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## SETTLEMENTS AND OTHER AGREEMENTS CONCLUDED BEFORE A MEDIATOR

### Abstract

The development of the use and awareness of civil (business, family) mediation in Poland over the last 20 years of its functioning in the Code of Civil Procedure has shown the multitude of situations that can be encountered in mediated disputes. This raises doubts as to whether the current legal framework of Polish substantive law, regulating the contract of settlement, and procedural law referring to a court settlement and settlement agreement concluded before a mediator, exhausts all the possibilities for unanimous arrangements available to the parties in mediation. It is further influenced by, inter alia, the basis for conducting mediation, the interests of the parties to be reflected in the agreement concluded before a mediator, a legally determined possibility to modify parties' legal relations, or a form of declaration of will prescribed by law. The article includes an analysis of the above problems, selected by the authors, in light of applicable law, case law and legal texts. It leads to the question whether, at this stage of the development of mediation in Poland, a new normative concept – a mediated settlement agreement should be considered.

## KEYWORDS

mediation, settlement agreement, court settlement, mediator, civil proceedings

## SŁOWA KLUCZOWE

mediacja, ugoda, ugoda sądowa, mediator, postępowanie cywilne

## I. INTRODUCTION

In civil (business, family) mediation, if the parties reach a consensus on resolving their dispute, the content of the agreement is reflected in the settlement agreement concluded before a mediator. However, the multitude of situations that can be encountered in mediated disputes raises doubts as to whether the use of the term ‘settlement agreement’ exhausts all possibilities of the parties’ unanimous arrangements made in mediation. For the purposes of this article, the authors assume that the scope of the legal term ‘settlement agreement concluded before a mediator’, referred to, e.g., in Article 183<sup>15</sup> § 1 of the Code of Civil Procedure,<sup>1</sup> includes all such parties’ arrangements regarding the mediated dispute.

Many factors influence the scope and effectiveness of declarations of will made in an agreement concluded before a mediator. These include in particular:

- the basis for conducting mediation (court decision to refer the parties to mediation and/or mediation agreement),
- the interests of the parties to be reflected in the agreement concluded before a mediator,
- a legally determined possibility to modify parties’ legal relations, being the basis for the agreement settling the dispute,
- a form of declaration of will prescribed by law.

The above stimulates to join the discussion on the need to determine the relationship between the normative concepts of a settlement agreement concluded before a mediator under Article 183<sup>15</sup> § 1 of the Code of Civil Procedure and a settlement agreement under Article 917 of the Civil Code.<sup>2</sup> Unquestionably, a settlement agreement provided by the civil substantive law is a universal tool for resolving disputes, but when it is confronted with mediation, further questions arise.

<sup>1</sup> Code of Civil Procedure of 17 November 1964 [2024] JoL [Journal of Laws] 1568, as amended.

<sup>2</sup> Civil Code of 23 April 1964 [2024] JoL 1061, as amended.

Whether and to what extent, in a settlement agreement concluded before a mediator, the parties can regulate other legal relations than those at their disposal, e.g., in divorce cases, i.e., when the nature of the court's decision is constitutive. Why does a settlement agreement concluded before a mediator not always end the dispute, but can constitute the basis for further actions by the parties or the court? This leads to the issue of whether, in light of the development of mediation over the last 20 years of its functioning in the Code of Civil Procedure, a need has arisen to introduce a new normative concept – a mediated settlement agreement.

The authors' considerations were based on the analysis of legal acts (formal-dogmatic method), legal texts (non-reactive method) and the study of case law.

## II. MEDIATION AS A UNIVERSAL METHOD FOR RESOLVING DISPUTES

Mediation, since its introduction to the Code of Civil Procedure in 2005, has evolved from a rarely used alternative to court proceedings to an increasingly acceptable and recognised method of dispute resolution. Civil procedure increasingly emphasises various ways of resolving a dispute – primarily under the general directive of Article 10 of the Code of Civil Procedure, which includes court settlement and mediation.<sup>3</sup> Additionally, in 2023, conversion, i.e., submitting a pending dispute before a state court to an arbitration court was introduced under Article 1161<sup>1</sup> of the Code of Civil Procedure.<sup>4</sup>

Recently, noticeable attempts to introduce conciliation alongside mediation could be observed, although the concept of conciliation does not appear in Polish statutory law. It seems that the impulse for such practice could have been the Rules of Court and Procedure before the Arbitration Court at the General Counsel to the Republic of Poland,<sup>5</sup> which use both concepts. § 50 section 3 of the Rules – 'Conducting mediation' indicates: 'The mediator does not resolve the dispute between the parties, but tries to support the parties in an impartial and independent manner in the negotiations they conduct', while in accordance with § 54 section 1 of the Rules, 'the purpose of the conciliation procedure is for the

<sup>3</sup> See Anna Kalisz, Adam Zienkiewicz, 'Kompetencje mediacyjne sędziego w zakresie polubownego rozwiązywania spraw cywilnych (uwagi na tle nowelizacji k.p.c.)' [2021] Państwo i Prawo 10, 90.

<sup>4</sup> See Marcin Dziurda, 'Art. 1161(1)' in *Kodeks postępowania cywilnego. Praktyczny komentarz do nowelizacji z 2023* (Wolters Kluwer Polska 2023), accessed via LEX.

<sup>5</sup> The latest, unified version as of 16 September 2022 is available at: <<https://www.gov.pl/attachment/b927511c-97eb-46ed-8a3d-9c779cf9e835>> accessed 22 October 2025.

