

Mediation as a Tool to Avoid Strikes: Case Study in Poland

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ABSTRACT

The purpose of this study is to investigate if mediation is an effective tool to avoid strikes. Mediation is a method of Alternative Dispute Resolution (ADR). It can be applied to solve different types of conflicts, such as disputes about Civil, Family, Labour, Contractual and sometimes Criminal Law. Poland was chosen to analyze this investigation, because mediation is an obligatory stage before employees are allowed by the law to make a strike in that country. This research shows that first country had 311 strikes between the years 2009 and 2016 (absolute numbers) and the number of mediations with agreements' results is approximately 1,31 times bigger than mediation without agreements between the years 1994 and 2017. These numbers can show that mediation may be helpful as a tool to avoid the strikes.

Keywords: Mediation. Strikes. Alternative dispute resolution. Collective disputes. Labor law. Mediation in collective disputes.

INTRODUCTION

Mediation is an extrajudicial method of conflict resolution in which a third-party act as a facilitator of interaction and dialogue between the parties. Thus, it is a method of alternative dispute resolution (ADR) available to parties. In this context, mediation in collective disputes appears also as a method of industrial conflict management. In Poland, it is obliged to apply the mediation in collective labor conflicts before workers strikes. There is an increasing number of labor conflicts, particularly in times of economic and social crisis, when the existing unequal distribution of wealth and power in the capitalist system is aggravated.

This paper presents the mediation as a tool to avoid strikes. In order to achieve this goal, at the beginning the definition, features and procedure of Mediation and the procedure to solve industrial conflict in Polish labor law which this ADR is applied were presented. Following these issues, data concerning mediation as effective tool to avoid strikes were showed and discussed. Among these data, it is possible to highlight the number of applications of mediation in collective disputes between the years 1994 and 2017 and their respective results (agreement, disagreement or partial agreement). Data related to number of strikes in Poland were discussed as well.

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METHODOLOGY

The methodology used on this paper is based on critical analysis of legislation of Poland about mediation of conflict about labor law to understand this phenomenon in a comprehensive and holistic way. Thus, it was utilized the interpretive method with focus on the similarities and difference between the laws of those countries. It was applied too documentary analysis to make possible categorize the improvement of legislation of Poland as well. In order to discuss deeply the subject of this paper the authors have made the collect of the Ministry of Labor and Social Policy from Poland about the results of mediations in this country during 1994 to 2017. Data regarding mediation and strike are showed and analyzed in this paper.

Mediation: definition, features and procedure

Mediation is a method of alternative dispute resolution (ADR). It is a process of direct negotiation between parties and should be a promising instrument to prevent and resolve conflicts in a more constructive way. Williams, Robert and Burden (1997) state that “mediation

is to find ways of helping the other to learn. Particularly, this involves helping learners to move through the next layer of knowledge or understanding” (Cichob³aziński 2013). The occurrence of social conflicts is inevitable, because the people, naturally, is grouped in society. The people are endowed with individual characteristics and interests different. This is enough to make the conflicts appears.

Thus, at mediation is used to solve the conflicts. There is a involvement of a third-party at mediation which is considered necessary to help the parties to deal with the conflicts when they are not able to find solution to their disputes by themselves (Dhiaulhaq & others, 2014, p. 23). The mediation is recommendable in a context of wicked problems (Rittel & Weber, 1973) and when parties disagree about goals. With the help of the mediator, the parties who are involved in conflict work out agreements on the issues aforementioned. It is combined with many technical solutions to solve the conflicts (Elkouri & Elkouri, 2017). It is possible to say that the main features of mediation in Poland legislation and literature are fallowing below:

