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Mandatory Mediation – Remarks on Determining a Dispute's Suitability for Mediation and the Parties' Concerns Regarding Mediation

Mediacja obligatoryjna – uwagi na tle ustalania predyspozycji mediacyjnej sporu oraz obaw stron przed stosowaniem mediacji

SUMMARY

The main aim of the article is to present the considerations concerning the issue of introducing mandatory mediation into the Polish legal system within the scope of business lawsuits as well as some other kinds of civil disputes with respect to determining their suitability for mediation and the parties' concerns regarding the use of mediation. The choice of the subject matter and the aim of these considerations have been mainly inspired by the author's practical experience of working as a mediator in civil disputes (including business cases) and the relevant statistics concerning mediation proceedings held within the Business Mediation Center (BMC) at the District Chamber of Legal Advisers in Olsztyn. Introducing an obligation to mediate in selected types of disputes into the Polish social-legal system following an appropriate legislative and organizational preparation should, in principle, be considered beneficial as it might lead to popularizing mediation and making the most of its potential and advantages. Furthermore, expanding the citizens' access to the broadly understood system of justice in its in- and out-of-court formula may result in reducing a backlog of cases in courts of justice and, in consequence, strengthening the idea of diversification in the justice system.

Keywords: mandatory mediation; a dispute's suitability for mediation; the parties' concerns regarding mediation

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INTRODUCTION

The main aim of the article is to present the considerations concerning the issue of introducing mandatory mediation into the Polish legal system within the scope of business lawsuits as well as some other kinds of civil disputes with respect to determining their suitability for mediation and the parties' concerns regarding the use of mediation[1]. The choice of the subject matter and the aim of these considerations have been mainly inspired by the author's practical experience of working as a mediator in civil disputes (including business cases) and the relevant statistics concerning mediation proceedings held within the Business Mediation Center (BMC) at the District Chamber of Legal Advisers in Olsztyn.

According to the Center's statistics over 50% of all the cases referred by the court to mediation or initiated upon one party's request did not take place due to one or both parties' refusal to participate in the proceedings, while an agreement was reached in 53.91% of the cases where mediation did take place[2]. These data lead to a reflection on the court's or a party's effectiveness in determining a business dispute's suitability for mediation, which justifies making an effort to determine at least some aspects of civil disputes to be taken under consideration in diagnosing whether a particular dispute should be referred to mediation[3]. In order for mediation to be used more widely, it is also significant to make judges, mediators, and lawyers more capable of identifying the causes and, above all, the types of the parties' concerns leading to their refusal to take part in mediation proceedings.

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[1] When the parties' conflicting interests (aims) are revealed in a public forum, the conflict transforms into a dispute, which is "a public conflict between particular social entities (individuals, groups or their organizations) in which one party feels the other party has infringed its rights" – A. Korybski, *Alternatywne rozwiązywanie sporów w USA. Studium teoretycznoprawne*, Lublin 1993, p. 26. Cf. *Polskie spory i sądy*, red. J. Kurczewski, M. Fuszara, Warszawa 2004, p. 7. A concern is understood in its basic (common) sense as a feeling of anxiety or uncertainty as to the results of something – *Obawa*, http://sjp.pwn.pl/szukaj/obawa [access: 10.09.2018]. A dispute's suitability for mediation is quantifiable and denotes a dispute's potential for being resolved through mediation or at least for the parties to take advantage of the multifaceted aims of the mediation discourse other than agreement. More on the subject of the multifaceted aims (potential) of mediation in the personal, interpersonal, social, psychological, communicative or negotiation-informative dimension see A. Zienkiewicz, *Studium mediacji. Od teorii ku praktyce*, Warszawa 2007, pp. 96–123.

[2] The statistics regarding the Business Mediation Center at the District Chamber of Legal Advisers in Olsztyn were compiled by the BMC chairman C. Jezierski. They were prepared as of 30 September 2017 and include 302 mediation cases. The statistical analysis is in the author's possession and is available for viewing.

