

## INTERNATIONAL

On Oct. 22, 2004, the European Commission (EU) issued a Proposed Directive on Mediation for civil and commercial matters to be implemented by all Member States (except Denmark) by Sept. 1, 2007, at the latest. On June 9, 2005, the European Economic and Social Committee delivered its supporting opinion and on Dec. 2, 2005, the EU Council of Ministers “reached a common understanding on the text of a draft Directive on mediation in civil and commercial matters, subject to the definition of cross-border crisis and the application of the principle of subsidiarity.”<sup>1</sup> The European Parliament has not yet delivered its opinion at first

reading.<sup>2</sup> Poland is one of the first EU Member States to enact detailed legislation on mediation in civil and commercial

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# How the New Polish Civil Mediation Law Compares with the Proposed EU Directive on Mediation

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**Eastern Europe cannot be ignored when it comes to alternative dispute resolution, including mediation. Poland is one of the first EU Member States, the first in Eastern Europe, to enact detailed legislation on mediation in civil and commercial cases. This article discusses the provisions of the new Polish law in light of the requirements of the Proposed European Directive on Mediation.**

cases. The Law of July 28, 2005 (Polish Mediation Law), which introduced mediation as a separate part of Poland's Civil Procedure Code,<sup>3</sup> entered into force on Dec. 10, 2005. This article compares the Polish Mediation Law with the proposed EU Mediation Directive.

### The Proposed EU Mediation Directive

The EU Mediation Directive embodies the fruits of the EU Commission's multi-year research into methods of obtaining better performance in resolving civil disputes in Member States.<sup>4</sup> Based on the Commission's evaluation of mediation legislation and practice in the Member States, it concluded that there was no need for it to regulate mediation or the appointment or accreditation of mediators. However, it determined that there was a pressing need for it to: (1) establish minimum common rules in the Community (i.e., by a directive) to ensure a sound relationship between mediation and judicial proceedings, and (2) provide tools for courts to actively promote the use of mediation, without "making mediation compulsory or subject to specific sanctions."<sup>5</sup>

The Explanatory Memorandum accompanying the EU Directive defines the Directive's tasks and objectives:

- There is need to ensure better access to justice for individuals and businesses in Member States by supplementing their national legal systems with amicable, non-adjudicative mechanisms, the first of which is mediation.
- Implementation of mediation in court proceedings should be coupled with relevant safeguards of due process and professional conduct, including clear rules for mutual relationship between mediation and court proceeding (statutes of limitation, constitutional right to seek justice in court).
- The Directive is perceived as a promotion tool, encouraging civil mediation, as a legitimate mechanism for resolving civil disputes in a swift, inexpensive and professional manner.
- Mediation is expected to offload pressure on the court system and the plague of congestion of cases and long delays in case-handling, affecting virtually all Member States.

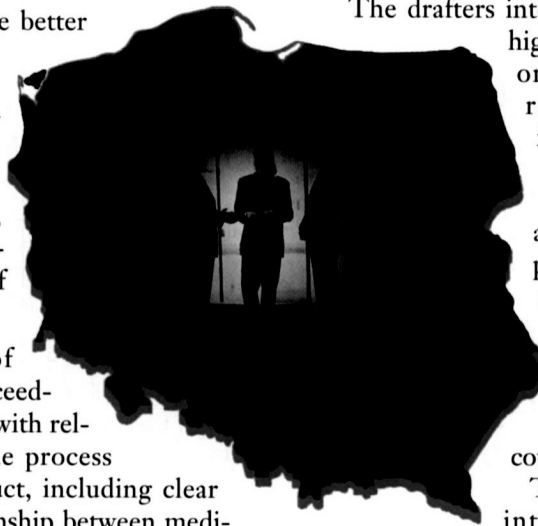
According to the EU, widespread use of mediation will bring measurable economic benefits to parties (e.g., reduced transaction costs) and society at large; it will also ease social tensions by building a new legal culture in and among Member States based on friendship, reasoned conversation and compromise.

### Origins and Objectives of the Polish Mediation Law

The Civil Law Codification Commission at the Ministry of Justice and a panel of experts on civil and commercial law (including law professors, Supreme Court judges and distinguished practitioners) prepared the draft mediation legislation over the course of two years. The Commission invited comments from professional and business organizations like the Polish Arbitration Association, the Polish Confederation of Private Employers, the Business Centre Club, and law firms. The draft legislation eventually reached Parliament in August 2004. After intensive work by parliamentary commissions, the legislation was voted into law on July 28, 2005. The expectation in enacting this legislation was that mediation would result in faster, more convenient and satisfactory resolution of disputes through settlements.