Conciliator to issue a non-binding position for the parties, containing a proposal to resolve the dispute'. Such a distinction could be found in the doctrine of law, which also indicates practical problems it may create.<sup>6</sup> At the same time, the possibility of the interchangeable use and equivalence of those terms were raised.<sup>7</sup> This relates to the division of mediation, introduced by Leonard L Riskin: (1) evaluative mediation, in which the mediator can communicate their opinions and suggestions regarding the resolution of the dispute and (2) facilitative mediation, in which the role of the mediator is limited to moderating the discussion and supporting communication between the parties, without going into the merits.<sup>8</sup> It seems that if mediation is understood in this way, the division between mediation and conciliation is unnecessary.

Since 2018, this distinction has been put to an end worldwide by the amended UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation.<sup>9</sup> The term 'conciliation' was replaced by the term 'mediation', supporting the position on their equivalence in favour of 'mediation', adapting to the current practice in order to contribute to the popularisation of this instrument.<sup>10</sup>

As far as the Polish Code of Civil Procedure is concerned, this distinction ceased to be relevant in 2016 with the introduction of Article 183<sup>a</sup> which *expressis verbis* allows the mediator to use various methods aimed at amicable resolution of the dispute, including supporting the parties in formulating their settlement proposals, and even non-binding indication of manners for settling the dispute upon the parties' joint request.<sup>11</sup> At the stage of legislative works, the proposed amendment gave rise to numerous comments,<sup>12</sup> but ultimately it stayed in the amended Code

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<sup>6</sup> See Robert B Davidson, 'International Mediation Basics' in Rufus V Rhoades, Daniel M Kolkey, Richard Chernick (eds), *Practitioner's Handbook in International Arbitration and Mediation* (2<sup>nd</sup> edn, JurisNet, LLC 2007) 451.

<sup>7</sup> See Henry J Brown, Arthur L Marriott QC, *ADR Principles and Practice* (2<sup>nd</sup> edn, Sweet & Maxwell Limited 1999) 127.

<sup>8</sup> See Leonard L Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' [1997] *Harvard Negotiation Law Review* 1, 7, 23; see also Ewa Gmurzyńska, '9.2.1. Mediacja facylitywna i mediacja ewaluatywna (ocenna)' in Ewa Gmurzyńska, Rafał Morek (eds), *Mediacje. Teoria i praktyka* (Wolters Kluwer Polska 2024) 179–184, Adam Zienkiewicz, *Studium mediacji. Od teorii ku praktyce* (Wydawnictwo Difin S.A. 2007) 173–175.

<sup>9</sup> Available at: <[https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01363\\_mediation\\_guide\\_e\\_book\\_rev.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01363_mediation_guide_e_book_rev.pdf)> accessed 22 October 2025.

<sup>10</sup> See footnote 2 on p 56 of the Model Law.

<sup>11</sup> See Małgorzata Sekuła-Leleno, 'Mediacja jako nowoczesny sposób rozwiązywania sporów - analiza zmian wprowadzonych z dniem 1.01.2016 r.' [2016] *Rejent* 8, 93.

<sup>12</sup> See Cezary Rogula, 'Nowy kształt postępowania mediacyjnego w świetle zmian Kodeksu postępowania cywilnego' in Barbara Jelonek-Jarco, Rafał Kos, Julita Zawadzka (eds), *Usus magister*

of Civil Procedure. Thus, the Code of Civil Procedure, which does not contain a legal definition of mediation, opted for a broad understanding of this term, instead of distinguishing between mediation and conciliation.

In view of the above, there is no justification for perceiving informatory meetings, provided for in Article 183<sup>8</sup> § 4 of the Code of Civil Procedure, as judicial conciliation, i.e., conducting settlement talks also by professionally active judges, who *ex lege* cannot be mediators, as stipulated by Article 183<sup>2</sup> § 2 of the Code of Civil Procedure. Informatory meetings serve to present methods of resolving disputes available to the parties other than obtaining a court decision,<sup>13</sup> but do not introduce a new method used by a judge or any other person. Such an interpretation – an informatory meeting as a basis for conducting conciliation by judges, presented primarily by the Polish Section of the European Association of Judges for Mediation GEMME<sup>14</sup> is, in the authors' opinion, incorrect, especially since the meaning of the term mediation in the Code of Civil Procedure includes conciliation.

Thus, when it comes to non-adjudicatory methods of resolving a dispute, the Polish Code of Civil Procedure recognises: (1) a call for a pre-trial settlement, (2) a court settlement and (3) mediation. Due to the fact that the Code of Civil Procedure does not contain a legal definition of mediation, 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<sup>15</sup> may provide additional help. Article 3 letter a) of the Directive broadly defines mediation<sup>16</sup> as ‘a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator’.

Such a general definition reflects the interests of the parties that may be related to a given dispute. These may include, among others, the interests:

- recognised by substantive law, remaining at the disposal of the parties, e.g., a claim for payment for a service provided,

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*est optimus: rozprawy prawnicze ofiarowane Profesorowi Andrzejowi Kubasowi*, (Wydawnictwo C.H. Beck Sp. z o.o. 2016), 721–722.

<sup>13</sup> See Ewa Stefańska, ‘Art. 183(8)’ in Małgorzata Manowska (ed), *Kodeks postępowania cywilnego. Komentarz aktualizowany*. Vol I. Art. 1–477(16), (LEX/el. 2022).

<sup>14</sup> See <<https://polska.gemmeeurope.org/>> accessed 22 October 2025.

<sup>15</sup> [2008] OJ L 136/3, as amended.

<sup>16</sup> See Rafał Morek, ‘V. Definicja pojęcia “mediacja”’ in Paweł Grzegorzczak, Karol Weitz (eds), *Europejskie prawo procesowe cywilne i kolizyjne* (Wydawnictwo Prawnicze LexisNexis 2012) accessed via LEX.

