Mediation and Conciliation in Italian labour law

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1. Mediation and conciliation in Labour Law: how to balance the aim of reducing the judicial workload and protecting the weaker party of the employment relationship?

Mediation and conciliation, together with arbitration, are the main Alternative Dispute Resolution (ADR) methods used in employment disputes in all the EU Member States. All these three forms have in common the presence of a third party, who is asked to intervene in order to settle a conflict between two parties of the employment relationship (then the conflict is individual) or a conflict between two collective actors such as Unions or employers or employers' associations (then the conflict is collective). The distinction between the three procedures is not always easy, but generally speaking is the nature and the intensity of the third party intervention that helps to draw the lines between the different procedures. Surely another feature in common of the three procedure is their objective: they all aim at avoiding a judicial resolution of the employment disputes, either because the access to justice is too expensive, or processes are too long because of the excessive judicial workload. Any reform in the direction of implementing one of these ADR procedures normally is justified by one of these aims, the most recurrent of which is the reduction of the length of processes and of the heavy judicial workload.

The decision to introduce ADR procedures in a legal system to settle employment disputes has to deal with some relevant factors. First of all, conciliation and mediation, in particular, may be compulsory or not. When conciliation or mediation are compulsory, the claimant, before bringing a case to Court, must propose a conciliation or mediation attempt to the counterpart. If the judge ascertains, at the beginning of the procedure, that no attempt at conciliation has been made, she may suspend the proceedings and order the parties to undergo conciliation procedure otherwise, otherwise the case cannot be discussed.

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The other factor to take into account is the fact that any mediation and conciliation implies a transaction on workers' rights, so the nature of the rights at stake should be carefully evaluated. If they are fundamental rights, or rights that are not at workers' disposal, a mediation or a conciliation risk to be transformed in a dangerous situation, where workers loose their rights without any judicial guarantee. Unless, for example, the protection of the worker is guaranteed by the fact that conciliation is performed before a board, where there is a union representative or a public officer.

We would like to stress the importance of striking a balance between the legitimate needs of justice administration, like reducing the judicial workload, and the need of protecting the worker, who is the weaker party of the employment relationship. Enhancing the importance of the judicial administration needs at the expenses of the protection of workers' rights, especially in the area of fundamental rights, could finally reverse the structure itself of labour law, which presupposes the existence of rights that should be protected even against any worker's will.

In this paper we will describe the Italian legislation on ADR in employment disputes leaving aside the use of these techniques in industrial and collective disputes[1], starting from the definitions of conciliation, mediation and arbitration, and following by a short description of these techniques, we will argue, that the limited use of mediation should be proposed in employment disputes.

2. Definitions

Is not always easy to draw the conceptual borders between the different forms of Alternative Dispute Resolution, thus, we refer to the definition of the three main procedures given by the Report on European Judicial Systems in 2014[2]:

Mediation: is a voluntary or mandatory, non-binding private dispute resolution process, in which a neutral and independent person assists the parties in facilitating their discussion in order to help them resolve their difficulties and reach an agreement. It exists in civil, administrative and criminal matters.[3]

Conciliation: the conciliator's main goal is to conciliate, most of the time by seeking concessions. She/he can suggest to the parties proposals for the settlement of the dispute. Compared to a mediator, a conciliator has more power and is more proactive.

1 For a general description of settlement of industrial conflicts through conciliation procedures see T. Treu: *Labour Law in Italy.* New York, Kluwers Law International, 2011. especially chapter 7, 223 ff.

2 Council of Europe, European Commission for the Efficiency of Justice: *European Judicial Systems, Efficience and Quality of Justice.* [CEPEJ Studies no. 20] 2014. 148., in http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf

3 The ILO definition of mediation and conciliation is very similar: Conciliation and mediation are procedures whereby a third party provides assistance to the parties in the course of negotiations, or when negotiations have reached an impasse, with a view to helping them to reach an agreement. While in many countries these terms are interchangeable, in some countries a distinction is made between them according to the degree of initiative taken by the third party. See http://www.ilo.org/ifpdial/areas-of-work/labour-dispute/lang--en/index.htm

In practice, mediation and conciliation are interchangeable in many countries, whereas in other countries a distinction between them is possible according to the degree of intervention and initiative of the third party. We can say, that in any conciliation, there is a phase of mediation before a conciliation agreement is signed.