[3] It is worth pointing out here that Article 183^8 § 5 of the Polish Code of Civil Procedure states that: "Before instituting the proceedings, the presiding judge decides whether to refer the case to mediation. To this end, the presiding judge may call upon the parties to appear in person at a closed-door hearing if there is a need for hearing the parties". The Act of 17 November 1964 – Code of Civil Procedure (Journal of Laws, 2016, Item 1822, consolidated text, 31 October 2016).

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Taking into consideration the effectiveness of the Center's mediators, the question arises whether at least some of the cases where mediation was rejected would have ended in a mediation settlement agreement if mediation had been enforced. In consequence it leads us to consider how justified is the introduction of mandatory mediation in business lawsuits as well as some other kinds of civil disputes within the Polish legal system and what form it should take[4]. Due to the limited length of the text, the author's remarks will only regard selected aspects of obligation and major legislative directions without proposing specific legislative content.

A DISPUTE'S SUITABILITY FOR MEDIATION AND THE PARTIES' CONCERNS REGARDING MEDIATION

Forming a precise definition of the so-called suitability for mediation of every civil case is definitely not easy or could even constitute an impossible task with the current lack of infallible tools or diagnostic methodology. Even more so, considering the multitude and the individual character of its possible aspects, dispute dynamics or the diverse, and often unpredictable impact of outside factors. Nevertheless, it still seems justified to make an attempt at identifying what qualities predispose a civil dispute to be resolved with an agreement reached through inclusive negotiations in the presence of a mediator. While analyzing a dispute with regards to its potential for amicable conciliation (not only through mediation) it is worth determining and evaluating such of its legal and non-legal aspects as e.g. the significance for each party of maintaining positive relations vs. the material (including economic) result of the case[5]; mutual relations of the parties in the past and presently; the level of conflict escalation; the level of toxicity in the communication between the parties; the predicted duration of the relations and the need for cooperation between the parties in the future; the level and nature of interdependence; the level of complication (ambiguity or precedence) of the judicial context of the case; each party's amount of evidence; the level of uncertainty about the court's decision; time pressure; each party's hierarchy of values, interests and needs; each party's personality type including inclination towards conciliation, cooperation and

[4] Cf. the author's considerations on an obligation to mediate in certain types of disputes in the context of providing the citizens with a broader access to the system of justice presented in the expert report from 10 May 2017 prepared for The Centre for Research, Studies and Legislation at the National Chamber of Legal Advisers. See A. Zienkiewicz, *Mediacja jako uzupełniająca forma wymiaru sprawiedliwości*, http://obsil.pl/wp-content/uploads/2017/05/Raport-z-10.05.2017-r.-mediacja.pdf [access: 10.09.2017].

[5] On the subject of an individual's reaction to a dispute depending on the level of significance for each party of maintaining positive relations vs. material result of the case see e.g. A. Kalisz, A. Zienkiewicz, *Mediacja sądowa i pozasądowa. Zarys wykładu*, Warszawa 2014, pp. 20–21.

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compromise; the way of looking at the disputed issue (personal preferences regarding the relevant categories like power, right, interest, needs or the loss-profit style of decision making)[6]; hidden motives behind the parties' attitudes and behaviors.

When diagnosing a dispute, it may also be particularly useful for the parties' lawyers or the mediator to take advantage of such ADR institutions as confidential listening or litigation management. The former involves hearing the parties' positions and providing a third-party neutral (the so-called neutral/confidential listener) with their offers regarding the final settlement (kept confidential from the other party) in order to determine and inform the parties if their offers lie in a mutually acceptable space of agreement, and therefore establish if it is worth commencing negotiations or mediation. The aim of the latter is to assess the probable litigation budget for each party and their chances for winning the case in court. This form of ADR involves factual, evidence-based and legal analysis of the situation – so-called litigation risk analysis. Additionally, it is useful to comparatively extend litigation management investigations with the assessment of the time and emotional costs of continuing the dispute in the form of litigation, arbitration or mediation[7].

In an attempt to present and classify the parties' main concerns regarding resolving disputes through mediation, which are often unsubstantiated and stem from the lack of adequate knowledge, based on the author's practical experience and research, we can point to three basic groups of concerns:

a) concerns regarding mediation proceedings,
b) concerns regarding the mediator,
c) concerns regarding one's own or the opposing party[8].

