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Articles Studia Iuridica Lublinensia vol. XXVII, 3, 2018
DOI: 10.17951/sil.2018.27.3.187-195

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Mediation and Enforcement Proceedings

Mediacja a postępowanie egzekucyjne

SUMMARY

The issues of mediation and enforcement proceedings discussed in the study are focused on presenting both these institutions functioning in the widely understood law application process. On the one hand, mediation as a supplementary form of the law application process, on the other hand, enforcement proceedings as this part of the law application process whose primary goal is execution of the legal norm specified at the earlier stages of the decision-making process. An element shared by both these institutions in the judicial law application process is an institution of a settlement agreement concluded before a mediator which is the result of mediation proceedings and provides the basis for commencement and implementation of court execution. In the procedural dimension, mediation perceived as an alternative form of dispute resolution needs to have tools guaranteeing that its provisions shall be executed in case they are not voluntarily followed. This function is fulfilled by the state which has the exclusive rights to use various forms of coercion, including enforcement, in order to implement the provisions of a legal decision.

Keywords: mediation; enforcement proceedings; law application process; settlement agreement concluded before a mediator; enforceable title

INTRODUCTION

My analysis of the institutions of mediation and enforcement proceedings for the purposes of this study is combined with the law application process[1], however, it does not preclude their examination from other perspectives (axiological, psycho-

[1] J. Wróblewski, *Stosowanie prawa (model teoretyczny)*, „Państwo i Prawo" 1967, z. 3, p. 375 ff.

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Data: 20/11/2026 12:39:52

logical, cultural). As the starting point for the discussion I adopt the decision-making model of law application by J. Wróblewski[2]. The decision-making perspective on law application[3] belongs to these research approaches which, due to their universality and practicality of the concept, are effective and appropriate for description of both these institutions functioning nowadays in the Polish law system. Especially useful is the procedural dimension of the decision-making model[4] in which the stage of law enforcement plays a crucial role in the case of lack of willingness to comply with the provisions of a legal decision. The right to compulsory execution of the provisions of a mediation settlement agreement (the right to enforcement) constitutes in practice an integral part and another stage of the right to judgment[5].

In accordance with the basic divisions of the law application process presented in literature on law theory[6], mediation and enforcement proceedings can be regarded, on the one hand, as elements of the law application process, and, on the other hand, as an independent decision-making process. From the perspective of the discussed subject, comparison of these institutions is not the primary goal: in my opinion, it is more important to indicate several practical elements which, when juxtaposed, demonstrate that both procedures complement each other and function in the broadly understood law application process. Obviously, mediation and enforcement proceedings operate at different stages of the decision-making process, but in practice one institution supplements the other. In this sense, mediation provides enforcement proceedings with an enforceable title (a settlement agreement concluded before a mediator), while enforcement proceedings enable execution of the provisions of a settlement agreement concluded before a mediator in the event they are not voluntarily implemented.

STATUS OF A SETTLEMENT AGREEMENT CONCLUDED BEFORE A MEDIATOR IN ENFORCEMENT LAW APPLICATION

From the perspective of a person applying enforcement law in practice, I view mediation proceedings primarily in the context of the result, that is a settlement agreement concluded before a mediator which, after its approval by the court with

[2] *Idem*, *Sądowe stosowanie prawa*, Warszawa 1988, p. 42 ff.

[3] The most fully developed in the recent years by L. Leszczyński, see A. Korybski, L. Leszczyński, *Stanowienie i stosowanie prawa. Elementy teorii*, Warszawa 2015, p. 134 ff.

[4] J. Wróblewski, *Zarys procesowego modelu sądowego stosowania prawa*, „Państwo i Prawo" 1985, z. 4, p. 3 ff.

[5] Cf. e.g. the ECHR's judgment of 19 March 1997 in the case of Hornsby v. Greece, application No. 18357/91.

[6] A. Korybski, L. Leszczyński, *op. cit.*, p. 134 ff.

