Kluwer Mediation Blog

Can I Have Something To Say?

Cezary Rogula (Lewiatan Mediation Centre) · Thursday, November 19th, 2015 · Young Mediators Initiative (YMI)

When I had to take the civil procedure exam during my law studies in Poland, the provisions concerning mediation were already there. It was hard to find many judgments or commentaries on them and, true story, when I tried to search for any materials on the Internet, the search engine displayed: *Did you mean **meditation**?* It is also true that the legal education I went through was litigation oriented. But, to say the least, all law students had to know these several articles. For the time being, let's forget that I was fascinated by mediation so much that half a year later I went to ICC International Commercial Mediation Competition and stayed in the mediation practice and academic research field ever since. With no specific courses on mediation in law school curriculum at that time, this one exam I mentioned at the beginning has meant that lawyers from my generation started practising with an awareness that mediation was one of the ways of resolving civil disputes. In other words, I don't remember times when going to court was the only available option. Of course one might say that these provisions were not used in practise – courts did not direct cases to mediation and private, out-of-court commercial mediation was literally non-existent. However, a counterargument to this is when I organised a first-of-a-kind mediation training for my colleagues at the Bar training programme, all spots went like hot cakes – these young practitioners were eager to find more about mediation.

Coming back to the present, the Polish legislator has decided it's high time to review these provisions and take some actions that may facilitate the use of mediation in civil and commercial cases. What's worth noting is that the Ministry of Economy, not the Ministry of Justice, took the lead in these endeavours. It appointed six regional Arbitration and Mediation Centres, aiming at educating, promoting and providing easy access to ADR, especially in commercial cases. While being a mediator at Lewiatan Mediation Centre, one of the participants of the Ministry programme, I can personally confirm that these centres engaged into lots of good and effective initiatives beneficial to the Polish practice of mediation.

The jewel in the crown among the Ministry's efforts is an act of 10 September 2015 amending certain acts for the support of amicable dispute resolution. As of 1 January 2016, most of the provisions I mentioned before will be amended. I will write upfront that Poland decided not to follow the Italian example and will not introduce mandatory mediation. Instead, the amendments provide for mechanisms that will facilitate the use of mediation and its further integration with the legal system. Among others, they create a new type of mediator – the permanent mediator. They also oblige the plaintiff to indicate if an attempt to resolve a dispute through mediation was made before initiating the court proceedings, or introduce a specific informational meeting about

mediation and other ADRs parties may be asked to attend.

However, I would like to focus on one new provision of the Code of Civil Procedure that turned out to be the most controversial – Article 183(3a): *The mediator shall conduct mediation by using different techniques leading to an amicable resolution of the dispute, including supporting the parties in formulating their settlement proposals, or, at the joint request of the parties, the mediator may indicate options of resolving the dispute, which are not binding on the parties* (my own, non-official translation). I made this choice because of two reasons. Firstly, legal practitioners of my age don't seem to find any difference between mediation and conciliation, they rather use these terms interchangeably. This fact, confirmed by many authors, is obviously strongly connected with the disambiguation between facilitative and evaluative mediation, made by Professor Leonard L. Riskin. Nonetheless, if I ask any young lawyer that has never heard about Professor Riskin what she or he would call a process where a neutral party suggests non-binding options of resolving a dispute, the vast majority would say mediation.

Secondly, I believe the background of this provision is a perfect example of combining mediation theory and practice. As indicated by the Ministry, applying former provisions concerning mediation created some ambiguities as to the admissibility of formulating non-binding options by the mediator. During public consultations, the proposal was heavily criticised by many practising mediators and mediation organisations. They invoked breach of fundamental principles, such as impartiality and neutrality of the mediator. They pointed out the danger of confusing mediation with conciliation and arbitration. They also referred to autonomy of the conflict and the exclusive right of the parties to the conflict to find resolution.

The proposal was slightly reformulated and stayed in the bill. Eventually, in January 2016, it will become a part of the Code of Civil Procedure. On this point, I feel I should defend the right of mediators to use this provision and have something to say about the possible ways of resolving a parties' dispute. What is quite specific about mediation in the Polish Code of Civil Procedure is that it does not contain a definition of mediation; nor does it give many hints on what should or shouldn't be considered as one. Without joining the discussion on whether and how mediation should be defined, it's enough to say here that this lack doesn't create any hindrance in practice in Poland. I didn't hear of a single case where the court would not recognise proceedings involving a neutral as mediation. At the same time, it could be said that it does give one hint on what should be favoured: flexibility. From that perspective, the new provision does not create an obligation for the mediator to formulate proposals or options of resolving the dispute. Instead, it leaves it at his or her disposal and explicitly allows another means of adjusting to the dynamic situation at a mediation table.

Moreover, I will coldly say I don't put much care to disambiguation between mediation and conciliation, I might be the only one in the room that would see the difference and I would not expect the parties to have such knowledge. And when it comes to arbitration, the reservation that these proposals and options are non-binding seems to be enough to see I am not talking about arbitral proceedings. The "final yes" stays with the parties. I cannot have anything to say about this.

Does it mean I am for evaluative mediation? No, it only means I am in favour of the possibility of expanding and using the whole array of tools helpful in reaching a settlement agreement. Similarly to many mediators, not only from Poland, I believe that the choice between these instruments should be dictated by the parties' needs and the specificity of the dispute, not by a legislative act

dealing with the procedure that is to be informal. Although I am trying to defend the new provision, I do see the danger for neutrality and impartiality of the mediator, as well as temptation of pushing too hard towards a proposal made by the mediator. At the same time, both from my own experience and from numerous talks with other mediators, I know that many disputants see a mediator as a neutral who is a third party with no interest as to the dispute itself. They want to use her or his experience, be it legal or any other expertise, to find a long-lasting settlement agreement. Please consider that if that weren't the case, the Ministry would not find the basis for its proposal in the first place. On top of that, the mediator has instruments to protect his impartiality and neutrality. Apart from rules of professional conduct, she or he may make certain suggestions during caucuses. At the end of the day, if she or he stops feeling neutral or starts acting as party representative, there is always a possibility, or rather an obligation, to step out from the mediation.

For all that, as a mediator, I stay optimistic and I am glad that since January 2016, the Code will provide an answer for my question. I don't assume I will have something to say, but I am pleased I can do it. Once the provisions come into force, I hope the practice won't prove me wrong. And legal practitioners, either younger or older than me, finally don't have to worry if they know the difference between mediation and conciliation.

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