Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 08/11/2026 03:07:47

Articles

Studia Iuridica Lublinensia vol. XXVII, 3, 2018
DOI: 10.17951/sil.2018.27.3.129-142

Anna Kalisz
Supreme Administrative Court
ORCiD: 0000-0001-9855-0067
a_kalisz@yahoo.pl

Mediator as a Profession Incorporated into the System of Common Courts – Civil Mediation Practice in the Light of Recent Changes

Mediator jako zawód włączony w ustrój sądów powszechnych – praktyka zmian dotyczących mediacji cywilnej

SUMMARY

The article is an attempt to examine the results of the amendments, which have been introduced to civil procedure and to mediation law since the 1st January 2016. Mediation corresponds with the nature of private law and in many other Western countries it has become a significant part of justice in civil, commercial and family matters. The examined updating was meant to: raise the social knowledge and recognition of mediation; increase the number of mediations conducted; motivate lawyers to apply it as a solution for legal disputes; raise the standards of professional court mediators and – last but not least – shorten the length of the civil proceedings. Most of the changes have been inspired by the EU directives on commercial disputes.

Keywords: civil mediation; mediator; amendments

MEDIATION AS A MECHANISM HARMONIZED WITH PRIVATE LAW

It has been widely known for years that mediation in Poland develops without spectacular successes, however statistical figures show a slow but evident upward trend[1].

[1] Data according to the Polish Ministry of Justice. See details: Informacje o mediacji dla stron postępowań sądowych, https://ms.gov.pl/pl/dzialalnosc/mediacje/publikacje-akty-prawne-statystyki [access: 20.05.2018]. Data as far as from the end of 2015 were taken into account.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 08/11/2026 03:07:47

According to data collected before the legislation intended to support the methods of non-judicial dispute resolution was enacted and became effective[2], "the number of settlements concluded as a result of mediation proceedings does not exceed even 1% of civil cases heard before the Polish courts"[3].

For at least two reasons, this was both a point of regret and a concern for the legislator. Firstly, mediation goes in line with the very nature of private law, namely with the civil-law method of regulation, which assumes equality and balance of the parties and the autonomy of their will to shape their mutual legal relationships, as well as with the Ulpian's[4] principle of *volenti non fit iniuria* dating back to the Roman times. Therefore, alternative dispute resolution (ADR), including mediation, seems to be natural in this context, especially as the legislator sees the need to establish a "sufficiently developed system of non-judicial conflict resolution methods that may offer a faster and cheaper alternative to settling cases in court"[5]. Secondly, mediation (and ADR in general) corresponds with judiciary system as understood in circumstances of the 21st-century life. The ever-accelerating pace of social life and globalization resulted in far-reaching 'juridisation' (i.e. growing legal regulation of social relations, which previously were governed by other norms than law), and thus a potential and actual increase in the number of legal disputes and the need to supplement the traditional system by resolution methods that are alternative to purely judicial ones.

In view of the above, judiciary system can be defined more narrowly (as an "imperative, final settlement of disputes over facts of legal significance and the law concerning these facts, done in accordance with procedural provisions"[6]) or more broadly[7] – by extending the subjective scope of the definition to non-judicial public bodies or entities. This second approach comprises various forms of ADR as an activity that involves managing legal disputes, which is not the exclusive domain of courts[8]. In practice, ADR replaces (pre-trial dispute resolution) or complements

[2] The Act of 10 September 2015 on the amendment of some acts in connection with the support of amicable dispute resolution methods (Journal of Laws, 2015, Item 1595).

[3] Rządowy projekt ustawy o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw w związku ze wspieraniem polubownych metod rozwiązywania sporów, Druk nr 3432, www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=3432 [access: 18.09.2018].

[4] Ulpianus (Gnaeus Domitius Annius Ulpianus, died 223 AD) – one of the most prominent Roman jurists, who used the most apt quotations from Roman lawyers of the classical period and commented on them. Cf. J. Kamiński, *Ulpianus*, [in:] *Prawo rzymskie. Słownik encyklopedyczny*, red. W. Wołodkiewicz, Warszawa 1986.

[5] Rządowy projekt ustawy o zmianie ustawy…

[6] See e.g. L. Garlicki, *Polskie prawo konstytucyjne*, Warszawa 1999, p. 304.