- recognised by substantive law, remaining at the disposal of the parties, with the statutory requirement to observe a prescribed form of declarations of will, e.g. division of marital assets, including real estate,
- recognised by substantive law, not remaining at the disposal of the parties, but which can be modified by a joint procedural motion specifying the contents of a constitutive court decision, e.g. the expectation of no-fault divorce,
- other interests, not recognised by substantive law and not subject to procedural protection, e.g. mutual expectation of keeping the house clean and tidy.

It should also be stated that concluding a settlement agreement does not have to be equivalent to the parties' reconciliation, except for the legal protection of personal interests, where a mediated agreement may include an apology.

Moreover, the scope of the agreement concluded before a mediator also refers to the basis on which mediation may be conducted, as provided for in Article 183<sup>1</sup> § 2 of the Code of Civil Procedure. According to this criterion, a distinction is made between contractual (out-of-court) mediation – conducted on the basis of a mediation agreement, and court-annexed mediation – conducted on the basis of a court decision referring the parties to mediation.<sup>17</sup> Furthermore, the amendments to Article 183<sup>13</sup> § 2 and Article 183<sup>14</sup> § 2<sup>1</sup> of the Code of Civil Procedure enacted in 2023 allow claims not covered by the lawsuit, as well as claims covered by different court proceedings, to be included in the settlement agreement concluded before a mediator.<sup>18</sup> Because of the above-mentioned issues, there is also a hybrid form of mediation that may include both court-annexed and contractual mediation. Therefore, the possible situations are as follows:

- court-annexed mediation: the subject matter of mediation is the same as that of the court proceedings in which the court decision referring the parties to mediation was issued,
- contractual mediation:
  - there are no court proceedings pending within the scope of the subject matter of mediation specified by the parties (this includes a mediation clause obliging the parties to undertake a pre-trial mediation attempt), or
  - the parties decide to conduct mediation within the scope of the subject matter of one or more court proceedings in which court decisions referring the parties to mediation were not issued,

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<sup>17</sup> See Ewa Gmurzyńska, '9.2.5. Mediacje sądowe i mediacje umowne' in Ewa Gmurzyńska, Rafał Morek (eds), *Mediacje. Teoria i praktyka* (Wolters Kluwer Polska 2024) 192–194.

<sup>18</sup> See Magdalena Skibińska, *Mediacja po reformie KPC* (LEX/el. 2023).

- mixed mediation: the court decision referring the parties to mediation was issued, but during the talks, the parties decided to extend the subject matter of mediation to include other pending court proceedings or other claims and concluded a mediation agreement.

Each of the above types is currently widely used, including the situation where a mediation agreement refers solely to pending court proceedings. Such mediation has similar effects to court-annexed mediation (including reimbursement of the court costs under Article 79 of the Act of 28 July 2005 on court costs in civil cases).<sup>19</sup> The indicated mediation types are also one of the factors that affect the permissible scope of the agreement concluded before a mediator and the degree of flexibility granted to the parties in formulating settlement provisions.

### III. THE CONCEPT OF A SETTLEMENT AGREEMENT IN SUBSTANTIVE AND PROCEDURAL LAW

The Code of Civil Procedure does not contain a legal definition of a ‘settlement agreement concluded before a mediator’, as referred to in Article 183<sup>12</sup> § 2, Article 184<sup>14</sup> § 1 or Article 183<sup>15</sup> § 1. As a side note, in view of the wide use of means of distance communication in mediation, expressly permitted by Article 183<sup>11</sup> of the Code of Civil Procedure, the expression is rather outdated, as the parties may not be physically present next to a mediator. Fortunately, the use of postal services for the exchange of signed copies of settlement agreements concluded as a result of mediation,<sup>20</sup> e.g., as prescribed by Article 78 § 1 of the Civil Code, is widely accepted.

In light of the above, the new Article 183<sup>12</sup> § 2<sup>2</sup> of the Code of Civil Procedure, which introduces the possibility of submitting to the court a settlement agreement signed with a qualified electronic signature or electronically certified copy of the agreement, may be considered as the next step in the development of the use of mediation.

Due to the lack of a definition of a settlement agreement in the Code of Civil Procedure, the starting point for further considerations is substantive law<sup>21</sup> – Article

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<sup>19</sup> Consolidated text: [2024] JoL 959, as amended.

<sup>20</sup> See Aneta Arkuszewska, ‘Sposoby i formy zawarcia ugody mediacyjnej w dobie pandemii COVID’ [2022] *Acta Iuridica Resoviensia* 1 (36), 15–17.

<sup>21</sup> See Piotr Nazaruk, ‘Art. 917’ in Barbara Bajor and others, *Kodeks cywilny. Komentarz aktualizowany* (LEX/el. 2024).

917 of the Civil Code, which recognises and defines a settlement agreement as a separate type of contract:

By the contract of settlement, the parties shall make mutual concessions within the scope of the legal relation existing between them for the purpose of setting aside uncertainty as to the claims arising from that relation or ensuring their performance or setting aside a dispute which exists or which might arise.<sup>22</sup>

The key element (*essentialia negotii*) for a given agreement to be considered a contract of settlement within the meaning of substantive civil law involves mutual concessions. That has been repeatedly emphasised in legal texts<sup>23</sup> and case law.<sup>24</sup> Mutual concessions are assessed from the perspective of the parties' subjective perception of their terms and do not have to be uniform in their type, value, etc. or be equivalent, as long as they occur mutually. The circumstances of concluding the settlement agreement are sufficient to determine mutual concessions, they do not have to be precisely indicated in the text of the contract.<sup>25</sup> Thus, the Civil Code allows for a very broad interpretation of 'mutual concession' and recognises that they may be of either substantive or procedural nature (e.g., resigning from obtaining a court judgment protected with *res iudicata*).<sup>26</sup> A settlement agreement is not independent in the sense that, in order for it to be concluded, there must be a prior legal relation in which a dispute arose between the parties, including a dispute as to the existence or nature of this relation (e.g., whether the prior contract concluded between the parties is a franchise agreement or a contract for providing services). The parties are granted considerable freedom in shaping the settlement agreement, as long as it falls within the framework of freedom of contracting provided by Article 353<sup>1</sup> of the Civil Code, although Article 58 of the Civil Code (grounds for nullity of legal actions) should also be observed.<sup>27</sup>

The subject of the settlement agreement may be any legal relation, regardless of the source of this relation [...] from the sphere of obligations, property, family, inher-

<sup>22</sup> Translation based on the English version of the legal acts available at LEX.

