

**MEDIATION ON MATTERS ARISING FROM LABOUR RELATIONS.
THE CHINESE AND EUROPEAN PERSPECTIVE****Prof. Rafal Blicharz***University of Silesia in Katowice, Poland
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The article is devoted to the issue of mediation on matters arising from labour relations from Chinese and European perspective. It provides historical context of mediation on matters arising from labour cases in China, shows principles, institutions, mechanisms and proceedings concerning labour cases specification on mediation. The second part of the article is devoted to European regulation on the same aspects of mediation rising from labour cases.

Key words: *mediation in China; mediation principles; mediation proceedings; types of mediation in China; labour relations*

JEL Classification: *K40*

I. INTRODUCTION

Conflict is inherent in human relations especially when conflicting or divergent interests exist. It should not therefore be surprising that they have existed since the dawn of humanity, as well as in modern societies. However, it is not their quantity or the temperature of the conflict that is relevant. These were, are and will be different. The measure of humanity, culture, civilization development and human treatment is how conflicts are resolved. Humanity has developed different methods of conflict resolution. The most common and appreciated and, at the same time, found in most modern legal systems and social relations, is the resolution of disputed situations by means of the organs of justice. However, at the base of the justice system in most societies was the public interest, which was originally realized by attempts to settle a dispute in an amicable way. They can be seen as a source of modern mediation. Today, in most cases, for slightly different reasons, humanity returns to so-called alternative dispute resolution, including mediation, recognizing its advantages.

The subject of this article is to present the contemporary regulation of mediation in disputes arising from labour relations. Its innovativeness lies in comparing solutions adopted in two different legal cultures: Chinese and European. The comments presented below are of a cross-sectional nature, especially in relation to European regulations, mainly due to the rich specificity of solutions adopted in individual European Union countries. The authors' aim was to juxtapose the regulations and try to compare them.

II. CHINESE PERSPECTIVE

With the world's largest population, 1.3 billion plus, China has significant pressure to keep everyone in its borders employed. Even more daunting is its task to keep its workers safe and protected in the workplace. In 2008, China undertook a major labour reform designed to protect the rights and interests of workers. It promulgated the Labour Dispute Mediation and Arbitration Law (the "LDMAL") which provided aggrieved workers a channel and forum to adjudicate their labour disputes.

The mechanism for labour dispute settlement is established by Article 79 of the Labour Law 1994, which provides that:

Where a labour dispute takes place, the parties involved may apply to the labour dispute mediation committee of their enterprise for mediation; if the mediation fails and one of the parties requests for arbitration, that party may apply to the labour dispute arbitration committee for arbitration. Either party may also directly apply to the labour dispute arbitration committee for arbitration. If one of the parties is not satisfied with the adjudication of arbitration, the party may bring the case to a people's court.

When a labour dispute occurs, an "internal" labour dispute mediation committee is established. Agreements reached through this committee are binding upon the parties (See Article 80 of the LDMAL). If, however, the

mediation fails and one of the parties requests an arbitration, that party may apply to a Labour Dispute Arbitration Committee for arbitration (See Article 81 of the LDMAL). Moreover, if either of the parties is not satisfied with the adjudication of the Arbitration Committee, that party may bring the case for adjudication by a People's Court. The operation of the People's Courts in this area takes place on two levels, the First Instance People's Court and the Intermediate People's Court. This move – across the “bridge” between administrative labour arbitration and judicial dispute resolution – is provided for by Article 83 of the Labour Law 1994, which also makes the People's Courts the appropriate institution charged with powers to compel implementation of the terms of a labour arbitration award. This institutional arrangement is often described as “one arbitration and two trials” (一裁两审).

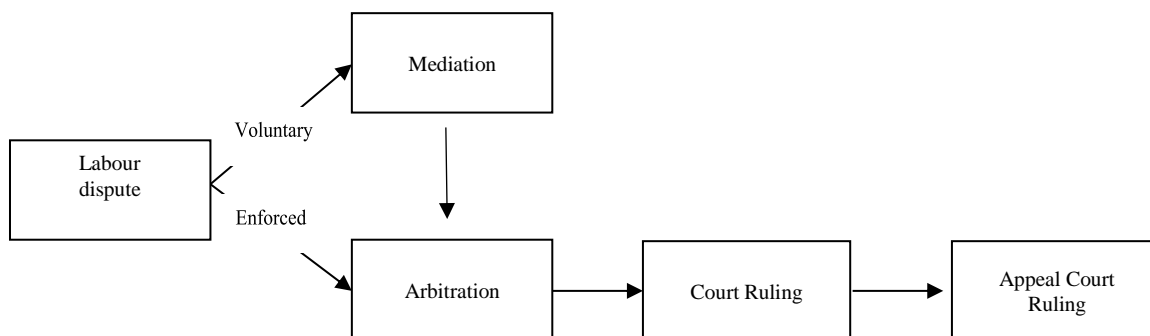


Figure 1 – Labour Dispute Resolution System in China

Although the labour disputes could go through various stages of judicial settlement, the mediation always sits at center of the process. Article 3 of the LDMAL has indicated a labour dispute shall be settled with emphasis on mediation so as to protect the legal rights and interests of the parties according to law.

II.1. HISTORY AND THE PRINCIPLE OF LABOUR MEDIATION PRACTICE

Mediation is traditionally preferred means by which to resolve disputes throughout Chinese history, and equally important mechanism in the employment relationship regarding labour rights (Brown, 2014). Since the social-economic context has varied from time to time, the labour dispute mediation mechanism were set up in different shape but never in absence from the founding of the People's Republic of China (PRC) in 1949 (Zhuang & Chen, 2015).

II.2. THE HISTORY OF LABOUR DISPUTE MEDIATION MECHANISM

In the early years of PRC, mediation was the primary method to achieve ordinality of labour relation because the labour disputes were ideologically regarded “internal contradictions among people” (Fu & Choy, 2004). Between 1949 and 1958, prior to nationalization reform of economy, there were vast number of private-owned enterprises and the conflicts between workers and private employers were extremely obvious. In order to ensure that labour disputes can be effectively dealt with, the state trade union promulgated the Interim Provisions on the Labour Dispute Resolution Procedure (thereafter, “LDRP”). The LDRP clearly stipulated that handling of labour disputes should facilitate mediation proceedings. In June 1950, the Central Labour Ministry issued the Organizational and Work Rules of the Municipal Labour Dispute Arbitration Committee, which offered guidance on solving labour dispute arbitrations, which also inserted mediation in the process of arbitration. The promulgation of the above rules and regulations has marked the preliminary establishment of the labour dispute settlement mechanism in contemporary China. After the completion of nationalization in 1958, the ownership of enterprises was completely fixed with State. The labour disputes were regarded as internal conflict amongst people and the amount saw constantly decreasing. Therefore, the labour dispute settlement agencies at all levels of government to deal with labour disputes are constantly being abolished. The labour disputes were often settled through internal petition mechanism (Zhuang, 2013).

