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Managing judicial change through mediation — Part 1

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Case study of court-annexed mediation

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Why should a court offer mediation?

Crisis of civil justice

Like many traditional democracies and transition countries, Slovenia is facing a crisis in its civil justice system as a result of the persistent inefficiency of the courts. Criticism of the civil courts has its origin primarily in the slowness of judicial proceedings, the level of legal costs – making access to courts difficult – and the legal unpredictability of case law, which frequently gives the appearance that the courts have lost contact with what is going on in society.

This notion of a gap between reality and ideals has taken a firm hold in the Slovenian public's perception of the performance of the civil judiciary, and is manifest in the low level of public confidence in the courts, which generally reflects how the courts deal with ordinary civil disputes in which ordinary parties are involved.

In seeking to identify opportunities for the civil judiciary to improve the extent to which it meets the reasonable expectations of the parties in a dispute, we need to recognise that it is not only the courts that have problems – litigants and their lawyers face difficulties too. Measures aimed at reducing court backlogs must therefore ensure not only faster administration of justice but also improved participation by the parties in the dispute, cheaper procedures, earlier attention to the dispute by lawyers and their clients, faster exchange of information, and so on.

The difficulty in seeking to respond to the question of how a court should ensure more effective resolution of disputes is further exacerbated by three tensions that accompany every disputed relationship: (1) between creative and distributive value in a dispute;[1] (2) between empathy and assertiveness; [2] and (3) between the interests of the principal party and those of his or her agent.[3]

In these circumstances a traditional civil dispute, which is like a football match in which the two parties to the dispute try to score as many goals as they can, is no longer able to satisfactorily fulfil the interests of the plaintiff and the defendant. Let us assume that a formal dispute has come about following the failure of negotiations, as a form of direct bilateral exchange between the parties. In practice what is increasingly becoming established is a formal but flexible procedure in which the parties have complete autonomy because they control the rules and the outcome of the procedure. This procedure is called mediation. It is founded on the principle of self-determination by the parties and is sometimes described as justice with a human face.

The position of the courts between the public and private sector

When a company finds itself in crisis what usually happens is that crisis management is introduced. The same must happen in the case of a court. At the largest first-instance court in Slovenia – the District Court in Ljubljana – the crisis of civil justice required the adoption of business strategies and the development of modern court management, directed towards accessibility, speed and quality of judicial services, and hence aimed at

satisfying the users of these services. The starting point for this approach was seeing the mission of judges not as servants of the state clad in black robes, but rather as providers of fast, cheap, quality services to the public.

This starting point made it possible to conceive of carrying through Drucker's idea about the introduction of management into public services being the principal task of future generations.[4] New public management in the judiciary represents a major change because it means the public and private sectors no longer operate independently from each other. As long as these two sectors are separate there will be no one to organise and mobilise support for improving the functioning of the judiciary.

The users of court services do not form groups to support the judiciary. Courts and judges are therefore isolated from society and reforms are not dealt with as a social priority. Hanson therefore states that those public policies which ensure inalienable benefits, such as the right to a fair trial within a reasonable time, will be second class because stakeholders will obtain these services even if they do not contribute to the establishment or maintenance of such a policy. It is therefore unlikely that stakeholders who receive selective benefit within the framework of judicial procedures would organise themselves as an interest group to lobby for the further advancement of such activity.[5]

According to the *argumentum a contrario* method, linking the judiciary, part of the public sector, with the private sector could enable the courts to develop an 'electoral base', and cause citizens to actively support the business policy of a court, which would considerably strengthen public trust in the judiciary. Therefore areas need to be identified in which court functions can be transferred to civil society bodies or to suitable entities in the private sector to provide the services that are otherwise provided by the state.

Mediation as a method of privatisation

With any liberalisation of the judicial function, the ability of the courts to provide an efficient service to citizens within a limited financial framework is subject to controls that ensure the rational use of available resources. New public management shifts that control to the private sector. The owners of resources in the open market should therefore have the decisive role. The relations between them are regulated by competition. This affects not only the functioning of the economy but also the functioning of the judiciary, because the users of legal protection services will always go where these services are cheapest, quickest and best. An essential element of new public management is privatisation. This ensures financial savings, improved procedures in the sense of speed and fairness, improved efficiency in the sense of better output, and greater success and capacity because of the greater flexibility in the system.

