

## **THE MEDIATION AS A TOOL OF MANAGEMENT OF DISPUTES ABOUT LABOR LAW: SIMILARITIES AND DIFFERENCES BETWEEN POLAND AND BRAZIL**

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### **Abstract**

The purpose of this study is showing the similarities and differences about the mediation of conflict about labor's rights in Poland and Brazil and to demonstrate improvement for both systems of mediation. Therefore, this paper presents the similarities of definition and procedure of mediation in Poland and Brazil, the mediation in conflict collective about labor and the differences of mediation in conflict about labor law in Poland and Brazil. As a result of analysis of this paper, it is possible says that there are some similarities between both countries about mediation, such as it is a confidential, voluntary, informal and specialize method of alternative dispute resolution (ADR) available to parties. This ADR has less costly and is a much faster process than judicial procedure. This study concluded that it is possible to apply the mediation in collective labor conflicts, but not in Brazil. It was possible to conclude too that the mediation in these type of conflict in Poland has a procedure with phases which helps to solve the collective bargain; that there are a lot of advantages to applied mediation to solve conflicts resolutions of everyday life, included conflicts about labor disputes and that Brazil should allowed the application of this ADR in disputes about work's rights. Finally, it was discovered that Labor Court in Brazil (TST) has been judging less half judicial cases than the received proceeding by that Court, so mediation is a tool to increase this number of judgments of judicial trials.

**Keywords:** alternative dispute resolution, collective disputes, labor law, mediation in collective disputes, court of work's rights

## 1. Introduction

The human being is spontaneously grouped in society for life. Such fact is positive since it makes social life easier. However, the occurrence of social conflicts is inevitable. This word (conflict) comes from the Latin words *confictus* or *confligere*. One of its meanings used in legal language indicates clash and opposition (Marx, Morita, 2000, p. 69). The mediation has been applied to solve many different disputes, including labor conflicts. The mediation is a technical activity performed by a third party, which is chosen or accepted by the interested parties. Its role is to listen to them and provide guidance to allow the involved to prevent or resolve conflicts consensually.

There is an increasing number of labor conflicts, particularly in times of economic and social crisis, when the existing unequal distribution of wealth and power in the capitalist system is aggravated. The labor law disputes are divided into individual and collective conflicts. The first one involves the employee and employer disputing about a labor contract, while the second one is about groups of workers and employers, within the scope of the establishment or company, or even of the category.

The satisfaction with the reward systems produces can produce more efficiency of service as well as financial benefits to the organization (Beck Krala& others, 2017, p.17). However, it is naturally that disputes about work's rights happens inside the company and conflicts about collective labor law becomes real. It is possible to say that conflict is common during the expansion of industrial (Borras et al., 2011, Hall, 2011, Gerber, 2011, Li, 2015) and the mediation is necessary to try to solve this kind of dispute.

This study shows the similarities and differences about the mediation of conflict about labor law in Poland and Brazil. The importance of this paper is to demonstrate improvement for both systems of mediation. It is worthwhile, because it was possible to discover that in Poland, it is possible to apply mediation in collective labor disputes, but the same is not true in Brazil for example. Therefore, this study possibilities the advance of the knowledge about mediation, because it makes possible. Thus, this paper shows this paper presents the similarities of definition and procedure of mediation in Poland and Brazil, the mediation in conflict collective about labor and the differences of mediation in conflict about labor law in Poland and Brazil.

## **2. Methodology**

The methodology used on this paper is based on critical analysis of legislation of Poland and Brazil about mediation of conflict about labor law to understand this phenomenon in a comprehensive and holistic way. Thus, it was utilized the interpretive method with focus on the similarities and difference between the laws of those countries. It was applied too documentary analysis to make possible categorize the improvement of legislation of Poland and Brazil.

In order to discuss deeply the subject of this paper the authors have made the collect of the Ministry of Labor and Social Policy from Poland about the results of mediations in this country during 1994 to 2015. It was collected the numbers concerning to collective disputes in Brazil from Tribunal Superior do Trabalho (the Supreme Court of Labor Work in that country) as well.