From 1987 to 1993, China conducted a comprehensive reform, particularly on SOEs. A large number of workers were laid off. As a result, which trigger a dramatic increase of labour disputes. Therefore, government had to pay tremendous attention on settling those disputes. Indeed, on July 31, 1987, the State Council promulgated the Provisional Regulations on the Labour Dispute Settlement in State-owned Enterprises, which brought the labour dispute settlement mechanism back in life. The provisions generally emphasized on two aspects: (1) the application scope of the labour dispute settlement has been defined, covering both types of disputes arising from the failure to perform labour contracts and dismissal; (2) The three basic procedures for settling labour disputes were established, namely mediation, arbitration and litigation. As to the dispute triggered by performance of labour

contract, the parties can request the mediation committee of the enterprise to mediate. If dissatisfied with the mediation, the parties can request the labour dispute arbitration committee to conduct the arbitration. Both parties can directly call for arbitration without mediation, but arbitrator can conduct mediation prior ruling. If the parties were not satisfied with the arbitration awards, the parties could file a lawsuit in the people's court, where mediation might be launched as well. The abovementioned Provisional Regulations were of great significance to the protection of state-owned enterprises and the rights and interests of laborer's in China and played a positive role in safeguarding the normal order of enterprises, coordinating the relations between employers and employees, and ensuring social stability. With the construction of the market economy system in China and the continuous diversification of labour relations, the aforesaid provisions were unable to cope with the disputes raised from non-SOEs. Therefore, it is imperative to further improve the labour dispute resolution mechanism.

Thereafter, the NPC has conducted inspection on the enforcement of Labour Law nationwide and touch upon the performance labour arbitration as well. On December 29, 2007, the standing committee of the NPC enacted the LDMAL of PRC, which came into force on January 1 of the following year. It was designed to deal with the problems that emerged in the labour dispute mechanism in the following areas: first, to highlight the mediation function and to request the court to issue a payment warrant according to the mediation agreement; and second, to simplify the labour dispute arbitration procedure for workers to access justice; third, to reduce the time limit of arbitration; fourth, to rebalance the power relationship between employers and employees through special configuration on burden of proof in solving labour cases; fifth, to exempt charges of arbitration for both parties to access the service.

II.3. THE PRINCIPLE OF LABOUR DISPUTES MEDIATION

There are twofold purposes of labour disputes mediation in order to satisfy both the micro and macro demand of society. From micro perspective, the purpose of mediation is not to judge guilt or innocence, but to help parties to get at the root of their problems and devise their own solutions to them. Therefore, the satisfaction of both parties is the key benchmark for success of mediation rather than the registered success in mediator's record by applying pressure on the weaker party, or pushing settlements that are not in the best interests of the parties. From macro aspect, the goal of mediation is to achieve social harmony. The mediation has been approved playing a active role in maintaining social stability by solving labour disputes "peacefully" (Chen & Xin, 2012).

The labour mediation ought to respect the principle of equality and free-will of parties. The equality refers to the parties ought to enjoy equal rights and access to the material and procedural protection offered by the labour laws. In order to ensure the parties to express their opinion freely, the mediator shall maintain a neutral position by not interfering or forcing the parties to reach an agreement. In the meantime, the delay of settling disputes ought to be avoid. if mediation agreement could not be reached in time, the proceeding of dispute settlement should move on to the next stage immediately.

It also be required by the Provisions on Enterprise Labour Dispute Consultation and Mediation (thereafter, the "Provisions"), the labour disputes ought to be settled on the basis of facts and on the principles of legality, fairness and timeliness (Article 6 of the Provisions). Conceivably, the mediation activity is conducted rat her fairly and promptly, as it is vital to avoid any aggravation. However, the legality of mediation agreement might be questionable when both parties have agreed upon certain deals that is compromising the minimum labour standard, such as treating the prompt compensation with deduction of compulsory overtime pay.

II.4. THE LABOUR MEDIATION INSTITUTIONS

In accordance with the LDMAL intends to invite wide range of players to join labour mediation service. According to this law, instead of the "one mediation" (by mediation committees) required by the previous system set up in 1993, "triple mediations" was introduced. Article 10 of the Law stipulates that: where a labour dispute arises, a party may apply to any of the following mediation organizations for mediation: labour dispute mediation committee of an enterprises, grassroots people's mediation organization and other organization. Upon the occurrence of any labour dispute within an enterprise, either the employer or the employee may seek mediation assistance. Such assistance may be provided by any designated labour dispute mediation committee within the enterprise (the "Internal Mediation Committee") or by certain governmental or quasi-governmental organizations or groups established at the township or lower level outside of the enterprise (the "External Mediation Committee") (Brown, 2014). However, it remains uncommon for the parties to choose the external mediation organizations other than the internal mediation committee of an enterprise. Therefore, this article will take the mediation committee of an enterprise as key sample to decrypt.

In 2012, Ministry of Human Resources and Social Security (MOHRSS) called the large and medium-sized enterprises to establish labour dispute committees to ensure effective dialogue between employers and employees. The Internal Mediation Committee of an enterprise must be comprised of member(s) representing the employee side and member(s) representing the employer side. The committee member representing the employee side ought to be either a member of the trade union or a representative elected by employees of the enterprise. The committee

member representing the employer can be chosen by the officer(s) of the enterprise (See Article 15 of the Provisions).

Indeed, the key role of Internal Mediation Committee includes the mediation but not limited to it. Article 16 stipulates that the responsibility of Internal Mediation Committee are : “(1) promoting labour protection law, regulations and policy; (2) conducting mediation upon the internal labour disputes; (3) monitoring the implementation of conciliation and mediation agreement; (4) appointing, dismissing and managing mediator; (5) participating the conciliation regarding the issues arising from implementation of labour contract, collective contract and code of conduct; (6) participating the research on the scheme closely relating to worker’s interests; (7) assisting the enterprises to set up labour dispute prevention and early-alert mechanism”.