<sup>23</sup> See Katarzyna Krziskowska, 'Art. 917' in Mariusz Frasz, Magdalena Habdas (eds), *Kodeks cywilny. Komentarz*. Vol V. Zobowiązania. Część szczególna (art. 765–921(16)) (Wolters Kluwer Polska 2018), accessed via LEX.

<sup>24</sup> See, e.g., case I ACa 230/22 28 November 2023 Court of Appeal in Kraków (Sąd Apelacyjny w Krakowie), LEX No 3791209.

<sup>25</sup> See Katarzyna Krziskowska, 'Art. 917' in Mariusz Frasz, Magdalena Habdas (eds), *Kodeks cywilny. Komentarz*. Vol V. Zobowiązania. Część szczególna (art. 765–921(16)) (Wolters Kluwer Polska 2018), accessed via LEX.

<sup>26</sup> See Przemysław Buczkowski, 'Uгода w prawie cywilnym materialnym i procesowym – wady i zalety' [2010] *Przegląd Prawa Handlowego* 5, 39.

<sup>27</sup> See Krzysztof Falkiewicz, Magdalena Romatowska, 'Uгода w postępowaniu mediacyjnym w sprawach cywilnych' [2012] *Temidium* 5, 24.

itance or labour relations, provided they are not excluded from the parties' disposal. The subject matter of the settlement agreement is all claims resulting from a given legal relation that is covered by the settlement agreement, and this settlement agreement is binding for the parties, with the proviso that it is possible to avoid its legal effects, based on the given circumstances.<sup>28</sup>

The purpose of the settlement is to end the dispute and eliminate the uncertainty that has arisen between the parties. The parties should have no doubts with regard to the factual basis, as their declarations of will are to cause specific legal effects.

The settlement agreement as a legal action is subject to all provisions on the requirements for the effectiveness of declarations of will, general provisions on the methods of concluding a contract, the form of legal actions and defects of declaration of will, with the exception of avoiding the effects of an agreement concluded under the influence of error. The form of the settlement agreement is arbitrary; however, if a specific form is required for a specific legal action due to its subject matter, then the settlement agreement should also be concluded in such form.<sup>29</sup>

From the perspective of substantive law, a settlement agreement is a contract, and therefore, it is binding until, e.g., it is effectively challenged.<sup>30</sup> The lawmaker's goal is to protect the durability of the settlement agreement,<sup>31</sup> which was expressed in Article 918 of the Civil Code, which takes precedence over Article 84 of the Civil Code (error as to the content of legal action). This provision allows for freeing oneself from the legal consequences of a settlement agreement concluded under the influence of an error only if the error regarded the state of facts which both of the parties considered undisputable according to the settlement agreement's content, and the dispute or uncertainty would not have arisen had the parties known of the real state of affairs. Moreover, one may not free himself from the legal consequences of a settlement agreement due to having found evidence as to the claims being the subject matter of the settlement agreement, unless it has been concluded in bad faith. As indicated by the Court of Appeal in Szczecin: 'the causes of the defects of the declaration of will of the party concluding the settlement agreement must be clearly documented',<sup>32</sup> and according to the judgment of the Court of Appeal in Poznań:

<sup>28</sup> Case III AUa 1338/19 15 July 2020 Court of Appeal in Gdańsk (Sąd Apelacyjny w Gdańsku), LEX No 3259795.

<sup>29</sup> Ibid.

<sup>30</sup> See case III PRN 66/72 13 October 1972 Supreme Court of Poland (Sąd Najwyższy), LEX No 602642.

<sup>31</sup> See case II CSKP 2319/22 29 May 2024 Supreme Court of Poland (Sąd Najwyższy), LEX No 3719754.

<sup>32</sup> Case I ACa 474/14 14 November 2014 Court of Appeal in Szczecin (Sąd Apelacyjny w Szczecinie), LEX No 1649299.

The one freeing himself from the consequences of a settlement agreement should submit appropriate statements in writing within one year of discovering the error, i.e. from the date of obtaining knowledge that the true state of affairs is different from the one unanimously recognised by the parties in the settlement agreement as unquestionable.<sup>33</sup>

On the other hand, the Code of Civil Procedure provides for a settlement agreement concluded before a court (a court settlement), also without providing its legal definition. Undoubtedly, a court settlement is of a dualistic nature, i.e., in addition to the substantive element provided for by Article 917 of the Civil Code, there is also a procedural element, as the court settlement should have specific effects on the pending court proceedings.<sup>34</sup> However, a court settlement is closely linked to the legal concept of a settlement ability, which means that in a given category of disputes, legal provisions do not prohibit the conclusion of a court settlement (e.g. legal proceedings on the exclusion of a shareholder from a company do not have settlement ability).<sup>35</sup> Furthermore, a court settlement can be concluded only between the parties to a given court proceedings,<sup>36</sup> within the scope of their subject matter.

Since a court settlement is concomitantly a procedural action, it is being examined on the basis of Article 203 § 4 (grounds for the inadmissibility of withdrawal, relinquishing or limiting of a claim) and Article 223 § 2 (grounds for the inadmissibility of court settlement) of the Code of Civil Procedure. Furthermore, it should be clear from the content of a court settlement that it finally resolves the dispute in terms of the entire legal relation or a precisely indicated claim, taking into account the fact that its provisions should be capable of being enforced through enforcement proceedings.<sup>37</sup> The Court of Appeal in Białystok also indicated:

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<sup>33</sup> Case I ACa 1416/17 4 December 2018 Court of Appeal in Poznań (Sąd Apelacyjny w Poznaniu), LEX No 2775956.

