Mediation
Handbook

MEDIATION HANDBOOK

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About the project “Improvement of the Court Conciliation System" project

The Republic of Croatia is implementing the Justice and Home Affairs program as part of the Norwegian Financial Mechanism 2014-2021. The program is run by the Ministry of Justice and Public Administration, with assistance provided by the Norwegian Courts Administration in the role of donor program partner, and the Council of Europe as an international partner organization. The value of the program amounts to 15 million euro, as a result of the grant provided by the Kingdom of Norway, with the Republic of Croatia donating 2.64 million euro. The goal of the program is to strengthen the rule of law, and the program encompasses four projects implemented by the Ministry of Justice and Public Administration in cooperation with Croatian and Norwegian partners and the Council of Europe.

The project "Improvement of the Court Conciliation System", which was initiated in 2020 and completed in 2024, was implemented by the Directorate for Civil, Commercial and Administrative Law of the Ministry of Justice and Public Administration in cooperation with project partners - the Norwegian Courts Administration and the Judicial Academy.

The project was carried out with the aim of strengthening the rule of law in the Croatian judicial system, given that, inter alia, an underdeveloped and insufficiently utilized system of mediation within the courts was identified as one of the main challenges to achieving the goal of strengthening the rule of law. In addition to the activity of carrying out an analysis of the existing conciliation system in comparison with the conciliation systems of other European countries, the activity of conducting a sociological-legal analysis of the reasons for the lack of use of conciliation, the activity of conducting conciliator training for 500 persons who are directly involved in the work of the judicial system, or persons who are otherwise relevant for the development and acceptance of conciliation in the Republic to Croatia (judges, court advisors, lawyers, state attorneys, civil servants, representatives of the academic community and the educational system) and the activity of conducting an awareness raising campaign included the activity of creating a handbook court mediation.

The importance of educating judges on conciliation is recognized as a prerequisite for achieving the stated goal of strengthening the rule of law through strengthening the use of the conciliation system at the courts. Therefore, during the implementation of the project, more than 500 people participated and successfully completed basic and additional conciliator training, most of whom are judges and court advisors.

The intention is to encourage the use of acquired knowledge of conciliation in everyday work, as well as to encourage further training and education in the field of conciliation. The handbook was primarily created for the purpose of providing support for judges to consider the possibility of applying conciliation in conducting court proceedings, as well as to motivate the parties to consider such a possibility. The topic of conciliation and how to conduct conciliation is covered comprehensively in the handbook, and it relates to conciliation in general. Therefore, the handbook is recommended as a practical guide for all current and future conciliators.

Content:

introduction

1. Introduction

Conciliation/mediation is a method of resolving disputes between parties with the help of a third neutral person, by reaching an agreement, for which the legislative and institutional framework in the Republic of Croatia is developed, and which has been changed over time in order to improve it and ensure compliance with European standards.
Given that recent Croatian legislation accepts and recognizes the term “mediation”, this term shall be used in the handbook.

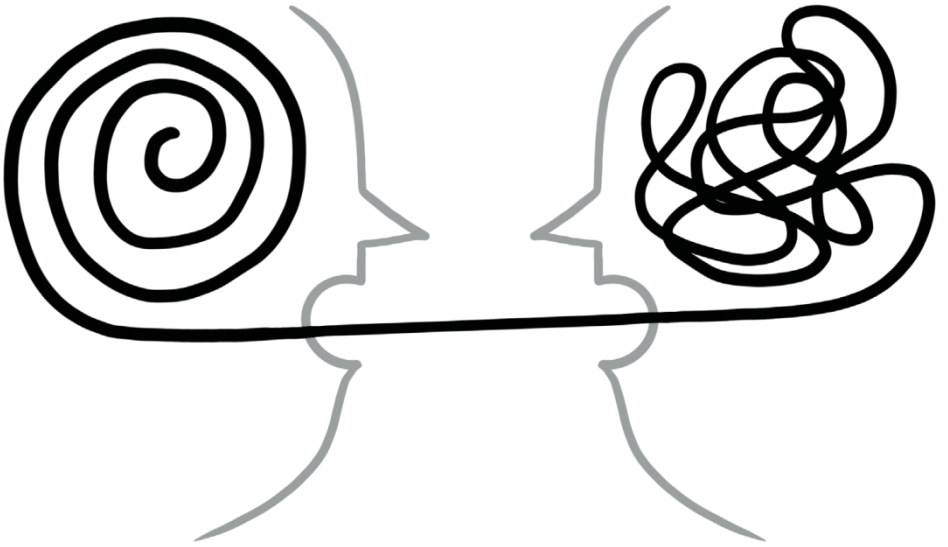
The handbook contains general information about mediation, an overview of mediability, i.e. assessment of the suitability of a dispute for amicable settlement, the principles of mediation, especially those that are useful to discuss with the parties, the order of actions in mediation, as well as instructions on the techniques used by the mediator at each stage of mediation.

It is suggested to use the handbook in the following cases:

a) mediation at court as part of which a judge who performs judicial duties at the court in question acts as the mediator

b) an effort to reach an amicable settlement of a dispute is made at a certain stage of the court proceedings, where the judge indicates to the parties the possibility of amicable dispute settlement without referral to mediation, after which, if no settlement is reached, the court proceedings will continue before the same judge

c) consideration of the possibility of referring parties from court proceedings to mediation.



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2. Mediation

On conflicts in general

A greater frequency of contact, from which conflict may arise, is expected in democratic and pluralistic societies where different social views confront one another. Conflict can be understood as expressing a problem. To a certain extent, conflict is the first step towards problem solving, and it represents an opportunity to improve relationships. At the root of the conflict there is a problem that can be understood, described, taken into account, treated and eventually solved. This means that conflicts can be managed. Namely, the initial positions of the conflicting parties can be directed towards a framework that enables negotiations for conflict resolution during which the parties begin to understand the problem as mutual one.

Friedrich Glasl[1] discusses three levels of conflict - from the lowest to the highest level of escalation. Given that each level has three stages, he proposes a scale with nine levels of conflict escalation. The scale escalates “downwards”, towards the irrational, and de-escalates "upwards", towards the rational.

The 1st level (win – win) – Conflict suitable for mediation.

Stage 1 – Tension.
Conflicts begin with tensions, for example occasional conflicts of opinion. This is a common occurrence and is not perceived as the beginning of a conflict. However, if the conflict does arise, the positions of the parties to the conflict are established.

Stage 2 – Debate.
From this stage on, the parties to the conflict consider possibilities to convince each other of their arguments. Differences of opinion lead to disputes. The conflicting parties put pressure on each other and uncritically position themselves according to their attitudes and opinions.

Stage 3 – Actions instead of words.
The conflicting parties increase the pressure on each other to express their opinion. The discussion is interrupted, there is no more verbal communication and the conflict becomes more and more intense.

The 2nd level (win – lose) – Conflict suitable for adjudication.

Stage 4 – Coalitions.
Conflict is exacerbated by the search for sympathizers of one's cause. The controversial issue is no longer important, but it is necessary to come out of the conflict the winner, with the opponent losing.

1 Friedrich Glasl, (1941, Vienna) Austrian economist, organizational consultant and conflict researcher. He developed a model of conflict escalation that is useful in conflict analysis.

Stage 5 – Loss of face.
The loss of trust is now complete, and the opponent needs to be smeared using insinuations. In this sense, loss of face means loss of moral credibility.

Stage 6 – Threat strategies.
The parties to the conflict try to gain absolute control by threats through which they express their own power. For example, a demand (“10 million euro”) is threatened, which is to be enforced through a sanction (“otherwise I will blow up your main building”), and the potential for the sanction is emphasized ("exposing explosives"). Proportions determine the credibility of a threat.

The 3rd level (lose - lose) - The need to de-escalate in order for the outcome of the dispute to make sense.

Stage 7 – Limited destruction.
Attempts are made to seriously damage the opponent by all means available. The opponent is no longer considered human. From now on, a limited personal loss is perceived as a gain if the damage to the opponent is greater.

Stage 8 – Total annihilation.
The opponent should be destroyed by any means necessary.

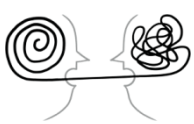
Stage 9 – Together into the abyss.

On conflict resolution

Conflicts are inevitable; they arise every day in different areas of people's lives, as well as in the functioning of society in general. Conflicts are very often resolved spontaneously, through the activity of the participants in the conflict. However, some conflicts escalate to the extent that they fail to be resolved without the intervention of a dispute resolution forum, usually the courts. A conflict is called a dispute, in terms of the legal terminology, when it is resolved by applying legal standards.

An alternative to initiating court proceedings is the use of mediation, that is, alternative dispute resolution.

The idea of resolving disputes through the negotiation efforts of the parties to the conflict themselves, with the help of a neutral third party, has been put forward and accepted since the earliest of times. However, in recent modern approaches, the idea of the so-called Harvard negotiation method, according to which negotiations aimed at a high-quality dispute resolution should be "integrative" and “interest-oriented”. Thus, the difference between integrative negotiations and, for example, hostage situations or one-off business negotiations is that the negotiations are not positional (the position in court proceedings is stated in the claim and the response to the claim), but are interest-based, that is, integrative.



In contrast to distributive negotiation, which is characterized by competitiveness and the main question of which is who will achieve more for themselves through negotiations, Integrative negotiation is characterized by cooperation, whereby the parties strive to reach an agreement acceptable to both of them.

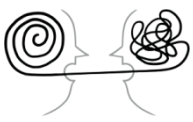
Mediation is considered a type of assisted negotiation, with features of integrative negotiation.

Mediation is carried out by mediators, who approach the matter using several possible methods: facilitative, evaluative or transformative. The legal system of the Republic of Croatia and the current legislation provide for facilitative mediation.

In facilitative mediation, the mediator conducts the mediation process by applying mediation skills in order to help both parties try to reach a settlement to the dispute themselves. The mediator does not provide the parties with legal advice on the subject matter of the dispute, nor do they propose a solution to the dispute, but rather manage the mediation process.

In evaluative mediation, the mediator is neutral and guides the parties to a resolution of the dispute. However, while doing so, they express their position on the matters in dispute. It is possible to agree on whether the position expressed by the mediator shall be binding.

In transformative mediation, the emphasis is on the transformation of the parties' relationship. The mediator helps the parties to establish a relationship that leads to a resolution of the dispute through their mediation skills.



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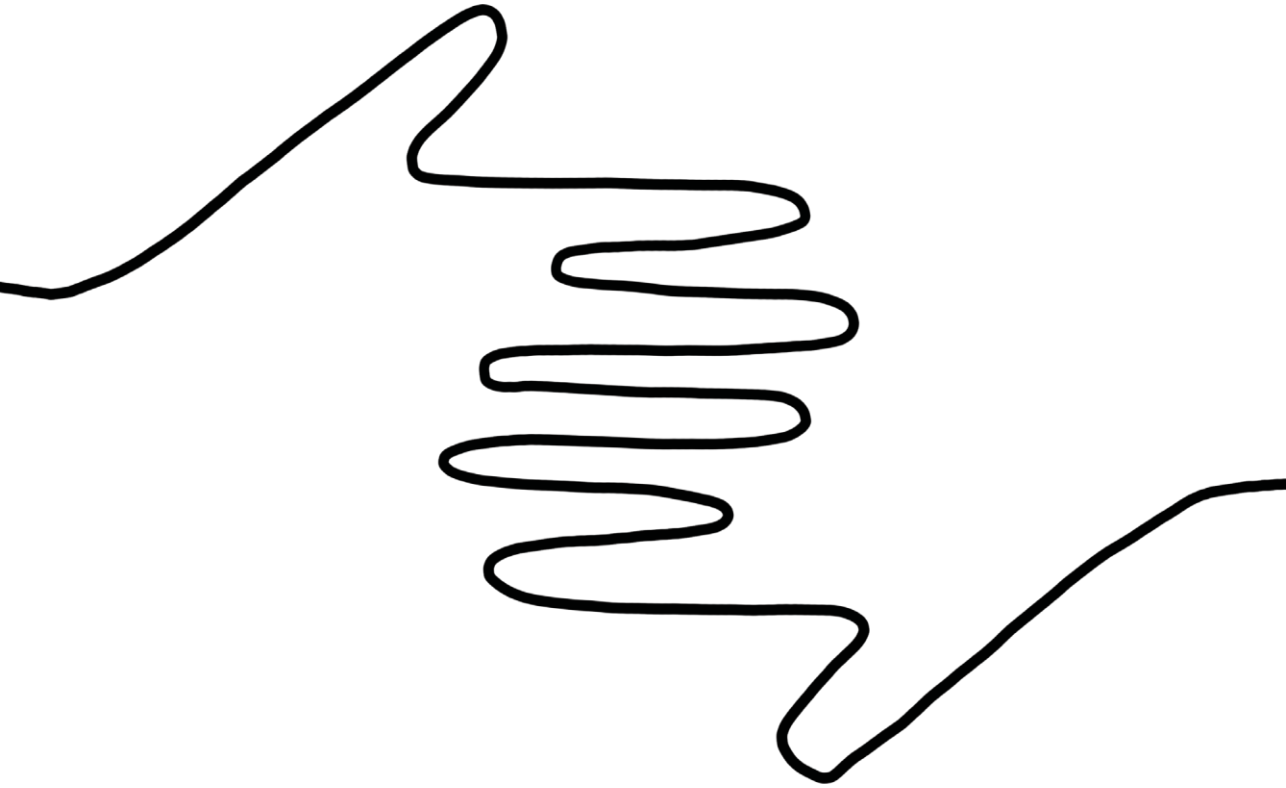

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3. Mediability

Mediability indicates the extent to which (potential) court disputes are suitable (more suitable) for mediation compared to those that are not.
The judge, or the person who resides over the dispute, should certainly think about ways to resolve a specific dispute in a faster/easier/better/or more appropriate way - within the framework of court proceedings or one of the amical dispute resolution schemes.