The concerns regarding mediation proceedings include in particular: concerns about the agreement being unfavorable for one of the parties (lack of equity/appropriateness); concerns about a failure to establish the truth through mediation proceedings (lack of evidence-based proceedings); concerns about inefficiency/unenforceability (including illegality) of the agreement; concerns about the statute of limitations while mediation is in progress; concerns about the disclosure of the mediation agreement; concerns about the lack of appropriate equality (rights) protection throughout proceedings; concerns about the length of mediation proceedings; concerns about an inability to use legal counsel, specialist knowledge or a legal

[6] On the subject of the parties' personal preferences regarding dispute resolution within the relevant categories like power, right, interest, needs or the loss-profit style of decision making, see A. Kalisz, A. Zienkiewicz, *Polubowne rozwiązywanie konfliktów w pomocy społecznej. Komunikacja, psychologia konfliktów, negocjacje i mediacje socjalne*, Sosnowiec 2015, pp. 94–97.

[7] A. Kalisz, A. Zienkiewicz, *Mediacja sądowa i pozasądowa…*, p. 37.

[8] Further on the subject the parties' concerns concerning resolving disputes through mediation and the ways of overcoming them see A. Zienkiewicz, *Obawy stron przed rozwiązywaniem sporów poprzez mediację*, [in:] *Mediacje w prawie*, red. J. Czapska, M. Szeląg-Dylewski, Kraków 2014, pp. 29–44.

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representative's participation in mediation proceedings; concerns about the hidden costs of mediation; concerns about the inability to litigate in case mediation fails.

The concerns regarding the mediator include in particular: concerns about the mediator's incompetence; concerns about the mediator's partiality; concerns about the mediator's attitude being ill-suited to the preferences/expectations of the parties (the requirement of optimally adjusting strategy and mediation techniques to the particular dispute); concerns about the mediator disclosing the content of the mediation proceedings to the social environment; concerns about the mediator's lack of civil liability insurance.

The concerns regarding one's own (personal) or the opposing party tend to be particularly concentrated on: concerns about the opposing party invoking in court the settlement proposals, proposed mutual concessions or other declarations made throughout mediation; concerns about the parties' lack of knowledge about mediation procedures or law in general and concerns about the parties' lack of real impact on the course and result of mediation.

At this point it must be emphasized that the majority of the above-mentioned concerns leading to the parties not using mediation, especially the ones resulting from the lack of adequate knowledge of the nature mediation proceeding and the role and duties of the mediator, can be effectively eliminated as early as the preliminary inquiry on the subject of mediation initiated by the court, at a meeting with competent legal counsel or during pre-mediation[9].

Apart from the aforementioned concerns, various other causes for not using mediation proceedings may arise in business lawsuits and other disputes. Such causes may particularly include: fierce competition between the parties, perceiving the disputed matter the prism of power and right, prior conflicts between the parties and their negative experiences in settlement-oriented dispute resolution, a conviction about one's own stronger legal standing, including having more evidence against the other party, treating litigation as an 'investment' which may result in an additional financial gain in case of a favorable ruling in court as well as a party's legal representative's resentment towards mediation (e.g. due to the lack of a predetermined additional fee for mediation proceedings, desire to gain a higher fee for representing the party in court or insufficient knowledge and experience in mediation).

[9] Cf. Article 183^8 § 4 of the Polish Code of Civil Procedure, which states that: "The presiding judge may call upon the parties to participate in an information meeting regarding amicable dispute resolution and mediation in particular. The information meeting may be chaired by a judge, a court referendary, a court official, a judge's assistant or a permanent mediator". On the subject of pre-mediation, the joint mediation session and post-mediation see e.g. A.Zienkiewicz, *Studium mediacji…*, pp. 123–137.

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MANDATORY MEDIATION IN CERTAIN TYPES OF CIVIL MATTERS

Considering the issue of an obligation to mediate, it is worth first pointing to significant distinctions between its forms, which can differ depending on the legislator's conception[10]. Without being overly meticulous, we should particularly distinguish between the variants where: an obligation to mediate in some matters is directly stated in law (an unconditional obligation), an obligation to mediate in some matters stems from the court's discretionary power (a discretionary obligation).

