

**A short presentation of the Polish mediation system  
in comparison to the Spanish one**

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**A SHORT PRESENTATION OF THE POLISH MEDIATION SYSTEM IN  
COMPARISON TO THE SPANISH ONE**

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**Abstract:** *The following article contains a short presentation of the functioning of the mediation procedure in civil cases in Poland in comparison to the one existing in Spain. In light of the enforcing of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters which forced all members of European Union to implement a mediation procedure into their legal system, the goal of the article is to look at the differences and similarities existing in these two legal systems after implementation this Directive. Due to this being just a short presentation the author only indicates a few of the most important points of the Polish mediation system in civil cases, concentrating on the four following points: i) the way in which the mediation procedure is regulated; ii) the possible way of initiating the mediation procedure; iii) the requirements for becoming a mediator; iv) the possible way of enforcing mediation settlement. In conclusion, the author presents her opinion on how the existing distinctions may affect the development of mediation.*

**Extracto:** *En el marco de la ejecución de la Directiva 2008/52 / CE, ciertos aspectos de la mediación en asuntos civiles y mercantiles, los Estados miembros de la Unión Europea fueron obligados a instaurar el procedimiento de mediación en sus sistemas jurídicos como método de resolución de controversias. El siguiente artículo contiene una breve presentación del proceso de mediación civil y su funcionamiento en Polonia, y una comparativa con el sistema de mediación establecido en España, analizando las diferencias y similitudes existentes en estos dos sistemas legales tras la implementación de la Directiva en ambos países. En el artículo, la autora presenta su opinión respecto de las diferencias existentes entre ambos sistemas jurídicos, y cómo éstas pueden afectar al desarrollo de la institución de la mediación. Los puntos relevantes del sistema de mediación polaco en casos civiles que la autora ha querido destacar son: i) La regulación del procedimiento de mediación; ii) Cómo se inicia un procedimiento de mediación; iii) Los requisitos para ser mediador; iv) Las posibles maneras de hacer cumplir al acuerdo de mediación.*

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### I. Introduction.

Alternative Dispute Resolution, that is any method of resolving disputes other than by litigation, is nowadays the object of great interest of the European Union and scientists exploring the subject of resolving conflicts. ADR seems to be a good alternative for the traditional trial as a more effective, cheaper and more flexible way of resolving conflicts, and because of this, it should be promoted.

Following this way of thinking, the European Union inter alia concentrated on promoting the idea of mediation as a way of *maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured*.<sup>1</sup> The community came to conclusion that the only way to make mediation eventually happen in the EU is by introducing a mandatory form of mediation. Because of this, on 21 of May 2008 the European Parliament and the European Council enforced Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (hereafter referred to as *Directive*). Since then all the members of the European Union, even those lacking such whatsoever, have had to implement a mediation procedure into their legal system.

As it is well-known, members of the European Union do not apply European directives in a straightforward matter, they have to adopt them to their legal systems, this creates differences between particular countries and their ways of using these regulations.<sup>2</sup> In this article, I am going to shortly present how mediation in civil cases functions in Poland and draw your attention to existing differences and similarities in comparison to the Spanish legal system. Due to this being just a short presentation I will only indicate a few of the most important points of the Polish mediation system in civil cases, concentrating on the four following points:

- the way in which the mediation procedure is regulated,
- the possible way of initiating the mediation procedure,
- the requirements for becoming a mediator,
- the possible way of enforcing mediation settlement.

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<sup>1</sup> 1 Introduction to 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 2008, item L 136/3).

<sup>2</sup> 2 C. Mika, The methodology of implementation of European Community law in national legal systems, in: Implementation of European integration law in national legal systems, ed. C. Mika, Toruń 1998, p. 28 – 29 et al.

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### **II. The way in which mediation procedure is regulated in the Polish legal system**

At the beginning, it is necessary to mention that in Poland, similarly as in Spain, there is not just one act regulating mediation in all legal branches. Every legal field has its own acts and codes which contain particular regulations about the mediation procedure. In Spain mediation in civil and commercial cases is mainly regulated by the Act 5/2012, of July 6, mediation in civil and commercial matters (hereafter referred to as *Act 5/2012*) and the Royal Decree 980/2013, of 13 December, amending certain aspects of the Act 5/2012, of July 6, mediation in civil and commercial matters develop (hereafter referred to as *Royal Decree 980/2013*), in Poland by the Act of 17 November 1964 Code of Civil Procedure (hereafter referred to as *CCP*) and the Act of 23 April 1964 Civil Code (hereafter referred to as *CC*).