Mediation is one of the possibilities for an amicable resolution of a dispute and it is there to help a judge, when and to the extent it is possible and practical.

Amicable dispute resolution of the dispute by agreement of the parties, without court proceedings, is possible in cases where the parties are authorized to exercise their rights.

In cases where the parties are not authorized to exercise their rights (for example, in status disputes), the court may still take into account certain dispositions by the parties.

In any case, an agreement is possible provided that such dispositions are not contrary to mandatory rules of law, morality and the rights of third parties.

On the question of when it is most appropriate to engage in mediation and how to determine which dispute is suitable for mediation

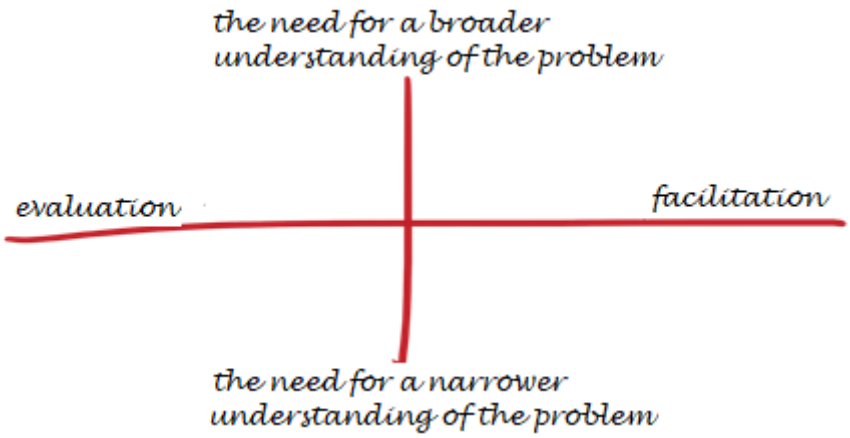
Determining which disputes are suitable for mediation can serve as a general orientation criterion. Each dispute has certain characteristics that make it more or less suitable for mediation (for example, highly emotional disputes are suitable for mediation).

However, when determining mediability, it is necessary to consider the specific dispute in order to determine whether:

- a better and faster resolution of the dispute is possible with a broader understanding of the parties' relations (deviation from the positions - lawsuit and response to the lawsuit), or the court's opinion on the legal basis of the parties' positions is sought

- a better and faster resolution of the dispute can be achieved through the evaluation of the positions of the parties, or through facilitation, based on the interests of the parties.

The need to consider a specific dispute in order to determine its mediability can be shown using a coordinate system in which it is possible to determine the point where the dispute is located.



Example 1.

In certain disputes, it can be concluded that it is necessary to cover the matter more broadly and deviate from the positions of the parties (lawsuit and response to lawsuit) and consider their interests. In this case, facilitation is sufficient. For example, a judge concluded that success in litigation does not solve the issue of the parties, but it is important to provide them the opportunity to communicate about the issue. In doing so, it is a precondition that the parties are free to exercise their rights. Such a dispute is placed in the **upper right quadrant** and represents a dispute in which it is certainly necessary to consider certain amicable dispute resolution methods.

Example 2.

The parties are not authorized to reach agreements contrary to mandatory rules of law, morality and the rights of third parties, which is why an evaluation of the positions and interests of the parties is necessary, but it is certainly appropriate to consider the interests underpinning the positions. Such a dispute is placed in the **upper left quadrant**.

Example 3.

There are disputes in which the interests of the parties are clearly expressed by their position, but for high-quality and quick resolution of the dispute, it is necessary to provide the parties with a “day at a court", that is, time and space for quality communication about the dispute, which places such a dispute in the **lower right quadrant**.

Example 4.

Disputes in which the parties presented the facts to the court and seek relief from the court. Further communication depends on how the court will evaluate the positions of the parties. Such a dispute is placed in the **lower left quadrant**, that is, in such a case the court should not insist on the agreement of the parties, but should rather adjudicate the matter.

It is possible to imagine an infinite number of points on a coordinate system, just as life offers an infinite number of possibilities in creating and resolving conflicts.

The coordinate system is an aid when considering whether the parties should be referred to mediation. For each dispute, it is possible to choose a point in relation to the axis (evaluation - facilitation) and in relation to the ordinate (the need for a narrower or broader approach to the problem being resolved).

At the same time, there are circumstances that indicate the opportunity for mediation and in which quadrant it would be appropriate to position the dispute.

1. If affective elements prevail in the dispute, it is better to try to resolve the dispute through mediation. On the line leading from the objective to the subjective, the court is more authoritative for the left part of the line (which refers to objective criteria that can be verified), while mediation is more successful in resolving disputes on the right part of the line, where the criteria are subjective.

   Cognitive problems in the dispute are mainly the subject of consideration by the court. In mediation, as a rule, facts are not established and evidence is not presented. Mediation is prospective, not retrospective, which means that the primary goal is not to determine what happened (the determination of past events is characteristic of court proceedings), but what kind of relationship is to be achieved in the future.

2. It is also necessary to consider the issue of the effectiveness of mediation, which is faster and cheaper for the parties than court proceedings. A quick resolution of the dispute is of crucial importance, and the long duration of the proceedings is commonly the most significant issue for parties to the dispute. When a dispute is resolved in court proceedings, the court is obliged to respect the strict formal rules of procedure and adjudicate objectively, which can require some time even if there is no issue pertaining to the court's workload.

On the question of how the judge refers the parties to mediation

After the judge concludes that the dispute is suitable for mediation, they will refer the parties to mediation.

The way in which the judge informs the parties about the options available to them and encourages them to settle the dispute amicably will influence the parties' decision whether to try to resolve the case through mediation.

Referring the parties to mediation is the activity of the judge, and it depends on the interest and preparation in the specific case, partly on the personality and communication skills of the judge.

In order for referral to mediation to be successful, the judge should emphasize to the parties that referral to mediation is not a denial of court proceedings, but an additional attempt to achieve a faster and mutually satisfactory resolution of the dispute. The wording used by the judge is important, and the wording that is suggested to be used and repeated in communication with the parties is “resolution of the dispute”.

The judge will inform the parties about the mediation, whereby they will:

- briefly explain the principles of mediation (for example, the principle of voluntariness, confidentiality, neutrality, its prospective nature, informality)

- indicate that due to the nature of the specific dispute, it is more appropriate to try to reach a resolution of the dispute through mediation, rather than in court proceedings

- assertively point out that accepting mediation would represent a responsible approach to attempting to resolve the dispute outside of court proceedings

- explain that the parties do not stand to lose anything in mediation, considering that mediation can be carried out during court proceedings, quickly and without affecting the course of court proceedings

- highlight the advantages of resolving the dispute through mediation, and especially emphasize that mediation enables them to:

  - reach a mutually acceptable agreement and resolve the dispute by concluding a settlement with the help of an impartial third party - the mediator
  - decide whether, when and how to resolve the dispute with the possibility of deciding not to proceed with mediation at any time
  - reach a resolution to the dispute in a way that is acceptable to them, and which is faster and cheaper, given that mediation is an informal procedure, the implementation of which can be organized quickly
  - try to resolve the dispute in a confidential procedure, given that in relation to third parties, all information and data presented during mediation are kept confidential, except in cases prescribed by law
  - preserve mutual personal or business relationships.

On accepting a suggestion for mediation

The availability of justice and legal security for the parties must be guaranteed, primarily by guaranteeing the right of access to a court.

Providing access to a court does not entail preventing the parties from resolving their dispute themselves. In the event that they request the intervention of the court because they do not know or do not want to resolve the dispute themselves, the court has the possibility to encourage the parties to reach an amicable settlement of the dispute and conduct mediation.

Furthermore, through their activity the parties should provide assistance the court in conducting the procedure, and therefore they are obliged to consider the possibility of an amicable settlement of the dispute when they are encouraged to do so by the court.

A party should consider the possibility of mediation either on their own initiative or at the suggestion of the court. If a party accepts mediation and the mediation fails, the court will conduct the procedure and adopt a binding decision.

Within the framework of the common law legal system, the judgment of the English court in the case of Susan Dunnett v Railtrack from 2002 is significant and interesting.

Description of the dispute and court decision:

The plaintiff bred horses and, as a lessee, used the fields adjacent to the defendant's railway line for grazing. A part of the field was located on the other side of the railway line, and that part was accessed through a gate that was broken. The defendant's employees replaced it. The old gate, unlike the new gate, closed automatically. Railroad workers passed that way and through that gate, and the plaintiff demanded that the new gate be locked, with her keeping the key and handing it over to the workers as needed. It was established that the plaintiff requested the above from the defendant's worker only once, and that was when the new gate was installed. Not long after the gate was installed, the plaintiff put four horses out to graze, and they wandered onto the tracks and were killed by a train.

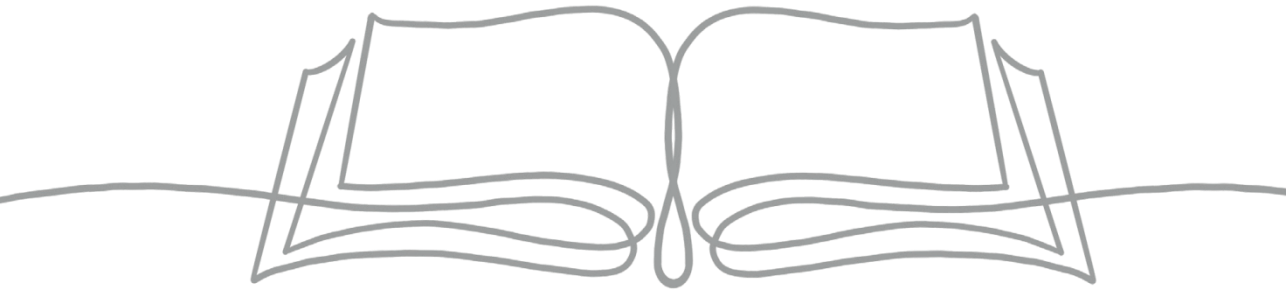
The plaintiff sought GBP 9,000, which is the amount representing the value of the horses killed, as well as compensation for the post-traumatic stress disorder suffered. The first-instance court rejected the plaintiff's claim, with the explanation that the plaintiff, after communicating with the defendant's worker who was installing the new gate, simply accepted what the worker said. She did not express her disapproval of the new situation, which she could have done in such a way as to further make an issue of the installation of new gate, in the railway station or in the defendant's office, with an employee who has greater responsibility than the worker who installs the doors.

The plaintiff filed an appeal against the judgement dismissing her claim, and the court of appeal decided to consider the appeal, but at the same time invited the parties to consider the possibility of an alternative dispute resolution. The plaintiff accepted the possibility of alternative dispute resolution. However, the defendant was convinced of success in the dispute and did not accept the said possibility.

The court of appeal dismissed the plaintiff's appeal. However, the court decided not to award costs to the defendant who succeeded in the dispute. Namely, in accordance with the applicable rules of civil procedure, both the lawyers and the parties are obliged to comply with the principle of “overriding objective"[2], according to which court proceedings are considered the last resort in terms of dispute resolution. In this sense, if a party refuses to participate in alternative dispute resolution without a valid reason, regardless of success in the dispute, they will not be awarded the cost of the procedure.

2 "Overriding objective", UK Civil Procedure Rules, a rule of civil procedure that enables the court to fairly resolve the court case with proportionate costs, with the aim of conducting the procedure in a timely manner.

Principles of mediation



4. Principles of mediation

Mediation is conducted after the parties have agreed thereon. The agreement may be implied, but it can also be expressly established between the parties. The mediation agreement results in informality as a feature of mediation when compared to, for example, court or arbitration proceedings.