There is no hard threshold to qualify a mediator in the Internal Mediation Committee. Generally speaking, only the staffs of the enterprises can be the candidate for mediator. Apart from enthusiasm and passion to solving labour disputes, the mediator ought to be equipped with the labour law knowledge in order to ensure the legality of mediation process (See Article 18 of the Provisions). The term of office of a mediator has been set at least one-year subject to renewal and review. When a mediator is unable to perform the mediation duties, the mediation committee replace in the timely manner. It is imperative for the employer to offer support and treat the performance of the mediation duties as normal attendance.

II.5. THE PROCEDURE OF LABOUR MEDIATION

The mediation is a voluntary procedure for parties to choose, therefore parties have to file the mediation on their own. The mediation committee allow the parties to submit application orally or in writing, which ought to include basic information on the applicant, requests under application for mediation, facts and reasons (See Article 21 of Provisions). In addition, the mediation committee could conduct the called “active mediation” after gaining agreement from the parties, which allow the committee to check the intention of parties rather than waiting reply from workers. The mediation shall be conducted in private, unless both parties make a request for open mediation. The Committee will appoint one or team of mediator(s) to conduct mediation, also can invite external experts to assist the mediation.

There is no unified rule or method to conduct mediation. The LDMAL simply calls flexible and various means to help the parties to reach a mediation agreement voluntarily through patient and meticulous persuasion. For instance, trade union are mobilized to assist parties to figure out solutions. In addition, legal aid resource has been imported to reach an agreement based on better understanding of the legal floors through so-called “informed enchantment” (Gallagher, 2006).

The time limit for concluding mediation process is 15 days upon the acceptance of the application for mediation, unless both parties agree to extend it. Where no mediation agreement is reached within the aforementioned time limit or the parties decided to withdraw their mediation application, it shall be considered as the failure of mediation, and the case could be submitted to labour arbitration committee for judicial settlement.

During the arbitration and litigation stage, the mediation is alongside the process as well. This article takes the intra-mediation as an example, to illustrate the application of mediation in the arbitration process. As for disputes on which the party directly applies for arbitration without prior mediation, the arbitration committee may issue a mediation proposal to the parties, and direct them to a mediation organization. In accordance with the Rules for Handling Arbitration Cases on Labour and Personnel Disputes 2017 (thereafter, the “Rules”), if the parties agree on the pre-hearing mediation, the arbitration process is about to be suspended (Article 69 of the Rules). Even before the first hearing session is held, an arbitral tribunal may entrust a mediation organization or any other organization or individual that is capable of mediating between both parties for mediation upon the consent of both parties. Where no mediation agreement is reached within ten days from the date of the consent of both parties, the first hearing session shall be held. During the hearing, an arbitral tribunal shall mediate when hearing a case involving a dispute, and may invite relevant entities, organizations or individuals to participate in mediation when necessary (Article 71 of the Rules). Where an agreement is reached through mediation, the arbitral tribunal shall prepare a mediation statement. Similar mediation arrangement also appears in the litigation process, which allows the option of mediation opening throughout the process of labour dispute settlement.

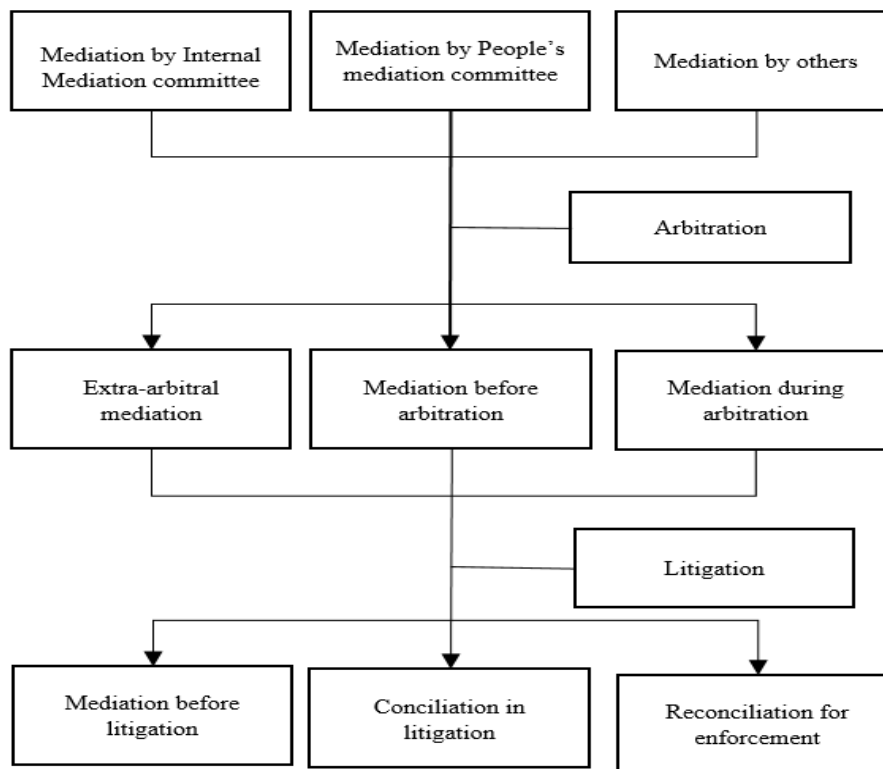


Figure 2 - The Legal Effect of Labour Mediation Agreement

Any agreement(s) reached as a result of mediation must be documented in writing and signed (or stamped with official seal) by the employer, the corresponding employee and the mediator. This signed (or sealed) document (the “Mediation Agreement”) is legally binding upon the parties.

However, the legal effect of mediation agreements is various at different stages of labour disputes settlement. If the mediation agreement has been reached within the Internal Mediation Committee, it is merely regarded as a contractually binding agreement and is not a judicial decision that directly enforceable by courts, e.g. judgement. In order to reinforce its legal effect, both parties may, within 15 days from the date the mediation agreement takes effect, jointly apply to the arbitration committee for endorsement. The arbitration committee shall endorse the mediation agreement [1] or issue an arbitral award [2] if the procedures and content of it are lawful and effective, the arbitration committee can revoke a mediation agreement if it found the mediation agreement did not satisfy the criteria of legitimacy [3].

