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MEDIATION IN FAMILY AND LABOUR LAW CONFLICTS

Introduction

Peaceful settlement of disputes serves not only the interest of the parties concerned but also that of the entire society. Mediation has a great but partly unexploited potential for preventing and handling conflicts. We use the example of conflict resolution in Croatian family law and Hungarian labour law, examine various levels of regulation and explore to what extent is mediation effective in the two selected fields. We list the obstacles and make recommendations on how to make the most of mediation in the future.

I. Mediation in labour law conflicts

To understand the national system of mediation it is important to examine the international context. For this reason first we present the most important documents regarding labour mediation. Afterwards noteworthy elements from the practice of other states are displayed. Lastly we turn our attention to the Hungarian regulations and practice.

1. Labour mediation in international documents and a snapshot from the practice of other states

a) International documents

The International Labour Organisation treats the resolution and the prevention of labour disputes almost as equal categories. Recommendation No. 92 on Voluntary Conciliation and Arbitration as early as 1951 advocated the use of ADR in labour conflicts. Mediation also has a distinguished role when it comes to workers with limited right to strike or no right to strike at all. The Committee on Freedom of Association underlines that appropriate, independent, fast, conciliation, mediation or arbitration procedures which have the trust of the parties have to compensate for the restrictions on the right to strike.[1]

The Council of Europe also devotes substantial attention to the use of mediation in labour issues. Article 6 (3) of the European Charter states that "With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake […] to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes."

At European Union level one can distinguish three main channels to resolve labour disputes: (1) industrial relations (2) administrative way (3) judiciary. Undoubtedly, the first channel

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[1] 328th Report, Case No. 2114, para. 406.

gains most of the attention. The policy of the Union concentrates more on encouragement of collective bargaining and avoidance of conflict through dialogue, negotiation and workers' participation than the resolution of an already escalated conflict.[2] It is noteworthy that in labour law cases no directive similar to Mediation Directive 2008/52/EC exists. Although an elaborated and uniform regulation is lacking one can observe clear intentions to formulate common ground (see Art. 13 of the Community Charter of the Fundamental Social Rights of Workers). The Community Charter lists three categories of alternative methods: conciliation, arbitration and mediation. Establishment and use of these processes has to be promoted. From the wording of Art. 27 on implementation it is apparent that it is mainly the task of the member states to ensure the application of the rights protected under the Community Charter. This article refers to the specific features of national law and underlines the importance of contractual and act based law sources.

b) The practice of other states

In the US mediation, – which as a technique first appeared in the employment arena– is a natural corollary to conflicts arising from collective bargaining. The Uniform Mediation Act of 2001 with more than 2500 legal sources connected to it is the cornerstone of the regulation. To ensure the effectiveness of the negotiations before a collective agreement expires the parties have to use mediation. The tendency is that the parties often make mediation a prerequisite to arbitration.[3]

Recognising the threat open labour conflicts pose on both the society and the labour market from the beginning of the 19th century until the end of the 20th century most of the European states institutionalised the system of collective dispute resolution. To protect the public interest and to restore industrial peace the state and in some cases the social partners themselves supported the use of a third party (conciliator, mediator or arbitrator).[4] Mediation was (is) useful in individual disputes (related to for instance wage, holidays, unlawful termination of employment relationship, etc.) as well.[5]

In the United Kingdom alternative dispute resolution (ADR) forms natural part of the industrial relations. The Advisory, Conciliation and Arbitration Service claims that amongst other factors its accessibility, fast reactions, and informality are to be thanked for its success.[6] In contrast in France mediation is seldom applied to resolve labour disputes. The

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[2] Hendrickx, Frank, 'Labour Dispute Resolution and Settlement in EU Perspective', in Brenninkmeijer, Alex F. M. et al. eds., *Effective Resolution of Collective Labour Disputes* (Groningen, Europe Law Publishing 2006) p. 33 at pp. 36–37.

[3] Raisfeld, Ruth D., 'How Mediation Works: A Guide to Effective Use of ADR', 33 *Employee Relations Law Journal* (2007) p. 30.

[4] Jefferys, Steve et al., *A five country study of third party dispute resolution social dialogue and the changing role of conciliation, arbitration and mediation services in Europe (CAMS).* 2010. http://www.workinglives.org/londonmet/fms/MRSite/Research/wlri/Comparative%20Report.pdf5

[5] Purcell, John, Individual Disputes at the Workplace: Alternative Disputes Resolution. *EIRO* (2010) 11–12. http://www.eurofound.europa.eu/eiro/studies/tn0910039s/tn0910039s_10.htm (18.11. 2011)

[6] Noonan, Francis, 'The ACAS Approach to Employment Dispute Resolution', in Liebmann, Marian ed., *Mediation in Context* (London J. Kingsley Publishers, 2000) p. 155 at p. 161.

reasons include lack of information and inflexibility of the partners. Lately however, there is a growing interest in mediation on the behalf of social partners especially in relation to acute conflicts requiring rapid solution.[7] A specific feature of the French system to be considered is that labour inspectors also mediate.[8] In Germany works councils have similar role.[9] In Sweden state organised mediation is regulated by law since 1908.[10] The use of mediation is not wide-spread, except one field: labour issues, where it is applied successfully.[11] The mediator has strong rights, should the parties refuse to comply with his request, he may ask the National Mediation Office to intervene and freeze the collective dispute and order a postponement for maximum 14 days.[12] Finland declares mediation compulsory, but with no obligation to reach an agreement.[13]

2. Mediation in Hungary

a) The legal background

The rotes of ADR go way back in Hungarian history. Sayings such as "It is better to be harmed then to litigate", "Gifts make the judge blind" or "The law's nose is waxy" illustrate well the unpopularity of litigation. Alternative methods had a very important role. The so-called trapped or chosen judge (*fogott bíró*) was asked to arbitrate, the head of the extended family (*nagycsalád feje*) served as a permanent judge of his family members. If several hunters shot a beast together, the hunter-judge decided whose shot was fatal, to name just a few examples.

