Chapter 3.

COSTS OF THE PROCEEDINGS IN THE CIVIL JUDICIAL PROCEDURES AND ALTERNATIVE DISPUTE RESOLUTION ON THE EXAMPLE OF MEDIATION – SELECTED PROBLEMS

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Many people, in the course of their lives, have no opportunity to come into contact with the judicial system and the mechanisms of its functioning. While in criminal matters it is the most desirable situation, in civil cases such a situation is quite frequent due to either a lack of conflict – that would require intervention of the court – or being unaware of the need for the use of the assistance of the court (e.g. that a statement of inheritance should be ordained by the court). However, if one receives the option of judicial interference in their relationship, right then there is a lot of different kinds of questions, such as how to initiate civil proceedings, whether to stand alone or to be represented by a professional representative, i.e. the lawyer, etc.

From the point of view of the subject of this chapter, among the most interesting questions there seem to be those which concern two aspects: (1) whether for the resolution of the conflict it is better to go to court or to use one of the forms of ADR (Alternative Dispute Resolution), and if so, which one; (2) how much court proceedings and, e.g., proceedings before a mediator cost. In both areas, it is difficult to give a definite answer because, first of all, we do not really know what the intentions of the party are as to how to resolve the conflict, and, second, he/she is often hampered by a lack of reliable information on how to carry out each of these actions (in passing, there should be

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noted that the transmission of information is far from ideal). However, turning to the merits of the article, it should be emphasized that opting for any dispute resolution, whether judicial or alternative, quite often one just does not pay attention to the amount and type of costs that these actions generate. In society, it is often misconstrued that the procedure is "free of charge" or common knowledge with respect to these costs is limited to knowledge of the court registration fee. At the same time, issues related to the costs that arise during the proceedings (e.g. the cost of expert evidence) or those relating to the reimbursement of the opposing party's costs (which is particularly important when the other party is represented by a professional representative) are kept aside. And at the end of the proceedings in which the court dismisses the party's application, the party is unpleasantly surprised that he/she is obliged to the reimbursement of the fees and the expenses of the other party's one lawyer. Ever increasing costs of litigation in Poland (caused mainly by the increasing number of cases) resulted in attempts to amend the legislation with purpose of improving the functioning of justice, as well as in the interest in non–judicial dispute resolution assumed to be the method of conflict resolution better than using the courts. It is better because it is faster and cheaper as well as allows maintaining good relations between the parties involved[2]. Therefore, the fiscal aspect of litigation and alternative dispute resolution should be referred to in this chapter. It is worth considering whether ADR methods actually are more favourable and, if so, in what respect.

Briefly speaking, the legal costs of civil proceedings are divided into court costs, costs of personal participation of the party, costs associated with the representation of the party by a non–professional or professional representative and costs of mediation of the case referred by the court to mediation[3]. The court costs (in Polish *koszty sądowe*) are generally divided into court fees (in Polish *opłaty sądowe*) and court expenditures (in Polish *wydatki sądowe*)[4]. The civil proceedings are generally chargeable to the party. This means that persons intending to obtain protection of their

2 M. Skibińska, *Koszty mediacji w sprawach cywilnych*, ADR. Arbitraż i Mediacja 2009, No. 3, p. 41–42.

3 Articles 98 and 98[1].

4 Act of 28 July 2005 on Court Costs in Civil Proceedings (Journal of Laws 2010, No. 90, item 594, as amended).

rights in civil proceedings are required to temporarily cover costs of the proceedings provided for in the Code of Civil Procedure (ccp.). No provision of the Polish Constitution guarantees the proceedings "free of charge", so it may be chargeable to the party, which means that the law–maker may make a right of action conditional on the obligation to bear the costs of the proceedings[5]. The Code of Civil Procedure sets the rules for the reimbursement of costs of the proceedings that are applied by the court when determining costs in a final judgment. Among them, we should pay attention primarily to two: (1) the "recovery of proper costs" requirement and (2) the principle of responsibility for the outcome of the proceedings. They are described in Article 98 § 1 ccp. stating that the losing party is obliged to pay, upon the opponent's request, his/her costs necessary for the proper protection of his/her own rights and proper defence. The principle of responsibility for the outcome of the process means that the losing party reimburses costs of the proceedings incurred by the opposing party. As a rule, the losing party is the plaintiff whose action was dismissed or the defendant whose defence was unsuccessful, regardless of whether the party lost the case on the merits or on formal grounds, e.g. due to rejection of the claim and whether it was the fault of the losing party[6]. The Code of Civil Procedure does not define the costs necessary for the proper protection of the party's own rights and proper defence. They are subject to the court's opinion and the latter will depend on the specific circumstances of the case in which the costs were generated. It should be noted that the court assessment in this respect is not discretional; the court should consider whether in fact the action that caused the costs was required to enforce the party's rights. This assessment must be objective and not subjective. If the court considers an action incurring costs as objectively necessary, it has to determine to what extent the costs incurred in connection with its performance are objectively justified[7]. Of course, it should be remembered that there is a possibility of a waiver or an exemption from court costs; however, it does not free a party from the obligation to reimburse the costs of

