



# Using Mediation in Poland to Resolve Civil Disputes: A Short Assessment of Mediation Usage From 2005-2008

BY SYLWESTER PIECKOWSKI

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**M**ediation is the newest alternative dispute resolution method to be institutionalized by state law in Poland. One of the first EU Member States to enact a mediation regime for civil and commercial matters,<sup>1</sup> the legislation was added to Poland's Civil Code in 2005 and entered into force on Dec. 10, 2005.

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*Sylwester Pieckowski is an arbitrator and mediator, and an advocate at Chadbourne & Parke LLP, in Warsaw. He is currently the president of the Polish Arbitration Association, deputy director of the Business Mediation Center in Warsaw, vice president of the Court of Arbitration at the Polish Confederation of Private Employers Lewiatan, and vice president of the Civic Council on ADR at the Ministry of Justice.*

Why regulate mediation on a national level? First, mediation laws preserve vital party rights (e.g., protecting confidentiality and tolling the statute of limitations), and make mediation settlements enforceable in the enacting nation's courts. Second, mediation laws give the process legitimacy vis a vis state courts and arbitral tribunals. They also recognize the fundamental freedom of the individual to make their own economic and personal decisions. Third, a mediation law makes a tools to promote mediation to entrepreneurs and consumers and teach them about the process.

This article summarizes the Poland's mediation statute and then looks at the statistics on the usage of mediation since the law was enacted. These statistics show that mediation needs a greater push from government, lawmakers, lawyers, mediation institutions and the media in order to become a real alternative to arbitration and litigation.

#### General Description of the Law

*Voluntary Process.* The mediation law made contractual and court-annexed mediation legitimate alternatives to civil court adjudication of disputes. The statute includes a financial incentive for plaintiffs to reach a settlement in court-connected arbitration—the return of three-quarters of the court fee already paid.

Mediation under the statute is a voluntary process. For contractual mediation to occur, there must be a pre-dispute agreement to mediate future disputes, or a post-dispute agreement to mediate the existing dispute. For court-referred mediation to take place, the parties must also agree because the statute allows a party to stop the process by objecting to mediation within seven days of the court's referral.

To protect the legitimate rights of the parties, the statute provides that embarking on mediation interrupts the running of statutes of limitations, and if mediation is unsuccessful, the statute of limitations runs anew from the time of the interruption.

The Polish mediation law prescribes a facilitative model of voluntary mediation in which a neutral mediator helps the parties conduct their negotiations. The facilitative approach makes

sense given Poland's lack of experience dealing with mediation in civil matters.

*Confidentiality.* The Polish mediation law contains a limited confidentiality provision. It requires the mediator not to disclose facts learned during the mediation proceeding. The only exception is if the mediator and the parties so agree.<sup>2</sup> The statute protects the mediator from having to testify as witness in civil proceedings.

The ADR community in Poland has proposed that the confidentiality provision be amended to require the parties, witnesses and other participating persons to keep mediation communications confidential.

*Procedures.* The provisions on mediation procedure call for the mediator to establish the date and place of the joint mediation session, unless the parties agree to forego it.

The law requires the mediator to draft a report specifying the place and time of the mediation, as well as the names and addresses of the parties, the mediator, and the result of the mediation. The report is to be signed by the mediator. If the parties enter into a settlement, it must be signed by the parties and included in or attached to the report. If a party refuses or does not sign the settlement, the reason should be stated in the report.

After a settlement is reached in court-referred mediation, the mediator is supposed to submit the report to the referring

court. A party to the mediation may request the court to approve, or approve and enforce, a settlement. The court may refuse to approve a mediation settlement in whole or in part if the settlement is contrary to the law or principles of social coexistence, or is incomprehensible or contradictory. The court may approve a settlement by issuing a decision after an *in camera* session. To enforce a settlement, upon a party request the court must stamp an enforcement seal on the settlement document. Once approved by the court, a mediation settlement has the same legal virtue as a settlement entered into before the court.

