Chapter 4.

MEDIATION BEFORE ADMINISTRATIVE COURTS IN POLAND

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1. General assumptions

Litigation is a situation in which one party makes a claim, complaint or demand that the other party contests. Settlement of these disputes is primarily the court's responsibility. The essence of this method of dispute resolution is as follows:

1) a binding character of decisions and legal sanctions system's support,
2) depriving the parties of influence of the choice of the person who settles the dispute,
3) ensuring that parties to the proceedings actively participate in the proceedings, particularly by quoting the relevant arguments, submitting evidence or making other claims[2].

Litigation is perceived as an expensive and time consuming method of resolving disputes. That is why the idea of alternative dispute resolutions (ADR) has arisen. It is said that ADR is more beneficial for parties to resolve their differences by negotiated agreement rather than through contentious proceedings. There are differences between scholars and practitioners as for philosophy and approach to ADR. However, we can define alternative dispute resolution as an umbrella term describing

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2 Z. Kmieciak, *Mediacja w polskim prawie administracyjnym,* [in:] H. Machińska (ed.), *Mediacja w sprawach administracyjnych*, Warszawa 2007, p. 35.

a range of practices designed to assist parties to achieve a resolution of their dispute without the necessity of going to court for a full trial in a courtroom. Alternative dispute resolution comes in a variety of forms[3]. The principal ones are arbitration, mediation and conciliation.

Mediation is a technique whereby a third party – a mediator – who is neutral as far as the parties to the dispute are concerned, attempts to explore the possibilities for the parties reaching an outcome which satisfies both of them. This is sometimes known as "win–win" to contrast with a court process, which may be characterized as "win–lose". This outcome will not necessarily be one which court would have reached. It has the advantage that the decision will be one at which the parties have themselves arrived, albeit with the advice and assistance of the mediator[4].

In Europe the term "standards of ADR" has been used for a long time. However, the idea and different forms of ADR developed in the USA, where they are widely used. European consistent rules derive from acts issued by the Council of Europe and its body – the Committee of Ministers.

The aim of this chapter is to present mediation in administrative matters before Polish provincial administrative courts according to the European rules formulated by the Council of Europe. It analyzes provisions of the Law on Proceedings Before Administrative Courts[5] that regulates mediation as well as the possibilities of using ADR in administrative matters.

2. European rules referring to Alternative Dispute Resolutions

Recommendations of the Council of Europe constitute soft–law, which means they are guidelines and states have a wide discretion in making their own regulations implementing the concept of alternative

3 M. Parington, *Introduction to the English Legal System,* New York 2008, p. 209.
4 *Ibid*.
5 The Act of 30 August 2002 – Law on Proceedings Before Administrative Courts (consolidated text Journal of Law 2012, item 270, as amended), hereinafter referred to as l.p.a.c.

dispute resolution. There are three recommendations that deal with alternative dispute resolutions in court proceedings and all of them refer to Article 6 section 1 of the European Convention on Human Rights, which protects the right to a fair trial[6].

In the Recommendation of 14 May 1981 No. R (81) 7 on Measures Facilitating Access to Justice the Committee of Ministers to Member States noticed that court procedure is often so complex, time–consuming and costly that private individuals, especially those in an economically or socially weak position, encounter serious difficulties in the execution of their rights in member states. In order to simplify the procedure, the Committee advised that measures should be taken to facilitate or encourage, where appropriate, the conciliation of the parties and the amicable settlement of disputes before any court proceedings have been instituted or in the course of proceedings. All measures should be taken to minimize the time to reach a determination of the issues. To this end steps should be taken to eliminate archaic procedures which fulfill no useful purpose, to ensure that the courts are adequately staffed and they operate efficiently, and to adopt procedures which will enable the court to follow the action from an early stage. Moreover, provisions should be made for undisputed or established liquidated claims to ensure that in these matters a final decision is obtained quickly without unnecessary formality, appearances before the court or cost.