These characteristics are widely recognised advantages of the mediation procedure compared to the traditional court procedure.[6] Mediation therefore represents a specific model of privatisation in the civil judiciary. In practice, courts offer mediation in two forms: as ADR annexed to the court procedure which proceeds in the courts, or as a procedure carried out by private providers in the open market by order of the court. There are important differences between the two models.

For every society it is very important whether people encounter the law within or outside the courts. The courts in the United Kingdom, for example, offer mediation to parties involved in judicial disputes by instructing them to seek mediation services from a private provider. In this way the mediation is separate from the civil action, and represents an alternative to it. Parties are sent away from the court. In this case mediation is not part of the activities carried out by the court. By contrast, in Slovenia the District Court in Ljubljana offers mediation as a court service. According to Lord Woolf and Genn, the basis for this business strategy is a progressive philosophy under which the services of the court are not reserved merely for adjudication but are also for resolution of disputes by settlement.[7]

Mediation as a mandatory activity of the court

As a rule, a court can never resolve as many cases in one day as parties or their lawyers can file. Therefore in many countries the introduction of court-annexed ADR was promoted primarily with a view to easing the burden on the judicial system. This reason was the basis for introducing the Woolf reforms to the civil procedure in the United Kingdom in 1999,[8] for the Coulon report in France, for the reform of the German civil procedure law in 1998, for the Dutch report on ADR,[9] for the founding of non-state *treteiskiye sudi* (literally 'third courts') in Russia,[10] and the 1990 Civil Justice Reform Act in the US.[11]

The District Court in Ljubljana too has recognised that until an action in respect of a dispute is filed with the court, that question can be a matter for the individual, but once it is filed it is a matter for the state court. The court is therefore obliged to offer parties ADR which is located at the court and is supervised by the court. Stienstra and Wilging outlined the three main reasons for mediation annexed to the civil procedure as follows:

- equality of access to the court
- fairness of the procedure
- maintenance of a broad-based public law judicial system.

The task of a court is to assist citizens to resolve their disputes. In so doing the courts must enable access to any procedure that suits a particular case, whether it involves adjudication, court settlement, mediation, arbitration, early neutral evaluation or any other procedure. Citizens who find themselves in a civil action would be rightly shocked if the court, as a public law institution, proposed that they should turn to private providers in the open market for help in ADR, all the more so in those systems where private providers of these services do not yet exist. The courts owe citizens the opportunity of resolution of disputes by agreement and protection by means of a procedure annexed to the judicial procedure and encompasses all the established standards of fairness and integrity.

The second reason why the courts have a duty to offer parties ADR is

connected with the first reason: a fair procedure is only possible if the quality of services is guaranteed (case selection, training and licensing of mediators, assessment of mediators, protection of the principle of confidentiality). The court is trained and responsible for maintaining this quality.

The third reason is that if the courts were to suggest that citizens should resolve their disputes elsewhere it could sow doubt in the judicial system. Some cases are important for the progress and development of the law and must be adjudicated by the courts. If ADR were restricted only to the private sector it could lead to the formation of a private legal system, the effect of which would be to jeopardise the basic function of a court, which is to maintain peace and create law, much more than it could be jeopardised by court-annexed ADR.[12]

A policy of multiple options

The huge expansion of ADR programs formulated by the courts could lead one to think that there is a danger of a judicial monopoly or exclusivity over the development and provision of such services. But while for their part the courts are expected to include the comparative advantages of informal dispute resolution mechanisms in formal procedures so as to enable the parties to seek resolution of their dispute in a way that best reflects social norms and practices, one cannot ignore the fact that ADR mechanisms in essence derive from the private not the public sector.

