European Research Studies Journal
Volume XXIV, Issue 3, 2021

pp. 1001-1010

Mediation in Real Estate Disputes as an Element of the State's Economic Security Policy

Submitted 13/06/21, 1st revision 03/07/21, 2nd revision 25/07/21, accepted 28/08/21

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Abstract:

Purpose: *Mediation is one of the alternative forms of resolving legal disputes. Considering the importance of mediation in shaping social attitudes, and due to the scope of relevant possibilities introduced by the Polish legislator into the legal system, in this article we analyze the institution of mediation from the perspective of its application in real estate disputes, whose low costs and less formal nature compared to court trials relieve public funds, having a positive impact on the state's economic security policy.*
Design/Methodology/Approach: *The study was carried out using the method of problem analysis and synthesis, and its main goal was to systemize the research field for future studies.*
Findings: *The analysis highlights the enormous potential of mediation as an alternative method of dispute resolution, for real estate disputes. It was found that mediation can be highly beneficial for entities that choose this way of proceeding. This implies not only financial advantage, understood as optimizing the costs of proceedings, but also image-related benefits.*
Practical Implications: *The problems tackled in the article may contribute to increased awareness of alternative dispute resolution methods, especially mediation. The analyses carried out in this paper should be of value to entrepreneurs but also to natural persons who may find themselves in a dispute with real estate entities. Business owners should therefore pay attention to several legal and economic benefits that can be achieved with the use of mediation, especially that its use optimizes the level of the state's economic security policy pursued in this area.*
Originality: *The paper explores the problems of public and economic life that have not been much discussed in the literature in the context of solving real estate disputes. Entities that are unable to dialogue during real estate disputes may show a less conciliatory attitude, focused on escalating the conflict and getting their own way, rather than trying to constructively resolve the dispute, a situation which generates additional costs, especially in real estate business transactions, not only for the parties but also for the State Treasury.*

Keywords: *Mediation, dispute, security, real estate, settlement.*

JEL codes: *J52, K15.*

Paper type: *Research paper.*

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1. Introduction

Legal disputes are a common part of business trading. Especially when a dispute concerns real estate, they tend to arise from the negligence of one or both parties as to the arrangements set out in the contract for construction works, commercial leases regarding office and warehouse space, or agreements for the sale or purchase of real estate. Real estate disputes may therefore concern issues such as the settlement of remuneration for the works performed, or the calculation of contractual penalties for delays or due to the quality of the completed facilities and their technical defects. However, resolving real estate disputes in court is costly, especially for business owners, but also for company employees or even the State Treasury, due to the need to engage expert appraisers and arbitrators when these cannot be hired at the party's own discretion.

An alternative to judicial resolution of legal disputes is mediation, which is currently used in virtually all branches of law, although in practice it finds application mostly in private law disputes and therefore civil cases, which are the natural area of development of mediation. Real estate disputes are also part of public and economic life, where mediation could in many cases be successfully applied by settling the conflict not only formally but also by creating a platform for further cooperation. At the same time, the use of mediation in this area is desirable from the standpoint of the state's economic security policy, which is one of the components of state and societal security (Jurgilewicz *et al.*, 2019).

2. The Role of Mediation in Real Estate Disputes

Real estate disputes that most often fall within the ambit of private law are part of civil disputes when they concern, in particular, settlements under a real estate sale or lease agreement, etc. Meanwhile, in the case of construction work contracts and contracts related to the construction process for construction work (such as those involving design work), any potential conflict will constitute an economic dispute, despite being itself the example of a civil dispute. To resolve such disputes, mediation, as outlined in the provisions of the Act of 17 November 1964 Code of Civil Procedure (Journal of Laws of 2019, item 1460 as amended), can therefore be successfully applied. Let us note that the out-of-court procedure for settling civil disputes was fist introduced into the national legal system in 2003, when the Commission for the Codification of Civil Law, acting under the Ministry of Justice, began probing this problem area through an arbitration think tank.

However, it was only at the end of 2005 that the institution of mediation appeared in the civil procedure, namely in section II. *"Proceedings before the courts of first instance, chapter 1. Mediation and conciliation, section 1. Mediation."* Technically, the regulation on mediation is included in the part of the Act from art. 183^1 to art. 183^{15} of the Code of Civil Procedure, although bearing in mind the entire content of the Code of Civil Procedure, other normative areas referring to mediation and/or

mediator can be mentioned, such as: art. 98^1 § 1-4, art. 103 § 1-2, art. 104^1, art. 202^1, art. 259^1, art. 436 § 1, 2 and 4, art. 445^2, or art. 570^2 (Jurgilewicz and Dana, 2015).