Regardless of the informality of mediation, it is necessary to respect the basic principles of mediation:

- principle of confidentiality
- principle of voluntariness
- principle of impartiality
- principle of independence PRINCIPLE OF NEUTRALITY
- principle of non-adjudication
- principle of the prospective nature of mediation
- principle of informality
- principle of cost-effectiveness
- principle of efficiency
- principle of mediator competence
- principle of lawfulness
- principle of equality of parties
- principle of orality
- principle of conscientiousness and honesty.

In mediation, the principles of voluntariness, neutrality (which includes the principle of impartiality, independence and non-adjudication) and confidentiality of mediation must be explained to the parties. However, for the sake of a better understanding of mediation, it is possible to explain other principles of mediation to the parties, especially the principles of its prospective nature and informality.

4.1. The principle of voluntariness

The principle of voluntariness states that mediation is voluntary for the parties and that it is useful for the parties to consider the possibility of amicable dispute resolution, but also that each party is authorized at any time, after trying in good faith to reach an amicable resolution of the dispute, if they consider that proceedings are not in their favor, to withdraw from mediation and take part in court proceedings.

Therefore, mediation begins by informing the parties that they are at the mediation meeting voluntarily, that the mediation is being conducted for the benefit of the parties, but also that they can withdraw from mediation if they are of the opinion that it is not possible to satisfactorily resolve their dispute through mediation.

Mediation efforts that do not result in a settlement are often considered unsuccessful. A settlement reached certainly represents success for the parties, but the case in which the parties did not succeed in reaching an agreement that would result in a settlement is not necessarily a failure for the parties. The benefits achieved by conducting mediation, even if no settlement is reached, give mediation a special significance as a method of amicable dispute resolution. For example, it is possible that each of the parties has thought about their interests and the interests of the opposing party, that the matter in dispute has been narrowed down and that it has been reduced to a question for the court about the application of the law in the specific case. Unsuccessful mediation also does not entail that the parties cannot, even after some time, try again to resolve the dispute amicably in a new mediation procedure.

The principle of voluntariness and the mandatory attempt to resolve the dispute amicably

Examples of prescribing a mandatory attempt to resolve a dispute amicably also exist in regulations in the Republic of Croatia (for example, in the Act on Amicable Resolution of Disputes[3], Civil Procedure Act[4], the Payment System Act[5] and the Electronic Money Act[6]). However, the aforementioned prescription of a mandatory attempt to resolve a dispute amicably does not suspend the principle of voluntary mediation as a fundamental principle of mediation.

The justification of prescribing a mandatory attempt at mediation is also examined by considering whether such a provision represents a violation of the right of access to a court, that is, to a fair trial.

Article 6.1[7]

The right to a fair trial

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

3 Article 9 of the Act on Amicable Resolution of Disputes ("Official Gazette", No. 67/23)

4 Article 186a of the Civil Procedure Act ("Official Gazette", number 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/ 08, 96/08, 123/08, 57/11, 148/11, 25/13, 89/14, 70/19, 80/22, 114/22 and 155/23)

5 Article 72, par. 5 of the Payment System Act ("Official Gazette", number 66/18 and 114/22)

6 Article 11, par. 5 of the Electronic Money Act ("Official Gazette", number 64/18 and 114/22)

7 Article 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("Official Gazette", IT, 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10 and 13/17)

If the law prescribes a mandatory attempt to resolve the dispute amicably, the above should not be considered an exception to the principle of voluntariness.

In this sense, the principle of voluntariness stipulates that it is certainly good practice to consider the possibility of an amicable resolution of the dispute, but also that the party is authorized at any time, after making efforts in good faith to reach an amicable resolution of the dispute, if they consider that it is not in its favor, to withdraw from mediation and initiate court proceedings.

4.2. The principle of neutrality

The principle of neutrality is explained to the parties in the introductory stage of mediation.

It is not easy for a mediator to remain neutral in relation to everything the parties say. Namely, each person has a certain frame of reference from which they perceive the world, so even mediators are not devoid of personality traits and attitudes, especially in informal proceedings.

The neutrality of the mediator implies their independence, impartiality and non-adjudication. In adjudicative proceedings (litigation proceedings and arbitration), a third party in the dispute (judge, arbitrator) makes a decision on the outcome of the dispute. In the mediation procedure as a non-adjudicative procedure, it is important to explain to the parties that the mediator does not make a decision on the resolution of the dispute, but that the parties make the decision themselves.

Regarding the impartiality of the mediator, regardless of the fact that the mediator does not make a decision on the dispute, it is important that they are completely impartial, and that the parties have the impression of their impartiality. During the entire procedure, the mediator makes sure that the parties accept them as an impartial mediator who guides the parties to a mutually acceptable solution to the dispute, without favoring one of the parties. If the parties' impression of the mediator's impartiality is damaged, it is good to discuss it immediately and see if mediation can be continued. In any case, the mediator may not lead the mediation process in case of doubt about their impartiality. It is then possible to continue the mediation before a new mediator, of course, if the parties agree to the change of the person of the mediator.

According to the regulations covering mediation in the Croatian legal system, the mediator’s role is that of a facilitator, which means that they do not make decisions and do not evaluate the positions of the parties. However, the mediator guides the parties to a mutually acceptable solution to the dispute, making sure that the results of the mediation are not contrary to mandatory rules of law, morality and the rights of third parties.

The mediator can also participate in drafting the settlement agreement and propose its content, which is not considered a violation of the principle of neutrality.

If the mediator does not want to directly warn the parties about certain elements of the settlement that they consider harmful, unacceptable or counterproductive, they also have the option of

implementing the so-called reality testing, for example by asking the party at an individual meeting what they think about a certain idea or plan, whether they consider the idea feasible and acceptable.

4.3. The principle of confidentiality

The importance of confidentiality in mediation also stems from the fact that if mediation does not end with a settlement, possibly court (arbitration) proceedings will follow, which must not be disrupted by the events of the mediation.
For example, the plaintiff requires the defendant to pay the amount of EUR 10,000.00 stating that it is the overdue amount that the defendant owes based on the loan agreement. The defendant claims that they owe nothing to the plaintiff and that no agreement was concluded; on the contrary, the plaintiff caused them damage that was not compensated. In mediation, the parties agree on certain payments and provide certain legal qualifications to their proposals. In case mediation is completed without a settlement, such statements (which could be given with limited meanings during the negotiation process) would only disrupt the course of the subsequent court proceedings.

Therefore, the parties are informed about confidentiality in mediation in the introductory part of the mediation.

The confidentiality obligation regarding mediation is also reflected in the accepted practice of signing a statement of confidentiality.
Confidentiality is binding on all participants in mediation, both the mediators and the parties, as well as other persons who participated in the mediation process in any capacity.

If the parties have not agreed otherwise, the mediator is obliged to keep all information and data confidential in relation to third parties that they learned about during the mediation process, unless they are obliged to communicate them based on law, or if this is necessary for the implementation or enforcement of the concluded settlement. The mediator is responsible for the damage caused by the violation of the subject obligation.

In some cases of mediation, the parties understood confidentiality in such a way that it is an assertion or a piece of evidence “exhausted” in mediation and therefore cannot be used in court, which is not correct, and given that the above could be considered a violation of the right of access to a court.

The decision about what is considered confidential in mediation is the result of the mediator's assessment of which value is more important: confidentiality in a specific case or the impending danger.

It is important to note that what the court needs to know in order to implement the settlement, i.e. in the execution itself, is not confidential.

Furthermore, information about, for example, criminal offenses is not confidential. Criminal offences involving terrorism, serious threats aimed at the integrity of persons and abuse of children should definitely be reported, that is, the principle of confidentiality should be ignored. The principle of confidentiality is especially important when the mediator holds individual meetings with the parties.

At the individual meeting, the party tells the mediator what they must not convey to the other party. It is important to end the meeting with the mediator's question to the party: "Which of the above may I convey to the other party?"

4.4. The principle of the prospective nature of mediation

The mediator may or may not inform the parties about the principle of the prospective nature of mediation. Namely, it is an instruction that is important primarily for the mediator, but it can also be important for the parties themselves.

In principle, facts are not established and evidence is not presented in mediation. Mediation focuses on what should be, and not on what was.

If necessary, evidence can be presented in mediation. Sometimes, for example, it is necessary to determine the cadastral plot number of a certain property or the amount of the invoice for the repair of a certain item. However, this is not what mediation focuses on.

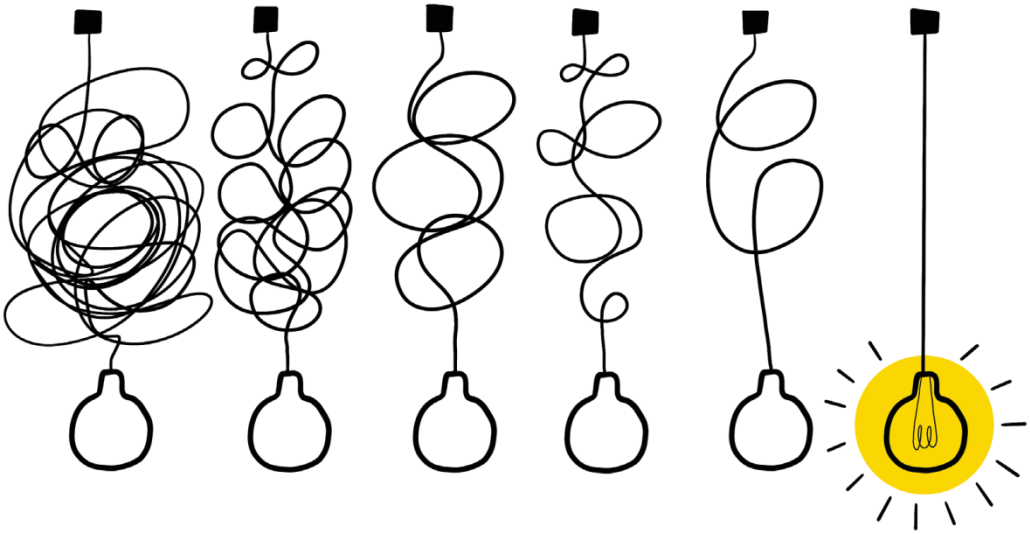
What is important to the mediator is the relationship of the parties to the facts and what kind of relationship the parties would like in the future.

4.5. The principle of informality

Mediation is basically an informal procedure. However, to a certain extent it contains a form that is not determined by law, such as for example in civil proceedings. Namely, it is about a certain experience (suggestion) about what actions a mediator can take at what moment when conducting mediation.

Thus, the informality of mediation refers to the fact that the largest number of actions and relationships in mediation are subject to agreement.

On the other hand, the parties cannot agree on: (1) the extent of their powers (they can negotiate only about the rights they can exercise) and (2) the neutrality of the mediator.



Stages of mediation

5. Stages of mediation

Mediation is informal, but for the purpose of its effectiveness it is possible to provide for a schedule of actions in mediation.

Actions in mediation can be divided into six stages of mediation:

- preparation
- introduction
- presenting a point of view (position)
- research and establishment of communication
- negotiation
- completion.

There are appropriate mediation techniques for each stage of mediation.

The stages of mediation are shown in a circle. The procedure starts at "noon" and runs clockwise. If circumstances arise in the mediation that call into question the successful continuation of the mediation, the procedure can reverse direction. Then the mediator returns the process to one of the previous stages in order to lay the foundation for the next stage of mediation and allow the mediation to continue. Reversal is not a special stage of mediation, but is located between the research and communication stage and the negotiation stage.

	Stages of mediation	Actions in a particular stage (brief overview - reminder)
1	Preparation	The mediator prepares themselves and the parties for mediation, finds out what the dispute is about and informs the parties of what awaits them in the mediation (informing the parties can also be done by the administration).
2	**Introduction**	The mediator has the main role, they deliver a mediator's speech, which consists of three parts: (1) optional conversation; (2) principles of mediation – voluntariness, neutrality and confidentiality; (3) the rules of the game.
3	*Presenting a point of view (position)*	The parties play the main role - they present their positions (claim, response to the claim), while the mediator actively listens, summarizes, paraphrases and rephrases.
4	**Research and establishment of communication**	From position to interest - the mediator asks open-ended and closed-ended questions, applies the "onion peeling" technique, determines the emphasis employed by the parties and establishes communication that is necessary for negotiations.
5	**Negotiation**	Integrative negotiation is conducted, based on the interests of the parties, according to the rules of the so-called Harvard method of negotiation; the problem is tacked, and not the opposing party.
6	Completion	The parties reach an agreement. The mediator draws up a settlement agreement so that it is enforceable. If no agreement is reached and no settlement is reached, the mediator commends the parties for making an effort.

