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# Managing judicial change through mediation — Part 2

Ales Zalar

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Case study of court-annexed mediation

# Managing judicial change through mediation — Part 2

**Aleš Zalar**

*Editor's note: This is the second part of an article describing the successful introduction of court-annexed mediation in Ljubljana, Slovenia. Part 1 appeared in issue 6.8.*

## Principles applied in the implementation of the mediation program

### *Principle of consumer sovereignty*

Mediation at the Ljubljana District Court derives from the so-called client approach, based on the principle of consumer sovereignty. The participation of the litigants in mediation is voluntary. The court offers mediation to anyone who files a suit or who is defending a suit. Because this area is not legally regulated in detail the court cannot order parties to make use of mediation with an opt-out possibility, nor impose any (cost) sanctions on a party for not accepting the court's offer.[1] The legal position of the parties is also not affected if they opt for mediation and subsequently change their mind, or if the mediation is unsuccessful. In any case, the court guarantees the order in which their case will be heard as determined by the date when the suit was filed.

Where mediation is voluntary the key question is how to convince the parties to agree to participate in the procedure? In the United Kingdom, at Central London County Court, for example, where mediation was not compulsory, only five per cent of parties opted to take up the Court's offer. Genn therefore argues that a better model is so-called 'selective pressure', consisting of the threat of

cost sanctions on a party who refuses to participate in mediation.[2] However, it is important to note that the courts in the United Kingdom refer parties to private mediation service providers, which can have an important influence on their decision whether to opt for mediation.

In Slovenia's case, where mediation takes place at the court and under supervision of the court, the parties have their 'day in court'. This clearly contributes to their willingness to take part in mediation, with 31 per cent of parties responding positively to an open invitation from the Court.[3] Furthermore, the invitation from the Court itself also contributes to the willingness of parties to take part in mediation. The parties see it as a clear signal as to the Court's expectations.

### *Informed consent*

With voluntary mediation it is particularly important that the parties are informed of its advantages. The Ljubljana District Court therefore sends a written offer to the parties together with a publication explaining in detail what the advantages of the mediation procedure are, the rules, the possible outcomes, the time and cost aspects, what the qualifications of the mediators are, how they can exclude a particular mediator due to conflict of interest, and also when a case is not suitable for mediation.

The incentives to parties, which the court includes in the open invitation to take part in mediation, are of great importance. The Court has turned the weakness of the length of court procedures into an advantage because it guarantees that the mediation procedure will be carried out within three months of receiving consent. The Court also offers two further incentives: the mediation is free of charge and any agreement concluded in mediation in the form of a Court settlement is enforceable. Parties can opt for mediation within 30 days of receiving the offer from the Court, or at any time later during the first instance civil procedure.

The Court sends an invitation to participate in mediation to the parties in all cases in which the judge considers there are no obvious obstacles. Exceptions are those cases where, in the suit or in the response to it, parties have indicated that they do not wish to take part in mediation.

The Court initially began sending the invitation to take part in mediation both to the parties and to their lawyers. After one year of this practice, however, the Court stopped sending invitations and brochures to lawyers because they became familiar with the routine accompanying documentation from the Court.

### *Individualised approach*

One of the major shortcomings of the Slovenian mediation program is that the procedural rules do not yet permit the Court to discuss with the parties the sense and the suitability of mediation at special preliminary hearings (such as a screening or pre-trial conference). In the United States this method has proved the most effective way of convincing the parties to participate, particularly if the discussions are headed by a judge. We believe that if this method were applied in Slovenia there would be a substantial rise in the percentage of parties consenting to take part in mediation because of the regard parties have for the Court. Also, in separate meetings with parties, the Court would be able to convince those who could not be convinced by their lawyers. A letter from the Court cannot have the same persuasive value as a conversation between a judge and the parties involved, even though it may only last a few minutes.

The Court has attempted to tackle this shortcoming by setting up an ADR service to explain, manage, monitor, supervise and adapt the program and to communicate reactively and proactively with the public.

