

ADAPT-ILO CONFERENCE
"LABOUR IS NOT A COMMODITY" TODAY
Bergamo (Italy) | 28-30 November 2019.

Possibilities of workplace mediation in the European Union

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Introduction

Nature of the conflicts at the labor market

- Individual disputes - collective disputes

Rights dispute, interest dispute and the ADR schemes

- Litigation - individual matters
- Arbitration - CBA
- Mediation, conciliation

External mediation – internal mediation

Internal - informal environment, fast to set up, knowledge of the organizational background, emphasis on joint meetings

External - neutrality, formal approach, objective perspective, wider experience on various organizational conflicts

Styles of mediation

	Facilitative	Evaluative	Transformative	Narrative
Role of the mediator	<ul style="list-style-type: none"> - Obligation to be neutral - Shall not give any direct advice - Less role in solution creation or reality check 	<ul style="list-style-type: none"> - Extensive intervention - Recommendations - Pointing out strengths and weaknesses of a case 	<ul style="list-style-type: none"> - Transformation of the conflict - From destructive to constructive - Identify the positions, shift to interests personal empowerment, interpersonal recognition, and constructive interaction 	<ul style="list-style-type: none"> - Encourages the conflicting parties to tell their personal "story" of the conflict - reach resolution through a understanding of the context of their individual stories
FOCUS	<ul style="list-style-type: none"> - Best opinion shall be negotiated by the parties – party and process focused 	<ul style="list-style-type: none"> - A neutral, third party opinion on the issue - Get the guidance of an expert to avoid litigation 	NOT agreement focused Preserving the relationship!	<ul style="list-style-type: none"> - Outside of the box thinking - Detach the parties from the conflict to avoid harm
Specialties	<ul style="list-style-type: none"> - Requires no expertise - Volunteers often involved 	<ul style="list-style-type: none"> - Mediator is a highly qualified expert - Mediator's proposal - Lawyers often involved 	success is not measured by settlement	Similarities with therapy sessions: <ul style="list-style-type: none"> - understanding, overcoming relationship problem Face-to-face contact



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Why to mediate in an individual dispute?

- Informal approach means greater **flexibility**
- Discussion with ensured **confidentiality**
- **Avoids** damaging discussion, escalation of the conflict
- **Repairs, maintains** the relationship
- **Balanced** negotiation with a **problem-solving approach**
- **Cheaper** than litigation, arbitration
- **Future benefits** – chance to analyze systematic changes at the workplace.

Workplace mediation in the USA

By the late 1950s, almost all collective bargaining agreements contained arbitration provisions (approved by the U.S. Supreme Court in the In the Steelworkers' decisions).

Mediation of interest disputes, arbitration of rights disputes **is general!**

- CBA provisions, ombudsman mediation at universities, mediation offices at companies
- railway and traffic industry labor and workplace conflicts has a 97% success rate and have been settled peacefully

Characteristics of the legal system:

- Cost efficiency – „Employment at will” doctrine – right to terminate with immediate effect without any justification (just cause)
- who is paying attorney's fees?
- American Rule / English Rule



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Promotion of labor and employment ADR

ILO Convention No. 92 (1951) on Voluntary Conciliation and Arbitration Recommendation

- Does not include mediation, but: „voluntary conciliation should be made available to assist in the prevention and settlement of industrial disputes between employers and workers”

ILO Convention No. 154 (1981) on Collective Bargaining

- alternative dispute resolution as part of the bargaining process is possible (Article 6) within the framework of conciliation and/or arbitration machinery or institutions

ILO Convention No. 151 (1978) on Labor Relations

- Explicitly includes mediation as a tool to resolve labor disputes „*conditions of employment are to be sought through independent and impartial machinery, such as mediation, conciliation and arbitration, established in such a manner as to ensure the confidence of the parties involved*”



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Promotion of Mediation in the EU

2004 - Code of Conduct for European Mediation Services (COM Directorate of Justice and Home Affairs)
Proposal for legislation to ensure uniform practices and standards

2009 - Directive 2008/52/EC of the European Parliament and of the Council of Certain Aspects of Mediation on Civil and Commercial Matters

Framework for cross-border mediation

Gave a binding effect to the earlier Recommendations as well (by 20 May, 2011)

2016 - Commission report on the Mediation Directive

15 already introduced a comprehensive, 9 member states had scattered regulations, and 4 adopted mediation for the first time

- Lack of mediation culture - cultural change" was still necessary to ensure that citizens trust mediation.
- insufficient knowledge and expertise,
- low level of awareness of mediation,
- Implemented, but attorneys are not comfortable suggesting it
- disfunction of the quality control mechanisms for mediators



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Promotion of Mediation in the EU II.

Mediation an instrument generally dealing with labor and/or employment dispute resolution has not yet been introduced on an EU level

- regulation of workplace mediation also remains limited within the EU
- Mediation Directive is arguably applicable in cross-border employment disputes
 - Employment law is or is not a civil matter?
 - Directive does not apply matters where the parties are not free to decide the applicable law

Great differences among national labor law systems, and the wide range of mediation processes in each country to deal with collective workplace disputes.

- Mandatory mediation (making mediation compulsory for certain categories of cases (such as commercial cases, family law, employment law or small claims) would affect the exercise of the right to an effective remedy,

Consumers - 2013/11/EU on alternative dispute resolution for consumer disputes (the “ADR Directive”) and Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes (the “ODR Regulation”)

- provided alternative dispute resolution entities for all kinds of contractual disputes with traders, and established an EU-wide online platform for consumer disputes that arise from online transactions with traders.



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Conclusions / Observations I.

Consumer status is similar to the employee

- Weaker position is compensated by legal guarantees
- Financial leverage, limited legal awareness, less accessible legal support and remedies
- Unbalanced position at the market

Labor and employment law is going through huge changes.

- Various forms of work have been evolved – people who perform work fall outside the protective scope of labor law,
- consumer ADR is increasing – workplace mediation is not getting recognition

Mediation – especially facilitative and transformative mediation is:

- informal, simply structured process,
- neutrality, the mediator is obliged to withhold his or her own legal or personal opinion,
- Balance and confidentiality – prohibited discovery, special tools (caucus).



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Conclusions / Observations II.

Roman Renwald (US Attorney, arbitrator in several European Countries, Doctor of Law in Poland)

- „Mediation is completely misunderstood in Europe.”
- Common mistake - professionals associate mediation with arbitration and problem
- The job of the mediator is to bring the parties to a common resolution, mostly by posing well formulated questions.

Main principles – mediation must be understood! – attorneys shall also know what to expect

- Confidentiality must be protected so that the settlement negotiations with the participating mediator may not be used in subsequent litigation or arbitration.
- Must be able to be stopped at any time by either party dissatisfied with the process.
- Mediation must toll the Statute of Limitations - suspended

Not arbitration – mediator is withholding his/her opinion, no evaluation, no judgement

Not a settlement conference – confidentiality, directed interaction and controlled communication

Pre-litigation tool – if the only way is litigation, parties realize how strong their case is, reach a partial settlement

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Thank you for your kind attention.

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