5.1. Preparation

The preparation stage in mediation can be organized so that it is carried out by the mediator, and it can also be carried out by an administrator or the appropriate administrative service. It is possible to inform the parties about the mediation with pre-prepared information, i.e. a leaflet or other appropriate materials.

If the preparation stage is performed by a mediator, it is important to note that at this stage the mediator is informed about the main elements of the specific dispute and does not yet enter into in-depth assessments of the dispute itself.

Also, and what is important for the successful course of mediation that follows, at this stage the mediator assesses where countervailing action is needed, i.e. the establishment of a balance of power between the parties.
At the same time, the mediator approaches both the parties and the outcome of the mediation neutrally, and it is important that the parties do not perceive them as an advocate for their respective positions, but as a person who has an equal role in the mediation in relation to both parties.

In the preparation stage, the parties are informed about the course of mediation and the way of working in mediation, for example it is explained to them when joint meetings are held and when individual meetings are held and what kind of communication is expected between mediation participants. It is also explained to them what awaits them in mediation, what the possibilities and obstacles in mediation are, and how to prepare for mediation. The parties receive specific information on when and where the meeting will be scheduled, how long the meeting will last, how many meetings can be expected, what information or powers of attorney for negotiation a party must obtain, especially if a party is a legal entity.

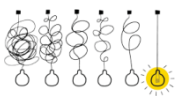
The mediator informs the parties that they are not authorized to legally assess their dispositions and that in case of need, for example when a party undertakes a certain obligation that would need to be thought through in more detail, they will instruct the party to contact a person of trust, usually a lawyer, during a break between two meetings or during a break in the meeting itself.

At this stage of the mediation, it is useful to explain to the parties that it is possible that circumstances may arise during mediation due to which the mediation may brought to a standstill and become ineffective. The most common reasons for the above are, for example:

- insufficient preparation for mediation
- a heightened level of emotions between the parties
- poor communication between mediation participants
- different expectations of the parties
- external factors
- different information available in mediation
- different risk assessments
- different attitudes of the parties towards the settlement
- when the dominant desire is for revenge
- when the parties consider that another way of resolving the dispute is better than mediation
- when the parties are convinced that they are right
- when the pace of mediation is inappropriate.

If the aforementioned circumstances occur during the mediation, and in order for the mediation to continue successfully, the mediator should advise the parties and discuss the problem. In such a situation, the mediator can use several possible approaches.

- The mediator can advise the parties to prepare for mediation in such a way that they consider the good and bad sides of their positions, as well as the positions of the other party, and to consider what interests might lie behind the prominent positions and whether they have any suggestions.
- Given that the mediator understands the excessive expression of the parties' emotions as an expression of concern, desire or need of the party who expresses these emotions, they can advise the parties to be mindful of the fact that heightened emotions are a part of the process of amicable dispute resolution.



- The mediator can advise the parties that polite behavior result in a greater possibility for a positive and constructive reaction from the interlocutor.
- The mediator can point out to the parties that, above all, in mediation, the joint effort of the parties aimed at finding a mutually acceptable solution to the dispute is most important.
- The mediator is aware that there are often external factors that make the dispute more complex (for example, expectations of relatives, neighbors); in that case, they can instruct the parties to recognize to what extent they are instruments of other people's expectations and to what extent they can assert their own interests.
- In mediation, as in any other procedure, the question of accurate information is crucial, and for this reason the mediator can instruct the parties to check the information on which they base their positions.
- The mediator can advise the parties to assess the risks they will be exposed to if they decide to resolve the dispute in court proceedings, as well as to try to manage the identified risks.
- The mediator can point out to the parties that proposing or accepting mediation is not a sign of weakness, i.e. a belief that the party is “not in a good position”, but that it is an attempt to resolve the dispute in a way that satisfies both (all) parties to the dispute, and that an amicable resolution of the dispute is often more acceptable to the parties than a resolution that would be reached in court proceedings.
- The mediator can indicate to the parties that it is not desirable to use mediation in order to take revenge, defame or otherwise harm the other party.
- The mediator should familiarize the parties with the limits of the possibilities of each procedure, including mediation. They should definitely point out the main principles of mediation again (voluntariness, neutrality, confidentiality, possibly the prospective nature of mediation and informality).
- The mediator can warn the parties that mediation does not determine who is right and who is wrong, as well as that the purpose of mediation is not to win or lose, but to try to resolve the dispute in a mutually acceptable manner.

However, in the aforementioned situations, it is also necessary to take into account the cost-effectiveness of mediation. The mediator assesses to what extent it is necessary and justified to inform and advise the parties for the purpose of continuing the mediation.

5.2. Introduction

In the introductory stage of mediation, the mediator has the main say, who is almost the only participant who speaks. The introduction to mediation should be measured in terms of content in such a way that the mediator takes into account that the parties may not be able to absorb too much information in a short time. At the same time, of course, the mediator must make sure that the parties receive the necessary information and that they understand and accept it.

The leading role of the mediator requires the mediator to hold a speech in the introductory stage of the mediation.

As a rule, the mediator's speech is of the same type, and it is necessary for the mediator to prepare and report it in advance. At the very beginning, a mediator who is just gaining experience in conducting mediation can use notes.

The mediator's speech consists of three parts:

1. Casual conversation

The mediation meeting begins with a discussion of topics unrelated to the subject of the dispute. The parties come to the meeting with the intention of presenting their problem as soon as possible. However, there is (are) (an)other side(s). In the introductory stage, the mediator should make it possible for the parties to relax, and should point out to them that communication is expected in mediation and not a monologue by one party to the dispute.

2. Principles of mediation

The mediator explains to the parties the three principles of mediation (voluntariness, neutrality, confidentiality), although the parties were informed about this in the preparation stage. In the introductory stage concerning the principles, they mention how they would "briefly review what has been covered", determine their role, and how they would:

- remind the parties that they entered the mediation voluntarily and in good faith to resolve the dispute amicable, for which they should be commended
- confirm their role as a person who has no interest in the outcome of the dispute and who does not make a decision, but is there to help the parties agree on a mutually acceptable solution to the dispute as part of which there are no winners and losers, but the problem is solved
- point out to the parties that experiences of integrative negotiation enable an outcome in which each party gets more than what they expected
- determine whether the parties have signed a declaration of confidentiality, that is, whether they commit to confidentiality in relation to everything they learn in the mediation.

3. Rules of conduct in mediation

The informality of mediation allows for prior establishment of rules on the manner in which the mediation will take place. The mediator will not impose the rules, but will propose them to the parties as rules that represent the parties' mutual agreement on the method of communication and the course of the mediation. With this, the parties reach a first agreement, which can be a further step towards reaching an agreement on the resolution of the dispute itself.

The rules of conduct in mediation refer to the following:

- Separating people from problems. It is considered acceptable to attack the problem, but it is not

acceptable to attack people by identifying them with the problem. Attacking people (*argumentum ad hominem*) is actually a sign that a person has no other arguments, so it is a recognition of the validity of the opponent's position. In addition, such an attack escalates the dispute, increases tensions and moves away from the resolution of the dispute.

- Communication without insults. In case of insults, the mediator will warn the party that it is an inappropriate way of communication, which will not mean the mediator's bias. The mediator will try to interpret the raised tones of the parties, whether it is essentially an expression of concern, desire or need of the party and possibly propose an excuse for inappropriate communication.
- Respect for the interlocutor. In communication, respect for what the interlocutor is saying can only be expected if the respect is mutual.
- Expression of attitudes. Appreciation of views is possible only if the appreciation is mutual. It is necessary to enable the interlocutor to express their position, and for the interlocutor to reciprocate in the same way.
- Response to attitudes. Everyone will be ensured the right to express a position and the right to respond to the position expressed by the opposing party.

In the introductory stage, the mediator also determines:

- whether a mediation agreement (and statement of confidentiality) has been signed
- whether the person representing the legal entity has the necessary authorizations for representation, negotiation and signing of the settlement agreement.

The mediator also informs the parties:

- how long the meeting will last
- about breaks for rest, phone calls, calling lawyers, which are agreed upon between the parties
- until when the mediation will take place and under what conditions
- how to schedule the next meeting if necessary
- whether telephone (video, e-mail) communication will be used between meetings
- that at some point they will propose separate meetings and that the content of those meetings will be confidential, except for the part in which the party with whom the meeting was held expressly allows the transfer of information.

During the introductory stage, the mediator, while speaking, should establish eye contact with the parties, in order to determine with certainty whether the parties have heard and understood what they are saying. The mediator addresses each of the parties at the same time. If the parties want to ask a question, the mediator pauses and provides answers, but not to questions related to the dispute, but rather those encompassing the content of the introductory stage. At the same time,

if a party intends to speak about their positions in the dispute, the mediator rejects such intention of the party and informs the part that they will have the opportunity to express their views in more terms later on. Furthermore, if one party asks more questions trying to dominate the conversation, the mediator takes this into account and countervails the resulting situation in order to provide the parties with an equal position in the mediation.

It is important to point out that, in case the mediation is brought to a standstill, there is a possibility that in the later stages of the mediation the mediator returns to the introductory stage, in which they presented the rules for the mediation, and revisits them with the parties.
The mediator asks the parties which of the parties would like to present their position first. A natural assumption is that the plaintiff would be the party to do so. However, the parties sometimes want the defendant to speak first. The mediator will not make an issue of such an order of presentation of the parties' positions, but will accept what they have agreed upon or, if the parties so propose, will determine themselves which party will speak first.

5.3. Presenting a point of view (position)

In the stage of presenting the point of view (positions), the parties present their points of view, or positions.

At the stage of presenting the position, the mediator actively listens to the parties and summarizes, rephrases and paraphrases what the parties say.

As a rule, the initial positions of the parties are different. Each side views the dispute in its own way. The mediator listens to the presentation of positions and does not correct them (of course, omitting/mitigating insults). The mediator tries to reproduce as accurately as possible the way in which the parties present their positions, and it is extremely important to recognize what is most important to the parties.

The mediator ensures that each party gets the necessary time to present their positions. In doing so, the mediator takes into account that the parties are different and that they are not able to express themselves in the same way and at the same pace. Therefore, it is important to take care that the parties do not get the impression that one of them has more space than the other, and that the parties do not feel deprived of the opportunity to present their positions.

The technique that the mediator uses in the stage of presenting the point of view (position) is primarily the technique of active listening. After speaking in the introductory stage and establishing control and the role of leader in the mediation, the mediator is now actively listening.

During active listening, the mediator pays attention to what is important to a party. They asks open-ended questions. Open-ended questions usually start with "who", "what", "when", "where", "how" and "why", where with "why" attention should be paid to not asking for verification of the parties' position, which would could interfere with communication.

An open-ended question is usually followed by a closed-ended question that begins with "if I understood correctly...".

In communication, the mediator pays attention to the verbal and non-verbal communication of the parties.

5.4. Research and establishment of communication

When the positions of the parties have been presented, the mediator begins with the determination of interests - that is, they begin with the stage of research and establishment of communication.

In the stage of research and establishment of communication, the mediator, by applying mediation techniques (skills), helps the parties to determine their interests in joint communication.
The mediator suggests a certain way of communication that the parties follow.

In cases where the parties in the communication lose sight of the agreed upon method of communication, i.e. if they start shouting, threatening, interrupting or ignoring the interlocutor, the parties can discuss the preferred method of communication for resolving the dispute. It is about "communication about communication", which implies the mediator taking over the floor and reminding the parties of the previously agreed upon method of communication in mediation.

The mediator establishes control with a series of questions:

1. [in a louder voice] Do you think this is going anywhere?
2. Would you like to do something to improve the situation?
3. What can we do?

The mediation techniques (skills) used by the mediator are:

I - you messages

Instead of sentences that start with "you", sentences that start with "I" are used, thus establishing the possibility of expressing opinions without escalating the conflict.

For example, it is positive communication to refrain from saying "You are destroying my relationship with our children", saying instead "I feel that my relationship with the children is destroyed"; or refrain from saying "You are not helping me anymore", saying instead "I miss those moments when you helped me".

Successful communication, apart from the content of the message itself, also depends on the way in which the parties speak. Good communication is devoid of verbal aggression, and the best way to achieve this is to communicate using "I-messages". They communicate something about the person, their feelings, attitudes and thoughts. If they contain criticism, it refers to the behavior of another person, and not to the person themselves. Such communication often leads to positive outcomes

and increases the likelihood that the interlocutor really hears the message being conveyed.

The structure of the "I-message" consists of three parts:

1. "Višeslav, you make me angry..." - we start with the name of the person we are addressing and say how we feel, that is, what impression the other person's behavior left on us, without self-accusation or justification.
2. "...when you're late and I'm always waiting for you..." - we are talking about another person's action, a description that is not an evaluation or assessment.
3. "...and please come on time from now on so that we can get to work on time" - we are talking about the real consequences of certain actions.