Currently mediation is used in various areas, such as labour law, family law,[14] healthcare,[15] criminal law[16] etc. Hereinafter we will use labour mediation as an example to display the Hungarian system.

Act LV of 2002 on Mediation sets out the general rules of mediation, defines the services, the conditions and the modalities of mediation which precede or replace the trial in the case of litigation in civil and commercial matters. Parties may be natural persons, legal persons, business entities without legal personality and other organisations. Vital principles of mediation include confidentiality, impartiality, interest-based negotiation, open

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[7] Rojot, Jacques et al., 'Mediation within the French Industrial Relations Context: The SFR Cegetel Case', 21 *Negotiation Journal* (2005) p. 443 at pp. 443–467.

[8] According to the statistics of the Labour Ministry in 2003–2004 labour inspectors mediated in 94-98 % of the mediated labour disputes. Grima, François and Trépo, Georges, 'Knowledge, Action and Public Concern: the Logic Underlying Mediators Actions in French Labour Conflicts', 20 *The International Journal of Human Resource Management* 2009. p. 1172 at p. 1173.

[9] Alexander, Nadja Marie, *International and Comparative Mediation, Legal Perspectives* (Alphen aan den Rijn, Kluwer Law International 2009) p. 211 at p. 232.

[10] Eriksson, Kurt, *The Swedish Rules on Negotiation and Mediation. A Brief Summary.* (Medlingsinstitutet, 2010) http://www.medlingsinstitutet.se/pdfs/pdfs_2005/sw_rules.pdf (11.11. 2011) p. 6.

[11] Lindell, Bengt: Mediation in Sweden, 7 *ADR Bulletin* 2004. p. 85 at p. 85.

[12] Industrial actions already under way are excluded. http://www.mi.se/inenglish/lev3_eng_presentation.html (11.11. 2010)

[13] Welz, Christian and Eisner, Mike, 'Collective Dispute Resolution in an Enlarged European Union', *EIRO* (2006) http://www.eurofound.europa.eu/pubdocs/2006/42/en/3/ef0642en.pdf (18.11.2011) p. 7.

[14] 2003 amendment to Government Decree No. 149/1997 (IX. 10.) on Child Welfare Agencies, Child Protection and Child Welfare Administration

[15] Act CXVI of 2000 on Mediation in Healthcare

[16] Act CXXXIII of 2006 about the Mediation in Criminal Cases

communication, trust, etc. Mediation is voluntary. The mediator's fee is subject to agreement. Mediation might be used before, during or after court procedure. Though there is no legal obstacle to having recourse to extrajudicial mediation as an instrument of management of litigation but there has been no significant breakthrough in this field as of this date.[17]

Mediation in labour conflict is regulated by Act 22 of 1992 on the Labour Code (hereinafter: LC). The LC came shortly after the change of regime. It introduced arbitration, mediation and conciliation. These methods were seen as tools for resolving collective disputes over interests. The weak point of the act: blurred categories. The current LC distinguishes four forms of ADR: negotiation (*egyeztetés*), conciliation (*békéltetés*), mediation (*közvetítés*) and arbitration (*döntőbíráskodás*). Negotiation leaves the decision to the parties, who exclusively participate in the process. In conciliation a third, neutral person is involved. The conciliator helps the parties to find a solution but has no authority to give any recommendations to the parties nor decide any of the issues. His/her aim is to improve the parties' communication, define and clarify the issues, help the parties understand their and the others needs and interests and in general get the viewpoints closer. The third method, mediation is very similar to conciliation, however there is a very important difference. The mediator is more active, he/she has the competence to make suggestions for resolution of the conflict. The suggestions however are not binding to the parties. Finally, the strongest method regulated by the LC is arbitration. Here the dispute is taken from the hands of the parties and turned over to a third, neutral decision maker, the arbitrator. This is the strongest method, because the case is decided by the arbitrator.

To resolve disputes of interest the Hungarian law makes the use of these alternative methods available. The Strike Act (Act VII of 1989) too mentions one method itself: it prescribes an obligatory 7 day cooling off period in which the parties have to negotiate but it does not contain reference to other methods.

Collective interest-based disputes are typically the subject of collective bargaining between the parties. The balance of power between trade unions and employers (employers' associations) is closer to equal (at least compared to the balance of power between employee and employer). About half of all collective agreements contain regulations on internal conflict settlement and 28 per cent establish some sort of conflict-management committee. Also, the majority of multi-employer collective agreements include some mechanism to solve collective disputes at the workplace level.[18]

b) Labour mediation – is it any different?

Though mediation as a technique is universal, the fields in which it is applied are unique. Divorce Mediation may serve as a therapeutic adjunct to divorce and may help the parties in

[17] First International Conference on Judicial Mediation, Paris, 16-17. October 2009

[18] András Tóth and László Neumann, 'Thematic Feature on Collective dispute resolutions in an enlarged European Union - case of Hungary', *EIRO,* (Dublin 2005) http://www.eurofound.europa.eu/eiro/2005/08/word/hu0508102t.doc (15.01.2012).

resolving grief issues. In case of labour relations the characteristic which makes mediation unique is the special working environment and the imbalance of power between the parties. While the employer possesses more resources and information, the employee as the subordinated party has much less power and influence. The mediator has to create equilibrium.