<sup>34</sup> See Marcin Białecki, 'Uгода zawarta przed mediatorem – charakter prawny' in Marcin Białecki, *Mediacja w postępowaniu cywilnym* (Wolters Kluwer Polska 2012), accessed via LEX, invoking Jerzy Lapiere, *Uгода sądowa w polskim procesie cywilnym* (Wydawnictwo PWN 1968). See also case V CSK 157/10 8 December 2010 Supreme Court of Poland (Sąd Najwyższy), LEX No 688708.

<sup>35</sup> See Dobrosława Tomzik, '1.2. Zdolność ugodowa a zdatność mediacyjna' in Cezary Rogula, Agnieszka Zemke-Górecka (eds), *Mediacja w praktyce mediatora i pełnomocnika* (Wolters Kluwer Polska 2021) 192.

<sup>36</sup> See Leszek Jantowski, 'Art. 917' in Małgorzata Balwicka-Szczyrba, Anna Sylwestrzak (eds), *Kodeks cywilny. Komentarz aktualizowany* (LEX/el. 2025).

<sup>37</sup> See Henryk Pietrkowski, 'Rozdział XI Uгода sądowa. Postępowanie pojednawcze. Mediacja' in *Czynności procesowe zawodowego pełnomocnika w sprawach cywilnych* (Wolters Kluwer Polska 2024) 360.

If the parties' intention was to exclude some claims, or in other words, to cover only part of the claims resulting from this relation, they should unequivocally express such intention in the content of the settlement agreement, since the general rule is that the settlement agreement concerns the entire legal relation, i.e., all its elements, and not only particular claims.<sup>38</sup>

As for freeing oneself from the substantive legal consequences of a court settlement, according to the Supreme Court's case law:

Freeing oneself from the substantive legal consequences of a court settlement after the final conclusion of the proceedings shall be made by means of a lawsuit to determine the non-existence of the court settlement (Article 189 of the Code of Civil Procedure). In such proceedings, the party may invoke defects in the declaration of will (Article 82 et seq. of the Civil Code) or demonstrate – by referring to the provisions of substantive law – that the court settlement as a legal action is invalid on the grounds indicated in Article 58 of the Civil Code.<sup>39</sup>

Therefore, if the party, in the appeal against the court decision discontinuing the proceedings as a result of concluding a court settlement, invokes defects in the declaration of will provided by substantive law, this issue will require examination in light of the previous proceedings by the court examining the appeal or – in the event of the need to conduct complex evidentiary proceedings – by the court of first instance after the decision discontinuing the proceedings has been set aside.<sup>40</sup>

The above deliberations lead to the main question posed by the authors: are the above regulations sufficient and consistent with the agreements that can be achieved in mediation?

#### **IV. SETTLEMENT AGREEMENT CONCLUDED BEFORE A MEDIATOR**

Referring to the basis of conducting mediation, while an analogy between the settlement agreement concluded before a mediator and the court settlement may be observed in court-annexed mediation, such a reference seems insufficient in the case of contractual or mixed mediation. First, in contractual or mixed media-

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<sup>38</sup> Case I ACa 558/18 15 November 2018 Court of Appeal in Bałystok (Sąd Apelacyjny w Białymstoku, LEX No 2596549, see also case II CSK 375/17 12 April 2018 Supreme Court of Poland (Sąd Najwyższy), LEX No 2490618.

<sup>39</sup> Case V CKN 953/00 16 April 2002 Supreme Court of Poland (Sąd Najwyższy), LEX No 57200.

<sup>40</sup> Case II CZ 129/67 16 February 1968 Supreme Court of Poland (Sąd Najwyższy), OSNC 1968, No 8–9, item 158.

tion, the link between the subject matter, specified parties of the civil proceedings (which may not have been initiated) and the appropriate scope of a settlement agreement concluded before a mediator ceases to exist. People who use the services of the mediator indicate the issues they want to solve themselves, and, while mediating, it may turn out that other parties will join. Furthermore, not every interest that the parties have is protected by law (i.e., it cannot form a legally viable claim). Finally, mediation does not seem to fit in with the procedural concept of settlement suitability. Intra-organisational mediation is one of such instances,<sup>41</sup> in which, procedurally speaking, a claim for exclusion of a shareholder from the company does not have settlement ability, whereas such disputes are increasingly resolved with the participation of a mediator.

Divorce mediation, conducted either on the basis of a court decision referring the parties to mediation (although divorce proceedings do not have settlement ability) or a mediation agreement, is an example of an agreement that, if any, has a minimal substantive law element but instead is, in its essence, a set of procedural motions regarding further (or planned) court proceedings.

The separation of the settlement concluded before a mediator from the regulations of substantive and procedural civil law has already occurred in criminal proceedings. Hence, the application of analogy to Articles 917 and 918 of the Civil Code has been limited, even if the content of such a settlement agreement may include redress, e.g., payment of a sum of money by the accused to the injured party, which is an enforceable obligation in civil law. It has been pointed out, however, that the concept of such a settlement agreement is broader and thus treating it exclusively in terms of civil law is impossible to align with the idea of restorative justice.<sup>42</sup>

The authors claim that a civil law settlement agreement concluded before a mediator may be either a settlement agreement in the strict sense or a settlement agreement in the broad sense. A settlement agreement in the strict sense meets the requirements specified in Article 917 of the Civil Code and concerns legal relations remaining at the disposal of the parties, which they can modify by themselves. It may contain procedural elements, e.g., a motion for its approval by the court, and provisions on court costs in court-annexed mediation. It is effective *per se*, whereas the possibility of its approval by the court, also by issuing a writ of

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<sup>41</sup> See Przemysław Nawojski, Katarzyna Purc-Kurowicka, '3. Rodzaje sporów korporacyjnych na przykładach' in Agnieszka Zemke-Górecka, Cezary Rogula (eds), *Mediacja z udziałem przedsiębiorców. Zagadnienia praktyczne* (Wolters Kluwer Polska 2025).