[7] *Leksykon współczesnej teorii i filozofii prawa*, red. J. Zajadło, Warszawa 2007, p. 359.

[8] A. Kalisz, A. Zienkiewicz, *Mediacja sądowa i pozasądowa. Zarys wykładu*, Warszawa 2014, pp. 38–39.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 08/11/2026 03:07:47

(proceedings as part of judicial procedures) judiciary system in the narrow sense, thus broadening the meaning of this notion[9].

Although ADR may replace a court trial procedure, it is not intended to replace the system of common courts, but merely to supplement it, thus broadening the notion of justice in terms of subject and function (Multi-Door Courthouse Project[10]). The use of alternative forms comprising an element of dialogue, to a certain extent stirs the whole society and particular individuals to action, and also corresponds with the subsidiarity principle which forms a foundation of democratic governance and European integration.

Therefore, both the Council of Europe through its recommendations[11] and the European Union through its *soft law* and binding secondary law[12] support the devel-

[9] This is in line with the idea of Multi-Door Courthouse Project, which combines diverse forms of amicable resolution of disputes with the traditional judicial procedure into a single coherent system. Cf. A. Zienkiewicz, *Studium mediacji. Od teorii ku praktyce*, Warszawa 2007, pp. 225–226. For the very idea of Multi-Door Courthouse Project see F. Sander, *Varieties of Dispute Processing, Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 1976, *passim*. From more recent references: J. Folberg, D. Golann, L. Kloppenberg, T. Stipanowich, *Resolving Disputes. Theory, Practice, and Law*, New York 2005, pp. 607–617; A. Korybski, *Alternatywne rozwiązywaniesporów w USA. Studium teoretycznoprawne*, Lublin 1993, pp. 135–148.

[10] More on the subject, see A. Zienkiewicz, *op. cit.*, pp. 221–226 and the literature cited therein.

[11] The promotion of ADR methods by the Council of Europe began with normative regulations of a *lex generalis* nature. Chronologically, the first one was Recommendation No. R(81)7 on measures facilitating access to justice, adopted by the Committee of Ministers of the Council of Europe. It invoked the aforementioned right to a fair trial (Article 6 of the European Convention) and referred to Resolution No. R(78)8 on legal aid and advice, and its subject matter covered disputes in civil law, administrative law, labour law and social welfare-related and financial matters. Another Recommendation No. R(86)12 concerning measures to prevent and reduce the excessive workload in the courts recommended that the availability and effectiveness of arbitration be increased and 'conciliation-mediation' procedures be introduced, and it also established, in terms of ethics of law professionals, the obligation to seek an amicable or conciliatory settlement. An additional legal instrument, also of a *soft law* nature, was Resolution No. 1(2000) on delivering justice in the 21st century. It concerned general issues related to avoiding latency in the decision-making process, modernization of the judiciary in the 21st century and increasing the efficiency and reliability of operation of the justice system. The next step was the recommendations of a *lex specialis* nature, which listed differences in the use of alternative methods in particular branches of law. These include: Recommendation No. R(87)18 concerning the simplification of criminal justice, Recommendation No. R(99)19 concerning mediation in penal matters, Recommendation No. R(98)1 on family mediation, Recommendation No. R(01)9 on alternatives to litigation between administrative authorities and private parties, as well as Recommendation No. R(2002)10 on mediation in civil matters. More on the content of the aforementioned recommendations, see A. Kalisz, A. Zienkiewicz, *op. cit.*, pp. 110–114.

[12] As soon as in the first document (not being a source of law) on this topic, Green Paper on alternative dispute resolution in civil and commercial law from 2002, the European Commission, stressing that access to justice is one of the key objectives of EU policy and the right enshrined in the Charter of Fundamental Rights of the European Union, underlined the importance of developing forms of ADR as a means of facilitating its implementation. At present, binding acts of EU secondary law are also directly applicable to mediation: Directive 2008/52/EC and two interrelated and mutually

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 08/11/2026 03:07:47

opment of mediation. The Polish lawmakers' concern about this, perhaps somewhat forced by international (European) recommendations or directives, is expressed primarily[13] in the amendment of certain acts due to support for non-judicial dispute resolution methods[14]. It was aimed at streamlining civil mediation in the broad sense (i.e. including narrow-sense civil-law mediation, as well as family-related, business mediation and mediation in labour law matters).