5 M. Sorysz, [in:] A. Góra–Błaszczykowska (ed.), *Kodeks postępowania cywilnego. Komentarz. Tom I*, Warszawa 2013, p. 359.

6 M. Manowska, [in:] M. Manowska (ed.), *Kodeks postępowania cywilnego. Komentarz*, Warszawa 2013, p. 195–196.

7 M. Sorysz, *op. cit.*, p. 363.

the proceedings to the opposing party. It is therefore clear that the lawsuit essentially works on the winner–loser system (win–lose system) intended to resolve the dispute; this model corresponds to the rules for the reimbursement of costs of the proceedings (you can say, colloquially: "the loser pays"). On the other hand, in relation to ADR procedures, the system is fundamentally different. ADR is an alternative to court justice and, in general, it is rather to help the parties resolve the dispute between them than resolve the dispute. Thus, it is based on the winner–winner situation (win–win situation), where each party in an ADR process (and in particular in mediation) emerges victorious as he/she achieves the result which is most satisfactory and (which needs a special emphasis) generated by the parties themselves with the participation of a neutral third party, i.e. the mediator. The rules for the reimbursement of costs of mediation of the case are subordinated to this concept.

It should be noted here that in Poland mediation can be used in civil proceedings in two ways: (1) by a mediation contract; (2) by a court order that refers the case to mediation (Article 183^1 § 2 sentence 1 ccp.). Mediation can also be initiated by a party's filing for mediation attempt (Article 183^1 § 2 sentence 2 in conjunction with Articles 183^6–183^7 ccp.).

In the case of referral to mediation by the court, some additional regulations are going to be applied, i.e.:

- Article 98^1 ccp. (in particular the first paragraph which states that in such a case the costs of mediation are among the necessary costs of the proceedings, so one can request for reimbursement thereof),
- the Regulation of the Minister of Justice of 30 November 2005 on the Remuneration and Reimbursable Expenses of the Mediator in Civil Proceedings[8], issued pursuant to Article 98^1 § 4 ccp. (the remuneration and reimbursable expenses of the mediator are also treated as the necessary costs of the proceedings),

8 Journal of Laws 2013, item 218. The Regulation sets limits of the mediator's remuneration; in pecuniary matters it is a maximum of 1000 PLN regardless of the value of the subject of the dispute and in non–pecuniary matters each meeting is chargeable – the first at 60 PLN and the next 25 PLN each.

– Article 79 paragraph 1 point 2a of the Act on Court Costs in Civil Proceedings which provides for the court's obligation to return ¾ of the court registration fee to the party of first instance proceedings, if during the proceedings a settlement was reached in front of a mediator,
– Article 104^1 ccp. which provides for mutual cancellation of the costs of mediation that resulted in settlement, unless the parties agreed otherwise (it means that in such a case parties bear their own costs; if the plaintiff is not exempted from paying the court costs, he/she will bear the court fees and the costs of legal representation and the defendant, if legally represented, will bear the costs of legal representation)[9].

A party exempted by law or granted a complete waiver or a partial waiver from the court costs of the case that mediation was held in is not freed from the obligation to pay the costs of mediation, i.e. the mediator's remuneration and expenses incurred in connection with mediation. It does not matter whether the party is exempted by law or granted a waiver. In practice, this means that the mediator's remuneration and expenses will be charged also to a person exempted from the court costs[10]. There is also a universal provision relating to both judicial and extrajudicial mediation, i.e. Article 183^5 ccp. pursuant to which the mediator is entitled to remuneration and reimbursement of expenses associated with conducting the mediation, unless he/she agreed to mediate without remuneration. This flexible formula allows the parties and the mediator to agree on remuneration or specify how the remuneration is to be determined. The question arises when this agreement on financial issues should be concluded and whether it is a prerequisite to mediation. The legal provisions do not specify this clearly but it should be assumed that the duty to inform the parties of remuneration is determined in:

– p. XI of the Code of Ethics for Polish Mediators of May 2008[11] as follows: "The mediator shall provide the parties with clear

9 M. Skibińska, *op. cit.,* p. 51.
10 M. Białecki, *Mediacja w postępowaniu cywilnym*, Warszawa 2012, p. 255.
11 http://ms.gov.pl/Data/Files/_public/mediacje/adr1/kodeksetyczny.pdf (11 December 2013).

and unambiguous information about his remuneration and all expenses relating to the proceedings in which they participate";

– standard X of the Standards of 26 June 2006 on Conducting of the Mediation Proceedings and the Conduct of the Mediator [12] as follows: "Mediator may provide information about the institution of mediation, the benefits resulting from it and its costs. Such information should be reliable and comprehensive".