Thus, beyond the study and critic analysis of those data, the authors on this paper shows presents the similarities of definition and procedure of mediation in Poland and Brazil, the mediation in conflict about labor and the differences of mediation in conflict about labor law in Poland and Brazil, shows how the mediation is performed in Poland and in Brazil, promotes the analyzes of numbers related to agreements and disagreements concerning mediation in collective conflicts in both countries and suggests that this extrajudicial method of conflict resolution can also be applied in collective labor disputes law in Brazil.

## **3. The similarities of definition and procedure of mediation in Poland and Brazil**

Mediation is a method of alternative dispute resolution (ADR). It is a process of direct negotiation between parties and should be a promising instrument to prevent and resolve conflicts in a more constructive way. Williams, Robert and Burden (1997) state that “mediation is to find ways of helping the other to learn. Particularly, this involves helping learners to move through the next layer of knowledge or understanding” (Cichobłaziński 2013). It is important to register that mediation can be applied to solve different types of conflicts, such as disputes about Civil, Family, Contractual and some times Criminal Law. During the research to do this paper was possible to note some similarities about the definition and procedure of mediation between Poland and Brazil. The next lines will explain the main resemblance about this subject (definition and procedure of mediation) according Polish and Brazilian literature. The main differences when this ADR is applied in about

labor’s rights conflicts between Poland and Brazil legislation will be explain on the next section.

The occurrence of social conflicts is inevitable, because the people, naturally, is grouped in society. The people are endowed with individual characteristics and interests different. This is enough to make the conflicts appears. Soat mediation is used to solve the conflicts. There is a involvement of a third-party at mediationwhichis considered necessary to help the parties to deal with the conflictswhen they are not able to find solution to their disputes bythemselves (Dhiaulhaq& others, 2014, p. 23).The mediation is recommendable in a context of wicked problems (Rittel& Weber, 1973) and when parties disagree about goals. With the help of the mediator, the parties who are involved in conflict work out agreements on the issues aforementioned. It is combined with many technical solutions to solve the conflicts (Elkouri&Elkouri, 2017). It is possible to say that the main similarities of mediation between Poland and Brazil legislation and literature are fallowing below:

**Table 1.Main similarities of mediation between Poland and Brazil  
legislation and literature**

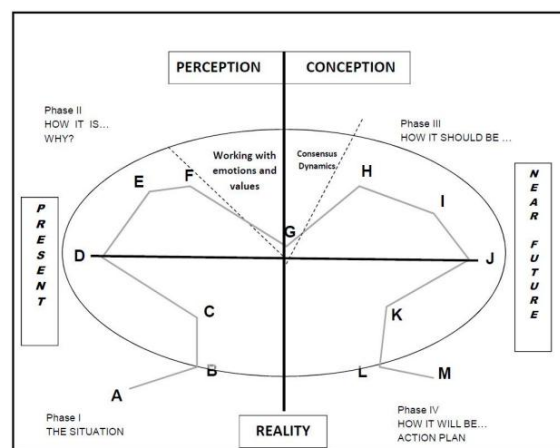
<b>Main similarities of mediation between Poland and Brazil</b>	
<b>Type of solution controversy</b>	Autocomposition. It is entirely voluntary, informal and Confidentially procedure.
<b>Management of conflict</b>	The mediator does not decide for the parties. Instead, they encouragethem to agree to a settlement. It is a non-coercive procedure.
<b>During of mediation</b>	There is no time. However, usually, it is faster than judicial procedure.
<b>Where is located the mediation</b>	The mediation happens outside the scope and control of the judge, but there is a judicial mediation as well.
<b>Who the mediator is</b>	The mediator is choose by the parties. They are the third party neutral.
<b>Who makes the mediation rules</b>	The rules of mediation procedure are make by parties. However, sometimes the law can regulate

	the mediation proceeding.
<b>Which type of dispute mediation can be apply</b>	The mediation can be applied to solve different types of conflicts, such as disputes about Civil, Family, Contractual and some times Criminal Law.
<b>Main advantages</b>	Simplicity; informality; economy; quickly; confidentiality; larger chances to attend the parties interests.