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Data: 20/11/2026 12:39:52

an enforcement clause, constitutes an enforceable title subject to court execution[7]. On the other hand, the perspective of the law application model[8] makes it possible to analyse mediation proceedings on a wider research plane. A settlement agreement concluded before a mediator, provided with an enforcement clause, as the effect of the principal part of the decision-making process, delineates the object- and subject-related borders of execution. Moreover, from the perspective of the regulations of Article 797 § 1 sentence 2 of the Civil Procedure Code[9], an enforceable title has the central place in the process of the enforcement law application. Its status is guaranteed i.a. by the fact that each application for commencement of enforcement proceedings must by accompanied by an original enforceable title. Only then the execution shall be carried out on the basis of law and within its limits.

In literature on the subject, it is emphasized that mediation is a way of dispute resolution which is alternative (or supplementary[10]) to judicial proceedings[11]. From the perspective of the European regulations, similarly as in the Polish law, mediation

> […] means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State[12].

The result of mediation in the form a settlement agreement concluded before a mediator, similarly as the result of judicial proceedings, is secured with a possibility of compulsory execution, with the reservation that settlement agreements concluded before mediators are, by nature, much more frequently implemented voluntarily, without a need to use state enforcement. Certainly, this results from the

[7] Article 183[15] of the Civil Procedure Code.

[8] There is a notion of the so-called mediation subtype of law application. See A. Korybski, L. Leszczyński, *op. cit.*, p. 115.

[9] "An application for commencement of enforcement proceedings or a request for *ex officio* enforcement must indicate an action which should be taken. An enforceable title is attached to the application or request".

[10] A. Zienkiewicz, *Mediacja jako forma wymiaru sprawiedliwości*, „ADR. Arbitraż i Mediacje" 2013, nr 4, p. 101 ff.

[11] 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) directly provides that "Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the goodwill of the parties. Member States should, therefore, ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable". More on alternative methods of dispute resolution see A. Korybski, *Alternatywne rozwiązywanie sporów w USA. Studium teoretycznoprawne*, Lublin 1993, p. 103 ff.

[12] Article 3 of 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.

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Data: 20/11/2026 12:39:52

specific character of mediation as an institution whose aim is to resolve disputes through an agreement between the parties.

A mediation settlement agreement is the basis and the intransgressible limit of execution in enforcement proceedings, in the sense that a party cannot receive more than follows from the settlement agreement. In the event that a party puts forward a motion exceeding the scope of a mediation settlement agreement, the role of a court enforcement officer as an authority applying enforcement law is to examine the motion and refuse to execute it in a part exceeding the enforceable title. On the other hand, a mediation settlement agreement contains also subject-related borders, i.e. its provisions clearly define who is the creditor and who is the debtor (in the sense that it is unacceptable to carry out execution against and for people not mentioned in the enforceable title).

A SETTLEMENT AGREEMENT CONCLUDED BEFORE A MEDIATOR AS AN ENFORCEABLE TITLE IN COURT EXECUTION

In the practice of enforcement law application, the first contact of an enforcement authority (a court enforcement officer) with mediation, and precisely with its result, that is a settlement agreement concluded before a mediator and provided with an enforcement clause (an enforceable title), takes place at the commencement of enforcement proceedings[13]. The current legal status of a settlement agreement concluded before a mediator as an enforceable title results from the amendments introduced in 2011[14]. Pursuant to the Act of 16 September 2011 amending the Civil Procedure Code and certain other acts[15], a settlement agreement concluded before a mediator was deleted from the list of enforceable titles. In the justification of the Act, the changes in the status of a settlement agreement concluded before a mediator were explained i.a. by the fact that it is a private document and thus cannot be classified in a closed list of enforceable titles[16].

[13] In the process of enforcement law application, the proceedings are instituted at the moment when an application for commencement of execution is submitted together with an original enforceable title. This is unlike the commencement of execution which takes place at the moment when the first act of execution is carried out (e.g. seizure of real property).

[14] Until 2012, in the process of law application, a settlement agreement concluded before a mediator had the status of an enforceable title by virtue of law, it was directly mentioned in the list of enforceable titles enumerated in Article 777 of the Civil Procedure Code.

[15] Journal of Laws, 2011, No. 223, Item 1381.