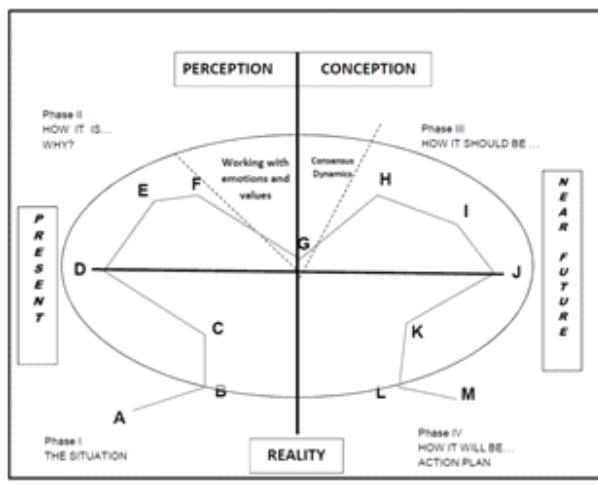
TABLE 1: MAIN FEATURES OF MEDIATION BETWEEN POLAND AND BRAZIL LEGISLATION

MAIN FEATURES OF MEDIATION IN POLAND	
Type of solution controversy	Autocomposition. It is entirely voluntary, informal and Confidentially procedure.
Management of conflict	The mediator does not decide for the parties. Instead, they encourage them to agree to a settlement. It is a non-coercive procedure.
During of mediation	There is no time. However, usually, it is faster than judicial procedure.
Where is located the mediation	The mediation happens outside the scope and control of the judge, but there is a judicial mediation as well.
Who the mediator is	The mediator is chosen by the parties. They are the third party neutral.
Who makes the mediation rules	The rules of mediation procedure are made by parties. However, sometimes the law can regulate the mediation proceeding.
Which type of dispute mediation can be apply	The mediation can be applied to solve different types of conflicts, such as disputes about Civil, Family, Contractual and sometimes Criminal Law.
Main advantages	Simplicity; informality; economy; quickly; confidentiality; largerchances to attend the parties' interests.

Source: Poland. Law about the settlement of collective labor disputes, created on 23 of May of 1991 in Poland;

The mediation is recommendable in a context of wicked problems (Rittel & Weber, 1973) and when parties disagree about goals. With the help of the mediator, the parties who are involved in conflict work out agreements on the issues aforementioned. It is combined with many technical solutions to solve the conflicts (Elkouri & Elkouri, 2017). Broome says that theory and practice are vital for studying of peace and conflict. However, theory and practice could exist in separate worlds, both wants privilege and recognition (Broome, 2017, p. 252). The procedure of mediation can be explained into 13 phases that were represented below from letter A to M (Caser & others, 2017).

Figure 1: The Process of Mediation



(Caser & others, 2017)

According to the authors (Caser & others, 2017), "A" is the Mediator's preparation before the ADR, like a stakeholder analysis. It is a preliminary process design and initial contact with the disputing parties, for instance; "B" shows the mediation agreement (ground rules and behavioral guidelines); "C" corresponds to the issues and the schedule of mediation sessions; and "D" is the mediator's attitude, which ranges from leadership to assistance. It is necessary to define each party's vision, which can be common, complementary, and

conflicting. This process occurs at "E", while "F" shows the work with parties' emotions and values, because identifying feelings and venting emotions is very important in mediation. This also appears at "G". The consensus dynamics, like the approval of mutual comprehension, is represented at "H" point. The process of generating and assessing alternatives for settlement are shown at "I" and "J", respectively.

The success of the mediation is at "K". It is the final bargaining (consensual formula, substantial agreement, package settlements). The result of this process is a final agreement, which are indicated at "L" and "M". The procedure presented above also demonstrates the advantages of mediation in power imbalanced situations. So, for many reasons, mediation is indicated to help solve conflicts, including labor disputes.

The procedure to solve industrial conflict in Polish labor law: the application of mediation

In Poland, since 1991, the treatment and conduct of disputes between unions and employers in industrial conflict for instance has been regulated by the Collective Disputes Act (Journal of Laws RP, 1991). At the beginning it should be emphasized that the institution of a collective dispute has a very strong legitimacy in Polish legislation as it is mentioned in the constitution.

The Constitution of the Republic of Poland of April 2, 1997, directly refers to negotiations with the participation of a labor union organization. Based on the language interpretation of the art. 59 par. 3 of the Constitution of the Republic of Poland, labor unions and employers along with their organizations have the right to participate in the resolution of a collective dispute during negotiations. (...) Article 59, paragraph 2 of the Constitution of the Republic of Poland refers to the concept of a collective dispute. The

procedure to solve industrial conflict in Poland labor law, according to the Collective Disputes Act (Journal of Laws RP, 1991), has the following stages:

1. Submission of a demands list by the labor unions to the employer. These requests may only concern issues listed by law, such as: working and pay conditions, social benefits and labor union rights and freedoms. The dynamics of the conflict are adjusted by the regulation allowing only the employee side to initiate a dispute, while the employer does not have such a power. Therefore, an initiative in a collective dispute always belongs to employees, and the role and position of an employer is always defensive.
2. Employer's response, which determines the further course of the dispute. It can be: positive - all requests have been met, negative - at least one request has not been met.
3. If the employer's response is negative, a collective dispute begins in the sense defined by the Act and the employer is obliged to report it to a District Labor Inspectorate.
4. Negotiations - employer and labor unions talks aimed at resolving disputes. It should be emphasized that 'the employer is obliged to immediately make negotiations to conclude an agreement. [...] The negotiations time has no legal regulation. However, it can be assumed that collective negotiations should be carried out for as long as there is a chance of reaching an agreement.'
5. Mediation - if the negotiations bring a solution to the conflict, the collective

dispute ends. If not - mediations take place. They are a separate institution and consist of several phases. Their type and number depend on a path chosen by the parties to the dispute, because the Act leaves them a great liberty in this area.