Arbitration: the parties select an impartial third party, the arbitrator, whose (final) decision is binding. Parties can present evidence and testimonies before the arbitrators. Sometimes there are several arbitrators selected, who work as a court. Arbitration is most commonly used for the resolution of commercial disputes, whereas in labour law disputes, it is normally surrounded by suspicion, especially by trade unions, since in many cases it is a way of by-passing the judicial powers with no counterbalance for workers.

The comparative researches on Alternative Dispute Resolution in employment disputes show contradictory results.[4] Some authors underline the negative effects of ADR, since in most cases in avoiding the access to employment Tribunals, they tend to reproduce inequalities in the employment relationship and inequalities in access to justice. Those, who underline the positive aspects, emphasize the fact, that ADR lower the cost of justice for people, reduce the judicial workload and shorten the duration of judicial processes. In some legal orders, speedier and less costly alternative to judicial litigation are also endorsed in very sensitive areas, like discrimination disputes.[5]

We would prefer not to discuss, anyway, the level of success of these ADR techniques in employment disputes as far as their quantitative impact on the overall volume of judicial litigation, but we should rather concentrate on the theoretical issues raised by the expansion of ADR in relation to the crucial issue of defining the core of labour law, that, in principle, should be excluded from any kind of individual disposition. That is why we should start affirming that, generally speaking, ADR and especially mediation can be used in labour disputes only when they deal with workers' rights that are at their disposal. This seems to be, in our opinion, the fundamental issue at stake when analysing, in a comparative perspective, a different legal system, making use of ADR in employment disputes. Any comparative analysis should include, from this point of view, a clear definition of the employment rights, deriving from norms, that each legal system considers mandatory and cannot be deviated by individuals.

The statistics on the use of ADR in employment disputes are influenced by many factors, all related to the fundamental features of each legal system, with the more or less long tradition in experimenting this kind of dispute resolution. In many cases, especially in the case of conciliation and mediation, ADR numbers are influenced by the degree of trust that mediators and conciliators produce on the

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[4] See for example: N. Clark – S. Contrepois – S. Jefferys: Collective and individual alternative dispute resolution in France and Britain. *The International Journal of Human Resource Management*, no. 3, 2012. 550. ff; F. Valdes Dal-Re (ed.): *Labour Conciliation, Mediation and Arbitration in European Union Countries* cit.; J. Purcell: *Individual Disputes at the Workplace: Alternative Disputes Resolution.* Dublin, European Foundation for the Improvement of Living and Working Conditions, 2010.

[5] R. G. Silberman – S. E. Murphy – S. P. Adams: Alternative Dispute Resolution of Employment Discrimination Claims. *Louisiana Law Review*, 54., 1994. 1533. ff.

parties, and this is also strictly linked to the recognised expertise of the persons performing the role of mediator, conciliator or arbitrator. Emphasizing the positive or negative aspects of ADR in employment disputes is, in many cases, deeply linked with the aims of a legislative reform introducing an ADR in employment disputes and in order to avoid misunderstanding and false analysis, these aims should be clearly declared.

As a preliminary remark, it is very difficult to guarantee a rapid and effective resolution of employment disputes ensuring at the same time the fundamental right to have access to a judicial system, the capacity of protecting the right of defence or the protection of the weaker party of the employment relationship from derogating fundamental rights that are not at his/her disposal. In many cases the protection of these different rights cannot be satisfied at the same level.

Another important theoretical issue is the distinction between individual and collective disputes. The tradition of collective conflict extra judicial resolution is deeply linked with the industrial relations tradition in each Member States, and finds its pillars in the institution and procedure for industrial conflicts set up by collective agreements.[6] In the next paragraphs we will give a short description of ADR in employment disputes in the Italian legal system. However, we will not deal with collective disputes, but rather individual disputes, since any comparative research in the area of collective rights is less useful, if not preceded by a short description of the whole system of industrial relations and this would exceed the aims of this paper.