To understand the mechanism to resolve employment conflicts one has to be familiar with a specific typology of employment disputes. These disputes are divided into subcategories such as individual and collective, rights and interest disputes. The first concerns a single worker, the second groups of workers, mainly represented by a trade union. A rights dispute concerns disagreement over the implementation or interpretation of statutory rights, or the rights set out in an existing collective agreement. An interest dispute involves settling the terms of a new agreement, mostly a collective agreement.

It is essential to point out that mediation is capable of solving both individual and collective disputes of law, but it is up to the legislator to decide in which cases it allows mediation to operate.

Anyone may be a mediator who has a diploma and registers on the roll of mediators, but there is no requirement to complete mediation training. Mediators come from all sorts of backgrounds (e.g. law, sociology, psychology and economics) and usually have another „main occupation". There are additional requirements of qualification and practice regarding certain legal areas, such as child protection. A labour mediator has to hold a university degree and have five years work experience in the field.

The parties may decide to make the content of their agreement resulting from mediation enforceable. They can request the court or a public notary to incorporate the agreement into a judgment or an authentic instrument which can be enforced afterwards.

The agreement relating to the mediation procedure does not affect the right of the parties to turn to the court to deal with their conflict. In such a case, the court forces the plaintiff to reimburse the costs of the procedure. If, thanks to mediation, the parties agree on a solution the judge can confirm the agreement and verify its conformity with the applicable rules. If the mediation is unsuccessful the parties can refer to the court to decide the case (provided it concerns conflict of rights). The code of conduct for employment law disputes issued by the Labour Mediation and Arbitration Service (hereinafter: MKDSZ) contains rules on confidentiality.

The main actor in conflict resolution is the Labour Mediation and Arbitration Service. MKDSZ carries out three activities: conciliation, mediation and arbitration. Although it has been operating since 1996 parties seldom turn to the Service. In practice, unfortunately parties mostly take advantage of MKDSZ when chances are already high that the situation gets bitter, by the time even the relationship that could initially be considered as good goes awry when "direct connections almost completely vanish, communication ceases, and trust

reaches the lowest possible level."[19] The mediation offered by the Service however is successful in 93% of the cases that is the parties reach an agreement. The presence of the mediator eases the tension, gets the dialogue between the parties started, keeps the negotiation within borders, encourages the parties to suspend the use of coercive tools and give up threatening one another. Mediation usually lasts for 3–4 weeks average.[20]

Mediation is often used in disputes concerning pay. Mediation is applied in transport sector (Volán bus company, Malév Hungarian Airlines), energy supply (Nuclear Plants of Paks) as well as certain areas of the public sector (school, hospital).[21] For instance it was used successfully in resolving the dispute between the workers of Dekoten Ltd (a firm which is a contracting partner of the Nuclear Plants of Paks) and the workers of PADOSZ (Trade Union of Paks Nuclear Power Plant Employees). The MKDSZ intervened after an initial strike action and the dispute was settled in a short period of time.[22] Mediation is also used in relation to strikes (prevention, moderation of escalated strikes) it makes the negotiation process more effective, speed up the agreement. It is important to point out that mediation is not a substitute for the right to strike. There is one exception: when certain groups of workers (e.g. policemen) are denied the right to use industrial weapons. In such case the use of an impartial third party, a mediator, or another ADR expert becomes essential, therefore the use of the ADR method so to speak replaces the more traditional methods of collective interest representation.[23]

3. Labour mediation: a tried & tested but seldom used method

a) Tried and tested

We are all aware of the benefits of mediation. This method is fast, cheap, flexible and adaptable to the parties' needs, the parties retain the ability to make their own decision. Mediation could (and in fact it does) prevent damages, let us think about the working hours lost due to strike. Indeed, mediation has numerous advantages. It is economic, disputants save time and money. It handles the conflict confidentially, in a safe environment. It is less complicated and more flexibly than the judicial way. It is the parties process as they have the power to "craft" the process, choose the mediator, select the issues they wish to discuss, self

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[19] Gulyás Kálmán, 'Közvetítés a munka világában' [Mediation in the World of Labour], in Eörsi Mátyás and Ábrahám Zita szerk., *Pereskedni rossz!* [It is Not Good to Litigate!] (Budapest, Minerva 2005) p. 104 at p. 109.

[20] Kovács Géza, 'Sztrájk a mediátor szemével' [Strike through the Eyes of the Mediator], 54 *Munkaügyi Szemle* (2010) p. 52 at 53–55.

[21] Mihály Ildikó, 'Vitarendezés, kulturált munkaügyi kapcsolatok, preventív mediáció, beszélgetés Kovács Gézával a Munkaügyi Közvetítő és Döntőbírói Szolgálat igazgatójával' [Conflict Resolution, Civilised Labour Relations, Preventive Mediation, Interview with Kovács Géza, director at Labour Mediation and Arbitration Service], 52 *Munkaügyi Szemle* 2008 p. 89 at pp. 89–92.