AMENDMENTS REGARDING MEDIATION AS INCIDENTAL PROCEEDINGS WITHIN CIVIL PROCEDURE

The amendments intended to promote and enhance civil proceedings and incorporate mediators into the justice system became effective on 1 January 2016. The assumption aimed at the development of mediation was to "establish a system of procedural and organizational improvements and economic incentives to make the parties attempt to resolve their dispute amicably before bringing the case in court or during judicial proceedings, and to ensure the appropriate quality of mediation services".

---

complementary normative acts, namely Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (so-called Directive on consumer ADR), and Regulation (EU) No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR). More on the topic in: R. Morek, *Dyrektywa Parlamentu Europejskiego i Rady 2008/52/EC z dnia 21 maja 2008 r. o niektórych aspektach mediacji w sprawach cywilnych i handlowych: nowy etap rozwoju mediacji w Europie*, „ADR. Arbitraż i Mediacja" 2008, nr 3, *passim*; M. Hutniewicz, *Mediacja w sprawach cywilnych i handlowych. Dyrektywa Parlamentu Europejskiego i Rady 2008/52/WE*, „Radca Prawny" 2009, nr 2, pp. 84–87; A. Kalisz, A. Zienkiewicz, *op. cit.*, pp. 115–120.

[13] It is worth mentioning the amendments which became effective on 1 June 2017 and introduced mediation into the Code of Administrative Proceedings and which shaped the mediation proceedings as part of the judicial administrative proceedings based on the model applied in the Code of Civil Procedure – see: the Act of 7 April 2017 amending the act – Code of Administrative Procedure and some other acts (Journal of Laws, 2017, Item 935).

[14] The work on the above-mentioned bill was carried out as part of the implementation of Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (O.J. EU L 165 of 18 June 2013, p. 63) – see Rządowy projekt ustawy o zmianie ustawy… As an EU member state, Poland is obliged to guarantee the availability of mediation services and to systematically carry out activities to promote mediation. This obligation follows from Directive 2008/52/EC. These tasks were reiterated by the European Parliament in its Resolution of 13 September 2011 on the implementation of the directive on mediation in the Member States, its impact on mediation and its take-up by the courts (2011/2026 INI).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 08/11/2026 03:07:47

Article 10 of the Code of Civil Procedure itself, containing the basic general rule to seek to settle the dispute amicably, was modified by adding the following provision: "specifically by encouraging the parties to mediate", which highlights the preference of the legislature for this form of ADR. This change is to make more specific the obligation imposed on the court to seek an amicable settlement of the dispute, in particular, to encourage the parties to mediate.

As mediation practice shows, the chances of reaching an agreement in a dispute are the greater, the sooner the dispute is brought to mediation. Therefore, the legislature provided for mechanisms aimed at raising the mediation awareness of the parties to the legal relationship (and dispute) even before the legal action is brought before court and in the preliminary phase of the proceedings.

In the first case, this is done by introducing the obligation to specify in the statement of claims whether the parties have attempted mediation or other non-judicial methods to resolve the dispute or not, or to clarify the circumstances that prevented such attempts[15]. An additional formal condition for a statement of claim by adding Point 3 in Article 187 § 1 of the Civil Procedure Code was introduced in order to clearly indicate that any case brought in the court should be preceded by an attempt to resolve the conflict in an amicable way. The information contained in the statement of claim will help the judge make a preliminary assessment of whether the case may be referred to mediation during judicial proceedings.

In the second event, i.e. at the stage of the court trial, the court is supposed to persuade the parties to mediate regardless of the status of the proceedings, and also instruct them about the option of amicable settlement of the case. This is also underlined by the judge's duty to analyse the case in terms of its mediation potential before starting examination of merits of the case and consideration of the advisability of referring the case to mediation. In order to inform about the option of recourse to mediation, the amendment provides for an option of arranging a closed pre-trial hearing before the date of the first trial hearing in order to hear the parties and assess whether the matter is suitable for mediation, before deciding if the parties should be referred to mediation. In addition, the judge will be allowed to personally encourage the parties to mediate and to provide direct information about the benefits of mediation, in accordance with the obligation under Articles 10 and 210 § 2^2 of the Code of Civil Procedure. According to the grounds for the proposed bill, "courts can and should play an important role in promoting the culture of amicable settlement of disputes, thus it is extremely important to strengthen the obligation of the courts in this respect".

