisNexis, 2001), 355; see also: Wacław Osuchowski, *Zarys rzymskiego prawa prywatnego* (Warsaw: Państwowe Wydawnictwo Prawnicze, 1967), 392–393.

11 Reinhard Zimmermann, *The Law of Obligations Roman Foundations of the Civilian Tradition* (Oxford: Oxford University Press, 1996), 95.

12 Drapała, "Dodatkowe," 1315; see also: Witold Borysiak, "Miarkowanie kary umownej," in *Prawo i Państwo. Księga jubileuszowa 200-lecia Prokuratorii Generalnej Rzeczypospolitej Polskiej*, ed. Leszek Bosek (Warsaw: Wydawnictwo Sejmowe, 2017), 449; Reinhard Zimmermann, "Agreed Payment for Non-performance," in *Commentaries on European Contract Laws*, eds. Nils Jansen and Reinhard Zimmermann (New York: Oxford University Press, 2018), 1541–1542.

the CC).[13] The contractual penalty may therefore be reserved in a far higher amount than the actual loss suffered by the creditor. Standing for values such as fairness and justice, the Polish legislator introduced a measure for the protection of the debtor in the form of contractual penalty reduction, designed to be a remedy for the excessive effects of the use of the contractual penalty in its repressive aspect by the more powerful party. Similarly, the doctrine indicates that the basis for reducing the contractual penalty is the need for judicial limitation of the negative effects of the incorrect assessment of the risk of sanctions assumed by the debtor for non-performance or improper performance of their obligation, due to the complexity of factors influencing the proper performance of such obligation.[14]

According to Article 484 § 2 of the CC, if the obligation has been performed in a significant part, the debtor may demand a reduction in the contractual penalty; the same applies to cases where the contractual penalty is grossly excessive. The legal norm stipulated therein is *iuris cogentis*, hence the provisions agreed on by the parties which exclude or limit the possibility of reducing the contractual penalty by the court pursuant to Article 484 § 2 of the CC, in particular those under which a party may wave the right to demand reduction of the contractual penalty in advance, are invalid.[15]

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13 Przemysław Drapała,, "Kara umowna (art. 483 k.c.) a odszkodowanie na zasadach ogólnych (art. 471 k.c.)," *Państwo i Prawo*, no. 6 (2003): 62; Zakrzewski, in *Kodeks*, 934.

14 Witold Borysiak, in *Kodeks cywilny. Komentarz. Tom III A. Zobowiązania. Część ogólna*, ed. Konrad Osajda (Warsaw: Wydawnictwo C.H. Beck, 2017), 1116; Paweł Dąbek and Aleksandra Nowak-Gruca, "Uwagi o karze umownej z perspektywy ekonomicznej analizy prawa (EAP)," in *Prawo kontraktów*, eds. Zbigniew Kuniewicz and Dorota Sokołowska (Warsaw: Wydawnictwo Wolters Kluwer Polska, 2017), 72; Drapała, "Dodatkowe," 1315–1316.

15 Borysiak, "Miarkowanie," 455–456; Borysiak, in *Kodeks*, 1118; Marcin Ciemiński, *Odszkodowanie za szkodę niemajątkową w ramach odpowiedzialności ex contractu* (Warsaw: Wydawnictwo Wolters Kluwer Polska, 2015), 304; Drapała, "Dodatkowe," 1319; Falkiewicz and Wawrykiewicz, *Kara*, 37; Jastrzębski, *Kara*, 309; Jacek Jastrzębski, "Nietypowe kary umowne – swoboda sankcji kontraktowych i ochrona dłużnika," *Przegląd Prawa Handlowego*, no. 6 (2014): 11; Marcin Lemkowski, in *Kodeks cywilny. Tom II. Komentarz. Art. 353–626*, ed. Maciej Gutowski (Warsaw: Wydawnictwo C.H. Beck, 2022), 1325; Agnieszka Rzetecka-Gil, *Kodeks cywilny. Komentarz. Zobowiązania – część ogólna* (Lex/el., 2011), commentary on article 484, thesis 14; Jarosław Szewczyk, "O kryteriach miarkowania nadmiernych kar umownych w kontekście orzecznictwa Sądu Najwyższego", *Palestra*, no. 1–2 (2013): 299; Łukasz Węgrzynowski, "Wierzycielska kara umowna," *Przegląd*

As it is explicitly stated in Article 484 § 2 of the CC, reduction of the contractual penalty does not take place *ex officio*, but solely and exclusively upon debtor's request. It is not a creating competence, as its use by the debtor is only a prerequisite for the court to issue a decision changing the obligation relationship between the parties.[16] The request to reduce the contractual penalty should be made clearly and explicitly.[17] In principle, in legal proceedings, it takes the form of a substantive objection raised by the debtor against the creditor's claim for the payment of the contractual penalty.[18] However, the view that it may take the form of a legal action instituted by the debtor to form a legal relationship by reducing the contractual penalty needs to be accepted.[19] Also incorrect is the position concerning the request to reduce the contractual penalty, which is extremely liberal in nature, according to which the debtor's request for denial to consider the claim for the payment of the contractual penalty includes the request for its reduction.[20] Moreover, it needs to be added that from the point of view of procedural pragmatism, it is worthwhile that the request for

Sądowy, no. 6 (2022): 108; Zakrzewski, in *Kodeks*, 936; Szwaja, *Kara*, 151; Polish Supreme Court, Judgment of February 13, 2014, V CSK 45/13, Legalis.

16 Borysiak, "Miarkowanie," 481; idem, in *Kodeks*, 1125; Drapała, "Dodatkowe," 1317; Maciej Rzewuski, "Chwila złożenia wniosku o miarkowanie kary umownej (glosa do wyroku SN z 23 czerwca 2017 r., I CSK 625/16)," *Przegląd Sądowy*, no. 4 (2018): 116.

17 Borysiak, "Miarkowanie," 482–483; idem, in *Kodeks*, 1126–1127; Gawlik, in *Kodeks*, 762; Jastrzębski, *Kara*, 348–349; Katner, "Odpowiedzialność," 629; Popiołek, in *Kodeks*, 112; Szwaja, *Kara*, 136; Zakrzewski, in *Kodeks*, 936; Polish Supreme Court, Judgments: of May 7, 2002, Ref. No. I CKN 821/00, reported in: Legalis; of March 23, 2006, Ref. No. IV CSK 89/05, reported in: Legalis; of 6 February 2008, Ref. No. II CSK 421/07, reported in: Legalis; of November 26, 2008, Ref. No. III CSK 168/08, reported in: Legalis; of April 16, 2010, Ref. No. IV CSK 494/09, reported in: Legalis; of July 23, 2014, Ref. No. V CSK 503/13, reported in: Legalis; of February 12, 2015, Ref. No. IV CSK 276/14, reported in: Legalis; of June 23, 2017, Ref. No. I CSK 625/16, reported in: Legalis; of February 28, 2019, Ref. No. I PK 257/17, reported in: Legalis.

18 Drapała, "Dodatkowe," 1317; Zakrzewski, in *Kodeks*, 937; Polish Supreme Court, Judgment of November 26, 2008, Ref. No. III CSK 168/08, reported in: Legalis.

19 Borysiak, "Miarkowanie," 484; idem, in *Kodeks*, 1127; Drapała, "Dodatkowe," 1318; Lemkowski, in *Kodeks*, 1330.

20 Drapała, "Dodatkowe," 1317–1318; Falkiewicz and Wawrykiewicz, *Kara*, 38; Polish Supreme Court, Judgments: of July 14, 1976, Ref. No. I CR 221/76, reported in: Legalis; of March 25, 1998, Ref. No. II CKN 660/97, reported in: Legalis; of July 16, 1998, Ref. No. I CKN 802/97, reported in: Legalis; of December 4, 2003, Ref. No. II CK 271/02, reported

reducing the contractual penalty, despite the lack of such requirement, states the amount by which the contractual penalty is to be reduced, so that in the event of an appeal against the judgment of the court of first instance, which reduced the contractual penalty, but to a small extent in the opinion of the debtor, the court of second instance has a point of reference in the case when it comes to the conclusion that it is legitimate to grant legal protection to the debtor's request. The right to demand a reduction of the contractual penalty expires upon the payment of the contractual penalty by the debtor.[21]

Contractual penalty is subject to reduction by way of a constitutive judgment, which has a law-making nature.[22] The court's competence is limited to reducing the amount of the contractual penalty, and the court cannot modify the binding relationship between the parties in any other way. The discretionary power of the judge includes the power to reduce the contractual penalty in its entirety,[23] although from the practical point of view, when certain special circumstances occur, contractual penalty is usually reduced to a symbolic amount. The concept of contractual penalty reduction does not appear in the legal language, therefore it is not regulated in the doctrine. The institution provided for in Article 484 § 2 of the CC is commonly referred to as the reduction of the contractual penalty.[24] It seems

in: Legalis; of January 22, 2010, Ref. No. V CSK 217/09, reported in: Legalis; of February 27, 2009, Ref. No. II CSK 511/08, reported in: Legalis.

21 Borysiak, "Miarkowanie," 475; idem, in *Kodeks*, 1124; Popiołek, in *Kodeks*, 107; Zakrzewski, in *Kodeks*, 942.

22 Borysiak, "Miarkowanie," 474; idem, in *Kodeks*, 1124; Drapała, "Dodatkowe," 1316; Lemkowski, in *Kodeks*, 1330; Lutkiewicz-Rucińska, in *Kodeks*, 893; Popiołek, in *Kodeks*, 107; Zakrzewski, in *Kodeks*, 942; Polish Supreme Court, Judgments: of November 21, 2007, Ref. No. I CSK 270/07, reported in: Legalis; of May 23, 2013, Ref. No. IV CSK 644/12, reported in: Legalis.

23 Borysiak, "Miarkowanie," 478–479; Borysiak, in *Kodeks*, 1125; Magdalena Wilejczyk, "Miarkowanie kary umownej *de lege ferenda*," *Transformacje Prawa Prywatnego*, no. 2 (2020): 191. Otherwise see: Lutkiewicz-Rucińska, in *Kodeks*, 893; Szwaja, "*Kara*", 149–150; Wiśniewski in "*Kodeks cywilny. Komentarz. Tom III. Zobowiązania. Część ogólna*, ed. Jacek Gudowski (Warsaw: Wydawnictwo Wolters Kluwer Polska, 2018), 1240; Polish Supreme Court, Judgment of December 4, 2003, Ref. No. II CK 271/02, reported in: Legalis.

24 Marcin Lemkowski, *Odsetki cywilnoprawne* (Warsaw: Wydawnictwo Wolters Kluwer Polska, 2007), 323; Lutkiewicz-Rucińska, in *Kodeks*, 893; Rzetecka-Gil, *Kodeks*, thesis 9; Renata Tanajewska, in *Kodeks cywilny. Komentarz*, eds. Jerzy Ciszewski and Piotr Nazaruk

that it should be discussed in a pragmatic manner as a procedure aimed at contractual penalty reduction that is initiated upon debtor's request to reduce the contractual penalty, and also in apragmatic terms as the result of such a procedure, i.e. a reduction of the amount of the contractual penalty due to the creditor.[25] Not only may contractual penalty reduction be applied with respect to contractual obligations, but also to obligations arising from other sources.[26]

Article 484 § 2 of the CC provides for the grounds for contractual penalty reduction, i.e. performance of a significant part of the obligation or gross excessiveness of the contractual penalty. This is an inseparable alternative in which the basis for contractual penalty reduction is the occurrence of one of the aforementioned prerequisites, but it may also be the case that both of them occur at the same time, which in turn may

(Warsaw: Wydawnictwo Wolters Kluwer Polska, 2019), 889; Wiśniewski, in *Kodeks*, 1240; Zakrzewski, in *Kodeks*, 936; Polish Supreme Court, Judgments: of October 15, 2008, Ref. No. I CSK 126/08, reported in: Legalis; of February 13, 2014, Ref. No. V CSK 45/13, reported in: Legalis.

25 Reduction of the contractual penalty is usually identified only with the apragmatic approach, so that the reduction in question is defined solely as a reduction of the contractual penalty due to the creditor by way of a court decision; Ciemiński, *Odszkodowanie*, 306; Janina Dąbrowa, "Skutki niewykonania zobowiązania," in *System prawa cywilnego. Prawo zobowiązań – część ogólna*, t. III, cz. 1, ed. Zbigniew Radwański (Wrocław–Warsaw–Kraków–Gdańsk–Łódź: Zakład Narodowy im. Ossolińskich Wydawnictwo Polskiej Akademii Nauk, 1981), 832; Falkiewicz and Wawrykiewicz, *Kara*, 37; Katner, "Odpowiedzialność," 625; Lutkiewicz-Rucińska, in *Kodeks*, 893; Rzetecka-Gil, *Kodeks*, thesis 9; Szewczyk, "O kryteriach," 299; Szwaja, *Kara*, 137; Wiśniewski, in *Kodeks*, 1240; Zakrzewski, in *Kodeks*, 936; Polish Supreme Court, Judgment of February 13, 2014, Ref. No. V CSK 45/13, reported in: Legalis. It should be added, however, that there is also a view that provides a different definition of the contractual penalty reduction, i.e. as a substantive legal means of protecting the debtor against the creditor's request for the payment of the contractual penalty; Polish Supreme Court, Judgment of June 13, 2013, Ref. No. V CSK 375/12, reported in: Legalis; see also: Oskar Radliński, "Dopuszczalność zastrzeżenia kary umownej za zwłokę w wykonaniu zobowiązania w postaci określonego procentu wynagrodzenia umownego za każdy dzień zwłoki, bez wskazania końcowego terminu naliczenia kary umownej lub jej maksymalnej wysokości," *Monitor Prawniczy*, no. 12 (2022): 656; Michał Sehn, "Miarkowanie kary umownej w świetle najnowszego orzecznictwa Sądu Najwyższego w sprawach cywilnych," *Monitor Prawniczy*, no. 9 (2021): 491.