The drafters intended to make mediation highly attractive to parties in order to make mediation reality. To this end, it included financial incentives to encourage parties to use mediation steadily and frequently. For example, if a mediation settlement is reached in a case filed in court, the legislation provides that the plaintiff will recover three-quarters of the court fee already paid.

The Polish Mediation Law introduces mediation as a new option in Polish civil procedure, creating an alternative to the traditional adjudication of civil cases by state courts. The legislation is quite simple and straightforward. It provides that all civil disputes that qualify for amicable agreement can be resolved by means of settlement concluded in front of a mediator. A mediation settlement has legal status equal to that of a court settlement. Embarking on mediation interrupts the running of statutes of limitation, so if a mediation is unsuccessful, the statute of limitations runs from the beginning.



The Polish Mediation Law regulates two types of mediation in civil matters: (1) conventional or contractual mediation and (2) mediation in court proceedings.

### **The Polish Mediation Law vis-à-vis the EU Directive**

The Polish Mediation Law and the EU Mediation Directive voice the same need for decisive upgrading of the existing dispute resolution system by offering mediation of civil disputes. This should dramatically improve the general legal culture and direct discourse toward rea-

of mediators, mediation procedures and settlement agreements.

The EU Directive defines mediation in Article 2 to mean “any process, however named or referred to, where two or more parties to a dispute are assisted by a third party to reach an agreement on the settlement of the dispute, and regardless of whether the process is initiated by the parties, suggested or ordered by the court or prescribed by the national law of a Member State.”

Thus, both Poland’s Mediation Law and the EU Directive contemplate the “classic” model of mediation as a supportive process involving the

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soned conversation and settlement, lessening the role of state court systems.

In accordance with the principles of subsidiarity<sup>6</sup> and proportionality,<sup>7</sup> the EU Directive focuses on mediation in the court context, leaving it to Member States, individuals and businesses to decide how mediation should be regulated (i.e., the standards for mediation proceedings, qualifications and selection of mediators, mediator training, etc).

Poland’s Mediation Law is broader in its scope. It focuses on mediation in the court context but also other mediation issues, such as the mediation agreement, selection of the mediator, confidentiality, and conduct of the mediation proceedings).

Both the Polish Mediation Law and the EU Mediation Directive apply to civil matters, which includes all commercial disputes. However, the Polish Mediation Law does not apply if the civil matter does not qualify for resolution by amicable settlement (i.e., a matter that, by definition, is not freely controlled by the parties and can be regulated only by a court verdict, as in the case of a matrimonial dispute, inheritance or proprietary claim).

### **Definition of Civil Mediation**

The Polish Mediation Law does not define civil mediation; rather it describes its objectives and constitutive elements, the most important of which are the scope of civil disputes that can be settled by mediation, forms of mediation (e.g., conventional and court-ordered), qualifications

of a neutral person who is independent of the parties—a mediator, who assists the parties or facilitates their discourse for the purpose of reaching a mutually acceptable settlement. This type of mediation is closer to the facilitative model than the evaluative. It has been observed, however, that in order to be productive, every mediation must also contain certain particles of “evaluation” by the mediator.<sup>8</sup>

### ***Referral to Mediation***

Article 3 of the EU Directive says that the court can invite parties to mediate but it cannot mandate it. At the same time Article 3.2 says that the EU Directive does not prejudice national legislations to make mediation compulsory or subject to incentives or sanctions.

The Polish Law goes further. It allows state courts to mandate mediation, even though they have not made a prior agreement to mediate.

### ***Quality Assurance***

The Directive calls upon Member States to undertake concrete steps aimed at establishing and improving standards (code of ethics) of conduct for mediators and organizations offering mediation services. The Directive also sees a necessity for building control and supervisory mechanisms to raise the professional level of mediation through mediation training and certification.

The Polish Law is less than satisfactory in this regard. There are no qualitative or professional criteria for mediators to meet. Indeed, it provides

that “[a]ny person with full legal capacity to make legal representations can perform as mediator.”<sup>9</sup> The explanatory memorandum submitted by the government expressly states that a “mediator’s abilities do not rest in mediator knowledge but in his personality. Therefore, in order to make it easier for the parties to undertake mediation, no specific requirements as to the education of mediators are foreseen.”

This defect in the Mediation Law could be cured by state courts and their presidents, who could create lists of registered mediators who meet certain requirements. A good example for them to follow is U.S. court mediation programs.<sup>10</sup>

#### ***Enforcement of Settlement Agreements***

Under the Polish Law, a settlement agreement constitutes an “execution title” that is the equivalent of an arbitral award. After acceptance by a court, a settlement has the legal value of a settlement concluded before a court. This is consistent with the EU Directive, which provides that Member States ensure in their legislation that mediation settlements are fully valid and enforceable.