At the end of such a message, the expectations, that is, the desired changes, are stated, without the parties blackmailing or accusing each other.

"You-messages" are always directed at the interlocutor, are often aggressive and criticize the person, and not their behavior. If the communication starts with this type of message, the interlocutor will respond in the same way, by blaming the other person, which does not lead to the desired results.

Assertiveness

Assertiveness is defined as the skill of standing up for oneself and one's rights by directly expressing opinions and attitudes, doing so without anger and conflict escalation. It is about open and unambiguous communication, but it is important that the people we call assertive do not threaten the rights of other people, but respect and respect them. The main difference between assertiveness and aggression is that a person who is assertive does not intend to realize their rights, interests, desires and needs by harming others.

Assertiveness can be part of the personality that an individual is born with, but it is also a skill that is acquired and developed throughout life.

Reframing, or changing the frame

Cognitive reframing is a psychological technique that consists of identifying and changing the way a person views situations, experiences, events, ideas and/or emotions. It is a technique by which situations or thoughts are recalled and then changed.

In mediation, reframing as a technique serves the mediator to change negative communication and the parties' perception of the dispute into positive communication aimed at achieving a mutually acceptable solution. Namely, the same or similar ideas that are placed in a different context can be acceptable when resolving a dispute in a way that can surprise the parties.

Since mediation is prospective, the mediator in this way directs the parties to establish the relationship they consider desirable.

Onion peeling technique

The technique of "peeling the onion" in mediation has its origins in the teachings of Fritz Perls[8], which Bud Feder[9] and Jorge Rosner[10] rely on in their books of the same title - Peeling the Onion -.

Fritz Perls deals with psychological development, which he sees as peeling the layers of an onion, that is, removing the layers of emotional armor created during life. He lists three layers - the cliché layer, the role-playing and the phobic layer.

The procedure of “peeling the onion” is also designed for mediation in a similar way. The technique of “peeling the onion” refers to the “peeling” of the layers of the dispute, starting from the surface layer, which refers to the positions of the parties - the lawsuit and the response to the lawsuit. It then continues with the layer that refers to the general and individual attitudes of the parties, while the deepest layer refers to the interests, that is, the concerns, wishes and needs of the parties to the mediation.

Common questions that a mediator asks when using the “peeling the onion” technique in mediation are the following:

- How would you feel if you got what you stated you were seeking?
- How would you feel if you did not get what you were seeking?
- Please describe to me in more detail your feelings about the possibility of not getting what you are seeking.

Before the end of the stage of research and establishment of communication, and almost until the end of the stage of negotiation, the mediator works with the parties in separate meetings, however, not necessarily and not always.

After the mediator has determined the interests of the parties, they ask the following questions:

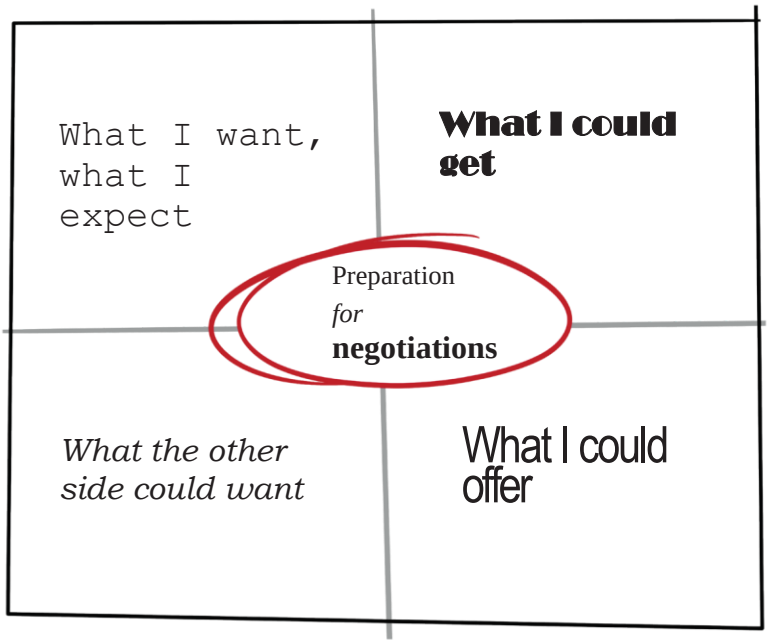
- Are these your interests (after the interests are listed)?
- Are these all of your interests?
- Are you ready to negotiate these interests (with the opposing party in mediation)?

8 Fritz Perls (1893–1970), German psychiatrist, psychoanalyst and psychotherapist. He coined the term "Gestalt therapy" to identify a form of psychotherapy. The core of the "Gestalt therapy" process is an increased awareness of sensations, perceptions, bodily feelings, emotions and behavior in the present moment. The relationship, the contact between oneself, the environment and others is emphasized.

9 Bud Feder (Simon Maurice Feder, known as Bud Feder, 1930-2018), clinical psychologist, began his fifty-eight years of clinical practice, fifty-two of which he devoted to "Gestalt therapy".

10 Jorge Rosner (1921-1994), an American psychotherapist, worked on "Gestalt therapy" and founded the Gestalt Institute of Toronto.

The communication necessary for negotiation was established between the parties, and a **reversal** occurred. The parties are about to start negotiations - after individual and common interests have been determined. The ***reversal*** is not a special stage of mediation, and it can be visually represented through the so-called "negotiation window".



Negotiation window – a visual representation of the party's thought process at the moment when the interests are determined, and before the very beginning of the negotiations:

5.5. Negotiation

Negotiations in mediation take place according to the principles of the so-called of the Harvard method of negotiation, which applies integrative negotiation and results in the fact that mediation has the features of assisted negotiation. In order for the negotiation to be successful, it is important to note that there are no strict rules that the mediator must follow. However, it is possible to determine recommendations that can help the mediator during the mediation.

Recommendation 1 – Separate people from problems.

The first rule of the so-called "Harvard method of negotiation" is the rule according to which it is allowed to "strike at" the problem, but not the people being negotiated with. The mediator works to induce the parties to accept the principle "I'm OK, you're OK" and points them to the fact that there is a problem that they should solve together.
In a large number of cases, at some point in the mediation, the parties begin to define the dispute as "our problem", which indicates that they have separated people from the problem.

Recommendation 2 - Do not argue about fundamental positions. Instead of positions, focus on interests and build mutually beneficial opportunities for dispute resolution.

In order to achieve the conditions for quality negotiations, they were preceded by several actions in mediation. At the end of the stage of research and establishment of communication, the interests of the parties are determined, and the interests determined in this way are the basis of integrative negotiation. It is considered that through integrative negotiation it is possible to achieve a much more favourable outcome concerning the dispute for each of the parties than what may be expected.
If interests are not established well, negotiations will not lead to resolution. In this case, it is possible to return to one of the previous stages of mediation.

When negotiating interests, the process begins with common interests. However, when the parties start developing an agreement, they show a greater degree of persistence in trying to develop that part of the agreement that is based on the individual interests of the respective parties.

It is best to start by agreeing on certain elements of the proposed agreement that are not in dispute and then focus on the matters in dispute and how to resolve them.

Recommendation 3 – Develop the value criteria that the settlement should contain, and which should be respected during negotiations.

During negotiations, it is useful to determine which value criteria the agreement must contain in order to be mutually acceptable.

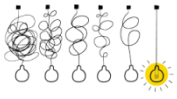
The parties' agreement on principled values helps the mediator in devising a settlement agreement at a later date. On this occasion, the mediator refers to the fact that some values have been agreed upon and that a specific proposal meets the given value criteria.
Not all values are equally important to the parties. The mediator therefore does not insist on established values, but focuses on those that are important to the parties.

This part of the negotiation precedes the negotiations on numbers and quantities.

Recommendation 4 – It is useful to have more options to choose from.

In negotiation, the mediator encourages the parties to come up with several ways or proposals to meet the agreed criteria.

For example, when dividing property consisting of a house, an apartment and a car, it can be agreed that one party will get the house, the other the apartment and the car, or the apartment and a certain amount of money, that is, a reciprocal offer is also valid.



If there was no need for it until this part of the mediation, the brainstorming[11] method can help here.

Brainstorming is a technique of group creativity that tries to find a solution to a specific problem by collecting various ideas that, in the specific case, the participants of the mediation presented spontaneously.

Brainstorming lasts a limited period of time and represents a situation in which the mediator encourages the parties to generate new ideas and solutions centered on a certain area of interest by removing inhibitions. The parties have the opportunity to think more freely and propose as many spontaneous new ideas as possible, and these ideas are recorded without criticism and then evaluated.

The mediator points out to the parties that brainstorming is not about making firm offers and that only those ideas and proposals that the parties consider acceptable will be discussed. Alternative solutions to the dispute presented in this way are what can be negotiated.

Recommendation 5 – The best alternative to a negotiated agreement (BATNA).

BATNA is an acronym - best alternative to a negotiated agreement. Determining or identifying the negotiator's best alternative to the negotiated agreement is one of the pieces of information that negotiators seek when considering an agreement and devising negotiation strategies.

During negotiations, it is necessary to devise a BATNA procedure - the best alternative to negotiations (which is not negotiated itself).

For example, before renewing the home insurance policy, Mislav decided to check the market in order to compare the prices of insurance policies. Namely, the offer submitted by the existing insurer is 10% more expensive compared to the previous year. Mislav found a bidder who offers an insurance policy 30% cheaper than the price of the insurance policy offered by the existing insurer.

However, before concluding the contract with the new insurer, he researched the new insurer's offer and found that the coverage clauses and definitions of the terms were not the same within the general business conditions. After taking everything into account, he concluded that the offer of the existing insurer was still more favorable.

Therefore, BATNA is not negotiated and it involves considering circumstances that are an alternative to negotiations conducted in mediation.

11 Brainstorming is a method for finding creative solutions to certain problems. It is carried out so that the participants concentrate on the problem and then try to come up with as many radical solutions as possible. The term was coined by Alex Faickney Osborn (1888–1966), an American advertising executive.

Recommendation 6 – Respect the objective criteria.

Mediation is necessarily more subjective than court proceedings, in the same way that the affective elements of a problem are more subjective than the cognitive ones, and as interests are more subjective than positions.

Therefore, the mediator instructs the parties to respect the objective criteria. For example, a legal provision or established judicial practice is more objective than the party's opinion on the subject of the dispute.

However, given that the mediator does not make a decision on the dispute, when instructing the parties to respect objective criteria, they will not tell the parties that their proposals are not enforceable or that they are not in accordance with the practice of the courts. The mediator will conduct the so-called reality testing by asking a party whether they think the presented idea will be feasible. An objective criterion could refer, for example, to the legally prescribed procedure of land registry entry, which the court carries out only if certain formal conditions are met.

If the mediator assesses that one of the parties needs additional encouragement and explanation in order to better understand the objective circumstances, the mediator works with them at an individual meeting, respecting the principle of neutrality. Here it is necessary to repeat that the mediator is not authorized to provide legal advice, but in case of need for legal advice, they instructs the party to seek it from a person they trust and who is an expert in the field.

Recommendation 7 – Recognize "dirty" tricks and "tame" difficult negotiators by referring to agreed rules.

In mediation, it can happen that the parties who are communicating act, sometimes intentionally, but also unintentionally, unfairly, harboring negative motives, using tricks and reasoning incorrectly. In this case, the role of the mediator who manages the mediation is important, and the mediator will warn the parties about the rules of communication and procedures that were previously agreed upon, as well as the proposals that may have been established earlier as the subject of negotiations.

There are cognitive biases that it is desirable to recognize in mediation and that can serve as orientation criteria for determining the described undesirable behavior of the parties to the mediation, for example:

Anchoring

People sometimes put too much faith in the first information they learn about something. For example, in salary negotiations, the one who makes the first offer limits the range of possibilities in the understanding of both negotiating parties.

Available information

Overestimating the information that is available. For example, a person may claim that smoking is not harmful to health because the know someone who lived an extremely long life and smoked several packs of cigarettes a day.

General acceptance of an idea

The probability that a person will accept a particular idea increases with the number of people who accept that idea. This is sometimes the reason why mediation meetings are unproductive.

Supporting a particular choice

When people choose something, they tend to justify their choice to feel good about that choice.

Grouping illusion

In this case, there is a tendency to recognize patterns in random events. The above is the key to various gambling misconceptions, for example the impression that it is more or less likely that the roulette ball will land on red after it has landed on black several times.

Outcome bias

A judgment based on the outcome of a particular chain of decisions is not always correct. Sometimes the outcome is random, that is, it is not a logical consequence of the decisions and actions that preceded it. The fact that a person won money gambling does not mean that the decision to gamble was a wise one.