26 Borysiak, "Miarkowanie," 453; idem, in *Kodeks*, 1117; Drapała, "Dodatkowe," 1319.

affect the scope of the reduction of the amount of the contractual penalty.[27] The list of these prerequisites is exhaustive in nature.[28] The burden of proof of the prerequisites for contractual penalty reduction rests with the debtor (Article 6 of the CC).[29] As for the grounds for contractual penalty reduction consisting in the performance of a significant part of the obligation, the point of reference in this case is debtor's performance of the obligation in its entirety, whereas its performance in a significant part occurs when the creditor's interests in the performance of the obligation that are worthy of protection are almost entirely satisfied.[30] This prerequisite applies only to cases in which partial performance of the obligation satisfies to some extent the creditor's legitimate interests that are worthy of protection, thus it is not possible to invoke the aforementioned prerequisite in the cases where the creditor has no interest in partial performance of the obligation.[31] As for the prerequisite for contractual penalty reduction in the form of gross excessiveness of the contractual penalty, it should be pointed out that it is more flexible than the prerequisite of the performance of

27 Borysiak, "Miarkowanie," 457; idem, in *Kodeks*, 1118; Drapała, "Dodatkowe," 1320; Jastrzębski, *Kara*, 323; Katner, "Odpowiedzialność," 625–626; Lutkiewicz-Rucińska, in *Kodeks*, 893; Rzetecka-Gil, *Kodeks*, thesis 11; Szwaja, *Kara*, 138; Tadeusz Wiśniewski, in "*Kodeks*," 1242; Polish Supreme Court, Judgments: of April 19, 2006, Ref. No. V CSK 34/06, reported in: Legalis; of 11 September 2019, Ref. No. IV CSK 473/18, reported in: Legalis.

28 Borysiak, in *Kodeks*, 1118; Ciemiński, *Odszkodowanie*, 307; Dąbek and Nowak-Gruca, "Uwagi," 72; Drapała, "Dodatkowe," 1319–1320; Jastrzębski, *Kara*, 323; Popiołek, in *Kodeks*, 107; Rzetecka-Gil, *Kodeks*, thesis 12; Szwaja, *Kara*, 138; Sehn, "Miarkowanie," 493; Janusz Szwaja, "Miarkowanie kary umownej według polskiego kodeksu cywilnego," in *Odpowiedzialność cywilna za wyrządzenie szkody*, ed. Stefan Grzybowski (Warsaw: Państwowe Wydawnictwo Naukowe, 1969), 184; Tanajewska, in *Kodeks*, 889; Zakrzewski, in *Kodeks*, 941; Polish Supreme Court, Judgment of October 15, 2008, Ref. No. I CSK 126/08, reported in: Legalis.

29 Borysiak, "Miarkowanie," 453; idem, in *Kodeks*, 1119; Falkiewicz and Wawrykiewicz, *Kara*, 38; Lemkowski, in *Kodeks*, 1329; Radwański and Olejniczak, *Zobowiązania*, 375; Radosław Strugała, "Wysokość kary umownej a możliwość jej markowania," *Monitor Prawniczy*, no. 3 (2016): 139; Szwaja, *Kara*, 147; Zakrzewski, in *Kodeks*, 942.

30 Borysiak, in *Kodeks*, 1119; Dąbek and Nowak-Gruca, "Uwagi," 73; Drapała, "Dodatkowe," 1324; Jastrzębski, *Kara*, 325; Lutkiewicz-Rucińska, in *Kodeks*, 893; Popiołek, in *Kodeks*, 108; Rzetecka-Gil, *Kodeks*, thesis 28; Szwaja, *Kara*, 146; Jastrzębski, *Kara*, 332–333; Szewczyk, "O kryteriach," 299; Tanajewska, in *Kodeks*, 889; Wiśniewski, in *Kodeks*, 1241.

31 Borysiak, in *Kodeks*, 1119; Dąbek and Nowak-Gruca, "Uwagi," 73; Jastrzębski, *Kara*, 325; Rzetecka-Gil, *Kodeks*, thesis 29; Szwaja, *Kara*, 140; Polish Supreme Court, Judgment of March 25, 2011, Ref. No. IV CSK 401/10, reported in: Legalis.

a significant part of the obligation, since the legislator has not indicated any benchmark against which the excessiveness of the contractual penalty should be assessed and deemed to be gross. In view of the above, the court is competent to adopt on an *a casu ad casum* basis the most appropriate criterion, in its opinion, according to which the assessment will be made, e.g. the degree of damage, the amount of penalty under general rules, the degree of fault or the value of the principal benefit.[32] If, in the light of the criterion adopted by the court as a reference point for the assessment in question, the contractual penalty is grossly excessive, in an amount that is not acceptable in the sense of fairness and justice, then the prerequisite of gross excessiveness of the contractual penalty is met.[33] The contractual penalty may be grossly excessive as early as at the time of its reservation, but it may also turn out to be grossly excessive at a later time, in particular, only after failure to perform or improper performance of the obligation with respect to which it was reserved.[34]

Article 484 § 2 of the CC does not provide for any criteria for determining the scope of contractual penalty reduction. The doctrine indicates, however, that the scope of reduction should be determined considering the point of reference specified in the criterion which the court considered as grounds for reducing the contractual penalty.[35] Furthermore, it is also stressed that account should be taken of the function of the contractual penalty, which it is predominantly supposed to fulfill in a specific legal status in accordance with the will of the parties, i.e. whether it is designed to

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32 Regarding the criteria for assessing the gross excessiveness of the contractual penalty see: Borysiak, "Miarkowanie," 463 et seq.; idem, in *Kodeks*, 1120 et seq.; Ciemiński, *Odszkodowanie*, 311–312; Drapała, "Dodatkowe," 1321 et seq.; Falkiewicz and Wawrykiewicz, *Kara*, 40; Katner, "Odpowiedzialność," 626 et seq.; Lutkiewicz-Rucińska, in *Kodeks*, 893; Popiołek, in *Kodeks*, 108–109; Rzetecka-Gil, *Kodeks*, thesis 44 et seq.; Sehn, "Miarkowanie," 493; Szewczyk, "O kryteriach," 300; Szwaja, *Kara*, 142–143; Węgrzynowski, „Wierzycielska," 109; Zakrzewski, in *Kodeks*, 938 et seq.

33 Rzetecka-Gil, *Kodeks*, thesis 30.

34 Dąbrowa, "Skutki," 833; Drapała, "Dodatkowe," 1320–1321; Falkiewicz and Wawrykiewicz, *Kara*, 41; Jastrzębski, *Kara*, 334; Katner, "Odpowiedzialność," 629; Rzetecka-Gil, *Kodeks*, thesis 42; Szwaja, "Miarkowanie," 190; Wiśniewski, in *Kodeks*, 1241; Polish Supreme Court, Judgment of November 21, 2007, Ref. No. I CSK 270/07, reported in: Legalis.

35 Drapała, "Dodatkowe," 1325; Jastrzębski, *Kara*, 345; Szwaja, *Kara*, 148.

act as a substitute for a penalty, or a civil law sanction motivating the party to properly fulfill their obligation.[36]

3. Reduction of Contractual Damages According to the Code of Obligations

Contractual penalty regulated in Articles 483–484 of the CC is a continuation of the Polish civil tradition from the interwar period, as it is related to the regulation of contractual damages contained in Articles 82–85 of the CO, which was also referred to in the literature as the contractual penalty.[37] Although there are significant substantive differences between the two aforementioned regulations, e.g. contrary to *legis latae*, contractual penalty provided for in the Code of Obligations could be reserved in the event of non-performance of any kind of obligations, not only non-monetary ones[38], but they are not fundamental enough to constitute two substantively different legal institutions.[39] This also applies to contractual penalty reduction in compliance with the Civil Code, the structure of which preserves the solutions concerning contractual penalty that are stipulated in the Code of

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36 Drapała, "Dodatkowe," 1325; Rzetecka-Gil, *Kodeks*, thesis 16; Szwaja, *Kara*, 148.

37 Ludwik Domański, *Instytucje kodeksu zobowiązań. Komentarz teoretyczno-praktyczny. Część ogólna* (Warsaw: Marjan Ginter – Księgarnia Wydawnictw Prawniczych, 1936), 388; Roman Longchamps de Bérier, *Zobowiązania* (Lviv: Księgarnia Wydawnicza Gubrynowicz i Syn, 1938), 184; Jan Korzonek and Ignacy Rosenblüth, *Kodeks zobowiązań. Komentarz. Tom I* (Kraków: Księgarnia Powszechna, 1936), 202; Fryderyk Zoll, *Zobowiązania w zarysie według polskiego kodeksu zobowiązań*, podręcznik poddany rewizji i wykończony przy współudziale Stefana Kosińskiego i Józefa Skąpskiego (Warsaw: Nakład Gebethnera i Wolffa, 1948), 87. On the other hand, on the basis of the current legal status, the term "contractual compensation" is used interchangeably with the term "contractual penalty"; Czachórski et al., *Zobowiązania*, 349; Falkiewicz and Wawrykiewicz, *Kara*, 10; Bartosz Fogel, "Kara umowna jako kontraktowa regulacja odpowiedzialności odszkodowawczej – wybrane zagadnienia," *Acta Universitatis Wratislaviensis*, no. 3161, Prawo CCCVIII (2009): 84; Jastrzębski, *Kara*, 58–59; Radwański and Olejniczak, *Zobowiązania*, 373; Szwaja, *Kara*, 13–14; Witczak and Kawałko, *Zobowiązania*, 176; Polish Supreme Court, Resolution of November 6, 2003, Ref. No. III CZP 61/03, reported in: Legalis.

38 Domański, *Instytucje*, 393.

39 Widerski, "Charakter," 29; see also: Anna Fermus-Bobowiec, "Od ryczałtu odszkodowania do miarkowania – kompensacyjny charakter kary umownej w prawie polskim na tle rozwiązań przyjętych w dziewiętnastowiecznym prawie cywilnym," *Studia Iuridica Lublinensia*, no. 3 (2016): 295.

Obligations. In the case of contractual penalty set forth in the Code of Obligations, it could be reduced at the request of the debtor in court proceedings, by way of a judicial decision, but not *ex officio*.[40] Pursuant to Article 85 § 1 of the CO, in the event that the contractual penalty is grossly excessive or if the contract has been performed in part, the debtor may demand a reduction of the contractual penalty, especially if they prove that the creditor has not suffered any damage as a result of the non-performance of the contract or the damage caused was minor. Thus, the main substantive difference between the regulation of the contractual penalty in the Civil Code as opposed to the Code of Obligations concerns the grounds for the reduction of the contractual penalty. However, as Janusz Szwaja rightly points out, these differences are not significant enough to state that the Civil Code did not copy these prerequisites from the Code of Obligations.[41] Moreover, it should be noted that the Civil Code retains the legal nature of the list of prerequisites, which was also exhaustive in the Code of Obligations. The burden of proving the prerequisites for the reduction of contractual damages rested with the debtor.[42]

The grounds for the reduction were formulated in Article 85 § 1 of the CO in a more liberal manner than in Article 484 § 2 of the CC. Both provisions provide for a prerequisite relating to the performance of the obligation, but in the case of contractual damages set forth in the Code of Obligations, the debtor's right to demand a reduction of the contractual damages was enforceable if the contract was performed at least in part, while in the current state of the law, not every partial performance of the obligation may be the basis for demanding a reduction of the contractual penalty, but only the performance of the obligation to a specific extent, as Article 484 § 2 of the CC provides for the performance of the obligation to a large extent. Hence, when applying the provisions of the Code of Obligations, it was easier to reduce the contractual penalty than when referring to the analogous prerequisites under the Civil Code.[43]

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40 Korzonek and Rosenblüth, *Kodeks*, 208; Jan Namitkiewicz, *Kodeks zobowiązań. Komentarz dla praktyki. Tom I. Część ogólna. Art. 1–293*, opracowany przy współudziale Alfreda Samolińskiego (Łódź: Wydawnictwo "Kolumna", 1949), 124.