<sup>42</sup> See Cezary Rogula, Agnieszka Zemke-Górecka, 'Mediacja' in Mariusz Olęzałek (ed), *Praxis. Prawo karne procesowe dla sędziów, prokuratorów, obrońców i pełnomocników* (Wydawnictwo C.H. Beck Sp. z o.o. 2024) 201.

execution pursuant to Article 183<sup>14</sup> of the Code of Civil Procedure, only facilitates the forced enforcement of the settlement agreement in the event of non-compliance with its provisions on a voluntary basis.

The settlement agreement, in the broad sense, also called by the authors a mediated memorandum of understanding, reflects the multitude of agreements that can be achieved in mediation. It may refer to mediation:

- concerning legal relations for which, although they are at the parties' disposal, the law requires a specific form of legal action to modify them, e.g., the law requires a notarial deed for the dissolution of co-ownership of real estate. Hence, unless the mediator is also a notary public, the settlement agreement in such instances contains:
  - an obligation to conclude a contract of specified content before a notary public, or
  - an obligation to conclude a court settlement of specified content that meets the requirement of a specific form of legal action, or
  - a joint procedural motion as to the way the court will regulate the legal relation
- concerning legal relations that are not at the parties' disposal, and a constitutive court ruling is necessary to change or terminate the legal relation, e.g., in a divorce case, the settlement agreement is a joint procedural motion of the parties as to how the court should proceed,
- concerning the interests of the parties that are not recognised by substantive or procedural law (e.g., indicating when a family member cleans the apartment).

The above distinction proves that it is possible to reach such agreements in mediation that may not meet the requirements of Article 917 of the Civil Code or procedural law (e.g., the settlement ability). Moreover, although it is not legally prohibited in light of Article 183<sup>14</sup> § 2 of the Code of Civil Procedure, a mediated memorandum of understanding containing a joint procedural motion of the parties regarding further court proceedings does not require its approval by the court,<sup>43</sup> but should result in the court taking further necessary actions.

This leads to the conclusion that the settlement agreement concluded before a mediator goes beyond the existing legal framework of the substantive settlement agreement or the court settlement. Therefore, it may be justified to consider the introduction of separate provisions regulating a mediated settlement agreement. This is the authors' proposal as a contribution to further discussion, while

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<sup>43</sup> See Rafał Morek, 'Ugoda zawarta przed mediatorem' in Ewa Gmurzyńska, Rafał Morek (eds), *Mediacja. Teoria i praktyka* (Wolters Kluwer Polska 2024) 326–327.

additionally recognising that such a next step is justified by the current stage of development of civil mediation in Poland.

First, this would allow for acknowledging the possible scope of a mediated settlement agreement, especially in the case of legal relations that are not at the parties' disposal, so far considered by many authors as incapable of being the subject matter of a settlement agreement.<sup>44</sup> Moreover, introducing the general possibility of including the parties' procedural motions in a mediated settlement agreement would also allow the parties to include withdrawal of a lawsuit. Currently, case law and scholars deny it,<sup>45</sup> hence, if the parties wish to discontinue the proceedings by withdrawing a lawsuit while simultaneously taking advantage of the benefits of mediation prescribed by law (such as a higher refund of the court fees), the settlement agreement must include, e.g., the plaintiff's obligation to submit a statement of withdrawal of the lawsuit, instead of including it in the agreement.

In addition, the authors support the postulate that a mediated settlement agreement should have legal effects also when the law requires a specific form of legal action.<sup>46</sup> It seems that in such a situation, the approval of a mediated settlement agreement by the court provides for sufficient means of control. In light of Article 183<sup>15</sup> of the Code of Civil Procedure, the judiciary takes the position that a settlement agreement concluded before a mediator, even after its approval by the court, does not meet such a requirement.<sup>47</sup> This, in turn, means for the parties that, in such a situation, they must currently use one of the options indicated above in the case of legal relations that are at the disposal of the parties, but the law requires a specific form of legal action to modify them. This generates unnecessary additional time and costs for the parties, e.g., for notarial deeds. To make this postulate fully functional, it is also necessary to include in Article 183<sup>14</sup> § 1 of the Code of Civil Procedure the prescribed time, e.g. 30 days, within which the court shall approve the mediated settlement agreement. Unfortunately, it is not included in the amendment to that provision that will come into force on 1 March 2026, as it leaves the current imprecise term 'without delay'.

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<sup>44</sup> See Henryk Pietrkowski, 'Rozdział XI Ugoda sądowa. Postępowanie pojednawcze. Mediacja' in *Czynności procesowe zawodowego pełnomocnika w sprawach cywilnych* (Wolters Kluwer Polska 2024) 374.

<sup>45</sup> See case III PRN 23/72 10 May 1972 Supreme Court of Poland (Sąd Najwyższy), LEX No 7089; Tadeusz Ereciński, 'Art. 183(14)' in Paweł Grzegorzczak and others, *Kodeks postępowania cywilnego. Komentarz*. Vol II. Postępowanie rozpoznawcze (5th edn, Wolters Kluwer 2016), accessed via LEX.

<sup>46</sup> See Joanna Dominowska, 'Ugoda zawarta przed mediatorem a ugoda sądowa' [2018] *Przegląd Prawa Handlowego* 2018 6, 40.