> If the private sector were to rely predominantly on public or state institutions in connection with the resolution of private legal disputes then one could not assert that this sector was working. Therefore it is of vital importance for the private sector to resolve its own problems by itself.[13]

In the transition of countries moving towards a free market economy the lack of initiative from the private sector for participative dispute resolution within a framework of ADR procedures may therefore be one of the reasons for the initiative in this regard being temporarily assumed by the state courts.[14] However, in principle the private sector will become the basic source and location of ADR mechanisms because of the convergence there of needs, motives and possibilities. Compared with the state sector, there are many more disputes in the private sector which require an appropriate solution that enables the parties to 'move forward', and at the same time the private sector has fewer institutional constraints in terms of creativity, both procedurally and substantively.

However, the formulation of ADR programs in the public sector, specifically at the courts, must not be compromised by the desire to attract business, to protect certain types of people or interest groups or to promote a particular political policy.[15] The danger in courts planning ADR programs lies not in hidden purposes or agendas but may simply be a lack of awareness that ADR can only be a good means by which to resolve disputes if the limited scope of these programs is taken into consideration. ADR cannot replace the function of court adjudication; it only supplements it. Nor can it overcome all the problems faced by overloaded courts.

Court-annexed ADR procedures cannot exclude a person's right to judicial protection where that person does not explicitly consent to waive such a right. The provision of various forms of ADR by a court means that the state is encouraging the introduction of a policy of multiple options. But it is up to individuals to choose freely the procedure which best suits them.

Therapeutic justice

The introduction of new public management strategies and methods in the state courts means that courts and judges too have to justify their existence. The standards by which their performance is measured are access to the courts, the speed of court procedures and time restrictions on court procedures, equality of treatment of clients, the fairness of procedures and the integrity, impartiality and accountability of judges.

The strategies, which ensure respect for the standards of effective administration of justice, are directed towards (time) planning, (sovereignty of) the user, (direct and indirect) profit and the (non-defective) product. New case management means that the judges in every court formulate a system that promotes, monitors and analyses progress in the handling of each individual case.

The most important elements of this system are the earliest possible court intervention in the dispute, the setting of deadlines for deliberation and for resolution of cases reflecting how demanding they are, concentration of adjudication, easing the burden on judges caused by administrative judicial tasks, the introduction of open adjudication where the judge carefully explains to the parties before a court decision is handed down what type of decision they can expect, and the introduction of court-annexed ADR (mediation, conciliation, arbitration, early neutral evaluation, and so on).

This means that the role of a judge is changing. The judge does more than simply decide a case; he or she assumes the role of problem solver. In this way a model of therapeutic justice is developing which is oriented towards ensuring appropriate judicial services and to the attention which a court pays to an individual case. It can be measured by 'the degree to which a litigant believes that a court has understood the nature of his case, that it has solicited his opinion about the case, that it has shown an interest in his circumstances and that it was reasonably responsive to his claims'.[16]

How should a court offer mediation?

Management and Machiavelli

Reform of the concept of judicial resolution of disputes means the introduction of changes. 'There is nothing harder to plan, less likely to succeed and more dangerous to manage than the introduction of new methods of government …'[17] While Machiavelli's *Il Principe* is perhaps not so relevant today for analysing the methods enabling an ambitious individual to assume sovereign rule, it is relevant in the way that it defines the circumstances that are important for the effectiveness and success of modern management.

Resistance to change in court

management is based first and foremost on traditional reasons. 'Anyone who introduces changes has enemies among those who profited from the old methods'.[18] So even Machiavelli highlighted the concept of sunk costs. This concept warns that the older, experienced individuals who have invested energy and/or money into the existing system often reject change, something which is particularly characteristic of traditional organisations.[19] And a court can often be a fortress of traditional and hierarchical internal organisation. One of the consequences of this resistance to change in management can be the establishment of a 'tyranny of the status quo'.[20]

However, the origin of resistance to change in management is connected not only with the question of profitability. Machiavelli argued that a lukewarm response to changes derives partly from a fear of opponents who have the law on their side, and partly from a scepticism by those who do not trust the new programs if, based on experience, they do not believe they are solidly formulated. Psychological factors (uncertainty, lack of confidence, stress, confusion, fear, depression), psycho-social factors (behavioural regularities, teamwork, dominant values, organisational philosophy) and personal rejection strategies (closed mind,[21] looking backwards,[22] simplification,[23] tokenism,[24] specialisation[25]) are the elements which cause comfort with the known and fear of the unknown on which all those responsible for changes in management must count.[26]

Role of the chief judge

A condition for the success of the new approaches in the court is that the judges accept them as their own and not see them as imposed. The main task of the chief judges in a court is therefore, within a framework of cooperative management, to encourage debate and to prevent judges from being sceptical about these reforms. The conditions for formulating a new approach to the resolution of disputes are not complicated. In this case the lack of an electoral base in the judiciary referred to in the introduction is an advantage.