*Source: Poland. Law about the settlement of collective labor disputes, created on 23 of May of 1991 in Poland; and Brazil. Congresso Nacional. Lei da Mediação (Law n. 13.140, created on 29 of 2015 in Brazil). Brasília, Distrito Federal, April 2018*

The main similarities of mediation’s procedure in Poland and in Brazil can be explained into 13 phases that were represented below from letter A to M (Case & others, 2017). Broom says that theory and practice are vital for studying of peace and conflict. However, theory and practice could exist in separate worlds, both wants privilege and recognition (Broom, 2017, p. 252).

**Figure 1. The Process of Mediation**



**Source: (Case & others, 2017)**

According to the authors (Case & others, 2017), “A” is the Mediator’s preparation before the ADR, like a stakeholder analysis. It is a preliminary process design and initial contact with the disputing parties, for instance; “B” shows the mediation agreement (ground rules and behavioral guidelines); “C” corresponds to the issues and the schedule of mediation sessions; and “D” is the mediator’s attitude, which ranges from leadership to assistance.

It is necessary to define each party's vision, which can be common, complementary, and conflicting. This process occurs at "E", while "F" shows the work with parties' emotions and values, because identifying feelings and venting emotions is very important in mediation. This also appears at "G". The consensus dynamics, like the approval of mutual comprehension, is represented at "H" point. The process of generating and assessing alternatives for settlement are shown at "I" and "J", respectively. The success of the mediation is at "K". It is the final bargaining (consensual formula, substantial agreement, package settlements). The result of this process is a final agreement, which are indicated at "L" and "M". The procedure presented above also demonstrates the advantages of mediation in power imbalanced situations. So, for many reasons, mediation is indicated to help solve conflicts, including labor disputes.

#### **4. Mediation as a tool for ensuring Human Right of Justice Access**

Human Rights are an important instrument for the protection of the rights of citizens, and they have the power to be protected internationally. The international protection of Human Rights is a modern conventional of developments in contemporary international law. The essence of Human Rights is in the act of detaining rights, making effective actions and opinions that reveal the content of human struggle for the defense of their prerogatives (ARENDR, 1989).

Also, is possible to say that access to justice can be looked at from two main perspectives: the narrow and the wider senses (OKOGBULE, 2005). In the first one term it can be said to be coextensive to be possible get into judicial process in Judicial Court. The other term mean embraces access to the political order, and the benefits accruing from the social and economic developments in the state (OKOGBULE, 2005). However is possible included in this concept that access to justice is more then get into judicial process in Judicial Court. It is too the quickly answer from Law Court.

Mediation is an important tool for ensuring justice access. Using Mediation the parties can solve them own conflicts. Also, even if the parties are not came to agreement in audience, is possible observe that, after while, the cause of dispute will disappear. In the next topic, will be possible understand with more details about definition and procedure of mediation.

It is possible to observe in table that the number of cases received by TST (Tribunal Superior do Trabalho), the Labor Court, went down in the period from 1998 to 2017. The same happened with the agreements. But the number of cases that the Labor Court has to

judge remains high. In 1988, TST judged 61% of the received cases in that year, and in 2017 this number increased to 68%.

But this law that allows to apply mediation in labor collective disputes does not exist. This ADR has been used to solve individual conflicts, including the ones about labor law, although the TST prohibits mediation in disputes about collective rights.

### **5. The differences of mediation in conflict about labor law in Poland and Brazil**

In Poland, since 1991, the treatment and conduct of disputes between unions and employers has been regulated by the Collective Labor Disputes Act (POLAND, 1991, online). Before to this period, however, there were no official conflicts in the workplace, given that in the era of Communist Poland, which was a Marxist ideology, collective labor conflicts would not occupy these spaces. Therefore, for that reason, until 1991, there was no normalization regarding how to solve collective labor issues (CICHOBŁAZIŃSKI, 2013, page 119).

