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Comparative Perspectives in ADR

Alternative dispute resolution in Slovenia

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Introduction

In Slovenia today ADR is promoted to reduce court backlogs and accelerate court procedures.[1] However, this is not the only reason for the promotion of ADR. An equally important objective is to create awareness that consensual dispute resolution represents an important legal value.

In the past ADR processes have been neglected in Slovenia. They are currently in an early stage of development. In terms of arbitration, the statutory framework regulating arbitration is found in the Civil Procedure Act (CPA). However, the existing Permanent Court of Arbitration attached to the Slovenian Chamber of Commerce does not hear many cases and there are practically no specialised arbitrations.

In terms of consensus-based ADR, there are no adequate schemes for the alternative dispute resolution of consumer disputes which would promote a more efficient access to justice.[2] There is a negligible number of private institutions or firms that either profitably or non-profitably conduct mediations.[3] The number of mediated settlements in Slovenia is small, not only compared to the US, but also compared to countries with similar legal procedural systems and traditions such as Germany.[4] Accordingly, it has been necessary to encourage ADR in connection with judicial proceedings and *to emphasise the role of the judge* in reaching in-court settlements within the framework of regular civil procedure.[5]

Amendment of the Civil Procedure Act: the settlement conference

With the exception of the unsuccessful attempt at introducing mandatory settlement conferences in small claims matters in the early 1980s (pertaining to the idea of the 'socialising of the judiciary'),[6] the idea of encouraging party autonomy via in-court settlement of civil disputes conflicted with the function of socialist Yugoslavian courts actively to implement a particular social order.[7]

Accordingly, the focus of the courts was on the interests of the community according to political ideals, which meant, in turn, that the practice of in-court settlement was not generally promoted.[8]

While the CPA of 1976 provided an option for courts to encourage in-court settlement of disputes, amendments to the CPA of 1999 moved ADR a step forward by emphasising the significance of such settlements.[9] Article 306 of the CPA follows the model of para 279 of the German Code of Civil Procedure (ZPO) by imposing on a judge an obligation to advise and help the parties reach a settlement. However, the legislation is deficient as it does not stipulate at what stage of a case the court should examine the possibility of settlement.

Despite the fact that that the purpose of the amended CPA was to assist with in-court settlements, the amendment is not likely to encourage courts to conduct a preliminary examination of settlement possibilities. While it was possible under the CPA of 1976 to call a preparatory hearing, this specific provision was abolished in the CPA of 1999.

This situation contrasts with the trend in many other legal systems to create special stages in the court procedure for examining the possibility of settlement. In American jurisdictions, special settlement conferences have been established and parties are obliged in their procedural applications to address the question of whether consensual dispute resolution is possible, and whether they have already tried to reach a settlement. In Germany a special judicial settlement conference *(Gütungsverfahren)*, intended to examine the possibility of reaching an in-court settlement, was introduced by an amendment to the ZPO, which came into force on 1 January 2002.[10] Following the German model, a second amendment to the CPA was adopted in Slovenia.

The purpose of this amendment is to extend the institution of in-court settlement, increase the involvement of a judge in reaching settlement, and to introduce a special settlement conference (Articles 305a to 305c of the Amendment of the CPA).[11] The second amendment of the CPA emphasises to a greater extent the obligation of a court to be more active in encouraging settlements. It expressly stipulates (Article 306/3) that the court is obliged to consider the possibility of dispute resolution and, where possible, lead the parties towards a resolution of their dispute. The requirement applies during the entire proceedings, even after the procedure for taking evidence is completed. It is not sufficient for the court merely to inform the parties of the possibility of settlement.

A controversial innovation relates to the specific role of a judge in encouraging parties to reach settlement. Where practicable, the judge may prepare a concrete and detailed proposal of a settlement, offering it as a possible solution to the parties (Article 307 of the CPA). An English or American lawyer might consider the scenario in which one judge suggests settlement terms to the parties and then, in the event that the terms are not accepted by the parties, goes on to hear the same case, as involving a conflict of interest. However, German case law suggests that

such judicial activity does not represent a substantiated basis for disqualification of a judge from continuing to hear the case.

Nevertheless, judges who choose to make use of this statutory possibility will have to be cautious and make efforts to preserve the appearance of impartiality. A contemporary judge is no longer a passive observer in litigation, but takes an active role in case management and openly discusses factual and legal issues with the parties, which may include advising clients on how to reach a consensual solution. However, when the judge actively co-operates in settlement, it is imperative that the principle of self-determination be observed. The settlement must express the parties' conscious and willing decision, based on informed consent.

