Out-of Court Labour Dispute Settlement Elements in the European Union and Recommendations for Russia

By Hans-Juergen Zahorka[1]

Contents

---

[1] Senior Legal Advisor until June 2004 in the Labour Legislation and Arbitration Project, Moscow. The author welcomes comments (zahorka@gmx.de). This text does not reflect necessarily the opinion of the European Commission and is entirely under the responsibility of the author.

1. Introduction

The purpose of this paper is to elaborate some of the European Union's and above of all of its Member States' **principles and regulations for out-of court labour dispute settlement**, with an accent on "the softest law", i. e. mediation.

At the end of this paper some conclusions will be set up with relevance for Russia labour dispute settlement legislation. Thus, this paper may serve as highlighting **EU experience for use in third countries** like Russia, or even within the European Union.

First, it is examined **if and how the EU as political level has rules** herefore, including some **future aspects within the EU Constitution** and its part II, the **European Charter of Fundamental Rights**, which might have an impact on out-of court dispute settlements.

Second, the **practice on the national levels** within the EU will be examined, as well as the step-by-step history of mediation. Mediation is mainly practised in an informal way, without mediation laws, in the EU (for practical reasons, this study limits itself to the EU Member States as before the 1st May 2004, leaving out the new Member States, as there is not too much experience in labour dispute settlement, as these countries are or were transition countries themselves, and right around the 1st May 2004, the accession date, there is neither comprehensive material available from these countries).

Third, some proposals can be isolated and displayed for **further examination for Russian legislation, but also Russian "soft law" practice.**

2. European Union Law

Labour law is regulated in art. 136 – 145 EC Treaty (ECT)[2]. However, labour law plays only a subsidiary role, compared to "Social Policy, Education, Vocational Training and Youth" mentioned in the headline of the Title XI of the ECT; labour law is not mentioned here.

However, labour law does exist on the level of the European Union, at first implied in the art. 136 – 145 ECT[3], but also in the jurisdiction of the European Court of Justice (ECJ), and in many respects on a secondary level (EU Directives).

2.1. Existing EU Legislation

In the existing labour law legislation on the EU level, the following subjects are mentioned in art. 136 et al. ECT:

- Art. 136 ECT speaks of the implementation of "measures which take account of the diverse forms of national practices, in particular in the field of contractual relations".
  The accent of this article is widened, if compared to the old art. 117 Maastricht Treaty,but only to fields of social dialogue and employment policy, not regarding labour law. But this general clause is the basis for interpretation for other EU law, including secondary law.
- Furthermore, there is mention of the common market, "which will favour the harmonisation of social systems, but also from … the approximation of provisions laid down by law, regulation or administrative action".
  In contrast to the previous EC Treaties, the Nice Treaty has provided for the first time a mention of the "common market", which will on the long term ensure a harmonisation, if necessary by jurisdiction, and which means cohesion of the living and working conditions throughout the EU. But

[2] Consolidated Version of the Treaty Establishing the European Community, Official Journal (OJ) C 325 from 24.12.2002, pp. 33-184 (EN) [Remark: This is a consolidated version of all EU Treatis from the Treaty of Rome 1957 until the Treaty of Nice 2000, which will be replaced by 1.1.2007 with the EU Constitution, provided the ratifications will be dealt with in time and positively]
[3] see Annex 1

nevertheless, the legal measures in the field of social policy – to which labour law in legal literature belongs – constitute only "a small item characterisation"[4] *and although complimentary to all other subjects within the EU Single Market have been built only after the market.*

- In art. 137 ECT only material labour law is mentioned to be "supported and complemented" in view of activities of the Member States. This concerns the fields of
    - Health and safety at work
    - Social security and social protection of workers, the modernisation of social protection systems *(which is social and not labour law)*
    - Protection of workers where their employment contract is terminated
    - Information and consultation of workers
    - Representation and collective defence of the interests of both workers and employers, including co-determination
    - Equality between men and women as to labour market opportunities and treatment at work
    - Integration of persons excluded from the labour market, combating of social exclusion
    - Employment conditions for third-country nationals living in the EU

    The "protection of workers where their employment contract is terminated" – see third sub-indent - is a new regulation, compared to previous ECT, and it might be understood as to regulations including procedural provisions. But in art. 137 (2) ECT. "any harmonisation of the laws and regulations of the Member States" is excluded. This means all laws cannot be harmonised if they are not mentioned in the enumerative catalogue of art. 137 (1).

Art. 137 (2 b) ECT implies that only by unanimous decision a legal provision can be determined by the EU Council in the fields of

- social security and social protectoin of workers,
- protection of workers where their employment contract is terminated,

[4] Christine Langenfeld, in: Grabitz/Hilf, Das Recht der Europäischen Union (commentary to ECT), art-136 ECT annotation 8, February 2002

- representation and collective,defence of the interests of workers and employers, including co-determination,
- conditions of employment for third-country nationals legally residing in the EU.

In case of

- protection of workers where their employment contract is terminated,
- representation and collective,defence of the interests of workers and employers, including co-determination,
- conditions of employment for third-country nationals legally residing in the EU.

- the three last indents of the last enumeration – the Council can decide **unanimously** to transfer these fields into normal legislation procedure (without unanimous votes).

It is at present totally unlikely that the Council of Ministers decides – unanimously - to transfer sectors of labour law to a special procedure like arbitrage, mediation or similar. This would, even if done so, contribute to split the procedural labour law and be very unpracticable. In the present and foreseeable situation this will not be planned and can be excluded, also because of the principle of **subsidiarity**[5]. Although in theory it might be possible.

The art. 138, 139, 140, 141, 142, 143, 144 and 145 ECT don't have any reference to the parts of labour law investigated in this paper. There is neither a basis for relevant procedural EU legislation in the EC Treaty, nor in the secondary law of the numerous labour law directives of the EU.

2.2. Legislative Changes After the EU Constitution?

The European Council of 18.06.2004 in Ireland adopted, after several months of uncertainty after the conclusions or better non-conclusions of the European Council during its meeting in Rome in December 2003, the EU Constitution which will replace the EC Treaty as from **01.11.2006**, provided that all ratification procedures within the old and new Member States will go smoothly. It is, however, very likely that the

[5] see subsidiarity in art. 5 (2) ECT or art. I-9 (3) EU Constitution

ratifications will be approved by the different parliaments or in popular votes about the Constitution.

The articles in Chapter III Section II on Social Policy (which can be considered as framework notion for labour law), III-103 et al[6]., do not contain essential changes to the provisions in the EC Treaty. Therefore continuity can be expected as regards to labour law, or "non-labour law" on EU level.

Also **in the time of the EU Constitution**, it is very likely that **no procedural provisions** will be declared by secondary EU law. If so, this would be announced by initiatives of the social partners, in a year-long and sometimes cumbersome process, which is **not visible** at present.

2.3. Impact of the EU Charter of Fundamental Rights (Part II of the Constiution)

For the first time in the history of the EU, there was elaborated a Charter of Fundamental Rights in a Convention ("institution besides the institutions", not being mentioned in any Treaty, with a wide composition: EU Commission, European Parliament, national Governments, national parliaments, with observers of many other EU institutions) specially set-up for working on this Charter which was adopted at the European Council of Nice in December 2000. This Charter is now part II of the EU Constitution.

There are now social fundamental rights in this Charter and therefore in the EU Constiitution, like in the French, German, Spanish and Polish national constitutions. There was a long discussion during the Convention on these social provisions, and this chapter is often considered as the most controversial of the whole Constitution[7]. According to art. II-52 EU Constitution, the provisions of the Charter which contain principles, may be implemented by legislative and executive acts taken by instituions and bodies of the EU, and by acts of the Member States when tey are implementing

[6] see Annex 2

[7] see Eibe Riedel, Kapitel IV: Solidarität, in: Jürgen Meyer (Ed.), Kommentar zur Charta der Grundrechte der Europäischen Union, pp. 323-431. The editor, Prof. Jürgen Meyer, was himself a member of the Convention, on behalf of the German parliament.

EU law, in the exercice of their respective powers. These provisions shall be judicially cognisable only in the onterpretation of such acts and in the ruling of their legality.

Besides some general clauses in other parts of the Charter, there is the art. II-47 guaranteeing the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article, as well as the right to a *"fair and public hearing within a reasonalbe time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be mada availöable to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice".* This article refers to art. 13 ECHR and therefore to art. 8 General Declaration of Human Rights of the UN. This article is also valid for labour dispute settlement[8], as it is valid for all judicial authorities.