[15] This obligation is imposed on a plaintiff who brings an action and, under Article 511 § 1 of the Code of Civil Procedure, applicants in non-litigious proceedings in cases where it is admissible to reach settlement agreements.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 08/11/2026 03:07:47

A particular *novum* is the possibility of inviting the parties to attend an information session on the use of mediation prior to the appointment of the trial hearing[16]. The meeting may be presided over by a judge, court referendary, court mediator, judicial clerk or court clerk. The manner of holding information sessions may vary and depend on individual organizational conditions in particular courts. Where a party unreasonably fails to attend the information session, the court has the discretion of charging the party for the costs of attendance of the opposing party in the judgment which closes the proceedings in the case – regardless of the outcome of the case.

According to the current legislation, the court may refer the parties to mediation at any stage of the proceedings, also more than once, contrary to what used to be before.

To increase the popularity of mediation, the legislature applied the motivational function of law and established economic incentives on three levels.

First of all, apart from unreasonable failure to attend the information session, also "unreasonable refusal to undergo mediation" may result in the obligation of reimbursement of costs by the party concerned (Article 103 § 2 of the Code of Civil Procedure). This regulation corresponds with the provision of Article 103 of the Code of Civil Procedure, which governs the culpability principle when the court decides on costs in the ruling concluding the case. To apply this principle, it is necessary to find an aggravated wilful misconduct – carelessness or manifest misconduct of the party. This provision is an exception to the principle of responsibility for the result of the trial, so the principle of culpability is subject to strict interpretation and can only be applied in exceptional circumstances.

> The court deciding the case will have the option to apply the proposed rule only if it considers that the party's refusal to recourse to mediation was irresponsible and assesses the conduct of the party as careless or manifestly wrong. […] It should be stressed that the proposed change in no event result in the obligation to mediate or to reach a settlement. A party has the right to refuse mediation without giving reasons (in accordance with Article 183^8 § 3 of the Civil Procedure Code), withdraw from mediation at any stage, and refuse to conclude a settlement. The party will then be able to avoid being charged for additional costs of the proceedings. The financial consequences will be possible only in a situation described under Article 103 § 1 of the Civil Procedure Code, where manifestly unreasonable refusal will at the same time be considered a careless or manifestly wrong conduct, i.e. contrary to good morals, or disloyal towards the other party or the court[17].

Secondly, when determining the number of costs incurred by a party represented by a professional attorney, the court considers the activities taken by the attorney to amicably resolve the dispute before bringing the action before the court. "The

[16] The institution of information session has been provided for in Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (Article 5 Item 1).

[17] Rządowy projekt ustawy o zmianie ustawy…

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 08/11/2026 03:07:47

change is intended to prompt attorneys in law and legal advisers to propose mediation and other non-judicial methods as a way to resolve the dispute also before instituting the trial proceedings"[18].

Thirdly, the option of exemption from court costs for the parties who decide to enter into a settlement agreement was extended. When a settlement is reached at the initial stage of the proceedings, the new regulation provides for a return of the entire court fee. A situation when a settlement (both a court settlement and off--court settlement) is reached before the court proceeds to the consideration of the merits of the case is deemed privileged. The reimbursement of the entire fee on the suit would depend on the specific moment the settlement was reached. If the settlement is made before a mediator at a later stage of the proceedings, the court shall return, as it has been before, three-quarters of the fee paid on the submission commencing the dispute. Conclusion of a settlement also results in that the matter of costs of proceedings is resolved on a without cost basis.

Furthermore, requests for approval of the settlement concluded before a mediator as a result of out-of-court mediation (on the basis of a mediation agreement) have been exempt from the court fee.

THE ROLE OF MEDIATOR AND MEDIATOR'S POSITION WITHIN THE JUDICIARY

An important change is the attempt to raise both issues – the prestige of mediator profession and the standards required from court mediators, and the introduction of a mechanism to verify their professional skills and qualifications. Thus, the amendment sets out the new rules for developing lists of court mediators. A court mediator may be an individual who meets the basic conditions described in Article 183^2 §§ 1 and 2 of the Civil Procedure Code (i.e. who is not an active judge and who enjoys full legal capacity and full public rights), and also who has knowledge and skills in mediation, is over 26 years of age, has a good command of Polish, was not convicted for a wilful offence and there is no case under way against him or her for such an offence and who has been enrolled in the list of court mediators. The enrolment in the list of court mediators (and deletion from such list) must be made by the president of the regional court in the form of administrative decision[19].