3. Reduction of judicial workload and length of procedure: is mandatory conciliation and mediation the right instrument?

One of the aims, that are usually pursued, when ADR is introduced in employment disputes, is to reduce the judicial workload. The access to judiciary and the right to defence is frequently undermined by judicial workload, capable of causing an excessive length of judicial dispute resolution. In the case of employment disputes, both the interests of the employer and employees are at stake. On the employer's side, the excessive length of judicial dispute resolution reduces legal certainty on which the employers underpin their need of calculating direct and indirect cost of employment disputes. If, for example, there is a dispute on a dismissal case and the legal system establishes, that in case of unlawful dismissal an indemnity should be given to the employee calculated on the basis of the lost salaries from the day of the dismissal to the day of the judgement, the cost will vary significantly on the basis of the length of the entire process and the workload of the single judge in charge of the decision. From this point of view, either we pursue the aim of simply reducing the judicial workload

6 I. Schömann: *Alternative Dispute Resolution Procedures in Labour Issues: Towards an EU Mechanism? Transfer,* 8 (4), 2002. 701. ff; C. Weltz – T. Kauppinen: *Industrial Action and Conflict Resolution in the New Member States*, in *European Journal of Industrial Relations*, 2005, 11 (1), p.91 ff.

displacing the resolution of dismissal disputes to ADR from the judiciary, or we intervene in the structure of the process in labour disputes by cutting times and procedures.

Official Italian statistics show about 4.500.000 civil disputes (of which 664.000 are employment disputes) waiting for judicial resolution. As for the length of the process, the average length of a civil process is 844 days and in employment litigation it is 688 days (in case of an appeal arriving to the upper Cassation Court data reports six years).

The medium length reported from recent researches of a dismissal trial in tribunals is different in the various regions of Italy, but in any case it is sufficiently long to raise some questions: 266 days in Milan, 429 days in Rome and 200 days in Turin.[7] These numbers, in principle, legitimate the adoption of radical measures, but we will see, that during the years the Italian legislation has adopted opposite measures, looking for the right solution. We should underline, that some of these measures have been adopted during the economic crisis and inevitably the economic and social context have played an important role in legitimising policies oriented in reducing the role of judge intervention considered, at best, as a burden. The myth of the freedom of contract, the 'flexicurity agenda'[8] pushed by the European institutions has surely constituted to the ideological basis for reducing judicial powers especially in dismissal cases. As an alternative to ADR techniques, it could be definitely more effective, at least in the case of dismissal disputes, to avoid judicial control, fixing in a very precise manner, through the law, the cases of legitimate reasons of dismissal or fixing the damages on the basis of employees seniority, in order to render the dismissal legitimacy almost automatic and avoid the judicial control.[9]

4. ADR procedures in employment disputes in Italy

In this chapter, we will give a short description of the ADR procedure in employment disputes in the Italian legal system.

4.1 Conciliation

In Italy nowadays conciliation is voluntary in labour disputes (since Law No. 183 of 2010). Before 2010 it was mandatory for the parties of a labour disputes to attempt conciliation before going to a Court. The question is why the Italian legislator has turned into voluntary conciliation when before it

7 A. Ichino – P. Pinotti: *La roulette russa dell'art. 18.* in http://www.lavoce.info/archives/27539/la-roulette-russa-dell'articolo-18/

8 European Commission: Green Paper on "Modernising labour law to meet the challenges of the 21st century. COM (2006) 708 (22. 11. 2006)

9 See in the Italian legislation the recent legislative decree no. 23 of 2015 introducing a new dismissal regime, establishing that in case of unlawful dismissal the general remedy will not be reinstatement (only in very limited cases) but only the right to a monetary compensation calculated on a monthly salary for each year of seniority, up to a maximum limit. In the Spanish legislation the reform of dismissals in Real Decreto Ley no. 3 of 2012, in the area of economic dismissals, is an example of legislation defining specific cases of lawful dismissal in order to render automatic the legitimacy of dismissals and reduce judicial control.