[22] http://www.tpk.org.hu/engine.aspx?page=tpk_MKDSZ_Hirek_rolunk_irtak&switch-content=tpk_mkdsz_rolunk_egy_konfliktus_tanulsagai&switch-zone=Zone1&switch-render-mode=full (21.07.2010)

[23] Kajtár Edit, *Magyar sztrájkjog a nemzetközi és az európai szabályozás fényében. PhD értekezés* [Hungarian Strike Law in the Light of International and European Regulations. Doctoral Thesis] (Pécs, PTE Állam- és Jogtudományi Karának Doktori Iskolája 2011) p. 27.

determination is a key element, in other words the parties remain "masters of the case". It is voluntary, the parties may leave the room any time they feel to. As the parties play an active role in shaping the solution the agreement usually lasts. There is also a possibility to future check-ups. Mediation very often serves as an "alarm clock" – as the third party neutral sheds light on the objective facts as well as the things the parties may lose (in terms of time, money, prestige, etc.) if they continue the fight.[24] The existence of effective dispute resolution method is a decisive factor in the success of collective bargaining process and it also have an effect on how individual workers feel (and on the long term perform) at the workplace. For these reasons we can fully agree with Rúzs Molnár Krisztina who claims that unlike in other fields of law, in labour law mediation should not be seen as an "alternative," but as the "traditional" way of dispute resolution.

b) Seldom used: The obstacles to mediation in labour law

Seeing the advantages of mediation one could easily arrive to the conclusion that in Hungary the majority of conflicts is resolved this way. The reality however is different, strikes (in case of conflict of interest) and labour court cases (in case of conflict of law) are a lot more prevalent. Despite all its benefits mediation is seldom used. Here we attempt to display the reasons for this phenomenon. We will move from broad to specific, first we will expose those features that are connected to Hungarian culture, later focus on those elements that make mediation in general difficult, finally we highlight those specific elements that impede labour mediation.

Starting with the features that are connected to Hungarian culture, historical traumas of the 20th century are partly to be blamed for the ineffectiveness of mediation. These dark periods deeply traumatized the Hungarian society, created fear, suspicion and the sense of injustice. The latest trauma, the 45 years of communist-socialist era created mistrust in society. This works against mediation, a process which is very much based on communication patterns and trust (later in the sense that the participants trust in the process and in the legal system).[25]

There are obstacles stemming from the legal regulation too. The Hungarian Mediation Act is becoming outdated. To take one example: the act is not suited to online mediation. The obligation to meet personally (at least twice: once at the first meeting and once when the parties sign the settlement agreement) rules out solely online procedure.[26] The other side of the same coin: The parties can send their representative to act on their behalf (except on the

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[24] Hajdú József and Rúzs Molnár Krisztina, 'Az alternatív vitamegoldás rendszerének általános jellemzői, különös tekintettel a munkaügyi vitákra'' [General Features of the System of ADR with Specific Regard to Labour Disputes] in Ploetz, Manfred and Tóth Hilda szerk., *A munkajog és a polgári jog kodifikációs és funkcionális összefüggései* [Labour Law and Civil Law in Functional and in Codification Context]. (Miskolc, Novotni Kiadó 2001) p. 337 at pp. 355–364.

[25] Révész, Judit, *Mediation without Trust: Critique of the Hungarian Mediation Law* May 2005. http://www.mediate.com/articles/reveszJ1.cfm (03.01.2012)

[26] Szőke, Gergely, 'The Possibility of Online Mediation under the Hungarian Mediation Act – in Comparison with a Number of International, including European Documents on Mediation', 15 (2) *Information and Communications Technology Law* (U.K.) (2006) p. 129 at p. 138. http://mujlt.law.muni.cz/storage/1205530110_sb_12-szoke.pdf (10.13.2011)

first meeting when they sign a mediation form). Though at the first glance this seems as a beneficial option very often it backfires. The main advantage of the mediation is that it creates a safe environment in which parties can act. If there is no need to participate personally, this opportunity is lost. Another flaw is that the plaintiff, having opted for a trial after successful mediation is forced to pay all the expenses of the court procedure regardless of the outcome of the lawsuit.

Some obstacles are related to the system of labour relations. In the Hungarian context of a pluralistic union system, disagreements between members of different unions can also make dispute resolution difficult. There are also "hard to deal with" cases. For instance conflicts in multinational companies are difficult to access. While they seemingly accept the unions' presence, complaints filed to headquarters are often sanctioned by local managers. Legal regulations concerning mediation do not suit multinational companies. Local executives may not have the competence to make decisions and, in such a situation, the MKDSZ has no mediation instruments at its disposal either. Also, the MKDSZ only has access to large organisations where trade unions are present, even though a substantial proportion of individual disputes are emerging in SMEs. A solution would be to improve employees' awareness, which might be raised if mediation cases received more publicity.[27]

The parties' presuppositions and (hidden) agendas may also serve as disincentives. Parties often have prejudices about mediators and they generally wish to resolve their disputes alone. Oddly enough in practice it also happens that the parties ask for mediation without a genuine will to settle the dispute (e.g. the case between the Free Trade Union of Railway Workers and Hungarian Railway Company). Obviously mediation does not work if the true will to settle is missing, or if one of the parties enters mediation under false pretences (for instance to gain time or money).[28] The use of mediation is also not advisable if one of the parties wishes to make a precedent out of the case (i.e. the real motive is to send a message to the other).[29]

4. Conclusions regarding labour mediation. The way forward

Mediation indeed has many outstanding advantages yet, it would be mistaken to view it as a "one fixes it all" magic tool. As examples from Hungary and from other states show, mediation is capable of solving the majority of collective labour disputes, but not all of them.

What is the way forward? The first step is to provide information in various levels and to various groups. Education should start as early as possible (elementary school). It is essential

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[27] Lovász, Gabriella and Neumann, László, 'Social Partners Evaluate Role of Mediation and Arbitration Service', *EIROnline* (2006) http://www.eurofound.europa.eu/eiro/2006/10/articles/HU0610019I.htm (10.13. 2011.) See also: Balogh Eszter et al., *Kutatási Beszámoló. A Munkaügyi Közvetítői és Döntőbírói Szolgálat tevékenységének társadalmi hasznossága. (Rézler Gyula Mediációs Intézet Zárótanulmánya)* [Research Report. The Social Effectiveness of the Labour Mediation and Arbitration Service. (Final Report of the Rézler Gyula Mediation Institute)] (Budapest, Foglalkoztatási és Szociális Hivatal 2008)

[28] Lovász and Neumann 2006: loc. cit. n. 27.