[18] *Ibidem*.

[19] The amendment does not constrict the rights of non-governmental organizations and universities in the sphere of maintaining lists and founding mediation centres. They can still keep lists of mediators and provide information on mediator lists and mediation centres to the president of the relevant regional court. Nevertheless, for a prospective mediator, this means that he or she needs to make a 'double' registration: first, with the organizational list (having met the conditions under

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 08/11/2026 03:07:47

The manner of developing a list of court mediators, the procedure of enrolling in and deleting mediators from it, confirming that the conditions of entry into the list are met and updating the data, as well as the model application form of an entry into the list and the type of documents attached to the application, are determined by the Minister of Justice by way of secondary legislation[20] (according to the statutory delegation contained in Article 157e of the Law on Common Courts Organisation[21]).

Changes in the way of becoming a mediator, especially in comparison with the previous arbitrariness allowing significant discrepancies in the training and qualifications of mediators, should be regarded as an important step towards professionalization of such occupation. So far, the fact that mediator qualifications were not well defined and their verification was not possible has not provided a sufficient guarantee of high quality mediation services. "The statutory determination of requirements for court mediators strives to increase in professionalism of mediators, aimed at improving the quality of mediation services"[22]. Besides, this serves to unify the mediator profession and for the convergence of both the requirements as to the qualifications and the procedure of enrolling in mediator lists[23] for mediation in other branches of law (in criminal cases and matters involving juveniles).

Last but not least, Article 5 of the amending act incorporated mediators in the system of common courts, which confirms the status of mediation as a mechanism complementing the judiciary. Efficient communication "between judges and mediators and court mediators, as well as cooperation in organizing information sessions" is to be provided by a mediation coordinator working at the area of jurisdiction of a given regional court. This function is to be performed by a judge. The coordinator should perform his or her activities in all types of cases in which court-referred mediation is possible, hence not only in civil law cases but also in criminal and juvenile cases.

As regards the course and effects of mediation, virtually no major changes were introduced. The mediator's role was, in a sense, highlighted by adding Article 183^{3a} of the Civil Procedure Code, according to which "the mediator shall conduct mediation by employing various methods aimed at amicable settlement of the dispute, including by supporting the parties in the formulation of settlement proposals, or at the mutual request of the parties, he or she may propose ways of resolving

internal standards of the organization, such as training or paying a membership fee), and then with the court list (having met the conditions resulting from the generally applicable law).

[20] The Regulation of the Minister of Justice of 20 January 2016 on keeping lists of court mediators (Journal of Laws, 2016, Item 122).

[21] The Act of 27 July 2001 – Law on Common Courts Organisation (Journal of Laws, 2001, No. 98, Item 1070).

[22] Rządowy projekt ustawy o zmianie ustawy…

[23] The Regulation of the Minister of Justice of 20 January 2016 on keeping lists of court mediators (Journal of Laws, 2016, Item 122).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 08/11/2026 03:07:47

the dispute that are not binding for the parties" – however, this is not any novelty from the point of view of the mediation methodology. The course of mediation has always been and remained unregulated by the provisions of generally applicable law. This purposeful legal gap means that the mediation process is deformalized (which is one of the rules governing mediation), and the mediator – as the 'host' thereof – decides what strategy to adopt.

The course of effective mediation[24] can be briefly defined in the following stages: decision/initiation; preparation (pre-mediation); opening of the mediation session; presentation of positions; defining problems; exchange of solution proposals and verification of them; working out a joint solution; writing an arrangement (settlement, agreement); closing the mediation session[25].

This course of the process is of universal nature. As part of it, the mediator himself/herself plays the role of a 'communication expert' by performing various functions to moderate and optimize it. First of all, it gives the parties the opportunity to be heard. Secondly, he or she helps, by means of questions, present one's position and provide information that is relevant to any agreement. Then the mediator makes a preliminary identification of roots of the dispute, the interests of the parties and barriers to the conclusion of an agreement. Thirdly, the mediator proposes to the parties different communication techniques, explaining how these techniques can help in reaching an agreement. Fourthly, the mediator helps determine the type of issues worth negotiating (the diagnosis of the conflict and the delineation of the mediation area). Fifthly, the mediator shall ensure equal position of both parties and a supportive atmosphere for effective and peaceful communication. The mediator shall moderate communication to ensure intelligibility, truthfulness, and symmetry.