Most of the articles of Title IV (Solidarity) are formulated as individual rights[9], only the last articles (36-38) contain objectives for the European Union:

- Art. 27 covers the workers' right to information and consultation within the undertaking,
- art. 28 the right of collective bargaining and action,
- art. 29 the right of access to placement services,
- art. 30 the protection in the event of unjustified dismissal *(stating explicitely that every worker has the right to protection against unjustified dismissal, in accordance with EU law and national laws and practices – but not how, and nothing about any out-of-court practices)*
- art. 31 explains the right to fair and just working conditions,
- art. 32 reminds of the prohibition of child labour and protection of young people at work,
- art. 33 covers family and professional life (maternity rights etc.),
- art. 34 social security and social assistance,
- art. 35 health care,
- art. 36 the access to services of general economic interest *(like e. g. public postal distribution, electrictiy, gas, access to telecommunication services etc.),*

[8] Albin Eser, Kapitel VI, Justizielle Rechte, in: Jürgen Meyer (Ed.), Kommentar zur Charta der Grundrechte der Europäischen Union, p. 503
[9] see Annex 3

- art. 37 environmental protection and
- art. 38 consumer protection.

However, there are no direct references for procedural clauses of labour law in the EU Charter of Fundamental Rights and therefore in part II of the EU Constitution.

The EU Constitution including its important part II on fundamental rights, after all, have therefore **no immediate impact** on out-of court labour dispute settlements within the European Union.

2.4. The European Commission Green Paper on Alternative Dispute Resolution in Civil and Commercial Law

In April 2002 the EU Commission launched a Green Paper on alternative dispute respiulution (ADR) in civil and commercial law[10]. The purpose of this was to initiate a broad-based consultation of those involved in legal issues which have been raised as regards alternative dispute resolution in civil and commercial law. ADR in this context does not mean arbitration[11] as this is closer to a quasi-judicial procedure than to an ADR as arbitrators' awards replace judicial decisions, but mediation or conciliation. The Green Paper is concerned also with employment law.

There is an ecouraging tendency in Member States in direction of ADR or meditation in labour relations; in the Green Paper there have been named explicitely[12]

Denmark	Arbejdsmarkedets Ankenarven (Labour Market Mediation Commission)
Ireland	Conciliation Service of the Labour Relations Commission
Greece	Conciliators acting pursuant art. 13-16 of Act No. 1876/1990 on collective labour disputes have to be officials from the Ministry of Labour

In total, the EU institutions are not covering this field, and this is why the European Council has stressed e.g. in Vienna in December 1998 the importance of mediation

[10] COM(2002) 196 final from 19.4.2002
[11] dto., p. 6
[12] dto., p. 9

as a means of solving family law conflicts[13], which has been repeated in the European Council session in Tampere in October 1999, when an area of "freedom, security and justice within the European Union" has been proclaimed. In Tampete there was decided that "alternative, extrajudicial procedures should also be created **by Member States**".[14] Finally, the Laeken European Council from December 2001 "stresses the importance of preventing and resolving social conflicts, and especially trans-national social conflicts, by means of voluntary mediation mechanisms"[15]

The European Union, although it is not in its competence range, wants to boost the development of ADR in labour relations[16]. ADR or mediation is said to be a key component of any dispute settlement in labour or industrial relations in all the EU Member States. There is a certain social partners' dominance, i. e. representatives of employers and employees), in those procedures which have been created on the level of the Member States, and most alternative dispute resolution in industrial relations are carried out by the social partners themselves.

In the case they fail, the demanding party has access to ADR institutions or state courts (labour courts or simillar); the procedures are different from one Member State to another.[17]

Although ADR is not mentioned in the newest assessment of the Tampere process[18], in the Agenda for Social Policy of the European Commission from June 2000[19] the EU Commission speaks of the creation of instruments to mediate in disputes, by

---

[13] Para. 83 of the Vienna 1998 presidency conclusions, http://ue.eu.int/cms3_fo/showPage.asp?id=432&lang=EN&mode=g
[14] Para. 30 of the Tampere 1999 presicency conclusions, http://ue.eu.int/cms3_fo/showPage.asp?id=432&lang=EN&mode=g
[15] Para. 25 of the Laeken 2001 presidency conclusions http://ue.eu.int/cms3_fo/showPage.asp?id=432&lang=EN&mode=g
[16] COM(2002) 196 final from 19.4.2002, p. 22
[17] In order to contribute to the clarification of language, the following ADR notions are defined herewith as follows:

- mediation = voluntary attempt to find a dispute settlement solution, by anybody who is able to mediate; the solution is not enforceable, but relies on consensus between the parties
- conciliation = voluntary attempt to find a dispute settlement solution, by a person who by legal provision is switched in the dispute in order to settle it; the solution is not enforceable, but relies on consensus between the parties

Even the UNCITRAL Model Law (see Annex 5) on Mediation does not strictly differ between these two expressions. Of course, the difference between the two expressions is sometimes flowing.
[18] COM(2004) 401 final from 2.6.2004, Area of Freedom, Security and Law: The Results of the Tampere Programme and Perspectives (SEK(2004)680 et SEK(2004)693}
[19] COM(2000) 379 from 28.6.2000

explaining its intention “to consult the social partners on the need to establish at European level voluntary mechanism on mediation, arbitration and conciliation for conflict resolution”[20], upon which the EU Commission evidently has launched some preparations.[21] The fact that there are no real results visible can only be explained by the “European dimension” the Commission wanted for these mechanisms, or if not so, by the still not existing European structures like the Societas Europeae (S.E.)[22], which is since long in discussion, but will be reality only in some months.

It can, after all, be said that labour procedure law, in particular for out-of-court practices plays a **subsidiary role**[23] in the legal hierarchy of the EU, although there are some attempts, which, however, are not followed on a priority basis. That means, in a federalist context, that the EU level may only set up a framework, make suggestions, exercise political pressure etc. on the Member States; in comparison this might be thinkable for the relationship Russian Federation / subjects as well. This may be the case is in particular with decentralised, informal procedures like mediation.

3. Mediation in Labour Relations

3.1. 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 “consense-oriented policy understanding”.

[20] dto., p. 17
[21] COM(2002) 196 final from 19.4.2002, p. 22
[22] cross-border joint-stock company
[23] Subsidiarity is explained in art. 5 (2) EC Treaty (ECT): “In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be bettr achieved by the Community.”

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[24]. 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.

3.2. 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, **although mediation makes quick progress in labour relations.**

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 mediation[25].

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

[24] Practice in mediation implies that the mediator has a certain "natural authority", also due to her/his experience and labour law as well as general knowledge.
[25] www.ufcw.net/articles/Toolkit/mediation_inside-01.html, 27.5.2004, a Canadian labour union influenced website (Members for Democracy)

workers for salaries, working time or other working conditions[26]. 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 companies[27]. Among all ADR procedures mediation is the preferred method in the 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 law[28]. 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 arbitration[29]. The backgound 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 complaints[30]. Since then, legislation in the United States has permanently progressed into more and more mediation.

[26] The wording iin the Erdman Act was: „Controversies … concerning wages, hours of labor, or conditions of employment" (in: Mark Lembke, Mediation im Arbeitsrecht, 2001, p. 31)
[27] Kramer, Alternative Dispute Resolution in the Work Place, 1998, § 1.02, p.1-8
[28] Gilmer v. Interstate/Johnson Lane Corporation, 500 U.S. 20, 111 S.Ct. 1647 (1991)
[29] Dunlop Report, Executive Summary, p. xviii et al.
[30] Dunlop Report IV 1, p. 25

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 Code[31]. 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 courts[32]. The competence of labour courts in Germany for binding decisions in labour disputes is exclusive[33]; this is why arbitration courts in general can be excluded (with some exceptions). This is valid for some other EU Member States, too.

Otherwise, only mediation is a non-conflict dispute settlement instrument, besides the **courts which have to look permanently for a peaceful settlement**, prescribed by the procedure laws[34] for every stage of a trial.

3.3. 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 kind[35]. 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 heads[36]. Still today e.g. in Germany, mediation is not always recognised in legal studies as part of the curriculum.

[31] §§ 4, 101 III ArbGG (Arbeitsgerichtsgesetz = Labour Procedure Code)
[32] Grunsky, Arbeitsgerichtsgesetz, 7th edition 1995, § 4 annot. 2
[33] see §§ 2 and 2a ArbGG
[34] in the court-annexed mediation attempts in German labour procedures (§ 54 ArbGG, 279 I ZPO = Civil Procedure Code)
[35] Mark Lembke, Mediation im Arbeitsrecht, 2001, p. 72
[36] AGH Nordrhein-Westfalen from 19.11.1999, MDR 2000, 611

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. .
- 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 for them only in case of success of the case, and 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 arbitrage 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.[37]
- 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

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

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 services[38].