The wage clause of mediation agreement might be an exemption. For labour disputes in connection with failure to pay employees' earned work compensation or other incurred economic loss, or to pay for any damage corresponding to work-related bodily injury or any related loss, if the employer failed to perform its obligations as set forth under the mediation agreement, the employee may apply to the People's Court for a warrant (the “Payment Warrant”) to enforce the terms under the aforementioned resolution. However, the effectiveness of a Payment Warrant remains questionable in China. According to the Civil Procedure Law, a Payment Warrant is a minor remedy, because once the other party objects, the Payment Warrant automatically terminates. After termination, either party can apply arbitration to settle the dispute.

Indeed, the mediation agreement reached at the labour arbitration and litigation stage is directly enforceable by courts. Since the mediation agreement is witnessed by arbitrator or judge and stamped by arbitration committee and court, it enjoys the same status of arbitration award and court judgement. Moreover, the mediation agreement therewith has final legal binding power, which is non-appealable to any higher judicial bodies. Therefore, the solution through mediation is favoured by arbitrators and judges (Zhuang & Chen, 2015).

II.6. THE CHARACTERISTICS OF LABOUR MEDIATION

The mediation has repeatedly emphasized in the process of settling labour disputes, which is deeply rooted in Chinese culture. “China has a long history of mediation”(Zeng, 2009: 2). It is the concept of harmony and cooperation rooted in Confucianism and Taoism-based value system that is the wellsprings of China’s mediation

culture (Qian, 2010). Unsurprisingly, mediation is the traditionally preferred means by which to resolve labour disputes throughout contemporary history (Brown, 2014).

Mediation also offers a very effective instrument to maintain social stability in modern labour relationship regulation. Its determining legal effect creates new incentives and opportunities for local authorities and judicial bodies to develop various forms of mediation and even to extend mediation to the process of arbitration and adjudication (Zhuang & Chen, 2015). The mediation rate remains quite high ever since, particularly after the promulgation of the LDMAL in 2008.

However, the facilitation of mediation in the process is as rosy as it portrays, as it encounters at least two-fold challenges. First, despite the heavy regulation on due process of the mediation activities, legitimacy of the mediation content remains unsupervised. The arbitration committee is empowered to conduct judicial review on the mediation agreement reached within pre-arbitration stage, checking whether it is fully in compliance with the existing laws. It is widely believed that the mediation only confer on bureaucratic agencies the power to resolve conflicts without having to comply with minimum standards, it goes so far as to legitimize the courts' "non-legalistic approach" to settling dispute case (He & Ng, 2013). Moreover, it is not uncommon that the process of mediation ought to respect the autonomy of parties, which could be lower than minimum stage as long as it has been agreed upon the parties free-will.

Another noteworthy aspect is the legal effect of mediation agreement does not enjoy same legal status during different stage of labour dispute settlement. In particular, the mediation agreement that reached in the Internal Mediation Committee has contractual legal effect but is not directly enforceable by the people's court. In the contrast, the mediation agreement rendered in the labour arbitration and litigation process enjoys same legal status as the arbitration award and judgements do. It indicates that the policymakers are not fully confident with grassroot institution of mediation, the people's mediation committee in particular, to ensure the legality of mediation agreement. Therefore, a judicial review of the mediation agreement seems imperative prior to offering enforcement support, but might drag the already reached mediation agreement into uncertainty or back to unnecessary formality that it designs to avoid in the first place (Feng & Xie, 2020).

III. THE EUROPEAN PERSPECTIVE

In view of the dynamic development of alternative dispute resolution (ADR), including the ever-increasing popularity of mediation in Europe and worldwide, the European Parliament and the Council of the European Union issued Directive 2008/52/EC on 21 May 2008 on certain aspects of mediation in civil and commercial matters (Dz.U.L 136/3 z 24. May 2008 r.). The Directive was issued in order to maintain and develop freedom, security and justice in the free movement of persons. In particular, it is within this area of the common market that the principle of the right to a court is implemented. The smooth resolution of disputes between parties has a direct impact on the effectiveness of the EU internal market. Meanwhile, the number of domestic and cross-border cases handled by the courts in their standard mode of justice is steadily increasing, prolonging court procedures. Hence, the achievement of the objectives of the Directive in the context of justice required the adoption of certain common solutions and standards within the Member States of the European Union. It is among other things, that compliance with these standards enables a well-functioning internal market within the Union to be maintained. The Directive is also a form of response to the previous call by the European Council for the creation of common alternative out-of-court dispute resolution procedures (See the conclusions of the European Council meeting of 15-16 October, 1999 in Tampere, Section B, points 28-32). Although the Directive applies to cross-border disputes (Article 2 of the Directive), its provisions may also be adopted in the national legal systems of Member States (point 8 of the introduction of the Directive) for the purpose of settling domestic disputes, i.e. those where there is no foreign element. Most EU Member States have adopted the so-called monistic system, assuming that the rules of mediation procedure are the same for domestic as well as cross-border disputes (This system exists in Germany, Poland, the Czech Republic, Belgium, Croatia, Hungary, Italy, Portugal, Slovakia, Slovenia and the Baltic States (Lithuania, Latvia and Estonia). By contrast, the so-called dual system means that a country has adopted separate rules governing the mediation procedure when there are no foreign elements in the dispute (domestic dispute) and when there are such elements. A dualistic system is found for example in Austria, Greece, the Netherlands and the United Kingdom (Weitz, Gajda-Roszczyńska, 2015: 48 – 49).

In addition to the Directive, the Recommendation Rec (2002)10 of the Committee of Ministers to Member States on mediation in civil matters of 18 September 2002, issued on the basis of Article 15b of the Council of Europe Statute, occupies a very important place in soft law regulations on mediation in the European Union (Earlier, European Ministers of Justice at a conference in London (8-9 June 2000) adopted Resolution 1 "Justice in the 21st century" stressing the growing role of ADR and the need for common solutions in the European Union in this area). The Recommendation underlines the social and economic importance of ADR and indicates the need to build mechanisms to guarantee its effectiveness. It is also worth noting the informal document establishing the European Code of Conduct for Mediators adopted by the European Commission at the conference in Brussels on 2 July 2004. The Code introduces rules of conduct of a mediator in civil and commercial matters, setting European

standards for the appointment and competence of mediators, their independence and impartiality, as well as the conduct of mediation proceedings, including the confidentiality of information obtained during mediation.