Thus, according to the Law about the settlement of collective labor disputes of Poland, it is perceived that the object of a collective conflict of may be the interest of the worker with respect to working conditions and also the content of the relations of work. In other words, collective bargaining does not only concern the circumstances of work but also, in a broader sense, is related to all factors that directly or indirectly determine the content of the labor relation. (BRONSKI AND JAROTA, 2015, p.35). In Poland, according to the Law about the settlement of collective labor disputes on resolution of collective disputes, such a dispute has the following stages (Cichobłaziński 2010, 2017 and Lankašová 2017):

1. Submission of a demands list by the labor unions to the employer. These requests may only concern issues listed by law, such as: working and pay conditions, social benefits and labor union rights and freedoms. The dynamics of the conflict are adjusted by the regulation allowing only the employee side to initiate a dispute, while the employer does not have such a power. Therefore an initiative in a collective dispute always belongs to employees, and the role and position of an employer is always defensive.
2. Employer's response, which determines the further course of the dispute. It can be: positive - all requests have been met, negative - at least one request has not been met. If the employer's response is negative, a collective dispute begins in the sense defined by the Act and the employer is obliged to report it to a District Labor Inspectorate.
3. Negotiations - employer and labor unions talks aimed at resolving disputes. It should be emphasized that 'the employer is obliged to immediately make negotiations to conclude

an agreement. [...] The negotiations time has no legal regulation. However, it can be assumed that collective negotiations should be carried out for as long as there is a chance of reaching an agreement.'

4. Mediation - if the negotiations bring a solution to the conflict, the collective dispute ends. If not - mediations take place. They are a separate institution and consist of several phases. Their type and number depends on a path chosen by the parties to the dispute, because the Act leaves them a great liberty in this area.
5. If mediation does not bring a solution, the parties may request for a settlement in the Board of Social Arbitration. It is, however, a weak institution, because its decisions are binding only if the parties agree to it and for this reason they seldom use this institution. Strike is another solution. But in this case, an additional criterion must be met, namely a referendum. It is valid only if at least half of employees take part and the majority votes in favor of strike.

To sum up, mediation in Polish legal system has an important place in the collective dispute resolution procedure, because it allows the use of all methods of resolving conflicts, before labor unions go to strike - the most severe form of pursuing their interests. However, in Brazil, it is not possible to apply the mediation in labor collectives conflicts. Mediation Act in that country is the Federal Law number 13.140 of June 26, 2015, which regulates mediation between individuals as a means of settling disputes and on the self-determination of conflicts within the public administration.

According to the article 42 from that Act (Brazil, Congresso Nacional, 2018, online), mediation in labor relations will be regulated by another law. In Brazil, there are 03 (three) main acts that regulate the mediation of conflicts, which are: Resolution n. 125 of the National Council of Justice (BRASIL, 2010, online), which provides on the National Judicial Policy for adequate treatment of conflicts of interest within the scope of the Judiciary and other measures; the New Code of Civil Procedure (BRASIL, 2015, online), Law no. 13,105, March 16, 2015; and Law no. 13.140, of June 26, 2015 (BRAZIL, 2015, online), which deals with mediation between individuals as a means of dispute settlement and on the self-determination of conflicts within the public administration.

It is important to note that none of these three normative acts, unlike Poland, allow Mediation in collective bargaining agreements. In addition, Art. 42, sole paragraph of Law n°. 13.140/15 provides that mediation in labor relations will be regulated by law (BRAZIL, 2015, online). Currently, there is no normative act that regulates this issue. With these provisions,



continue to discuss the procedure for the resolution of collective labor disputes in Poland, by the Polish Law on Settlement of Collective Labor Disputes. Brazil has not any law to regulate the application of mediation to solve conflicts collectives about labor's rights. However, that country allowed the application of this ADR as a tool of management of individual disputes about labor law. Thus, at the table below it is possible find the main differences between Poland and Brazil related to mediation in individual conflicts about labor's rights:

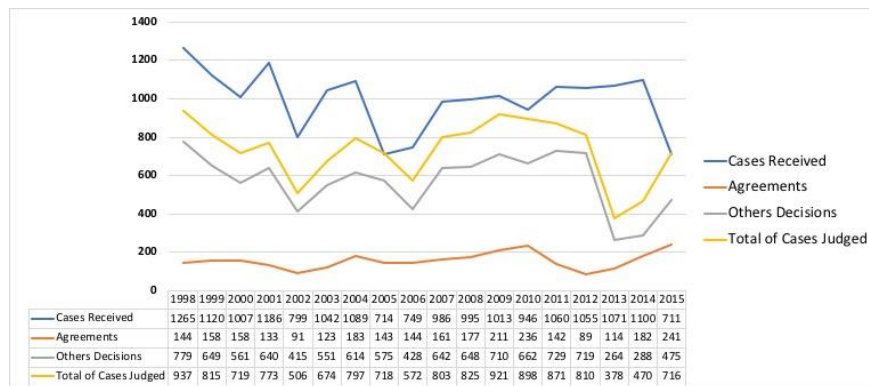
**Table 2. Differences between Poland and Brazil related to mediation in individual conflicts about labor's rights**

<b>Differences</b>	<b>Poland Collective Labor Disputes Act - 1991</b>	<b>Brazil Law nº. 13.140/15</b>
Liberation of Mediator from their job during mediation period	The Mediator has this right. However, it should be until 30 days each year	The Mediator does <b>not</b> have this right.
Regulation Act establishing the minimum remuneration for the Mediator	There is this Act in Poland.	There is <b>not</b> this Act in Brazil. The parties has to establish this subject before the mediation
Mediator can apply warning punishment on trial	The Mediator can apply it if the part delay in the implementation of the agreement unjustifiably	The Law does <b>not</b> regulate this. However, the parties can establish this rule before mediation stars.
Phase of Social Arbitration Council or Strike	There are those phases if the Mediation does not have the agreement.	The Law does <b>not</b> regulate those phases.

*Source: Poland. Law about the settlement of collective labor disputes, created on 23 of May of 1991 in Poland; and Brazil. Congresso Nacional. Lei da Mediação (Law n. 13.140, created on 29 of 2015 in Brazil). Brasília, Distrito Federal, April 2018*

The number of collective disputes in Brazil has been changing since 1998. In this specific year, the Labor Court (TST) received 1.265 cases to judge, but only 937 had a decision from that Court, about 74%. Besides, in 2017, TST received 640 cases and judged 627 (97%) (Brazil. Tribunal Regional do Trabalho, 2018, online). The number of collective disputes in Brazil has been changing since 1998. More details on this topic are shown in table below:

**Graphic 1. Number of collective disputes in Brazil**



**Source: Brazil. Tribunal Regional do Trabalho (TST). Dissídios Coletivos na JT. Brasília, Distrito Federal, April 2018. <<http://www.tst.jus.br/web/estatistica/jt/dissidios-coletivos>>. (Access: 3.10.2018)**

According to the graphic is possible to realize that in 1998, the Labor Court (TST) received 1.265 cases to judge, but only 937 had a decision from that Court, about 74%. Besides, in 2017, TST received 640 cases and judged 627 (97%). However, this number does not signify which those judge cases was received by TSE in that year, because there is a repressed demand. This term means that there are others cases received by TSE during previous years (2016 for instance), but they were judged just in 2017.

TST has a data called *Índice de Congestionamento – IC* which measures the percentage of repressed demand for definitive solutions in the processes under way in the TST. It corresponds to the proportion of processes still unresolved (Brazil, 2016). In the last 10 years (1995 – 2015), the average rate of this index was 55.8%. In 2015, the IC was 53.4% (Brazil, 2016). Thus, it is visible that IC in Brazil is really higher. The Labor Court in Brazil has been judging less half judicial cases than the received proceeding by that Court. The application of the mediation in collective disputes will represent tool of industrial conflicts management and it would help drop down the rate of IC.

