



Mediation in Labour Relations: What Can Be Learned From the North American and EU Example?

1. Definition

Mediation as part of alternative dispute resolution (ADR) instruments is, in general, a completely unregulated field, as far as legal provisions are concerned. Its definitions in legal literature focus on “fast”, “flexible” and “efficient” procedures, and reference normally is made to quick solutions in a networking and electronically working world. It also is said to work in favour of “cooperation instead of confrontation” and of a “consensus-oriented policy understanding”.

Usually, mediation is defined as process where the parties to a dispute – in labour relations: the employer and the labour union – invite a neutral third party, the mediator, to help them resolve their differences. This mediator has no power of decision concerning the conflict between the parties, but helps to find and reach a mutually acceptable and voluntarily reached solution. The mediator supports both parties by special negotiation skills and techniques and does not solve the dispute by authoritarian means. There is a clear difference to arbitration on the one side and negotiation on the other..

In labour law it is normally understood as continuation of private, company or collective autonomy by other means, namely as a procedure with a mediator as neutral “manager of negotiations”. The usual institutions in pre-court settlements and jurisdiction (labour courts or labour-related courts, arbitration institutions etc.) are more determined by external forces, in the point of view of the parties of a conflict.

2. History of mediation

In North America, labour mediation is very common and plays a far bigger role than in continental Europe. The European continental system – being like the one in Russia – however has made little use of mediation.

In Canada, mediation is frequently used in collective agreements, where many employers and unions have included this principle of ADR. Some have become so accustomed to using it that virtually all of their disputes go to mediation¹.

Mediation has often been equalized with constructive behaviour of both sides, and on questions which were not worth while to fight for e.g. in a strike etc. In the United States, mediation has a tradition in labour relations since 1898, when the *Erdman Act* has created a settlement system for disputes between railway carriers and workers for

¹ www.ufew.net/articles/Toolkit/mediation_inside-01.html, 27.5.2004, a Canadian labour union influenced website (Members for Democracy)



salaries, working time or other working conditions². This law first obliged the parties to a mediation or a conciliation attempt by the Chairman of the Interstate Commerce Commission; as a second step then to an arbitration procedure before an Arbitration Board.

In the last decades of the 20th century mediation was not only used in collective disputes, but also more and more in individual disputes and conflicts within the companies³. Among all ADR procedures mediation is the preferred method in United States business world. There has been recently a survey among 1.000 of the biggest corporations in the United States where the result was that almost 90% of the replying companies have made use of this opportunity, as well internally with the employees and externally with third parties (business partners).

With the *Gilmer v. Interstate/Johnson Lane Corporation* decision of 1991 the US Supreme Court has opened the way to further individual mediation in labour law, which lets calculate that more and more now mediation is used for individual disputes in labour law⁴. Furthermore, there was the famous *Dunlop Report*, chaired by the former Secretary of Labor John T. Dunlop (Dunlop Commission) in 1993, which has strongly advocated a larger role of mediation in collective and individual labour law. Due to an “explosion-like increase of individual labour disputes” with the consequence of timing problems within the courts, with high fees in particular for poorer employees and with delays in the administrative agencies, a so-called “employment litigation crisis” has been declared; the result has been a recommendation for “high quality” procedures of ADR at the workplace (in-house settlement procedures) and mediation as well as arbitration⁵. The background of this has been the increase of individual lawsuits for employees rights between 1970 and 1992 for 400%. The Equal Employment Opportunity Commission, an anti-discrimination administrative agency, got alone in 1993 about 93.000 discrimination complaints⁶. Since then, legislation in the United States has permanently progressed into more and more mediation.