For example, in the case of a change in economic policy which had to take account of the relevant environmental standards, the task would be far more difficult because a lot of interest groups would be involved and would lobby the political actors for a particular solution. Changes in the judiciary, by contrast, can proceed in a peaceful atmosphere without political or other interference from outside or from above but on the basis of impetus from below.

The hardest task is to encourage judges to abandon their traditional, individualistic professional ethos and working culture dominated on one hand by a high degree of individual autonomy and on the other by a lack of interest in the functioning of the court as an organisation. Because of their constitutional guarantee of independence, judges do not have a natural sense for teamwork, unlike most other organisations that require coordination and cooperation if they are to function successfully. This means courts can no longer be merely formal institutions but must become organisations *per se*.[27]

The change in mentality, which the chief judges in a court must encourage, is therefore important in order for the court as a whole to be able to adapt to changes in society as they occur. Establishing an orderly court is a long-term challenge requiring an ability to grow, develop, change and adapt to new conditions. Reform in the judiciary is thus never a completed process because the nature of social problems is changing all the time.

The preparation of a court-annexed mediation program must therefore be based on the assumption that the success or failure of the changes depends less on the reasons for or against reform and more on how those changes are introduced and managed. Slovenian experience suggests that a reform initiative can meet a positive response if it is seen as an opportunity and not a threat, and that the public can see resistance to reform initiatives also as resistance to assuming some responsibility for the functioning of the courts.

Planning court-annexed mediation in civil proceedings at the District Court in Ljubljana

Planning, encompassing the setting of goals and determining funds for their implementation, is a key element in management. It determines priorities, defines the obligations of individuals and institutions and ensures the harmonisation of criteria and the means and methods to achieve the goals. The planning of court-annexed mediation at the District Court in Ljubljana was focused on the formation of coalitions and the elaboration of analyses, principles applied in the implementation.

Formation of coalitions

Management coalition

It was first necessary to form a management coalition. The idea to introduce mediation was such an innovation that it was only feasible within a policy of cooperative management, which is vital whenever a problem or a change raises important questions concerning the work or position of many employees, when the solution to these questions requires the participation of these persons, where there is discord and the possibility of conflict and where human, financial and other resources are limited. What is important here is that cooperative management is not a result of influence, power or habit but that it is planned.

The actors of change in the court were identified by the president of the court. This process was based on the replies to two questions: who can influence the process of change and in what way can this process be influenced? The first question was aimed at establishing whose active support is required, whose passive consent is required, who the change will affect and how? The second question was aimed at establishing what sources of power these people control, what their attitude is towards the reform initiative, and what are the connections between these people.

The four key individuals who came together in the management coalition were the president of the court, the head of the civil department, his deputy

and the former head of the civil department, who had been promoted to the position of appeal court judge. The participation of the former head of the civil department was particularly important because on one hand it ensured continuity of management and with it the effectiveness of the program over the longer term, and at the same time it ensured direct communication and promotion of the program at the appeal court.

The selection of judges forming a group charged with initiating changes and improvements is extremely important. The group must be composed of sufficiently experienced individuals, but care must be taken to ensure that this experience is not used in a way that merely provides yesterday's solution to today's problems. The management team must be open-minded and must function according to Drucker's formula: 'First manage yourself and then manage your company.' The group must also share a vision of how to formulate the program and must be able to communicate that vision to those to whom the program relates (judges, court staff, lawyers, politicians and the general public).