Recognizing the advantages of mediation as one of the alternative means of dispute resolution, the Parliament and the Council of the EU emphasized in Directive 2008/52/EC the speed, flexibility and significantly lower costs of mediation proceedings compared to traditional court proceedings. Similarly, the Committee of Ministers, in its Recommendation Rec (2002)10, indicated that mediation should be used in particular when judicial procedures are not suitable for the parties, in particular because of the cost and formal nature of the procedure, or when there is a need to maintain dialogue or contact between the parties (See point III. of the recommendation). It is also widely argued that the parties are much more willing to implement the agreement resulting from mediation than to adapt to court rulings. Court rulings, as opposed to mediation settlements, are often challenged by launching appeal procedures. These procedures involve the judiciary, burden the judiciary with an increased number of cases, prolonging all proceedings and entailing even higher costs. In this context, mediation appears to be the optimal solution. However, unlike Chinese culture and traditions, mediation is not deeply rooted in the European mentality. Rather, the people of Europe rely on the credibility of the decisions of professionally trained judges, trusting that their judgments correspond to the letter and spirit of the law. On this basis, they have greater hopes of obtaining a fair solution than of being able to settle a dispute amicably. The problem, however, is that this hope is placed by both parties, and most often only one is satisfied with the solution. Therefore, in professional circles, appeals against first instance decisions issued by the judicial authorities are a frequent occurrence.

Mediation in Europe in economic, civil, commercial and labour law matters is more or less regulated in legal acts (usually codes) relating to civil procedure. The laws governing civil procedure in most EU Member States contain appropriate solutions for settling disputes through mediation. At the same time, mediation proceedings are subject to separate regulations in many European countries (See, for example, in Austria the Zivilprozessordnung of 1 August 1895, RGB No 113/1895, as amended (apart from the Code of Civil Procedure, Austria also has separate legal acts on mediation, such as the Bundesgesetz über Mediation in Zivilrechtssachen, BGBl. I No 29/2003); in Germany the Zivilprozessordnung of 30 January 1877, BGBl. I. p. 3202 as amended (see also Mediationsgesetz of 21 July 2012, BGBl. I p. 1577); in Switzerland Zivilgesetzbuch of 10 December 1907 as amended; in France Code de procédure civile C-25.01 consolidated text of 20 February 2020 and a separate act devoted to mediation Fr: Loi No. 95-125 du février 1995 relative à l'organisation des juridictions et à la procédure civile, pénale et administrative; in Poland, the Code of Civil Procedure of 17 November 1964, OJ L 357, 31.12.1964. 2019.1460; in England and Wales Civil Procedure Rules). The specificity of individual cases results in the fact that in some countries, regardless of the above, additional separate regulations are also adopted for family mediation or matters resulting from employment relations, however, all of them are based on basic principles common to all mediation proceedings, regardless of their subject matter and specificity. On the other hand, a mediation agreement is usually subject to substantive law regulations, usually national civil codes (In Austria Allgemeines Bürgerliches Gesetzbuch JGS No 946/1811, in Germany Bürgerliches Gesetzbuch of 02.01.2002 BGBl. I S. 42, ber. P. 2909, 2003 P. 738 as amended); in Poland the Civil Code of 19 June 2019, OJ 2019.1145).

As a rule, European regulations do not provide for separate rules and procedures in cases resulting from the employment relationship. As a result, the same rules and procedure apply to this type of cases as in mediation proceedings in civil and commercial matters (due to the specific nature of criminal and family cases, mediation proceedings in these types of cases and the rules governing them are slightly modified compared to the regulation of mediation proceedings in civil, commercial or consumer relations.). Although Directive 2008/52/EC of the European Parliament and of the Council states that its regulations should not apply to the rights and obligations of the parties, which they cannot freely dispose of, which is most often the case under labour and family law, the Directive does not prohibit the use of mediation in this type of cases, but only indicates the necessity to include appropriate modifications in national regulations in this respect. It should also be noted that the Directive can be fully applied to matters arising from the employment relationship if the dispute does not concern such rights or obligations. Consequently, all of the following observations also apply to mediation proceedings in matters arising from an employment relationship. However, mediation in employment relationship cases is most often used in disputes relating to employment relationships:

1. termination of the employment relationship (procedure of contract termination);
2. issuing a certificate of employment;
3. unethical behaviour, such as lobbying or discrimination;
4. reinstatement;
5. compensation or reparation;
6. wages (setting the amount of remuneration, bonuses, overtime pay or payments for outstanding wages);
7. conflicts within the company;
8. disciplinary proceedings;
9. issues relating to the infringement of the prohibition of competition.

III.1. THE CONCEPT OF MEDIATION AND THE PRINCIPLES OF MEDIATION PROCEDURE

According to Article 3 of Directive 2008/52/EC, mediation means a structured procedure of a voluntary nature, however named or referred to, whereby two or more parties to a dispute attempt by themselves to reach an agreement in order to settle their dispute with the assistance of a mediator (Billiet & Kurlanda, 2007: 15-16). The literature indicates a narrow and broad understanding of the concept of mediation (Metzloff: 1992: 440). Narrow includes mediation as a voluntary and out-of-court procedure aimed at reconciling the parties. Broadly speaking, however, mediation refers to various proceedings which may be called by different names and which have the common aim of amicably resolving a dispute, but it is not the same concept as all forms of ADR (Alexander, 2009: 12 – 15; Haft, 2000: 244 – 245). Regardless of the approach taken, European and American literature emphasizes that mediation is a procedure with three constitutive features. The first indicates that mediation is a process that aims at reaching an agreement (called a settlement) that resolves a dispute that exists between the parties. The second, stresses that mediation proceedings must be conducted with the participation of an independent, impartial mediator. The third feature, on the other hand, refers to the techniques by which mediation negotiations are conducted (Eidenmüller & Prause, 2008: 2738 - 2739; Mcilwrath & Savage, 2010: 9).