41 Szwaja, "Miarkowanie," 184.

42 Korzonek and Rosenblüth, *Kodeks*, 208.

43 Katner, "Odpowiedzialność," 625.

The first prerequisite for reducing the contractual penalty stipulated in Article 85 § 1 of the CO was its gross excessiveness. This prerequisite, in the same wording, was contained in Article 484 § 2 of the CC, and its aim was to regulate contractual penalty reduction. Nevertheless, it is necessary to point to a rather subtle difference in the understanding of the prerequisite in question in accordance with the present legal status. Currently, the prerequisite of the gross excessiveness of a contractual penalty is not clearly defined in normative terms,[44] showing a very high level of flexibility, because the legislator has not stipulated in the act any criterion that the court should take into account when assessing the penalty in terms of its gross excessiveness. Therefore, the court adjudicating in a case for the payment of a contractual penalty has considerable discretion, which is not limited solely and exclusively to evaluating the impact of the gross excessiveness criterion on the amount of the contractual penalty awarded to the creditor, but allows the court to choose such criterion as, in its opinion, will be the most appropriate in the light of the circumstances of the given facts to state whether the contractual penalty is grossly excessive. On the other hand, as far as the reduction of contractual damages according to the Code of Obligations is concerned, the criterion of the lack of damage or minor damage to the creditor was set forth in the act. Consequently, when it comes to the prerequisite of gross excessiveness in the case of contractual damages under the Code of Obligations, the court's freedom in the decision-making process was more limited due to the statutory criterion of the damage to the creditor, which thus needed to be taken into account by the court when assessing the gross excessiveness of contractual damages. Admittedly, the wording of Article 85 § 1 of the Code of Obligations does not lay any grounds to claim that the damage to the creditor is the only criterion to be taken into consideration by the court, therefore the damage criterion did not exclude considering other criteria for determining the gross excessiveness of the contractual penalty, which the court considered appropriate in the light of the circumstances of the given factual state. This position is confirmed by Roman Longchamps de Bérier, who claims that the proof that the creditor has suffered no or only minor damage is only an exemplary criterion, thus, despite even significant damage to

44 Drapała, "Dodatkowe," 1320.

the creditor, the judge may reduce the contractual penalty if they consider it too excessive.[45] In the current state of the law, in view of the absence of a similar legislative solution, the damage to the creditor ceases to constitute a statutory criterion when assessing gross excessiveness of the contractual penalty; only in the light of some part of the doctrine[46] and jurisprudence,[47] when determining whether the contractual penalty is grossly excessive, priority is given to the criterion of damage consisting in a comparison of the amount of the contractual penalty to the amount of the damage suffered by the creditor.

Contractual provision which excludes or limits the possibility of court's reduction of contractual damages was invalid. Unlike *legis late*, the mandatory nature of the legal norm contained in Article 85 § 1 of the CO was directly confirmed in Article 85 § 2 of the CO.

As regards the reduction of contractual damages, it is also worth paying attention to Article 531 § 1 of the Ordinance of the President of the Republic of Poland of June 27, 1934 – Commercial Code,[48] according to which if the merchant, in the performance of their business activity, has accepted an obligation to pay a contractual penalty, they may not demand its reduction. At the same time, Article 531 § 1 of the ComC provides for an exception to the general admissibility of contractual damages reduction. This exception applies solely and exclusively to a situation where the merchant has undertaken to do so in the course of conducting their business activity, i.e. when such obligation is a commercial act, namely the merchant's legal act relating to the running of their business (Article 498 § 1 of the ComC).[49] *De lege lata*, there are no such subjective limitations, therefore it is possible

45 Longchamps de Bérier, *Zobowiązania*, 188.

46 Borysiak, in *Kodeks*, 1120; Drapała, "Dodatkowe," 1321; Wiśniewski, in *Kodeks*, 1241–1242; Zakrzewski, in *Kodeks*, 938.

47 Polish Supreme Court, Judgments: of June 21, 2002, Ref. No. V CKN 1075/00, reported in: Legalis; of 12 May 2006 r., Ref. No. V CSK 55/06, reported in: Legalis; of November 30, 2006, Ref. No. I CSK 259/06, reported in: Legalis; of November 21, 2007, Ref. No. I CSK 270/07, reported in: Legalis; of February 13, 2014, Ref. No. V CSK 45/13, reported in: Legalis.

48 Journal of Laws of 1934 No. 57, item 502, as amended, hereinafter: ComC.

49 Maurycy Allerhand, *Kodeks handlowy. Komentarz* (Lviv: "Kodeks" Spółka Wydawnicza z Ograniczoną Odpowiedzialnością, 1935), 775.

to reduce the amount of the contractual penalty also in relations between economic entities as part of their business activities.[50]

4. Reduction of Contractual Penalty According to Resolution (78) 3 of the Council of Europe

A supranational act that is devoted in its entirety to contractual penalties and clauses similar to those regarding contractual penalties is Resolution (78) 3 of the Council of Europe. This resolution is not directly applicable to the Council of Europe member states, but, according to its preamble, only recommends governments of the member states to take the principles concerning penal clauses in civil law contained in the appendix to this resolution into consideration when preparing new legislation on this subject; to consider the extent to which the principles set out in the appendix can be applied, subject to any necessary modifications, to other clauses which have the same aim or effect as penal clauses and to make this resolution, its appendix and the explanatory memorandum available to the appropriate authorities and other interested bodies in their countries. Therefore, Resolution (78) 3 of the Council of Europe, or rather the Appendix thereto, which sets forth specific rules on contractual penalties, provides a certain benchmark guiding the legislative work of the governments of the Member States with regards to the normalization of contractual penalties and clauses similar to those concerning contractual penalties.[51]

Reduction of contractual penalty is regulated in Article 7 of the Appendix to Resolution (78) 3 of the Council of Europe. According to this legal provision, the sum stipulated may be reduced by the court when it is manifestly excessive. In particular, reduction may be made when the principal obligation has been performed in part. The sum may not be reduced below the damages payable for failure to perform the obligation. Any stipulation contrary to the provisions of this article shall be void. Resolution (78) 3 of the Council of Europe adopts the judicial reduction of

50 Polish Supreme Court, Judgment of April 19, 2006, Ref. No. V CSK 34/06, reported in: Legalis.

51 Widerski, "Charakter," 31.

contractual penalties.[52] However, as follows from the Explanatory Memorandum, the article does not include any rules concerning evidence, and in particular as regards the burden of proof. These questions are linked to the general rules of civil procedure and evidence in each member state and it would not be possible or desirable to attempt to harmonize them in the present context. Moreover, the article does not deal with the question whether or not the court should have the power to reduce *ex officio*, or of its own motion, the sum stipulated in the penal clause, for example in the situation where the promisor fails to take part in the proceedings. National systems should therefore be free to make provision for such an *ex officio* reduction in appropriate cases. There is, however, no suggestion that national systems which do not at present recognise such a power should change their law in this respect.[53]

Article 7 of the Appendix to Resolution (78) 3 of the Council of Europe stipulates that the prerequisite for reducing a contractual penalty is its manifest excessiveness, which under Polish law corresponds to the prerequisite of gross excessiveness. Manifest excessiveness is an undefined normative term, characterized by even greater flexibility than the term used in the Polish civil law. In the Polish legal order, the performance of an obligation to a proper extent has always been treated as a prerequisite for the reduction of the contractual penalty that is equivalent to the prerequisite of the gross excessiveness thereof.[54] In Resolution (78) 3 of the Council of Europe, on the other hand, partial performance of the principal obligation is not an independent prerequisite for the reduction of the contractual penalty, but only a statutory criterion that courts need to take into consideration when determining whether the contractual penalty is manifestly

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52 See also: Alessandra Mari, "Particular Remedies for Non-Performance," in *Principles of European Contract Law and Italian Law. A Commentary*, eds. Luisa Antoniolli and Anna Veneziano (Hague: Kluwer Law International, 2005), 474; Małgorzata Modrzejewska, "Rezolucja nr (78) 3 w sprawie kar umownych (klauzul karnych) w prawie cywilnym na tle unormowania polskiego kodeksu cywilnego," in *Standardy prawne Rady Europy. Teksty i komentarze. Tom II. Prawo cywilne*, ed. Marek Safjan (Warsaw: Oficyna Naukowa, 1995), 257.

53 *Penal Clauses in Civil Law: Resolution (78) 3 Adopted by the Committee of Ministers of the Council of Europe on 20 January 1978 and Explanatory Memorandum*, 22, accessed September 9, 2022, https://rm.coe.int/09000016804d1a18.

54 Borysiak, in *Kodeks*, 1118; Drapała, "Dodatkowe," 1320; Rzetecka-Gil, *Kodeks*, thesis 12.

excessive. Hence, in the light of Resolution (78) 3 of the Council of Europe, the prerequisite for contractual penalty reduction in the form of manifest excessiveness is so broad and flexible that its scope also includes comparison of the amount of the contractual penalty with the degree of performance of the principal obligation.

Resolution (78) 3 of the Council of Europe does not preclude the use of other criteria. The Explanatory Memorandum indicates that it is up to each legal system to determine under what precise circumstances the sum concerned should be considered to be manifestly excessive. It is, however, suggested that in a given case, the courts may have regard to a number of factors such as: damage pre-estimated by the parties at the time of contracting and the damage actually suffered by the promisee; the legilimate interests of the parties including the promisee's non-monetary interests; the category of the contract and the circumstances under which it was concluded, in particular the relative social and economic position of the parties at the time of its conclusion, or the fact that contract was a standard form contract; the reason for the failure to perform the obligation, in particular the good or bad faith of the promisor. This list of the criteria to be taken into account should not be regarded as exhaustive, nor does it indicate any order of priority.[55] *Ergo*, when assessing the contractual penalty in terms of its manifest excessiveness, the court should take into account any reduction of the penalty due to partial performance of the principal obligation, which, however, does not exclude considering other criteria that are not normatively provided for. Nevertheless, the most important case, according to the Explanatory Memorandum, is when the stipulated sum is clearly disproportionate to the loss suffered by the promisee. The mere fact that the loss actually sustained is less than the sum stipulated by the parties at the time of concluding the contract shall not constitute a sufficient reason for the reduction of the penalty.[56] According to the literature, the amount of damages must be more than merely disproportionate to actual damages; they must be "manifestly excessive."[57] Polish law does not specify

55 *Penal*, 22; see also: Larry A. DiMatteo, *International Contracting: Law and Practice* (Alphen aan den Rijn: Kluwer Law International B.V., 2022), 144.

56 *Penal,* 22

57 DiMatteo, *International*, 144.

the lower limit to which the contractual penalty may be reduced, while on the grounds of Resolution (78) 3 of the Council of Europe, the authors stated that it is necessary to impose a limit on the court's power with regards to the reduction of the penalty.[58] Therefore, a provision to this effect has been included in Article 7 of the Appendix to Resolution (78) 3 of the Council of Europe. The lower limit of the contractual penalty reduction is provided for in the third sentence of this provision and it constitutes the damages payable for failure to perform the obligation.[59]

From the fourth sentence of Article 7 of the Appendix to Resolution (78) 3 of the Council of Europe, it follows that contractual provisions inconsistent with this provision shall be invalid. *Ratio legis* of such a legislative solution is stated in the Explanatory Memorandum, from which it follows that the rules in Article 7 of the Appendix to Resolution (78) 3 of the Council of Europe concerning judicial control should be mandatory, otherwise the protection of the parties, which the provisions are designed to ensure, would rapidly become ineffective in practice, as standard form contracts would undoubtedly tend to include a clause excluding them from such control.[60]

5. Reduction of Contractual Penalty According to the UNIDROIT Principles

The UNIDROIT Principles are not a source of generally applicable law, and they are included in the model law that has no binding force (the so-called soft law).[61] The preamble declares that the UNIDROIT Principles set forth general rules for international commercial contracts. They may be applied

58 *Penal*, 22; see also: Mari, "Particular," 476.

59 See also: Falkiewicz and Wawrykiewicz, *Kara*, 71; Modrzejewska, "Rezolucja," 259.

60 *Penal*, 22.

61 Michael Joachim Bonell, *An International Restatement of Contract Law. The UNIDROIT Principles of International Commercial Contracts* (New York: Transnational Publishers, 2005), 6; Adam Brzozowski, "Umowy," in *System Prawa Prywatnego. Tom 5. Prawo zobowiązań – część ogólna*, ed. Konrad Osajda (Warsaw: Wydawnictwo C.H. Beck, 2020), 486; Michał Romanowski, "Ogólne reguły wykładni kontraktów w świetle zasad europejskiego prawa kontraktów a reguły wykładni umów w prawie polskim," *Przegląd Prawa Handlowego*, no. 8 (2004): 11; Ewa Rott-Pietrzyk, "Harmonizacja prawa prywatnego w aktach prawa modelowego (soft law)," in *System Prawa Handlowego. Tom 9. Międzynarodowe prawo handlowe*, ed. Wojciech Popiołek (Warsaw: Wydawnictwo C.H. Beck, 2013), 50;

when the parties, within the framework of a substantive indication of the legal regulation,[62] have agreed that their contract will be governed by these principles, general principles of law, the *lex mercatoria* or similar.[63] In such situations, the UNIDROIT Principles become an integral part of the contract, and they shape the content of the obligation relationship within limits set by the substantive law governing this obligation relationship.[64] According to the preamble, these Principles may also be applied when the parties have not chosen any law to govern their contract. They may be used to interpret or supplement international uniform legal instruments and domestic law. Finally, they may serve as a model for national and international legislators.[65]

According to the UNIDROIT Principles, an institution that constitutes an equivalent of the contractual penalty is the agreed payment for non-performance (Article 7.4.13 of the UNIDROIT Principles). Article 7.4.13 (2) of the UNIDROIT Principles provides for the possibility of reducing the agreed payment. Accordingly, notwithstanding any agreement to the contrary,

Rina See and Dharshini Prasad, "The UNIDROIT Principles 2016: A Contemporary English Law Perspective," *Hamburg Law Review*, no. 2 (2018): 83–84.