Internal coalition

The formation of a management coalition was followed by a second phase involving the securing of an internal alliance. Within the court's civil department a debate was encouraged among judges and professional staff on the possible approaches to promoting resolution of disputes by agreement as part of the civil procedure. The debate proceeded in several areas and various tactics were used to promote cooperation in the preparation and execution of the mediation program, such as:

- communication by 'selling the idea'
- presentations on how the new approach can help parties, the court and judges
- training seminars aimed at enabling employees to adapt to the new program
- negotiations and flexibility in short-term planning of the program
- the inclusion of potential and actual sceptics and opponents of the new idea in the decision-making process
- the use of other judges as third parties to neutralise resistance.

The communication network enabled the creation of an allegiance to mediation and its advantages, and as it turned out there were more judges interested in participating in the program than the planned number to be included in it. We believe the main reason for the support from judges for mediation was the transparency of the procedures, the decisions and the permanent dialogue with all those involved.

Statement of judicial policy

In Slovenia's case there was a delay in bringing about the third phase of establishing a coalition. Experience suggests that a public statement from the highest actors in the judiciary on judicial policy in the area subject to reform can be of key importance to its success. Such a statement should be a recommendation to parties and lawyers to make use of mediation and to support the program offered by the court. A statement of judicial policy is also extremely important because courts can always refer to it when they develop new programs, when they obtain budget funds for those programs, and when they set conditions for licensing mediators.

A statement of policy in the area of ADR can highlight the following:

- equal treatment of ADR and court procedures
- promotion of ADR by addressing the statement to the general public
- ADR as a logical element of time standards for the resolution of disputes, which will ensure the support of lawyers in particular
- support for a policy of multiple options for the parties to a dispute (mediation, arbitration, early neutral evaluation, civil action) and thereby broader access to legal protection
- procedures free of charge, or lower costs for parties in comparison with court procedures
- lower transaction costs for the courts because of the shorter time needed to resolve a case, which ensures support for the funding of such programs
- authorisation of ADR programs by the courts, which enables standards to be set concerning the quality of services, the monitoring and evaluation of programs and their adjustment to the expectations of the parties involved.

The initial absence of a public statement from the Supreme Court, the Judicial Council and the Ministry of Justice – the key actors of judicial policy – recommending amicable resolution of disputes using mediation was connected with poor provision of information about the advantages of mediation and the fact that it was the first experimental program of court-annexed ADR in Slovenia.[28] But another reason for the absence of a public statement on court policy in this area was that, unlike similar programs in the United States, the United Kingdom and the Netherlands, where the introduction of these programs was part of a top-down program, in the Slovenian case the policy was implemented from the bottom up.

External coalitions

The absence of a public statement from the key actors of judicial policy on the role of mediation meant that the process of concluding external alliances was significantly more uncertain in the Slovenian case, and communicating with the relevant social groups significantly more difficult. Above all, much more clarification was required about the need for ADR instead of about how the services should be provided.

The court therefore carried out intensive communication with the general public via press conferences, round tables and press releases, by producing special brochures containing information about mediation, organising conferences and seminars, and by publishing articles and discussions in professional journals.

An alliance needed to be forged with the institutions that have an important role in the mediation procedure: the attorney general's office, which represents the state in civil disputes, the big insurance companies, which are the most frequent parties in civil procedures, and above all the Chamber of Attorneys (Bar Association). Gaining the support of the Chamber of Attorneys was a particularly critical point of the program because lawyers

would not support any such program if they thought it could mean a reduction in their earnings.[29]

According to the principle of repressive tolerance – if you can't beat them, join them – the court supported, for example, a proposal from lawyers for a rise in their fees in the case where a court settlement is concluded, which is the ultimate goal of the mediation procedure. Also important was an invitation to lawyers to take part in a free training program for mediators, which provided the court with something of a 'Trojan Horse'. The inclusion of lawyers as mediators in the court program meant that mediation was promoted as an earning opportunity and as a new challenge to their profession. Judges and lawyers as mediators working together is an effective model for linking the public and private sectors in the area of dispute resolution.

Analysis of the situation, problems and goals

Planning can only be successful if it is based on a reliable assessment of the problems and requirements of a court. Courts may draw up ADR programs for the following reasons:

- because of the excessive caseload
- to improve the effectiveness and quality of preparations for trial and settlement
- to extend the methods offered to parties for resolving disputes.