Furthermore, it is possible to distinguish between the variant where the obliged parties are referred to: a) a preliminary inquiry on the subject of mediation (the minimal variant), b) the first mediation session (the basic variant), c) the whole mediation proceeding (the maximal variant). In practice, it is also possible to combine these variants, e.g. a) and b), or a) and c).

Depending on the adopted legislative procedure, an obligation to mediate can affect both parties or only one (e.g. the 'more powerful entity' in consumer or industrial disputes i.e. the entrepreneur or the employer).

An obligation to mediate may also imply that mediation takes place: a) independently of litigation (or even simultaneously with it) or b) as a condition for the parties to gain access to court.

Adopting an obligation to mediate may raise concerns about whether it violates the constitutional right to a fair trial (Article 45 of the Constitution of the Republic of Poland[11]). A legislation which makes the right to litigate conditional on prior mediation could raise valid constitutional and legal objections. Therefore, no potential act adopted in this matter in the future should introduce a legal obligation to mediate as a *sine qua non* condition for initiating litigation or its continuation

[10] This may be quantified with the use of the 5-point continuum developed by T. Sourdin and explained in the Polish literature by M. Flota, who proposes the following characteristics of the scale-based approach to voluntary/mandatory participation in mediation: "1. Voluntary basis – out-of-court mediation or mediation referred to by the court which the parties may refuse. 2. Requirement to attend a mediation orientation session or case conference to explore mediation. 3. 'Soft sanctions' – additional benefits for participating in mediation or penalties for refusal to mediate, e.g. increased court fees for the parties which refuse to mediate without presenting valid mitigating circumstances. 4. Opt-out scheme – compulsory discretionary or categorical mediation for all with provisions to be exempted. 5. No exemptions – mandatory participation in pre-litigation mediation or by court referral during litigation for all with no exemptions and sanctions for non-compliance (in the form of e.g. a refusal to consider the case)". See M. Flota, *Możliwość wprowadzenia obowiązkowej mediacji w Polsce*, Warszawa 2013, www.isp.org.pl/uploads/pdf/1114632877.pdf [access: 12.09.2017]. Cf. T. Sourdin, *Making People Mediate, Mandatory Mediations in Court-Connected Programmes*, [in:] D. Spencer, T. Altobelli, *Dispute Resolution in Australia: Cases, Commentary and Materials*, Sydney 2004, p. 148, quoted by: M. Flota, *op. cit.*

[11] The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws, 1997, No. 78, Item 483).

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in case of judicial referral to mediation[12]. The approved variant of an obligation to mediate should not violate the right to a reasonably prompt, fair and public hearing of the case by a proper, impartial and independent court[13].

When contemplating the subject of an obligation to mediate in some civil disputes (including business lawsuits) one should consider whether there are enough reasons to limit (and to what extend) or exclude the voluntary basis of mediation, which is its constitutive, basic and guaranteed property (Article 83^1 § 1 of the Polish Code of Civil Procedure). If the answer is affirmative, the reasons in question should be looked for in categories which are closely connected with particular dispute types and predispose them to the proposed legislative measure, including in particular:

- the welfare of a child, the sustainability of marriage (e.g. separation, divorce, child support, parental authority, child arrangements cases),
- the level of priority and the predicted duration of future relations (e.g. family, industrial, neighborhood and some business disputes),
- justifiable public or social interest (e.g. in connection with an urgent need to prevent a backlog of cases in court, shortening court proceedings, improving conditions for running business or safety).

Hence, the types of disputes in which an obligation to mediate should be considered include among others: family and custody disputes including marital cases, the ones concerning the relations between children and parents or child arrangements cases; individual labor law disputes; neighborhood and business disputes[14].

At this point it needs to be emphasized that the voluntary basis of mediation refers to many aspects and the idea of limiting or excluding it should be approached

[12] Similarly: R. Morek, *Dopuszczalność obligatoryjności mediacji online*, www.rozwiązywaniesporow.pl/2016/11/04/dopuszczalnosc-obligatoryjnosci-mediacji-online [access: 19.09.2018].