<sup>47</sup> See case I CSK 2079/22 28 October 2022 Supreme Court of Poland (Sąd Najwyższy), LEX No 3515919, case I ACa 404/16 23 September 2016 Court of Appeal in Katowice (Sąd Apelacyjny w Katowicach), LEX No 2137014.

The authors also call for the clarification of the grounds on which the parties may 'revoke' their mediated settlement agreement. This need is particularly visible in cases of legal relations whose creation, change or termination requires a constitutive court ruling. Such settlement agreements concluded before a mediator are currently not sufficiently protected by either substantive law (including the qualified form of error under Article 918 of the Civil Code) or procedural law. At the same time, a mediated settlement agreement of that subject matter does not seem to require court approval. Instead, it needs further court proceedings based on the joint procedural motions, which subsequently should not be freely changed, modified or even revoked by the parties without a clearly prescribed legal basis.

The introduction of a separate regulation of the mediated settlement agreement may also fully take into account the conditions of conducting contractual mediation. If a motion for the court approval is filed, the court in such instance does not have any court files based on which it could verify what legal relation and what claims have been settled, as well as what mutual concessions have been made, which should certainly remain *essentialia negotii* of the mediated settlement agreement,<sup>48</sup> while maintaining the possibility for the court to examine them.

Finally, further extension of the newly regulated mediated settlement agreement may be considered. This may refer to currently questionable cases, such as concluding a mediated settlement agreement for the duration of mediation, which in a way may replace the court's decision on interim measures, or the possibility of concluding a mediated settlement agreement in enforcement proceedings. This seems to be a natural next step, after the amendments to Article 183<sup>13</sup> § 2 and Article 183<sup>14</sup> § 2<sup>1</sup> of the Code of Civil Procedure enacted in 2023 and taking into account the amendments to those provisions that will come into force on 1 March 2026, which do not relate to the issue raised above.

The framework of this article cannot provide an exhaustive answer to the question of whether and how to regulate a new mediated settlement agreement; therefore, it aims to indicate potential problems and issues for further discussion.

## V. CONCLUSION

The growing use of mediation, which increasingly enters new areas of legal relations and the existence of various entities, allows for the presentation of the

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<sup>48</sup> See Aneta Małgorzata Arkuszewska, '4. Uгода a porozumienie (pojednanie)' in Aneta Małgorzata Arkuszewska, Jerzy Plis (eds) *Zarys metodyki pracy mediatora w sprawach cywilnych* (Wolters Kluwer Polska 2014), accessed via LEX.

entire spectrum of what the parties can achieve as a result of their talks. The multitude of settlement agreements concluded before a mediator is a ground for further development of mechanisms that take into account, e.g., disputes without settlement availability or those requiring a specific form of legal action. Concomitantly, it shows the inadequacy of the currently functioning legal provisions, which do not reflect all the possibilities that may appear as a result of each type of mediation: court-annexed, contractual and mixed. This can even be considered an obstacle to the further development of mediation.

Twenty years ago, when mediation was introduced into the Code of Civil Procedure, there was hardly any awareness of the existence of contractual mediation, not to mention mixed mediation. Those two decades have allowed society to acquire new skills dedicated to this method of resolving disputes. Appreciation of this state of affairs should also be given to judges, who, by issuing decisions to refer the parties to mediation, acknowledged its potential. In that way, they often facilitate the discontinuation of court proceedings due to a concluded mediated settlement agreement, which has a much wider extent than settlement possibilities granted to judges by the Code of Civil Procedure.

Hence, the authors, taking into account the presented multitude of possible agreements concluded as a result of mediation, propose the next step – introducing a mediated settlement agreement that will adjust this type of contract to the reality of mediation.

## REFERENCES

### BOOKS AND ARTICLES

Arkuszevska AM, '4. Ugoda a porozumienie (pojednanie)' in AM Arkuszevska, J Plis (eds), *Zarys metodyki pracy mediatora w sprawach cywilnych* (Wolters Kluwer Polska 2014), accessed via LEX

Arkuszevska A, 'Sposoby i formy zawarcia ugody mediacyjnej w dobie pandemii COVID' [2022] *Acta Iuridica Resoviensia* 1 (36)

Bialecki M, 'Ugoda zawarta przed mediatorem – charakter prawny' in M Bialecki, *Mediacja w postepowaniu cywilnym* (Wolters Kluwer Polska 2012)

Brown HJ, Marriott AL QC, *ADR Principles and Practice* (2<sup>nd</sup> edn, Sweet & Maxwell Limited 1999)

Buczowski P, 'Ugoda w prawie cywilnym materialnym i procesowym - wady i zalety' [2010] *Przegląd Prawa Handlowego* 5

Davidson RB, 'International Mediation Basics' in RV Rhoades, DM Kolkey, R Chernick (eds), *Practitioner's Handbook in International Arbitration and Mediation* (2<sup>nd</sup> edn, JurisNet, LLC 2007)

Dominowska J, 'Uгода zawarta przed mediatorem a ugoda sądowa' [2018] *Przegląd Prawa Handlowego* 2018 6

Dziurda M, 'Art. 1161(1)' in *Kodeks postępowania cywilnego. Praktyczny komentarz do nowelizacji z 2023* (Wolters Kluwer Polska 2023), accessed via LEX

Ereciński T, 'Art. 183(14)' in P Grzegorzczak and others, *Kodeks postępowania cywilnego. Komentarz*. Vol II. Postępowanie rozpoznawcze (5th edn, Wolters Kluwer 2016), accessed via LEX

Falkiewicz K, Romatowska M, 'Uгода w postępowaniu mediacyjnym w sprawach cywilnych' [2012] *Temidium* 5

Gmurzyńska E, '9.2.1. Mediacja facylitatywna i mediacja ewaluatywna (ocenna)' in E Gmurzyńska, Rafał Morek (eds), *Mediacje. Teoria i praktyka* (Wolters Kluwer Polska 2024)