[24] Some split the process of mediation into three basic phases, wherein the first phase "involves building friendly relations, reducing hostility and promoting mediation as a remedy for the given case. The second phase focuses on the use of non-directive tactics to facilitate the resolution of the problem and to encourage the parties to seek their own way to resolve the conflict. Where the desired effect is not achieved, the third phase takes place, in which the mediator would apply directive techniques combined with pressure, by proposing specific solutions and encouraging consent". See E. Kowalczyk, *Mediacja i arbitraż jako przykład interwencji trzeciej strony w negocjacjach gospodarczych*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1999, nr 2, p. 188 and the phase diagram and American literature on the subject referred therein.

[25] A similar arrangement of the mediation process is defined by Ch. Moore (*The Mediation Process. Practical Strategies for Resolving Conflict*, San Francisco 2004, *passim*), by dividing it into twelve stages: 1) establishing relationship with the disputing parties, 2) selecting a strategy to guide mediation, 3) collecting and analysing background information, 4) designing a detailed plan for mediation, 5) building trust and cooperation, 6) beginning the mediation session, 7) defining issues and setting an agenda, 8) uncovering hidden interests of the disputing parties, 9) generating options for settlement, 10) assessing options for settlement, 11) final bargaining, 12) achieving formal settlement. See also K. Bargiel-Matusiewicz, *Negocjacje i mediacje*, Warszawa 2007, pp. 82–84.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 08/11/2026 03:07:47

An important element is the scope of the mediator's activity, which is also called the mediation strategy. The mediator can use three basic strategies[26]. These include: procedural, substantive and transformative strategies. They are of a model nature and in practice they are often mutually combined within one mediation. Procedural (facilitative) mediation assumes the least possible intervention in the dispute. Not only does the mediator refrain from presenting a personal point of view on the matter of the conflict (neither instructs the parties nor provides advice to them), but also does not express, even by using targeted questions based on the experience, any opinion on the options of resolving the dispute; he or she does not forecast how the contentious issues would be resolved by the court. The mediator only focuses on moderating communication between the parties and assisting them in the formulation of positions, expectations and proposals for solutions, as well as on drawing up the agreement in a lawful manner. This option provides the parties with maximum freedom, giving them also the discretion to assess the actual and legal consequences of their choices. On the other hand, in substantive (evaluative) mediation, the mediator has significant powers to intervene in the dispute. The mediator gives opinions on weaknesses and strengths of the mediation[27], and he or she even advises (most often by targeted questions). Therefore, the mediator participates in the substantive drafting of the agreement, at the same time being able to propose his or her own solution to the dispute, taking into account the interests of both parties. The mediator's role, however, is to 'balance the arguments' in the context of predicting the possible decision of the court, not to decide on which party is right. The agreement is usually achieved primarily by the mediator making the parties aware of their actual real and legal position, assessed in terms of possible court proceedings. However, it is always based on an autonomous decision of the parties. In transformative mediation, the mediator focuses on allowing the parties to define contentious problems and to help them better understand the perspective and arguments of the opposite party. Therefore, in addition to interests, this strategy focuses on the relationship of the parties. This means at least a partial change of the point of view and the way one's interests are understood. On the one hand, such a vision of mediation is the most risky in terms of neutrality and lack of mediator's engagement, while on the other hand it still does not violate the idea of mediation, but even fully implements it, provided that the changes in perception of the situation result from the reflections by the parties, not the pressure from the mediator[28].

[26] More on various mediation strategies (orientations), see A. Zienkiewicz, *op. cit.*, pp. 170–194.

[27] It is worth noting that opinions and suggestions concern the entire mediation situation, not individual participants.