- *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 steps[39]:
    - *Open door policy*: every employee can turn to an manager on a higher level or the Human Ressources 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 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 overwhelming[40]:
    - It is cheaper than arbitration

[38] David Westfall/Gregor Thüsing, Das Arbeitskampfrecht der Vereinigten Staaten und der Bundesrepublik im vergleichenden Überblick, RdA 1999, 251
[39] Gleason (Rowe), Workplace Dispute Resolution – Directions for the 21st Century, pp. 79, 96 et al.
[40] Why mediation got hot, in www.ufcw.net/articles/Toolkit/mediation_inside01.html, 27.5.2004

- 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…

3.4. 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 area[41]. 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.[42]

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.

[41] 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
[42] 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.[43]
- A first mediation-like session can be repeated if both parties agree[44], but only once (not twice).
- The quota of settled disputes can be enlarged with the use of mediative negotiation techniques[45]. 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 mediation[46]. There is also a scope of legally constituted conciliation institutions, mediation or arbitration services which all tend to have idependent 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 Inspecçao das Condiçoes de Trabalho – IDICT)
    - Netherlands (Advies en Arbitrage Commissie)
    - Belgium (Conseil National du Travail, with several sub-bodies).

[43] 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)
[44] § 54 I phrase 5 ArbGG
[45] Wolfram Henkel, Elemente der Mediation im arbeitsgerichtlichen Verfahren, Neue Zeitschrift für Arbeitsrecht (NZA) 2000, 929
[46] see Antoine Jammeaud, Conciliation, médiation et arbitrage des conflicts (collectivfs) du travail en France, Lyon 2002, p.16

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, 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 conciliatian and mediation is done both by the relevant officials. Plurality is the dominant trend in this landscape[47], and non-jurisdictional dispute settlement methods are normally not standardised (with some exceptions e.g. in Spain and Belgium).

The **Council of Europe**, who keeps decade-long merits in taking care of European legal culture, has recommended strongly its member states to enable citizens and buisinesses to mediation; he did not restrict this to labour disputes but in general to all civil matters, to which labour dispute settlements belong. In its Recommendation from 2002[48] the Council of Europe, in which also Russia is a member, urges its members to facilitate mediation wherever this is appropriate; but notes that although mediation may help to reduce conflicts and the workload of courts, it cannot be a substitute for an efficient, fair and easily accessible judicial system. The Council of Europe also expresses its awareness of the "important role of courts in promoting mediation".

As the Council of Europe mentions former Recommendations on mediation in family matters[49], in penal matters[50] and on alternatives to litigation between administrative authorities and private parties[51], it can be assumed that labour law did not play a too urgent role for the adoption of this Recommendation on mediation.

There is also the **UNCITRAL Model Law on International Commercial Conciliation**[52], from the **United Nations**, where international aspects are prevailing.

---

[47] Fernando Valdés Dal-Ré, Synthesis Report on conciliation, mediation and arbitration in the European Union countries, Madrid, March 2002, p. 21
[48] Rec (2002)10 of the Committee of Ministers to Member States on mediation in civil matters (Adopted by the Committee of Ministers on 18 September 2002 at the 808th meeting of the Ministers' Deputies)
[49] Recommendation No. R(98)1
[50] Recommendation No. R(99)19
[51] Recommendation Rec(2001)9
[52] UNCITRAL (United Nations Commission on International Trade law), 35th session from 17.-28.6.2002

However, though being focussed on international parties of mediation, it is also useable for domestic mediation, like in labour dispute settlement. The **Western Balkan states** adopt one after the other mediations laws, where the UNCITRAL Model Law had strong influence, e. g. in **Albania**[53] [54] or **Bosnia-Herzegovina**[55] [56]. The **Macedonian Draft Law on Mediation** has been drafted – it is still in consideration of a working group and for sure will be simplified – parallel to the structure and according to the UNCITRAL Model Law[57].

3.5. Consequences and Recommendations for Mediation in Russia

It may be very helpful for Russia to have strong mechanisms of mediation, and very many and with skillful mediators. But the following, among others, has to be included in all considerations who want to go this way:

1. Image of mediators

Mediators may have a more professional and impartial image than judges; this is also the case in the Western Balkan countries.

2. Trainng and certification of mediators

However, they should be trained, and if possible certified. Thus, also the big existing experience in labour law could be used. It should not be condition to employ in a mediation case only a certified mediator, as it will take time to train sufficient mediators, and a certification has not been seen indispensible, however can be recommended.

3. Mediation Law

Like in most of the EU states, there should be no “Mediation Law”, as mediation needs plurality, and it may be impossible to include all the possibilities. If a Mediation

[53] Albanian Law on Mediation in Dispute Settlement, No. 9090 from 26.6.2003
[54] See Annex 6
[55] BiH Law on Mediation Procedure.
[56] See Annex 7
[57] See Annex 8

Law would be set up, it should be as short as possible, just reminding the reader of the principles of mediation (like e.g. the Council of Europe Recommendation).

Altogether, a Law on Mediation is, of course, 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).

4. Inventory of mediation elements in Russia

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. Of course, local good practices should have priority.

5. “Rewards” for the application of mediation

These abovementioned “sweets” could also be a full deductability of costs of mediation, or special deductable means in case of its application. However, this must be at first cleared with the RF Ministry of Finance (or possibly in a subject with the subject’s Ministry of Finance), or the Ministry of Justice (e.g. concerning attorney fees, which could be raised in case of mediation, like e.g. in the case of a German “Vergleich” [peaceful settlement solution of a civil or adminstrative case]).

6. Exchange of Russian mediators and their associations with the EU

Russian associations of mediators should take up an intensive exchange of views and experrience with their EU colleagues, whenever possible. Where they are not yet founded, they should be launched. It should be examined if a Tacis Framework Project for some months duration could be opened to train mediators and to arrange some exchanges.

7. Mediation is in the interest of the state: It takes the load off from courts

Mediation should be boosted by the Russian 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. Even if courts are working fast, they will be happy if the load of cases will be taken off their shoulders.

8. Permanent mediation "courts" for large companies?

In particular for larger companies internal or external mediation may be an attractive solution; this includes also public companies or institutions. They wiould have to remain strictly independent, of course. This principle can be relevant as well to towns, cities, smaller regional units, in order to professionalize mediation as much as possible.

9. Unbureaucratic enforcement clause for mediation-found payment solutions

In view of possible long delays of payments, alotted e.g. by a compensation solution between two parties of a labour mediation, it should be thought over that and how mediators or the parties can quickly induce an execution decision by a court (e.g. if payment plans are added to the mediation results).

10. Mediation for internationally influenced companies

Mediation should be envisaged and promoted by foreign investors, as it would make them at first independent of courts. But there is also a second reason: 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.

11. Pilot models and scientific evaluation

Pilot models are strongly encouraged; they should be monitored and be subject to large discussion exchanges, also between the EU and Russia. The monitoring could be a scientific evaluation, concerning e.g. the impartiality of the judges, the enforcement of solutions, the quality of the procedure etc.

ANNEX 1

EC Treaty

Title XI – art. 136 – 145

TITLE XI

SOCIAL POLICY, EDUCATION, VOCATIONAL TRAINING AND YOUTH

CHAPTER 1

SOCIAL PROVISIONS

Article 136

The Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

To this end the Community and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Community economy.

They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action.

Article 137

1. With a view to achieving the objectives of Article 136, the Community shall support and complement the activities of the Member States in the following fields:

(a) improvement in particular of the working environment to protect workers' health and safety;
(b) working conditions;
(c) social security and social protection of workers;
(d) protection of workers where their employment contract is terminated;
(e) the information and consultation of workers;
(f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5;
(g) conditions of employment for third-country nationals legally residing in Community territory;
(h) the integration of persons excluded from the labour market, without prejudice to Article 150;
(i) equality between men and women with regard to labour market opportunities and treatment at work;
(j) the combating of social exclusion;
(k) the modernisation of social protection systems without prejudice to point (c).

2. To this end, the Council:

(a) may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States;
(b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

The Council shall act in accordance with the procedure referred to in Article 251 after consulting the Economic and Social Committee and the Committee of the Regions, except in the fields referred to in paragraph 1(c), (d), (f) and (g) of this article, where the Council shall act unanimously on a proposal from the Commission, after

consulting the European Parliament and the said Committees. The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament, may decide to render the procedure referred to in Article 251 applicable to paragraph 1(d), (f) and (g) of this article.

3. A Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraph 2.

In this case, it shall ensure that, no later than the date on which a directive must be transposed in accordance with Article 249, management and labour have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive.

4. The provisions adopted pursuant to this article:

- shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof,
- shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with this Treaty.

5. The provisions of this article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.

Article 138

1. The Commission shall have the task of promoting the consultation of management and labour at Community level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties.

2. To this end, before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Community action.

3. If, after such consultation, the Commission considers Community action advisable, it shall consult management and labour on the content of the envisaged

proposal. Management and labour shall forward to the Commission an opinion or, where appropriate, a recommendation.