Overconfidence

Some people are overly confident in their abilities and, as a result of such a belief, take greater risks when making a decision.

Recommendation 8 - Do not be a victim.

The mediator is neutral and them becoming a victim would entail siding with one of the parties to the mediation. In most cases, the mediator becomes a victim by trying to become a savior. The aforementioned roles of victim and savior are undesirable in mediation, given that they are not related to the dispute that is being resolved, but to the parties' predetermined life roles.

The aforementioned situation can also be shown using the so-called Karpman drama triangle model as a representation of the social model of human interaction, which shows a destructive pattern of behavior, that is, it shows the interaction that can happen between people in conflict. It is a model that makes it possible to understand how a negative interaction can arise between the participants in

a particular conflict. There are three roles in the drama triangle - the role of persecutor, victim and savior.

Participants have a primary or habitual role when entering drama triangles. Although each of the participants has a role with which they identify the most (life script), when they find themselves in the triangle, the participants find themselves in all three positions.

Recommendation 9 – Apply mediation techniques (skills) in negotiations.

The mediator in mediation must be focused, informed and persistent and use mediation techniques and communication skills (active listening, rephrasing, summarizing, paraphrasing).

5.6. End of mediation

If it is successful, mediation ends with the parties reaching an agreement, asking the mediator to draw up a settlement agreement that will contain the agreed upon clauses.

In a certain number of cases, the parties did not agree on a resolution of the dispute. However, it is possible that they agreed on some of the elements of the dispute. Such an outcome of mediation is neither considered successful nor unsuccessful because it brought the parties closer to a solution, which can help in the eventual court proceedings.

The mediator should be patient and persistent, but they are not obliged to wait endlessly for the parties to reach an agreement. Should they determine that the mediation is not constructive and does not lead to a resolution of the dispute, the mediator suspends the mediation. In this case, the mediator will commend the parties for attempting to resolve the dispute amicably in good faith.

However, when the mediator draws up a settlement agreement, they will ensure that the settlement is enforceable.

Article 6 of the Directive of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (OJ L 136/3), the provisions of which have been transposed into domestic legislation:

1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.

2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.

...

In this way, an outcome is reached that is similar to the judicial outcome of the dispute. Mediation becomes a legitimate method of resolving disputes and enables justice to be served to a greater degree.

Enforceability can be achieved in several ways:

- the parties can enter into a court settlement
- the parties can withdraw the claim (waive the claim) or acquiesce to the claim in the ongoing court proceedings
- if no court proceedings have been initiated, it is possible to reach a settlement in court in an out-of-court proceedings
- enforceability can also be achieved before a notary public (notarized document or solemnized document), or by arbitration award (mediation in arbitration or ad hoc arbitration after mediation).

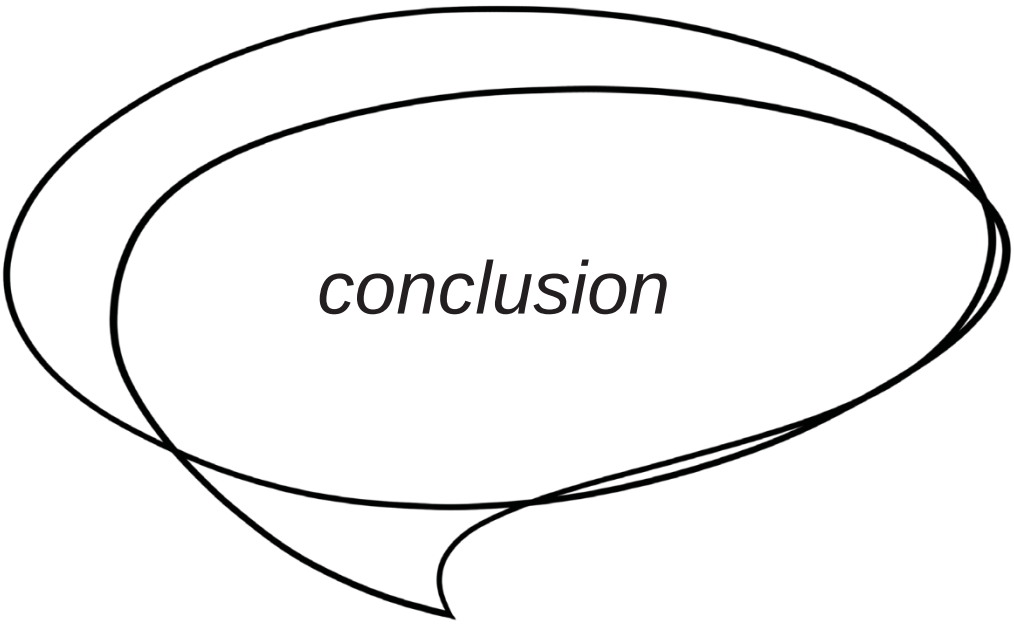
The advantage compared to the court judgement is evident because the resolution of the dispute is achieved without considering the evidence, without writing an explanation, without an appeal, and probably without the need for enforcement.

The special possibility of achieving the enforceability of a mediation settlement agreement is provided for in Article 20 of the Act on Amicable Resolution of Disputes:

> *(1) A settlement reached through mediation binds the parties involved. If the parties have undertaken specific obligations in the settlement, they are required to fulfil them in a timely manner.*
>
> *(2) A settlement reached through mediation is an enforceable document if it establishes legal consideration that the parties can mutually agree upon and includes a statement by the obligee allowing immediate enforcement (hereinafter: enforceability clause).*
>
> *(3) The enforceability clause signifies the obligee's explicit agreement that, based on the settlement, enforcement may be promptly initiated to fulfil the obligation after its due date. This clause may also be contained in a separate document.*

Therefore, for the settlement to be enforceable, it is sufficient for the mediation parties to conclude a settlement agreement with an enforceability clause signed by the mediator.

After the conclusion, it may happen that the mediator monitors the implementation of the settlement. It is also possible to have a mediation clause in enforcement, as well as mediation regarding enforcement.


conclusion

6. Conclusion

The possibility of conducting court mediation is both ensured by the current regulations, and already accepted in practice. It is a consequence of the recognition of the general social benefit of mediation - both for the parties to the dispute and for society as a whole - because its significance as a way of achieving justice in court, without the formality of court proceedings, has multiple aspects.

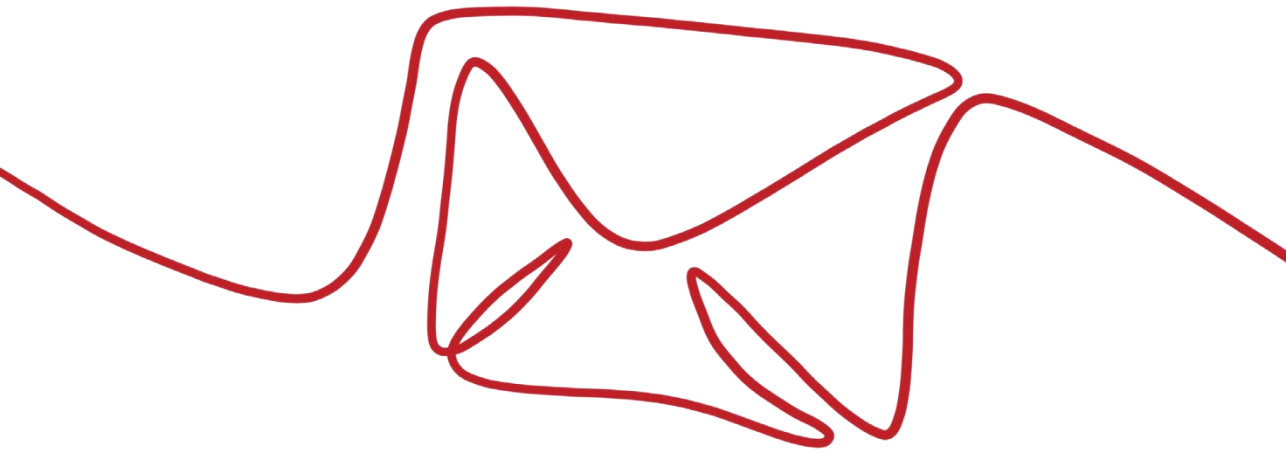
First of all, court mediation provides the parties to a dispute with the right of access to a court that is guaranteed by the Constitution of the Republic of Croatia, while accepting and applying scientifically based principles of reaching a fair, mutually acceptable agreement between the parties.

However, the importance and benefits for the parties arising from court mediation cannot be realized without motivated and well-educated judges and mediators.

Therefore, the purpose of this Manual is for it to be a useful tool for judges in conducting the mediation process and to encourage them to accept mediation as part of the work of judges.

The Manual was prepared for the purpose of conducting court mediation. However, the techniques and skills presented in the manual that the mediator applies in the implementation of mediation are not significantly different compared to those that are applied in extra-judicial mediation, which means that there is the possibility of a wider application of the manual.

In addition, this manual has additional value for judges because they are required to have, in addition to formal legal knowledge, the skills of working and communicating with people in conducting proceedings.



appendices

APPENDIX I

STATEMENT OF CONFIDENTIALITY

The judge mediator in this mediation is obliged to act impartially and equally in relation to each party in the mediation.

The judge mediator is obliged to safeguard the secrecy, in relation to third parties, of all information related to the mediation.

A judge or arbitrator in a dispute that was or is the subject of mediation, or in any other dispute arising from or in connection with that legal relationship, may not act in the capacity of the judge mediator.

The parties to the mediation, the mediator or another person who otherwise participates in the mediation, including the administrative staff, cannot in any other procedure (court, arbitration or other procedure) refer to the circumstances of or propose as evidence: a) the fact that one of the parties proposed mediation or was willing to participate in mediation, b) the positions expressed by the party to the mediation or proposals presented in that procedure, c) statement of facts or admissions of requests or facts given during mediation, if such statements or admissions are not an integral part of the settlement reached, d) proposals presented by the mediator in the mediation, e) the fact that one party to the mediation was willing to accept the proposal of the mediator, as well as f) a document that was prepared exclusively for the purposes of the mediation, or a document regarding which the parties to the mediation agreed that they shall not use it in any other procedure.
With our signature, we confirm that we have understood the Statement of Confidentiality and that we fully accept all obligations specified therein.

_____	_____
plaintiff	defendant
_____	_____
plaintiff's attorney	defendant's attorney
_____	_____
judge mediator	other parties

In_____, on _____

APPENDIX II

EXAMPLE OF AN INFORMATION LEAFLET ON MEDIATION

Amicable dispute resolution

Amicable dispute resolution is prescribed in the Act on Amicable Resolution of Disputes ("Official Gazette", number 67/23).

What is mediation?

Mediation is the procedure for amicable resolution of a dispute as part of which the parties endeavor to resolve the dispute amicably with the help of one or more mediators who provide aid to the parties in reaching a resolution, without the authority to impose a binding solution on the parties.

Where is mediation conducted?

Mediation is conducted at a court, a mediation institution or at another venue.

Advantages of mediation

Mediation is an informal procedure, the implementation of which can be prepared for quickly.

Mediation enables the parties to:

- reach a mutually acceptable agreement and resolve the dispute by concluding a settlement agreement with the help of an impartial third party (mediator)
- decide whether, when and how to resolve the dispute with the possibility of deciding not to proceed with mediation at any time
- reach a solution to the dispute in an acceptable way, faster and with as few costs as possible, considering the fact that mediation is an informal procedure, the implementation of which can be quickly prepared for
- confidentiality of the procedure
- preservation of mutual personal or business relationships.

Risks of mediation

Regardless of the fact that the benefits of mediation greatly exceed its risks, there is no guarantee that the parties will reach a resolution of the dispute through mediation, and they may have to resolve the dispute in court proceedings.

Mediator

In mediation, the mediator is obliged to act professionally and impartially.

The mediator can participate in drafting the settlement agreement and propose its content.

In relation to third parties, the mediator is obliged to safeguard the confidentiality of all information and data they have been familiarized with during mediation, except in cases prescribed by law. The law stipulates that the mediator is liable for damages in case they fail to fulfill the prescribed obligation. All of the above applies in an appropriate manner to the parties to the mediation, as well as to other persons who participated in mediation in any capacity.