Mediation in civil cases, due to the specificity of this institution, seems to be particularly desirable in the field of family disputes (Gójska, 2011), but also consumer, economic and real estate disputes. And so, pursuant to art. 183^1 § 2 of the Code of Civil Procedure in connection with art. 183^6 § 1 of the same, mediation in civil matters may be applied on the basis of a party's request for mediation with the consent of the other party (mediation upon request), a court order referring the parties to mediation (court mediation), or under a mediation agreement concluded by the parties (contractual mediation). Mediation is voluntary, which implies the party's conscious participation in such proceedings and the autonomy of their will. The voluntary nature of mediation is normally an advantage, with a few notable exceptions, such as when the party refuses to engage in mediation despite the conclusion of a mediation agreement, which then prolongs the settlement process that could otherwise be concluded via a different procedure, e.g. adjudication or arbitration (Ereciński *et al.*, 2012; Zienkiewicz, 2005; Itrich-Drabarek, 2019).

Mediation itself is confidential, meaning that third parties must at no stage be made privy to information exchanged between the parties or the party and the mediator during the mediation session. The only exception is when one or both parties subject to the mediation procedure give their express consent for such information to be shared. In addition, in the course of court or arbitration proceedings, it is no use to refer to settlement proposals, mutual concessions or other declarations made during mediation proceedings, given that the duty of confidentiality concerns equally the mediator who cannot disclose any of the facts learned throughout the course of mediation proceedings.

Meanwhile, according to art. 259^1 of the Code of Civil Procedure, the mediator cannot serve as a witness to the facts learned in connection with mediation. In some exceptional cases however, the mediator may be exempted from non-disclosure by the parties to mediation. And while the provisions of civil procedure do not explicitly stipulate the duty of confidentiality for the parties, this obligation is likely to apply to them if such reservation has been contained in the mediation agreement, plus art. 72^1 § 1 of the Act of 23 April 1964 Civil Code (Journal of Laws of 2019, item 1145 as amended) could be applied *per analogiam*. In accordance with that norm, if, during the negotiations, a party discloses confidential information, the other party shall not disclose and pass it on to other persons or use that information for its own gains, unless the parties have agreed otherwise, while in the event of non-performance or negligence of said duties, a party may seek redressal or release of benefits obtained in this way. In addition, with the consent of the parties and in agreement with the mediator, other persons (e.g., experts) may participate in the mediation session, other than the mediator and the parties or their representatives.

Depending on the circumstances, the responsibility for the disclosure of confidential information may then be assigned to the mediator or the party applying, for example, art. 471 of the Civil Code or art. 474 of the Civil Code (Jurgilewicz and Dana, 2015; Morek, 2007). Still other mediation principles, such as neutrality, impartiality or professionalism (Cebula, 2011; Surma, 2018), apply to the mediator themselves, whose status will be discussed in more detail later in the article.

As already mentioned, the basis for real estate disputes may be contracts for construction works or commercial leases, and these would mainly concern financial settlements. The construction process is very complex and time-consuming, which is why its untimely or incorrect (as per contract) implementation may easily be a source of conflict. This is similar with arrears under the lease agreement or the settlement of utility costs and other additional charges. Examples of areas where mediation can be applied also include, disputes over the abolition of joint tenancy, disputes related to the restructuring of a jointly owned property, neighbor disputes resulting from misunderstandings over land or roads, disputes related to the expropriation of real estate, or disputes regarding changes to land-use projects. Regardless of the basis for initiating mediation, its effectiveness depends on the actual approval of the settlement reached by the court during the course of mediation proceedings.

And so, pursuant to art. 183^{12} § 1-3 of the Code of Civil Procedure, a protocol is drawn up from the course of mediation, in which items such as the place and time of mediation, name, surname (legal name) and address of the parties are included, along with the name and address of the mediator and the outcome of mediation. The protocol is signed by the mediator, and once the parties have reached a settlement, that settlement is then included in, or attached to, the protocol. The parties are in turn obliged to sign the settlement, whereas their inability to do so is annotated by the mediator in the protocol. The signing of the settlement by the parties constitutes consent to apply to the court for its approval, a fact of which the mediator is obliged to notify the disputing parties. The mediator must also provide the parties with a copy of the protocol. The competent court immediately carries out the proceedings to approve the settlement: if it is enforceable by execution, it is approved by issuing an enforcement clause, otherwise the court approves the settlement by issuing a statement in closed session.