In another Recommendation No. R (86) 12 of 16 September 1986 on Concerning Measures to Prevent and Reduce the Excessive Workload in the Courts the Committee invites the governments of member states to consider the advisability of pursuing one or more of the following objectives:

– encouraging, where appropriate, a friendly settlement of disputes, either outside the judicial system, or before or during judicial proceedings;

6 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

– not increasing but gradually reducing the non–judicial tasks entrusted to judges by assigning such tasks to other persons or bodies;
– providing for bodies which, outside the judicial system, shall be at the disposal of the parties to solve disputes on small claims and in some specific areas of law;
– taking steps, by suitable means and in appropriate cases, to make arbitration more easily accessible and more effective as a substitute measure to judicial proceedings;
– generalizing, if not yet so, trial by a single judge at first instance in all appropriate matters;
– reviewing at regular intervals the competence of the various courts as to the amount and nature of the claims, in order to ensure a balanced distribution of the workload;
– evaluating the possible impact of legal insurance on the increasing number of cases brought to court and taking appropriate measures, should it be established that legal insurance encourages the filing of ill founded claims.

In the second half of the nineties of the last century the Committee on Legal Co–operation – Project Group on Administrative Law started working on a draft concerning alternative dispute resolutions between public administration and an individual. As a result of this work the Committee of Ministers of the Council Europe adopted on 15 September 2001 Recommendation No. R (2001) 9 on alternatives to litigation between administrative authorities and private parties. In this act the Committee underlines that the courts' procedures in practice may not always be the most appropriate to resolve administrative disputes. This recommendation deals with the following alternative means: internal reviews, conciliation, mediation, negotiated settlement and arbitration. Alternative means to litigation should be either generally permitted or permitted in certain types of cases deemed appropriate, in particular those concerning individual administrative acts, contracts, civil liability and, generally speaking, claims relating to a sum of money. The regulation of alternative means should provide either for their institutionalization or their use on a case–by–case basis, according to the decision of the

parties involved. According to this recommendation the regulation of alternative means should:

- ensure that parties receive appropriate information about the possible use of alternative means;
- ensure the independence and impartiality of conciliators, mediators and arbitrators;
- guarantee fair proceedings allowing in particular for the respect of the parties' rights and the principle of equality;
- guarantee, as far as possible, transparency in the use of alternative means and a certain level of discretion;
- ensure the execution of the solutions reached using alternative means.

According to the Recommendation No. R (2001) 9, the widespread use of alternative means of resolving administrative disputes can allow these problems to be dealt with and can bring administrative authorities closer to the public.

3. Mediation before administrative courts

In Poland administrative matters are resolved by administrative bodies that act in accordance with the provisions of the Code of Administrative Proceedings[7]. These bodies guard the rule of law and take all the steps necessary to carefully clarify the state of affairs and resolve the issue with regard to the social interests and the justified citizens' interests. These bodies see to the fact that the parties to proceedings and other participants therein suffer no harm through ignorance of the law, and ensure the parties of active involvement in every stage of the proceedings. Administrative proceedings occur in two instances. Administrative court proceedings may be initiated only after all means of appeal have been exhausted if the complainant had recourse to such resources during proceedings before the relevant court[8].

7 The Act of 14 June 1960 – Code of Administrative Proceedings (consolidated text Journal of Laws 2013, item 267).

8 Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union i.n.p.a., www.juradmin.eu/index.php/en/tour–d–europe–en (15 May 2013).

Administrative disputes between an individual and public authority can be resolved only by administrative courts. The court proceeding is regulated in l.p.a.c. and has been used since l.p.a.c. came into force in 2004. These provisions in Articles 115–118 l.p.a.c. regulate the mediation procedure that can be initiated before administrative courts. Administrative disputes cannot be considered by independent bodies. It is emphasized that the introduction of non adjudication dispute settlement is the result of a trend occurring in modern law, and therefore strives for amicable settlement of disputes.

Mediation was introduced to the Polish law because of the need to develop alternative disputes resolutions, which are less expensive and simpler than traditional adjudication by the court.

The essence of mediation is the parties, assisted by the court, searching for such a method of settling the matter within the law that will be satisfactory to both parties. The purpose of mediation, bearing in mind the primary function of administrative justice – administration of justice by controlling the activities of the public administration in terms of compliance with the law – is for the person conducting the mediation proceedings to explain to the parties whether or not, in the course of proceedings before an administrative authority, the law had been infringed, in which exactly it lies on, which might result in the next infringement of law and what actions should be taken by the administration in order to exclude these infringements. After admitting certain infringement of law, public administrative authority may itself eliminate a faulty legal act or actions and dispose the administrative matter substantively. On the other hand, the explanation to the applicants that they wrongly detected violation of law in the operation of the administrative authority may lead to the withdrawal of the complaint and consequently to cancellation of an administrative litigation. The use of the mediation speeds up the completion of the substantive matter before administrative courts. Generally, given that the jurisdictional powers of the administrative provincial courts are of cassation nature (court cannot decide the merits of the case), the court allowing the complaint causes on

the side of a public administration authority redispose an administrative matter[9].