6. If mediation does not bring a solution, the parties may request for a settlement in the Board of Social Arbitration. It is, however, a weak institution, because its decisions are binding only if the parties agree to it and for this reason, they seldom use this institution. Strike is another solution. But in this case, an additional criterion must be met, namely a referendum. It is valid only if at least half of employees take part and the majority votes in favour of strike. (Cichob³aziński 2010, 2017 and Lankašová 2017)

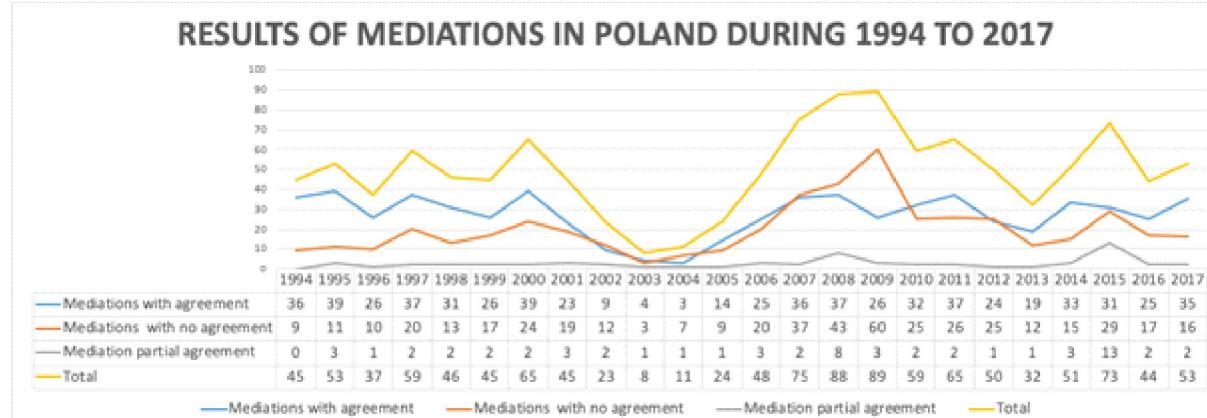
As it is possible to notice, mediation in Polish legal system has an important place in the collective dispute resolution procedure, because it allows the use of all methods of resolving conflicts, before labor unions go to strike - the most severe form of pursuing their interests.

Results in Poland: mediation as a tool to avoid strikes

In Poland, the numbers of mediation applied to try to solve collective disputes appear on the following graphic. This data shows the relation between the numbers of mediations in Poland which have agreements, no agreements and partial agreements, according to total of mediations happened between the years 1994 and 2017.

According to the graph, it is possible to

Graphic 1. Results of Mediations in Poland during 1994 to 2017



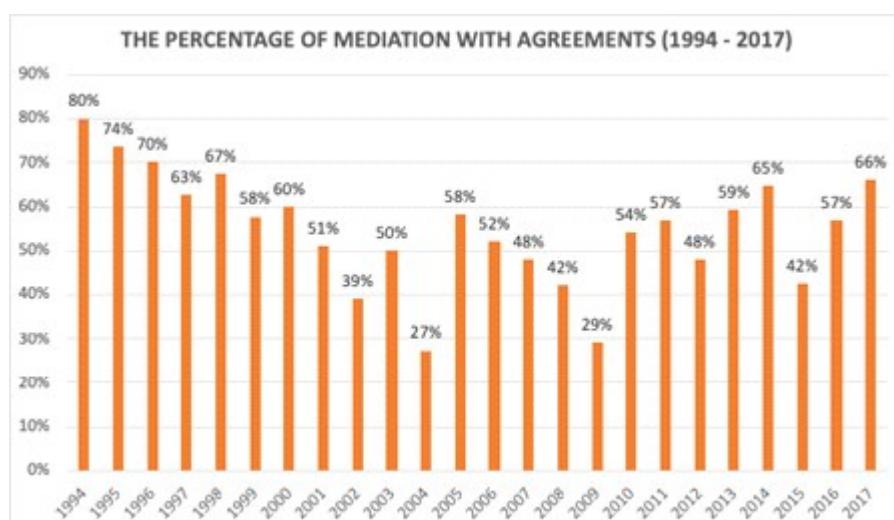
Source: Own study based on the resolution of collective disputes. Guidebook 2006-2007, Social Dialogue Library - Ministry of Labor and Social Policy, Warsaw 2008, p. 45 and Informator 2015, MRPiPS, Warsaw 2016, p. 50.

notice that Poland has an effective system of mediation. In almost every year between 1994 and 2017 the numbers of mediation done with agreement was higher than mediation without agreement (with a discrepancy protocol). The exceptions are the years of 2009 and 2012. Without these years (2009 and 2012), it is possible to notice that the data related to mediation with agreement has been improving each year. In 2016, for example, the data of agreement is 1.4 times higher than mediation without agreement.