[29] Csécsei Roland: 'Szerződéses jogviták és a mediáció' [Contract Conflicts of Law and Mediation], in Eörsi Mátyás and Ábrahám Zita szerk., Pereskedni rossz! [It is Not Good to Litigate!] (Budapest, Minerva 2005) p. 67 at pp. 72–73.

that ADR forms part of higher education such as legal education (this can be done by including mediation in the academic curricula). We should provide law students with information about ADR, negotiation techniques and peaceful dispute resolution. We should teach them to think outside the box, consider alternative options to solve disputes, not just trial. It is to be welcomed that specific trainings are being made available for the parties concerned (employers, employees, trade unions). In Hungary since 1 April 2004 persons eligible for legal assistance can receive information from the legal assistance provider on the possibilities of settling a legal dispute out of court. Their three-day training is based on the US model, teaching negotiation techniques, the stages of mediation, the mediator's role, ethical issues as well as a number of skill building exercises. Judges are in the position to spread mediation as well therefore their training is of utmost importance.

Only when information is provided can we start to build trust towards the use of mediation. Once people know about mediation, they might try it, and former good experience with mediation certainly serves as an incentive to choose the method again. The willingness to negotiate is strengthened by previous positive experience. In Hungary the parties' choice is usually based on personal connections or on how experienced the mediator is (the more an expert mediates the more likely he or she will be asked again).[30] If one of the parties requests mediation for the other one this serves as an incentive to go along too, as he too would like to demonstrate his willingness to make compromises to the outer world (to the media, business partners, consumers).

Furthermore, there is a need for more effective legal regulation. Of course, it would be naive to assume that there is a direct and exact correlation between the changes in for instance strike numbers (one indicator of open collective conflicts) and the modification of the mediation act. However, it is also true that strikes as social phenomenon have a special relationship with the legal regulations. One example: in Spain, when strike rates went down, analysts pointed out more factors behind the decline. Obviously, economic prosperity kept the fighting spirit low, but there was another reason too. They claimed that the creation of a system of conciliation and mediation too contributed to industrial peace.[31] For this reason in Hungary the legal regulation concerning the operation of the MKDSZ needs to be clarified; this should include specifying the individual cases in which the MKDSZ is authorised to act, together with supplementing public sector laws to regulate proceedings of mediation.

It would be one option to make mediation obligatory in certain types of disputes. This idea is supported by the trade unions but fiercely opposed by the employers. This solution is dubious because of the very nature of mediation (i.e. it is a voluntary process). The availability of mediation is a better option. By available we mean: a system that is cheap,

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[30] Lovász Gabriella, 'Mediátorok: szerintünk. Avagy milyen tényezők állnak az MKDSZ közvetítői tevékenysége fogadtatásának hátterében?' [Mediators- How We See Them. What Factors Influence the Reception of the Mediation Activity of MKDS?], 54 *Munkaügyi Szemle* (2010) p. 56 at p. 59.

[31] Mongourdin-Denoix, Sara, 'Spain: a country profile,' *EIRO* (2010) http://www.eurofound.europa.eu/pubdocs/2010/08/en/1/EF1008EN.pdf p. 8. (.19.11.2010)

accessible and fast in reacting to the conflict. In labour disputes we suggest the parties involved to inform the MKDSZ about their collective bargaining developments.

Last but not least mediators as well as their organisations (especially the MKDSZ) have to adapt to the new challenges. As we pointed out there is only a small number of requests for mediation. In addition to provision of information this requires a shift in activity towards pre-emptive mediation and counselling and a more close cooperation with the social partners is a must.

II. Mediation in family law conflicts

Termination of a family union and the need to resolve the issues concerning disputable personal and ownership relationships between former marital and cohabitation partners, as well as regulation of the way for accomplishing content of parental responsibility concerning joint children, are the most frequent sources of conflict of interests in family law matters.

For example, conflicts may break out between the parents regarding exercising parental responsibility for their common child, whereby the same may be further encouraged, or even caused by a disturbed relationship of the spouses, but long-term parental conflict also inevitably leads to crisis of marriage and can cause dissolution of a family union.

Therefore, in this part of paper it will be presented some general reflections on mediation in family law conflicts, international regulations in this area, especially legal instruments of the Council of Europe as well as the present state of family mediation in Croatian domestic legislative with concluding reflections on peaceful resolution of conflict of interest in family law matters including review of possibilities for its further development and extension of its implementation in Croatian family law system in light of European solutions and global tendencies.

1. Family mediation in general

Family law conflicts are specific due to the fact that family law matters above all involve an emotional component and continuity, especially in the case of relationships between parents and children. In judicial proceedings, as a regular way of giving legal protection, family members are opposing parties and this leads to deepening of conflicts in the relationship and growing apart of the parties involved in family law matters. Such development of the situation usually affects children the most. In such circumstances children are often in the centre of their parents' conflicts and therefore become a "weapon" in legal disputes of the people who are primarily supposed to take care of their benefit. Seeking for another way, trying to obtain something that is a rare case in lawsuit, and this is a winning position for both parties in a legal matter (the so called win-win) obtained by their cooperation and agreement and better implementation of principals for protection of the best child's interest lead to broader acceptance and legal regulation of various models of peaceful resolution of conflicts of interest in family legal matters in the contemporary legal systems.

