CVETAN KOVAČ¹
IVANA KRIŠTO²

MEDIATION - ALTERNATIVE DISPUTE RESOLUTION

¹Independent Trade Unions of
Croatia
Zagreb, Croatia
²City of Zagreb,
Emergency management office,
Zagreb, Croatia

¹cvetan.kovac@gmail.com

²kristo.ivana@yahoo.com

Abstract: *The European Union actively promotes methods of alternative dispute resolution ("ADR"), such as mediation. The Mediation Directive is applied in all EU countries and it refers to mediation in civil and commercial matters. Encouraging the use of mediation facilitates the resolution of disputes, and it helps to avoid the worry, time and cost associated with court-based litigation. This way, it enables citizens to secure their legal rights in an efficient way.*

Keywords: alternative dispute resolution, the Mediation Directive, judicial and extra-judicial mediation.

INTRODUCTION

The *Mediation Directive* applies to cross-border disputes in civil and commercial matters. Mediation, arbitration, and alternative dispute resolution (ADR) are processes used to resolve disputes, either within or outside the formal legal system, without adjudication or decision by a judge. More recently, the terms 'appropriate dispute resolution' and 'process pluralism' have been used to express the idea that different kinds of disputes, variable by subject matter type, parties involved, or location of the dispute or transaction, may require different kinds of processes – no one legal or informal dispute process can serve for all human disputing. Mediation is a process in which a third party (usually neutral and unbiased) facilitates a negotiated consensual agreement among parties, without rendering a formal decision. In arbitration, a single third party or a panel of arbitrators, most often chosen by the parties themselves, render a decision, in terms less formal than a court, but often with a written award. It covers disputes in which at least one of the parties is domiciled in a Member State other than that of any other party on the date on which they agree to use mediation or on the date mediation is ordered by a court. The principal objective of this legal instrument is to encourage the recourse to mediation in the Member States.

The *Directive* contains five substantive rules:

- It obliges each Member State to encourage the training of mediators and to ensure high quality of mediation.
- It gives every judge the right to invite the parties to a dispute to try mediation first if she/he considers it appropriate given the circumstances of the case.
- It provides that agreements resulting from mediation can be rendered enforceable if both parties so request. This can be achieved, for example, by way of approval by a court or certification by a public notary.
- It ensures that mediation takes place in confidentiality.
- It provides that the mediator cannot be obliged to give evidence in court about what took place during

mediation in a future dispute between the parties to that mediation.

- It guarantees that the parties will not lose their possibility to go to court because of the time spent in mediation. Also, the time limits for bringing an action before the court are suspended during mediation.

MEDIATION IN EU MEMBER STATES

Croatia

The Government of the Republic of Croatia, through the Ministry of Justice, provides strong support (legislative, financial, technical) to the development and promotion of mediation, and it has become one of the important parts of the Judicial Reform Strategy.

Judicial and extra-judicial mediation

Mediation can be conducted in all regular and specialized first and second instance courts (municipal, county, commercial and the High Commercial Court) in all stages of the proceedings, and therefore, for the duration of the appeal proceedings. Mediation is conducted exclusively by a judge of the court concerned who is trained in mediation and who is named on the list of judge mediators determined by the President of the Court, by way of an annual assignment of arrangements. A judge mediator shall never conduct mediation in a dispute for which he/she is appointed as a judge.

Extra-judicial mediation has been very successfully conducted by: *Mediation Centers at the Croatian Chamber of Economy, Croatian Chamber of Trades and Crafts and Croatian Employers' Association* and by the *Croatian Mediation Association, the Croatian Bar Association, the Croatian Insurance Bureau and the Office for Social Partnership of the Government of the Republic of Croatia*. However, mediation with selected mediators can be conducted outside of these centers.

Pursuant to the *Mediation Act* (Official Gazette of the Republic of Croatia), No 18/11 and the *Rules on the Register of Mediators and Accreditation Standards for*

Mediation Institutions and Mediators (NN, No 59/11), the Ministry of Justice is to maintain the Register of Mediators [3].

Alternative Dispute Resolution Commission

The Ministry of Justice established and appointed the Alternative Dispute Resolution Commission, the composition of which includes representatives of the courts, the Public Prosecutor's Office, the Office for Social Partnership of the Government of the Republic of Croatia, the Croatian Chamber of Economy, the Croatian Employers' Association, the Croatian Chamber of Trades and Crafts and the Ministry of Justice [3].