Although there is a risk of refusal to grant an enforcement clause or to approve a settlement concluded before the mediator in whole or in part (if it is contrary to the law or principles of social coexistence, tends to circumvent the law, or is incomprehensible or contradictory), but from the practical point of view these are exceptions (art. 183^{14} § 1-3 of the Code of Civil Procedure).

According to art. 183^{15} § 1 of the Code of Civil Procedure, a settlement concluded before the mediator after its approval by the court has the legal force of a settlement concluded before the court, while the agreement approved by issuing an enforcement clause is enforceable. The settlement cannot infringe upon the provisions of specific

types of legal transactions, e.g., by excluding the drawing up of a notarial deed regarding the right to real estate. Therefore, the conclusion of a settlement on the transfer of real estate ownership will be ineffective if no notarial deed has been drawn up in the process (Wrzecionek, 2009).

The literature cites many reasons as to why real estate disputes should be resolved through mediation. These reasons also stem from the very nature of mediation, most notably including:

- the ability to adjust the dispute resolution to the specifics of the contract or transaction,
- better opportunity for each party to speak and be heard than in a court of law,
- no winners or losers are announced in the mediation process,
- mediation encourages creative solutions, which results in a more accurate examination of the case and therefore greater satisfaction after the mediation process,
- mediation allows for better relations between the parties,
- mediation is less costly than a traditional lawsuit (Bregman, 2012).

3. The Role of the Mediator in Real Estate Disputes

A mediator is someone who supports the communication process between the parties to a dispute. It is therefore pivotal that the mediator has proper background to fulfill this function effectively (Martynoga and Sielenzak, 2018). The mediator in real estate disputes should be impartial, as provided for in art. 183^3 § 1 of the Code of Civil Procedure, but it is also their knowledge and personality traits that are of particular importance. Mediators in real estate disputes should ideally be able to create a comfortable atmosphere for the parties to dialogue, and even more importantly, skillfully encourage the parties to exchange relevant information so as to better predict whether a settlement can be reached. The mediator should therefore have strong negotiation skills while being able to balance out the parties' demands with what is actually achievable. Needless to say, the mediator should therefore constantly self-improve and expand knowledge in the field of law, mainly construction and civil law, psychology, as well as negotiation methods.

This is important because, in practice, the parties often expect to be offered a specific proposal to resolve their dispute, meaning that is not only the mediator's personality but their professional knowledge that play the key role. When conducting mediation, the mediator can resort to different methods aimed at amicable settlement of the dispute, including supporting the parties in formulating their settlement proposals or, upon their joint request, pointing to ways of resolving the disputes that are not binding on the parties. Having said that, this model of proceeding is often difficult to achieve in practice, given that national legislation in Poland sets out rather lax formal

requirements for candidates for mediators. Any natural person with full legal capacity and enjoying full public rights, but who is not a retired judge, can be a mediator in Poland (Jurgilewic and Dana, 2015; Jakubiak-Mirończuk, 2018).

In practical terms, the mediator's duties consist in asking the parties relevant questions, alleviating tensions, analyzing the sources of conflict, and assessing the feasibility of the parties' settlement proposals. There is indeed a risk for mediation to be conducted by inexperienced or ill-prepared mediators (Zienkiewicz, 2005). In addition to that, mediation conducted by an incompetent mediator may undermine the chances of settling the dispute, which is especially worrying if we consider that the court may refer a party to mediation only once during the proceedings (art. 183^8 § 2 of the Code of Civil Procedure).

The Ministry of Justice, appreciating the special role of the mediator in the course of the mediation procedure, emphasizes that mediation should be conducted reliably and professionally. The associated challenges faced by the mediator have been defined in mediation standards and guidelines for mediators. They were developed by the Social Council for Alternative Methods of Resolving Conflicts and Disputes acting under the Minister of Justice. And while they do not have binding legal force, and thus cannot constitute the basis for legal claims, they are nevertheless significantly helpful in mediation. Compliance with the standards developed by the aforementioned Council helps to ensure the safety of both mediation parties and mediators, but also increases social trust in said institution. Thus far, the Council has distinguished nine key standards and principles for mediators to follow.