The most important amendment of the CPA relates to the judicial settlement conference itself. During the conference, a judge, in accordance with the principles of case management, attempts to assist the parties achieve a consensual resolution of the dispute. The judge does not hide from the parties his or her views of the legal and factual aspects of the dispute, thus encouraging the parties realistically and critically to assess their positions.[12] By enabling the judge and the parties at the outset to define which issues are disputed, and particularly which are relevant for adjudication, the trial and proceedings are not delayed. On the contrary, the proceedings are speedier and less expensive. It should also be stressed that the settlement conference is not a mediation, although it can have many features in common with evaluative mediation.

Judicial settlement conferences are held prior to a trial, after the receipt of a reply to an action. They are not compulsory. In general, the courts will not encourage parties to settle where:

(a) the parties have already unsuccessfully carried out an out-of-court ADR procedure, for example mediation or early neutral evaluation (ENE). An unsuccessful negotiation held between the parties without the participation of a neutral third party does not meet this requirement.
(b) after considering the arguments of the parties to the dispute and the nature of the dispute, the court is of the opinion that there is no possibility for settlement (the latter also applies if there is a dispute concerning the rights which the parties cannot freely dispose of; in such a case settlement is not allowed, Article 3/3 of the CPA).
(c) the court is of the opinion that settlement does not represent a suitable means to resolve a dispute (for example, essential or actual inequality between the parties, violent disputes, precedents or test cases that require a decision on merits, actions in which the legal and factual situation is clear, and ill-founded claims).[13]

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Foreign legal systems demonstrate that in order for a settlement to succeed, it is necessary that the parties directly (not only through their representatives) participate in the settlement procedure.[14] What is envisaged, therefore, is that the court may require the parties to appear personally and answer questions. This does not interfere with the rights of parties to appear at a settlement conference with a lawyer.

If all the parties summoned to the conference fail to appear, then the proceedings are suspended. If one of the correctly summoned parties fails to appear at a settlement conference, the settlement conference is considered to

be unsuccessful, and the absent party bears the costs of the procedure. It is also essential that the settlement conference does not unnecessarily delay proceedings. Accordingly, the amended CPA determines (as does the equivalent German law) that, if a settlement conference is not successful, the court immediately continues proceedings by the commencement of a trial.

The CPA amendment[15] also deals with forms of out-of-court ADR such as mediation. The court may stay proceedings for a maximum of three months if the parties agree to make use of an out-of-court ADR procedure.

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An appropriate system of court and lawyer fees as a device for facilitating settlements

In Slovenia the existing system of awarding legal fees involves payment for each procedural act performed by a lawyer including each written submission and each appearance at a hearing. Accordingly, the system does not encourage attorneys to desire fast and simple proceedings. As the role of the lawyer is often decisive in making an in-court settlement, it would be useful to amend the existing system to achieve a system of costs that would encourage parties and their representatives to settle (or at least to end proceedings as soon as possible).

The German system, according to which a fee is paid for each stage of procedure, for action, evidence taking and judgment, provides a useful model in this regard.[16] The most recent amendment to the Slovenian *Court Fees Act* draws on this model by providing that if a proceeding is completed by an in-court settlement, a party is reimbursed half of the fee. This similarly applies to the withdrawal of an action.[17]

With respect to legal fees, the system of a lump-sum payment to lawyers based only on the value of a disputed issue, rather than the number of individual procedural acts performed, would increase the use of ADR and settlement measures.[18] Such a payment system is also based on the German model. Under this scheme a lawyer is awarded the same fees whether he or she completes one action and one hearing with evidence taking, or files numerous preparatory applications and makes several court appearances. In this way they are encouraged to make in-court settlements and to make efforts to end proceedings as soon as possible.

The system adopted in Slovenian law, according to which a representative is paid a reward separately for each procedural act performed, is unfavourable for rationalising and accelerating proceedings and making in-court settlements. The German system is not necessarily less favourable for attorneys; but compared to the existing Slovenian system it ensures a lower payment in longer proceedings, however a still higher payment in proceedings that end quickly. Further, such a system benefits the parties as they are better able to estimate legal fees prior to the commencement of proceedings.

A long-term project: court-annexed ADR

The amendment to the CPA has been an important step towards the development of ADR in Slovenia; however, the possibilities for development are not yet exhausted. One of the most important issues regarding the development of ADR is the extent to which the state should

regulate ADR. The establishment of ADR can be left entirely to private initiatives with ADR being performed as a profit-making activity, for example by lawyers and business companies that offer mediation services. In England and the United States, the development of ADR has taken this direction to a large extent. While there are no barriers for persons or organisations to offer mediation services as a profit making activity in Slovenia, the Slovenian legal culture and tradition is not inclined to support ADR. Accordingly, it cannot be expected that ADR will be developed without any positive measures being taken by the state. A more active involvement of the state will be necessary, particularly in cases in which the costs of mediation outweigh the monetary value of the dispute. An example of state intervention is in the court-annexed ADR initiative in Ljubljana.