How to prepare for mediation

In order to prepare for mediation, the following is recommended to the parties:

- before mediation, if necessary, ask for legal advice and obtain information about the nature of the dispute in order to understand your legal rights and obligations, while it is useful to know how much time and money has been spent to that point in order to resolve the dispute, as well as to estimate the time required to resolve the dispute in court proceedings and the amount of costs of the court proceedings in the future
- consider what are the positive sides and negative sides of your position, as well as the position of the other party, as well as consider the interests that could underpin the demands put forward and whether they solutions can be proposed
- take into account that emotions are heightened in a conflict and that it is possible that they are expressed in an unacceptable way
- take into account that reaching a mutually acceptable resolution of the dispute requires a joint effort by the parties
- look at external factors that make the dispute more complex, for example possible expectations of the environment, and given that these are possible obstacles in achieving one's own interests
- check the information on which they base their views, and
- take into account that proposing or accepting mediation is not considered a sign of weakness, i.e. that it is not a matter of "the party not being in a good position in the dispute", but that it is an attempt to resolve the dispute in such a way that the resolution is satisfactory for all parties in the dispute, involving a more acceptable way compared to the resolution that would be reached in court proceedings

APPENDIX III

AN EXAMPLE OF A COMMERCIAL DISPUTE AND ANALYSIS OF POSSIBLE MEDIATION

Dispute description:

The plaintiff is the owner of a business that sells and processes glass. The defendant is a political party. The defendant ordered glass from the plaintiff for the entrance door to the party's premises, which was broken as a result of an attack by vandals. The plaintiff and the defendant agreed on a price, the plaintiff procured the material, produced the glass and brought it to the party's headquarters for assembly. The defendant refused to receive the glass because it was produced contrary to the order. During the proceedings, the defendant states that they showed the broken glass when concluding the contract and that it had the party's logo in the middle of the pane. The plaintiff agreed to make the same kind of glass. The plaintiff presented the defendant with an invoice in the amount of EUR 10,000.00, which the defendant refused to pay. The plaintiff states that they incurred the costs of purchasing the materials, and that they produced new glass in accordance with the dimensions specified in the order, with the quality being in accordance with the order as well, and that they prepared it for assembly as agreed. They claim that the defendant never mentioned having the party's logo engraved in the glass. The defendant encloses in the file a video of the surveillance camera that was recorded on a public surface - without the plaintiff's knowledge - from which it is evident that the president of the party showed the developed glass to the defendant during the conclusion of the contract and provided them with a sample of the glass. The plaintiff objects, stating that this represents inadmissible and requesting that it be excluded from the file. The plaintiff proposes that the court conduct an expert report on the value of the manufactured glass and hear the witness who was present when the deal was arranged, and on the fact that the plaintiff was not instructed to engrave the party's logo in the glass. The defendant proposes hearing the president of the party in connection with the deficiency of the item that was ordered. They deem the contract to have been concluded as a service contract, so the defect in the delivered work is irremediable, which is why the plaintiff did not grant a subsequent deadline for fulfilling the obligation. The plaintiff seeks from the court to draw up a plan for the management of the procedure and to discuss the legal basis of the dispute because they deem that the contract has been concluded as a purchase and sale contract since the defendant did not emphasize that they require a special result of the work. The plaintiff notes that they are not an artist, but a craftsman, and that they would not have accepted the job had they known that they were required to engrave a certain logo in glass because that is outside the scope of the plaintiff’s activities. The judge hears the witness and the president of the party. With the consent of the parties, the case is referred to mediation.

How to approach mediation:

Who will the mediator invite to the mediation meeting?

In principle, facts are not established in mediation, that is, evidence is not presented. The attitude of the parties to the facts is decisive. Therefore, the parties are invited, and only as a last resort is someone else invited who has the necessary knowledge about the subject of the dispute, assuming that an agreement has been reached with the parties.

What does the mediator do at the joint meeting?

At the joint meeting, the mediator is familiarized with the positions of the parties, actively listens to what the parties have to say about their positions, paraphrasing, rephrasing and summarizing it.

Who will the mediator invite first to a separate meeting?

This depends on the agreement of the parties, their preferences or (if it is not possible to determine the priority in this way) on the proposal of the mediator (it is a proposal, not a decision; the parties accept that proposal).

What does a mediator do at a separate meeting?

At separate meetings, the mediator "peels the onion" with each of the parties, that is, determines the interests of the parties and mediates in the negotiations, shifting the positions and interests of the parties towards mutually acceptable ones.

What would be the interests common to the parties?

This case represents a commercial dispute, and this type of relationship implies different interests compared to, for example, family disputes, where the interests are more personal. In commercial disputes, it is typical that the speed of dispute resolution is crucial. It is necessary to examine whether the parties have an interest in further business transactions or business improvement.

What is the plaintiff's main argument?

Regardless of the arguments, it is necessary to be careful to move towards the resolution of the dispute, and not the dominance of one party over the other in order to win.

What is the defendant's main argument?

Therefore, it is crucial to convey the emphasis on the resolution of the dispute, and not on becoming a winner in the dispute.

What is the role of potential proxies?

Given that the role of a lawyer is to work in the best interest of their client, lawyers as proxies of the parties are important in mediation as well, and they are of great help to the parties. Therefore, it is useful for the mediator to devise the best way to involve a lawyer in actively helping to devise a mutually acceptable solution to the dispute.

APPENDIX IV

EXAMPLES OF MEDIATION THAT WAS CONCLUDED WITH A SETTLEMENT AGREEMENT

Example 1.

Dispute description:

The sister initiated court proceedings against her brother for disturbance of possession, in which she sought that her brother move out with his family from the apartment - a special part of the house that she inherited after her mother's death. The mother bequeathed the house where the brother and sister live in separate apartments with their families to her daughter, without informing her son about it. The mother lived in her son's household until her death, with the fact that she moved in with her daughter a month before her death - when she wrote her will.

Mediation process:

In the court proceedings, the parties were referred to mediation and agreed to it. At the first mediation meeting, when the parties were invited to present their positions, the brother expressed anger and rage towards his sister, as well as disbelief that it was the mother's will to bequeath the entire house to his sister because he was the only one who took care of their mother when she fell ill, and until her death, while his sister did not participate in taking care of the mother at all. The sister claimed that her brother took advantage of their mother while they lived in the same household, that he used the mother's pension income, that he did not take good care of the mother, and that in the last month before the mother's death, she took over all the activities in connection with providing care for their mother. The parties stated that they discontinued all communication after the probate hearing held a year ago and that this is their first conversation after the probate hearing, even though they live in the same house. Conflicts often broke out between the parties, so the police was often involved. The parties were allowed to tell each other what they resent, without it ending in a physical confrontation, but tensions were very high in the beginning. After the first mediation meeting, the parties remained steadfast in their demands, and the meeting was postponed. The parties were given the task of making a proposal, by the next meeting, of how their dispute could be resolved so that it would be acceptable to both parties. A few more meetings were held, each time the brother and sister managed to achieve a small shift in bringing their points of view closer to one another. When the brother became aware of his anger at his mother for not bequeathing him anything, and bequeathing everything to his sister, as well as the fact that his sister wanted to have a good relationship with her brother again and that she was willing to sell the house and give her brother a part of the funds so that he could buy an apartment, the parties began to reflect on how they can resolve the dispute. The mediation ended with an agreement stipulating that the sister, who is the owner of the house, will advertise the sale of the house, undertake to pay her brother a certain part of the sale and purchase price, allow her brother to register a lien on the house in the amount of the subject part of the sale and purchase price until the house is sold, and until payment of the agreed amount, she recognized her brother's right to live in the house.

Comment:

This is an example of an amicable resolution of the dispute that arose between blood relatives, as part of which emotions are the most prevalent element, and the parties needed help to become aware of their feelings, to gain the courage to express them in front of the other party and for the other party to hear them and think about them. Only after that, the parties were ready to creatively participate in finding a solution to the common problem. Both parties engaged attorneys who resisted the mediation, advising their respective party to withdraw, but the feelings between the brother and sister, as well as the mediator's support, were stronger than that legal advice, keeping the parties involved in mediation and ultimately leading them to reach a settlement agreement.

Example 2.

Dispute description:

The sister, as one of the legal heirs, initiated court proceedings against her brother as the other legal heir, because in the probate proceedings after their mother passed away, she was directed to initiate court proceedings in order to include the gift in the brother's inheritance. The inheritance bequeathed by the mother consisted of a house in Brdovec, an apartment in Zagreb, a burial site and several plots of arable land.

Mediation process:

Both parties agreed to mediation, but the sister had just moved to Sweden, so the dates of the mediation meetings had to be adapted to the sister's schedule. The sister sought to become the sole owner of the apartment. She claimed that her mother always said that she would leave that apartment to her because, during her lifetime, she gave her brother the money he used to buy himself an apartment, but she did not make a will. She needed the apartment to have a place to stay when she came to Croatia, and she was willing to leave everything else to her brother. The brother did not agree with this proposal, claiming that he received only part of the money for the apartment from their mother and that he was not aware that their mother said that she wanted to leave the apartment to her daughter. At the same time, he stated that the house in Brdovec is in very poor condition, that it needs to be maintained because it is falling apart, as well as that his sister does not participate in that maintenance of the house, while the apartment is in good condition and could be leased, with the possibility of using the rent to pay the costs incurred in connection with other properties, the apartment being the only valuable property out of the entire estate. The sister did not agree with leasing the apartment. The parties had not spoken at all since the probate hearing, and when the sister came to one of the later mediation meetings with her belly being rather large, the brother noted with sadness that she had not even informed him that she was pregnant, to which she replied that how would she even inform him when they do not communicate in any situation other than at court. Since the brother still insisted that the entire estate be divided in half, and the sister could not agree to that, repeatedly stating that she did not know why she had even come, that this made no sense, that she had lost her brother, also mentioning her sister-in-law who she has taken issue with. The meeting was adjourned and the brother was given the task of listing the expenses he incurred in maintaining the property and to try to obtain an appraisal of the value of the house

because the parties had agreed at that time to sell the house. At the next meeting, the brother presented a list of expenses, a an appraisal of the value of the house, which was very low, stating that he neither wants to sell the house, nor to leave the ownership of the apartment to his sister. The sister still wanted nothing other than the apartment, in connection with which the brother stated that he could not let her have the apartment because he lived in a smaller apartment with his wife, while she would only occasionally stay in the larger apartment. The sister stated that she stayed in their mother's apartment, that there was no hot water because the heat was not working, to which her brother replied with an offer to come and fix it, also asking why she did not call him and why she did not tell him when she gave birth. The mediation ended with an agreement, with the sister proposing a solution to the common problem based on her brother leaving his small apartment to her, and she the larger one, which was owned by their mother, to him, proposing as well that the house be sold and the money divided, with the rest of the estate belonging to the brother.

Comment:

In this mediation, the parties already showed regret at the first hearing regarding the broken relationship, as well as resentment towards their mother who did not resolve the property issues before her death. The physical distance between the parties may have helped them realize how important they are to each other and that the best solution is an agreement that will be equally favorable, but also equally unfavorable for both parties.

Example 3.

Dispute description:

The parties are ex-spouses, and the court proceedings were initiated on the basis of the ex-wife's lawsuit, in which she sought the determination of matrimonial property concerning one half of the co-ownership part of a house. Four children were born while the ex-spouses were married, and the wife had to leave the house due to domestic violence. Since she had an extremely low income, the children stayed with their father. She rented a single room where she moved to and, because of her low income, even after 10 years have passed since the divorce, she still hasn't been able to solve her housing situation. The former spouses initiated several court proceedings, in different capacities, in some of which their common children participated as well, as plaintiffs in the proceedings whereby an increase in the amount of maintenance was sought, and as defendants when the mother sought a reduction of the amount of maintenance.

Mediation process:

At the moment when the court case is effectively referred to mediation, the court proceedings have already been conducted for more than 10 years. In the meantime, two annulment decisions have been adopted, the children have come of age, and the parents have not yet resolved the issue of matrimonial property. The ex-husband claimed that the house was his exclusive property because his level of income during the marriage was higher, he took out a loan to buy the property and received

part of the money from his parents, while the ex-wife was not employed most of the time, and when she did work, she had a very low income and did not take care of the children at all, with him mostly doing all the household chores. The ex-wife stated that they bought and expanded the house together during their marriage, that she mostly worked and that she took care of the children until her ex-husband drove her out of the house. He did not pay her anything as part of the matrimonial property, and did not even allow her to take her personal belongings. Since the property was acquired during their marriage, to which the provisions of the Marriage and Family Relations Act applied on account of the period of the marriage ("Official Gazette" 11/1978, 27/1978, 45/1989, 59/1990, 25/1994 and 162/1998), according to which the shares of spouses were determined, the court proceedings were drawn out in lengthy presentation of evidence. The parties agreed to mediation at a time when they no longer had the strength or will for further litigation. Despite this, the ex-husband did not want to admit that the ex-wife had the right to the matrimonial property, emphasizing that she is still obliged to pay maintenance for the two children, who have since become adults. The ex-wife, exhausted by the lengthy proceedings, stated that she was willing to agree to less than the amount she sought in the lawsuit and that she was only seeking the bare minimum so she could have a place to live. After several meetings, when the parties were given the opportunity to express their emotions to each other - what hurt them, what they expected from the other party, when they were invited to try to be aware of the needs of the other party, but also the options of the party having a performance obligation, they began to solve the problem together. The ex-husband finally accepted that the parties had matrimonial property, and that it is fair to pay the ex-wife a certain amount, corresponding to 1/3 of the co-owned part of the house, which amount will be reduced by the ex-wife's debt based on unpaid child support. At the same time, the ex-husband undertook to gift to the children 2/3 of the subject real estate, on which he would register the lifetime usufruct. He undertook to check with the bank how much he could borrow, and when he offered his ex-wife to pay her that amount, she checked whether she could find an apartment on the market for that price. After she found an apartment, and the children also agreed that the dispute should be resolved in this way, they signed a settlement agreement. The mediation ended with the conclusion of a settlement agreement in which both parties undertook to withdraw the lawsuits and enforcement motions that they filed against each other with the date of payment to the ex-wife.