4. On the occasion of such consultation, management and labour may inform the Commission of their wish to initiate the process provided for in Article 139. The duration of the procedure shall not exceed nine months, unless the management and labour concerned and the Commission decide jointly to extend it.

Article 139

1. Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements.

2. Agreements concluded at Community level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 137, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.

The Council shall act by qualified majority, except where the agreement in question contains one or more provisions relating to one of the areas for which unanimity is required pursuant to Article 137(2). In that case, it shall act unanimously.

Article 140

With a view to achieving the objectives of Article 136 and without prejudice to the other provisions of this Treaty, the Commission shall encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields under this chapter, particularly in matters relating to:

- employment,
- labour law and working conditions,
- basic and advanced vocational training,
- social security,
- prevention of occupational accidents and diseases,
- occupational hygiene,
- the right of association and collective bargaining between employers and workers.

To this end, the Commission shall act in close contact with Member States by making studies, delivering opinions and arranging consultations both on problems arising at national level and on those of concern to international organisations.

Before delivering the opinions provided for in this article, the Commission shall consult the Economic and Social Committee.

Article 141

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
(b) that pay for work at time rates shall be the same for the same job.

3. The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Article 142

Member States shall endeavour to maintain the existing equivalence between paid holiday schemes.

Article 143

The Commission shall draw up a report each year on progress in achieving the objectives of Article 136, including the demographic situation in the Community. It shall forward the report to the European Parliament, the Council and the Economic and Social Committee.

The European Parliament may invite the Commission to draw up reports on particular problems concerning the social situation.

Article 144

The Council, after consulting the European Parliament, shall establish a Social Protection Committee with advisory status to promote cooperation on social protection policies between Member States and with the Commission. The tasks of the Committee shall be:

- to monitor the social situation and the development of social protection policies in the Member States and the Community,
- to promote exchanges of information, experience and good practice between Member States and with the Commission,
- without prejudice to Article 207, to prepare reports, formulate opinions or undertake other work within its fields of competence, at the request of either the Council or the Commission or on its own initiative.

In fulfilling its mandate, the Committee shall establish appropriate contacts with management and labour.

Each Member State and the Commission shall appoint two members of the Committee.

Article 145

The Commission shall include a separate chapter on social developments within the Community in its annual report to the European Parliament.

The European Parliament may invite the Commission to draw up reports on any particular problems concerning social conditions.

ANNEX 2

Draft EU Constitution

Chapter III – Section II (Social Policy)

Chapter III
POLICIES IN OTHER SPECIFIC AREAS

SECTION 2
Social policy

Article III-103

The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between the social partners, the development of human resources with a view to lasting high employment and the combating of exclusion.

To this end the Union and the Member States shall act taking account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy.

They believe that such a development will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Constitution and from the approximation of provisions laid down by law, regulation or administrative action.

Article III-104

1. With a view to achieving the objectives of Article III-103, the Union shall support and complement the activities of the Member States in the following fields:

   (a) improvement in particular of the working environment to protect workers' health and safety;

(b) working conditions;
(c) social security and social protection of workers;
(d) protection of workers where their employment contract is terminated;
(e) the information and consultation of workers;
(f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 6;
(g) conditions of employment for third-country nationals legally residing in Union territory;
(h) the integration of persons excluded from the labour market, without prejudice to Article III-183;
(i) equality between men and women with regard to labour market opportunities and treatment at work;
(j) the combating of social exclusion;
(k) the modernisation of social protection systems without prejudice to point (c).

2. To this end:

(a) European laws or framework laws may establish measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States;
(b) in the fields referred to in paragraph 1(a) to (i), European framework laws may establish minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such European framework laws shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

In all cases, such European laws or framework laws shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee.

3. By way of derogation from paragraph 2, in the fields referred to in paragraph 1(c), (d), (f) and (g), European laws or framework laws shall be adopted by the Council of Ministers acting unanimously after consulting the European Parliament, the

Committee of the Regions and the Economic and Social Committee.

The Council of Ministers may, on a proposal from the Commission, adopt a European decision making the ordinary legislative procedure applicable to paragraph 1(d), (f) and (g). It shall act unanimously after consulting the European Parliament.

4. A Member State may entrust the social partners, at their joint request, with the implementation of European framework laws adopted pursuant to paragraph 2.

   In this case, it shall ensure that, no later than the date on which a European framework law must be transposed, the social partners have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary step enabling it at any time to be in a position to guarantee the results imposed by that framework law.

5. The European laws and framework laws adopted pursuant to this Article:

   (a) shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof;
   (b) shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Constitution.

6. This Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.

Article III-105

The Commission shall have the task of promoting the consultation of the social partners at Union level and shall adopt any relevant measure to facilitate their dialogue by ensuring balanced support for the parties.

To this end, before submitting proposals in the social policy field, the Commission shall consult the social partners on the possible direction of Union action.

If, after such consultation, the Commission considers Union action desirable, it shall consult the social partners on the content of the envisaged proposal. The social partners shall forward to the Commission an opinion or, where appropriate, a recommendation.

On the occasion of such consultation, the social partners may inform the Commission of their wish to initiate the process provided for in Article III-106. The duration of the procedure shall not exceed nine months, unless the social partners concerned and the Commission decide jointly to extend it.

Article III-106

1. Should the social partners so desire, the dialogue between them at Union level may lead to contractual relations, including agreements.
2. Agreements concluded at Union level shall be implemented either in accordance with the procedures and practices specific to the social partners and the Member States or, in matters covered by Article III-104, at the joint request of the signatory parties, by European regulations or decisions adopted by the Council of Ministers on a proposal from the Commission. The European Parliament shall be informed.

   Where the agreement in question contains one or more provisions relating to one of the areas for which unanimity is required by virtue of Article III-104(3), the Council of Ministers shall act unanimously.

Article III-107

With a view to achieving the objectives of Article III-103 and without prejudice to the other provisions of the Constitution, the Commission shall encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields under this Section, particularly in matters relating to:

(a) employment;
(b) labour law and working conditions;
(c) basic and advanced vocational training;
(d) social security;
(e) prevention of occupational accidents and diseases;

(f) occupational hygiene;
(g) the right of association and collective bargaining between employers and workers.

To this end, the Commission shall act in close contact with Member States by making studies, delivering opinions and arranging consultations both on problems arising at national level and on those of concern to international organisations, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.

Before delivering the opinions provided for in this Article, the Commission shall consult the Economic and Social Committee.

Article III-108

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
2. For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

   Equal pay without discrimination based on sex means:

   (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
   (b) that pay for work at time rates shall be the same for the same job.
3. European laws or framework laws shall establish measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value. They shall be adopted after consultation of the Economic and Social Committee.
4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order

to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Article III-109

Member States shall endeavour to maintain the existing equivalence between paid holiday schemes.

Article III-110

The Commission shall draw up a report each year on progress in achieving the objectives of Article III-103, including the demographic situation in the Union. It shall forward the report to the European Parliament, the Council of Ministers and the Economic and Social Committee.

Article III-111

The Council of Ministers shall, by a simple majority, adopt a European decision establishing a Social Protection Committee with advisory status to promote cooperation on social protection policies between Member States and with the Commission. The Council of Ministers shall act after consulting the European Parliament.

The tasks of the Committee shall be:

(a) to monitor the social situation and the development of social protection policies in the Member States and the Union;
(b) to promote exchanges of information, experience and good practice between Member States and with the Commission;
(c) without prejudice to Article III-247, to prepare reports, formulate opinions or undertake other work within its fields of competence, at the request of either the Council of Ministers or the Commission or on its own initiative.

In fulfilling its mandate, the Committee shall establish appropriate contacts with the social partners.

Each Member State and the Commission shall appoint two members of the Committee.

Article III-112

The Commission shall include a separate chapter on social developments within the Union in its annual report to the European Parliament.

The European Parliament may invite the Commission to draw up reports on any particular problems concerning social conditions.

ANNEX 3

Draft EU Constitution

Chapter II – Art. 27-38 (Solidarity)

TITLE IV

SOLIDARITY

Article II-27

Workers' right to information and consultation within the undertaking

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.

Article II-28

Right of collective bargaining and action

Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

Article II-29

Right of access to placement services

Everyone has the right of access to a free placement service.

Article II-30

Protection in the event of unjustified dismissal

Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.

Article II-31

Fair and just working conditions

Every worker has the right to working conditions which respect his or her health, safety and dignity.

Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

Article II-32

Prohibition of child labour and protection of young people at work

The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations.

Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

Article II-33

Family and professional life

The family shall enjoy legal, economic and social protection.

To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

Article II-34

Social security and social assistance

The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.

Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.

In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.

Article II-35

Health care

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

Article II-36

Access to services of general economic interest

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Constitution, in order to promote the social and territorial cohesion of the Union.

Article II-37

Environmental protection

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

Article II-38

Consumer protection

Union policies shall ensure a high level of consumer protection.

ANNEX 4

Council of Europe

Recommendation on Mediation in Civil Matters (18.9.2002)

COUNCIL OF EUROPE | CONSEIL DE EUROPE

COUNCIL OF EUROPE

COMMITTEE OF MINISTERS

Recommendation Rec (2002)10 of the Committee of Ministers to member States on mediation in civil matters

(Adopted by the Committee of Ministers on 18 September 2002 at the 808th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Welcoming the development of means of resolving disputes alternative to judicial decisions and agreeing on the desirability of rules providing guarantees when using such means;

Underlining the need to make continuous efforts to improve the methods of resolving disputes, while taking into account the special features of each jurisdiction;

Convinced of the advantages of providing specific rules for mediation, a process where a "mediator" assists the parties to negotiate over the issues in dispute and reach their own joint agreement;

Recognising the advantages of mediation in civil matters in appropriate cases;

Conscious of the necessity to organise mediation in other branches of the law;

Having in mind Recommendation No. R(98)1 on family mediation, Recommendation No. R(99)19 on mediation in penal matters and Recommendation Rec(2001)9 on alternatives to litigation between administrative authorities and private parties, as well

as the results of other activities and research carried out by the Council of Europe and at a national level;

Having regard more particularly to Resolution No. 1 on "Delivering justice in the 21st century" adopted by the European Ministers of Justice at their 23rd Conference in London on 8-9 June 2000 and in particular to the invitation addressed by the European Ministers of Justice to the Committee of Ministers of the Council of Europe to draw up, in co-operation in particular with the European Union, a programme of work aimed at encouraging the use, where appropriate, of extra-judicial dispute resolution procedures;

Aware of the important role of courts in promoting mediation;

Noting that, although mediation may help to reduce conflicts and the workload of courts, it cannot be a substitute for an efficient, fair and easily accessible judicial system;

A. Recommends the governments of member states:

i. to facilitate mediation in civil matters whenever appropriate;

ii. to take or reinforce, as the case may be, all measures which they consider necessary with a view to the progressive implementation of the "Guiding Principles concerning mediation in civil matters" set out below.

Guiding Principles concerning mediation in civil matters

I. Definition of mediation

For the purposes of this Recommendation, "mediation" refers to a dispute resolution process whereby parties negotiate over the issues in dispute in order to reach an agreement with the assistance of one or more mediators.

II. Scope of application

This Recommendation applies to civil matters. For the purpose of this Recommendation, the term "civil matters'* refers to matters involving civil rights and obligations including matters of comrnercial, consumer and labour law nature, but

excluding administrative or penal matters. This Recommendation is without prejudice to the provisions of Recommendation No. R(98)1 on family mediation.

III. Organisation of mediation

States are free to organise and set up mediation in civil matters in the most appropriate way, either through the public or the private sector.

Mediation may take place within or outside court procedures.

Even if parties make use of mediation, access to the court should be available as it constitutes the ultimate guarantee for the protection of the rights of the parties.

When organising mediation, States should strike a balance between the needs for and the effects of limitation periods and the promotion of speedy and easily accessible mediation procedures.

When organising mediation, States should pay attention to the need to avoid (i) unnecessary delay and (ii) the use of mediation as a delaying tactic.

Mediation may be particularly useful where judicial procedures alone are less appropriate for the parties, especially owing to the costs, the formal nature of judicial procedures, or where there is a need to maintain dialogue or contacts between the parties.

States should take into consideration the opportunity of setting up and providing wholly or partly free mediation or providing legal aid for mediation in particular if the interests of one of the parties require special protection.

Where mediation gives rise to costs, they should be reasonable and proportionate to the importance of the issue at stake and to the amount of work carried out by the mediator.

IV. Mediation process

States should consider the extent, if any, to which agreements to submit a dispute to mediation may restrict the parties' rights of action.

Mediators should act independently and impartially and should ensure that the principle of equality of arms be respected during the mediation process. The mediator has no power to impose a solution on the parties.

Information on the mediation process is confidential and may not be used subsequently, unless agreed by the parties or allowed by national law.

Mediation processes should ensure that the parties be given sufficient time to consider the issues at stake and any other possible settlement of the dispute.

V. Training and responsibility of mediators

States should consider taking measures to promote the adoption of appropriate standards for the selection, responsibilities, training and qualification of mediators, including mediators dealing with international issues.

VI. Agreements reached in mediation

In order to define the subject-matter, the scope and the conclusions of the agreement, a written document should usually be drawn up at the end of every mediation procedure, and the parties should be allowed a limited time for reflection, which is agreed by the parties, after the document has been drawn up and before signing it.

Mediators should inform the parties of the effect of agreements reached and of the steps which have to be taken if one or both parties wish to enforce their agreement. Such agreements should not run counter to public order.

VII. Information on mediation

States should provide the public and the persons with civil disputes with general information on mediation.

States should collect and distribute detailed information on mediation in civil matters including, *inter alia,* the costs and efficiency of mediation.

Steps should be taken to set up, in accordance with national law and practice, a network of regional and/or local centres where individuals can obtain impartial advice and information on mediation, including by telephone, correspondence or e-mail.

States should provide information on mediation in civil matters to professionals involved in the functioning of justice.

VIII. International aspects

States should encourage the setting up of mechanisms to promote the use of mediation to resolve issues with an international element.

States should promote co-operation between existing services dealing with mediation in civil matters with a view to facilitating the use of international mediation.

B. Instructs the Secretary General of the Council of Europe

to transmit this Recommendation to the competent authorities of the European Union, with a view to:

promoting co-operation between the Council of Europe and the European Union in any follow-up to this Recommendation and, in particular, to disseminate information on the laws and procedures in States on the matters mentioned in this Recommendation through an Internet web site;
and encouraging the European Union, when preparing rules at the European Community level, to draw up provisions aiming at supplementing or strengthening the provisions of this Recommendation or facilitating the application of the principles embodied in it.

A/57/17

United Nations

Report of the United Nations Commission on International Trade Law on its thirty-fifth Session

17-28 June 2002

General Assembly

Official Records
Fifty-seventh session
Supplement No. 17 (A/57/17)

UNCITRAL Model Law
on International Commercial Conciliation

Article 1. Scope of application and definitions

(1) This Law applies to international[58] commercial[59] conciliation

.

(2) For the purposes of this Law, “conciliator” means a sole conciliator or two or more conciliators, as the case may be.

(3) For the purposes of this Law, “conciliation” means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (“the conciliator”) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.

(4) A conciliation is international if:

(a) The parties to an agreement to conciliate have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) The State in which the parties have their places of business is different from either:

(i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or

[58] States wishing to enact this Model Law to apply to domestic as well as international conciliation may wish to consider the following changes to the text:
– Delete the word “international” in paragraph (1) of article 1; and
– Delete paragraphs (4), (5) and (6) of article 1.

[59] The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

(ii) The State with which the subject matter of the dispute is most closely connected.

(5) For the purposes of this article:

(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the agreement to conciliate;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

(6) This Law also applies to a commercial conciliation when the parties agree that the conciliation is international or agree to the applicability of this Law.

(7) The parties are free to agree to exclude the applicability of this Law.

(8) Subject to the provisions of paragraph (9) of this article, this Law applies irrespective of the basis upon which the conciliation is carried out, including agreement between the parties whether reached before or after a dispute has arisen, an obligation established by law, or a direction or suggestion of a court, arbitral tribunal or competent governmental entity.

(9) This Law does not apply to:

(a) Cases where a judge or an arbitrator, in the course of judicial or arbitral proceedings, attempts to facilitate a settlement; and

(b) […].

Article 2. Interpretation

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law, which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Article 3. Variation by agreement

Except for the provisions of article 2 and article 6, paragraph (3), the parties may agree to exclude or vary any of the provisions of this Law.

Article 4. Commencement of conciliation proceedings[60]

(1) Conciliation proceedings in respect of a dispute that has arisen commence on the day on which the parties to that dispute agree to engage in conciliation proceedings.

(2) If a party that invited another party to conciliate does not receive an acceptance of the invitation within thirty days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to conciliate.

Article 5. Number and appointment of conciliators

(1) There shall be one conciliator, unless the parties agree that there shall be two or more conciliators.

(2) The parties shall endeavour to reach agreement on a conciliator or conciliators, unless a different procedure for their appointment has been agreed upon.