was mandatory? In Italy, the parties can have recourse to the following types of conciliation methods in labour disputes:

a) 'Administrative conciliation' takes place at a special board set up by the Territorial Employment Office (Conciliation Board) and it is composed by a representative of the employee, a representative of the employer and the Director (or a delegated person) of the Territorial Employment Office. Once the agreement is reached, it is registered at the Territorial Employment Office as binding and enforceable.

b) 'Union conciliation' takes place following the procedures defined by collective agreements. In case of an employment dispute, a worker can give written permission to a trade union to attempt 'trade union conciliation' in the workplace. Once the agreement is reached, it is registered at the Territorial Employment Office as binding and enforceable.

c) 'Conciliation before the labour inspector' (Legislative Decree No. 124 of 2004) takes place in case of employee claims relating to the payment of wages. It is dealt with by 'monocratic conciliation' at the Provincial Labour Directorate prior to a formal intervention of the Labour inspector or during the inspection.

d) 'Judicial conciliation' takes place, if the parties go directly to a court, and the judge will explore at the first hearing the possibility of the settlement of the controversy instead of a judgement[10].

Before 1998, conciliation was mandatory only in dismissal disputes in small enterprises (less than 15 employees). After the Legislative Decree No. 80 of 1998, conciliation has been declared mandatory in all employment disputes, thus, any labour dispute is preceded by a mandatory attempt of conciliation, with no obligation to reach a conciliation agreement, but with an obligation for the parties to try conciliation. The results of the conciliation meetings had to be recorded and the attempt of conciliation was a condition for bringing a claim before a court. If the judge ascertained at the first hearing, that no attempt has been made to reach conciliation, the proceeding was suspended and the judge must set up a conciliation procedure before using his/her ordinary powers and follow the usual procedure.

After the enactment of Law No. 183 of 2010, conciliation in labour disputes is no longer mandatory (Article 410 of the Civil Procedure Code). One of the parties can file a written request of conciliation to the other party, as an alternative to the judicial procedure, and the counterpart is free to accept or refuse this proposal. In case of acceptance to conciliate, the counterpart should send (within 20 days after receiving the written request of conciliation) to the Territorial Employment Office a statement specifying facts and reasons related to his/her claim. Within this time limit, each party is free to bring the case before the court. The Conciliation Board of the Territorial Employment Office, within 10

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[10] See on conciliation in the Italian legal system O. Dessi: *L'indisponibilità dei diritti del lavoratore secondo l'art. 2113* c.c. Torino, Giappichelli, 2011. 173. ff.

days from receiving the conciliation request from the parties, sets a date for meeting the parties and the board has to terminate the conciliation procedure after 30 days. If the conciliation succeeds, the Conciliation Board will make a minute containing all the terms of the conciliation agreement and this agreement will be binding and enforceable.

As it has been mentioned, the aim of Law No. 183 of 2010 was to reduce the judicial workload and to shorten the duration of the processes. Why then conciliation has been defined as voluntary and not mandatory anymore? Statistics has demonstrated that the previous mandatory conciliation in employment disputes had very little incidence in reducing the number of labour court disputes. Besides, mandatory conciliation had the effect of extending *de facto* the duration of the process in labour disputes. Simply parties did not believe in conciliation and let the time pass without really trying to conciliate, just because it was a procedural obligation. In this legal framework, mandatory conciliation has been considered as a way of adding an extra burden to the ordinary judicial procedure, mostly simply extending the duration of a procedure.