The Commission's mandate is to monitor the development of alternative dispute resolution, monitor the implementation of the existing programs and propose measures to promote the development of alternative dispute resolution. The Commission's mandate also encompasses providing opinions and responses to inquiries falling within its remit.

Legislative Framework

Mediation as a means of resolving disputes was regulated for the first time by special regulation - *The Mediation Act* (NN, No 163/03, entered into force on 24 October 2003), which has integrated some of the guiding principles contained in the *Council of Europe Recommendation on mediation in civil and commercial matters* as well as the so-called *Green Paper* on alternative dispute resolution in civil and commercial law of the European Union. The Act was amended in 2009, and at the beginning of 2011, a new *Mediation Act* was passed (NN, No 18/11), which entered into force in full on the accession date of the Republic of Croatia to the European Union.

In addition to the Mediation Act, which is the most important, there are other laws governing this subject matter in part, as well as implementing regulations ensuring implementation of the law [2].

Mediation process

The mediation process is initiated by way of a proposal by one party to a dispute which is accepted by the other party, by way of a joint proposal by both sides for an amicable resolution of the dispute, or by way of proposal by a third party (e.g. a judge in court proceedings).

Mediators are the persons or several persons who, based on an agreement between the parties, conduct the mediation. Mediators must be trained (the expertise and skill of a mediator are the essential components of successful mediation), and continually undergo professional training. The Judicial Academy is of the utmost importance in organizing and conducting training for mediators.

Mediation is conducted as agreed by the parties. The mediator, during the mediation, will ensure fair and equal treatment of the parties. The mediator in the

mediation procedure may meet with each party separately, and unless the parties have agreed otherwise, the mediator may disclose information and data received from one party to the other party only where permission to do so has been given. The mediator may participate in drafting the settlement and make recommendations as to its contents.

A settlement reached by way of mediation is binding on the parties that signed it. If the parties undertook certain obligations under the settlement, they are required to discharge them in a timely manner. A settlement reached by way of mediation is an enforceable document if it contains an obligation due for performance in respect of which the parties may reach a compromise, and if it contains a statement of direct permission to enforce (enforceability clause).

Unless the parties have agreed otherwise, each bears its own costs, while the parties are to bear the costs of the mediation equally, or in accordance with a special law or the rules of the mediation institutions.

According to most experts in the field of mediation, the conflicting parties should almost always be encouraged to resolve the dispute amicably. Mediation is particularly suitable for business disputes (i.e. Commercial disputes), as well as in cross-border disputes (one of the parties is domiciled or habitually resident in a Member State of the European Union) in civil and commercial matters. It should be noted that cross-border disputes do not include customs, tax or administrative proceedings or those disputes relating to state responsibility for acts or omissions in the exercise of power [4].

Slovenia

The Act on Alternative Dispute Resolution in Judicial Matters (UL RS; Official Gazette of the Republic of Slovenia) Nos 97/09 and 40/12 - *Fiscal Balance Act* (ZUJF)), which was adopted on 19 November 2009 and came into force on 15 June 2010, requires first-instance and second-instance courts to adopt and bring into force a program of alternative dispute settlement to allow parties alternative means of settlement in disputes on commercial, labor, family and other civil-law matters. Under this program, courts are obliged to allow the parties to use mediation in addition to other forms of alternative dispute resolution.

The Ministry of Justice keeps a central register of mediators who operate in court program for alternative dispute resolution.

The Council for Alternative Dispute Resolution operates under the auspices of the *Ministry of Justice and Public Administration*. The Council was set up in March 2009 and is a central, independent, expert body of the Ministry with a coordinating and consultative role.

Mediation may be used in civil, family, commercial, labor and other property-related matters about claims which can be disposed of and settled by the parties. Mediation is also admissible in other matters if it is not

excluded by law. Mediation is most common in civil, family and commercial matters.

Recourse to mediation is voluntary. *The Mediation in Civil and Commercial Matters Act* (ZMCGZ, UL RS No 56/08) refers to mediation in general, i.e. to mediation associated with judicial procedures and to non-judicial mediation. It sets out only the basic rules for mediation procedures, leaving other aspects to self-regulating mechanisms. For example, it lays down where mediation begins and ends, who appoints the mediator, the mediator's basic rules of conduct, the form of the dispute settlement agreement, how to ensure it can be enforced, etc. Parties may deviate from provisions of the Act, except provisions regulating the principle of impartiality of mediator and the impact of mediation on preclusion and limitation periods.