[28] The issue of transformation through conversation is covered even more broadly by the concept of, as it is known, motivational dialogue. See S. Rollnick, W.R. Miller, *Dialog motywacyjny*, Kraków 2014, *passim*.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 08/11/2026 03:07:47

The amendment allows each of the above-mentioned strategies, including evaluative or transformative, within the open formula of mediation, but only upon a mutual request of the parties and with the approval of the mediator, and also only when the parties fail to work out themselves the terms of the settlement. As emphasized in the grounds for the bill, "there are different methods of conflict resolution, which should be tailored to the specificity of a particular case and the type of the case, taking into account various needs of the parties in civil, family-related and commercial mediation"[29]. The stress on the mediator's active role in supporting the parties in the formulation of settlement proposals is intended to increase "the effectiveness of mediation procedures and the number of settlements concluded in such procedures, especially in disputes where the parties appear without a professional attorney"[30].

Financial incentives were also offered to mediators, in order to encourage people to choose this occupation. Firstly, the rates were increased according to a new regulation of the Minister of Justice regarding this matter[31], which became effective on 1 July 2016. Secondly, under the currently applicable legislation, the court became responsible for the remuneration of the mediator, namely it pays him/her the invoiced remuneration and then decides on the costs of the parties in the final ruling. The payment of the mediator's remuneration during the proceedings must be made provisionally from the funds of the State Treasury (in the same way as the expert witness' remuneration). The amendment also allows a party to be exempt from mediation costs in whole or in part (in which case the costs are borne by the State Treasury), because it deems the costs of mediation carried out as a result of court referral to court costs, more specifically: expenses.

As regards the legal effects of mediation, no changes were introduced in this respect and a settlement agreement, once approved and having the clause of cost settlement appended, ends the trial, becomes the enforcement title and exerts direct effects as to all its provisions, and therefore its legal effect is tantamount to that of a court ruling.

CONCLUSIONS

The current Polish civil procedure contains 'more mediation' than it had before the amendment. The institution of mediation is to be promoted and developed mostly through enhancement of the information obligations of attorneys (by introducing the obligation to inform in the statement of claim about attempts of out-of-court

[29] Rządowy projekt ustawy o zmianie ustawy…

[30] *Ibidem*.

[31] The Regulation of the Minister of Justice of 20 June 2016 on the amount of remuneration and mediator's reimbursable expenses in civil proceedings (Journal of Laws, 2016, Item 921).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 08/11/2026 03:07:47

resolution of the dispute before the action was brought before the court) and the court; incorporation of mediators in the system of common courts and raising their remuneration while introducing additional qualification requirements; the establishment of a system of economic incentives regarding court costs (and improvements in the field of tax payments related, among other things, to settlement agreements not described here).

The expected effects of the amendment include a decrease in the number of cases brought in the courts, thus reduction in the duration of court proceedings and reduction of trial costs, both for citizens and the state.

However, it is difficult to predict whether the years to come will bring the intended effect. So far, statistics for 2016[32] show an increase in the number of mediations initiated by a court decision, and this indicator increased from 0.5–0.7% in previous years to 0.9%. At the same time, the mediation effectiveness indicator decreased (from approx. 24–29% in previous years to approx. 22%). Although the number of settlement agreements increased in absolute numbers, the rate of settlement agreements in civil cases[33] considered proportionally decreased.

The mediator community also does not see the growth in mediation ordered by courts of law, but it is noted that the number of pre-trial mediation cases is growing, however, it is difficult to say whether this is the result of pre-trial information sessions.

It seems that the local cultural context significantly affects the development of mediation. The historically legalistic features of the Polish legal culture and the low value of compromise in the Polish tradition, combined with high social distrust[34], result in that Poles approach mediation very tentatively, as they are afraid of compromise and "taking the issue/conflict resolution in their own hands". In addition, the legislator seems to enact further mediation regulations more due to the obligation to comply with international or European commitments and standards rather than for the social need realized by the public. In the circumstances of the Polish mentality and legal order, mediation continues to be a 'novelty' and a somewhat exotic element.

[32] Statistics from the Department of Statistical Management Information of the Department of Strategy and European Funds of the Ministry of Justice published at: http://mediacja.gov.pl/Statystyki.html [access: 18.09.2018].

[33] As part of civil law mediation, i.e. carried out under the civil procedure, the highest percentage of court mediation is recorded in family matters, then – economic matters, and the lowest percentage is recorded in disputes in the area of labour law and civil law in the strict sense.

[34] According to: *Zaufanie społeczne. Komunikat z badań*, 2016, www.cbos.pl/SPISKOM.POL/2016/K_018_16.PDF [access: 18.09.2018].