*Who May Serve as a Mediator.* Poland's mediation law allows "[a]ny person with full legal capac-

**Statistics on the usage of mediation show that the process needs a greater push from the government, lawyers, lawmakers, mediation institutions and the media in order to become a real alternative to arbitration and litigation.**

ity to make legal representations” to serve as a mediator.<sup>3</sup> The explanatory memorandum submitted by the government states that a “[m]ediator’s abilities do not rest in mediator knowledge but in his personality. Therefore, in order to make easier for the parties to undertake mediation, no specific requirements as to mediator’s education are foreseen.”

Although the mediation law does not contain any standards to assure the quality of mediators, the Civic Council for Alternative Methods of Conflict and Dispute Resolution<sup>4</sup> established by the Minister of Justice in 2005, adopted a code of ethics for mediators, standards of conduct for mediators and mediation proceedings;<sup>5</sup> and standards for training of mediators.<sup>6</sup>

The Code of Ethics of the Polish Mediators

dentiality of mediation proceedings, before, during the proceedings and after the proceedings.

- VIII. The mediator should avoid conflicts of interests with the parties and he should immediately remove doubts in this respect.
- IX. The mediator cannot accept or receive any benefits from the parties, except the mediator’s fee. He should not also derive benefits from referrals.
- X. The mediator should advertise his services in a manner which is not misleading as to his credentials, abilities, experience, scope of services and charged fees.
- XI. The mediator should inform the parties in a clear and unequivocal manner on his

***The Polish mediation law does not contain any standards to assure the quality of mediators, but the Civil Council for Alternative Methods of Conflict and Dispute Resolution adopted a code of ethics and standards of conduct for mediators, as well as standards for training mediators.***

was adopted by the Council on May 19, 2008 and it contains the following rules.

- I. The mediator should conduct mediation proceedings based on principles of parties’ independence and autonomy.
- II. The mediator should be guided by the good and interests of the parties.
- III. The mediator should assure that the parties freely participate in mediation.
- IV. The mediator should conduct mediation in such way to ensure that the parties understand the concept and objectives of mediation proceedings, the role of mediator and the conditions of eventual settlement.
- V. The mediator should not offer his assistance in a conflict resolution in case he does not have full conviction of his abilities that allow him to run the proceedings in a proper way.
- VI. The mediator should refrain from conducting mediation if he cannot assure his impartiality or cannot remove doubts as to his impartiality.
- VII. The mediator should safeguard confi-

compensation and other costs associated with the proceedings the parties take part in.

- XII. The mediator should improve and expand his professional skills in order to better serve the parties.

The standards of conduct for mediators and mediation proceedings include, for example, requiring the mediator to: to make sure that the parties’ attendance in mediation and their settlement is free and voluntary; to be neutral and impartial; to protect the confidentiality of mediation; to accurately inform the parties on the essence and conduct of mediation; to take care of his high professional skills; to collaborate with other specialist for the benefit of mediation proceedings; and to inform the parties about his services in a professional, honest and dignified way.<sup>7</sup>

The Civic Council also developed a training program for mediators.<sup>8</sup> The programs covers the main principles and components of a mediation proceeding; psychological mechanisms of appearance, growth and resolution of conflicts; training of practical skills and mediation tech-

niques; the legal and organizational aspects of mediation; special types of mediation. It also developed requirements for institutions involved in mediation training.

The Civic Council's work product seems to comply to some extent with the EU Directive for Member States to establish a code of ethics for mediators and to put in place quality assurance and supervision mechanisms to improve the quality of mediators. However, they may not go far enough. A good model to follow is the AAA-ABA Code of Ethics for Mediators in Commercial Disputes<sup>9</sup> and the mediation programs provided by U.S. courts.<sup>10</sup>

**Mediation Usage Statistics<sup>11</sup>**

Numbers of mediation organizations, centers and mediators. According to the Polish Mediation Law, the associations and public organizations may establish mediation centers and maintain lists (registers) of permanent mediators. This information is to be released to the president of the circuit court of appropriate jurisdiction.