#### ***Confidentiality Safeguards***

The safeguard of confidentiality plays a fundamental role in making mediation a safe place to discuss sensitive matters with the mediator. Lack of confidentiality provisions effectively erases any temptation to try mediation.

Both the EU Directive and Polish Law recognize the importance of confidentiality in mediation but only to a limited extent. Neither provides as much confidentiality protection as the Uniform Mediation Act, developed in the United States.

The Polish Law only requires mediators to keep confidential all facts learned during mediation, and protects them from having to testify as a witness in civil proceedings regarding the same matter. However, there is no similar provision for parties and other participants in mediation. This is a rather obvious deficiency which should be corrected by subsequent amendment.

The EU Directive has more detailed confidentiality provisions. It prohibits mediators and any person involved in the administering mediation

services from testifying or giving evidence in civil judicial proceedings about:

- an invitation by a party to engage in mediation or the fact that a party was willing to participate in mediation;
- views expressed or suggestions made by a party in a mediation in respect to a possible settlement of the dispute;
- statements or admissions made by a party in the course of the mediation;
- proposals made by the mediator;
- the fact that a party had indicated its willingness to accept a proposal for a settlement made by the mediator;
- a document prepared solely for purposes of the mediation.

Significantly, neither the Polish Law nor the EU Directive provide confidentiality protections to parties.

The EU Directive has three exceptions to the confidentiality obligations, while the Polish Law only has one. The EU excludes from confidentiality protection:

- information necessary for the purposes of implementing or enforcing a mediation settlement; this should include interpretation of a settlement and its validity;
- overriding considerations of public policy, such as the safety of children, or threats of physical jeopardy to a person;
- if the mediator and the parties so agree.

Under the new Polish Law, the mediator cannot testify as a witness about facts learned during the mediation unless the parties relieve the mediator from this obligation.

The EU Directive’s confidentiality provisions, which are generally based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation of 2002 (“UNCITRAL Model Conciliation Law”), provide far less protection than the UMA, which affords confidentiality protections to mediators, non-party participants and parties.<sup>11</sup>

It should be noted that the UNCITRAL Model Conciliation Law played a limited role in the drafting of the Polish Mediation Law, first of



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all because the Model Law does not address specific issues connected with court-referred mediation which, in turn, occupies a central place in the Polish Mediation Law. During the drafting process, Polish lawmakers and supporting professional institutions put more emphasis on Poland's internal needs to improve the dispute resolution system in general, and severe deficiencies of the court system in particular; plus they have carefully reviewed the existing EU and U.S. practice and regulations.<sup>12</sup> Other countries that have enacted a comprehensive law on mediation, such as Austria, have elected a similar approach.

### ***Interruption of Statutes of Limitation***

As noted above, the Polish Law provides in Article 123 § 1 of the Civil Code that “[t]he running of the period of limitation shall be interrupted: ... (3) by commencement of mediation.”

The EU Directive provides for suspension of limitation periods when: (a) the parties agree to

cerning mediation standards, mediator training and certification. There are also no guidelines to how civil courts should establish and maintain lists of qualified mediators. The existing provisions are too short and too general.

The main hurdle is a complete lack of awareness of what mediation is all about; this sad finding refers to everybody—the general public, the government, the courts and business. There is a tremendous need for education about what mediation is and what it can accomplish. Educational projects at universities, promotion in the general media and in business and law magazines and newspapers, as well as chambers of commerce and bar associations, must engage in promotional activities to make the option of civil mediation known so that the process can be used.

### ***Proposed Steps***

Acceptance of mediation by Polish judges is essential for a successful takeoff and growth of

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use mediation, (b) the use of mediation is ordered by a court, or (c) an obligation to use mediation arises under the national law of a Member State.

The Polish Law seems to be far more mature than the solution provided by the Directive and in this sense has an impact similar to the commencement of commercial arbitration. In both instances the statute of limitations starts over from the beginning.

### ***Conclusions and Proposed Steps***

Mediation has a real opportunity to become a significant factor in the intended overhaul of the Polish judicial system. The expectation is that it will bring about the resolution of great numbers of civil disputes stemming from private contracts, business dealings and cross-border transactions. Positive mediation experience and practice in other countries, especially in the United States, could make these expectations stronger.

The Polish Mediation Law is generally perceived by the courts, law practitioners, academia and business community to be a successful piece of legislation. It opens new doors for individuals, entrepreneurs and civil courts to make dispute resolution less contentious and less expensive than traditional court litigation or even arbitration.