The sense of different approach when it comes to resolving conflicts in family law matters lies firstly in the endeavour to give the family in crisis, which is confronted with strong

emotions, weakening of the feeling of belonging and being connected to each other provoked by divorce or termination of cohabitation partnership, the needed support and help to reshape their relationships. Reaching acceptable solutions by agreement should contribute to shortening of conflict duration, increasing of sustainability of agreements achieved in such a way, and better future communication for the sake of the child with the aim to obtain better and more quality parenthood after the termination of family union.

The most widespread and important form of peaceful resolution of family law disputes is family mediation. It is a process that was initially tied exclusively to the controversies that arose over the divorce, while in recent times its application seems to expand.

In addition to family mediation, as a main institute in the field of peaceful settlement of disputes of family law disputes, there are also other forms of assistance to families in crisis with the aim of faster and easier finding ways of resolving the conflict, which mainly take into account the interests of the parties themselves, encouraging them to participate actively in the search for acceptable solutions, respecting their autonomy, but taking into account the protection of the welfare of children who are often at the centre of family conflict.[32] Taking into account the experience of other jurisdictions which suggests that the numerous advantages of this way of resolving the family law conflicts, and because of the importance of preserving family relationships after termination of the family union, especially for children, it is necessary to consider the potential for their wider acceptance in the Croatian family law system.

2. Family mediation in international documents

The first international instrument, which includes provisions about the use of family mediation was the European Convention on the Exercise of Children's Rights[33] 1996 that emphasizes the importance of the principle of family autonomy and obligates the member states of Council of Europe to promote mediation, i.e. peaceful models of resolving conflicts

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[32] Those models are: parenting education, expert evaluation, parenting coordination, collaborative law. See A. Schepard, *Children, Courts and Custody* (Cambridge, Cambridge University Press 2004) pp. 68-78, 108-111.; G. Firestone and J. Winestein, 'In the Best Interest of Children, A Proposal to Transform the Adversarial System', 42 *Family Court Review* (2004) pp. 203-215.; Ver Steegh, Nancy – Erickson, Solveig, 'Mandatory Divorce Education Classes: What Do the Parents Say', 28 *WM. Mitchell L. Rev* (2001), pp. 890-909,; T. Schaefer, 'Saving Children or Blaming Parents? Lessons from Mandated Parenting Classes', 19 *Columbia Journal of Gender and Law* (2010), pp. 491-537.; Pollet, Susan L., 'A nationwide survey of programs for children of divorcing and separating parents', 47 *Family Court Review* (2009), pp. 523-543.; J. Johnston, 'Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-conflict Divorcing Families and their Children: Who Needs what Kind of Help', in J. Singer and J. Murphy, eds., *Resolving Family Conflicts* (Ashgate Publishing Limited 2008) pp. 297-316.; N. Ver Steegh, 'Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process', 42 *Family Law Quarterly* (2008) pp. 659-671.; E. Greenberg, 'Fine Tuning the Branding of Parenting Coordination: „...You May Get What You Need“', 48 *Family Court Review* (2010) pp. 206-211.; P. Tesler, *Collaborative Law, Achieving Effective Resolution in Divorce without Litigation* (Chicago, American Bar Association 2008),; J. Hilbert, 'Collaborative Lawyering: A Process for Interest-Based Negotiation', 38 *Hofstra Law Review* (2010) pp. 1083-1101.

[33] European Convention on the Exercise of Children's Rights, Official Gazette (Narodne novine – MU) 1/10.

of interest in family law matters related to the exercise of children's rights. According to the Convention, they should be the primary format for resolving such disputes. Family mediation -should be allowed before the court proceedings were initiated, and during it, as well as in the stage of enforcement, while the agreements resulting from mediation or other forms of ADR should not be against the best interests of children.[34]

Another instrument of the Council of Europe also stipulating obligation of States Parties to promote and facilitate the peaceful ways of resolving conflict of interest in family law matters is the Convention on Contact Concerning Children 2003.[35] Specifically, the Convention provides that the judicial authority shall take all appropriate measures to encourage parents and other persons having family ties with the child to reach amicable agreements with respect to contact, in particular through the use of family mediation when resolving disputes concerning contact.[36]

Since both conventions are in force in Croatia, it follows that the state is obliged to comply with the conventions' requirements and to act appropriately in order to promote family mediation and peaceful ways of resolving family law disputes generally, especially those affecting children.

The most important document of the Council of Europe concerning the peaceful settlement of conflict of interest in family law matters is definitely Recommendation No. R (98) 1 of the Committee of Ministers to member states on family mediation.[37] Despite being non-binding legal document, the Recommendation is extremely important because it contains fundamental principles and regulates the basic characteristics of mediation proceedings in family matters in details. It provides the member states with the basis and legal framework for regulation of family mediation. Recommendations to the Member States of the Council of Europe include introduction, promotion and strengthening of implementation of family mediation as an appropriate model for resolving family law disputes together with outlining advantages of that model of dispute resolution in terms of preserving quality and continuity of family relationships and promoting the best interests of the child. The following document of Parliamentary Assembly of Council of Europe is the Recommendation 1639 (2003) on family mediation and gender equality[38] that aimed to regulate one aspect of family mediation more detailed, namely to ensure gender equality at all stages of the proceedings. In addition, when the subject matter is related to a question concerning a child, it encourages the participation of the child in mediation in order to be given the opportunity to express his/her

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[34] Art. 13. Convention on the Exercise of Children's Rights. See European Convention on the Exercise of Children's Rights (ETS no. 160), Explanatory Report (p. 65.), http://conventions.coe.int/Treaty/en/Reports/Html/160.htm, (14.12.2011)

[35] 'Convention on Contact Concerning Children', *Narodne novine – MU*, 7/2008, 1/2009.