Both provisions have been prepared by the Social Council for Alternative Dispute and Conflict Resolution. The requirements regarding information on mediator remuneration is merely a recommendation, and thus failure to observe has no adverse effects on a mediator[13]. However, one must remember that the mediator can relinquish only remuneration and not reimbursement of expenses[14] related to conducting mediation. One can define the anticipated expenses in terms of their amount using the necessity test known in civil procedure. Both the mediator's remuneration and reimbursement of expenses are charged to the parties[15]. If mediation was conducted by a permanent mediator selected from the list of a mediation centre, it results in acceptance by the parties of the tariff rates applied by the centre. The mediation contract should determine which party and to what extent shall bear the costs of mediation[16]. The mediator does not guarantee the conclusion of a settlement by the parties in the mediation process but he/she has an unlimited possibility to identify the causes of the conflict and discuss with the parties possibilities to prevent the dispute and to search for a solution[17]. That is why the mediator's remuneration is not dependent on the outcome of the mediation. It follows from the above that the law–maker has left the parties the power to determine the amount of remuneration and reimbursement of expenses according to the principle

12 http://ms.gov.pl/pl/dzialalnosc/mediacje/spoleczna–rada–ds–alternatywnych–metod–rozwiazywania–konfliktow–i–sporow/dokumenty–deklaracje/ (11 December 2013).

13 M. Skibińska, *op. cit.*, p. 45.

14 In literature, there can be found opinions that the mediator's possibility to relinquish only remuneration and not the expenses is the result of defective drafting of Article 183[5] ccp.

15 T. Żyznowski, [in:] H. Dolecki, T. Wiśniewski (ed.), *Kodeks postępowania cywilnego. Komentarz. Tom I*, Warszawa 2013, p. 662.

16 E. Stefańska, [in:] M. Manowska (ed.), *op. cit.*, p. 344.

17 M. Malczyk, [in:] A. Góra–Błaszczykowska (ed.), *op. cit.*, p. 508.

of freedom of contract referred to in Article 353[1] of the Civil Code[18] which states that contracting parties may shape the legal relationship at their discretion unless its content and/or purpose contradict the properties (nature) of the relationship, the law or the principles of social co–existence. The parties therefore have a power that they do not have in court proceedings where the court is the only body allowed to make decisions with respect to the costs. It should be noted that the parties have an impact on the amount of remuneration and reimbursement of expenses of a mediator (which admittedly are the major costs of mediation) and can significantly reduce the costs of the mediation proceedings. Opting instead for the court path, we have pre–defined fees, e.g. court registration fees. At the time of the conclusion of the mediation contract the parties usually already know the costs of mediation, which is favourable compared to court proceedings; in relation to the latter it is difficult to predict whether: the proceedings will end before the court of the first or second instance; a cassation appeal will be brought to the Supreme Court; the party will need assistance of a professional representative[19]. The Code of Civil Procedure also provides for a kind of "promotion" with respect to the mediation contract. Namely, according to Article 98[1] § 2 ccp., if civil proceedings are commenced within three months from the conclusion of the mediation proceedings that a settlement has not been reached in or within three months from the date when the decision to refuse approval of the settlement by the court became final, the necessary costs of the proceedings include the costs of mediation of up to a quarter of the court fee. This provision refers to situations where, first, the mediation was conducted under the mediation contract concluded by the parties but a settlement was not reached, or, second, if the parties reached a settlement but the court refused to approve it. The reckoning of the costs of these proceedings is therefore possible only in a situation when the party initiates court proceedings under the conditions laid down in Article 98[1] § 2 ccp.