62 Jadwiga Pazdan, "Czy można wyłączyć umowę spod prawa?," *Państwo i Prawo*, no. 10 (2005): 8–9; Maksymilian Pazdan, *Prawo Prywatne Międzynarodowe* (Warsaw: Wydawnictwo LexisNexis, 2012), 156–157; Maksymilian Pazdan, "Zobowiązania umowne oraz wybrane instytucje wspólne prawa zobowiązań," in *System Prawa Prywatnego. Tom 20 B. Prawo prywatne międzynarodowe*, ed. Maksymilian Pazdan (Warsaw: Wydawnictwo C.H. Beck, 2015), 76; idem, "Materialno-prawne wskazanie a kolizyjnoprawny wybór prawa," *Problemy Prawne Handlu Zagranicznego*, no. 18 (1995): 108–109; idem, "Materialnoprawne wskazanie regulacji prawnej na tle konwencji rzymskiej z 1980 r.," in *Studia i rozprawy. Księga jubileuszowa dedykowana Profesorowi Andrzejowi Całusowi*, ed. Andrzej Janik (Warsaw: Szkoła Główna Handlowa – Oficyna Wydawnicza, 2009), 327–328; Ewa Rott-Pietrzyk, "Zobowiązania umowne oraz wybrane instytucje wspólne prawa zobowiązań," in *System Prawa Prywatnego. Tom 20 B. Prawo prywatne międzynarodowe*, ed. Maksymilian Pazdan (Warsaw: Wydawnictwo C.H. Beck, 2015), 121.

63 *UNIDROIT*, 1; see also: Bernadetta Fuchs, "Harmonizacja prawa prywatnego w aktach prawa modelowego (soft law)," in *System Prawa Handlowego. Tom 9. Międzynarodowe prawo handlowe*, ed. Wojciech Popiołek (Warsaw: Wydawnictwo C.H. Beck, 2013), 61; Michael Joachim Bonell, *The UNIDROIT Principles in Practice. Caselaw and Bibliography on the UNIDROIT Principles of International Commercial Contracts* (New York: Transnational Publishers, 2006), 44 et seq.

64 Pazdan, "Zobowiązania," 76–77.

65 *UNIDROIT*, 1; see also: Bonell, *The UNIDROIT*, 46 et seq.

the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances. Although it is not set forth in the provision in question, the commentary to the UNIDROIT Principles states that the reduction of the amount reserved under the agreed payment falls within the scope of the so-called judiciary law, and thus the power to reduce the amount lies with the court.[66] We can, therefore, conclude that the structure of reduction adjudicated by the court is upheld by the UNIDROIT Principles. The agreed sum may be reduced, but not entirely disregarded.[67]

Similarly to Resolution (78) 3 of the Council of Europe, the UNIDROIT Principles provide for only one prerequisite for reducing the agreed sum, namely its gross excessiveness. Contrary to the Polish civil law, the UNIDROIT Principles do not mention partial fulfillment of the obligation as grounds for reducing the agreed payment for non-performance. Article 7.4.13 (2) of the UNIDROIT Principles indicates that the list of circumstances that may be taken into account in the assessment of the gross excessiveness is non-exhaustive, although one of the criteria is given priority and should always be considered by the court hearing a case for the payment, namely, the damage criterion which boils down to the comparison of the specified sum in relation to the loss resulting from the non-performance. This statement is confirmed in the commentary to the UNIDROIT Principles, according to which regard should in particular be had to the relationship between the sum agreed and the harm actually sustained.[68] Therefore, the prerequisite under Polish law of the performance of a significant part of the obligation may be relevant in the context of the reduction of the agreed payment for non-performance, but as a criterion that the court will take into account when assessing its gross excessiveness. Particularly valuable in the context of the problems posed by Polish law in determining the meaning of the concept of gross excessiveness of contractual penalty is the explanation contained in the commentary to the UNIDROIT Principles on how

66 *UNIDROIT*, 290; see also: Lars Meyer, *Non-performance and Remedies Under International Contract Law Principles and Indian Contract Law. A Comparative Survey of the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law, and Indian Statutory Contract Law* (Frankfurt am Main: Peter Lang GmbH, 2010), 245.

67 *UNIDROIT*, 290.

68 Ibid.; see also: Mari, "Particular," 476.

to understand the term "grossly excessive" in the context of agreed payment for non-performance. The amount agreed being "grossly excessive" means that it would clearly appear to be so to any reasonable person.[69]

As in the case of Resolution (78) 3 of the Council of Europe, the authors of the UNIDROIT Principles assumed that the scope of the reduction of the specified sum cannot be arbitrary, therefore the reduction limit should be defined in some way. Accordingly, it is stipulated that the limit of the reduction is a reasonable amount, as indicated in Article 7.4.13 (2) *in medio* of the UNIDROIT Principles. On the one hand, this is an undefined normative term with a high level of flexibility; on the other hand, it does not give the court absolute discreetion with regards to the scope of the reduction. From Article 7.4.13 (2) *in principio* of the UNIDROIT Principles, it follows that the possibility of reduction in accordance with the indicated rules may under no circumstances exclude such reduction on the basis of a different agreement between the parties.[70]

6. Reduction of Contractual Penalty According to the PECL Principles and the DCFR

Similarly to the UNIDROIT Principles, the PECL Principles also have no binding force.[71] Michał Romanowski and Ewa Rott-Pietrzyk talk about model law,[72] Piotr Machnikowski and Tomasz Pajor about model rules,[73] and Robert Stefanicki about a universal non-normative set of rules in the field of contract law.[74] The PECL Principles show that they are intended to be applied as general rules of contract law in the European Communities (Article 1:101 point 1 of the PECL Principles). The PECL Principles may be applied when: the parties have agreed to incorporate them into their contract or that their contract is to be governed by them; the parties have agreed that

69 *UNIDROIT*, 290.

70 Lars Meyer, *Non-performance*, 245.

71 Brzozowski, "Umowy," 497.

72 Romanowski, "Ogólne," 11; Rott-Pietrzyk, "Harmonizacja," 50.

73 Piotr Machnikowski and Tomasz Pajor, "Prawo prywatne Unii Europejskiej i jego wpływ na prawo polskie," in *System Prawa Prywatnego. Tom 1. Prawo cywilne – część ogólna*, ed. Marek Safjan (Warsaw: Wydawnictwo C.H. Beck, 2012), 310–311.

74 Robert Stefanicki, "Zasady europejskiego prawa umów (PECL)," *Studia Prawnicze*, no. 3 (2005): 114.

their contract is to be governed by the "general principles of law," the "*lex mercatoria*" or similar principles; the parties have not chosen any system or rules of law to govern their contract (Article 1:101 points 2–3 of the PECL Principles). Lastly, the PECL Principles may provide a solution to the issue raised where the system or rules of law applicable do not do so (Article 1:101 point 4 of the PECL Principles).[75]

The PECL Principles have been incorporated into the DCFR with minor changes. The DCFR provides the basis for the Common Frame of Reference, which has been created by the European research community to define common principles, terminology and regulations that the EU legislator should use when drawing up or amending the *acquis communautaire*.[76] As for the application of the DCFR as a model act,[77] the case is analogous to that of the PECL Principles.[78] Subjecting a contract to the PECL Principles or the DCFR has the effect of a substantive indication of a legal regulation, and thus it produces an effect only within the limits of substantive contractual freedom, the limits of which are determined by the mandatory provisions of law applicable to a given contract. Therefore, the court will apply the provisions of model law, provided that they do not contradict the mandatory rules of law binding on the contract.[79]

Similarly to the UNIDROIT Principles, the PECL Principles and the DCFR also do not use the concept of contractual penalty. In the PECL

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75 Lando and Beale, *Principles of European*, xxix; see also: Brzozowski, "Umowy," 497–498; Rott-Pietrzyk, "Harmonizacja," 53–54; Stefanicki, "Zasady," 115–116; Maria Anna Zachariasiewicz and Jarosław Bełdowski, "Europejskie prawo umów. Wprowadzenie," *Kwartalnik Prawa Prywatnego*, no. 3 (2004): 807 et seq.

76 Bar and Clive, *Principles, Definitions*, 3–4; Ewa Łętowska and Konrad Osajda, "Wprowadzenie do części ogólnej zobowiązań," in *System Prawa Prywatnego. Tom 5. Prawo zobowiązań – część ogólna*, ed. Marek Safjan (Warsaw: Wydawnictwo C.H. Beck, 2020), 85; Machnikowski and Pajor, "Prawo," 312; Rott-Pietrzyk, "Harmonizacja," 53; Reiner Schulze, "The Academic Draft of the CFR and the EC Contract Law," in *Common Frame of Reference and Existing EC Contract Law*, ed. Reiner Schulze (Munich: Sellier. European Law Publishers, 2008), 3 et seq.

77 Łętowska and Osajda, "Wprowadzenie," 85.

78 Ibid., 83.

79 In regard to the PECL Principles, see: Brzozowski, "Umowy," 498; Piotr Machnikowski, "Zasady europejskiego prawa umów a przepisy kodeksu cywilnego o zawarciu umowy," *Transformacje Prawa Prywatnego*, no. 3–4 (2006): 80; Rott-Pietrzyk, "Harmonizacja," 53–54; Zachariasiewicz and Bełdowski, "Europejskie," 807.

Principles, the equivalent of the contractual penalty is the agreed payment for non-performance, and in the DCFR, it is the stipulated payment for non-performance. Article 9:509 (2) of the PECL Principles provides for the possibility of reducing the agreed payment. Pursuant to this provision, notwithstanding any agreement to the contrary, the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the loss resulting from the non-performance and other circumstances. The provision contained in Article 9:509 (2) of the PECL Principles has, practically speaking, been repeated in Provision III. – 3:712 (2) of the DCFR, with minor changes introduced therein. According to Provision III. – 3:712 (2) of the DCFR, notwithstanding any provision to the contrary, the sum so specified in a contract or other juridical act may be reduced to a reasonable amount where it is grossly excessive in relation to the loss resulting from the non-performance and other circumstances. As noted by Piotr Machnikowski and Tomasz Pajor, in the DCFR the central concept is no longer a contract, as it was in the PECL Principles, but an obligation,[80] the consequence of which is the stipulation contained in Provision III. – 3:712 (2) of the DCFR that the reduction may apply not only to the payment provided for in a contract, but also in another legal act, in particular, in a unilateral juridical act, as stated in the commentary to the DCFR.[81]

The provisions for the reduction of the stipulated sum according to the PECL Principles and the DCFR are very similar in lexical terms to the regulation set forth in the UNIDROIT Principles.[82] As is the case with the UNIDROIT Principles, according to the PECL Principles and the DCFR, the reduction in question is also within the exclusive jurisdiction of the court.[83] The commentary to the PECL Principles indicates that

80 Machnikowski and Pajor, "Prawo," 312.

81 Bar and Clive, *Principles, Definitions*, 963.

82 Drapała,, "Dodatkowe," 1283.

83 In regard to PECL Principles, see: Lando and Beale *Principles of European*, 454; Martijn W. Hesselink, *The New European Private Law. Essays on the Future of Private Law in Europe* (Hague–London–New York: Kluwer Law International, 2002), 130; Hein Kötz, *European Contract Law*, translated by Gill Mertens, Tony Weir (New York: Oxford University Press, 2017), 278; Lars Meyer, *Non-performance*, 245; in regard to the DCFR see: Bar and Clive, *Principles, Definitions*, 962–963.

the court's power with regard to reducing the penalty has a limit. The court should not reduce the award to the actual loss, because it should respect the intention of the parties to deter default.[84] The same viewpoint on the stipulated sum reduction is shared in the commentary to the DCFR.[85] Thus, it can be concluded that in the light of both model acts, the reduced sum cannot be lower than the actual loss suffered by the creditor.

Consequently, as far as supranational legal regulations on contractual penalty are concerned, both the PECL Principles and the DCFR provide for one prerequisite for reducing the amount, namely gross excessiveness. However, Article 9:509 (2) of the PECL Principles and Provision III. – 3:712 (2) of the DCFR do not state that the list of circumstances that may be taken into account in the assessment of gross excessiveness is exhaustive. On the contrary, it is non-exhaustive, but as in the case of the UNIDROIT Principles, one of the criteria is given priority and should always be taken into consideration by the court adjudicating a case for payment; namely, the damage criterion which boils down to the comparison of the specified sum with the loss resulting from the non-performance. Actual loss suffered by the creditor is the point, which is confirmed in the commentaries to the PECL Principles and the DCFR. They clearly present that, if there is a gross disparity between the specified sum and the actual loss suffered by the aggrieved party, the court may reduce the sum, even if at the time of the contract it seemed reasonable.[86] Thus, the performance of a significant part of the obligation does not constitute grounds for the reduction of the penalty in the light of the PECL Principles and the DCFR, but, similarly to the UNIDROIT Principles, due to the considerable flexibility of the "gross excessiveness" prerequisite, fulfillment of the obligation to a significant degree may constitute a criterion that the court will take into consideration during its assessment.

According to Polish law regulations, the contractual penalty may turn out to be grossly excessive following non-performance or improper performance of the obligation for which it was reserved, but it may be grossly

84 Lando and Beale, *Principles of European*, 454.

85 Bar and Clive, *Principles, Definitions*, 963.

86 In regard to the PECL Principles see: Lando and Beale, *Principles of European*, 454; in regard to the DCFR see: Bar and Clive, *Principles, Definitions*, 962–963.

excessive as early as at the time of its reservation. The approach to this issue is different in the PECL Principles and the DCFR, where it is clearly stated that the purpose is to control only those stipulations which are abusive in their effect. Hence, the allocation of a special place in the reduction of the criterion of the actual loss, so that the court's power can beexercised where it is clear that the specified sum substantially exceeds the actual loss.[87] When it comes to understanding the prerequisite of "gross excessiveness," the commentaries to the PECL Principles and the DCFR emphasize that the crucial point is the relationship between the specified sum and the loss actually suffered by the creditor, as opposed to the loss legally recoverable taking account of the foreseeability principle. The calculation of actual loss should take into acount that element of the loss which has been caused by the unreasonable behavior of the creditor.[88]

In the light of both model acts, the extent of the said reduction is not entirely arbitrary on the part of the court. As in the case of the UNIDROIT Principles, the reduction is restricted by an undefined term – the "reasonable amount." Nevertheless, it should be added that the meaning thereof under the PECL Principles and the DCFR is less flexible than under the UNIDROIT Principles due to the fact that, as indicated above, the sum cannot be reduced to less than the actual loss of the creditor.