Why the European continental legal systems did historically not make very much use of ADR in labour law? In Germany for example there is an exclusion of arbitrage decisions in labour law, according to the Labour Procedure Code⁷. Thus it should be excluded that arbitrage courts would be set up with an inferior legal training, independence and being less bound to material law than labour courts⁸. The competence of labour courts in Germany for binding decisions in labour disputes is

² The wording in the Erdman Act was: „Controversies ... concerning wages, hours of labor, or conditions of employment” (in: Mark Lembke, *Mediation im Arbeitsrecht*, 2001, p. 31)

³ Kramer, *Alternative Dispute Resolution in the Work Place*, 1998, § 1.02, p.1-8

⁴ *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20, 111 S.Ct. 1647 (1991)

⁵ *Dunlop Report*, Executive Summary, p. xviii et al.

⁶ *Dunlop Report IV 1*, p. 25

⁷ §§ 4, 101 III ArbGG (*Arbeitsgerichtsgesetz* = Labour Procedure Code)

⁸ Grunsky, *Arbeitsgerichtsgesetz*, 7th edition 1995, § 4 annot. 2



exclusive⁹; this is why arbitration courts in general can be excluded (with some exceptions).

Otherwise, only mediation is a non-conflict dispute settlement instrument, besides the courts which however have to look permanently for a peaceful settlement, prescribed by the procedure laws¹⁰

3. Examples from North America

The economic impact becomes immediately visible with some examples of mediation systems: However; in the USA there are more than 2.500 laws on federal and state level covering mediation regulations of all kind¹¹. This shows that mediation is useable and used as a decentralised, deregulated and ununified system, with very many different facets of attempts and results, and also in an environment of relative high legal fees for all parties. There is a strong contrast to some European legislations, e.g. Germany where *Rechtsanwälte* (solicitors/barristers, attorneys-at-law) have only been allowed after some litigation in professional law to carry the mention “Mediator” on their letter heads¹². Still today e.g. in Germany, mediation is not always recognised in legal studies as part of the curriculum.

In the United States mediation in labour law has a resolution quota of 85%; it is often marked as “high yield – low risk” procedure. The reasons in the US are – which would have to be confirmed in continental Europe by relevant legal fact research:

- Cheaper procedure
- Faster procedure
- More discrete procedure
- More flexible than court procedures

There are some differences between Europe and North America concerning the costs of labour procedures, which will not make the mediation principle transferred too easily:

- US lawyer fees determine often a high initial investment of the clients: a routine case in individual labour law regularly costs more than 100.000 US\$, which makes it virtually impossible for an average employee to pursue a lawsuit.
- There are no legal fee insurances, like e.g. very often in Germany, which pay the *Rechtsanwalt*, whose fees have to be paid by the party who hired him, at least in first instance labour court cases.

⁹ see §§ 2 and 2a ArbGG

¹⁰ in the court-annexed mediation attempts in German labour procedures (§ 54 ArbGG, 279 I ZPO = Civil Procedure Code)

¹¹ Mark Lembke, *Mediation im Arbeitsrecht*, 2001, p. 72

¹² AGH Nordrhein-Westfalen from 19.11.1999, MDR 2000, 611



- In contrary, in principle the parties have to pay their own attorney; their fees are normally not refunded by the defeated party (and if, the amount is regularly much lower than expected by the attorney).
- Attorneys-at-law will have to decide from case to case if they would agree to a contingent fee (payments from them only in case of success of the case, in case of no success – no fees).

In the U.S. impressive figures show the overall success of mediation:

- In the first year of mediation in the US coal industry in the 80s there were 153 complaints of which 89% have been settled without arbitration procedures. This so-called “grievance mediation” settled disputes three months faster than in arbitration, and to a third of the costs of such a procedure.¹³
- The U.S. railway and air traffic industry is ruled, concerning conflicts, by the Railway Labor Act; both industries have a high significance if one considers the mobility, the distances etc. in the U.S. There is an administrative agency, the National Mediation Board (NMB), which has to follow strict rules, but reports that 97% of all conflict cases in its history have been settled peacefully, and that since 1980 less than only 1% had negative effects on transport services¹⁴.
- *Brown & Root Corporation* is a big private construction company with 30.000 employees, who are not organized in labour unions (it appears that just this is very difficult to reach in Europe!). After having been sued by an employee for sexual harassment for more than five years and more than 400.000 US\$ of legal fees, and after having won this case, the company decided to launch an mediation programme by four steps¹⁵:
 - *Open door policy*: every employee can turn to a manager on a higher level or the Human Resources department, or to an employees’ hotline which is run by specially trained employees;
 - The next step is the *conference level*:: with meetings of the employee and representative(s) of the company, as well as with an “advisor” or the director of the dispute settlement programme.
 - The next step, if step 2 is not the end, would be external mediation by an external mediator.
 - The last step is external arbitration (with an external arbitrator).