However, in Brazil, it is not possible to apply the mediation in labor collectives conflicts. Mediation Act in that country is the Federal Law number 13.140 of June 26, 2015, which regulates mediation between individuals as a means of settling disputes and on the self-determination of conflicts within the public administration. According to the article 42 from that Act (Brazil, Congresso Nacional, 2018), mediation in labor relations will be regulated by another law. In Brazil, there are 03 (three) main acts that regulate the mediation of conflicts, which are: Resolution n. 125 of the National Council of Justice (Brazil, 2010, online), which provides on the National Judicial Policy for adequate treatment of conflicts of interest within the scope of the Judiciary and other measures; the New Code of Civil Procedure (Brazil, 2015, online), Law no. 13,105, March 16, 2015; and Law no. 13.140, of June 26, 2015 (Brazil, 2015, online), which deals with mediation between individuals as a means of dispute settlement and on the self-determination of conflicts within the public administration.

When Labor Court judges a case, it is not appropriate to the parties, because, besides other reasons, in a trial process, a lot of time and money is involved. Not to mention that the person that will decide the dispute, the judge, is not chosen by the parties. Perhaps, applying mediation in collective disputes is better to the parties involved. In Poland, for example, this application has been performed successfully.

Mediation is a tool for promote access to justice which is a Human Rights example. That right (of access to justice) has come to be regarded as the fundamental requirement - the most basic of human rights – of a modern and egalitarian legal system which has a goal to guarantee the rights of all person (Cappelletti, Garth, p. 58, 1999). Access to justice must therefore be universal and efficient enough to be capable of producing individual and socially just results, with a primacy of substantial equality. The access to justice is a right that, usually, has not been respected in Brazil.

According Conselho Nacional de Justiça (CNJ), 52% of cases received for Labor Work did not have judgments in 2014. Is important to say that CNJ has the goal to inspect the Court of Brazil and the last research about Labor Work cases was in 2014. Cinthia Robert and Elida Séguin (2000, p.180) understand that access to justice as a form of legal protection. Also, they told that the relevance from it is juridical and also moral, political and social. Is important that the Court judge the cases bring to them in a short time. If not, the government will lose the credibility.

## 6. Conclusions

After the analysis of legislation about mediation in Poland and Brazil it was possible concluded that the mediation is a method to solve disputes. It involves an impartial and neutral person, the mediator, facilitating the dialogue between the involved parties in conflict. It is a process to help parties find a mutually satisfactory agreement. The mediator is chosen or accepted by the parties and helps them to prevent or resolve conflicts in a consensual way. The mediation has been used in many different disputes in the world, including labor conflicts. In Poland, that institute has been applied it in collective disputes about employment rights, among other cases.

The similarities between mediation applied in Poland and Brazil are related about those items: Type of solution controversy; Management of conflict; During of mediation; Where is located the mediation; Who the mediator is; Who makes the mediation rules; Which type of dispute mediation can be apply and Main advantages showed on Table 1. However, there are some differences about mediation of conflict about labor law between those countries such as related to Liberation of Mediator from their job during mediation period; Regulation Act establishing the minimum remuneration for the Mediator; Mediator can apply warning punishment on trial Phase of Social Arbitration Council or Strike as showed on this paper.

Instead this, it was possible to observe that in Brazil mediation is applied to solve demands in the field of individual labor rights. However, this ADR is not used in collective disputes about labor law in that country, because Federal Law number 13.140 states that mediation in collective labor relations should be regulated by another law, but this Act does not exist yet. It is considered that the fact that Brazilian law does not allow the application of mediation in collective labor disputes is considered as not so good. In that country, Labor Court had to judge 61% of the received cases in 1988 and 68% in 2017, which represents a higher number. In that country, TST (Supreme Court of Labor) has been judging less half judicial cases than the received proceeding by that Court. The average rate of IC index in the last 10 years (1995 – 2015), of this index was 55.8%. The application of mediation in collective disputes would help to drop down this number. However, that application will be possible just if Brazil Government has a law to regulate this issue.

Mediation is confidentiality and much less expensive than a trial dispute. The mediation helps the parties in conflict to solve the dispute in a more constructive way. If Brazil were allowed to use mediation in such cases, the number of agreements should behigher, and the government would spend less money to solve that kind of demand. Mediation in collective

disputes is also a toll of industrial conflict management because conflict between employer and labor unions is a case of organizational conflict which is very specific and important part of management in any organization where labor unions operate. So, Brazil should apply these ADR to solve disputes about collective bargains about labor work too.

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