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„Mediation in the light of the provisions of the code of civil procedure”

Abstract of the doctoral dissertation

The subject of the doctoral dissertation is mediation in the light of the provisions of the code of civil procedure. The manner of formulating the subject results from the fact that the provisions of the civil procedure code, in the absence of a separate act on mediation, are the basic legal act regulating mediation proceedings resulting from relations in the field of civil law. The analysis of mediation has been supplemented with legal acts of a statutory rank, including executive acts that, due to their dispersed nature, complement the shape of the regulation contained in the code of civil procedure.

One of the arguments justifying the choice of the subject of the doctoral dissertation is the deepening regulation of mediation, which involves the need to evaluate the way it is regulated in the dogmatic dimension and in the context of practical aspects of the application of the applicable provisions. This is updated especially in the aspect of the appropriate shape of current regulations and their effects, including numerous problems affecting the assessment and functioning of mediation institutions, the nature of which often allows many interpretations, and sometimes it may be a barrier to making a decision to use mediation.

The aim of the doctoral dissertation is to answer the question whether the current shape of legal regulations relating to mediation is appropriate and can be considered coherent and precise, and whether the level of mediation regulation is sufficient and fully realizes the purpose of the amendment introducing mediation to the code of civil procedure.

The aim of the doctoral dissertation also implies a fundamental thesis, which presupposes that the legal regulation of mediation, despite numerous legal solutions conducive to its use, requires further changes. It is not fully coherent and precise and the level of regulation is insufficient. In addition, the existing legal regulations do not fully pursue the aim of making mediation regulations simple and uncomplicated, facilitating claims and effectively providing legal protection to entities using mediation. In order to prove the thesis, it is important to prove the correctness of detailed theses.

Legal solutions relating to permanent mediators are imprecise and insufficiently regulated, and regulation is dispersed. Establishing a general requirement of having

knowledge and skills by permanent mediators does not allow verification of the real level of their preparation and does not guarantee the improvement of the quality of provided mediation services. It only shifts the implied obligation to verify candidates for permanent mediators from mediation centers to presidents of district courts. However, the presidents of district courts do not have legal instruments that allow them to verify candidates for permanent mediators in a reliable way.

Regulation of 259¹ KPC is inconsistent, as it only indicates a mediator who can not be a witness in the scope of information obtained in connection with mediation, bypassing the category of "other persons taking part in the mediation proceedings" which are obliged under art. 183⁴ § 2 KPC for confidentiality, but which have not been excluded as a witness.

The principle of voluntary mediation is not absolute and in assessing its scope, the content of the mediation contract should be taken into account. The voluntary nature of entering a mediation process may be limited by the parties as a result of contracting a mediation agreement.

The essential elements of the mediation agreement should include the consent to mediation, in addition to the subject of mediation and the indication of the mediator or the method of its selection. Consent to mediation indicated in the text of art. 1831 § 2 sentence 2 KPC is an element constituting a contract for mediation. Statements which do not contain consent for mediation, but only intentions and declarations, can not be considered as a contract for mediation and constitute grounds for an allegation arising from art. 202¹ KPC.

The contract for mediation, concluded between the parties and the mediator, although not separated in a systematic manner in the provisions of the code of civil procedure, the provisions of the code allow to distinguish the parties, subject and content of the contract, including mutual rights and obligations of the parties. This excludes art. 750 KC, as a basis for its assessment.

There are serious terminological difficulties in the provisions of the Code of Civil Procedure dedicated to mediation. They result from the use of phrases "do not agree" (art. 183⁶ § 2 section 3-4 KPC, art. 183⁸ § 2 KPC, art. 183⁹ § 2 KPC), "declares that he does not agree" (art. 183¹⁰ § 2 KPC) and "refuses" (art.183⁶ § 2 items 1-2 KPC). Lack of terminological consequence causes problems with which phrases can be combined with the presumption of tacit consent, and what phrases are associated with the institution of objection and require a statement. Consequently, this leads to different interpretations as part of the operative and doctrinal interpretation. The correct interpretation of the phrases indicated is important in the context of the initiation of mediation and the interruption of the limitation

period, as well as the initiation of court mediation. In the latter case, interpretative problems often lead to the generation of costs, including expenses made by the mediator, even if the parties did not consent to mediation, because the court's decision on referring the parties to mediation was directed at the same time to the parties and the mediator.