Neither the PECL Principles nor the DCFR explicitly prohibit the exclusion of reduction rules by way of an agreement between the parties, as is the case under the UNIDROIT Principles. In the author's opinion, in view of the great similarity between the regulations, this issue ought to be considered in line with the regulation contained in the UNIDROIT Principles. Thus, it should be stated that the reduction rules provided for in Article 9:509 (2) of the PECL Principles and Provision III. – 3:712 (2) of the DCFR cannot be excluded by the parties.

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87 In regard to the PECL Principles see: Lando and Beale, *Principles of European*, 454; in regard to the DCFR see: Bar and Clive, *Principles, Definitions*, 963.

88 In regard to the PECL Principles see: Lando and Beale, *Principles of European*, 455; in regard to the DCFR see: Bar and Clive, *Principles, Definitions*, 963; see also: Zimmermann, "Agreed," 1552.

7. Reduction of Contractual Penalty According to the TransLex Principles

The information on the website points out that TransLex Principles are a systematic online collection of principles and rules of transnational commercial law. They are used by counsels and arbitrators in international arbitrations as well as contract drafters, academics and participants of moot court competitions in international arbitration across the globe.[89] The TransLex Principles can be used in a way that is characteristic of many other soft law acts.[90]

The TransLex Principles do not use the concept of contractual penalty, nor do the UNIDROIT Principles, the PECL Principles and the DCFR. In TransLex Principles, the equivalent of the contractual penalty is a promise to pay in case of non-performance. These rules provide for the possibility of reducing the amount. According to the TransLex Principles No.VI.4 sentence 2, if the amount is grossly excessive in relation to the loss resulting from non-performance and other circumstances, the specified sum may be reduced by an arbitral tribunal or court to a reasonable amount, notwithstanding any agreements of the parties to the contrary. Consequently, in relation to the supranational legal regulations discussed hereinabove, the TransLex Principles also take the position of the agreed sum reduction by the court.[91] These rules provide for only one prerequisite for the reduction, i.e. in the case of gross excessiveness of the agreed sum. The commentary to the TransLex Principles specifies the manner in which this prerequisite should be construed. According to it, the agreed sum is grossly, i.e. clearly and obviously, excessive in relation to the loss caused by the non-performance and also in relation to other circumstances of the case.[92] The criterion according to which gross excessiveness of the specified sum is determined is the creditor's loss resulting from non-performance, which does not exclude other criteria that the court may take into account when deciding on the reduction.

89 "Principle: No. VI.4 – Promise to pay in case of non-performance," University of Colognem, accessed September 9, 2022, https://www.trans-lex.org/945000.

90 Rott-Pietrzyk, "Harmonizacja," 64.

91 "Commentary to Trans-Lex Principle, thesis 4," University of Cologne, accessed September 9, 2022, https://www.trans-lex.org/945000.

92 Ibid.

The commentary to the TransLex Principles indicates that in determining whether the sum is grossly excessive, the court or arbitral tribunal necessarily enjoys a certain degree of discretion. The power of the court or arbitral tribunal is limited to a "reduction" of the sum, which excludes both a total elimination (a "reduction to 0") and an increase of the agreed sum.[93] Hence, although it is not explicitly stated in the TransLex Principles No.VI.4, it may be concluded that total reduction is inadmissible. Most of all, however, it should be emphasized that the scope of the reduction is not arbitrary due to the fact that the sum can be reduced to a reasonable amount. This is consistent with the solutions adopted in the UNIDROIT Principles, the PECL Principles and the DCFR. The commentary to the TransLex Principles states that even if the parties have excluded in the contract the right to demand a judicial reduction of the specified amount, such exclusion cannot be deemed to be effective.[94]

8. Conclusions

The institution of contractual penalty reduction has a well-established place in the Polish civil law tradition, as it was already provided for in the Code of Obligations, and the present regulation contained in Article 484 § 2 of the CC undoubtedly draws onArticle 85 § 1 of the CO. This, of course, does not mean per se that adapting the institution in question to modern standards of legal transactions is not necessary. First of all, the fact that Polish private law allows for contractual penalty reduction deserves a positive assessment, and it draws on modern legislative solutions that are reflected in supranational model acts. The existence of the possibility of reducing the contractual penalty is not evident from a historical point of view, for in terms of the civil tradition, such reduction was an unprecedented phenomenon.[95] Today, according to Michael Joachim Bonell, the possibility of reducing the agreed sum is recognized under most of the civil law systems that provide for clauses known as "penalty clauses," as opposed to the common law systems that traditionally distinguish between penalties and liquidated

93 Ibid.
94 Ibid.
95 Zimmermann, "Agreed," 1551.

damages clauses.[96] Even today, not all legal systems allow for the possibility to reduce the contractual penalty.

At the supranational level, there is a discussion whether the contractual penalty may be reduced only upon request of the debtor, or whether the court may reduce the contractual penalty *ex officio*. Reinhard Zimmermann's position is convincing. He opts for the first solution and argues that there is no need for the law to impose its protection upon a debtor who is not willing to be protected. Also, it is not conductive to legal certainty if a judge can *mero motu* consider a reduction of a penalty.[97] The Polish regulation of contractual penalty fits into this rightful trend, as Article 484 § 2 of the CC manifestly states that the contractual penalty is reduced at the request of the debtor. What is more, the prevailing view is that the request for reduction of the contractual penalty should be made explicitly.

It seems that Polish law requires some changes with respect to the prerequisites for the reduction of the contractual penalty. In the Polish civil law tradition, there are two equal prerequisites for the reduction of the contractual penalty, i.e. partial performance of the obligation and gross excessiveness of the contractual penalty. In view of the analysis performed, a conclusion can be drawn that this constitutes a certain peculiarity of the Polish legal order as far as contractual penalty reduction is concerned, since the uniform supranational solutions provide for one criterion for the reduction in question, namely gross excessiveness of the penalty,[98] while an independent prerequisite of the partial performance of the obligation does not function.

Resolution (78) 3 of the Council of Europe refers to the partial fulfillment of the obligation, however not as a prerequisite for the reduction that is equivalent to gross excessiveness of the contractual penalty, but as a criterion to be applied in the course of the assessment thereof. In the author's opinion, it is reasonable to abandon the prerequisite of the "performance of the obligation in a significant part" as stipulated in Article 484 § 2 of the CC

96 Bonell, *An International*, 163; see also: Borysiak, "Miarkowanie," 449; Hesselink, *The New European Private Law*, 130; Jastrzębski, *Kara*, 306; Lando and Beale, *Principles of European*, 456; Ingeborg Schwenzer, Pascal Hachem, and Christopher Kee, *Global Sales and Contract Law* (New York: Oxford University Press, 2012), 633 et seq.

97 Zimmermann, " Agreed," 1552; see also: Wilejczyk, "Miarkowanie," 176 et seq.

98 Zimmermann, "Agreed," 1551–1552.

as an independent prerequisite for the reduction of contractual penalty, because it is inadequate and may lead *in concreto* to unfair and unjust judicial decisions, in particular, the contractual penalty may be reduced due to performance of the obligation in a significant part, while it is not at all grossly excessive. J. Szewczyk rightly draws attention to the risk posed by the prerequisite of the performance of the obligation in a significant part by indicating that the damage suffered by the creditor may be several times higher than the value of the principal service.[99] As a matter of fact, even the non-performance of an insignificant part of the obligation itself may inflict a relatively large damage on the creditor, especially when it comes to *lucrum cessans*, and despite this, on the grounds of *legis latae*, there is the possibility of reducing the contractual penalty due to performance of the obligation in a significant part, i.e. the prerequisite for contractual penalty reduction that is independent of gross excessiveness. In addition, this prerequisite weakens one of the two main functions of the contractual penalty, which is the repressive function. Within the framework thereof, the contractual penalty is designed to motivate the debtor to properly perform their obligation, thus fulfilling it in its entirety, while at the same time it is possible to reduce the contractual penalty on the grounds that it was performed in a substantial part. Thus, the applicability of the prerequisite of the performance of the obligation in a significant part may demotivate the debtor, who, hoping to reduce the contractual penalty, may strive to perform the obligation in a substantial part rather than in its entirety. Recognizing the disadvantages of the prerequisite of the performance of the obligation in a significant part, the judicature also advocates its application with great caution.[100] Therefore, *de lege ferenda*, only one prerequisite for the reduction of the contractual penalty should be maintained, namely gross excessiveness, as is the case in all the unified supranational legal regulations on contractual penalty that have been discussed herein. At the same time, it would be optimal, so as not to completely break with the tradition of the Polish civil law, to reformulate the prerequisite of the "performance of a significant part of the obligation" from being an independent prerequisite

[99] Szewczyk, "O kryteriach," 301.

[100] Polish Supreme Court, Judgment of September 15, 1999, Ref. No. III CKN 337/98, reported in: Legalis.

for reducing the contractual penalty into a normative criterion that ought to be considered when assessing the prerequisite of gross excessiveness of the contractual penalty. With such a solution, performance of the obligation in a substantial part would not be devoid of relevance when it comes to contractual penalty reduction, but it would be one of the possible criteria that the court may consider when determining whether the contractual penalty is grossly excessive.

In addition, another criterion should be introduced in Article 484 § 2 of the CC. Currently, in the context of the prerequisite of gross excessiveness of the contractual penalty, only the doctrine and judicature indicate that it is primarily a matter of comparing the amount of the contractual penalty with the criterion of the extent of the damage suffered,[101] or possibly compensation.[102] It would be worthwhile to clarify this issue normatively, which would relate to the solutions adopted in the model acts subject to the present analysis (the UNIDROIT Principles, the PECL Principles, the DCFR and the TransLex Principles). Undoubtedly, the statutory definition of the criteria to be taken into account in the assessment of gross excessiveness of the contractual penalty should not be exhaustive in nature, so that the court could consider other circumstances it deems appropriate as assessment criteria.

Clearly, the fact that Article 484 § 2 of the CC does not set forth any criteria on the grounds of which the issue of gross excessiveness of the contractual penalty should be resolved has one advantage, namely a very high level of flexibility of this normative term, which leaves the court virtually unlimited normative discretion in the selection of evaluation criteria,

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101 Borysiak, in *Kodeks*, 1120; Drapała, "Dodatkowe," 1321; Jastrzębski, *Kara*, 337; Węgrzynowski, "Wierzycielska," 109; Wiśniewski, in *Kodeks*, 1241–1242; Zakrzewski, in *Kodeks*, 938; Polish Supreme Court, Judgments: of June 21, 2002, Ref. No. V CKN 1075/00, reported in: Legalis; of May 12, 2006, Ref. No. V CSK 55/06, reported in: Legalis; of November 30, 2006, Ref. No. I CSK 259/06, reported in: Legalis; of November 21, 2007, Ref. No. I CSK 270/07, reported in: Legalis; of February 13, 2014, Ref. No. V CSK 45/13, reported in: Legalis.

102 Ciemiński, *Odszkodowanie*, 314–315; Falkiewicz and Wawrykiewicz, *Kara*, 40–41; Lutkiewicz-Rucińska, in *Kodeks*, 893; Modrzejewska, "Rezolucja," 259; Strugała, "Wysokość," 137; Szwaja, *Kara*, 144–145; Polish Supreme Court, Judgments: of June 13, 2003 r., Ref. No. III CKN 50/01, reported in: Legalis; of November 11, 2007, Ref. No. IV CSK 181/07, reported in: Legalis.

in the court's opinion the most appropriate *ad casum*, for the reduction of the contractual penalty. It is aptly noted that the legislator intentionally did not explicitly indicate the criteria that would determine the excessive amount of the contractual penalty, and also did not provide a hierarchy of such criteria, wishing in this way to ensure the possibility of flexible application of the institution of contractual penalty reduction, based largely on judicial discretion, taking into account the specific circumstances of a given case.[103] However, the statutory indication of the two criteria that should be considered when assessing gross excessiveness as part of contractual penalty reduction, without excluding the possibility of the court taking into account other assessment criteria, in principle does not depreciate the main advantages of using the undefined term of "grossly excessive" contractual penalty in Article 484 § 2 of the CC. Such formulation of the prerequisite for the reduction of the contractual penalty was already used in Article 85 § 1 of the CO, which referred to the damage to the creditor as a criterion for reducing the contractual penalty due to its gross excessiveness. This structure is used in all the supranational regulations subject to the present analysis. In the light of Resolution (78) 3 of the Council of Europe, this statutory criterion is partial performance of the principal obligation, while in the UNIDROIT Principles, the PECL Principles, the DCFR and the TransLex Principles it is the damage resulting from non-performance thereof.