### **III. A possible way to initiate a mediation procedure**

Also the way of initiating a mediation procedure is the same in these two legal systems. There exists a possibility of private mediation in Spain<sup>3</sup> as well as in Poland<sup>4</sup>. It means that the parties of a conflict may initiate mediation by themselves, out of the court, by going directly to a mediator.

However, even if the case has already been brought before the court, resolving a conflict by mediation is still possible. Then mediation can be decided upon by the court or be requested by one, two or all sides of the conflict (conventional mediation). Nevertheless, regardless of the initiator of mediation, it must be agreed upon by all the parties taking part in it, which is directly linked to the principle of voluntary mediation (Art. 183<sup>1</sup> § 1 CCP). Voluntariness is one of the key principles of mediation resulting from the EU Directive in force in the two legal systems: Polish and Spanish (Art. 3 (a) Directive).

What is also important, *If the court wishes to order a case for mediation ex officio, it can do so by the end of the first hearing (Art. 183<sup>8</sup> § 1 CCP)<sup>5</sup>* and it can do it only once during the whole proceedings (Art. 183<sup>8</sup> § 2 CCP). However, at any stage of the trial the court may suggest mediation to the parties according to the general rules of the proceedings.

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<sup>3</sup> Villamarín López M. L., Mediation in Spain: Dealing with Its First National Regulation, in: Steffek F., Hopt K. J. Mediation: Principles and Regulation in Comparative Perspective, Oxford 2012, p. 844.

<sup>4</sup> Morek R., Rozdeiczner Ł., Mediation in Poland: Time for a Quiet Revolution? in: Steffek F., Hopt K. J. Mediation: Principles and Regulation in Comparative Perspective, Oxford 2012, p.780.

<sup>5</sup> Ibid, p. 780.

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It is also necessary to mention that the Code of Civil Procedure also gives the parties the right to make a settlement before the trial starts (Art. 183<sup>2</sup>§2CCP). What is interesting, the CCP does not call the procedure “mediation” but it *may be considered as ‘judicial (quasi-)mediation’—conciliation. The procedure is handled by a judge based on a pre-trial request by a party. Parties participate in this procedure on a voluntary basis. If successful, this results in a court settlement; if not, a creditor has to file a claim against a debtor in a separate proceeding.*<sup>6</sup>

This procedure seems to be very similar to mediation and it is supposed to play an important role in a process of resolving conflicts. Unfortunately, in reality it is used to achieve totally different goals. Facts that submitting an application to a court to commence the settlement procedure interrupts the running of the limitation periods (Sentence of the Polish Supreme Court, 19 of March 2012, II PK 175/11) and the fee of this request costs only EUR 15 (Art. 23 Act of 28 July 2005 on court costs in civil cases, consolidated text Journal of Laws 2014, item 1025) make that *In most cases, the procedure is not used to settle the case, but merely to interrupt the running of limitation periods, or to warn a future respondent that a potential claimant is ready to file a court case.*<sup>7</sup>

### IV. The requirements for becoming a mediator

The Polish law is very liberal in the matter of requirements for becoming a mediator. As in Spain (Art. 11 (1) Act 5/2012), to be a mediator in Poland in civil cases it is necessary to be a natural person with full legal capacity, enjoying full civil rights. Moreover, the mediator may not be an active judge but this does not apply to retired judges (Art. 183<sup>2</sup> CCP). The Polish legislation does not specify the age, nor the education and occupation which a practicing mediator should have, when dealing with civil cases. Usually it is enough to have completed a training in mediation (but the law does not demand it in a straightforward matter) and be registered in the list of permanent mediators (made by social organizations and universities) to be able to provide mediation on the order of a court.

This lack of statutory requirements for becoming a mediator is a big difference in comparison to the Spanish legal system which states that a mediator must have a university degree and have completed a special training provided by one of the accredited institutions (Art. 11 (2) Act 5/2012).