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### *Indicators for an invitation to mediation*

When it launched the mediation program the Court did not set out indicators to determine which cases were suitable to be submitted to mediation. Even if we analyse the consents and refusals to go to mediation, and the cases in which settlements were or were not concluded in 2001 and 2002, it is very difficult to make a reliable evaluation. In terms of the type of civil dispute, the least interest in mediation was in copyright disputes, while the fewest settlements were concluded in compensation cases brought against the state.[4]

Opinion is divided among experts as to whether it is possible to determine indicators of suitability for mediation. The Netherlands has developed such a model as part of its national court-annexed mediation project.[5] By contrast, most American experts believe that the key indicator of whether a case is suitable for mediation is the willingness of the parties to negotiate, compromise and cooperate. They do not believe there is a particular type of case which indicates the possibility of a successfully agreed resolution of the dispute in mediation, but that it is the attitude and views of the parties that count, and that selection criteria could therefore only be predetermined in an

ideal world. Civil disputants file claims for different reasons, but in principle and in general they are seeking money. This means that, as far as their interest in taking part in mediation is concerned, the existence of a certain negotiating space is crucial. This could be described metaphorically as the space between the floor and the ceiling.

### *Key actors*

The Court maintains a list of mediators, which initially comprised 15 individuals but has gradually expanded to over 40 mediators. The mediators are higher court or district court judges, retired judges, the Deputy Human Rights Ombudsman and lawyers. In family mediation, which the Court has introduced as a supplementary program, social workers also act as co-mediators.

The absence of a tradition of agreed resolution of disputes and the level of legal culture in Slovenian society meant that it was necessary, especially at the beginning, to ensure the parties had confidence in the mediation process. Therefore the first mediators were judges because of the authority and respect they command. They become key actors in its success. The judges performed the mediation services *pro bono* in addition to their regular duties as judges. This had the effect of strengthening the *pro bono* culture in society in general, and at the same time protected the Court from criticism that would have been aimed at it if the judges received payment for their services as mediators in addition to their judges' salary, because these are matters that the Court has a duty to resolve in any case.

The inclusion of judges in the mediation program was important as a symbol that judges themselves take ADR seriously. We must not overlook the fact that the decision as to whether the Court invites the parties in a dispute to enter mediation is made by the judge in each individual case. If judges had no faith in the mediation process it could seriously undermine the implementation of the program. The participation of judges as mediators in the program has had another positive effect – lawyers tend to follow judges' initiatives. The enthusiasm of judges originated primarily in the need to reduce the load of unresolved cases at the Court and from a belief in the advantages of mediation and the related professional challenge.

On the other side, however, there are risks. The main concern is that judges might be too forceful in their relations with parties and might rely too much on their judicial authority. It is also possible that a judge may find it difficult to 'change hats' and ignore the law, or to become a good listener. For example, in the US state of Virginia, court-annexed ADR was opposed not only by lawyers but also by judges; by lawyers because they feared an alarming drop in their fees, and by judges because they feared losing their authority. There is also a danger that parties might see mediators who are judges not so much as intermediaries but more as individuals who make decisions, and would expect evaluative mediation from them.[6]

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### *Key means of supervision*

The quality of the service is vital to the success of mediation. The Court therefore ensures that mediators undergo initial training and continuous ongoing training. The content of the training programs and the program providers are determined by the Court.[7] Participation in these programs is free of charge. A minimum demand is that mediators undergo a 40-hour training program. On this basis the Court requires a commitment from the selected mediators to provide free services to a specified extent (15 hours a year), but at the same time guarantees their career development and does not restrict them with a competition clause. The Court's minimum requirement for inclusion in a training program for mediators is that the person is a law graduate who has passed the national law exam (except mediators in family mediation) and that the person has certain practical experience in resolving disputes. What ensures the quality of mediators is not only their professional qualifications but also their diversity and availability. Therefore it is the Court itself that gives permission to perform services in the Court program. And the Court also carries out the procedure for monitoring and evaluating the work of mediators.

Supervision of the quality of mediation services is extremely important as far as the success of the program is concerned. The Court therefore laid down ethical standards for mediation, a special appeal procedure and a procedure for excluding mediators in the event of a conflict of interest or the suspicion of bias, as well as determining the duty of mediators to take part in a further training program organised by the Court once a year. An expert council has also been set up comprising three Appeal Court judges acting as mediators to function as an advisory body for the president of the Court. The council proposes adjustments to the program and further policies for the Court in the area of mediation, and at the same time members of the council act as mentors, trainers and assessors of mediators. Ensuring the quality of the program is of great importance, particularly until mediation becomes a widely-known and widespread method of dispute resolution. The absence of competition could mean that poor quality services could marginalise what is in principle a positive initiative.