In line with those guidelines, the mediator should ensure, voluntary participation in mediation and conclusion of an agreement, confidentiality of mediation, high level of professional qualifications, neutrality towards the subject of the dispute and impartiality in relation to the participants in the proceedings, fairly informing parties about the nature and course of mediation, cooperating with other experts for the benefit of mediation proceedings, providing parties with a suitable place to conduct mediation (Korybski, 2018). All these guidelines are a valuable supplement to the legal rules binding the mediator, which include, among others, the duty of impartiality and neutrality (Jurgilewicz and Dana, 2015; Halpern, 1992).

Accordingly, the duty of impartiality applies to both mediation participants and the assessment of the nature of the dispute, whereas the duty of neutrality is to be associated with the mediator's lack of bias or interest in the outcome of the case, as well as their autonomy throughout the mediation procedure. In the event of inequalities between the parties to the dispute, which may occur for various reasons, the mediator can only take measures aimed at equalizing the chances of the parties by enabling the weaker party to become aware of the stronger aspects of their position (Gmurzyńska, 2014).
This, however, raises a problem arising from the already mentioned lax requirements for candidates for mediators in civil or economic cases – that is to say, no legal

knowledge is actually required from the mediator. It may nevertheless be necessary during mediation to provide the parties with binding information, in particular when they jointly request a legal opinion on the possible consequences of applying a given type of normative solution in their case, etc. This prompts a risk of error for the mediator, thereby justifying the previous assertion that the role of a mediator who lacks legal knowledge should, as a rule, not extend beyond enabling the parties to reach the source of their conflict by conducting the proceedings with diligence. In what concerns real estate disputes, it would be expected that the mediator conducting such proceedings has sufficient legal knowledge, especially in the field of civil as well as administrative law (Jurgilewicz, 2018).

The guidelines and standards developed by the Social Council for Alternative Methods of Resolving Conflicts and Disputes, acting under the Minister of Justice, are not the only set of rules on out-of-court dispute resolution in civil proceedings that can be used by candidates for mediators. These issues, also in relation to the mediator, are raised in the European Code of Conduct for Mediators (hereinafter referred to as ECCM). The ECCM makes a rather precise distinction between the requirement of impartiality and that of neutrality. The former means no prejudice and equal treatment of mediation participants, as well as avoiding favor of any of the parties by the mediator, while the latter should be understood as the mediator's inability to exert any pressure on accepting a settlement by the parties, let alone a settlement of a specific content (Morek, 2007).

In turn, the *Mediator's Code of Ethics* developed by the Polish Mediation Center, in addition to the principles of impartiality and neutrality, also introduces the principle of professionalism. According to this document, professionalism is based on the constant acquisition of knowledge and skills by the mediator. Other rules of mediation outlined in said document include, acceptability and respect, whose essence comes down to the mediator being accepted by the parties and conducting mediation proceedings with the understanding of and respect for the dignity of the parties and the mediator (*Mediator's Code of Ethics*).

4. Mediation Costs in Real Estate Disputes and the State's Economic Security Policy

In practical terms, mediation proceedings are less expensive than court or arbitration proceedings and are a positive manifestation of the state's economic security policy, which helps reduce not only public funds but also the number of people engaged in court proceedings.

And so, regarding the costs of mediation, let us note that, pursuant to art. 183^5 of the Code of Civil Procedure, the mediator is entitled to remuneration and reimbursement of expenses arising from mediation, unless they have consented otherwise, which however is not a common occurrence in real estate disputes. Remuneration and reimbursement of expenses are borne by the parties themselves. The mediator collects

these charges directly from the parties. The charges may also be established and awarded to the mediator by the court if at least one of the parties referred to mediation by the court has been exempted from court costs in the scope of the mediator's fees and the other parties have failed to reimburse the mediator in full.