[36] Art. 7. Convention on Contact Concerning Children.

[37] Recommendation No. R (98) 1 of the committee of Ministers to member states on family mediation, https://wcd.coe.int/wcd/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1153972&SecMode=1&DocId=450792&Usage=2 (03.12.2011)

[38] Recommendation 1639 (2003) on family mediation and gender equality**,** http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta03/erec1639.htm, hereinafter: Recommendation 2003, (12.12.2011)

opinion because, according to the recommendation, just hearing the child can come up with solutions that will indeed be in its best interest.[39] The Recommendation also specifies the basic content and characteristics of family mediation and proceeding from the principles set out in earlier Recommendation (1998), proposes a series of measures such as the ruling out mandatory referral to mediation, development "screening" tools for domestic violence, the inclusion of mediation in the legal aid system, review of the lawfulness and fairness of mediation agreements through their approval by the competent courts, the confirmation of mediation agreements by the competent courts, etc. The Guidelines for better implementation of existing recommendations concerning family mediation and mediation in civil matters of the European Commission for the Efficiency of Justice from 2007[40] highlighted the importance of providing information and raising awareness of general public on family mediation and its benefits, the indispensable role of judges and lawyers to develop culture of peaceful resolution of disputes, the existence of supervision system and evaluation of its implementation, the appropriate qualifications of mediators, common standards concerning their training, then confidentiality principle of the proceedings, and providing state's financial support for the mediation programmes. The above mentioned document provides the possibility that states make the obligation to bear the costs of court proceedings dependable on the party's attitude and willingness to discuss and attempt to resolve the dispute concerned using family mediation.[41] Such an approach could indirectly encourage the parties to think about the possibilities offered through alternative ways, which they should be informed about, and then decide to accept it. In addition to the documents of the Council of Europe, the relevant provisions on the peaceful resolution of disputes contain documents and initiatives adopted by the institutions of the European Union, although none of them applies especially to disputes in family law matters.[42]

Taking previously exposed into account, it should be pointed out that adequate support and assistance provided to families by concerted action of all authorities and persons whose support and assistance is expected, as well as their proper education and awareness about the benefits that the conflicted family members can have from expert and efficient acting, are of crucial importance for achieving the aim which should be strived for in our society - the preservation of the content and quality of family life in terms of transformation of family relationships due to the termination of the family union in order to reduce or avoid the negative effects of family law conflict.

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[39] Art. 6. Recommendation 2003.

[40] Guidelines for better implementation of existing recommendations concerning family mediation and mediation in civil matters, http://www.coe.int/t/dghl/cooperation/cepej/series/Etudes5Ameliorer_en.pdf, hereinafter: Guidelines 2007, (03.12. 2011)

[41] Art. 49. Guidelines 2007.

[42] Those documents are: Green Paper on alternative dispute resolution in civil and commercial law COM (2002) 196, European Parliament resolution on the Commission's Green Paper on alternative dispute resolution in civil and commercial law P5_TA (2003) 0084, European Code of Conduct for Mediators, Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters

Achieving this goal would follow the requirements set to Croatia by international documents that are in force in Croatia, being a state party, but would also mean taking into account modern trends in this area with a clear commitment to responsible parenthood with respect to the guaranteed child's rights.

3. Family mediation in Croatian legislation

In accordance with the provisions of the Croatian Family Law Act 2003[43] there is only one model of peaceful settlement of family law disputes carried out only in conjunction with the process of divorce and the content of that procedure is limited to an attempt to identify the causes of marital relations disorder, preferably to remove them and reconcile spouses, as well as to inform spouses about legal and psychosocial consequences of their divorce.[44] This is the institute of family intermediation, which has a long tradition in the Croatian family law. The social welfare centres, council for marriage and approved expert persons are authorized to help, and the process is substantially limited in content to attempt of spousal reconciliation, i.e. it has function of preserving the marriage, and the mere introducing regarding the legal and psychosocial consequences of divorce.[45]

The meaning and purpose of family intermediation, according to the rules of comparative family law systems and international documents, is to assist the parties in arranging consequences of divorce amicably, i.e. resolving other family law disputes by participation of a third neutral person.[46]

Since Croatian legislation does not specify that as content of the proceeding, i.e. obligation of the mediator, the mediation process according to the Family Law Act 2003 in strict sense, is difficult to deem as a real alternative model for resolving the disputes in family law matters. Likewise, the procedure of intermediation as a kind of peaceful resolution of conflict is in our family law limited to cases of divorce, while there is apparent trend towards expanding the application of mediation on other types of family law disputes.

This primarily applies to disputes about parental responsibility, which can occur regardless of the divorce. In that sense we think that it would be good to expand the applicability and to encourage alternative ways of resolving other types of disputes in family law matters, especially those affecting children, and work on dissemination of information and appropriate training of professionals working with families.