Although Brown & Root obliged themselves to pay for most of the legal fees and for the fees of the external mediators (and arbitrators), only 4% of all cases

¹³ Gleason (Skratek), Workplace Dispute Resolution – Directions for the 21st Century, 1997, pp. 57, 64

¹⁴ David Westfall/Gregor Thüsing, Das Arbeitskampfrecht der Vereinigten Staaten und der Bundesrepublik im vergleichenden Überblick, RdA 1999, 251

¹⁵ Gleason (Rowe), Workplace Dispute Resolution – Directions for the 21st Century, pp. 79, 96 et al.



went beyond step 3. The company's expenses for legal disputes decreased significantly (by 80%), there was less fluctuation within the staff, its human capital has been maximized. Other companies, like *Motorola* saved 75% of their legal costs.

However, again, this example seems to be unrealistic for Europe, as Brown & Root managed to keep "ununionized", i. e. without labour unions.

- But even from the point of (Canadian) labour unions the reasons in favor of mediation are overwhelming¹⁶:
 - It is cheaper than arbitration
 - It allows the union and the employer to control the outcome of the dispute to a much greater extent than they can at arbitration
 - It can be used as a way of getting rid of disputes that the union has no desire to fight – cheaply and efficiently: in the case of persistent or militant members who just won't accept that their union's representatives tell them that their case is a lost cause...

4. European examples of mediation elements

Although there are numerous elements in the EU of consumer protection or family mediation, there is still a deficit in the labour relations area¹⁷. The only EU communication on mediation is however oriented to the larger field of ADR and implies only mediation, together with arbitration and conciliation. It also states clearly that "procedures vary from one Member State to another, but they are generally voluntary as regards both the decision to go to them and the acceptance of the outcome".

As there are some elements e.g. in the German labour procedure code which impose to the judge the attempt to solve the dispute already in the first session, this has brought relatively fast procedures to the parties seeking justice before the labour courts: about 80% of all cases (end of the 90s) have been settled within six months, only 4% lasted more than one year.¹⁸

The following ideas will have to be or are discussed in this context:

- The more courts are computerised, the faster the procedures will take place, in particular the first sessions. Court computerisation has been finished or is in full course.

¹⁶ Why mediation got hot, in www.ufcw.net/articles/Toolkit/mediation_inside01.html, 27.5.2004

¹⁷ Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, presented by the Commission of the European Communities, 19.4.2002, COM(2002) 196 final, p. 22

¹⁸ Mark Lembke, *Mediation im Arbeitsrecht*, 2001, p. 126 et al.



