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**Mediation in the ADR-System
with Specific Regard to Its Role in Labour Law in
Hungary**

Summary of the Thesis

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I. The goal of the thesis

In the past few decades the attention of many legal writers has turned toward different methods of dispute resolution other than traditional litigation. The new opportunities appeared in the past years in Hungary and labour law was the first field of law where these were mentioned as possible ways of resolving labour disputes. Some authors are enthusiastic about using new methods, especially mediation (and conciliation) as real alternatives while others seem to be sceptic.

The primary goal of the thesis is to introduce the method of mediation (and conciliation) in a systemic approach, to give information on its theoretical background, operation in practice and further application focusing on the field of labour law.

In order to reach this goal the following questions should be answered: is it possible for mediation to be efficient in resolving labour disputes over rights? What is the proper level of regulation for mediation? What circumstances can influence the successful application of mediation?

II. Resources and methodology of research

1. In order to assess mediation as a part of the larger system (ADR) national and international resources were used, including: books, articles, essays, etc. To elaborate on the Hungarian history of mediation the analyses of legal sources was needed. The chapter introducing and analysing the regulation in force is based on the legal sources as well as domestic experts' studies. Evaluating the activity of the Labour Mediation and Arbitration Service (MKDSZ) was possible on the basis of the statistics issued by the Service. There is huge pool of information on this topic available on the Internet hence; governmental websites and the pages of various international organizations were also used. In order to get a wider prospect and better understanding of mediation it is useful to have psychological and economical aspects – that is the reason that some resources in psychology and economics were also used.

2. The method of mediation is basically approached through the viewpoint of labour law, emphasising the procedure in labour law.

In each country's labour law the system of dispute resolution in labour law is a coherent system and a result of organic development. Hence, a full

research of historical and functional development is needed country by country in order to get proper conclusions in the end of a comparative analysis. Due to the limitations of volume of the thesis it focuses mainly on the Hungarian situation: the historical roots, the effective regulation and the related practice.

III. Main conclusions of the thesis

1. Applicability of mediation

Mediation, as a voluntary and peaceful method of dispute resolution, has a particular value in labour law because the proper settlement of labour disputes is a societal interest of high priority. Unlike other fields of law – owing to its role in resolving interest-based disputes – mediation should not be seen as an “alternative,” but the “traditional” way of dispute resolution in labour law. In my opinion this process is not suitable only for settling disputes over interests but also for disputes over rights. However because of the peculiarities of these disputes the mediation process is different when it is used for settling *disputes over interests* or *disputes over rights*.

In *disputes over interests* (collective labour disputes) there is a delicate balance between the opposing parties. There are more conditions present, which help to maintain this balance. The first is the selection of the mediator because the parties select him or her by mutual consent. The second is the fact that each side has more individuals sitting at the table so it becomes easier for each side to articulate their point of view with the least possible influence.

In case of proper interest-based reconciliation the mediator should maintain the balance. (In this respect the collective disputes over rights is similar to the collective disputes over interests because of its collective nature.)

The case of *individual disputes over rights* is different. In this case the employer (generally represented by the executive officer) and the employee are the opposing parties to the dispute. The employee, by virtue of being subordinated or supervised, has much less power and influence than the employer. This imbalance of power dominates the dispute. Therefore, the mediator not only has to maintain the balance but he or she also has to establish it at the very beginning. Being impartial is of crucial importance in mediating individual rights-based labour disputes.

For this reason considering the intervention of the mediator is a key issue.

To properly intervene in a rights-based labour conflict, the mediator must have qualifications that meet the needs of the parties. It is important that the mediator have expertise in the subject matter of the conflict. If the mediator is to evaluate certain issues in the conflict, he or she must have a deep knowledge about the given field. It is especially true in individual labour disputes because there is great deal of legislation on this field protective the legal position of the employee. If the mediator does not know about the regulations protecting the employee's rights, it may increase the power imbalance already existing between the parties.

2. Regulation of mediation in labour law and the legal requirements of its application in Hungary

After the political changes in 1992, the new Labour Code introduced arbitration, mediation and conciliation as new dispute resolution methods, which can be used in collective disputes over interests. These legal institutions did not exist prior to 1992. However, when the Labour Code was enacted the legislature failed to define these methods nor describe the main points differentiating these processes. The problem remains unchanged to this date.