True, there are significant weaknesses in the Polish Mediation Law, particularly those con-

mediation in civil court proceedings. There is also a need for a cadre of trained mediators, registered in courts according to their fields of practice. To this end, the following is needed:

1. Local mediation centers need to be established. They can be attached to universities (schools of law), associations of entrepreneurs and employers, business chambers and professional associations. They could follow such leaders as the Business Mediation Centre at the Polish Arbitration Association, the Mediation Centre at Foundation “Partners” Polska and the Polish Mediation Centre.
2. Wide-scale mediator training and certification programs must be created. Such programs should be financed by local governments. The goal of these programs is to grow a cadre of professionally prepared mediators in a relatively short time.
3. Studies by circuit courts and mediation centers evaluating:
  - the scope, frequency and kind of matters channeled by courts to mediation;
  - the effectiveness of mediations (i.e., statistics on successful mediations);
  - the length of mediation proceedings; and
  - cooperation between courts and mediators (availability, professionalism, opinions by

courts, peers and public, participation in training programs, etc.).

In August 2005, Poland's Minister of Justice established a new advisory body, the Civic Council for ADR, whose 20 members are responsible for working out standards of mediation conduct, a mediator's code of ethics, and a draft law on ADR. The Council is also responsible for promoting ADR among employees of the judicial system, legal professionals and businesspeople. So far, the Council has worked out and published mediation standards for mediators and mediation procedures. Next, the Council has submitted a comprehensive proposal to amend the Polish Mediation Law to include mediator standards, selection and certification provisions, as well as an introduction to mandatory mediation in divorce matters for families with minor children. The latter proposal has already been included in a draft amendment of the Civil Procedure Code submitted by the Minister of Justice in June 2006. ■

## ENDNOTES

<sup>1</sup> Subsidiarity means the EU only regulates matters that cannot be better legislated on a local or state level.

<sup>2</sup> See [www.europa.eu.int/prelex/detail\\_dossier\\_real.cfm?CL=en&DossierId=191867](http://www.europa.eu.int/prelex/detail_dossier_real.cfm?CL=en&DossierId=191867) (Fr); [www.ejtn.net/www/en/resources/5\\_1095\\_1230\\_file.458.pdf](http://www.ejtn.net/www/en/resources/5_1095_1230_file.458.pdf) (Eng.).

<sup>3</sup> *The Journal of Laws*, 2005, No. 172, item 1438.

<sup>4</sup> Green Paper on alternative dispute resolution in civil and commercial matters (proposed by the Commission), Brussels 19.04.2002, COM(2002) 196 final. See [http://ec.europa.eu/comm/off/green/index\\_en.htm](http://ec.europa.eu/comm/off/green/index_en.htm).

<sup>5</sup> EC Explanatory Memorandum, item 1.1.1.

<sup>6</sup> See definition, *supra*, n. 1.

<sup>7</sup> Proportionality means the EU undertakes only legal measures required by implementation of EU's tasks and objectives.

<sup>8</sup> D. Peters, *Welcome to Alternative Dispute Resolution*, Inst. for Disp. Resol. Levin College of Law, Univ. Fla., 2005.

<sup>9</sup> Article 183(2) § 1.

<sup>10</sup> See U.S. Dist. Ct., N. Dist. Ill. Mediation Program for the Western Division: "It is the desire of the court to provide all parties with an opportunity for resolution of their dispute which would occur potentially early in the litigation process in order to keep transactional costs at a reasonable level."

<sup>11</sup> Uniform Mediation Act 2001 (UMA), National Conference of Commissioners on Uniform State Law, available at [www.nccusl.org/Update/ActSearchResults.aspx](http://www.nccusl.org/Update/ActSearchResults.aspx).

<sup>12</sup> *Supra* n. 3 and the UMA, *supra* n. 8.

The International Centre for Dispute Resolution® (the international division of the American Arbitration Association) and the Court of Arbitration at the Polish Chamber of Commerce (CAPCC) signed a cooperative agreement on Aug. 28, 2006, to advance the use of ADR to settle disputes arising from international commercial transactions.

"The demand for private alternatives to litigation is rapid-

## ICDR and Polish Arb Court Sign Cooperative Agreement

ly increasing in Poland. The Polish economy continues to enjoy robust economic growth and direct foreign investment, due in part to Poland's close relationship with the U.S. and its European Union membership," said Mark E. Appel, senior vice president of the ICDR. Piotr Nowaczyk, the CAPCC chairman, said, "We

are delighted to join the ICDR in promoting leading arbitration and mediation practices in Poland." Both organizations will recommend suitable individuals to serve as neutrals on cases filed with them and provide facilities, translation services and technical assistance. The two organizations will also jointly present lectures on leading ADR practices and on topics of mutual interest. ■

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