As for a more precise definition of the second statutory criterion for assessing gross excessiveness, in addition to the "performance of the obligation in a substantial part," despite the fact that, as the analysis conducted shows, the damage to the creditor, not compensation, is indicated as this criterion, it is nevertheless necessary to opt for compensation, which still refers in large part to the well-established criterion of damage due to the fact that the main factor in determining creditor's compensation is precisely the damage to the creditor. However, compensation does not always correspond to the magnitude of the loss, for instance, when the creditor himself contributed thereto (Article 362 of the CC), and therefore the compensation criterion is more adequate than the damage criterion in assessing

[103] Polish Supreme Court, Judgments: of November 30, 2006, Ref. No. I CSK 259/06, reported in: Legalis; of May 23, 2013, Ref. No. IV CSK 644/12, reported in: Legalis.

gross excessiveness of the contractual penalty. It is necessary to agree with the position of the Polish Supreme Court in the judgment of November 21, 2007, which indicated that the *ratio* of the amount of the penalty to the damage cannot be the criterion as the penalty corresponds to compensation, and the compensation may be, as a result of the applicability of various institutions of civil law (e.g. Article 322 of the the Act of November 17, 1964 – Code of Civil Procedure[104]), in a different amount than the damage suffered.[105]

Another weak point of the Polish regulation of contractual penalty reduction is the absence of any indication in the act of any directives as to the extent of the reduction of the contractual penalty as part of its adjustment, while the extent of the reduction cannot be completely arbitrary. It seems that setting a specific limit on the reduction in question, e.g. to the amount of the damage suffered by the creditor, would be unreliable in the spectrum of the factual situations which could involve contractual penalty reduction. In addition, the reduction of the contractual penalty is not intended to bring the contractual penalty to any specific legal parameter, e.g. the amount of damage, but as the Polish Supreme Court rightly states in its judgment of May 12, 2006, the purpose of reducing the contractual penalty is to set it by the court in such an amount that it loses its feature of "gross excessiveness" within the meaning of Article 484 § 2 of the CC.[106] It seems that with regard to the extent of the reduction of the contractual penalty, reference should be made to the sense of fairness and justice, and as in supranational regulations, i.e. the UNIDROIT Principles, the PECL Principles, the DCFR and the TransLex Principles, Article 484 § 2 of the CC ought to include a regulation according to which the contractual penalty should be reduced to a reasonable amount.

Some of the supranational regulations of contractual penalty discussed hereinabove expressis verbis provide for the prohibition of excluding the possibility of judicial reduction of the amount of contractual penalty

104 Journal of Laws 2021 item 1805, as amended.

105 Polish Supreme Court, Judgment of November 21, 2007, Ref. No. I CSK 270/07, reported in: Legalis.

106 Polish Supreme Court, Judgment of May 12, 2006, Ref. No. V CSK 55/06, reported in: Legalis; see also: Jastrzębski, *Kara*, 345; Popiołek, in *Kodeks*, 110.

on the basis of an agreement between the parties. In Polish law, there is no such prohibition explicitly stipulated in Article 484 § 2 of the CC, but the position of the doctrine and judicature is evident as to the absolutely binding nature of this legal norm. Therefore, it seems that there is no need for the legislator's intervention, especially since, for example, such a prohibition is not explicitly stated in the PECL Principles and the DCFR.

References

Allerhand, Maurycy. *Kodeks handlowy. Komentarz*. Lviv: „Kodeks" Spółka Wydawnicza z Ograniczoną Odpowiedzialnością, 1935.

Bonell, Michael Joachim. *An International Restatement of Contract Law. The UNIDROIT Principles of International Commercial Contracts*. New York: Transnational Publishers, 2005.

Bonell, Michael Joachim. *The UNIDROIT Principles in Practice. Caselaw and Bibliography on the UNIDROIT Principles of International Commercial Contracts*. New York: Transnational Publishers, 2006.

Borysiak, Witold. „Miarkowanie kary umownej." In *Prawo i Państwo. Księga jubileuszowa 200-lecia Prokuratorii Generalnej Rzeczypospolitej Polskiej*, edited by Leszek Bosek, 447–485. Warsaw: Wydawnictwo Sejmowe, 2017.

Borysiak, Witold. In *Kodeks cywilny. Komentarz. Tom III A. Zobowiązania. Część ogólna*, editedy by Konrad Osajda. Warsaw: Wydawnictwo C.H. Beck, 2017.

Brzozowski, Adam. „Umowy." In *System Prawa Prywatnego. Tom 5. Prawo zobowiązań – część ogólna*, edited by Konrad Osajda, 472–519. Warsaw: Wydawnictwo C.H. Beck, 2020.

Ciemiński, Marcin. *Odszkodowanie za szkodę niemajątkową w ramach odpowiedzialności ex contractu*. Warsaw: Wydawnictwo Wolters Kluwer Polska, 2015.

Czachórski, Witold, Adam Brzozowski, Marek Safjan, and Elżbieta Skowrońska-Bocian. *Zobowiązania. Zarys wykładu*. Warsaw: Wydawnictwo Prawnicze LexisNexis, 2009.

Dąbek, Paweł, and Aleksandra Nowak-Gruca. „Uwagi o karze umownej z perspektywy ekonomicznej analizy prawa (EAP)." In *Prawo kontraktów*, edited by Zbigniew Kuniewicz and Dorota Sokołowska, 64–77. Warsaw: Wydawnictwo Wolters Kluwer Polska, 2017.

Dąbrowa, Janina. „Skutki niewykonania zobowiązania." In *System prawa cywilnego. Prawo zobowiązań – część ogólna*, t. III, cz. 1, edited by Zbigniew

Radwański, 759–848. Wrocław–Warsaw–Kraków–Gdańsk–Łódź: Zakład Narodowy im. Ossolińskich Wydawnictwo Polskiej Akademii Nauk, 1981.

DiMatteo, Larry A. *International Contracting: Law and Practice*. Alphen aan den Rijn: Kluwer Law International B.V., 2022.

Domański, Ludwik. *Instytucje kodeksu zobowiązań. Komentarz teoretyczno-praktyczny. Część ogólna*. Warsaw: Marjan Ginter – Księgarnia Wydawnictw Prawniczych, 1936.

Drapała,, Przemysław. „Dodatkowe zastrzeżenia umowne." In *System Prawa Prywatnego. Tom 5. Prawo zobowiązań – część ogólna*, edited by Konrad Osajda, 1243–1332. Warsaw: Wydawnictwo C.H. Beck, 2020.

Drapała,, Przemysław. „Kara umowna (art. 483 k.c.) a odszkodowanie na zasadach ogólnych (art. 471 k.c.)." *Państwo i Prawo*, no. 6 (2003): 55–64.

Falkiewicz, Krzysztof, and Michał Wawrykiewicz. *Kara umowna w obrocie gospodarczym*. Warsaw: Wydawnictwo Difin, 2001.

Fermus-Bobowiec, Anna. „Od ryczałtu odszkodowania do miarkowania – kompensacyjny charakter kary umownej w prawie polskim na tle rozwiązań przyjętych w dziewiętnastowiecznym prawie cywilnym." *Studia Iuridica Lublinensia*, no. 3 (2016): 287–299.

Fogel, Bartosz. „Kara umowna jako kontraktowa regulacja odpowiedzialności odszkodowawczej – wybrane zagadnienia." *Acta Universitatis Wratislaviensis*, no. 3161, Prawo CCCVIII (2009): 83–98.

Fuchs, Bernadetta. „Harmonizacja prawa prywatnego w aktach prawa modelowego (soft law)." In *System Prawa Handlowego. Tom 9. Międzynarodowe prawo handlowe*, edited by Wojciech Popiołek, 60–63. Warsaw: Wydawnictwo C.H. Beck, 2013.

Gawlik, Zdzisław. In *Kodeks cywilny. Komentarz. Tom III. Zobowiązania – część ogólna*, edited by Andrzej Kidyba. Warsaw: Wydawnictwo Wolters Kluwer, 2014.

Gordon, Zdzisław. „Kary umowne w bieżącej praktyce zamówień publicznych." *Prawo Zamówień Publicznych*, no. 1 (2014): 126–144.

Hesselink, Martijn W. *The New European Private Law. Essays on the Future of Private Law in Europe*. Hague–London–New York: Kluwer Law International, 2002.

Jastrzębski, Jacek. „Nietypowe kary umowne – swoboda sankcji kontraktowych i ochrona dłużnika." *Przegląd Prawa Handlowego*, no. 6 (2014): 11–22.

Jastrzębski, Jacek. *Kara umowna*. Warsaw: Wolters Kluwer Polska, 2006.

Katner, Wojciech Jan. „Odpowiedzialność przedsiębiorcy za niewykonanie lub nienależyte wykonanie zobowiązania." In *System Prawa Handlowego.*

Tom 5A. Prawo umów handlowych, edited by Mirosław Stec, 530–638. Warsaw: Wydawnictwo C.H. Beck, 2020.

Kolańczyk, Kazimierz. *Prawo rzymskie*. Warsaw: Wydawnictwo Prawnicze LexisNexis, 2001.

Korzonek, Jan, and Ignacy Rosenblüth. *Kodeks zobowiązań. Komentarz. Tom I*. Kraków: Księgarnia Powszechna, 1936.

Kötz, Hein. *European Contract Law*, translated by Gill Mertens, Tony Weir. New York: Oxford University Press, 2017.

Lando, Ole, and Hugh Beale, eds. *Principles of European Contract Law. Parts I and II*. Hague–London–Boston: Kluwer Law International, 2000.

Lemkowski, Marcin. In *Kodeks cywilny. Tom II. Komentarz. Art. 353–626*, edited by Maciej Gutowski. Warsaw: Wydawnictwo C.H. Beck, 2022.

Lemkowski, Marcin. *Odsetki cywilnoprawne*. Warsaw: Wydawnictwo Wolters Kluwer Polska, 2007.

Litewski, Wiesław. *Rzymskie prawo prywatne*. Warsaw: Wydawnictwo Prawnicze LexisNexis, 2003.

Longchamps de Bérier, Roman. *Zobowiązania*. Lviv: Księgarnia Wydawnicza Gubrynowicz i Syn, 1938.

Lutkiewicz-Rucińska, Anita. In *Kodeks cywilny. Komentarz*, edited by Małgorzata Balwicka-Szczyrba and Anna Sylwestrzak. Warsaw: Wydawnictwo Wolters Kluwer Polska, 2022.

Łętowska, Ewa, and Konrad Osajda. „Wprowadzenie do części ogólnej zobowiązań." In *System Prawa Prywatnego. Tom 5. Prawo zobowiązań – część ogólna*, edited by Marek Safjan, 12–127. Warsaw: Wydawnictwo C.H. Beck, 2020.

Machnikowski, Piotr, and Tomasz Pajor. „Prawo prywatne Unii Europejskiej i jego wpływ na prawo polskie." In *System Prawa Prywatnego. Tom 1. Prawo cywilne – część ogólna*, edited by Marek Safjan, 257–316. Warsaw: Wydawnictwo C.H. Beck, 2012.

Machnikowski, Piotr. „Zasady europejskiego prawa umów a przepisy kodeksu cywilnego o zawarciu umowy." *Transformacje Prawa Prywatnego*, no. 3–4 (2006): 77–87.

Mari, Alessandra. „Particular Remedies for Non-Performance." In *Principles of European Contract Law and Italian Law. A Commentary*, edited by Luisa Antoniolli and Anna Veneziano, 443–479. Hague: Kluwer Law International, 2005.

Meyer, Lars. *Non-performance and Remedies Under International Contract Law Principles and Indian Contract Law. A Comparative Survey of the UNIDROIT Principles of International Commercial Contracts, the Principles of Euro-*

pean Contract Law, and Indian Statutory Contract Law. Frankfurt am Main: Peter Lang GmbH, 2010.

Modrzejewska, Małgorzata. „Rezolucja nr (78) 3 w sprawie kar umownych (klauzul karnych) w prawie cywilnym na tle unormowania polskiego kodeksu cywilnego." In *Standardy prawne Rady Europy. Teksty i komentarze. Tom II. Prawo cywilne*, edited by Marek Safjan, 249–261. Warsaw: Oficyna Naukowa, 1995.

Namitkiewicz, Jan. *Kodeks zobowiązań. Komentarz dla praktyki. Tom I. Część ogólna. Art. 1–293*, opracowany przy współudziale Alfreda Samolińskiego. Łódź: Wydawnictwo „Kolumna", 1949.

Olejniczak, Adam. „Dodatkowe zastrzeżenia umowne." In *System Prawa Prywatnego. Tom 5. Prawo zobowiązań – część ogólna*, edited by Konrad Osajda, 1203–1242. Warsaw: Wydawnictwo C.H. Beck, 2020.

Osuchowski, Wacław. *Zarys rzymskiego prawa prywatnego*. Warsaw: Państwowe Wydawnictwo Prawnicze, 1967.

Pazdan, Jadwiga. „Czy można wyłączyć umowę spod prawa?" *Państwo i Prawo*, no. 10 (2005): 5–18.

Pazdan, Maksymilian. „Materialno-prawne wskazanie a kolizyjnoprawny wybór prawa." *Problemy Prawne Handlu Zagranicznego*, no. 18 (1995): 105–119.

Pazdan, Maksymilian. „Materialnoprawne wskazanie regulacji prawnej na tle konwencji rzymskiej z 1980 r." In *Studia i rozprawy. Księga jubileuszowa dedykowana Profesorowi Andrzejowi Całusowi*, edited by Andrzej Janik, 325–332. Warsaw: Szkoła Główna Handlowa – Oficyna Wydawnicza, 2009.