However, the effective use of these new methods depends upon clear and understandable regulation. The potential users do not know precisely the differences between these methods and they cannot be aware of the various advantages and disadvantages.

Further, parties using mediation, arbitration, etc. in collective labour-disputes must be able to operate according to the rules of traditional market economies where they are able to clearly evaluate their economic role, strength, interests and economical interdependence with the other party to the dispute.

The new dispute resolution forms can be successful in labour law where these preconditions can be met.

Hence, the legislator should delineate the precise differences between them and create the background of its practical usage. In the course of elaborating these differences, the notions of negotiation (*egyeztetés*),

conciliation (*békéltetés*), mediation (*közvetítés*) and arbitration (*döntőbíráskodás*) should be defined.

In my opinion the following criteria should be kept in mind as content elements of the respective notions:

- **negotiation**: during this dispute resolution process the parties to the dispute aim to reach an agreement meeting each parties' needs with their exclusive participation; (At this point two other processes should be mentioned: *information*, which means unilateral transfer of information and *consultation*, which is an exchange of information regarding specific issues between the parties. In the last two cases there is no dispute exists between the parties; while negotiation is a dispute resolution process.)
- **conciliation**: the defining point is that there is a third, neutral person participating in this dispute resolution process helping the parties to find a solution, but this person has no authority to give any recommendations to the parties nor decide any of the issues. He/she just tries to improve the parties' communication, define and clarify the issues, help the parties to understand the needs and interests, and get the viewpoints closer;
- **mediation**: there is one added element compared to conciliation; the mediator has the competence to make suggestions for resolution of the conflict. So in this case he or she plays a more active role concerning the result of the dispute. Although his or her suggestion cannot be binding to the parties. (This dispute resolution method might be useful in resolving collective disputes over interests.)
- **arbitration**: this is a formal process, in which the third, neutral person, the arbitrator decides upon the case after listening to the parties' evidence and argument. The decision is binding. The key here is that in arbitration the resolution of the dispute is taken from the hands of the parties and turned over to a neutral decision maker.

The essential issue concerning the resolution of both collective and individual disputes is the proper level of regulation. Should legislature play an accented role in the regulation or should it be left to collective agreements or employment contracts?

The methods and procedures utilized by the parties for resolving *collective interest-based disputes* are typically the subject of collective bargaining

between the parties. In my opinion only the most general methods and procedures should be legislated. Due to the roughly equal (although debated) balance of power between trade unions and employers (employers' associations), the parties should be able to conclude proper collective agreements in this respect.

Regarding *individual disputes*, the proper defence of employees can be guaranteed with a more detailed legislation through a separate act or included within the Labour Code. Since there is a natural power-imbalance between the parties of the individual employment relationship, in my opinion, it would be improper to allow the rules of mediation to be dictated by the employment contract alone. For instance, it is not an acceptable practice to require the mediation of employment disputes as pre-condition of the employment.

However, not only would modifications to the legal regulations be helpful to expand the use of conciliation and mediation in the field of labour law, but the development of organizational structures affecting industrial relations would be very helpful to increase the use of new methods of dispute resolution. During the last decades we have witnessed a change of attitude toward greater cooperation and flexibility. Such personal skills have a higher value both in economic and in societal terms. Obviously, conflicts in labour law will always exist but the handling of these disputes may be different due to these changes. Cooperative methods of dispute resolution are gaining attention and importance. It is crucial for parties to employment contracts to understand the role and possibilities of the new methods. (It might be the task of the MKDSZ to study how the technological development affects social partners and their relationship with each other; prepare research papers on these topics and to take a strategic role in the field of industrial relations.)

In my opinion conciliation and mediation are effective and helpful methods of dispute resolution and each has an important place in the system of resolving labour disputes. Both processes are very flexible and adaptable to the parties' needs. When the parties retain the ability to make their own decisions and engage in interest-based bargaining, effective and relatively quick solutions are possible. However, we have to keep in mind that productive operation and widespread usage of these methods should fulfil certain requirements in Hungary (see next points).

3. Requirements of effective application of conciliation and mediation in the Hungarian labour law

At the moment being a mediator in Hungary is not a separate job although special skills, knowledge and practice are needed to accomplish the task properly. For this reason mediators must be required to have vocational training and further training in which either the methodology of resolution of individual disputes over rights and of collective disputes should be included.