As of June 2008, the official statistics reported by the circuit courts presented indicated that there are 331 associations dealing with mediation; 72 mediation centers; and 2,676 permanent mediators.<sup>12</sup>

**Court-Annexed Usage statistics**

The following statistics collected by the Ministry of Justice show the categories and number of disputes assigned by courts to mediation during 2006-2008.

<b>* 2006-2007 (24 months)</b>					
civil	commercial	labor	family	juvenile	ALL
2,464	469	100	69	966	4,068
<b>* 2008 (12 months)</b>					
civil	commercial	labor	family	juvenile	ALL
1,455	210	109	216	223	2,213
<b>* 2006-2008 (36 months)</b>					
civil	commercial	labor	family	juvenile	ALL
3,919	679	209	285	1,189	6,281

**Mediation centers need to establish ethical standards for mediators in private mediation and procedures for mediation proceedings, and help develop effective mediation techniques.**

The foregoing statistics, the reported activity of mediation centers and institutions that conduct private mediations, and research studies undertaken by the Ministry of Justice's Civic Council indicate that civil mediation has found a home in Poland but the official statistics confirm the sobering fact that the usage rate within the society at large is still quite small.<sup>13</sup> Nonetheless, Polish ADR experts and regulators are still cautiously optimistic that usage numbers will grow. But the low numbers of users suggest that initiatives are needed by Polish lawmakers, courts, legal professionals, mediation institutions, and the media to put mediation in Poland back on track.

On the policy side, mediation cannot significantly grow without clear and steady support by the state and its governing bodies. Lawmakers urgently need to enact legislation to address the financing of civil mediation. At the same time, Polish judges

must develop an in-depth understanding and appreciation of mediation. If judges do not support the process, the endeavor to increase the volume and quality of mediation may not succeed. Courts also need to develop procedures for court-annexed mediation, ethical standards for mediators and a roster of trained mediators.

In addition, mediation centers need to focus on training mediators and developing a program to certify them. These centers also need to establish ethical standards for mediators in private mediation, procedures for mediation proceedings and help develop effective mediation techniques.<sup>14</sup>

In addition lawmakers, mediation centers, judges and the media must convey a positive message about mediation to business leaders, entrepreneurs, and individual consumers. That message is that mediation is the best way to resolve their disputes as well as the fastest and most inexpensive way, and they should try mediation first before resorting to arbitration or litigation.

The media must accept mediation as a TOP ISSUE for societal development and better legal discourse. This is absolutely mandatory for ultimate success of mediation in Poland. ■

## ENDNOTES

<sup>1</sup> Law of 28 July 2005, amending the Civil Procedure Code. *Journal of Laws*, 2005, No. 172, item 1438.

<sup>2</sup> This differs from the requirements in Article 7 of the EU Directive on Mediation, adopted on May 21, 2008 by the European Parliament and the Council (made effective June 13, 2008) (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0052:EN:NOT>). The Directive contains an exception from nondisclosure when necessary to implement or enforce a mediation settlement (including when necessary to interpret a settlement and its validity) or when there are overriding considerations of public policy (for example, the safety of children, or jeopardy to a person). Poland's Mediation Law is much broader in scope than the EU Directive on Mediation, because the latter applies only to cross-border disputes, while the former covers domestic and cross border mediation.

<sup>3</sup> Article 183 (2) § 1.

<sup>4</sup> Decree No. 24/09/PR of April 3, 2009 on appointment of the Civic Council for Alternative Methods of Conflict and Dispute Resolution at the Minister of Justice (2nd term); See [www.ms.gov.pl](http://www.ms.gov.pl).

<sup>5</sup> These standards for mediators and mediation proceedings were adopted by the Civic Council on June 26, 2006.

<sup>6</sup> These standards were adopted by the Council on Oct. 29, 2007, and they include the following standards, by their headings:

- Standard I: Main principles and components of mediation proceeding;
- Standard II: Psychological mechanisms of appearance, growth and resolution of conflicts;
- Standard III: Training of practical capabilities within mediation;
- Standard IV: Knowledge of legal and organizational aspects of mediation procedures;
- Standard V: Requirements addressed to persons and institutions involved in mediation training;
- Standard VI: Special types of mediation trainings.