[13] Consistency and order require that we point out here that in the present legal situation in Poland there is a possibility to refer the parties in civil cases to a mediation orientation session on mandatory basis (see Article 183^8 § 4–6 of the Code of Civil Procedure). A specific obligation to mediate is also present within collective labour dispute resolution (see Article 10 of the Act of 23 May 1991 on collective dispute resolution, Journal of Laws, 2015, Item 295, consolidated text, 20 February 2015) or within judicial mediation (see Article 115 of the Act of 30 August 2002 – Law on Proceedings before Administrative Courts, Journal of Laws, 2016, Item 718, consolidated text, 10 May 2016). Furthermore it needs to be pointed out that based on EU regulations – the 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 of the European Union, L 136/3, 24 May 2008) – do not forbid member nations to introduce an obligation to mediate into national lagislation. The Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) (Official Journal of the European Union, L 165/63, 18 June 2013) treats the analyzed issue only generally – see Point 39 of this directive.

[14] At the same time, one must not lose track of the prerequisites limiting or excluding the expediency of applying mediation in a particular dispute of a given type (e.g. taking into consideration one party's addiction, use of violence or evident unbalance of power).

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with due care, and applied only insofar as absolutely necessary since a party's willingness to mediate may show in many situations when a decision must be made, such as: the decision to initiate/enter into mediation proceedings; the decision concerning the choice/acceptance of the mediator or the way in which a mediator ought to be chosen; the decision about the rules of mediation proceedings including the ones regarding the use of particular mediation strategies and techniques[15]; the decision concerning the place and time of mediation; the decision concerning the form of mediation (direct, indirect, mixed); the decision concerning the inclusion of third parties in mediation (lawyers, experts in dispute resolution, relatives, witnesses); the decision to continue or abandon mediation proceedings (the possibility to opt-out at any time); the decision to change the mediator; the decision to take an active part in the conversation (e.g. to tell your story, create options for dispute resolution, hear the other party, attempt to understand the other party's argumentation and situation); the decision to observe the rules of mediation especially concerning decent conduct and due respect; the decisions made throughout the negotiation stage of mediation (demands, concessions, etc.); the decision concerning the final agreement, its contents and form (oral, written or a notarial act).

When analyzing the aspects of the voluntary basis of mediation which might be limited or excluded by an obligation to mediate, it seems sufficient to focus on the aspect concerning the obligation to enter mediation proceedings, and specifically their first session which includes pre-mediation and the negotiation stage (the basic variant), with no possibility of leaving until the mediator ends it. An obligation to mediate interpreted in this way does not have an impact on the other aspects of the voluntary basis of mediation. In particular, it does not impose a solution on the parties or impair their power to decide on the final agreement and its contents[16].

In practice, any further obligation to continue mediation proceedings (the maximal variant) seems to be pointless, since it is difficult to presume that the party which definitely does not want to take an active part in the conversation (in good faith and accepting other rules of mediation) would upon the mediator's instructions reveal its own needs and interests, seek a space of agreement, create options for dispute resolution, declare its range of concessions, introduce its own argumentation or analyze the other party's position in order to understand it.

[15] On the subject of a the various mediation strategies see e.g. A. Zienkiewicz. *Różnorodny paradygmat mediacji – odpowiedź na wielocelowość dyskursu mediacyjnego*, „ADR. Arbitraż i Mediacja" 2008, nr 2(2), pp. 61–77.

[16] Further on the subject of a voluntary basis, conflict autonomy, parties' decision-making power and other rules of mediation see e.g. A. Kalisz, A. Zienkiewicz*, Mediacja sądowa i pozasądowa…*, pp. 58–61.

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CONCLUSIONS

Introducing an obligation to mediate in selected types of disputes into the Polish social-legal system following an appropriate legislative and organizational preparation should, in principle, be considered beneficial as it might lead to popularizing mediation and making the most of its potential and advantages[17]. Furthermore, expanding the citizens' access to the broadly understood system of justice in its in- and out-of-court formula may result in reducing a backlog of cases in courts of justice and, in consequence, strengthening the idea of diversification in the legal system[18].