### *Court settlement as a product*

The main advantage of the joint resolution of a dispute achieved by the parties is that there are no losers. It is a win-win situation. Another advantage of court settlement as a desired product of the mediation program is that it is quicker and cheaper than litigation, and parties are in control of the procedure at all times – they cannot be 'ambushed' by a judgment that comes out of the blue. But there is a need to ensure that the product is not defective. Because mediation is carried out by judges as part of their permitted legal activity and performed alongside their judicial service as well as by retired judges and by lawyers, mediation cannot be concluded with a court settlement but only with an out-of-court settlement. This obstacle was overcome by having the mediator prepare only the draft of a court settlement, while the settlement itself is concluded and signed before the judge presiding over the panel that would have heard the case if mediation had not been successful.

One of the ways in which we prevent the court settlement from being defective is through strict observance of the principle of confidentiality. The Court guarantees that the judge who will hear the case if the mediation is unsuccessful will not find out what happened in the mediation process. A defective settlement is also prevented by respect for the principle of representation, which means that the parties act together with their lawyers in the mediation process and that the dispute is resolved in the 'shadow of the court'.

### *Financial aspect*

Reducing or avoiding costs is one of the elements of efficiency. The dispute resolution procedure should be as cheap as possible for the direct user, in other words the party in a Court procedure, and for the end user, ie the taxpayer. The mediation procedure is therefore free of charge to the parties involved. However, when the court begins to carry out mediation in commercial disputes there will be a question as to whether mediation services should be paid for, not least because if the parties invest money in the mediation procedure they will take it more seriously and the procedure will have a certain value.

Judges carry out mediation services free of charge and the Court reimburses other mediators for their costs. The main criterion is not the success or otherwise of the mediation but the time spent studying the case and preparing an agreement. The funds for carrying out the mediation program are provided from the Court budget, and the president of the Court decides on their use because in Slovenia each court has an independent budget. In the Slovenian case this autonomy in deciding the use of budget funds is certainly an advantage which enables the mediation program to be carried out effectively.

### *Measuring the effects*

The model of court-annexed mediation at the Ljubljana District Court contradicts the idea that it is easier to set up new institutions than to reform old ones. On the other hand the fact that the Court is the only provider of these services in the whole country calls for a certain degree of caution.

In principle we can all agree that mediation saves time and money, but claiming a saving is not the same thing as an actual saving. A precondition for any saving is competition, and so it is essential that mediation service providers emerge in the open market within the private sector.

Mediation certainly does offer an opportunity for a faster and more flexible procedure. On the other hand, there is the potential for undesirable side effects, such as discrimination or unlawful agreements. Efficiency is certainly one of the advantages of mediation, but it is hard to measure results when two changes are taking place simultaneously, ie when the inflow of new cases falls and the number of resolved cases rises at the same time as a result of successfully concluded settlements.

Designing and implementing ADR programs means reform. Advocates of a reform always believe that it will work and are therefore often not interested in an analysis being carried out of the actual effects of the reform. Hence monitoring and evaluating the

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### Institute of Arbitrators and Mediators of Australia National Conference 2004

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### True Talking, Forward Walking

The 7th Annual Mediators' Conference will be held in Darwin NT from 30 June to 2 July 2004. The theme of the conference is True Talking, Forward Walking. It will focus on true talking, respectful, inclusive and creative practice in mediation and among practitioners, for better outcomes in the various fields in which mediators work.

The conference will include:

- Structured talking with key-note speakers and experienced facilitators
- Facilitated small group workshops to explore practice specialities and directions
- Exposure to Indigenous perspectives and peace-making ceremonies.

*For more information email <info@thebestevents.com.au>.*

### UN Online Dispute Resolution Conference

An international forum on online dispute resolution is coming to Australia. On 5-6 July 2004 the University of Melbourne will be hosting the Third Annual Forum on Online Dispute Resolution, in collaboration with the United Nations Economic and Social Commission for Asia and the Pacific.