The pilot project of a voluntary court-annexed mediation at the Ljubljana District Court

The question as to the likely success of ADR in Slovenia depends not only on appropriate legal regulation but also on tradition, legal culture and public awareness. In the absence of mandatory ADR legislation, potential parties and the legal profession (judges, attorneys) must consent to these procedures.

Foreign systems have demonstrated that new forms of ADR have been the result of comprehensive experimental procedures; for example the two pilot projects at the London County Court and the London Commercial Court in England, the mediation pilot project at five courts in the Netherlands ('Mediation alongside the courts' project[19]), the Singapore Mediation Centre[20] and numerous examples from the United States.

A pilot project in voluntary mediation at the Ljubljana District Court has also followed a comprehensive experimental procedure. The initial results of the pilot project have been positive considering the fact that this is only the beginning and the first such project. Participants in this project are the judges of the Ljubljana District Court (who are not paid for their participation and work outside their regular hours), mediators, attorneys and other legal experts.

The Slovenian court-annexed system operates as follows. At an early stage of the civil procedure, a court offers the parties the possibility of mediation together with a special booklet in which the procedure and the advantages of mediation are described. If the parties accept the mediation offer, the case is referred to mediation with another judge as a mediator. The judge conducts the mediation session and he or she can also meet separately with the parties as part of the mediation. The style of mediation varies from facilitative to evaluative, depending on the judicial mediator. If the mediation is successful, the parties' agreement is recorded as an in-court settlement. If the mediation is not successful, the case is referred to the originally appointed judge, who is not informed of the parties' activities, statements and applications within the mediation procedure. The principle of confidentiality is therefore ensured.[21] It is envisaged that this project will expand to include a wider range of cases and non-judicial mediators. In addition, a program of ENE is being introduced for copyright disputes.

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Conclusion

The active role of a judge in facilitating settlement is an integral

part of ADR in Slovenia. Settlement leads to the reduction of court backlogs and offers the parties a better, permanent and thorough resolution of disputes. Settlement helps preserve relationships between parties in the future and further develops a common legal culture in society. However, the judge, who encourages parties to settle, must take care that settlement expresses the parties' true and considered will. The amendment of the CPA is a positive improvement because it introduces a settlement conference, emphasises to a greater extent the obligation of a judge to continue to consider during the entire civil proceedings the possibilities of settlement and to help the parties to settle. A reformed system of court and legal fees would stimulate and expedite procedures and settlements. Finally, a successful voluntary mediation pilot project at the Ljubljana District Court demonstrates the potential to develop court-annexed ADR in Slovenia as a long-term project. ●

A reformed system of court and legal fees would stimulate and expedite procedures and settlements.

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Endnotes

1. *Poročilo o napredku Slovenije pri vključevanju v EU* [The Report on the Progress of Slovenia in Accession to the EU], Reporter, No 52/1999, p 46.

2. Commission Recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes 98/257/EC, 30 March 1998.

3. 'Legal Information Centre' in Ljubljana.

4. Statistics of the Supreme Court 2001.

5. 'Modernisation of Judiciary' conference held on 27-29 June 2001 at Brdo pri Kranju.

6. See D. Wedam Lukič, A Galič (2001), p 1.

7. S Triva (1960) p 63.

8. Eg M Wolf (1976) p 267.

9. Article 306 CPA 1999.

10. Paragraphs 2 to 6 of the amendment to Article 278 of the ZPO.

11. The Amendment of the CPA, Official Gazette 96/2002.

12. Z Trampuš, 'Materialno procesno vodstvo in sodna poravnava (Case management and settlement in court), Podjetje in delo', 28 (2002), p 1556.

13. N Betetto, 'Pravdnemu postopku pridružena mediacija (A litigation annexed mediation)', Podjetje in delo, 27 (2001), 6-7, p 1267.

14.P Gottwald, 'Die Bewaeltigung privater Konflikte im gerichtlichen Verfahren, Zeitschrift fuer Zivilprozess', 95 (1982) 3 p 267.

15. Stay for settlement – rule 26.4 CPR.

16. K Schellhammer, 'Zivilprozessrecht', 6 Aufl, Heidelberg, 1994, str p 344.

17. Article 16 of the Act on Amendment to the Court Fees Act (Official Gazette RS, No 93/01 – ZST-I).

18. K Schellhammer, 'Zivilprozessrecht', 6 Aufl, Heidelberg, 1994, str p 344.

19. Pel M, Mediation alongside the courts; execution of the national project Mediation judiciary (Summary), <www.restorativejustice.org/asp/details.asp>.

20. Chief Justice Yong Pung How, Address at the official opening of the SMC, 16 August 1997, <www.mediation.com.sg/smc-idx.htm>.

21. *Mirno reševanje sporov* [Peaceful Dispute Resolution], Ljubljana District Court, 2001 (Introduction: A Zalar).