When comparing the costs of litigation and mediation we must refer to the costs associated with participation of professional representative

18 Act of 23 April 1964 – Civil Code (consolidated text Journal of Laws 2014, item 121).
19 M. Skibińska, *op. cit.*, p. 44.

in these proceedings (attorney or legal advisor). Whereas in the case of court proceedings, one can hear about the legal representation quite often, in the case of mediation the participation, role and position of a professional representative is debatable (this is mainly due to means of dispute resolution in the ADR procedures different from judicial means of dispute resolution). Needless to say, involvement of a professional lawyer in a lawsuit can result in a significant expense. In the case of mediation, especially in the initial period of its operation, legal corporations have begun to fear they may be losing a significant part of their income. This was mainly due to unawareness of the rules relating to the mediation and the role the professional lawyer (classically trained to legal representation) can play in. The current corporate regulations, in particular the principles of ethics, require attorney and/or legal advisor to inform the client about the possibility of amicable settlement of the dispute, submission to mediation, especially when compared to court proceedings this will enable the client to save costs and will be in his best interest[20]. This raises the questions: (1) whether it is worth at all being legally represented in ADR procedures and (2) whether any assistance of a professional representative in preparation for the mediation and/or during the mediation may be cheaper than his/her participation in the court proceedings. With regard to the first question, the answer depends on the individual case because each mediation is different and if in the majority of cases the parties can do very well alone, then in some cases his/her participation may be advisable due to the complexity of the case. The basis for the costs of his/her participation is primarily the agreement with the represented party. However, in practice, the actual costs are lower due to the fact that it is in the interests of the parties themselves. From the point of view of a lawyer it is justified by the following arguments:

– the possibility to obtain additional remuneration (success fee); it depends on the lawyer's ability to convince the client that such a solution as mediation is profitable also for the client;

20 For more information on this subject see A. Bieliński, *Rola i pozycja profesjonalnego pełnomocnika w ramach procedur alternatywnego rozwiązywania sporów*, ADR. Arbitraż i Mediacja 2010, No. 2, p. 8–9.

– a chance for long–term cooperation; these relationships, the possibility to cooperate for a long time can be even more attractive financially than the one–off transaction;
– quick receiving of remuneration; mediation means money obtained from the client much faster; in the case of the classical process, a lawyer often has to wait for remuneration until the final judgment;
– the action in the interest of the client; if there is a chance for earlier, faster and cheaper solution, the client should be informed about this opportunity as it is in fact his/her case, decision and money.

Also from the client's view such an attitude of a professional representative is beneficial because the cost burden is lower than in the course of court proceedings, primarily due to a faster and less complicated procedure of mediation as well as a real chance of earlier payment by the debtor[21].

From the foregoing, we can formulate some clear conclusions. First of all, alternative dispute resolution, including mediation at the forefront, may indeed be a viable alternative in comparison to the "classic" court justice in terms of both a decision on the merits and costs of the proceedings. However, problems can arise with the very willingness to use alternative methods (due to solidified beliefs of the society that only *stricte* judicial procedures are able to protect our interests properly). Moreover, some disputes are not suitable for mediation. However, as a rule, compared to judicial proceedings the alternative methods provide a real opportunity for savings of both direct and indirect costs, e.g. incurred by involvement in long–lasting judicial proceedings resulting in a decline in the reputation of the company which may affect its revenues[22]. It should be emphasized that the EU regulations promote mediation as a method allowing for cost savings[23]. Of course, sometimes the costs of the mediation proceedings may be equal or even higher than

21 M. Bobrowicz, *Mediacja. Jestem za*, Warszawa 2008, p. 73–74.
22 M. Skibińska, *op. cit.*, p. 59.
23 See paragraph 6 of the preamble to the Directive of the European Parliament and the Council No. 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters (OJ L 2008, No. 136, p. 3).

those incurred in connection with court proceedings (which can take place, in particular, when the mediation proceedings initiated before court proceedings do not lead to the expected goal and the intervention of a judicial authority becomes necessary). The obstacles may exist also in the form of imprecise legal regulation or provisions that did not take into account the specificity of alternative methods (in particular, e.g., strict compensation scheme set out in the Regulation of 2005 referring to the principles of remuneration of the mediator and limiting his remuneration in pecuniary matters to the amount of 1 000 PLN regardless of the value of the subject of the dispute). However, if these legislative gaps will be filled and the cases referred to mediation will be suitable for this procedure, then benefits of mediation will be quickly noticed and appreciated[24]. It should also be seriously considered whether it is worth introducing the obligation to submit to mediation before initiating court proceedings with regard to minor pecuniary matters. Undoubtedly, this could help to save both the costs of the parties and expenses of the Treasury related to the administration of justice.

24 M. Skibińska rightly points that one of the methods allowing for cost savings (including the same mediation) may be the introduction of the so–called e–mediation (on–line mediation) undertaken by e–mail, video conferencing or instant messaging); M. Skibińska, *op. cit.*, p. 52–54.