[16] "Following the rule that an enforceable title is the basis for execution and that an enforceable title is a writ of execution with an enforcement clause, the draft act provides that also other documents can be enforceable titles if a legal act stipulates so, including writs of execution which, by virtue of explicit regulations, are the basis for execution (hence, they do not require an enforcement clause). In connection with the amendments proposed, enforceable titles can also be: a settlement agreement

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Data: 20/11/2026 12:39:52

In the current legal status, the regulations contained in Article 183[15] of the Civil Procedure Code explain the character of a mediation settlement agreement in the following way: "A settlement agreement concluded before a mediator, after its approval by the court, has a legal force of a settlement agreement concluded before the court. A settlement agreement concluded before a mediator, confirmed with an enforcement clause, is an enforceable title"[17]. A settlement agreement concluded before a mediator acquires the status of an enforceable title under Article 183[14] of the Civil Procedure Code[18], that is through its approval by the court with an enforcement clause. In all these cases when the provisions of a mediation settlement agreement are not enforceable through execution, the court approves the agreement without providing it with an enforcement clause. Hence, such a document does not have the status of an enforceable title and cannot be forcibly executed. The role of the court in the process of approving a settlement agreement is to examine its content only to a limited extent. However, it does not mean that at this stage the court verifies a settlement agreement only with regard to the conditions referred to in Article 183[14] § 3 of the Civil Procedure Code. Apart from the language interpretation, in order to reconstruct correctly the norm to be applied at this stage, it is necessary to appropriately use the regulations on enforcement clause proceedings (Articles 776–795 of the Civil Procedure Code) taking into account the purpose of these regulations[19]. In this context, the linguistic directives of interpretation are

concluded before a mediator, as well a judgment of an arbitration court or a settlement agreement concluded before an arbitration court when the court declares their enforceability. In this case, these shall be enforcement titles which are not writs of execution provided with an enforcement clause […]. The current wording of Article 777 § 1 Points 2 and 2[1] can give rise to ambiguity and doubt. Both a settlement agreement concluded before a mediator, prior to its approval, and a judgment of an arbitration court or a settlement agreement concluded before an arbitration court, prior to statement about their enforceability, do not fulfill the criteria of enforceable titles, owing to their legal character as private documents. Therefore, the draft project suggests they should be deleted from the list of enforceable titles contained in Article 777 § 1. After the court declares their enforceability, the documents mentioned shall become enforceable titles right away". See Druk nr 4332 z dnia 14 czerwca 2011 r., http://ww2.senat.pl/k7/dok/sejm/083/4332.pdf [access: 26.09.2017].

[17] The Act of 17 November 1964 – Code of Civil Procedure (Journal of Laws, 1964, No. 43, Item 296 as amended).

[18] "§ 1. If a settlement agreement has been concluded before a mediator, the court referred to in Article 183[13], at a motion of a party, commences the proceedings without delay to approve the settlement agreement concluded before a mediator. § 2. If a settlement agreement is enforceable through execution, the court approves the agreement by providing it with an enforcement clause, otherwise, the court approves the agreement with a decision taken at proceedings in camera. § 3. The court refuses to grant an enforcement clause or to approve a settlement agreement concluded before a mediator, partly or wholly, if the settlement agreement infringes law or rules of social coexistence, or is aimed at evading law, or when it is incomprehensible or contains contradictions".

[19] Cf. R. Schmidt, *Nadanie klauzuli wykonalności ugodzie zawartej przed mediatorem*, „ADR. Arbitraż i Mediacje" 2010, nr 1(9), p. 148 ff.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 20/11/2026 12:39:52