It is possible to hold mediation proceedings, presided over by a judge or a court referee. Such proceedings are held at the request of a complainant or administrative authority, submitted prior to the start of the court case. The purpose of the mediation proceedings is to clarify and consider the factual and legal circumstances of the case and lead the parties to an agreement on ways of resolving the dispute within the limit of binding law[10]. On the basis of the decisions agreed upon in the mediation proceedings, an administrative body annuls or amends the act that was complained against, or takes other actions appropriate to the circumstances of the case and within the limits of its competencies[11].

Request for mediation may be contained in the complaint, the response to the complaint or in a separate document. The party that brings an application should consult it with the other party. An application by a party for mediation is not binding[12].

The parties may submit an application prior to the determination of the hearing at the latest. Setting a hearing date should be understood as a date of an order of the Division President or the Judge–Rapporteur about the appointment of the hearing. A request made after the appointment of the hearing is ineffective. In this situation there are two possible solutions. If the Judge–Rapporteur or the secretary court finds that there are no circumstances indicating the desirability of conducting the mediation, the court at the hearing that has already been designated, issues a decision to dismiss a request for a mediation procedure. Such an order must be entered into the minutes of the hearing without writing and publishing a separate ruling. The provision does not require justification because the party has no right to appeal to the court of higher instance. If, however, the Judge–Rapporteur and Secretary court consider that there are grounds to conduct the mediation of the office, then depending on the circumstances, the president will refer the case to

9 Annual Report on activity of administrative courts in 2005, p.14–15, www.nsa.gov.pl/index.php/pol/NSA/Sprawozdania–roczne2 (15 May 2013).
10 Article 115 § 1 l.p.a.c.
11 Article 117 § 1 l.p.a.c.
12 B. Dauter (ed.), *Postępowanie sądowoadministracyjne. Komentarz,* Warszawa 2011, p. 346.

mediation meeting with the participation of the Judge–Rapporteur and the clerk of the court[13].

Article 115 § 2 l.p.a.c. provides an independent basis to conduct the mediation ex officio. According to § 36 section 1 of the Provincial Courts Regulations[14], the Judge–Rapporteur decides to carry out the mediation process, and if, in the absence of an application of the parties, there are circumstances indicating the desirability of conducting the mediation, they shall conduct the proceedings. Article 115 § 2 l.p.a.c. does not determine any deadline for the mediation proceedings taken ex officio. It is assumed that, in principle, the decision to conduct mediation should be made prior to the appointment date of the hearing. This does not mean, however, that mediation can not be carried out later (at the hearing). It is assumed that the mediation is possible until a decision in the case is issued. However, postponement of the trial because of the mediation proceedings should be assessed as unjustified[15].

The optional mediation proceedings determined in Article 115 § 2 l.p.a.c., are a right and not an obligation of the administrative court[16].

Provincial administrative courts are divided into chambers. According to § 2 section 5 of Provincial Courts Regulations there can be created a separate department for disposing the matter in the mediation process and for granting legal aid. If a separate department was created to deal with issues in mediation proceedings, those proceedings shall be carried out by this department.

At the mediation meeting the parties shall appear in person[17]. The public authority whose action or inaction is the subject of the complaint, should appear in person empowered to accept the findings as to how to settle the matter[18].

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13 *Ibid*, p. 346–347.
14 Regulation of the President of the Republic of Poland of 18 September 2003 on Provincial Courts Regulations (Journal of Laws 2003, No. 169, item 1646).
15 B. Dauter (ed.), *op. cit.,* p. 347.
16 Judgment of the Supreme Administrative Court of 16 May 2008, II OSK 438/07, LEX No. 505306.
17 Article 116 § 2 l.p.a.c.
18 B. Dauter (ed.), *op. cit.,* p. 350.

It should be assumed that in cases in which the applicant or the public authority asked for the mediation, the mediation in general should be carried out[19].