However, according to the regulation of the Minister of Justice of 20 June 2016 on the amount of remuneration and reimbursable expenses of the mediator in civil proceedings (Journal of Laws of 2016, item 921 as amended) regarding real estate, the mediator's remuneration is set out at 1% of the value of the subject of the dispute but being not less than PLN 150 and no more than PLN 2,000 for the entire mediation procedure. If the value of the subject of the dispute cannot be determined, the mediator's remuneration for conducting the mediation procedure is PLN 150 for the first meeting, and PLN 100 for each subsequent meeting, but not more than PLN 450 in total. Comparing these fees with the much higher costs of a court trial, the highly positive manifestation of the state's economic security policy in this respect should be emphasized (Brzeziński, 2019; Zimon *et al.*, 2020, Grabowska, 2019a).

In addition, the documented and indispensable expenses of the mediator incurred in connection with the mediation to cover the costs of travel - in the amount and under the conditions outlined in the provisions on the amount and conditions for determining the amounts due to an employee employed in a state or local-government budgetary unit for a business trip, as well as the cost of renting a space necessary to conduct mediation, in the amount not exceeding PLN 70 per meeting or PLN 30 per correspondence. If the parties fail to participate in mediation, the mediator is entitled to reimbursement of the incurred expenses in the amount not exceeding PLN 70. The remuneration of the mediator, who is a taxpayer obliged to settle the tax on goods and services, and the mediator's expenses, are increased by the applicable VAT rate provided for this type of activity in the relevant provisions on tax on goods and services.

5. Discussion

Real estate is an industry particularly sensitive to reputational fluctuations and one of the cornerstones of long-term partnerships. Disputes can therefore have a damaging effect on the real estate sector's business stability and hence financial performance, which is especially worrisome when considered from the standpoint of the state's economic security policy. Voices can be heard that mediation is an extremely effective conflict-resolution tool that brings about lasting results, a high level of confidentiality and accountability, all prized assets given the just mentioned sensitivity of the real estate sector to reputational risk (Wiegelmann and Fletcher, 2018).

It is often the case for real estate businesses to work closely with other actors, such as those from the construction sector, and vice versa. The emergence of a real estate dispute, e.g., concerning delays in the implementation of construction works, and subsequently entering court proceedings may not only be image-damaging to each

of the entities involved, but also prompt a significant risk that they will no longer be willing to cooperate in the future, which is then bound to take its toll on a both micro and micro scale, triggering losses across the economy. It therefore seems that mediation, by enabling the parties to resolve disputes faster and in a less cost-intensive fashion compared to court trials, may also be beneficial for the image of the brand, which is often that of entrepreneurs themselves.

Aside from its undeniable impact on the financial standing of businesses spanning a number of industries, mediation may also be helpful when it comes to issues concerning insurance. Skillful resolution of a dispute via mediation may eliminate the need to cover possible claims under insurance policies, which in turn may have a bearing on the customer's loss ratio recorded by insurance companies and therefore the amount of the insurance premiums to be paid in subsequent years of coverage. What is more, in the case of rent disputes, it may often be problematic to determine whether a damage should be covered by the owner’s or landlord’s insurance policy. Mediation is a solution that is becoming increasingly popular, and it can also serve as an alternative to pursuing disputes in court, helping to save time and cut costs for both parties, all while constituting added value to the state's economic security policy.

Considering the above, the state's economic security policy should be perceived as solutions put forward by the legislator, which aim to ensure the economic conditions necessary for the efficient functioning of state institutions, including common courts. Therefore, the trend of promoting the idea of mediation and allowing public actors to resolve real estate and other types of legal disputes via this alternative method of conflict resolution is a highly desirable course of action (Jurgilewicz *et al*., 2019; Wojtaszczyk and Materska-Sosnowska, 2009; Grabowska, 2019b).

6. Conclusion

Mediation in real estate disputes is an example of an alternative method of dispute resolution that reduces the costs of proceedings for the parties compared to seeking settlement in court. In addition, mediation is free from attorney fees, which are typical of court proceedings, and relatively rarely relies on expert appraisers whose participation in court trials is often cost-intensive. By opting for mediation in real estate disputes, litigation becomes less expensive, as it allows the parties to save time compared to the traditional court procedure, thus optimizing not only litigation costs but also the entire course of the proceedings in a given case. This cost-reducing solution has a positive impact on the economic security of the state as a whole, which itself promotes the pursuit of an optimized policy in this area.

In practical terms, a desirable solution when concluding real estate contracts is to introduce a provision stipulating that all disputes are to be resolved first via mediation. This enables mediation to be used at the stage of an emerging conflict and to

mitigate it by consolidating further cooperation, which, in the event of failure, in no way prevents the dispute from being resolved in court.

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