The purpose of mediation determines the rules governing it. The principles of impartiality, equality, confidentiality, voluntariness, cooperation between the parties and the mediator and speed of proceedings prevail. It should be stressed, however, that although mediation proceedings are subject to legal regulations, they are significantly formalized, especially in comparison with court or arbitration proceedings. This is, among other things, a factor determining its attractiveness.

The principle of impartiality applies to the mediator and implies a requirement that the mediator must be independent of the parties and not involve himself in the interests of any of the parties to the dispute. Accordingly, a mediator may not conduct a mediation procedure if the circumstances show that he is or might be involved in the interests of the parties and if there is or might be a conflict of interest between him and the parties. The European Code of Conduct for Mediators shall treat as such circumstances any personal or business relationship with one of the parties, any business or other interests directly or indirectly connected with the outcome of the mediation or the involvement of the mediator or a member of his or her family (and possibly persons associated with his or her business) in any activity for the benefit of one of the parties. However, if they consider that the mediator will remain independent and neutral despite these circumstances, the parties may agree to conduct the mediation.

The principle of equality in mediation proceedings is linked to the mediator's impartiality. It implies an obligation to treat each party to the dispute equally. It is unacceptable to favour any of the parties or to create additional difficulties for only one of the parties, even if such behaviour is apparent. Equality also means an obligation to maintain an informational balance between the parties. A mediator must not favour any one of the parties by providing only one piece of information on the legality of the proposed solutions or conduct strategy.

Confidentiality is a very important principle of mediation. This principle can be seen in two dimensions. In the first dimension, it is subjective in nature and includes a circle of persons obliged to keep certain information confidential. The second dimension concerns the type of information covered by the confidentiality clause from the subjective side, the confidentiality principle applies to all persons participating in mediation proceedings, i.e. the party and the mediator. In the case of court mediation, the confidentiality rule also applies to the judge conducting a given case, however, the legal basis for this rule is derived from other sources (Usually these are the rules governing the court proceedings in question, e.g. the Civil Procedure Code). On the other hand, from the party in question, the confidentiality rule covers the very fact of conducting mediation proceedings, including proceedings between specific parties and any information disclosed in the course of or in connection with the proceedings. Moreover, the mediator may be obliged to keep certain information provided to him by one of the parties only confidential (so-called internal confidentiality). Only the parties may exempt the mediator from the obligation of confidentiality, or a legal provision if *expressis verbis* states that the information in question is not covered by confidentiality.

The principle of voluntariness arises from the essence of the mediation. Mediation can only take place if the parties want to settle a dispute between them. If either party does not want to seek an agreement, it makes no sense to conduct mediation. Voluntary nature is a subjective feature that should be present both before the start of the mediation process and at all stages of the process. Neither party can be forced to participate in mediation, nor is there any obligation to continue or conclude a settlement agreement, even if all elements have already been agreed (However, it is worth noting that in some European countries (e.g. Italy) there is or has been so-called obligatory mediation. Mandatory mediation consists in the obligation to carry out mediation between the parties before formal court proceedings are initiated. Compare the judgments of the Court of Justice: judgment of 18 March 2010 in Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08 (the so-called Rosalba Alassini case); judgment of the European Court of Justice of 28 June 2013 in Case C-492/11, <http://curia.europa.eu>; judgment of the European Court of Justice of 3 February 2000 in Case C-228/98, <http://curia.europa.eu>; judgment of the European Court of Justice of 14 June 2017 in Case C-75/16, <http://curia.europa.eu>. See for further details on this subject in Polish: D. Kaczmarek: Mandatory mediation in the light of the case law of the Court of Justice of the European Union, *Administrative Studies* 9/2017, p. 137 - 153 www.wnus.edu.pl/sa). Although there is no

obligation on a formal or legal party to participate or continue to participate in mediation, there may be some kind of pressure on the economic side to participate in mediation. Such pressure may result from the economic situation or the calculation of profits and losses of possible participation in court proceedings. However, such pressure is not of a legal nature and constitutes a form of internal conviction that participation in mediation is justified in view of a potentially more favorable outcome to the dispute by settlement than a court ruling.

The principle of cooperation between the parties and the mediator is directly linked to the voluntary principle. Based on the assumption that the parties are committed to settling a case amicably, it should be in the interest of each of them to seek a compromise. Agreement can only be reached if there is goodwill on both sides and a certain level of mutual empathy. The mediation process serves the purpose of presenting the parties' arguments, but not only to articulate them and close their negotiating position, but also to hear the other party's arguments and, on the basis of the arguments heard, to work out a common ground for a potential agreement (settlement) acceptable to all parties. Such behavior requires the cooperation of the parties. Mutual understanding of the claims raised and the basis from which they are derived can result in a settlement. Therefore, the parties in mediation proceedings must demonstrate a high degree of understanding and flexibility. Unfortunately, in practice this is often not easy due to the tension and emotions that accompany interlocutors. Nevertheless, only such an attitude leads to cooperation between the parties, which positively influences the process of reaching a settlement. With the above in mind, the mediator's psychological and social-technical skills play a key role in reaching an agreement. A very important aspect of the principle of cooperation between the parties is the prohibition of abusing one's position towards the other. Often the market position, economic, financial or legal situation of the parties involved in mediation proceedings is not equal, which can be used by the better placed party in mediation talks. Such behavior constitutes an abuse and should not take place. In order to prevent such situations, the mediator should continuously monitor the conduct of the talks and take action to prevent their occurrence. The principle of cooperation between the parties and the mediator in relation to the mediator, as an outsider, means that the mediator may passively (in so-called facilitation) or actively (in so-called evaluation mediation) initiate, direct or modify the parties' cooperation during the mediation proceedings. The mediator's cooperation with the parties comes down to establishing his or her role in the proceedings and creating a good atmosphere conducive to constructive negotiations.

The latter principle, the principle of speed of mediation proceedings, is a natural consequence of mediation, as an alternative to court proceedings, to resolve disputes. Undoubtedly, one of the characteristics of mediation, which is the basis of its popularity in Europe, is the ability to resolve disputes quickly. It is an attractive counterbalance for the parties to many years of court proceedings. The speed of mediation proceedings is significantly deformed and based on the above mentioned principles. As a result, all these principles form a coherent set of norms whose observance determines the potential success of mediation.