As this is a United Nations event, participation is free. However, the number of participants from Australia will be limited to 50. To ensure you don't miss out, fill out an expression of interest form and find out more at: <www.psych.unimelb.edu.au/icrc>.

reform is extremely important. It tells us what is at fault, the service itself or the person to whom the service is intended. At the same time it allows us to maintain and adapt the program where necessary.

The Ljubljana District Court measures the effects of its mediation program in two ways. First, it analyses the various types of statistical data:

- number of cases offered for mediation;[8]
- number of cases in which the parties accepted the Court's offer;[9]
- number of cases in which one or all parties did not accept the Court's offer;[10]
- number of mediation procedures carried out;[11]
- number of settlements concluded or suits withdrawn;[12]
- number of cases returned to litigation after conclusion of mediation;[13]
- number and duration of mediation meetings in each individual case.[14]

The Court gathers this information as an aggregate and separately for each individual mediator. An analysis of settlements concluded or suits withdrawn within the mediation procedure reveals, for example, that the proportion of cases resolved in this way in 2001 was 50.5 per cent and in 2002 it was already up to 58.1 per cent.

But the success of mediation cannot be measured solely in terms of the number of agreements reached, because even mediation which is followed by litigation has important positive effects in that it focuses the dispute on the essential issues and renews communication between the parties. The Court therefore also measures the success of the program by analysing questionnaires which it gives to the parties and their lawyers following conclusion of the mediation procedures. The Court determines the extent to which the parties are satisfied with the work of the mediator and the outcome of the procedure, and what their assessment is of the fairness and integrity of the mediation procedure. Surprisingly, an analysis of these questionnaires revealed almost 100 per cent satisfaction among parties with all three categories, irrespective of the outcome of the mediation.[15] The development and implementation of evaluation methods and techniques in this part is based in particular on US research approaches.[16]

From the point of view of the declared operational goals of the Court, perhaps the most important achievement is that in 2002 the total number of unresolved civil cases at the Court fell by 3.3 per cent, which is exactly the proportion of cases resolved by the court through mediation. During 2002 there was a rise of 2.9 per cent in new civil cases filed with the Court. The Court managed to reduce the time required to resolve an average civil case from 21 months in 2001 to 16.5 months by the end of 2002.

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## Vision

Following the mediation model applied at the Ljubljana District Court another two of the largest first instance courts in Slovenia have begun to offer such services.[17] Interest in setting up court-annexed mediation is growing among Slovenia's courts. The Ljubljana District Court therefore decided to offer them the know-how and to take on the role of training mediators for the requirements of other courts. I believe it is not unrealistic to expect that within two years a court-annexed mediation program will be established at the majority of civil courts in Slovenia that are burdened by their caseload.

As mentioned earlier, in 2002 the Ljubljana District Court launched a new experimental program of mediation in family disputes and expert neutral evaluation in copyright disputes. In 2003 the Court also plans to launch a program of mediation and arbitration in commercial disputes, and to offer mediation in first cases in which a suit has not yet been lodged but where the parties are requesting free legal aid from the Court. This will be followed by consideration of whether the Court can also offer mediation in other types of dispute that are not yet in litigation but have a real possibility of ending up in court. This is because disputants are increasingly turning to the Court to request mediation before they have to file a suit as they do not wish to become involved in a court procedure. By displaying a reasonably responsive attitude towards people's needs the Court can gain what it is lacking: the support and trust of the public. Given such trends the question will certainly arise as to whether and to what extent it is possible to award mediation services contractually to external providers under Court supervision. There will be no lack of opportunities for experimentation, but if you want to build the peace you have to take risks.

The Court is also establishing further links with the private sector. Following a proposal from the Slovenian Insurance Association the Court will prepare a study to come up with a recommended model for a mediation centre for all types of insurance disputes in Slovenia. At the same time, by agreement with the Insurance Association, it will head the procedures for training mediators in this centre and issue permits to carry out mediation to them, with the authorisation of the Insurance Association and subject to an evaluation of their qualifications. In this way the Court will ensure that the mediation procedure will not be compromised because of the questionable quality of the mediators. A similar initiative can also be expected from the banks.