Pazdan, Maksymilian. „Zobowiązania umowne oraz wybrane instytucje wspólne prawa zobowiązań." In *System Prawa Prywatnego. Tom 20 B. Prawo prywatne międzynarodowe*, edited by Maksymilian Pazdan, 41–96. Warsaw: Wydawnictwo C.H. Beck, 2015.

Pazdan, Maksymilian. *Prawo Prywatne Międzynarodowe*. Warsaw: Wydawnictwo LexisNexis, 2012.

Penal Clauses in Civil Law: Resolution (78) 3 Adopted by the Committee of Ministers of the Council of Europe on 20 January 1978 and Explanatory Memorandum. Accessed September 9, 2022. https://rm.coe.int/09000016804d1a18.

Popiołek, Wojciech. In *Kodeks cywilny. Tom II. Komentarz. Art. 450–1088. Przepisy wprowadzające*, edited by Krzysztof Pietrzykowski. Warsaw: Wydawnictwo C.H. Beck, 2021.

Radliński, Oskar. „Dopuszczalność zastrzeżenia kary umownej za zwłokę w wykonaniu zobowiązania w postaci określonego procentu wynagrodzenia umownego za każdy dzień zwłoki, bez wskazania końcowego terminu na-

liczenia kary umownej lub jej maksymalnej wysokości." *Monitor Prawniczy*, no. 12 (2022): 653–658.

Radwański, Zbigniew, and Adam Olejniczak. *Zobowiązania – część ogólna*. Warsaw: Wydawnictwo C.H. Beck, 2018.

Radwański, Zbigniew. „Dodatkowe zastrzeżenia umowne." In *System prawa cywilnego. Prawo zobowiązań – część ogólna*, t. III, cz. 1, edited by Zbigniew Radwański, 458–469. Wrocław–Warsaw–Kraków–Gdańsk–Łódź: Zakład Narodowy im. Ossolińskich Wydawnictwo Polskiej Akademii Nauk, 1981.

Romanowski, Michał. „Ogólne reguły wykładni kontraktów w świetle zasad europejskiego prawa kontraktów a reguły wykładni umów w prawie polskim." *Przegląd Prawa Handlowego*, no. 8 (2004): 11–18.

Rott-Pietrzyk, Ewa. „Harmonizacja prawa prywatnego w aktach prawa modelowego (soft law)." In *System Prawa Handlowego. Tom 9. Międzynarodowe prawo handlowe*, edited by Wojciech Popiołek, 50–59, 63–87. Warsaw: Wydawnictwo C.H. Beck, 2013.

Rott-Pietrzyk, Ewa. „Zobowiązania umowne oraz wybrane instytucje wspólne prawa zobowiązań." In *System Prawa Prywatnego. Tom 20 B. Prawo prywatne międzynarodowe*, edited by Maksymilian Pazdan, 109–197. Warsaw: Wydawnictwo C.H. Beck, 2015.

Rzetecka-Gil, Agnieszka. *Kodeks cywilny. Komentarz. Zobowiązania – część ogólna*. Lex/el., 2011.

Rzewuski, Maciej. "Chwila złożenia wniosku o miarkowanie kary umownej (glosa do wyroku SN z 23 czerwca 2017 r., I CSK 625/16)." *Przegląd Sądowy*, no. 4 (2018), 116.

Schulze, Reiner. "The Academic Draft of the CFR and the EC Contract Law." In *Common Frame of Reference and Existing EC Contract Law*, edited by Reiner Schulze, 3–24. Munich: Sellier. European Law Publishers, 2008.

Schwenzer, Ingeborg, Pascal Hachem, Christopher Kee. *Global Sales and Contract Law*. New York: Oxford University Press, 2012.

See, Rina, and Dharshini Prasad. "The UNIDROIT Principles 2016: A Contemporary English Law Perspective." *Hamburg Law Review*, no. 2 (2018): 83–106.

Sehn, Michał. "Miarkowanie kary umownej w świetle najnowszego orzecznictwa Sądu Najwyższego w sprawach cywilnych." *Monitor Prawniczy*, no. 9 (2021): 491–494.

Skowrońska-Bocian, Elżbieta. "Kara umowna – kompensacja czy represja?," *Zeszyty Prawnicze UKSW*, no. 3.2. (2003): 179–194.

Stefanicki, Robert. „Zasady europejskiego prawa umów (PECL)." *Studia Prawnicze*, no. 3 (2005): 109–123.

Strugała, Radosław. „Wysokość kary umownej a możliwość jej markowania." *Monitor Prawniczy*, no. 3 (2016): 136–141.

Szewczyk, Jarosław. „O kryteriach miarkowania nadmiernych kar umownych w kontekście orzecznictwa Sądu Najwyższego." *Palestra*, no. 1–2 (2013): 298–304.

Szwaja, Janusz. „Miarkowanie kary umownej według polskiego kodeksu cywilnego." In *Odpowiedzialność cywilna za wyrządzenie szkody*, edited by Stefan Grzybowski, 163–210. Warsaw: Państwowe Wydawnictwo Naukowe, 1969.

Szwaja, Janusz. *Kara umowna według kodeksu cywilnego*. Warsaw: Wydawnictwo Prawnicze, 1967.

Tanajewska, Renata. In *Kodeks cywilny. Komentarz*, edited by Jerzy Ciszewski and Piotr Nazaruk. Warsaw: Wydawnictwo Wolters Kluwer Polska, 2019.

UNIDROIT Principles of International Commercial Contracts. Rome: International Institute for the Unification of Private Law, 2016. Accessed September 9, 2022. https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-i.pdf.

University of Cologne. "Commentary to Trans-Lex Principle, thesis 4." Accessed September 9, 2022. https://www.trans-lex.org/945000.

von Bar, Christian, and Eric Clive, eds. *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Full Edition. Volume I*. Munich: Sellier. European Law Publishers, 2009.

Węgrzynowski, Łukasz. „Wierzycielska kara umowna." *Przegląd Sądowy*, no. 6 (2022): 99–111.

Widerski, Paweł. „Charakter prawny kary umownej według prawa polskiego na tle ponadnarodowych uregulowań prawnych." *Studia Prawa Prywatnego*, no. 2 (2018): 24–44.

Wilejczyk, Magdalena. „Miarkowanie kary umownej *de lege ferenda*." *Transformacje Prawa Prywatnego*, no. 2 (2020): 175–197.

Wiśniewski, Tadeusz. In *Kodeks cywilny. Komentarz. Tom III. Zobowiązania. Część ogólna*, edited by Jacek Gudowski. Warsaw: Wydawnictwo Wolters Kluwer Polska, 2018.

Witczak, Hanna, and Agnieszka Kawałko. *Zobowiązania*. Warsaw: Wydawnictwo C.H. Beck, 2007.

Zachariasiewicz, Maria Anna, and Jarosław Bełdowski. „Europejskie prawo umów. Wprowadzenie." *Kwartalnik Prawa Prywatnego*, no. 3 (2004): 801–813.

Zakrzewski, Piotr. In *Kodeks cywilny. Komentarz. Tom III. Zobowiązania. Część ogólna (art. 353–534)*, edited by Magdalena Habdas and Mariusz Fras. Warsaw: Wydawnictwo Wolters Kluwer Polska, 2018.

Zalewski, Bartosz. „Stipulatio poenae." In *Leksykon tradycji rzymskiego prawa prywatnego. Podstawowe pojęcia*, edited by Antoni Dębiński, Maciej Jońca, 353. Warsaw: Wydawnictwo C.H. Beck, 2016.

Zimmermann, Reinhard. „Agreed Payment for Non-performance." In *Commentaries on European Contract Laws*, edited by Nils Jansen and Reinhard Zimmermann, 1539–1554. New York: Oxford University Press, 2018.

Zimmermann, Reinhard. *The Law of Obligations Roman Foundations of the Civilian Tradition*. Oxford: Oxford University Press, 1996.

Zoll, Fryderyk. *Zobowiązania w zarysie według polskiego kodeksu zobowiązań*, podręcznik poddany rewizji i wykończony przy współudziale Stefana Kosińskiego i Józefa Skąpskiego. Warsaw: Nakład Gebethnera i Wolffa, 1948.

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The Scope of the Employee's Right to Allowed Public Criticism of the Supervisor. Gloss to the Judgment of the Supreme Court of August 28, 2013, I PK 48/13. Critical Voice

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Abstract: This gloss discusses the position of the Supreme Court adopted in the judgment of August 28, 2013, I PK 48/13. The main thesis of the Court concerned the employee's possibility of allowed public criticism of the supervisor, i.e. the right to whistleblowing, which is the disclosure of irregularities in the functioning of the workplace consisting in various types of acts of dishonesty, unfairness involving the employer or its representatives, when this does not lead to a breach of the employee's duties consisting, in particular, in caring for the interests of the workplace and maintaining the confidentiality of information, the disclosure of which could cause damage to the employer (duty of loyalty; not to infringe the employer's interests – Article 100 § 2 (4) of the Polish Labor Code. The Supreme Court's lack of consistency in its ruling between informing the public about irregularities in the workplace and the employee's duty of loyalty provides for even more doubts on the part of employees wishing to report irregularities. In the author's opinion, the position taken in the case does not explain when loyalty is binding on the employee. The Supreme Court duplicated the lack of consistency in subsequent rulings, e.g. of May 10, 2018.

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1. Thesis

[…] the employee has the possibility of allowed public criticism of the supervisor (the right to whistleblowing, i.e. disclosing irregularities in the functioning of the workplace consisting in various types of acts of dishonesty, unfairness involving the employer or its representatives), when this does not lead to a breach of the employee's duties, in particular duty to care for the interests of the workplace and maintain the secrecy of information, the disclosure of which could cause damage to the employer (duty of loyalty; not violating the interests of the employer – Article 100 § 2 (4) of the Polish Labor Code), as well as to observe the principles of social coexistence in the workplace (Article 100 § 2 (6) of the Polish Labor Code; an employee may not rashly, in a manner justified only by subjective reasons, formulate negative opinions against the employer or its representatives).

2. Factual and Legal Background

The glossed ruling was issued as a result of a cassation appeal against the judgment of the District Court – Labor and Social Insurance Court of July 4, 2012, dismissing the cassation appeal of the defendant employer. The facts of the proceedings conducted in subsequent instances concerned an employee[1] who was employed at the Museum for an indefinite period from January 3, 2005 to March 31, 2011 as the head of the department. The director of the Museum was the immediate supervisor of the employee. In November 2010, the term of the city councilor exercised by the employee expired. The situation that gave rise to a direct conflict between the employee and the employer was related to an interview on television given by the employee in which the employee criticized the mayor's actions in the field of culture. The employee used the term "liquidation" during the interview and criticized the director of the Museum and called him "culturally illiterate." He stated that the mayor of the city "hired" the director of the Museum in order to "liquidate culture." The defendant also accused his immediate supervisor of terminating employment contracts with employees, including pregnant women, and of harassing employees. The employee emphasized that as an employee of the Museum, he declares total official

[1] For the purposes of the gloss, the entity concerned by the facts discussed herein will be alternately referred to as the "employee" or a "whistleblower."

loyalty to the director, but on the other hand, being a councilor, he is obliged to speak out in the interest of other employees of the Museum. The employee did not limit himself to indicating these allegations only in the interview he gave. He posted the allegations on the internet forum and website, although it should be pointed out that the main charge was the dismissal of the "female employee who is undergoing oncological treatment," who was reinstated by the Court in the defendant Museum. When the employee was dismissed from work, the director of the Museum was not aware that she had received oncological treatment.

Nevertheless, the termination of an employment contract with a pregnant employee occurred when the employer intended to submit her a notice of termination. On December 10, 2010, the employer terminated the employment contract with the plaintiff by three months' notice. The reasons for the dismissal were a prolonged conflict between the employee and the director, manifested in the dissemination of false information by the plaintiff and discrediting the director's good name, offensive, public reference to the director, undermining the legality and criticizing the director's actions in a way that exceeds the principles of allowed criticism, refusal to comply with the employer's orders, public questioning of the professional competences of the director of the Museum and accusing that the director is acting to the detriment of the institution he manages. In the opinion of the employer, the above behavior resulted in a loss of trust in the employee. In addition, the employer accused the plaintiff of failing to comply with the official order regarding the return of the company mobile phone while taking the annual leave.

The employee disagreed with such argumentation, which was expressed in the appeal against the statement concerning the employment brought to the District Court. With such findings, the District Court found that the claim did not deserve to be upheld. The Court of First Instance indicated that the employee, while performing the mandate of the councilor, had the right to speak about the director of the Museum "in a deeply critical manner," taking advantage of the protection of the freedom of speech and not being subject to verification in court proceedings. The District Court verified the grounds for termination of the employment contract with notice. The Court analyzed the testimonies concerning the facts: the dismissal by the director of the Museum of a pregnant woman, who

allegedly lost her child , the dismissal of a woman undergoing oncological treatment, or the "terror" prevailing in the Museum. In the opinion of the Court, the employee's allegations of "firing a pregnant woman from work" have not been confirmed, while the fact that the second of the dismissed employees was not supposed to inform the employer about her oncological treatment was significant. According to the Court, the allegations against the director of the Museum did not result from reliable information, duly verified by the plaintiff, which he could quickly obtain. In these circumstances, the District Court found that the plaintiff had slandered his supervisor and had not acted as a councilor (in the public interest), but as an employee of the Museum abusing the right to criticize the employer. When making statements about the supervisor's behavior, the plaintiff was not guided by the interests of the people allegedly aggrieved by the director or the general interest of all employees of the Museum, but he expressed a personal aversion to the supervisor, not being able to accept the fact that he was the director of the Museum.