III.2. MEDIATION PROCEDURE

Mediation proceedings may be initiated by the parties or may be proposed or ordered by a court or ordered by the law of a Member State. Recommendation of the Committee of Ministers Rec (2002)10 of 18 September 2002, similarly to Directive 2008/52/EC, defines mediation as a dispute resolution process where the parties negotiate, with the assistance of one or more mediators, the disputed issues with a view to reaching a settlement (point I. of the Recommendation). The Directive allows for a situation where the mediator is a judge, but he cannot be involved in any way in the proceedings that deal with the dispute in question. Nevertheless, the legislation of most EU Member States precludes a judge from acting as a mediator (Sometimes indirect solutions are adopted, e.g. it is allowed for a retired judge to be a mediator). The limitation, or sometimes exclusion of judges from acting as mediators at all, is dictated by the need to ensure the independence and impartiality of the mediator in deciding the case being mediated. According to the European Code of Conduct for Mediators, mediators should remain independent and neutral. Although it is difficult for judges to deny those qualities, given their position in judicial proceedings to which the parties return if mediation fails, the participation of a judge in mediation could seriously (adversely affect) the free behaviour of the parties. The literature also argues that the judicial system is distinct from mediation and that there is a desire to preserve the proper image and dignity of the courts, which could be undermined if judges were involved in mediation. All EU Member States stress that every mediator should be independent, objective, competent and trustworthy, but not everywhere is there a requirement for mediators to complete appropriate training (*Bundestag-Drucksache 17/5335: 18; Goltermann, Hagel, Klwait & Levien: 2013:48; Huber-Mumelter & Mumelter: 2009: 173; Rongeat-Oudin: 2012: 291*). This is because the mediation process is largely formalised and it is up to the parties themselves to decide who will be the mediator. Therefore, when choosing a mediator, the parties are usually guided more by authority and trust in the person concerned than by the formal completion of specialist courses. Nevertheless, when choosing a mediator, the parties can refer to official lists of mediators maintained by courts or mediators' organisations (usually mediation centres). Persons enrolled on such lists most often have to have a certain preparation to perform the activities of a mediator. Both candidates for a mediator (persons applying for inclusion on the list of mediators) and persons already having the status of a mediator must undergo appropriate training. The obligation to train mediators is dictated by the need to

ensure the highest level of service provided by them. In most EU Member States there are no restrictions on the training of a mediator. Therefore, any person can be a mediator (even without adequate preparation to act as a mediator, if chosen by the parties), regardless of their education or profession.

Two types of mediation are quite common in Europe: contractual (voluntary) and judicial (Cruyplants, Gonda & Wagemnas, 2009: 65). This is in line with the recommendation Rec (2002)10 of the Committee of Ministers. See point III of the recommendation). Both can take place directly with the participants or via electronic communication (in the case of mediation conducted using means of distance communication, the so-called ODR, or Online Dispute Resolution, is referred to. C. Rule: 2002. The dualism of the meaning of ODR is highlighted by Katch and Rifkin, 2001: 10-15). Contractual mediation takes place before entering into a judicial dispute. It is important that any EU country allowing an out-of-court type of mediation procedure ensures that parties can switch to court at any stage of the procedure (This is also recommended by the Committee of Ministers in its recommendation Rec (2002)10. See point III). When a conflict arises between the parties, they can first try to resolve the disagreement themselves or with the help of a mediator. If they use the services of a mediator, the parties may ask for the assistance of the professional mediation centre to which the mediators are affiliated or address their request directly to someone they trust. Mediation centres bring together mediators who are properly trained for this function, have received appropriate training and are usually included on special lists of mediators (such lists are maintained by the mediation centre or relevant authority (i.e. court). Official mediators affiliated with mediation centers are usually required to undergo further training courses and to continuously improve their qualifications. This is in line with the Recommendation of the Committee of Ministers Rec (2002)10, point V. On the other hand, individuals not associated with mediation centres do not need to be trained and are not obliged to improve their qualifications in the field of mediation (this is the case in most EU countries, e.g. Poland, Belgium, Switzerland, or France). The parties' trust in such persons is based on their authority. It should be emphasized that choosing a particular person as a mediator in a given case requires the consent of both parties. This solution is a guarantee of objectivity and their trust in the selected person as a mediator (Pfister, 2007: 547; Huber-Mumelter, 2009:173). On the other hand, court mediation takes place after the parties refer the case to the court for resolution. As a rule, once the case is accepted by the court, the judge urges the parties to settle the case amicably, as soon as its nature allows (examples of cases where mediation is not allowed are the rights protected by the public policy clause in some EU countries (France, Belgium). This is in line with Article 5 of Directive 2008/52/EC. However, in principle, the court cannot compel the parties to participate in mediation, which is always voluntary (some European countries have adopted the principle of mandatory mediation, which has been severely criticized by their constitutional courts (as was the case in Italy, for example). A similar solution has been adopted in Spain, where, as a general rule, in disputes arising from an employment relationship, the parties have to show an appropriate certificate confirming that they have tried to settle the dispute before the court). Importantly, mediation can be undertaken at any stage of the court proceedings until a court decision is reached. The initiative to initiate mediation proceedings in the course of judicial proceedings can be taken by the judge conducting the case as well as by any of the parties. The other party has the full right to refuse to participate in mediation proceedings. Refusal to participate in mediation proceedings may not result in negative consequences for the party who submitted such statement.

Regardless of the type of mediation procedure, its conduct depends largely on the mediator and the parties. Usually there are three basic models of the course of mediation proceedings: pendulum, evaluation and pendulum. The principle is a pendulum model. It is based on the mediator's passive behaviour. He listens to the position of the parties, tries to create favorable conditions for talks, watches over the appropriate climate, which is supposed to lead the parties to reach an agreement. However, he cannot interfere in the course of negotiations, he should not make proposals to solve the existing dispute. In the evaluation model, the mediator plays a more active role. His task is not only to build a good atmosphere of talks, but also to propose solutions to the dispute between the parties. However, the mediator cannot speak for either of the parties, he must remain neutral at all times. According to point IV of Recommendation Rec (2002)10 of the Committee of Ministers, mediation should be conducted impartially and should guarantee that the principle of equality of the parties is observed during the mediation, and moreover, the mediator has no right to impose a solution to the dispute on the parties. Consequently, the proposals suggested by the mediator for resolving the dispute should take into account the disputed interests of the parties and balance them so that they are acceptable to both parties. In submitting his proposals, the mediator may indicate the merits of his proposals, but he must bear in mind that normally the merits for one party are disadvantages for the other. Of course, proposals for resolving a dispute may also be neutral for both parties, but this is relatively rare. The pendulum model usually occurs in disputes where mutual animosities between the parties are so intense that the parties do not want to talk to each other directly. When it is certain that the confrontation of the parties will not bring about a positive solution to the dispute, or may even lead to its intensification, the mediator is a bridge between the parties. In such a situation, the mediator listens to each of the parties individually, and then hands over settlement submissions to each other (this procedure provides for a European Code of Conduct for Mediators - Article 3.1 in fine). In this way, an escalation of emotions is avoided, and the mediator assumes the

role of a mediator. It depends on the will of the parties that the mediator will only passively convey information between the parties or, as in the evaluation model, also formulate constructive proposals for resolving the dispute.