Current practice shows that mediation should be conducted by the court referee, and if it is not possible, by another judge appointed by the President of the Department (usually a Judge–Rapporteur). That will not cause any concern about the presence of a judge who is engaged in the dispute between the applicant and the public authority. Such a judge in the course of such proceedings would undoubtedly present their views on controversial issues in the case[20].

The duty of the mediator (the judge or the referee), regardless of whether the proceedings shall be conducted ex officio, upon the request of the applicant or the public authority, is an organizational preparation of mediation in such a way that at the first meeting conclusions as to how to settle the case should be drawn. In another situation, the mediation would not meet its role. The role of the mediator can not confine itself to listening to reasons presented by the parties to the dispute. The mediator, as a neutral person, being outside the dispute, should circumscribe the dispute occurring (its essence) in order to enable the parties to focus on the possible chances of an amicable settlement[21].

Another important factor of the quality of the investigation mediation is knowledge of the mediation psychology. Therefore an appropriate program and training to develop and improve the skills of acting as a mediator should be introduced.

The provisions of l.p.a.c. do not give the parties the right to choose a mediator. However, they may restrict their role to purely organizational tasks, without any possibility of their own suggestions for resolving the dispute. The mediator will always be responsible for ensuring that the fact adopted by the parties is within the scope of applicable law[22].

19 *Ibid.*
20 *Ibid.*
21 *Ibid.*
22 *Ibid*, p. 351.

Article 116 § 2 l.p.a.c. does not exclude the participation of the public at the mediation meeting, including representatives of the media. However, there is a possibility to quash the openness of the proceedings since Articles 96–97 l.p.a.c. are applicable *mutatis mutandis*. According to these provisions the person conducting mediation proceedings decides about quashing the openness ex officio or upon request.

The course of the mediation meeting is recorded in minutes, which shall contain the positions of the parties, in particular the arrangements made by the parties as to how to settle the matter. It is important for the further course of action to precisely record the content of the findings. First of all, they can not be contrary to law, shall accurately determine what the mutual obligations are, indicate the form and the exact date of implementation of the arrangements, and therefore contain all the elements that will later enforce these arrangements. Minutes shall be signed by a person leading mediation and the parties[23].

The arrangements adopted by the parties must be within the limits of applicable law. The l.p.a.c. does not specify who should carry out this disposition of the legal norm. It seems that this obligation will rest primarily on the person carrying out the mediation proceedings (judge or court clerk) and in the further place on a public authority, which on the basis of the findings of the mediation process will repeal or amend the contested act or will take another action. A person that is conducting the mediation proceedings should recourse to Article 60 l.p.a.c., which provides that the court is not bound by the withdrawal of the complaint if the withdrawal of the application seeks to circumvent the law or would uphold the act or actions that are invalid[24].

Measures adopted by public authorities on the basis of the findings of mediation may become the subject of a complaint to the provincial administrative court. According to law, it should be submitted within 30 days of the receipt of an act or an action. The final result of mediation – auto verification of its own decision by a public authority – is therefore subject to judicial review. Examining the lawfulness of public administration actions, the court may dismiss the findings established in

23 *Ibid,* p. 351–352.
24 *Ibid.,* p. 352.

the minutes of the mediation. There should be no doubt that if a public authority withdrew from these findings (containing an admission of an error), it duly justifies setting aside an act (action)[25]. The table below shows the number of mediations carried out between 2004 and 2012 by administrative courts.

Table 1. Mediations between 2004 and 2012[26].

Year	2004	2005	2006	2007	2008	2009	2010	2011	2012
No. of initiated mediations	679	406	172	87	36	21	11	23	25
No. of disposed matters	170	223	66	17	16	3	2	8	4

Practice shows that the institution of mediation in this form has not been caught on in the administrative judiciary, as it is evidenced by the steadily decreasing number of cases handled in this proceeding.

As the data indicate initially the prognosis to conduct mediation in administrative matters was positive. The Annual Report reveals that the advantages of this institution were recognized mainly by tax authorities and courts. Other entities in the proceedings demonstrated moderate confidence or lack of confidence in this institution. For instance, in most cases they do not respond to the call to clarify the circumstances of the case, which could be the subject of arrangements[27].

In mediation proceedings matters related to taxes and public finance predominated and mediation was conducted largely upon the request of a public authority or court.