The duration of mediation is not included in the duration of court proceedings, but the norm expressed in art. 18310 § 2 KPC in practice leads to a prolongation of the duration of proceedings in connection with the conduct of court mediation and may result in limiting the number of cases referred to mediation.

Conclusion of a settlement within court mediation, which goes beyond the subject of court proceedings is admissible. On the other hand, the court's approval of a settlement concluded in court mediation that goes beyond the subject of the proceedings is admissible, unless it leads to a violation of the material and local exclusive jurisdiction.

In art. 183¹³ § 1 KPC there is a normative gap, because after submitting the application for approval of a settlement concluded in out-of-court mediation, there is no regulation that would indicate the responsibility of notifying the mediator about the obligation to submit a record of mediation in court. This introduces a state of uncertainty and extends the time for the approval of the settlement. The mediation protocol is proof that the settlement is a settlement before the mediator.

Appeal contained in art. 183¹⁵ § 2 KPC to the "provision of § 1" of this article refers to the settlement concluded before the mediator, before its approval by the court. The court can not approve a settlement made before a mediator who violates the provisions on a particular form of legal transaction, because it is contrary to the law. The settlement concluded before the mediator, which meets the requirements for a given legal transaction and then be approved by the court, has in the scope of the form the legal force equal to the settlement concluded before the court.

The regulations governing the costs of mediation are imprecise, and thus the content of standards defining their scope is difficult to read, violating the principle of trust and legal certainty. Appropriate application of art. 98 § 2-3 KPC in connection with art. 98¹ § 3 KPC poses serious difficulties in determining the costs of court mediation. The maximum possible range of mediation costs, with the existing risk of disagreement, may be a significant barrier to the parties from making a decision to use court mediation.

The basic research method used in the doctoral dissertation is the dogmatic and legal comparative method, which will allow a broader approach to the problems studied in the

context of the assessment of the shape of native regulations and possible directions of the evolution of legal solutions.

The dissertation consists of an introduction, four chapters and an ending. The first chapter is the theoretical introduction for further deliberations, including its scope of attempts to construct a definition of mediation, including the presentation of the process of evolution of contemporary mediation. In addition, it analyzes mediation in relation to the concept of justice and civil court proceedings. Furthermore analyzes mediation goals against selected models of mediation proceedings. The last subchapter concerns the scope of subjective and objective mediation. Considerations on the mediator due to their broad scope are discussed in the second chapter.

The second chapter analyzes the requirements as well as normative and non-normative rules relating to mediators. In addition, the considerations were focused on the problems with regard to the method of verification of candidates for permanent mediators in the context of attempts to professionalize them, with the indication of the function of presidents of district courts in this regard. The subject of conducting the lists of mediators and lists of permanent mediators was also analyzed. The last subchapter includes considerations regarding the civil liability of mediators.

The structure of the third chapter dedicated to the initiation of mediation has been implicitly divided into two parts focused on extrajudicial and judicial mediation. The starting point is the scope of the principle of voluntary mediation. The mediation agreement and its essential elements were analyzed. A separate subchapter is a contract for mediation, which regulates the relationship between the mediator and the parties. The analysis also included the mode of initiating mediation upon the request and procedural instruments available to the court in pursuit of an amicable settlement of the dispute with the use of mediation.

The fourth chapter deals with the course and effects of mediation. The course of the mediation meeting and the report on the course of mediation were analyzed. In addition, the discussion focused on the problems related to the settlement concluded before the mediator, including the legal nature of the settlement and its structural elements, and the possibility of concluding a settlement within the court mediation, going beyond the scope of pending court proceedings. Further considerations concern the procedure for submitting an application for the approval of a settlement concluded before the mediator and its approval by the court. The last subsection was devoted to the cost of mediation.

The dissertation takes into account the legal status as of September 17, 2018.