With intermediation regulated by the norms of Family Law Act 2003, the other possibility for peaceful resolution of disputes in family law matters in Croatian positive law is the

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[43] 'Family Law Act' *Narodne Novine*, 116/2003, 17/2004, 136/2004, 107/2007, 61/2011.
[44] Art. 48. par. 1. i 2. Family Law Act.
[45] See Irena Majstorović, 'Posredovanje prije razvoda braka: hrvatsko pravo i europska rješenja' [Divorce Mediation: Croatian Law and EuropeanSolutions], 57 *Zbornik Pravnog Fakulteta u Zagrebu* (2007) p. 405 at p. 415.
[46] Cf. Schepard, op. cit. n. 32., at. p. 52.; L. Parkinson, *Family Mediation* (London, Sweet & Maxwell 1997) p. 5.; M. Roberts, *Mediation in Family Disputes, Principles of Practice*, (Aldershot, Ashgate Publishing Limited 2008) p. 8. and 9.

application of norms of the Conciliation Law Act 2011[47] to the disputes in the area of family law. Interpretation of the provisions of this Act could be inferred about their applicability and to disputes concerning family law relations and not just property ones (as it was the case under the previous Conciliation Law Act 2003[48]).

Nevertheless, as acceptable solution we consider the specific provisions within the basic family law legislation which would regulate the scope of peaceful resolution of conflict of interest in family law matters because one should not forget the uniqueness and complexity of family relations, especially in case of crises caused by conflict and the consequences it may have on third parties, especially when we think of the children.

For a quality system of peaceful resolution of family law disputes it is necessary to identify the specific characteristics of those types of disputes in relation to others which can also be dealt with alternative methods of resolution.

Ignoring special characteristics of family law disputes or making them equal to any other disputes in the area of civil law, represents a serious danger and underestimates the needs and best interests of children.[49]

4. Closing remarks on family mediation

Conflicts that arise between family members, especially between parents due to divorce or termination of the family union and the need for reshaping their relationships as well as those concerning children, except its legal nature, essentially involve strong emotions, and represent not only a legal conflict, but also psychological crisis and the crisis of relations. We can say that much more complex and layered conflict between family members is rooted deeply in the background of legal dispute. According to the nature of judicial proceeding, the judge who resolves a legal dispute does not involve himself in considering and discussing about that conflict background, so decision that he makes on filed claim cannot resolve all the complexities of family relationships from which the concerned dispute has arisen. Parties' dissatisfaction due to the mentioned reflects the fact that traditional judicial proceedings are not always the most appropriate way to resolve conflict of interest in family law matters.[50] In such circumstances greater success, both on the level of the family within which the conflict exists and the general social level, can be achieved by family mediation and other forms of peaceful resolution of family disputes. Judicial proceedings are likely to reinforce entrenched positions and rarely provide a solution that is acceptable to both parties.[51] They may also lead to further deterioration of the parties' relationship, and family conflicts are likely, despite or precisely because of court decision, to last even longer. Before

[47] 'Conciliation Law Act', *Narodne novine*, 18/2011.
[48] 'Conciliation Law Act', *Narodne novine*, 163/2003, 79/2009.
[49] Walker, Janet, 'Introduction to Family Mediation in Europe and its Special Characteristics and Advantages', in *Family Mediation in Europe: Proceedings. 4th European Conference on Family Law. Strasbourg, 1-2 October 1998* (Strasbourg, Council of Europe, 2000) p. 21 at p. 25.
[50] Err, Lydie, *Family Mediation and Equality of the Sexes, Report for Debate in the Standing Committee, Doc. 9983,* Committee on Equal Opportunities for Women and Men, 2003 http://assembly.coe.int/Documents/WorkingDocs/doc03/EDOC9983.htm, p. 21. (01.12.2011)
[51] Err, Lydie, 2003: loc. cit. n. 50. p. 23.

the adversarial judicial proceeding, which still remains the last option, the parties should be provided opportunities and be helped in reaching solutions of their dispute that will best suit their needs and interests. Specifically, the solutions obtained in this way are more sustainable and largely carried out without the need for some form of intervention or coercion. The interest of the child in such alternative models of family dispute resolution shall be a primary consideration.

III. Final conclusions

Mediation is a remarkable method with a partly unexploited potential. The obstacles which hinder the optimal efficiency of mediation are from various sources: the broader environment ("culture of mistrust"), the specialties of the given fields of law (power imbalance), the flaws in the letters of the law. How could we overcome these obstacles and make mediation more effective? The first step is to provide information and build trust. We suggest to raise awareness at both general and specific levels. Education should start at elementary school. Later on, legal education is in a distinguished position as it trains future judges, advocates, etc. It is very important that specific trainings are provided for the parties to the disputes concerned (employers, employees, trade unions, couples, families). While ADR education in elementary school is in its infancy, we can find encouraging examples in some Hungarian and Croatian law schools' academic curricula. Regarding specific information: the training of legal assistance providers in Hungary is a good practice.

There is a need for more appealing and more effective legal regulation (in terms of confidentiality, costs, enforceability, etc.). Of course, it would be naive to assume that there is a direct and exclusive correlation between the changes in for instance strike or divorce numbers and the modification of labour or family law mediation. However, it is also true that conflicts are solved more effectively in a stable and coherent legal environment. On the other hand it is also true that mediation must not be over-regulated.

An important contribution to the quality of the implementation of mediation, especially in family law conflicts, would be the creation of codes of ethics and standards of good practice as well as establishing an adequate system of monitoring adherence to set rules and standards that would perform a central authority for the mediation, the existence of which would be desirable from the point of affirming a new approach to resolving family law disputes.

Knowing the numerous advantages of mediation it is tempting to suggest introduction of obligatory mediation in certain types of disputes. This solution however is doubtful because of the very nature of mediation (voluntary process). The enhance availability of mediation is a better option. By available we mean: a system that is cheap, accessible and fast in reacting to the conflict. Former good experience with mediation serves as an incentive to choose it again. The willingness to negotiate is strengthened by previous positive experience.

Finally let us point out that mediation is constantly evolving. New forms such as online mediation present us with new challenges but also prove that the method is alive and capable of renewing itself.