Neither the provisions of the Directive nor the Rec Recommendation specify the duration of the mediation procedure. Recommendation Rec (2002)10 only stipulates that mediation should last long enough for the parties to have sufficient time to resolve individual issues and any possible resolution of the dispute (point IV). Given that mediation is intended to be an attractive alternative to judicial proceedings to resolve a dispute, mediation at the same time must not take too long. The duration of the mediation procedure must therefore constitute a reasonable compromise between the need to present the views of the parties and their possible modifications and the development of an agreement acceptable to all thrones - a mediation agreement. While in contractual mediation, the parties themselves decide on the duration of the mediation, possibly taking into account the mediator's suggestions, in court mediation the duration of the mediation is usually determined by law. EU Member States usually introduce time limits for the conduct of mediation proceedings while giving them an instructive character (e.g. Poland - in Poland this period is up to 3 months. The length of mediation proceedings is determined by the judge conducting the case (Article 18310 of the Polish Code of Civil Procedure). A similar solution is adopted in Belgium (Article 1734 §2 of the Code of Civil Procedure)), which means that these time limits can be extended depending on the needs of the case. Similarly, in French law, it is the judge in charge of the case who decides on the duration of the mediation procedure by issuing an order (articles 131-3, 131-1 of the French Code of Civil Procedure).

The mediation procedure ends either with a settlement agreement or a disagreement between the parties. In both cases, the mediator draws up a record of the proceedings, which he then signs and, depending on the type of proceedings, either forwards to the court (court mediation) or to the parties (contractual mediation) (in the case of professional mediators, the protocol is also kept by the mediator himself). If the mediation procedure was of a contractual nature, the absence of a settlement may or may not result in the parties claiming their rights before the courts (it is up to the parties to decide on further proceedings). If the mediation procedure has been conducted as part of a court proceeding, the completion of mediation always results in the case being returned to court, after which the court takes appropriate further steps either to confirm the settlement agreement concluded or to continue the procedure if a settlement has not been reached. The optimal solution for mediation is to end the proceedings with a settlement agreement. However, mediation proceedings also end if either party wishes to withdraw from mediation. It is worth noting that, in accordance with the principle of voluntariness, resigning from mediation does not require any justification. It is enough just to submit a declaration of resignation from participation in the proceedings. In such a situation, the mediator should close the proceedings and draw up a protocol, and if the mediation was of a judicial nature, submit it to the court.

III.3. THE SETTLEMENT AGREEMENT

The settlement agreement resulting from mediation in most EU Member States is an agreement in which the parties decide how to resolve their conflict (See for example § 1380 ABGB in Austria; Article 214 of the Swiss Code of Civil Procedure; Article 1732 of the Belgian Judicial Code; Article 2052 of the French Civil Code). This agreement, if it has been concluded through judicial mediation, also has an impact on ongoing judicial proceedings, depending on the specific legal systems of each EU Member State. It should be drawn up in writing and signed by the parties involved in the mediation and, under the legislation of some EU Member States, also at least initialed by the mediator. The legal nature of this agreement varies from one EU Member State to another and depends on the solutions adopted in terms of both substantive and formal (procedural) law. However, usually, an agreement resulting from mediation (whether judicial or contractual) constitutes an independent agreement for which the parties may seek an enforcement clause from the judicial authorities or another body designated by a Member State of the European Commission (Article 6 of Directive 2008/52/EC). All EU Member States are obliged to ensure that the parties or one of the parties, with the consent of the other parties, may request such a clause. Before giving the agreement - the mediation agreement - an enforceability clause, the court examines its legality and checks its enforceability. If both conditions are met, the court will declare the agreement enforceable.

IV. CONCLUSION

Mediation in Chinese and European both in culture and legal solutions do not differ significantly. Of course, there are many differences resulting from the characteristics of legal systems or detailed regulations of mediation proceedings, however, the purpose of the proceedings in both legal systems is common - achieving an acceptable compromise by the parties, thus alleviating potential social conflicts. The review of these two separate regulations draws attention to one, we believe, characteristic difference, which is worth paying special attention to. It is about the approach to the issue of openness and confidentiality of mediation proceedings. In the European legal system, the confidentiality of mediation proceedings and mediation plays an important role and is one of the key principles. Confidentiality guarantees the parties the possibility of conducting discreet conversations, judging the possibility of resignation of each party in the negotiation process, and at the same time third parties cannot know the course

of mediation proceedings, unless the parties in dispute agree otherwise. Meanwhile, in the Chinese legal system, the principle of confidentiality of mediation in principle does not exist. This rule is replaced by the exact reverse rule, according to which mediation proceedings are public. It aims to achieve an agreement between the parties and thus to strive to preserve social harmony. Hence, both mediation and arbitration proceedings, or ultimately the proceedings before the People's Court, always have a public context, because resolving the dispute is not only in the private interest of the parties at conflict, but also in the public interest.

The above described regulations on mediation in matters arising from labour relations in the Chinese and European legal culture are characterized by many convergent solutions. Despite the distance, cultural differences, traditions and history of the societies in both legal areas, the similarities in the purposes of mediation, the rules governing mediation proceedings and even some of the institutions involved in the procedure are striking. They point to the identity of man as a being on the one hand inclined to conflict, but at the same time striving for reconciliation, regardless of social, economic, political, cultural and religious conditions. Such a conclusion gives rise to the hope that, in all circumstances, man will always seek to reach agreement, to constructively overcome difficulties and to rise above the individual's particular interest.

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