Comment:

The relationship between the parties as it was during the marriage continued even through the long-term court proceedings, but the ex-husband finally realized during the mediation that the ex-wife also has certain rights and needs, that she is the mother of their children and that for the benefit of their mutual relationship it is productive to come to an agreement and terminate all mutual court proceedings.

Example 4.

Dispute description:

The parties are ex-spouses, and the wife initiated court proceedings against her ex-husband in order to

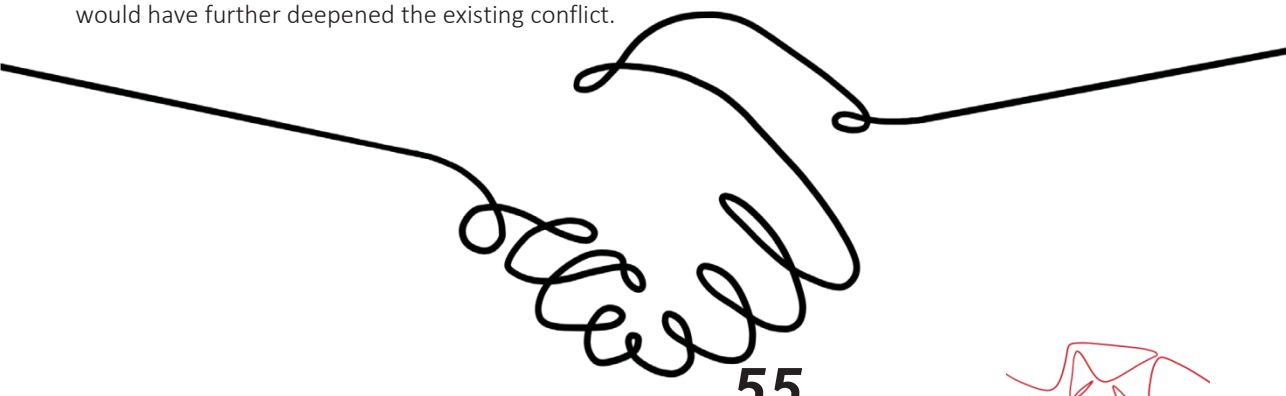
determine the matrimonial property concerning an apartment in Zagreb. The apartment was registered in the land registry as the property of the ex-wife, but it was occupied by the ex-husband who did not want to move out.

Mediation process:

The parties agreed to attempt to resolve the dispute through mediation. The ex-wife stated that she does not deny that the apartment only formally belongs to her and that it constitutes matrimonial property, as well as that she would like the apartment be sold and the money shared, which the ex-husband does not want because he lives in that apartment. The ex-husband considered it indisputable that the apartment constitutes matrimonial property, but he considered that his share was larger because the ex-wife did not work during their marriage, and they had no children. He did not want to move out because he wanted to reunite with his ex-wife, stating while they could not have children, he wanted them to try assisted reproduction, but his wife did not agree, and most importantly, that he still loves her and wants her to come back. Several meetings were held as part the mediation and separate meetings were held with the parties. With the approval of the ex-husband, it was conveyed to the ex-wife that the reason the ex-husband does not agree to sell the apartment and move out is that he still wants the two of them to live together, hoping that she will return, and is willing to do whatever she asks just for her to agree to that. The ex-wife stated that their marriage is dissolved, that she has no intention of reuniting with him and that she just wants them to divide the property. Upon her approval, the aforementioned was conveyed to the ex-husband, who took it very hard, cried, then repeatedly called the mediator and asked for additional explanations until he accepted the fact that their marriage was dissolved, that his ex-wife did not intend to reunite with him and that they have to divide the property. The mediation ended with an agreement based on the fact that the ex-wife found a buyer for the apartment, the ex-spouses agreed that she would be paid 40% and her ex-husband 60% of the sale and purchase price, and that he would move out of the apartment immediately after payment.

Comment:

This is an example of a dispute in which the ex-husband had extremely strong emotions that he could not control, he could not accept his ex-wife's lack of reciprocal emotions, and only at the moment when he realized that there was no possibility for their marriage to be re-established was he ready for constructive resolution of the dispute. Had their dispute had ended with a court judgement, enforcement proceedings would probably have followed with regard to its implementation, which would have further deepened the existing conflict.



APPENDIX IV

EXAMPLES OF MEDIATION THAT DID WAS NOT CONCLUDED WITH A SETTLEMENT AGREEMENT

Example 1.

Dispute description:

The parties are ex-spouses and the ex-husband-initiated court proceedings against his ex-wife, who was registered as the owner of the apartment, to determine the matrimonial property concerning the apartment in Zagreb.

Mediation process:

The ex-husband proposed mediation, and the ex-wife agreed to this proposal. At the mediation meeting, the ex-husband pointed out that his ex-wife and their six children still lived in the shared apartment, while he was driven to move to a vacation home outside Zagreb, which does not have adequate housing conditions, proposing that the apartment be sold, and the money divided. The ex-wife objected to that proposal, stating that there is nowhere for her to live with six children if the apartment is sold, that the ex-husband does not contribute to the maintenance of the children, and that her salary is much lower than his. During the mediation, the parties spoke to each other with voices raised, could not control their emotions and did not even accept the mediator's warnings that they could not communicate in that way. The ex-husband then expressed his hurt because out of six children, only one child wants to have a personal relationship with him. He believed that to be the mother's fault, who was turning his children against him. He stated that he does not to make child maintenance payment while being rejected like that, as well as that he is willing to agree on the division of matrimonial property if the court orders that the children live with him, or at least that the mother tries to influence the children to meet with their father. The mother mentioned that the father behaves badly towards the children, that he is rude, that he accuses them, speaks badly of their mother and that is why the five children, except for the youngest daughter, do not want to spend time with him. Therefore, she does not agree with the children living with their father, and she undertook to try to talk to the children so that they would meet him, but she mentioned that she thinks it would be better if the father tried to establish contact with them himself. At the same time, she stipulated that they agree on the issue of child maintenance in mediation. The father stated that money is not important to him, that he is willing to transfer the ownership of the apartment to the mother, only under the condition that he be awarded custody of all the children, that is, if it is determined that they will live with him. He did not want to try to arrange a meeting with the children himself. At the second meeting, which took place two months later, the father said that nothing had changed because no child had contacted him and that he was not willing to participate in mediation any further. The mother stated that she spoke with the children and suggested that they meet their father, but they refused. Given that the parties remained firmly entrenched in their positions and expressly stated that they no longer wanted to reconcile, as well as that there were approximately 10 ongoing disputes between them and that they were not ready to discuss their interests, the matter was referred back to court proceedings.

Comment:

In certain cases, the dispute escalates to the point where the parties are unable to see the positive, but only the negative possibilities of the outcome of the dispute ("I want to harm the other party"). In situations similar to this example, an attempt could be made to de-escalate the conflict, with emphasis on the fact that the interest of the children is of the essence for the resolution of the dispute. Namely, mediation is conducted on the basis of interests, and not on the basis of positions. Therefore, it is important to determine the interests of the conflicting parties. In this case and in similar cases, the parties should act as responsible parents and be aware of the best interests of the children, on which the settlement should be based.

Example 2.

Dispute description:

In the court proceedings, the plaintiff filed a lawsuit against the defendant, claiming disturbance of the possession of her apartment by the defendant.

Mediation process:

The parties were referred to mediation during the court proceedings. At the first mediation meeting, after the introductory part, the plaintiff explained that the defendant lived with her for a while because they were in a relationship, but when the relationship ended, she changed the lock, after which the defendant broke into the apartment and does not want to leave it. The defendant claims that the apartment constitutes consensual union property because it was bought with a loan that they repaid together, and that he does not want to leave the apartment until the issue of the apartment, the car that is in the plaintiff's possession and the dog that is in the care of the plaintiff's parents is resolved. The defendant's proposal is that the plaintiff sell the apartment and pay him half of the value and hand over the dog because he bought it for her when they started their relationship, and he is willing to give up the car. The plaintiff insists that the apartment is her property, that the defendant only stayed at her apartment only occasionally and did not participate in loan repayments. She does not want to share the apartment, but she wants the dog named Đuro because the dog was a gift for her, and she is willing to leave him the car. For some time, the parties expressed their emotions, exchanged ideas and tried to determine individual and common interests, but the parties could not agree on the dog Đuro. At the moment when the possibilities of further negotiations have been exhausted, the meeting is completed, and the parties are invited to reflect on the proposals of the opposing party and possibly make a counter-proposal. At the next meeting, the parties are still adamant that each of them wants the dog to live with them and that this is non-negotiable. Then, they started thinking about how it could be solved, and the plaintiff suggested that the defendant see the dog occasionally according to the agreement with her, and that the dog stay with her. The defendant started thinking about this idea. Furthermore, the plaintiff proposed to pay the defendant a certain amount of money for the repaid apartment loan for the duration of their union, and she was tasked with thinking about the amount until the next meeting and reporting the amount to the defendant's attorney. However, the parties' attorneys soon informed the court in writing that they have withdrawn from mediation, and

the matter in dispute was referred to court proceedings.

Comment:

There was a standstill at the stage of research and establishment of communication in this case. The mediator could try to overcome the resulting situation in mediation and could convince the parties to continue communicating. However, it is important to take into account that there are situations when it is not easy and possible to de-escalate the conflict. In the presented example, de-escalation of the conflict was difficult to implement for several reasons. The first reason is the dog Đuro - in these and similar cases, the attitude towards pets represents an insurmountable obstacle because there is no negotiation about emotions, considering that emotions are of a subjective nature. The second reason is that the concept of judicial protection of possession is confusing for the parties. Namely, if court proceedings are ongoing in connection with protection of possession, the parties do not understand what the court's role is in this. The third reason is the legally complicated relationship that the parties want to define definitively. Furthermore, it is important to take into account that not every case is suitable for mediation. In this case, it would be better for the parties to reach a settlement and leave the dispute behind them, which could be approached with certain reality testing or reframing, for example by instructing the parties to think about what the possibilities for them are in the absence of a dispute. Mediation makes it possible to reach a satisfactory resolution for both parties.

Example 3.

Dispute description:

Ex-spouses are arguing over the ownership of the house, which the plaintiff claims was acquired during the marriage, and the defendant claims that it is his own property. Since they both still live in the house, as well as their son and his family, the problem of paying utility bills and food costs also arose.

Mediation process:

At the first mediation meeting, after the introductory part, the parties presented their positions. Instead of co-ownership of the house, the plaintiff seeks payment on account of the investments made, stating that she is still repaying three loans. The defendant claims that the house was renovated with the funds he received from his relatives, that he inherited part of it, and that only a small part of the house was renovated from the loan taken out by the plaintiff. The parties were warned that mediation does not determine who is right, but how their relationship could be resolved to mutual satisfaction. During mediation, an attempt is made to identify a common interest and to encourage the parties to think about a solution that the other party could accept. The plaintiff then proposes a physical division of the house, or that the defendant make payments to her for the investments made in the amount that is sufficient to solve her housing situation, with the obligation to cover her utility costs. The defendant proposes the appraisal of the value of the investments, and he would potentially agree to pay the plaintiff half of the investments made, but not half of the value of the house. The parties were given tasks for the next mediation meeting: the plaintiff was to check the prices of apartments on the market, and the defendant was to estimate the value of the house. After that, another meeting was held, but the parties were too far apart in their outlook and offers made, and did

not want to give in.

Comment:

In this example, it is possible to ask whether there was an omission in the stage of research and establishment of communication when conducting mediation, and whether it is possible to motivate the parties to continue communicating given that it is evident that the parties do not want to deviate from their positions and take the interests of the opposing party into account, or the common interests. Namely, there are cases when the parties want to know who is right, regardless of the fact that during the mediation it was explained to them that mediation does not determine who is right, but instead seeks to resolve the dispute.

Mediation
Handbook