Establishing the optimal variant of mandatory mediation in the social and legal landscape of Poland should be the subject of a detailed, multifaceted analysis followed by legislative work acknowledging the positions of all the concerned groups and individuals who are professionally involved with mediation and the system of justice from the practical as well academic perspective. Its introduction ought to be performed with due consideration and care in order to avoid any resolutions which might encounter strong social resistance or be ineffective and, in consequence, deter the society, including lawyers, from the idea of mediation[19]. At the same time, one can assume that mandatory mediation could be treated as a 'temporary measure' which will be in use until it is common enough to become a consciously, voluntarily and frequently opted for alternative to litigation[20].

In the light of the ongoing discussion on the introduction of mandatory mediation in Poland we should return to the debate about compiling the Mediation Act which would on the one hand comprehensively and cohesively regulate the institution of mediation in different types of disputes (branches of law) and propose solutions guaranteeing accessibility to mediation, its excellent quality and the professionalism of mediators (or even making it a profession of public trust)[21], and on the other recognize the importance and authority of mediation itself in the legal community as well as the society as a whole.

In conclusion it is worth mentioning that as it is rightfully stated by the ADR Civic Council in the preamble "Standards for conducting mediation and standards

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[17] Further on the subject of multifaceted aims (potential) of mediation in the personal, interpersonal, social psychological, communicative or negotiation-informative dimension see A. Zienkiewicz, *Studium mediacji…*, pp. 96–123.

[18] Cf. L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*, Warszawa 1999, p. 188.

[19] Cf. A. Gójska, R. Boch's, *Obligatoryjna mediacja w sprawach rodzinnych – refleksje praktyków*, www.smr.org.pl/pdf/med_37.pdf [access: 19.09.2018]. Moreover, when considering the introduction of an obligation to mediate into the Polish civil law system, an analysis of the optimal model should be performed – regarding the funding sources of mandatory mediation.

[20] See e.g. M. Flota, *op. cit.*, p. 9.

[21] Cf. A. Zienkiewicz, *Studium mediacji…*, p. 320.

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for the conduct of mediators" of 26 June 2006: "Conducting mediation as an effective tool for dispute resolution greatly depends on the professionalism of mediators and their adherence to high ethical standards"[22], which should compel the legislators to closely examine whether the number of professional and active mediators in Poland would allow the civil cases affected by the introduction of mandatory mediation to be adequately and promptly handled. It is also worthwhile to continue the multifaceted theoretical and empirical studies into the accurate diagnosis of disputes with regard to their suitability for mediation and the methods of identifying and overcoming the different concerns or skepticism from the parties or their lawyers against making an attempt at amicable dispute resolution in the form of mediation.

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STRESZCZENIE

Głównym celem artykułu jest podjęcie rozważań na temat wprowadzenia do polskiego systemu prawa mediacji obligatoryjnej w sprawach gospodarczych, a także w niektórych innych typach sporów cywilnych na tle identyfikacji tzw. predyspozycji mediacyjnej sporu oraz różnorodnych obaw stron przed stosowaniem mediacji, dotyczących postępowania mediacyjnego, osoby mediatora, właściwości osobistych strony lub zachowań strony przeciwnej. Wybór tematu i celu rozważań w istotny sposób zainspirowały doświadczenia praktyczne autora, wynikające z wykonywania profesji mediatora w sprawach cywilnych (w tym gospodarczych), oraz relewantne dane statystyczne dotyczące postępowań mediacyjnych prowadzonych w ramach Ośrodka Mediacji Gospodarczych (OMG) przy Okręgowej Izbie Radców Prawnych w Olsztynie. Odpowiednio legislacyjnie i organizacyjnie przygotowane wprowadzenie optymalnego dla polskiego systemu społeczno-prawnego modelu obligatoryjności mediacji w wybranych typach sporów należy ocenić jako działanie co do zasady korzystne, które może przynieść dalszą popularyzację stosowania i wykorzystania potencjału i zalet mediacji. Ponadto istotne jest zwiększenie dostępu obywateli do szeroko rozumianego wymiaru sprawiedliwości zarówno w formule sądowej, jak i pozasądowej, pożądane odciążenie i uzupełnienie pracy sądów, a w konsekwencji także wzmocnienie realizacji postulatu istnienia pluralizmu form wymiaru sprawiedliwości.

Słowa kluczowe: mediacja obligatoryjna; predyspozycja mediacyjna sporu; obawy stron przed stosowaniem mediacji