For the time being court-based mediation conducted under ZARSS in disputes arising from relationships between parents and children and in labor-law disputes due to termination of an employment contract is free of charge for the parties; parties pay only for their lawyers. In all other disputes, except commercial disputes, the court covers the mediator's fees for the first three hours of mediation.

Such an agreement is not directly enforceable; however, it is possible. The parties may agree that the dispute settlement agreement should take the form of a directly enforceable notarial deed, a court settlement or an arbitration award based on the settlement.

Austria

In alternative dispute resolution procedure, a mediator assists those involved in a dispute to reach an agreement.

In civil law cases, mediation can be used to resolve disputes in which the ordinary courts would normally take a decision. Parties to a dispute can choose for mediation voluntarily to find their own solution to the dispute.

In some neighborhood disputes, an attempt to settle the matter out of court must be made first before the case can be brought to court. This may be done by referring the matter to a conciliation board, seeking a pre-trial settlement through the district court (a procedure known as 'prätorischer Vergleich') or by mediation. Mediators are not registered as being specialists in a given area, such as family, medical or building disputes; however, the details of the areas in which a registered mediator works can be entered separately.

Anyone who has completed the specific training and who meets the requirements can be listed as a registered mediator. There are no legal restrictions on who can use the professional title of a 'mediator'.

The mediation fees are agreed by the private mediator and the parties to the dispute.

Under *Directive, 2008/52/EC*, parties to a dispute must be allowed to submit a request for the content of a written agreement resulting from mediation to be made

enforceable. It is up to the Member States to indicate which courts or other authorities are responsible for receiving such requests. In Austria, the content of an agreement resulting from mediation is enforceable only if the agreement takes the form of a settlement (Vergleich) before a court or a notarial act before a notary.

DEFINING ALTERNATIVE DISPUTES RESOLUTION IN THE EUROPEAN UNION

All countries in the European Union allow for individual worker disputes concerning alleged breaches of employment law to be heard in an appropriate court of justice - whether a specialist labor court or a civil court.

A narrow definition of ADR is the use of third parties engaging in conciliation, mediation, and arbitration prior to a court hearing. This can be action by a legal authority, often the court judge, immediately prior to a hearing to resolve the dispute. Alternatively, or in addition, it can involve the appointment of publicly-funded specialists or private experts – either once an application has been made but before a court hearing is fixed, or before the claim has been made. These types of ADR linked to the judicial process are referred to as 'judicial ADR'. In addition, some countries emphasize the role of the social partners in the workplace, or sometimes in the region or sector, in providing an avenue for a worker to resolve a dispute at the level of the works council or similar institutions aligned to collective bargaining. These are referred to as 'non-judicial ADR'.

Mediation is growing in use, and all countries developing new forms of ADR have begun to use either court-based or private forms of mediation.

Most mediation takes the traditional form, whereby the third party hears both sides and seeks to find an acceptable resolution before issuing a non-binding decision or recommendation, usually in writing. In some cases, the mediator reviews written submissions. A variety of methods are used to initiate mediation. Mediation can be offered or arranged by the courts and/or operated outside the judicial system [1].

MEDIATION PROCESS IN INDIVIDUAL PROCEDURE- A 10 YEAR BEST PRACTICE IN THE CROATIAN POST

As a sort of alternative dispute resolution method, mediation is promoted in the Republic of Croatia as a convenient, cost-effective and efficient way of solving disputes, as it allows for more favorable and faster justice and legal protection for the parties involved in the dispute. The economic situation in the last 10 years has also affected the rise of court disputes, and the availability of justice is one of the goals of the European Union. With the development of alternative ways of solving disputes, citizens and legal persons can

choose more appropriate dispute resolution procedures. Conciliation is a process of resolving disputes without the need to engage the court.

Mediation in individual labor disputes in Croatia began at the end of 2007. Efforts and contribution of the *Croatian Post* in the development of mediation have been recognized in 2011 when Croatia Post separated as a public company with the best practice in solving individual labor disputes by negotiating with the *Office for Social Partnership*. Settling employment disputes by becoming a part of the organization also became a part of organizational culture (HP company book 2011). Significant support to the use of mediation is provided by representative trade unions (Croatian Trade Union and Croatian Trade Union Worker), which confirms the understanding of the financial, operational and organizational and social advantages of conciliation a solving labor disputes in court [1].