--, '9.2.5. Mediacje sądowe i mediacje umowne' in E Gmurzyńska, R Morek (eds), *Mediacje. Teoria i praktyka* (Wolters Kluwer Polska 2024)

Jantowski L, 'Art. 917' in M Balwicka-Szczyrba, A Sylwestrzak (eds), *Kodeks cywilny. Komentarz aktualizowany* (LEX/el. 2025)

Kalisz A, Zienkiewicz A, 'Kompetencje mediacyjne sędziego w zakresie polubownego rozwiązywania spraw cywilnych (uwagi na tle nowelizacji k.p.c.)' [2021] *Państwo i Prawo* 10

Krzyskowska K, 'Art. 917' in M Frasz, M Habdas (eds), *Kodeks cywilny. Komentarz*. Vol V. Zobowiązania. Część szczególna (art. 765–921(16)) (Wolters Kluwer Polska 2018), accessed via LEX

Lapierre J, *Uгода sądowa w polskim procesie cywilnym* (Wydawnictwo PWN 1968)

Morek R, 'V. Definicja pojęcia "mediacja"' in P Grzegorzczak, K Weitz (eds), *Europejskie prawo procesowe cywilne i kolizyjne* (Wydawnictwo Prawnicze LexisNexis 2012) accessed via LEX

--, 'Uгода zawarta przed mediatorem' in E Gmurzyńska, R Morek (eds), *Mediacja. Teoria i praktyka* (Wolters Kluwer Polska 2024)

Nawojski P, Purc-Kurowicka K, '3. Rodzaje sporów korporacyjnych na przykładach' in A Zemke-Górecka, C Rogula (eds), *Mediacja z udziałem przedsiębiorców. Zagadnienia praktyczne* (Wolters Kluwer Polska 2025)

Nazaruk P, 'Art. 917' in B Bajor and others, *Kodeks cywilny. Komentarz aktualizowany* (LEX/el. 2024)

Pietrzkowski H, 'Rozdział XI Uгода sądowa. Postępowanie pojednawcze. Mediacja' in *Czynności procesowe zawodowego pełnomocnika w sprawach cywilnych* (Wolters Kluwer Polska 2024)

Riskin LL, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' [1997] *Harvard Negotiation Law Review* 1, 7

Rogula C, 'Nowy kształt postępowania mediacyjnego w świetle zmian Kodeksu postępowania cywilnego' in B Jelonek-Jarco, R Kos, J Zawadzka (eds), *Usus magister est optimus: rozprawy prawnicze ofiarowane Profesorowi Andrzejowi Kubasowi* (Wydawnictwo C.H. Beck Sp. z o.o. 2016)

--, Zemke-Górecka A, 'Mediacja' in M Ołężałek (ed), *Praxis. Prawo karne procesowe dla sędziów, prokuratorów, obrońców i pełnomocników* (Wydawnictwo C.H. Beck Sp. z o.o. 2024)

Sekuła-Leleno M, 'Mediacja jako nowoczesny sposób rozwiązywania sporów – analiza zmian wprowadzonych z dniem 1.01.2016 r.' [2016] *Rejent* 8

Skibińska M, *Mediacja po reformie KPC* (LEX/el. 2023)

Stefańska E, 'Art. 183(8)' in M Manowska (ed) *Kodeks postępowania cywilnego. Komentarz aktualizowany*. Vol I. Art 1-477(16), (LEX/el. 2022)

Tomzik D, '1.2. Zdolność ugodowa a zdatność mediacyjna' in C Rogula, A Zemke-Górecka (eds) *Mediacja w praktyce mediatora i pełnomocnika* (Wolters Kluwer Polska 2021)

Zienkiewicz A, *Studium mediacji. Od teorii ku praktyce* (Wydawnictwo Difin S.A. 2007)

#### CASE LAW

Case II CZ 129/67 16 February 1968 Supreme Court of Poland (Sąd Najwyższy), OSNC 1968, No 8–9, item 158

Case III PRN 23/72 10 May 1972 Supreme Court of Poland (Sąd Najwyższy), LEX No 7089

Case III PRN 66/72 13 October 1972 Supreme Court of Poland (Sąd Najwyższy), LEX No 602642

Case V CKN 953/00 16 April 2002 Supreme Court of Poland (Sąd Najwyższy), LEX No 57200

Case V CSK 157/10 8 December 2010 Supreme Court of Poland (Sąd Najwyższy), LEX No 688708

Case I ACa 474/14 14 November 2014 Court of Appeal in Szczecin (Sąd Apelacyjny w Szczecinie), LEX No 1649299

Case I ACa 404/16 23 September 2016 Court of Appeal in Katowice (Sąd Apelacyjny w Katowicach), LEX No 2137014

Case II CSK 375/17 12 April 2018 Supreme Court of Poland (Sąd Najwyższy), LEX No 2490618

Case I ACa 558/18 15 November 2018 Court of Appeal in Bałystok (Sąd Apelacyjny w Białymstoku), LEX No 2596549

Case I ACa 1416/17 4 December 2018 Court of Appeal in Poznań (Sąd Apelacyjny w Poznaniu), LEX No 2775956

Case III AUa 1338/19 15 July 2020 Court of Appeal in Gdańsk (Sąd Apelacyjny w Gdańsku), LEX No 3259795

Case I CSK 2079/22 28 October 2022 Supreme Court of Poland (Sąd Najwyższy), LEX No 3515919

Case I ACa 230/22 28 November 2023 Court of Appeal in Kraków (Sąd Apelacyjny w Krakowie), LEX No 3791209

Case II CSKP 2319/22 29 May 2024 Supreme Court of Poland (Sąd Najwyższy), LEX No 3719754