- However, these first sessions are often determined by more or less mechanical attempts of the (professional) judge to dissolve a labour contract against a compensation payment by the employer.¹⁹
- A first mediation-like session can be repeated if both parties agree²⁰, but only once (not twice).
- The quota of settled disputes can be enlarged with the use of mediative negotiation techniques²¹. It is regularly not the “if” but the “how” of the first session before a German labour court which determines the possibilities of a peaceful settlement.
- There is a problem in the executable character of a court title obtained by mediation-like techniques. Normally, a compensation solution is taken into the court records and then a separate decision of executability has to be pronounced. This cannot be done in mediation, as the legal situation determines it now. But there were already thoughts of e.g. letting the mediator go to a court and induce a likewise decision.
- There is a new French legislation on social modernisation, passed on 17.1.2002, which is inclined to boost mediation²². There is also a scope of legally constituted conciliation institutions, mediation or arbitration services which all tend to have independent status:
 - Great Britain (ACAS)
 - Ireland (Labour Relations Commission, Labour Court)
 - Greece (OMED)
 - Austria (Federal Court of Conciliation)
 - Finland (National Conciliators Office)
 - Sweden (National Mediation Office)
 - Denmark (Statens Forligsinstitution)
 - Portugal (Instituto de Desenvolvimento e Inspecção das Condições de Trabalho – IDICT)
 - Netherlands (Advies en Arbitrage Commissie)
 - Belgium (Conseil National du Travail, with several sub-bodies).

It can be said, finally, that in the EU the clear trend is in favour of more mediation. Partly this is integrated in the present dispute settlement institutions and courts, partly it is with non-court institutions. Even these cannot follow mediation without problems; in Great Britain e.g. ACAS officials are only involved in conciliation,

¹⁹ According to the principle „If you dismiss your servant and send away, you should not let him go from you with empty hands“ (5th book Moses, chapter 15)

²⁰ § 54 I phrase 5 ArbGG

²¹ Wolfram Henkel, Elemente der Mediation im arbeitsgerichtlichen Verfahren, Neue Zeitschrift für Arbeitsrecht (NZA) 2000, 929

²² see Antoine Jammeaud, Conciliation, médiation et arbitrage des conflits (collectifs) du travail en France, Lyon 2002, p.16



whereas mediation is attempted by external experts. The Greek OMED and the Spanish SIMA are only active in mediation and arbitration, in Portugal and Finland conciliation and mediation is done both by the relevant officials. Plurality is the dominant trend in this landscape²³, and non-judicial dispute settlement methods are normally not standardised (with some exceptions e.g. in Spain and Belgium)..

5. Consequences for Russia

It may be very helpful for Russia to have strong mechanisms of mediation. (But) The following, among others, has to be included in all considerations who want to go this way:

- Mediators may have a more professional and impartial image than judges.
- However, they should be trained, and if possible certified. Thus, also the big existing experience in labour law could be used.
- Like in any EU state, there should be no “Mediation Law”, as mediation needs plurality, and it may be impossible to include all the possibilities.
- However, a Law on the Promotion of Mediation is thinkable, with provisions on the possibility of mediation, and of other “sweets” for those who apply this way and so do not contribute to further overcharging of the courts (although labour law concerns only a minority of court cases).
- Therefore, an inventory of mediation elements in the present Russian legislation and economic practice in the companies should be elaborated – even with the risk that nothing might be found – to examine if there are good or even best practices in Russia.
- These “sweets” could also be a full deductability of costs of mediation, or special deductible means in case of its application. However, this must be at first cleared with the RF Ministry of Finances (or possibly in a subject with the subjects Ministry of Finances).
- Russian associations of mediators should take up an intensive exchange of views and experience with their EU colleagues, whenever possible.
- In view of possible long delays of payments, allotted e.g. by a compensation solution between two parties of a labour mediation, it should be thought over that and how mediators can quickly induce an execution decision by a court.
- As mediation cannot be prohibited to Russia, it should be boosted by the state institutions, if it keeps employees or companies (in individual) or trade unions or companies/associations (in collective) labour disputes from calling courts, running danger that court settlements take more than the appropriate time.
- In particular for larger companies internal or external mediation may be an attractive solution; this includes also public companies or institutions.

²³ Fernando Valdés Dal-Ré, Synthesis Report on conciliation, mediation and arbitration in the European Union countries, Madrid, March 2002, p. 21



- The more the EU and Russia think of a harmonisation of their economic systems, the more it should be thought over that mediation is an excellent means for EU investors into the Russian economy.
- Pilot models are strongly encouraged; they should be monitored and be subject to large discussion exchanges, also between the EU and Russia.

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