Since 2006 we have been able to observe the rapid decline of the matters resolved in mediation. It is hard, however, to give reasons for this situation. Annual reports dated from 2006 suggest that this is due to the improvement of the efficiency and speed of the procedure before many

25 Z. Kmieciak, *Postępowanie mediacyjne i uproszczone przed sądem administracyjnym*, Państwo i Prawo 2003, No. 3, p. 25.
26 www.nsa.gov.pl (15 May 2013).
27 Annual Report on activity of administrative courts in 2005, www.nsa.gov.pl/index.php/pol/NSA/Sprawozdania–roczne2 (15 May 2013).

administrative courts. Short periods in which the cases are dealt make the mediation lose its main asset – the acceleration of an administrative litigation[28]. Table 2 shows the time for considering of cases from the date of the receipt of the complaint or the previous reporting period to the settlement.

Table 2. Time for considering of cases from the date of the receipt of the complaint or the previous reporting period to the settlement[29].

Time	Less than 2 months	2–3 months	3–4 months	4–6 months	6–12 months	12–24 months	More than 24 months
2005	12 710	7641	5618	8790	17 882	15 355	19 387
2006	13 591	10 198	8490	11 387	15 661	11 951	7392
2007	15 103	11 604	8244	10 748	13 999	5316	1928
2008	13 823	11 768	9187	12 040	9378	2000	534
2009	15 578	11 984	9739	12 424	8423	1089	263
2010	19 701	13 825	9783	12 113	7954	1115	85
2011	20 886	14 014	9803	12 028	11 367	1130	53
2012	20 948	14 895	10 445	12 274	12 101	1129	74

According to H. Knysiak–Molczyk, the institution of mediation is incompatible with the nature of the administrative judiciary, which excludes the possibility of mediation by an administrative court in the scope of the legality of the act of applying the law by an administrative authority, and it is incompatible with the role and functions of the administrative courts and administrative litigation[30].

In the literature it is emphasized that the mediation procedure is wrongly constructed[31]. Recommendation of the Council of Europe No. R (2001) encourages using alternative means that also may serve

28 Annual reports on activity of administrative courts, www.nsa.gov.pl/index.php/pol/NSA/Sprawozdania–roczne2 (15 May 2013).
29 www.nsa.gov.pl (15 May 2013).
30 H. Knysiak–Molczyk, *Sądownictwo administracyjne pięć lat po reformie*, Przegląd Prawa Publicznego 2010, No. 1, p. 8.
31 Z. Kmieciak, *op. cit.,* p. 26.

to prevent disputes before they arise, this is particularly the case in respect of conciliation, mediation and negotiated settlement. This recommendation deals with the use of friendly settlement of disputes, either outside the judicial system altogether or before or during legal proceedings. The latter one does not place any restriction on the time whereas article 115 § 1 l.p.a.c. limited the time for using mediation when the hearing has been determined[32].

In the Polish system of administrative law mediation or different types of ADR are impossible in the administrative procedure. These methods would have served blanking of conflict when the parties are not antagonized[33]. Z. Janowicz stressed that the applicant wishes to meet with the administrative authorities just before the court at the hearing and be truly equal party to the dispute about the right[34].

It appears that court clerks and judges are not sufficiently prepared to act as a mediator in administrative court proceedings. Aversion to mediation is not only the result of the parties attitude to that institution, but also the court itself. Low number of mediations also proves that the court would rather decide the case authoritatively than seek a place for agreement between the parties and lead to an end of the proceedings, which will satisfy both sides.

4. Conclusion

It seems that a discussion about mediation is needed in Poland. The Law on Proceedings Before Administrative Courts should be amended in a way that parties and courts will use these institutions more frequently. Appropriate steps should also be taken in order to increase public awareness of the possibility of mediation and judges of administrative courts should be better prepared to lead the mediation proceedings. At present judges do not decide to take mediation not only because of the shorter period of time of resolving matters, but also due to the

32 Z. Kmieciak, *op. cit.,* p. 25.
33 *Ibid.,* p. 26.
34 Z. Janowicz, *Głos w dyskusji o reformie sądownictwa administracyjnego*, [in:] J. Stelmasiak, J. Niczyporuk, S. Fundowicz (eds.), *Polski model sądownictwa administracyjnego*, Lublin 2003, p. 157.

fact that they are not qualified mediators. It seems that in mediation in administrative matters it is not only time and costs that count but a common agreement achieved by the parties to the proceedings.