The content of the program and the method by which it is implemented should be formulated and the priorities and criteria for monitoring and evaluating the program should be set with regard to the goal that has been identified.[30] The identified needs of the court should be based on situation analyses carried out by the court using three methods:

(1) collecting statistical data
(2) carrying out a functional analysis of concluded court settlements
(3) carrying out a comparative law analysis of ADR.

(1) Statistical reports

With the help of existing records the Ljubljana District Court measured statistical data on the work of the court using modern measurement methods. The court calculated quotients for the flow of civil cases, for unresolved cases and for the case backlog to determine how well it is controlling the inflow of new cases, how long it needs to resolve an average case and the extent to which it is failing to meet the time standards laid down in the Court rules or its internal Act. The calculations showed that before 2001 the Court took an average of 21 months to resolve a case, although this figure includes family disputes which the Court resolves considerably more quickly.

(2) Functional analysis

The Court also carried out a functional analysis of court settlements concluded between 1995 and 1999. This analysis showed 80 per cent of court settlements within civil procedures at the Court were concluded by the end of the first trial conference. This figure was important because it confirmed the prognosis that the program would be more successful if it focused on new cases and thus on the earlier phase of a case. At the same time the analysis in this part effectively countered the proposal from lawyers for the mediation program to be oriented only towards very old cases.[31]

Because of the lawyers' assertion that they themselves are very realistic in their claims, and consequently the question of whether additionally promoting the search for an agreed solution to a dispute is indeed necessary, an analysis was carried out of the success of plaintiffs in their claims. This analysis showed that the success rate was very low; plaintiffs succeeded fully in their claims in just 19 per cent of cases.

(3) Comparative law analysis of ADR

On the basis of an initiative from the Court, the Program Council of the National Targeted Research Project 'Legal Development Strategy of the Republic of Slovenia to 2010' at the University of Ljubljana's Law Faculty commissioned two comparative law analyses of ADR. These two analyses represented a key document because they addressed, among other things, the question of the legal basis for the introduction of court-annexed mediation.

There is no tradition of mediation in Slovenia. Providers of these services in the open market barely existed, and certainly there was no explicit regulatory framework providing a basis for such procedures. Mediation was therefore not regulated either by law or by implementing regulations and so the Court's experimental program did not result from government policy but rather from activism on the part of the Court. And because this area was not legally regulated the Court first of all had to address the issue of the legal permissibility of introducing mediation.

Experts from the Law Faculty agreed with the Court's interpretation that, from the point of view of procedural law, sufficient basis for offering mediation exists in the provision of Article 307 of the civil procedure law, which prescribes the duty of the Court to help parties to settle at all times during the court procedure.[32]

The substantive law basis for the introduction of a program of court-annexed mediation is laid down in Article 62 of the Courts Act and Article 171 of the Court Rules as an implementing regulation.[33] Both prescribe the duty of the Court to adopt a program to tackle case backlogs when statistics show a backlog at the Court over the previous 12 months. Formally, this program is adopted by the president of the court. Mediation was therefore introduced as a special program to tackle the case backlog at the Ljubljana District Court.[34]

Advantages of under-inclusiveness

The Court used the under-inclusiveness in the area of ADR in two ways. In the program to resolve the case backlog through mediation it determined that mediation should be an experimental pilot project to be carried out over two years. This approach made it possible for the program to be adjusted, abandoned, confirmed or extended on the basis of an analysis of the strengths and weaknesses. By introducing an experimental program the Court did not therefore guarantee success in the sense of achieving goals, and gave itself

greater flexibility because the program was being carried out within the framework of a 'learning organisation'.

Another advantage of the under-inclusiveness of ADR was that the Court itself could decide the principles and rules of the mediation procedure and the standards for selection, appointment, dismissal, training and evaluation of mediators. The circumstances for autonomously setting the rules were not complicated because there were no restrictions connected with the inclusion of interest groups which would lobby for a particular solution and because there was no political or other interference from outside or from above. In this respect a bottom-up policy was an advantage compared to a top-down policy.