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<sup>6</sup> Morek R., Rozdeiczer Ł., Mediation in Poland: Time for a Quiet Revolution? in: Steffek F., Hopt K. J. Mediation: Principles and Regulation in Comparative Perspective, Oxford 2012, p.781.

<sup>7</sup> Ibid, p. 781.

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In practice, more detailed requirements for mediators are determined by the internal regulations of the mediation center and also often taken into account by the courts, which send the matter to be mediated within the so-called judicial mediation<sup>8</sup>, nevertheless this current system is heavily criticized and practice shows that it is necessary to amend the rules in this area in order to ensure high professional qualifications of mediators; especially that nowadays there is no *legal guidance on the right and/or duty to use the title of mediator, nor are there any regulated complaint schemes or disciplinary proceedings*<sup>9</sup>.

Moreover, there are also private acts created to set some standards in mediation, for example *the Code of Ethics of Polish Mediators of 19 May 2008* adopted by the Civic ADR Council. To compare, Spain has only one private regulation on mediation in civil matters – *the Code of Ethics of the Association of Mediators of Madrid of 2010*<sup>10</sup>.

### V. The possible way of enforcing mediation settlement

In civil cases where the parties entered into a settlement agreement, it shall be attached to the minutes (Art. 183<sup>12</sup> § 1 and § 2 CCP). The mediator shall inform the parties that by signing the agreement they agree to apply to the court for its approval (Art. 183<sup>12</sup> § 2<sup>1</sup> CCP). The mediator shall send the protocol with the settlement forward to the competent court and serve a copy of the minutes to the parties (Art. 183<sup>12</sup> § 3CCP). The court shall immediately carry out the procedure as to the approval of the settlement or grant the enforcement clause for settlement with the mediator. The court shall refuse to declare a settlement enforceable or validate a settlement reached before a mediator in whole or in part, if the settlement is contrary to the law, social norms, or intends to circumvent the law, or when it is incomprehensible, or contradictory. A settlement reached before a mediator that was validated by issuing a writ of execution, has the power of a settlement concluded before a court and may be subject matter of execution (Art. 183<sup>14</sup>CCP). It means that the mediation settlement has a ‘dual’ legal character, which combines features derived from procedural law (such as the force of executory title) and from substantive law (binding as a contract). What is necessary to emphasize is that without the court’s validation the settlement cannot be a writ of execution and

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<sup>8</sup> Morek R., *Mediation in civil matters*, Warsaw 2012, p. 10.

<sup>9</sup> Morek R., Rozdeiczner Ł., *Mediation in Poland: Time for a Quiet Revolution?* in: Steffek F., Hopt K. J. *Mediation: Principles and Regulation in Comparative Perspective*, Oxford 2012, p. 801.

<sup>10</sup> VillamarínLópez M. L., *Mediation in Spain: Dealing with Its First National Regulation*, in: Steffek F., Hopt K. J. *Mediation: Principles and Regulation in Comparative Perspective*, Oxford 2012, p. 842.

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only the court is able to make this validation as opposed to the Spanish system in which the agreement can also be recorded in a deed by a notary<sup>11</sup>. In both systems however, without this formal approval the parties could only enforce it in a declarative process - as documentary evidence, alike any type of contract between individuals. It cannot be executed then.

### **VI. Conclusion**

To sum up, after a short analysis, it is possible to conclude that the procedure of mediation in Poland and Spain does not differ much. I think that the distinction which may have the biggest influence on the development of mediation and its quality is the lack of qualification requirements for mediators in Poland and also the possibility of using mediation or (*quasi-*)*mediation* to interrupt the running of limitation periods. These two factors can and do make that mediation in Poland is not treated as a serious alternative for the traditional trial and since the beginning of its functioning has the opinion of something of doubtful quality, not worthy of any attention. In my opinion, mediation in Poland cannot make any progress and in consequence become more popular, without changing these regulations and proper educational preparation of mediators.

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<sup>11</sup> VillamarínLópez M. L., *Mediation in Spain: Dealing with Its First National Regulation*, in: Steffek F., Hopt K. J. *Mediation: Principles and Regulation in Comparative Perspective*, Oxford 2012, p. 849.

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