(3) Parties may seek the assistance of an institution or person in connection with the appointment of conciliators. In particular:

[60] The following text is suggested for States that might wish to adopt a provision on the suspension of the limitation period:
Article X. Suspension of limitation period
(1) When the conciliation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the conciliation is suspended.
(2) Where the conciliation proceedings have terminated without a settlement agreement, the limitation period resumes running from the time the conciliation ended without a settlement agreement

(a) A party may request such an institution or person to recommend suitable persons to act as conciliator; or

(b) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

(4) In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, where appropriate, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

(5) When a person is approached in connection with his or her possible appointment as conciliator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A conciliator, from the time of his or her appointment and throughout the conciliation proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her.

Article 6. Conduct of conciliation

(1) The parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the conciliation is to be conducted.

(2) Failing agreement on the manner in which the conciliation is to be conducted, the conciliator may conduct the conciliation proceedings in such a manner as the conciliator considers appropriate, taking into account the circumstances of the case, any wishes that the parties may express and the need for a speedy settlement of the dispute.

(3) In any case, in conducting the proceedings, the conciliator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.

Article 7. Communication between conciliator and parties

The conciliator may meet or communicate with the parties together or with each of them separately.

Article 8. Disclosure of information

When the conciliator receives information concerning the dispute from a party, the conciliator may disclose the substance of that information to any other party to the conciliation. However, when a party gives any information to the conciliator, subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the conciliation.

Article 9. Confidentiality

Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.

Article 10. Admissibility of evidence in other proceedings

(1) A party to the conciliation proceedings, the conciliator and any third person, including those involved in the administration of the conciliation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:

(a) An invitation by a party to engage in conciliation proceedings or the fact that a party was willing to participate in conciliation proceedings;

(b) Views expressed or suggestions made by a party in the conciliation in respect of a possible settlement of the dispute;

(c) Statements or admissions made by a party in the course of the conciliation proceedings;

(d) Proposals made by the conciliator;

(e) The fact that a party had indicated its willingness to accept a proposal for settlement made by the conciliator;

(f) A document prepared solely for purposes of the conciliation proceedings.

(2) Paragraph (1) of this article applies irrespective of the form of the information or evidence referred to therein.

(3) The disclosure of the information referred to in paragraph (1) of this article shall not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of paragraph (1) of this article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement.

(4) The provisions of paragraphs (1), (2) and (3) of this article apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the conciliation proceedings.

(5) Subject to the limitations of paragraph (1) of this article, evidence that is otherwise admissible in arbitral or judicial or similar proceedings does not become inadmissible as a consequence of having been used in a conciliation.

Article 11. Termination of conciliation proceedings

The conciliation proceedings are terminated:

(a) By the conclusion of a settlement agreement by the parties, on the date of the agreement;

(b) By a declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration;

(c) By a declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) By a declaration of a party to the other party or parties and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

Article 12. Conciliator acting as arbitrator

Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator in respect of a dispute that was or is the subject of the conciliation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship.

Article 13. Resort to arbitral or judicial proceedings

Where the parties have agreed to conciliate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to conciliate or as a termination of the conciliation proceedings.

Article 14. Enforceability of settlement agreement[61]

If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable ... [*the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement*].

[61] When implementing the procedure for enforcement of settlement agreements, an enacting State may consider the possibility of such a procedure being mandatory

ANNEX 6

Albanian Law on Mediation in Dispute Settlement,
No. 9090 from 26.6.2003
(Original, uncorrected translation)

LAW

No. 9090, dated 26.06.2003

ON MEDIATION IN THE DISPUTE SETTLEMENT

According to articles 78 paragraph 1 and 83 of the Constitution, the Council of ministers proposes as follows,

Article 1.

1. Mediation constitutes an extra-judicial activity, which involves mediation through a third party or a group of persons in order to reach an acceptable solution to their dispute, which is not contrary to the law.

2. The mediator or the group of mediators are not entitled to order or to force the parties to accept the dispute resolution.

Article 2

1. According to this law, mediation applies to any disputes in the field of civil, commercial, family and criminal law that are submitted to the courts upon request of the injured claimant or request of the offender, in accordance with articles 59 and 284 of the Criminal Proceedings Code.

2. Pursuant to this law, mediation is applied when requested and accepted by the parties before or after the dispute has arisen, when it is compulsory in accordance with the law, as well as in cases where it has been requested by the courts, arbitration tribunals or the respective public bodies established by law.

3. Disputes for which judicial proceedings are obligatorily required cannot be subject to mediation.

4. For cases which are related with the procedures not regulated by this law, the mediation activity, as far as possible, shall be subject to legal provisions that regulate other proceedings, account being taken of the legal nature of the case at issue.

Article 3

For the purpose of this Law, any person that complies with the following conditions can exercise the mediation activity:

a) is more than 22 years of age;
b) has obtained a university degree;
c) has not been convicted for any criminal acts committed on purpose;
d) possesses the appropriate moral and public reputation in order to conduct the mediation activity.

Article 4

1. The mediator exercises its activity as a natural or legal person in his office or business centre.

2. Before the beginning of their activity, mediators exercising this activity professionally, are under the obligation to register as physical or juridical persons in court and to deposit their data with the register of mediators of the Ministry of Justice, as well as to register with the tax authorities, in accordance with the legal provisions in force.

3. When exercising the mediation activity professionally, mediators are under the obligation to organise collectively in order for the establishment and observation of professional and ethical rules, the implementation of which during the exercise of the activity is compulsory.

4. Mediators exercising this activity professionally are entitled to remuneration for the work and the expenses incurred during the mediation proceedings, pursuant to the terms of the agreement entered into by the parties.

Article 5

1. For the purpose of this law, unless otherwise agreed by the parties, the mediation proceedings in respect of a particular dispute that has arisen commence on the day on which the parties to the dispute agree to engage in mediation proceedings.

2. For the purpose of this law, in the event that one of the parties invites the other party to engage in mediation proceedings and the other party does not respond to said request within 30 days from the date on which the invitation has been sent or within the time limit determined in the invitation, the requesting party can consider this silence as a refusal to engage in mediation proceeding.

Article 6

A sole mediator shall be appointed unless the parties agree that there shall be a panel of mediators.

Article 7

1. In mediation proceedings with one mediator, each party shall endeavour to reach agreement for the appointment of the sole mediator.

2. In mediation proceedings with two mediators, each party appoints one mediator.

3. In mediation proceedings consisting of three or more mediators, each party appoints one mediator and shall endeavour to reach agreement on the name of the other mediators.

4. Parties may seek the advice or assistance of a natural or legal person of an established reputation in the mediation field and in particular with respect to the following:

(a) to recommend the names of suitable persons to act as mediators;

(b) to designate one or more persons suitable to act as mediators.

5. In recommending or appointing individuals to act as mediator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial mediator.

6. When a person is approached in connection with his or her possible appointment as a mediator, he or she shall disclose any circumstances likely to give rise to doubts as to his or her independence. A mediator, from the time of his or her appointment and throughout the mediation proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her.

Article 8

1. For the purpose of this law, the parties are free to agree, by reference to a set of rules or otherwise, on the rules manner according to which the mediation shall be conducted.

2. Failing agreement on the manner in which the mediation is to be conducted, the mediator or the panel of mediators may conduct the mediation proceeding in such a manner as the mediator or the panel of mediators consider appropriate taking into account the circumstances of the case, any requests submitted by the parties and the need for a speedy settlement of the dispute.

3. In any case, in conducting the proceedings, the mediator or the panel of mediators shall seek to maintain fair treatment of the parties, account being taken of the circumstances of the case.

4. Unless otherwise agreed by the parties the mediator may, at any stage of the mediation proceedings, make proposals for an acceptable settlement of the dispute.

Artic1e 9

Unless otherwise agreed by the parties, the mediator, the panel of mediators or a member of the panel may meet or communicate with the parties together or with each of them separately.

Article 10

When the mediator, the panel of mediators or a member of the panel receives information concerning the circumstances of the dispute from a party, the mediator, the panel of mediators or a member of the panel may disclose the substance of that information to the other party.

Article 11

1. Unless otherwise agreed by the parties, all the circumstances and information relating to the mediation proceedings shall be kept confidential.

2. Item 1 of this article shall not apply where disclosure of the information and circumstances of the mediation is required by law or for the purposes of implementation or enforcement of a settlement agreement.

Article 12

1. Unless otherwise agreed by the parties, a party that has taken part in the mediation proceedings or a third person, including a mediator, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony, irrespective of their form, regarding any of the following:

(a) an invitation by a party to engage in mediation proceedings or the fact that a party was willing to participate in mediation proceedings;

(b) views expressed or suggestions made by a party during the mediation proceedings or to the mediator in respect of a possible settlement of the dispute;

(c) statements or admissions made by a party in the course of the mediation proceedings;

(d) proposals made by the mediator;

(e) the fact that the party to the mediation had indicated its willingness to accept a proposal for settlement made by the mediator;

(f) a document prepared solely for purposes of the mediation proceedings.