Another requirement is an independent representative organization for mediators. Beyond representation of interests this body should play a leading role regarding professional issues, disseminating best practices and the creation of a code of ethics.

Mediation and conciliation are not frequently used in Hungary. In my opinion, new or modified regulation in labour law will not change this pattern. Nevertheless, advertising it and acquainting more employers and trade unions with the processes is extremely important. MKDSZ can play a central role in disseminating best practices for mediators, who work specifically in the field of labour law.

Using conciliation and mediation to resolving collective disputes (especially disputes over interests) will be crucial for these processes because parties who have a good experience with mediation and conciliation may choose these processes again for other types of disputes (dispute over rights) or at other levels of collective bargaining.

Another possibility to spread these new methods of dispute resolution is offering practical trainings for executives (or employees, as well) on methods for designing and building in-house dispute resolution systems. Broadening the competence of MKDSZ is also necessary because the service is in the best position to cooperate with employers in executing this mission as well as fulfilling advisory tasks.

The role of labour courts in spreading the use of mediation also has to be mentioned. The system of labour courts is extremely important in handling labour disputes. It is already a well-organized system tailored to handle only lawsuits of the field of labour law involving (individual and collective) disputes over rights. There is a great possibility for trying conciliation and

mediation within the labour court system even though it would require personal and organizational changes.

Altogether the Labour Mediation and Arbitration Service is in a key position to reach employers and trade unions. With appropriate organizational changes broadening its competence, it could contribute greatly to the use of mediation in the world of work.

IV. The possibilities of further utilization of the results

1. Despite the fact that the topic of mediation has already appeared in the Hungarian literature in the past few years, the central issue of the thesis, namely the application of mediation (and conciliation) in the Hungarian labour law, has not been elaborated yet.

2. Mediation in labour law has already been regulated in the Act XXII of 1992 so it can be stated that the legislature recognized the need for and the importance of this method. Amendment of the act is always on the agenda and this thesis may contain useful information for amending the relevant paragraphs connected to dispute resolution.

3. The dissertation can help make mediators more aware of certain critical points in their work.

4. The dissertation can provide a basis for further research and investigation on the application of alternative methods of dispute resolution in labour law, in other fields of jurisprudence or in other social sciences.

5. The dissertation also intends to provide valuable sources for legal education because it may also help students with theoretical and practical information about mediation, conciliation, and how these methods fit in the system of labour law. It also points out the importance of alternative ways of dispute resolution.

The value of effective peaceful conflict and dispute resolution has been known for hundreds of years. This dissertation supports the theory and practice of the modern, institutionalized mediation and conciliation.

Publications connected to the topic of the dissertation

1. *The General Features of Alternative Dispute Resolution, Especially in Labour Law* [in co-authorship with Dr. József Hajdú (Ph.D)] (in Hungarian) In: *The Codificational and Functional Relations Between Civil Law and Labour Law*, Novotni Publisher Miskolc, 2001
2. *The Role and Future Possibility of Mediation in Resolving Employment Disputes* (in Hungarian) In: *Administration of Labour Law and Jurisdiction in Labour Law*, Book published in honour of József Radnay's 75th birthday, Budapest, 2002
3. *Alternative Dispute Resolution and Its Spreading in the Unites States of America and in Hungary* (in Hungarian) *Acta Jur. and Pol. Szeged Publicationes Doctorandorum Juridicorum* 2003. Tomus II.
4. *The History of Dispute Resolution in the Field of Labour Law in Hungary* (in Hungarian) *Acta Juridica et Politica* Tomus LXIII. Fasc. 18. Szeged, 2003
5. *Resolution of Labour Disputes after the Political Changes in Hungary (with Specific Regard to the Methods of Alternative Dispute Resolution)* (in Hungarian) *Liber amicorum Studia Stephano Kertész dedicata* ELTE ÁJK Department of Labour Law and Social Security Budapest, 2004
6. *The systemic and Theoretical connections of Mediation (with Specific Regard to Labour Law)* (in Hungarian) *ACTA Juridica et Politica* Tomus LXVI. Fasciculus 19. Szeged 2004
7. *The Employer's Notice and the Employee's Complaint* (in Hungarian) *Munkaügyi Szemle* 2004. november