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Launching a Mediation Institute in Republic of Kazakhstan

The European Union and Council of Europe Legislation on Mediation - Mediation in Individual Labour Law

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It is with great pleasure that I am here on behalf of the **EU Project Consortium "Support to the Judicial and Legal reform in the Republic of Kazakhstan".**

Let me speak today

- on the Council of Europe Recommendation on mediation,
- on the European Union's policy in this field, especially on the framework law (in EU Law called "directive"),
- and then on mediation in individual labour law.
- But first let me say something on general aspects of mediation, including the supervision of mediators.

Of course not every possible subject can be touched, but together with the other conference contributions as well as with your possible questions, I hope you will get from today a general as well as an in-depth impression about the potential this country has in mediation.

But let me first congratulate this country for the important contribution which was delivered by adopting the Mediation Law in 2011. With that, a serious progress has been made in the direction of **bringing judicial institutions closer to the citizens.** Now it is the population, the citizens, the consumers, the economy which has to be **informed** about this possibility – this requires as we know from many other countries **a big and long-lasting publicity campaign in favour of mediation**.

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The result of this campaign will be that many cases, especially new ones, will not be brought to the courts. Their workload will then decrease significantly, and they will be able to work on pending and old cases as well as on really difficult questions which cannot be solved by mediators.

On the other hand mediation will have another result: In countries where the judiciary institutions are sometimes accused of being infected with corruption – be it correct or not – it is for sure that where there is mediation, there are much **less charges of corruption.** Mediation has often been called **"a justice system for the people, by the people and with the people".** I had the honour to speak some years ago here in Astana on a NUROTAN conference on corruption in local and regional government, and already there was a consensus that a locally anchored judiciary can help a lot to prevent this phenomenon. This is possible, despite all difficulties, and it is necessary in view of the international involvement.

This shows of course that for some purposes mediation will not be accepted and is therefore excluded: If one party in a litigation wants to achieve further development of the present legal situation, then this will not be made by a mediator, but by a court.

Who accepts mediation is also likely to accept a peaceful solution, a balance of interests, besides profiting of the advantages of mediation, which are clearly given by its possible speed. These days a mediator told me that mediating cases needs often more than six months. This timeframe should be shortened. In the Caribbean Community I was involved in drafting a consumer protection law with mediation in consumer cases, of which the strength has been seen in a legal provision that the first date of a mediation session should be within two weeks, under normal circumstances. Another advantage is discretion, as mediation sessions should be held without the public. And this enables the parties to go from the place where the mediation was held with a certain positive feeling even towards the other party.

Of course, it all depends of the mediator. In Kazakhstan and the countries around there has been the traditional personality of the "bi". These wise persons did a lot to pacify conflicts. The importance of homage to ancestors among the Central Asians is skillfully illustrated by your neighbour's country writer Chingiz Aytmatov who shows how degrading it is for parents and forefathers to live with '*mankurts*'- those who have forgotten or disdain their roots. Although nowadays in cities there is much less interest to the tribal origins among younger generations, but on the whole Central Asia honours its history, because you have a lot of it. The esteem for the forefathers is one of the key cultural values of the population, and I heard here some years ago a saying that "You can't call yourself a Kazakh if you do not know the names of your seven forefathers."

What I want to express here is that mediation is able to provide the last village with a reliable and accepted jurisdiction in the framework of mediation cases. Of course, the principles of the rule of law are more an ideal and no country can claim that it has reached the final rule of law. It is only possible to be closer or further from this ideal and all states have some room to improve. In today's world most of the societies strive to approach to the rule of law ideal by perfecting their legal systems. In this context local traditions may be extremely useful, and they enable a scope of possibilities to end a legal dispute – for example, what I once saw in the Kyrgyz Republic, by the physical handover of a sheep as compensation, before the eyes of a village dignitary, a kind of mediator. In an ordinary court this may be very difficult.