supplemented with and verified by systemic and purposive rules[20]. On the one hand, the content of a settlement agreement is verified in terms of feasibility of its execution, but on the other hand, the verification criteria are limited to five conditions (Article 183[14] § 3 of the Civil Procedure Code). At this stage, the court examines whether the settlement agreement submitted for approval does not infringe on law or rules of social coexistence, is not aimed at evading law, is comprehensible and does not contain contradictions. Verification of such a settlement agreement in the process of its approval clearly indicates that this document needs proper editing already at the stage of mediation proceedings, which in the later phase of law application guarantees its approval by the court with an enforcement clause and its compulsory execution by a court enforcement officer. Such elements of a settlement agreement as parties to the proceedings, claim, or due date determine the chances of its future execution. At the stage of enforcement clause proceedings (as the ones which directly precede the execution) the court's role is limited in practice to verification whether the document which is to be provided with an enforcement clause is subject to compulsory execution. In most cases, verification consists in examining whether the act submitted is an enforceable title or checking whether this document is eligible for execution (e.g. a settlement agreement concluded before a mediator). At this stage, the court does not inspect the content itself, e.g. the court does not examine whether the claim covered by a settlement agreement exists or is legitimate[21]. In the process of enforcement law application, a settlement agreement concluded before a mediator as an enforceable title guarantees the creditor, as the disposer of these proceedings, a possibility to request a court enforcement officer to execute the agreement. The enforcement proceedings are instituted at the moment when an application for commencement of execution is submitted together with an enforceable title[22]. In general, the tasks of a court enforcement officer concerning examination of these documents are specified in two articles, that is Article 803[23] and Article 804 of the Civil Procedure Code[24], whose provisions on the one hand determine the so-called subject-related limits of execution, while on the other hand they point to the limited competence of an enforcement authority

[20] Such an interpretation formula suits the concept of the operational interpretation of law, developed in the recent years. See L. Leszczyński, *Wykładnia operatywana (podstawowe właściwości*), „Państwo i Prawo" 2009, z. 6, p. 18 ff.

[21] *Egzekucja sądowa w Polsce*, red. Z. Szczurek, Sopot 2007, p. 279.

[22] Article 796 § 1 of the Civil Procedure Code: "An application for commencement of execution is lodged with a court or a court enforcement officer, depending on their competence"; Article 797 § 1 sentence 2 of the Civil Procedure Code: "An enforceable title is attached to the application or request".

[23] Article 803 of the Civil Procedure Code: "An enforceable title is the basis for executing the whole claim from all parts of the debtor's property unless the title stipulates otherwise".

[24] Article 804 of the Civil Procedure Code: "An enforcement authority is not entitled to examine legitimacy and enforceability of the obligation referred to in an enforceable title".

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Data: 20/11/2026 12:39:52

in examination of the content of an enforceable title. However, it does not mean that an enforcement authority does not have any tools to solve the arising doubts, e.g. related to the wording of a judgment or problems with its interpretation[25]. The situation looks similar from the perspective of the parties to proceedings who, to a limited extent, are entitled to central forms of control over an enforceable title (it is possible to question such an act also at this stage of law application, e.g. through an adverse claim)[26]. Securing mediation proceedings with a possibility to enforce their resolutions guarantees that the rights and obligations of the parties shall be executed. One of the basic questions arising here is what would be the value of mediation in the process of law application if its resolutions were not secured with state enforcement in the event they are not implemented voluntarily. The answer seems obvious: it would not be a competitive tool for judicial proceedings.

It follows from my practice that the institution of a mediation settlement agreement as an enforceable title is functioning in enforcement proceedings still only in rare cases. Limited trust of the parties in this method of dispute resolution does not seem justifiable. On the contrary, it should be the basic tool in dispute resolution. This situation can also be due to the fact that the character of the institution itself causes, in the majority of cases, voluntary implementation of mediation resolutions without enforcement proceedings.

CONCLUSIONS

From the perspective of the law application process, distinguishing the mediation and enforcement proceedings creates a universal research approach to the process of functioning of both institutions. On the one hand, we can view mediation as a way of dispute resolution preceding enforcement, voluntary implementation of a settlement agreement. On the other hand, in the current legal situation, mediation during enforcement proceedings is not normatively justified. The character of both institutions and their special role in the process of law application limit their mutual use to the institution of a settlement agreement concluded before a mediator. However, it does not preclude an attempt to reconcile the parties to these proceedings, i.e. the creditor and the debtor. A court enforcement officer, whose status in enforcement proceedings is currently not viewed consistently[27], is characterized

[25] H. Pietrzykowski, *Kodeks postępowania cywilnego. Komentarz*, t. 4, Warszawa 2012, p. 198.