<sup>7</sup> The Council proposed a four-hour model mediation training program for judges in civil, family, commercial and criminal matters. Judges, their deputies, assistants and trainees would undergo the training program. The facilitator would have a minimum

of three year's experience as a mediator. The training would include watching a video of a mediation, a live presentation, discussion, and work in subgroups. The materials would include case studies, sample settlements, videos of mediation, and mediation literature.

The Civic Council also developed proposals to facilitate and improve mediation by the civil courts within the existing provisions of law. These proposals were adopted in January 2008 and they embrace the following main suggestions: 1. As a rule, the court should refer the parties to mediation at the hearing with the parties present; 2. Prior to referring the parties to mediation the court should carefully examine if a specific dispute qualifies for mediation (is fit for mediation); 3. The court decision referring the parties to mediation should be specific enough to contain the following data: (i) full data of the parties and their lawyers, (ii) basic information on mediation, its features, objectives and cost, (iii) statement on whether the parties have agreed to mediate, (iv) reasons why the court has referred the parties to mediation; 4. While referring the parties to mediation without the parties present (in camera) the court should include in its decision an express information for the parties of their right to raise objection to mediation within 7 days; 5. The court should consider each time if the summons and answer to summons should be released to mediator, with parties' approval; 6. The court while referring the parties to mediation should release to them the summons and answer to summons respectively; 7. The court should inform the mediator on his appointment only after having passed 7 days during which the parties can disapprove (terminate) mediation; 8. The court while appointing a mediator should take into account the mediators' special profile and skills;...10. The court should consider the possibility of appointing two mediators in the most difficult and complex disputes; 11. Courts should publicly announce their applicable mediation rules and programs, and display permanent mediators' names in their premises and information leaflets.

The Civic Council also developed a model mediation training programs for judges and a form of pledge to mediation for business organizations and law firms.

<sup>8</sup> The training program was adopt-

ed by the Council on Oct. 29, 2007.

<sup>9</sup> Available online at [aaa.adr.org](http://aaa.adr.org).

<sup>10</sup> See for example, 19th Judicial Circuit Court-Civil Case Mediation Program, [http://www.19thcircuitcourt.state.il.us/bkshelf/arbit/civil\\_mediation0103.htm](http://www.19thcircuitcourt.state.il.us/bkshelf/arbit/civil_mediation0103.htm).

<sup>11</sup> All statistical data are from the Justice Institute of the Ministry of Justice. See J. Brol, *Barriers in alternative dispute resolution in civil matters*, Warszawa 2009.

<sup>12</sup> The largest numbers of permanent mediators (above 100) have been registered in the following circuit courts: Krakow (116), Lodz (123), Opole (177), Siedlce (102), Szczecin (252), Swidnica (104), Wroclaw (192), and Zamosc (117).

<sup>13</sup> In February 2009, during a joint conference between the Ministry of Economy and the Polish Arbitration Association it was concluded that ADR is underdeveloped in Poland and that specific promotion and marketing programs will be adopted and addressed by the government and the arbitration/mediation community directly to the public, and, specifically, entrepreneurs.

<sup>14</sup> At present, Poland's mediation centers and institutions include:

Centers attached to the courts of arbitration (e.g., the Court of Arbitration and the Polish Chamber of Commerce, the Court of Arbitration at the Polish Confederation of Private Employers Lewiatan);

Centers attached to professional associations (e.g., the Business Mediation Centre at the Polish Arbitration Association, the Polish Bar Association, the National Council of Legal Counsels);

Centers attached to law schools at Polish universities, like the Mediation Centre at Warsaw University;

In addition, there are a number of independent mediation institutions, including the Polish Mediation Center in Warsaw, Foundation "Partners—Polska," the Polish Mediation Association (Zielona Góra), the Mediation Center of the Lower Silesia, the Family Mediators Association, the Negotiation and Conflict Resolution Center at Warsaw University, the Institute of Applied Social Sciences, the All-Poland Professional Mediators Association, and the Conflict Clinic in Warsaw.