In this context, it is very important that the personalities who are able to mediate are somehow **approved by an independent but competent body**. Here it might be the Supreme Court or the Union of Judges who keep the list of mediators, make sure that there is a certain wisdom and a certain legal knowledge, and who supervise some Code of Conduct or of Ethics. This accreditation body should also act as controlling instance for the courses offered by Non-Governmental Organisations, to train mediators initially and continuously. This is the way all countries are travelling, and this may be also the main activity of any future Mediation Institute or Centre here in this country.

Altogether, with the Mediation Law, Kazakhstan takes now part in the many attempts of states in the world who try to democratize the performance of jurisdiction, and this by the possibility of mediation.

Council of Europe

What I said until now is reflecting the experience of Europe as a whole. The Council of Europe by its Ministerial Committee which comprises representatives of governments of all European countries, unfortunately with one exception, has approved in September 2002 a Recommendation – no convention, but not less. Although this Recommendation is not legally binding, it represents because of the unanimity with which it was adopted a high authority which can be also used as interpretation tool in the whole judiciary. There is now a strong consensus in Europe about the necessity of application of mediation, and I was involved and became witness how e. g. one Balkan state after the other introduced mediation.

In this Recommendation which calls for mediation in civil matters (but not in criminal or administrative matters), it is written:

- States are free to organise and set up mediation in civil matters in the most appropriate way, either through the public or the private sector.
- Mediation may take place within or outside court procedures

Civil matters in this context include also labour law, family law as well as commercial law. The Recommendation recognizes that mediation within court procedures can be a positive chance to shorten a case.

On training and responsibility of mediators, the Council of Europe recommends:
"States should consider taking measures to promote the adoption of appropriate standards for the **selection, responsibilities, training and qualification of mediators**, including mediators dealing with international issues.

And finally the Council of Europe wants that every of its Member States launches an awareness campaign in favour of mediation. I am happy to be present today in Kazakhstan, where a kick-off of an awareness campaign is launched, together with the many awareness elements provided by the NGOs active in mediation.

European Union

The European Union as such has only few rights to intervene into the law of dispute settlements and procedures of its today 27 Member States. But the EU can deliver so-called "best practices", and therefore has set up a Directive on Mediation. This is an EU Framework Law which has to be transposed into national law of every Member State.

This Directive from May 2008 **must be reviewed** on the basis of a report by the European Commission until 2016. That means, we all in the EU gather experience and then make a report, with possible recommendations what should be deleted, or what should be improved. This is a chapter in modern legislation, to review critically after a given time a law on the basis of an administrative report which will be discussed publicly in the parliaments and in civil society.

It speaks also of ensuring a balanced relationship between mediation and judicial proceedings. Besides inducing new mediation laws in all Member States of the EU, where mediation has not yet been in practice, the Directive shall apply in cross-border disputes and in civil and commercial matters only. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).

Despite these limits it encourages courts to include mediation into their procedures.

It also encourages the Member States to make use of electronic information technology in mediation. *The EU has accrued in the meantime a lot of experience in a quick dispute resolution scheme named SOLVIT which functions online and has reached a high level of acceptance as well as solid results, above all in Single Market issues. For example a Lithuanian works now in France and has brought his car with him. Within which time he has to register his car in France? This system is able to prevent or defuse smaller problems in context with the administration.*

Furthermore the EU Directive **seeks to promote the fundamental rights**, and takes into account their principles, recognised in particular by the **Charter of Fundamental Rights of the European Union**.

The EU Directive says also that mediators should be made aware of the existence of the **European Code of Conduct for Mediators** which should also be made available to the general public on the Internet. This European Code of Conduct, or Code of Ethics, is very important, and every mediator should sign it before the institution where he or she is registered. It may be a task for the future to elaborate in the forthcoming months a **Code of Conduct for Kazakh mediators,** and to publish this as broad as possible.