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 08/11/2026 03:07:47

REFERENCES

Bargiel-Matusiewicz K., *Negocjacje i mediacje*, Warszawa 2007.
Folberg J., Golann D., Kloppenberg L., Stipanowich T., *Resolving Disputes. Theory, Practice, and Law*, New York 2005.
Garlicki L., *Polskie prawo konstytucyjne*, Warszawa 1999.
http://mediacja.gov.pl/Statystyki.html [access: 18.09.2018].
Hutniewicz M., *Mediacja w sprawach cywilnych i handlowych. Dyrektywa Parlamentu Europejskiego i Rady 2008/52/WE*, „Radca Prawny" 2009, nr 2.
Informacje o mediacji dla stron postępowań sądowych, https://ms.gov.pl/pl/dzialalnosc/mediacje/publikacje-akty-prawne-statystyki [access: 20.05.2018].
Kalisz A., Zienkiewicz A., *Mediacja sądowa i pozasądowa. Zarys wykładu*, Warszawa 2014.
Kamiński J., *Ulpianus*, [in:] *Prawo rzymskie. Słownik encyklopedyczny*, red. W. Wołodkiewicz, Warszawa 1986.
Korybski A., *Alternatywne rozwiązywaniesporów w USA. Studium teoretycznoprawne*, Lublin 1993.
Kowalczyk E., *Mediacja i arbitraż jako przykład interwencji trzeciej strony w negocjacjach gospodarczych*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1999, nr 2.
Leksykon współczesnej teorii i filozofii prawa, red. J. Zajadło, Warszawa 2007.
Moore Ch., *The Mediation Process. Practical Strategies for Resolving Conflict*, San Francisco 2004.
Morek R., *Dyrektywa Parlamentu Europejskiego i Rady 2008/52/EC z dnia 21 maja 2008 r. o niektórych aspektach mediacji w sprawach cywilnych i handlowych: nowy etap rozwoju mediacji w Europie*, „ADR. Arbitraż i Mediacja" 2008, nr 3.
Rollnick S., Miller W.R., *Dialog motywacyjny*, Kraków 2014.
Rządowy projekt ustawy o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw w związku ze wspieraniem polubownych metod rozwiązywania sporów, Druk nr 3432, www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=3432 [access: 18.09.2018].
Sander F., *Varieties of Dispute Processing, Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 1976.
The Act of 17 November 1964 – Code of Civil Procedure (Journal of Laws, 2014, Item 101 as amended).
The Act of 27 July 2001 – Law on Common Courts Organisation (Journal of Laws, 2001, No. 98, Item 1070).
The Act of 10 September 2015 on the amendment of some acts in connection with the support of amicable dispute resolution methods (Journal of Laws, 2015, Item 1595).
The Act of 7 April 2017 amending the act – Code of Administrative Procedure and some other acts (Journal of Laws, 2017, Item 935).
The Regulation of the Minister of Justice of 20 January 2016 on keeping lists of court mediators (Journal of Laws, 2016, Item 122).
The Regulation of the Minister of Justice of 20 June 2016 on the amount of remuneration and mediator's reimbursable expenses in civil proceedings (Journal of Laws, 2016, Item 921).
Zaufanie społeczne. Komunikat z badań, 2016, www.cbos.pl/SPISKOM.POL/2016/K_018_16.PDF [access: 18.09.2018].
Zienkiewicz A., *Studium mediacji. Od teorii ku praktyce*, Warszawa 2007.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 08/11/2026 03:07:47

STRESZCZENIE

Artykuł jest próbą zbadania skutków zmian, które wprowadzono do postępowania cywilnego w zakresie mediacji od 1 stycznia 2016 r. Mediacja koresponduje z naturą prawa prywatnego, w wielu innych krajach zachodnich stała się znaczącą częścią wymiaru sprawiedliwości w sprawach cywilnych, handlowych i rodzinnych. Wprowadzenie zmian miało na celu: podniesienie poziomu wiedzy społecznej i uznanie mediacji, zwiększenie liczby mediacji, zmotywowanie prawników do stosowania jej jako formy rozwiązywania sporów prawnych, podniesienie standardów zawodowych mediatorów sądowych i – co równie ważne – skrócenie czasu postępowania cywilnego. Większość zmian została zainspirowana dyrektywami UE w sprawie sporów handlowych.

Słowa kluczowe: mediacje cywilne; mediator; nowelizacja

UMCS