Mediation statistics in the Croatian Post

The most common basics of individual labor disputes that are successfully resolved in the settlement are various financial obligations contracted by a collective agreement (differences in transportation, food supplements, remuneration, etc.) Disputes were also successfully resolved to compensate for damage from employment, and to settle disputes relating to termination of employment.

Table 1. *The results of mediation conducted in the Croatian Post (2007-2017) [2]*

Year	Initiated	Spent	Deal
2007	4	1	1
2008	32	29	21
2009	79	73	45
2010	57	19	7
2011	67	39	11
2012	21	13	9
2013	259	249	133
2014	223	222	198
2015	60	60	44
2016	24	24	17
2017	131	129	104
Total	957	858	590

Mediation data show that from the end of 2007 to the end of 2017, 957 reconciliations were initiated (mostly initiated by workers). The success in settling the settlement is 68% - since 590 settlements were settled between the employer and the employee in 858 reconciliations. Such data indicate that conciliation has often been concluded by harmonizing the interests of the worker and the employer, i.e. concluding the

settlement, which is also the purpose of the conciliation process.

Graph 1: *The dynamics of reconciliation in the Croatian Post [2]*

From the overview of dynamics and the results of conciliation follows:

- 89% of the initiated reconciliations are resolved in the process of conciliation (there is a mutual willingness to conciliate)
- 11% of initiated reconciliation does not enter the resolution phase (there is no mutual willingness to calm down)
- 68% of success (32% of mergers that entered the resolution phase do not end with settlement)

Within the Croatian Post, about a dozen employees passed basic training for co-workers, and further invested in more advanced training in the field of mediation and other communication skills. Knowledge and skills in mediation, even when not used in the process of reconciliation, empower employees with additional communication tools that enhance their business [1].

CONCLUSION

Some Member States have comprehensive legislation or procedural rules on mediation, whereas in others, legislative bodies have shown little interest in regulating mediation. However, there are Member States with a solid mediation culture which relies mostly on self-regulation.

More and more disputes are being brought to court. As a result, this has meant not only longer waiting periods for disputes to be resolved, but it has also pushed up legal costs to such levels that they can often be disproportionate to the value of the dispute.

Mediation is in most cases faster and, therefore, usually cheaper than ordinary court proceedings. This is especially true in countries where the court system has substantial backlogs and the average court proceeding takes several years.

Therefore, despite the diversity in areas and methods of mediation throughout the European Union, there is an increasing interest for in this means of resolving disputes as an alternative to judicial decisions.

Mediation is a specific form of alternative dispute resolution, in which parties resolve their own disputes under the leadership and with the assistance of an independent third party - a mediator. Mediation is a voluntary, non-binding and private procedure. The decision on whether the parties will be a part of a mediation process and enduring in it is solely in their hands.

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BIOGRAPHY of the first author

Cvetan Kovač, bacc. ing. sec., bacc. ing. traff.

Coordinator of Health and Safety Committee of the Independent Trade Unions of Croatia. He graduated from The Technical University in Zagreb, a course for Post, and High School for Security in Zagreb, a professional degree course in Occupation Safety. While working in the field of occupational safety and health, he has been promoting the importance and the role of the occupational safety representatives, as well as works council representatives and Trade Unions in the Republic of Croatia.

MEDIJACIJA - ALTERNATIVNI NAČIN RJEŠAVANJA SPOROVA

Cvetan Kovač, Ivana Krišto

Rezime: *Europska unija aktivno promiče alternativne načine rješavanja sporova poput mirenja. Direktiva o mirenju primjenjuje se u svim zemljama EU-a. Ta se direktiva odnosi na mirenje u građanskim i trgovačkim stvarima. Poticanjem upotrebe mirenja olakšava se rješavanje sporova i pridonosi se izbjegavanju zabrinutosti, gubitka vremena i novca povezanih sa sudskim parničanjem te time omogućava građanima da svoja zakonska prava osiguraju na učinkovit način.*

Ključne riječi: Alternativni način rješavanja sporova, Direktiva o mirenju, sudsko i vansudsko posredovanje.