The European Code of Conduct for Mediators, which has been set up in 2002, leaves the freedom for organisations providing mediation services to develop more detailed codes adapted to their specific context or the types of mediation services they offer, as well as with regard to specific areas (such as family mediation or consumer mediation). However, these codes of conduct which can be decided by everyone should be accredited by the Mediation Institute (which should be situated either by the Supreme Court of the Union of Judges).

The Code of Conduct in Europe covers finally issues like **competences, appointment of the mediators, their background, advertising and promotion of their activity, their independence, neutrality, impartiality, the procedure, the mediation agreement, the fairness of the process, the fees and the confidentiality.**

Mediation in Labour Law

Labour Law, in particular individual and not collective labour law, has been proved very well for mediation. Here we owe the development of mediation to North America:

In Canada, mediation is frequently used, however, also in collective agreements, where many employers and unions have included this principle. Some have become so accustomed to using it that virtually **all** of their disputes go to mediation.

Mediation has often been equalized with constructive behaviour of both sides, and on questions which were not worth to fight for, as it is the case in a strike etc. In the United States, mediation has a tradition in labour relations since 1898, when the *Erdman Act* has created a settlement system for disputes between railway carriers and workers for salaries, working time or other working conditions[2]. This law first obliged the parties to mediation or a conciliation attempt by the Chairman of the Interstate Commerce Commission; as a second step then to an arbitration procedure before an Arbitration Board.

In the last decades of the 20th century mediation was not only used in collective disputes, but also more and more in individual disputes and conflicts within the companies[3]. Among all Alternative Dispute Resolution procedures mediation is the preferred method in the United States business world. There has been some years ago a survey among 1.000 of the biggest corporations in the United States where the result was that almost 90% of the replying companies have made use of this opportunity, as well internally with the employees, but also externally with third parties (e.g. business partners, clients). This, of course, is due to the high costs of legal representation in the United States, which we do not know in Europe.

In Europe, the trend is now following the US and Canada. However, we were reluctant for a long time to include arbitrage elements into labour jurisdiction. Why this?

At first, the European continental legal systems did historically not make very much use of Alternative Dispute Resolution tools in labour law. In Germany for example there is traditionally an exclusion of arbitrage decisions in labour law, according to the Labour Procedure Code[4]. Thus it should be excluded that arbitrage courts would be set up with an **inferior legal training, independence and being less bound to material law** than labour courts[5]. The competence of labour

[2] The wording in the Erdman Act was: „Controversies … concerning wages, hours of labor, or conditions of employment"
[3] Kramer, Alternative Dispute Resolution in the Work Place, 1998, § 1.02, p.1-8
[4] §§ 4, 101 III German Arbeitsgerichtsgesetz = Labour Procedure Code
[5] Grunsky, (German) Arbeitsgerichtsgesetz, 7th edition 1995, § 4 annot. 2

courts in Germany for binding decisions in labour disputes is exclusive[6]; this is why arbitration courts in general should be excluded.

However, there are some elements e.g. in the German **labour procedure code which impose to the judge the attempt to solve the dispute already in the first session.** This in-court mediation which it is de facto has brought relatively fast procedures to the parties seeking justice before the labour courts: about 80% of all cases have been settled within six months, only 4% lasted more than one year.[7] Having run a law office for 21 years myself, I can confirm these figures: according to our statistics around 85% of all cases have been settled by this special way of judge-made mediation. It is clear that no judge should be against mediation: in this case he would not have to write a judgment. So this alone indicates that also court mediation has an effect of decreasing the workload of the court, besides a general acceleration of the courts' so-called case "turnover".

After all, there is still a long way to go, but the direction is known, and the first mediations in Kazakhstan have been held successfully. I am confident that as a new law the Kazakh Mediation Law will soon become fully implemented.

[6] see §§ 2 and 2a German Arbeitsgerichtsgesetz

[7] Mark Lembke, Mediation im Arbeitsrecht, 2001, p. 126 et al.