The employee disagreed with such a ruling, arguing in the appeal that the District Court did not consider that, while uttering certain words, he acted as a councilor. The Court of Appeal – taking into account the facts – pointed out that in the termination of the employment contract, the defendant employer referred to events that occurred when the plaintiff was serving as a councilor. According to the Court, the termination with the plaintiff of the employment relationship violated the protection of the durability of the employment relationship of the councilor as provided for in the Act of March 8, 1990 on the commune self-government. The Regional Court disagreed with the defendant that the termination of the employment relationship took place after the plaintiff lost his mandate, i.e., in the period when he did not have the status of a particularly protected employee. Assuming that the protection of the employment relationship of a councilor ends with the loss of his mandate would make the protection "illusory," as guaranteed under Article 25 sec. 2 of the Act on commune self-government. The purpose of protection against termination of the employment relationship of a councilor is to guarantee the freedom and security of the councilor employee during the term of office. The protection in question enables the councilor to take actions (including formulating

statements) in the public interest. Thus, the Court of Second Instance reinstated the employee to work for the previously held position.

The employer filed the cassation appeal. The employer complained that the Court of Second Instance had misinterpreted Article 8 of the Polish Labor Code and Article 45 § 2 of the Polish Labor Code. Considering the facts of the case, the decision to reinstate the plaintiff to work is not pointless, and the employee has committed negative behavior towards the supervisor, the claim for reinstatement of the plaintiff should be dismissed due to the plaintiff's abuse of legal protection. The Supreme Court indicated that the jurisprudence emphasized various aspects of the employee's right to the so-called "allowed criticism" and referred to the judgment of the Supreme Court of November 16, 2006, II PK 76/06. The employee has the right to allowed public criticism of the supervisor (the right to whistleblowing, i.e. disclosure of irregularities in the functioning of the workplace consisting in various types of acts of dishonesty, unfairness involving the employer or its representatives), when this does not lead to a breach of the employee's duties, in particular duty to care for the interests of the workplace and maintain the secrecy of information, the disclosure of which could cause damage to the employer (duty of loyalty; not violating the interests of the employer – Article 100 § 2 (4) of the Polish Labor Code), as well as to observe the principles of social coexistence in the workplace (Article 100 § 2 (6) of the Polish Labor Code; an employee may not rashly, in a manner justified only by subjective reasons, formulate negative opinions against the employer or its representatives).

3. Comment

It should be considered correct to refer to the ruling of the Supreme Court of November 16, 2006, II PK 76/06, LEX/el 2008[2] in which the Court ruled that it did not constitute a severe breach of the employee's basic duties (Article 52 § 1 (1) of the Polish Labor Code) giving a press interview by an employee, in which such employee critically assessed the behavior of a member of the employer's body, if the employee maintained the appropriate form of expression, and his behavior cannot be attributed to a significant level of

[2] Polish Supreme Court, Judgment of 16 November 2006, Ref. No. II PK 76/06, https://sip.lex.pl/#/jurisprudence/520414333.

bad will and deliberate action threatening the interests of the employer or putting the employer at risk to harm. It seems essential for the subject matter of the discussed case to narrow down or even avoid the arguments of the Supreme Court made in the commented judicature on the essence of the institution of reporting irregularities in the aspect of violation of the employee's basic duties by the employee. In order to correctly place whistleblowing in the context of the breach of the principle of loyalty in the applicable labor law system, it is necessary to at least briefly define it.

In the Polish labor law system, as Antoni Dral points out, there is no definition of the concept of protection of the durability of an employment relationship.[3] For Czesław Jackowiak, protection of the durability of the employment relationship consists in preventing unjustified termination of an ongoing employment relationship and ensuring continuity of work if termination of the employment relationship proves necessary. Tadeusz Zieliński understands the protection of the durability of the employment relationship as limiting the admissibility of terminating the employment contract by the employer in some instances under the provisions of the Polish Labor Code or separate provisions.[4] Artur Rycak distinguished the components of universal protection of the durability of the employment relationship, such as: "guarantees," "legal instruments" or "elements" (legal structure).[5] The boundary of protection of the durability of the employment

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3 Antoni Dral, *Powszechna ochrona trwałości stosunku pracy. Tendencje zmian* (Warsaw: Wolters Kluwer, 2009), 250 et seq.

4 Ibid., 26 and the literature referred therein; e.g. Helena Szewczyk, "Ochrona trwałości zatrudnienia w gospodarce rynkowej (wybrane zagadnienia)," in *Studia z prawa pracy. Księga pamiątkowa ku czci Docenta Jerzego Logi*, ed. Zbigniew Góral (Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2007), 245; Maria Matey, "Prawo do pracy," in *Prawa człowieka. Model prawny*, ed. Roman Wieruszewski (Wrocław-Kraków-Warsaw: Ossolineum, 1991), 769; Andrzej Walas, "Prawna ochrona trwałości stosunku pracy," *Państwo i Prawo*, no. 5–6 (1961): 248; Walas, "Prawo wypowiedzenia umowy o pracę," *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Rozprawy i Studia* 42, (1961): 94; Monika Latos-Miłkowska, "Kształt powszechnej ochrony przed wypowiedzeniem we współczesnym prawie pracy," *Praca i Zabezpieczenie Społeczne*, no. 10 (2008): 11 et seq.; Ludwik Florek, "Ochrona przed wypowiedzeniem w prawie pracy Republiki Federalnej Niemiec," in *Prawo pracy państw obcych*, ed. Maria Matey, vol. II, (Wrocław: Ossolineum, 1985), 148 et seq.

5 Artur Rycak, *Powszechna ochrona trwałości stosunku pracy* (Warsaw: Wolters Kluwer Polska, 2013), 313.

relationship has its source in two basic duties of the employee indicated by the Supreme Court in the cited judgment, i.e. the obligation of loyalty and not infringing the employer's interests – Article 100 § 2 (4) of the Polish Labor Code and compliance with the principles of social coexistence at the workplace, Article 100 § 2 (6) of the Polish Labor Code: every employer, both in the public and private sector, requires loyalty from their employees. This loyalty is a vague concept and requires special attention in the aspect raised by the Supreme Court in the cited judgment.[6] Under the Polish labor law, loyalty is somewhat inconsistent with "reporting irregularities," and may justify the termination of an employment contract without notice. Loyalty in labor relations is a complex topic that still causes much controversy in the Polish labor law doctrine. The Supreme Court quite inconsistently defined the boundaries of the so-called unlawful criticism of work that may violate the principle of the employee's loyalty. Firstly, the Court incorrectly pointed out that employee duties are the employer's primacy, not the natural persons representing the employer. Later, however, the Court emphasized that the essential feature of allowed criticism is the employee's "good faith," i.e. the employee's subjective belief that such employee bases the criticism on truthful facts (with due diligence in checking them) and acts in the legitimate interest of the employer. In this case, one can only agree with the statement that the employer's rights are respected during the statement that evaluates his actions. In the context of whistleblowing, the Supreme Court incorrectly defined it, because the Supreme Court identified whistleblowing with the employee's possibility of criticizing the employer. In addition, we cannot miss the fact that we were dealing with a former employee who, within the meaning of Article 25 sec. 2 of the act on commune self-government, did not enjoy the mandate of a councilor,[7] and therefore the legal protection provided for public officials. The Court was faced with the problem of assessing whether and how an employee may publicly criticize the supervisor, without violating the employee's duty of loyalty to the employer and without violating the employer's interests.

6 Article 100 of the Act of 26 June 1974, the Polish Labor Code, Journal of Laws 1974 No. 24, item 141.

7 Act on the Commune Self-Government of 8 March 1990, Journal of Laws 1990 No. 16, item 95, as amended.

The main problem in the glossed judgment, which the Supreme Court omitted, was the re-conceptualization of the principle of loyalty in the context of the wrongly established whistleblowing. The Court should have determined whether the loyalty is binding in each case and who is the object of the loyalty: the employer or the organization's rules.

In the same vein as the Supreme Court, Norman Bowie[8] maintains that whistleblowing is a *prima facie* violation of the duty of loyalty to the employer, which may be disregarded for reasons of higher duties in the name of the public good. The second significant issue that escaped the Court's attention is the acceptance that any criticism requires good faith, and vindictive criticism will negatively affect the employee. In the jurisprudence of the Supreme Court, one can notice unsuccessful attempts to conceptualize the principle of loyalty and care for the interests of the workplace in the face of criticism of the employer. Providing for the employee's duty to care for the interests of the workplace, the Supreme Court indicates that in Article 100 § 2 (4) of the Polish Labor Code:

> a special principle of the employee's loyalty to the employer has been established, which primarily implies the duty of the employee (regardless of the position held) to refrain from actions aimed at causing harm to the employer, or even assessed as actions to the detriment of the employer. This obligation applies to every employee in the performance of rights and obligations arising both from and outside the employment relationship. The question of whether the employee behaved disloyally to the employer in a specific case depends on the facts of each case; therefore it is not possible to define an abstract solution understood as a decision on an important legal issue.[9]

The Supreme Court clearly stated that the employee's care for the interests of the workplace means the care of the workplace understood as an organizational unit being the workplace, constituting a common value good not only of the employer but also of the employees.[10]

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8 Norman Bowie, *Business Ethics: A Kantian Perspective* (New York: Prentice-Hall, 1982), 140 et seq.

9 Polish Supreme Court, Judgement of 26 January 2011, Ref. No. II PK 236/10, LEX No. 1413531.

10 Polish Supreme Court, Judgment of 9 February 2006, Ref. No. II PK 160/05.

4. Conclusions

In the analyzed ruling, the Supreme Court considers the alternating interpenetration of concepts and principles that do not indicate what kind of loyalty and to whom it would be justified. Loyalty is also taking care of the interests of the workplace and may result from gratitude for employment (especially in an economy with high unemployment) and from "positive" concern for the enterprise, if not from complete identification with it. Loyalty does not always have to be binding. When a company or organization requires an employee to conceal the misconduct from the public, the role that underlies this obligation disappears.[11] The inconsistency of the Supreme Court was also reproduced in the judgment of May 10, 2018.[12]

In the cited judgment, the Supreme Court was once again taken from the consequences of determining whether there is a duty of loyalty to the employer in conflict with the disclosure of irregularities by an employee. The essence of the problem comes down to determining the actual relationship between the employer and employee, which is different from the relationship between individuals in private relations. Suppose that the relationship of the roles of employer and employee is more than economic, where the economic relationship is defined as the balance of competitive interest between the employer and the employee. In that case, reporting irregularities may be viewed as a breach of this obligation.[13]. According to Ronald Duska and Norman Bowie, being loyal does not require unlimited or even blind loyalty, e.g., as indicated by an employee/auditor, he may be asked to lie in terms of product quality, price, or quantity control.[14] As part of the broadly understood economic freedom and balance in labor relations, it indicates a purely economic justification for reporting irregularities. Company or corporation (private sector): produces a good or service that is intended to be profitable. However, generating profit is a fundamental function of an enterprise as a business because if it is not profitable to produce a good or service, the company will cease to exist. The employees,

11 Bowie, *Business Ethics*, p. 140 et seq.

12 Polish Supreme Court, Judgment of 10 May 2018, Ref. No. II PK 74/17.

13 Norman Bowie and Ronald Duska, *Business Ethics*, 2nd ed. (New York: Prentice-Hall, 1992), 16.

14 Idem.

in turn, are obliged to perform work and also seek to make a profit. In this regard, the Supreme Court had a difficult task, as the employee did not act as a councilor with the powers of a public official. The considerations of the Supreme Court in this and other judgments lead to even greater chaos in terminology.

References

Bowie, Norman. *Business Ethics: A Kantian Perspective*. New York: Prentice-Hall, 1982.

Bowie, Norman, and Ronald Duska. *Business ethics*. 2nd ed. New York: Prentice-Hall, 1992.

Dral, Antoni. *Powszechna ochrona trwałości stosunku pracy. Tendencje zmian*. Warsaw: Wolters Kluwer Polska, 2009.

Florek, Ludwik. "Ochrona przed wypowiedzeniem w prawie pracy Republiki Federalnej Niemiec." In *Prawo pracy państw obcych*, edited by Maria Matey, vol. II (Wrocław: Ossolineum, 1985).

Latos-Miłkowska, Monika. "Kształt powszechnej ochrony przed wypowiedzeniem we współczesnym prawie pracy." *Praca i Zabezpieczenie Społeczne*, no. 10 (2008): 11 et seq.

Matey, Maria. "Prawo do pracy." In *Prawa człowieka. Model prawny*, edited by Roman Wieruszewski. Wrocław-Kraków-Warsaw: Ossolineum, 1991.

Rycak, Artur. *Powszechna ochrona trwałości stosunku pracy*. Warsaw: Wolters Kluwer Polska, 2013.

Szewczyk, Helena. "Ochrona trwałości zatrudnienia w gospodarce rynkowej (wybrane zagadnienia)." In *Studia z prawa pracy. Księga pamiątkowa ku czci Docenta Jerzego Logi*, edited by Zbigniew Góral. Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2007.

Walas, Antoni. "Prawna ochrona trwałości stosunku pracy." *Państwo i Prawo*, no. 5–6 (1961).

Walas, Antoni. "Prawo wypowiedzenia umowy o pracę." *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Rozprawy i Studia* 42, (1961).