In 2017, this number increased to

approximately 2.2. the number of mediations with agreements' results is approximately 1,31 times bigger than mediation without agreements between the years 1994 and 2017. These numbers can show that mediation may be helpful as a tool to avoid the strikes. Usually, when the employees and employer have mediation, they make an agreement. The graphic 2 shows the percentage of mediation with agreements in 1994 to 2017. To find these data, the number of mediations with agreement was divided by the number total of mediation in each of those years:

Graphic 2: Percentage of mediations in Poland with agreements during 1994 to 2017



Source: Own study based on the resolution of collective disputes. Guidebook 2006-2007, Social Dialogue Library - Ministry of Labor and Social Policy, Warsaw 2008, p. 45 and Informator 2015, MRPiPS, Warsaw 2016, p. 50.

It is possible to realize that Poland has been applying mediation with considerable efficiency. The average of those percentages of mediation with agreements between the years 1994 and 2017 is 55%. This data means that mediation has been solving more than half of conflicts which it was applied. For instance, 59%, 65%, 42%, 57% and 66% of mediations had agreement in Poland in 2013, 2014, 2015, 2016 and 2017, respectively.

As mediation has to be applied before workers strike, it is possible to notice that this ADR has been avoiding strikes. The table 2 shows the real numbers of strike in Poland in 2009 to 2016.

TABLE 2: NUMBERS OF STRIKES IN POLAND DURING 2009 TO 2016

	2009	2010	2011	2012	2013	2014	2015	2016	Total
Strikes	49	79	53	17	93	1	14	5	311

Source: Ilostat, 2018, International Loubor Organization Available at: <https://www.ilo.org/>, Access on: 04.12.2018.

In Poland, according to the Collective Disputes Act, a strike, before it is established, must be applied mediation, a strike referendum, and only trade unions can legally organize a strike action (Journal of Laws RP, 1991). The number of strikes in that country has remained quite consistently low. There were 93 strikes in 2013, for example. Therefore, in 2014, there was just one strike registered and it has remained lower in the following years with 14 strikes in 2015 and 5 work stoppage in 2016 (ETUI, 2017). The total of work stoppage in Poland during the years 2009 and 2016 is just 311.

CONCLUSION

The mediation is a method to solve disputes. It involves an impartial and neutral person, the mediator, facilitating the dialogue between the involved parties in conflict. It is a process to

help parties find a mutually satisfactory agreement. The mediator is chosen or accepted by the parties and helps them to prevent or resolve conflicts in a consensual way. The mediation has been used in many different disputes in the world, including labor conflicts. In Poland, that institute has been applied it in collective disputes about employment rights, among other cases. Mediation is private and generally much less expensive than a trial dispute. The mediation helps the parties in conflict to solve the dispute in a more constructive way.

The procedure to solve an industrial conflict and to try to avoid the strike in Poland is regulated by the Collective Disputes Act. To summarize this procedure, at the beginning, the trade union has to send a notification to the entrepreneur (stage 1). Then, the businessman has to respond the notification (stage 2). If he does not accept the employees' demands (it is the most ordinary situation), the collective disputes involved have to try the negotiation (stage 4). After this stage, the difference of both countries procedure to solve this kind of disputes begins.

In Poland, employer and trade union have to try mediation before strike. The table 2 shows the real numbers of strike in Poland. As Polish Law demands the application of mediation before strikes, it was possible to realize that the numbers of this work stoppage in Poland is not higher. In 2009, Poland had 49 strikes; in 2010, 79; in 2011, 53; in 2012, 17; and in 2014, just 1 strike, for instance. The few numbers of work stoppage in Poland can be attributed to the successful application of Mediation, as shown in Graphic 1. The average of mediation with agreements between the years 1994 and 2017 is 55%. This data means that mediation has been solving more than half of conflicts which it was applied.

Thus, this ADR helps the companies to

spend less money and time to solve industrial conflicts. When mediation is completed with a successful agreement it is a good result for business and for the management of industrial relations. Strike means, at least, less hours of works which is prejudicial to the productivity. More than to avoid strike, mediation is relevant to business, because it is possible to increase control over the outcome, to lower the cost and make the process more efficient and to preserve the good relationships between workers and employers.

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