[26] Both in enforcement proceedings and in enforcement clause proceedings a debtor can question an enforceable title, in this case, a mediation settlement agreement (e.g. if it has already been executed and the debtor still applies for execution).

[27] On the one hand, as a public officer referred to in Article 1 of the Act of 29 August 1997 on court enforcement officers and execution (Journal of Laws, 1997, No. 133, Item 882 as amended),

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Data: 20/11/2026 12:39:52

by the fact that his or her relationships with the creditor and the debtor are based not on private law but on public law (in this sense a court enforcement officer is an independent and autonomous authority whose basic duty is to execute an enforceable title). The institution of an agreement, so characteristic of mediation, is not particularly useful in enforcement proceedings in which an enforcement norm and a situation of coercion build the environment necessary for execution of provisions of enforceable titles.

Juxtaposition of these two institutions creates a vision of mediation as one of the forms of justice administration[28] and of enforcement proceedings as a stage in the law application process where justice has already been administered. In the process of law application, in many areas of life, the institution of mediation can effectively provide an alternative to judicial proceedings which have been struggling in the recent years with inefficiency, low effectiveness and prolonged time of taking the final decision. Mediation, as a specific form of justice administration, aims to resolve a dispute by consensus whose result, in the form of a settlement agreement, is secured with an opportunity for its execution with state enforcement. The special character of a settlement agreement concluded before a mediator (after its approval by the court with an enforcement clause it becomes an enforceable title) guarantees that the law application process goes through all its stages. In this sense, issuing of such a settlement agreement completes, on the one hand, the basic stages of the decision-making process (i.e. preceding decision and decision-making stage)[29], but on the other hand it opens the way for supplementary phases, that is verification and execution (the execution phase of law application)[30] which, from the perspective of the decision-making model of law application, guarantee execution of rights and obligations not only in the provisions of a decision taken but also ensure their actual implementation. From the perspective of the law application value, the most important quality for the parties to the proceedings is effectiveness which, in my opinion, is ultimately fulfilled in enforcement proceedings. Examination of this value at earlier stages of the law application process shows only partial results which do not finally decide on the effectiveness of the law application process.

on the other hand, as a quasi-entrepreneur running a sole proprietorship. Cf. the judgment of the Constitutional Court of 14 May 2009, K 21/08, Legalis No. 158405.

[28] A. Zienkiewicz, *op. cit.*, p. 104.

[29] A. Korybski, L. Leszczyński, *op. cit.*, p. 136 ff.

[30] *Ibidem*, p. 145 ff.

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Data: 20/11/2026 12:39:52

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STRESZCZENIE

Problematyka mediacji i postępowania egzekucyjnego przedstawiona w artykule koncentruje się na ukazaniu obu instytucji funkcjonujących w szeroko rozumianym procesie stosowania prawa: z jednej strony mediacja jako uzupełniająca forma procesu stosowania prawa, z drugiej postępowanie egzekucyjne jako ta część procesu stosowania prawa, którego podstawowym celem jest urzeczywistnienie normy prawnej określonej na wcześniejszych etapach procesu decyzyjnego. Wspólnym elementem łączącym obie instytucje w sądowym procesie stosowania prawa jest instytucja ugody zawartej przed mediatorem, która stanowi rezultat prowadzonego postępowania mediacyjnego i daje podstawę do wszczęcia i prowadzenia egzekucji sądowej. W ujęciu proceduralnym mediacja postrzegana jako alternatywna forma rozwiązywania sporów nie może być pozbawiona narzędzi gwarantujących wykonanie jej postanowień w przypadku braku dobrowolności ich realizacji. Taką funkcję zapewnia państwo, które ma wyłączność na stosowanie różnych form przymusu, w tym egzekucji służącej urzeczywistnianiu postanowień decyzji stosowania prawa.

Słowa kluczowe: mediacja; postępowanie egzekucyjne; proces stosowania prawa; ugoda zawarta przed mediatorem; tytuł egzekucyjny