The Ljubljana District Court also takes part in cross-border cooperation by taking on the task of training prospective mediators in some of the countries of south-eastern Europe. In this way it can contribute to establishing and maintaining orderly legal systems in the region as well as mutual trust in international business, as the economy needs business to be protected by dispute resolution procedures that are both predictable and sufficiently flexible. The market of south-east Europe, just like the internal market of the European Union, needs a certain degree of coherence, which can be ensured by reducing the differences between the legal and regulatory systems. And universal, generally recognised principles and rules of mediation can be one of the key means of harmonisation. ●

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*Aleš Zalar is President of the District Court of Ljubjana, Slovenia and can be contacted at ales.zalar@sodisce.si.*

## Endnotes

1. The United Kingdom, for example, has a cost sanction in the event of unreasonable rejection of an instruction from the court to enter mediation.

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

3. Report on statistical data from the pilot program for ADR by mediation at the Ljubljana District Court for 2001 and 2002.

4. The Court's calculations were most inaccurate in its planning of the results of the program in disputes involving the state. In line with the Confucian principle that the basic mission of authorities is to set an example, the Court anticipated a strong willingness from state lawyers to enter into negotiations and compromise in disputes. But budget restrictions and the need for instructions and approval from the relevant ministries meant that in compensation disputes in which the state was the defendant a settlement was achieved in only 9.1 per cent of cases in 2002, whereas in other compensation cases a settlement was concluded in as many as 75.4 per cent of cases.

5. Pel, M, 2002, *Court-Annexed Mediation in the Netherlands*, Background Paper, Civil Litigation in the 21st Century, Copenhagen.

6. Evaluative mediation itself carries with it certain risks. The first is connected with the possibility that there will be a responsibility on the part of the mediator when, for example, he or she presents to the party an evaluation of his or her position, advises him or her what to do or even proposes an agreement to the party. This type of mediation also ignores the aspect of self-determination, the essence of which is the party's feeling that an agreement reached is his or her own and not that of the mediator. On the other hand, evaluative mediation is sometimes merely an excuse for something a party finds hard to accept, and seems appropriate especially when the party's expectations are unrealistic and the party's lawyer cannot convince him or her of this. The relative nature of evaluative mediation lies also in the fact that people will always listen to what they want to hear and that parties want an evaluation of their position only until they hear what it is.

7. Because there were insufficient providers of training services in Slovenia before the introduction of the experimental mediation program at the Ljubljana District Court, the first generation of mediators was trained in the United States and the United Kingdom.

8. In 2001 mediation was offered in 420 civil cases, and in 879 cases in 2002.

9. In 2001 the parties accepted the court's offer in 106 civil cases (25.2%), and in 269 cases (30.6%) in 2002.

10. In 2001 one or all of the parties to a dispute did not take up the Court's offer in 314 cases, and in 610 cases in 2002. Most frequently, consent was not given by the defendant. The proportion of cases in which none of the parties consented to mediation fell to 15.8% in 2002.

11. There were 105 mediation procedures concluded in 2001, and 179 mediation procedures in 2002.

12. A settlement was concluded in 52 cases (49.5%) in 2001, and in 104 cases (58.1%) in 2002.

13. On conclusion of the mediation process 53 cases (50.5%) were returned to the civil procedure in 2001, and 75 cases (41.9%) in 2002.

14. In 2001 the mediation was concluded at a first meeting in 31 cases (62%), and in 64 cases (61.5%) in 2002. On the basis of the selected sample of cases we can conclude that in 75% of cases the mediation lasted on average 1.3 hours, and one hour longer in the remaining cases.

15. Research by the US National Centre for State Courts and the National Judicial Institute came up with similar findings in 1994. The research found that the greatest benefit from ADR procedures was in the satisfaction of civil disputants with the course and result of these procedures (Steelman, D C, 2000, *Caseflow Management: The Heart of Court Management in the New Millennium*, National Centre for State Courts, Williamsburgh).

16. Hollet N L, Herman M S, Eaker D G, Gale J (2002) 'The Assessment of Mediation Outcomes: the Development and Validation of an Evaluation Technique' *The Justice System* 23/3 National Centre for State Courts, Williamsburgh.

17. The Ljubljana Regional Court and the Celje District Court.