2. Unless otherwise provided by law and to the extent and in the manner required by law, as well as for the purposes of implementation or enforcement of an agreement to mediate or a settlement agreement, the court, the arbitral tribunal or other competent governmental authority shall not order or accept as evidence the disclosure of such information and circumstances as set out under item 1 of this article. If submitted or accepted, such information shall be inadmissible.

3. The provisions of items 1 and 2 of this article apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the mediation proceedings.

4. Subject to the limitations of item 1 of this article, evidence that is otherwise admissible in arbitral or court proceedings does not become inadmissible as a consequence of having been used in a mediation proceeding.

Article 13

The mediation proceedings are terminated on the date of signature of:

(a) a settlement agreement by the parties;

(b) a written declaration of the mediator or the panel of mediators, after consultation with the parties, to the effect that further efforts at mediation are no longer justified;

(c) a written declaration of the mediating parties addressed to the mediator or the panel of mediators to the effect that the mediation proceedings are terminated;
(d) a written declaration of a party to the other party, the mediator or the panel of mediators, to the effect that the mediation proceedings are terminated.

Article 14

If the parties reach agreement on a settlement of the dispute and the parties and the mediator or the panel of mediators have signed the settlement agreement, that agreement is binding and enforceable as an arbitral award.

Article 15

Unless otherwise agreed by the parties, the mediator shall not act as an arbitrator in respect of a dispute that was or is the subject of the mediation proceedings or in respect of another dispute that has arisen from the same relationship and which has been subject to a mediation proceeding.

Article 16

1. Where the parties have preliminarily agreed to mediate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceeding with respect to an existing or future dispute, the court or the arbitral tribunal shall not initiate or shall suspend the course of the respective proceedings.

2. Notwithstanding the provisions under item 1 of this article, a party may request the initiation or the continuance of the arbitral or judicial proceeding when it considers such proceedings necessary to preserve its rights. Initiation of such proceedings does not constitute a waiver of the agreement to mediate or of the possibility of dispute settlement through mediation proceedings.

Article 17

1. Within 45 days from the date on which the court or the prosecution has submitted the case to him or her, the mediator shall notify them on the settlement of the dispute or its failure, by sending them the respective documents.

2. In the event that a dispute has been settled through mediation, the judicial or prosecution authorities shall decide the termination of the civil or criminal case or the waiver of the initiation of the criminal process and shall make the necessary mentions on the respective registers, except when the conclusion as to the inadmissibility of the mediation is reached.

3. The settlement through mediation of disputes relating to monetary obligations, transfer of real property, performance of services evaluated and documented in writing, can be contested in court within 10 days by the parties, participants in the proceedings, other interested persons or the respective authorities. Conversely, the settlement agreement shall constitute executive title in accordance with article 510 of the Civil Proceedings Code and the Bailiff Office shall be in charge of its enforcement.

4. In the event of the settlement agreement being defied in court, the court or the prosecution office shall take the mediation settlement into consideration, but, at the same time, no legal obstacle to another solution exists, in accordance with the law.

Article 18

The court or the prosecution office may deem the settlement agreement attained through mediation as void, when they come to the conclusion that it does not reflect the will of the parties to the dispute, when their rights are severely injured or when the compensation is openly disproportionate to the damage caused.

Article 19

1. For the purpose of this law, the settlement agreement through mediation shall be deemed as void if:

(a) it has been reached through persons who are not mediators or who cannot be considered as such for the purpose of this law;

(b) the dispute, according to the law, may only be resolved through judicial proceedings;

(c) it encompasses obligations for persons who have not participated in the proceedings;

(d) there has been a simulation and there are causes of nullity affecting the real conflict.

2. For the purpose of this law, the invalidity of the mediation agreement does not prevent the parties to enforce the settlement agreement, by exercising the rights that derive from other laws.

Article 20

Law No. 8465, dated 11.03.1999 on “The mediation for the amicable settlement of disputes” is abrogated.

Article 21

This law enters into force 15 days after the publication in the Official Journal.

ANNEX 7

Bosnia and Herzegovina

Law on Mediation Procedure (Draft with corrections!)

LAW ON MEDIATION PROCEDURE

I – General provisions

Article 1

This Law regulates the mediation process in the territory of Bosnia and Herzegovina.

Article 2

Mediation, in the sense of this Law, is a process in which a neutral third party (the mediator) endeavors to help the parties to achieve an acceptable resolution to their dispute.

The mediator may not impose a resolution on the parties.

Article 3

The mediation process shall be conducted by an individual mediator, unless the parties agree that the process shall be conducted by several mediators.

The mediator is a third neutral party mediating the dispute resolution between the parties in line with the principles of mediation.

Article 4

The parties in dispute may agree to resolve the dispute through the mediation process either before and after initiating the court procedure, but no later than the conclusion of the hearing.

If the parties, before initiating the court procedure, have not tried to resolve the dispute through the mediation process, the judge in charge of the court procedure may, if s/he considers it purposeful, propose to the parties during the preliminary hearing to try to resolve the dispute by mediation.

Article 5

The parties jointly select the mediator from the list of mediators, which is determined by the Association of Mediators of Bosnia and Herzegovina.

If the parties are not able to agree about the selection of the mediator, the mediator is appointed by the Association of Mediators of BiH.

II – Principles of the Mediation Process

Voluntary consent

Article 6

The parties in dispute initiate the mediation process and participate in achieving a mutually acceptable agreement voluntarily.

Confidentiality

Article 7

The mediation process is confidential. All statements made by the parties during the mediation process may not be used as evidence in any other process without the consent of the parties.

The mediator shall keep secret the information provided during separate meetings with each party and shall not discuss it with the other party, unless otherwise agreed.

Equality of parties

Article 8

The parties in the mediation process have equal rights.

Neutrality of Mediator

Article 9

The mediator shall mediate in a neutral manner, without any prejudices with regard to the parties and/or the subject matter of the dispute.

III – Mediation Process

Article 10

The mediation process shall be initiated by a written mediation contract signed by the parties in dispute and the mediator.

Article 11

The mediation contract must contain: information on the contractual parties, their legal representatives or proxies, the subject matter of the dispute (description of the dispute), a statement of acceptance of the principle of mediation defined by this Law and the conditions related to payment of the procedural costs.

Article 12

Once the contract on mediation is signed, the mediator, in agreement with the parties, shall determine the time and place for holding the mediation meeting.

Article 13

If the court procedure is in progress, the parties who have agreed to resolve the dispute through the mediation process are obliged to inform the judge in charge of the procedure.

Article 14

If the parties have agreed during the civil procedure, on their own initiative or upon the proposal of the judge, to try to resolve the dispute by the mediation process, the court shall postpone the hearing for not longer than 30 days.

Article 15

If the parties in the dispute are physical persons, their presence during the process is mandatory.

The interest of the parties during the process may be represented by the legal representatives or proxies.

The actions during the mediation process, including also signing the settlement agreement, which are taken by the proxy, have the same legal effect as taken by the party itself.

Article 16

In addition to the mediator, the parties, or their representatives, third parties may also be present during the process, granted with the consent of all parties.

All third parties attending the mediation process shall commit themselves in writing to comply with the principle of confidentiality within the mediation process.

Article 17

The parties shall provide the mediator in a timely manner with all relevant documentation regarding the subject matter of the dispute.

Article 18

At the beginning of the mediation process, the mediator shall inform the parties of the purpose of the mediation, the procedure to be conducted, and the role of the mediator and of the parties in the procedure as well.

Article 19

Each party may interrupt the mediation process at any time during the procedure.

The mediator may interrupt the mediation process if s/he estimates that the further conduction of the process is not purposeful.

The mediator shall interrupt the mediation process if there are reasons preventing her/him to be neutral and unbiased.

Article 20

The mediator is obliged to conduct the mediation process without delay.

Article 21

During the mediation process, the mediator may have separate discussions with each party individually.

Article 22

The mediator neither shall give promises nor guarantee a certain result of the mediation process.

Article 23

Upon the request of the party, emphasized during a separate meeting, the mediator may give a proposal of options for dispute resolution, but not a resolution.

Article 24

When the parties in the mediation process find a resolution for the dispute, through the mediator, they shall make a settlement agreement in writing and sign it immediately.

Article 25

The settlement agreement referred to in Article 24 of this Law has the power of an executive document.

Article 26

When a lawsuit is in process, the parties are obliged to inform the court about the outcomes of the mediation process immediately, no later than the hearing scheduled in accordance with Article 14 of this Law.

Article 27

The mediator is subject to liability for damage s/he causes to the party with her/his illegal actions in compliance with the general rules related to the liability for damage

and to the disciplinary accountability in accordance with the acts of the Association of Mediators of BiH.