Another advantage of autonomy of legal regulation and experimentation appeared a year into the program when the Government proposed to parliament supplementing the civil procedure law to authorise the Court to suspend the procedure at the request of the parties in order to attempt ADR.[35] This method of legal regulation, following a preliminary experiment, ensures a greater likelihood of support from the legislators because deputies are interested not merely in formal policy-making but also in the implementation of what they have passed. And parliament can more easily decide about the likelihood of a policy being implemented using information about the success of experimental programs.

Risks of under-inclusiveness

The under-inclusiveness of ADR also brings with it certain risks. The principle of confidentiality as a fundamental principle of mediation is particularly relevant with regard to the judicial procedure. Parties would be very reluctant to participate in mediation if in the event of failed mediation their openness would come back to them like a boomerang in the civil procedure. Everything that is expressed or submitted in writing during the mediation (views and proposals of parties, recognition of facts, proposals by a third party, willingness to settle, and so on) must remain confidential even with regard to the judicial procedure.[36] Unsuccessful mediation should not in any way be allowed to influence the legal position the parties had before the start of this procedure. The standard of admissible evidence is so important that it should be included in the procedural rules in a way that prohibits the disclosure of information and that if information is disclosed any evidence referring to an earlier statement, document or information would be inadmissible.

The Ljubljana District Court tackled this shortcoming by having parties who agree to the offer of mediation sign a declaration on protection of the principle of confidentiality and on respect for the rules on admissible evidence. But there remains a question as to how the Court will take account of the principle of confidentiality in the event of a dispute over an infringement of this principle or of the rules on admissible evidence. The question is whether it is sufficient to rely on the fact that all the documents in mediation (agreement of the parties to the dispute, declaration on protection of the principle of confidentiality, other principles and rules of the procedure) have been approved by the Court and are therefore also formally binding on the Court.

A certain risk from the under-inclusiveness in the area of ADR also exists with regard to the accountability of mediators. While the Court can prescribe the basic ethical principles that mediators are bound by, it cannot give mediators the immunity it provides to judges. The Ljubljana District Court mitigated this problem by having every agreed resolution achieved in mediation drawn up as a draft Court settlement before the mediator, and then the parties sign the final text of this settlement before the judge – the final text is subject to examination by the judge to ensure it conforms with the rules of the civil procedure.

Nevertheless, there is still the possibility that in mediation the parties will agree to something that the Court cannot recognise, or that they will achieve satisfaction in an out-of-court settlement whose legal effects are equated with a contract and not with a binding court decision. Because mediation is organised as a court-annexed procedure there remains the question of the liability of the state for damage caused to parties intentionally or through gross negligence on the part of the mediator.[37] It would be appropriate for this issue to be resolved at least by concluding liability insurance on the basis of a contract between the mediator and an insurance company. ●

Part 2 of this article will be published in Issue 6.9 of the ADR Bulletin.

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Endnotes

1. The desire for distributive acquisition means that a party wants a bigger piece of the pie than that given to him by the opposing party. Creative value, on the other hand, means the possibility for the whole pie to be increased in size, and with it the pieces belonging to the parties, but only if this is a result of the joint efforts of both parties.

2. Empathy means an understanding of the interests of the other party in the dispute, whereas assertiveness refers to ensuring one's own interests are met.

3. The interests of parties and their lawyers are rarely in complete harmony. A lawyer can help clients understand their legal position, or manipulate clients by not giving them full information or by encouraging extreme emotional reactions which make it more difficult to resolve the dispute. On the other hand, by making unrealistic demands or by withholding information a client can make the lawyer feel uncertain. And no lawyer's price list can overcome this contradiction. Mnookin R H, *Beyond Winning*, 2000, Harvard University Press, Cambridge, Massachusetts.

4. Drucker, 2000.

5. Hanson R A, *Resources, Service Delivery and Public Support for the Courts: Empowerment, Security and Opportunity through Law and Justice*,

2001, Background Paper, World Bank Conference, St Petersburg, Russia.

