ADR on the way up

From this year, alternative dispute resolution in Poland should be faster, cheaper and more popular

By **Maciej Jóźwiak**, attorney at law, Litigation team, Wierzbowski Eversheds

Over 1.8 million commercial cases were filed in the Polish courts in 2015. Statistics in the United States show that there a substantial majority of commercial disputes end in settlement, reached through mediation or arbitration. But in Poland neither of these institutions is that popular yet, mainly because they are not recognized by businesspeople. Lawmakers in Poland decided to change that.

The Act of September 10, 2015, Amending Certain Acts to Encourage Amicable Methods of Dispute Resolution has been in force since January 1, 2016. The intention of the changes was to promote mediation and arbitration in civil cases by streamlining the procedures and organizational aspects affecting the time and cost of the proceedings.

Stronger mediator

First, in amending the existing regulations governing mediation, the Parliament sought to strengthen the mediator's position. The mediator will now be able to support the parties in formulating settlement proposals, and, at the parties' mutual request, even suggest how the dispute should be resolved. Mediators have been ensured the right to review the case file promptly after the parties enter into mediation, thus increasing their level of preparation to conduct the mediation.

A list of permanent mediators has been drawn up at each of the regional courts throughout the country, with the contact details of the mediators and additional information about their qualifications to help the parties make a selection. The parties have the freedom to make their own choice of mediator, as the parties are entitled to refer to the permanent list but not required to.

Guarantees of the confidentiality of mediation proceedings have also been expanded by introducing a legal obligation to maintain the confidentiality of facts disclosed during the course of mediation, not only on the part of the mediator but also by the parties and any other persons taking part in the mediation.

Different procedures

The second group of changes in the regulations cover formal solutions in judicial proceedings. It is now a mandatory element of a statement of claim filed with the state court to inform the court whether the parties have attempted mediation or some other out-of-court method of resolving the dispute before filing the case in court, and if not, to explain why such attempts were not made. Significantly, the reasons for not attempting an amicable resolution of the dispute must be justified. Thus it is insufficient for the plaintiff to state that no attempt was made to resolve the dispute because it obviously would have been pointless. Moreover, the absence of this information is now regarded as a "formal defect" in the statement of claim, and consequently the court is authorized to reject the statement of claim if it lacks this information, and close the case without reaching a decision.

The judge is now entitled to summon the parties to participate in an informational meeting concerning amicable methods of resolving the dispute. The judge may also direct the parties to mediation at any stage of the case, and not only at the beginning of the case, and can do so more than once during the same case. Therefore, if the judge conducting the case perceives that there is a chance for reaching a settlement, and the litigants only need the assistance of a third party acting as mediator, the court will be authorized the stay the proceeding and direct the parties to mediation.

Favorable cost regulations

Thirdly, the changes extend to the cost element of mediation proceedings. Now, if mediation was conducted before filing suit but was unsuccessful, the costs of the mediation can be included in the award of trial costs. This means that if either of the parties to the trial grossly contributed to the failure of attempts at amicable resolution of the dispute, the party should expect to be required to bear the costs of that procedure if the case is lost. Financial relief has also been introduced in the form of exemption from the court filing fee on an application to confirm an out-of-court settlement concluded before a mediator, as well as refund of the entire court fee to the parties if they reach a settlement before commencement of the hearing of the case at the first instance.

Another positive move is the new rule that commencement of mediation proceedings interrupts the running of the limitations period for claims covered by the mediation, so long as the party holding the claim files a statement of claim with the court within three months after completion of mediation.

Changes in post-arbitration

As a way to persuade businesses to consider alternative dispute resolution methods, the Parliament also simplified the arbitration regulations.

One of the most important aspects of arbitration is the ability to enforce the award issued by the arbitral tribunal. The amendment simplified and shortened the procedure for obtaining recognition or enforcement of an arbitration award, but also the procedure for seeking to set aside the award. The procedure will be conducted at only one instance, and the period for filing a petition to set aside the award has been cut by a third, from three months to two months.

Finally, the regulations concerning judicial and arbitration proceedings have been unified in relation to bankruptcy. It will no longer be necessary to abandon pending arbitration cases because one of the parties enters bankruptcy, and it will be possible to commence new arbitration proceedings involving debtors in bankruptcy.

Tax incentives

Interestingly, favorable solutions have been introduced in the tax law to encourage parties, particularly enterprises, to resolve disputes out of court. The amending act introduced the possibility of settling correcting invoices and other accounting documents involving adjustment of revenue and costs (adjustment of taxable income for purposes of personal income tax or corporate income tax) during the current settlement period.

Summary

The recent amendments represent one of the many steps that will need to be taken to bring the effectiveness of the model of mediation and arbitration followed in Poland closer to that achieved in English-speaking countries. It remains to be seen whether the desired effect will be obtained. But the longest journey begins with a single step.