IV Conflict of Interest

Article 28

The mediator may not deal with subject matters in which s/he has or had personal interest, personal, family and/or business relations with a party in the dispute or if there are other circumstances casting doubts on her/his impartiality.

The mediator shall not deal with subject matters in which s/he previously acted as judge, assistant, legal representative or counselor of one of the parties.

Article 29

The mediator may conduct the mediation process in the events referred to in Article 28, if the parties, after being informed of the existence of such circumstances, agree that s/he may conduct the process.

V Payment Conditions Related to the Costs of the mediation process

Article 30

The remuneration and compensation of the mediator's costs in the amount defined by the act of the Association of Mediators as well as other expenses necessary for conducting the mediation process shall be borne by the parties themselves in equal portions, unless specified otherwise by the mediation contract.

VI Conditions for Dealing with Mediation

Article 31

The mediator may be a person who meets the general employment conditions of the state.

In addition to the condition referred to in paragraph 1 of this Article, the mediator must fulfill the following conditions:

a) University education
b) Completed the training program in accordance with the program of the Association of Mediators of BiH, or in accordance with some other training program recognized by the Association of Mediators of BiH
c) Court registry of the mediators carried out by the Association of Mediators of BiH

Article 32

A foreign citizen authorized to perform the activities of mediations in another country may conduct the mediation process in Bosnia and Herzegovina in individual cases and under the condition of reciprocity, with the prior consent of the Ministry of Justice of BiH and the Association of Mediators of BiH.

FINAL PROVISIONS

Article 33

The Association of Mediators of BiH is obliged to pass the required acts for enforcement of this Law within 90 days of the day when this Law comes into force.

Article 34

This Law comes into force on the eighth day after it is published in the «Official Gazette of Bosnia and Herzegovina».

ANNEX 8

Draft Macedonian Law on the Promotion of Mediation

(discussed in summer 2004 in a working group, before being proposed to the Government)

DRAFT

Law on the Promotion of Mediation

Remarks:

1. This draft law covers mediation in general, i.e. also in family matters and labour relations, not only in commercial relations.

2. It includes national and international mediation.

3. It is as far as possible based on the UNCITRAL Model law on International Commercfial Conciliation. But is is also based on the Council of Europe Recommendation Rec (2002)10 on mediation in civil matters.

4. Instead of "conciliation" there was always written "mediation", as in Europe sometimes a conciliator can propose settlement solutions like an arbitrator, but without the possibility to have his conclusions declared executable (i.e. in collective labour law). "Mediation" therefore is the only expression in Europe, which without any doubt is based on extra-court and mediation-like settlement.

5. All other proposals are made to offer a basis for further discussions.

Article 1. Scope of application and definitions

(1) This Law applies to mediation within Macedonia and to international commercial mediation .

(2) For the purposes of this Law, "mediator" means a sole mediator or two or more mediators, as the case may be.

(3) For the purposes of this Law, "mediation" means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the mediator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or

relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.

(4) A mediation is international if:

(a) The parties to an agreement to mediate have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) The State in which the parties have their places of business is different from either:

(i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or

(ii) The State with which the subject matter of the dispute is most closely connected.

(5) For the purposes of this article:

(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the agreement to conciliate;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

(6) This law also applies to any kind of mediation between family members on all aspects of family law, as well as to any kind of mediation between employers and employees on all aspects of labour law.

(7) This Law also applies to a commercial mediation when the parties agree that the mediation is international or agree to the applicability of this Law.

(8) The term "commercial" is given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not.

Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

(9) The parties are free to agree to exclude the applicability of this Law.

(10) Subject to the provisions of paragraph (11) of this article, this Law applies irrespective of the basis upon which the conciliation is carried out, including agreement between the parties whether reached before or after a dispute has arisen, an obligation established by law, or a direction or suggestion of a court, arbitral tribunal or competent governmental entity.

(11) This Law does not apply to:

Cases where a judge or an arbitrator, in the course of judicial or arbitral proceedings, attempts to facilitate a settlement.

Article 2. Interpretation

(1) In the interpretation of this Law, regard is to be had to its international origin, as United Nations Commission on International Trade Law (UNCITRAL) Model Law, and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Article 3. Variation by agreement

Except for the provisions of article 2 and article 6, paragraph (3), the parties may agree to exclude or vary any of the provisions of this Law.

Article 4. Commencement of mediation proceedings*c*

(1) Mediation proceedings in respect of a dispute that has arisen commence on the day on which the parties to that dispute agree to engage in mediation proceedings.

(2) If a party that invited another party to mediation does not receive an acceptance of the invitation within thirty days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to mediation.

Article 5. Number and appointment of conciliators

(1) There shall be one mediator, unless the parties agree that there shall be two or more mediators.

(2) The parties shall endeavour to reach agreement on a mediator or mediators, unless a different procedure for their appointment has been agreed upon.

(3) Parties may seek the assistance of an institution or person in connection with the appointment of mediators. In particular:

(a) A party may request such an institution or person to recommend suitable persons to act as mediator; or

(b) The parties may agree that the appointment of one or more mediators be made directly by such an institution or person.

(4) In recommending or appointing individuals to act as mediator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial mediator and, where appropriate, shall take into account the advisability of appointing a mediator of a nationality other than the nationalities of the parties.

(5) When a person is approached in connection with his or her possible appointment as mediator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A mediator, from the time of his or her appointment and throughout the mediation proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her.

Article 6. Suspension of limitation period

(1) When the conciliation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the mediation is suspended.

(2) Where the mediation proceedings have terminated without a settlement agreement, the limitation period resumes running from the time the mediation ended without a settlement agreement.

Article 7. Conduct of mediation

(1) The parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the mediation is to be conducted.

(2) Failing agreement on the manner in which the mediation is to be conducted, the mediator may conduct the mediation proceedings in such a manner as the mediator considers appropriate, taking into account the circumstances of the case, any wishes that the parties may express and the need for a speedy settlement of the dispute.

(3) In any case, in conducting the proceedings, the mediator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case.

(4) The mediator may, at any stage of the mediatorproceedings, make proposals for a settlement of the dispute.

Article 8. Communication between mediator and parties

The mediator may meet or communicate with the parties together or with each of them separately.

Article 9. Disclosure of information

When the mediator receives information concerning the dispute from a party, the mediator may disclose the substance of that information to any other party to the mediation. However, when a party gives any information to the mediator, subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party of the mediation.

Article 10. Confidentiality

Unless otherwise agreed by the parties, all information relating to the mediation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.

Article 11. Admissibility of evidence in other proceedings

(1) A party to the mediation proceedings, the mediator and any third person, including those involved in the administration of the mediation proceedings, shall not in arbitral,

judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:

(a) An invitation by a party to engage in mediation proceedings or the fact that a party was willing to participate in mediationproceedings;

(b) Views expressed or suggestions made by a party in the mediation in respect of a possible settlement of the dispute;

(c) Statements or admissions made by a party in the course of the mediation proceedings;

(d) Proposals made by the mediator;

(e) The fact that a party had indicated its willingness to accept a proposal for settlement made by the mediator;

(f) A document prepared solely for purposes of the mediation proceedings.

(2) Paragraph (1) of this article applies irrespective of the form of the information or evidence referred to therein.

(3) The disclosure of the information referred to in paragraph (1) of this article shall not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of paragraph (1) of this article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in
evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement.

(4) The provisions of paragraphs (1), (2) and (3) of this article apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the mediation proceedings.

(5) Subject to the limitations of paragraph (1) of this article, evidence that is otherwise admissible in arbitral or judicial or similar proceedings does not become inadmissible as a consequence of having been used in a mediation.

Article 12. Termination of mediation proceedings

The mediation proceedings are terminated:

(a) By the conclusion of a settlement agreement by the parties, on the date of the agreement;

(b) By a declaration of the mediator, after consultation with the parties, to the effect that further efforts at mediation are no longer justified, on the date of the declaration;

(c) By a declaration of the parties addressed to the mediator to the effect that the mediation proceedings are terminated, on the date of the declaration; or

(d) By a declaration of a party to th e other party or parties and the mediator, if appointed, to the effect that the mediation proceedings are terminated, on the date of the declaration.

Article 13. Mediator acting as arbitrator

Unless otherwise agreed by the parties, the mediator shall not act as an arbitrator in respect of a dispute that was or is the subject of the mediation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship.

Article 14. Resort to arbitral or judicial proceedings

Where the parties have agreed to mediation and have expressly undertaken not

to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to conciliate or as a termination of the mediation proceedings.

Article 15. Enforceability of settlement agreement

If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable. *(follow the provisions on how to make it enforceable)*

* * *