6. The terms 'mediation' and 'conciliation' are used in very different ways. Usually the difference in meaning is apparent in the approach of the third party or third parties assisting the parties in resolving the disputes. This difference may be apparent only in the techniques used. It can involve either enabling parties to find a solution (facilitative approach), or an assessment of the legal and actual position of the parties, including an assessment of the anticipated decision of the court (evaluative approach). It may also involve proposing the content of an agreement to resolve a dispute. But in no case can binding decisions be adopted in these procedures unless the parties agree.

7. Lord Woolf, Genn H, *Comments on the Slovenian Model of Court-Annexed Mediation*, 2002, South East European Regional Conference on ADR, Ljubljana, Slovenia (conference video recording).

8. Genn H, *Court-Based ADR Initiatives for Non-Family Civil Disputes: Commercial Court and Court of Appeal*, 2002, Lord Chancellor's Department, Research Secretariat, London.

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13. Brazil W D, *Why Should Courts Offer Non-Binding ADR Services? Optimising Court-Annexed Mediation Programs*, 1998, ABA Section of Dispute Resolution, Washington DC, p 96.

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15. Brazil W D, *Why Should Courts Offer Non-Binding ADR Services? Optimising Court-Annexed Mediation Programs*, 1998, ABA Section of Dispute Resolution, Washington, DC.

16. Hanson R A, *Resources, Service Delivery and Public Support for the Courts: Empowerment, Security and Opportunity through Law and Justice*, 2001, Background Paper, World Bank Conference, St Petersburg, Russia p 10.

17. Machiavelli [1513], 1992, *Il Principe*, Dover Publications, INC, New York.

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19. Hart I M, *The Management of Change in Police Organizations: Policing in Central and Eastern Europe*, 1997, Ljubljana, p 213; Moss, Kanter R, *The Change Masters: Corporate Entrepreneurs at Work*, 1984, London, Rontledge, p 69.

20. Gold A B, *Speedy Justice in Canada: Practical Solution for the Chief Justice, Manager of the Superior Court*, 1990, International Legal Practitioner.

21. By adopting a closed mind an individual rejects any input associated with the subject of change.

22. The individual adopting this method relies upon earlier experiences by applying yesterday's solutions to today's problems.

23. This method reduces the complexity of a problem to a simple and safe change which does not threaten anyone, but means that any change is marginal.

24. The result of this method is that an individual who apparently agrees with the change does nothing active towards implementing it.

25. Concentration on a narrow subject to the exclusion of all other information and issues.

26. Hart I M, *The Management of Change in Police Organizations: Policing in Central and Eastern Europe*, 1997, Ljubljana.

27. Langbroek P M, *Changing the Judiciary and Judicial Administration: The Netherlands and Guatemala, Empowerment, Security and Opportunity through Law and Justice*, 2001, Background Paper, World Bank Conference, St Petersburg, Russia pp 34-35.

28. This assessment is confirmed by the fact that all three of the institutions referred to publicly supported the mediation program and recommended it to courts and parties in dispute immediately after publication of an analysis of the first year of operation of the program at the Ljubljana District Court.

29. International Association of Judges, First Study Commission, Final Conclusions (1998), Porto.

30. Judge's Deskbook on Court ADR, 1993.

31. Nevertheless, the court also accepted this proposal from lawyers and introduced a special 'Settlement Week' when judges carried out only settlement hearings in older cases.

32. *Civil Procedure Act* Ur l RS No 26/99, as amended.

33. *Courts Act* Ur l RS No 19/94, as amended; *Court Rules* Ur l RS No 17/95, as amended.

34. Special program to tackle the case backlog at the Ljubljana District Court, dated 11 December 2000 (Su 9/2000), as amended.

35. Article 305b/V of the *Civil Procedure Act* Ur l RS No 110/2002.

36. See the UNCITRAL Model Law on International Commercial Conciliation.

37. According to Opinion No 3 (2002) of the Council of Europe's Consultative Council of European Judges (CCJE) on the principles and rules regulating a judge's professional conduct, particularly from the point of view of ethics, incompatibility and impartiality, the question of liability for an incorrect decision made as a result of gross negligence is not fully clear even in the case where such infringement is committed by a judge.