Presently, even in this new regime of voluntary conciliation, there are still some mandatory cases of conciliation:

a) First, conciliation is mandatory in those cases, where the contract of employment has been certificated. Certification[11] is a special voluntary procedure by which the parties of the contract of employment may certify either the qualification of the contract of employment (as subordinated or autonomous) or other contract clauses (such as legitimate dismissal). Only qualified certification commissions, composed by labour law experts, can certify the contracts of employment. The certification procedure has been introduced in 2003 (Legislative Decree No. 276 of 2003) with the explicit aim of reducing the judicial workload, on the basis of the idea, that once the parties have certificated the contract, or the qualification given to it, they would avoid any possible conflict on relevant issues. It is nonetheless possible to go to a court, when the certification is wrong, or when the way the employment relationship has been conducted contradicts the qualification given at the moment of certification (a worker has been qualified as autonomous, whereas was in reality an employee). In this case, before going to court, the parties are obliged to attempt conciliation before the same certification commission.

b) Second, conciliation is mandatory in individual dismissal cases based on an economic reason under Law No. 192 of 2012. In companies employing more than 15 employees at plant level, or 60 at national level, the employer willing to dismiss an employee for economic reasons, shall communicate his/her will to the Territorial Employment Office, specifying the economic reason. Within 6 days from receiving the communication, the employer and the employee are invited by the director of the Territorial Employment Office and are obliged to try to find an alternative solution to dismissal. The common alternative solution to dismissal is a consensual termination of

[11] L. Nogler: La certificazione dei contratti di lavoro. *Giornale di diritto del lavoro e delle relazioni industriali*, 2003. 203. ff.

employment with a resignation incentive (apart from unemployment benefits for workers). If the conciliation attempt fails, the employer can nonetheless proceed, but the attempt of conciliation is important. However, the judge will take into account the behaviour of the parties during the conciliation procedure, when, at the end of the process, he/she defines the dismissal indemnities. The less the employer has collaborated in conciliation to find an alternative solution, the more he/she will pay dismissal indemnities; respectively the less the employee has collaborated in conciliation in accepting reasonable solutions, the less he/she will receive dismissal incentives.

When we analyse the results of a conciliation agreement, we should underline that labour law is made, in a relevant part, by norms that cannot be derogated by the individual. Worker's rights, in particular, are rights that are not at his/her disposal neither individually, given the worker's weakness, nor through a mediation process. In Italian labour law it is admissible only in limited cases that worker's rights can be derogated through a conciliation procedure: this is the case of administrative conciliation or before the certification board. The reason for this exception is, that worker's will to derogate, in these cases, is considered genuine, since it is a will formed with the assistance of trade union representatives, who are members of the conciliation board. The protection of the worker as a weaker party of the contract is then guaranteed by the assistance of trade union representatives.

4.2 Mediation

Mediation is defined by Article 3 of Directive 2008/52/EC as a structured process, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties, respectively suggested or ordered by a court or prescribed by the law of a Member State. Directive 2008/52/EC states some fundamental principles, such as the Directive should not prejudice national legislation making the use of mediation compulsory or subject to incentives or sanctions, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.

As far as the areas in which mediation should apply, these are mainly civil and commercial matters. Labour law is not excluded as such from the scope of the Directive on mediation, but the fundamental criterion, in order to distinguish if a dispute can be settled through a mediation procedure, is indicated by the Directive. Mediation should not apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law. Such rights and obligations are particularly frequent in family law and employment law (whereas Article 10 of Directive 2008/52/EC). That is why employment law is in principle excluded from the scope of the Directive on the basis of the nature of the rights and obligations involved.

The Directive on mediation has been implemented in Italy through Decree No. 28 of 2010, modified by law No. 98 of 2013, following a Constitutional Court ruling (No. 272/2012). Labour law is excluded from the scope of mediation legislation on the basis of the nature of the rights and obligations involved, as it has been mentioned above. From a comparative point of view, we could nonetheless say, that in any conciliation procedure there is a mediation before a conciliation agreement is reached, so any comparison should be made between conciliation and mediation in different countries, provided that conciliation and mediation sometimes are interchangeable.

Mediation could be a) non-compulsory and it applies to any civil and commercial litigation; b) compulsory and it applies to any possible dispute related to insurance, banking and financial agreements, joint ownership, property rights, division of assets, inheritance and family law, leases in general, gratuitous loans, leases of going concerns, medical liability or defamation, and for motor/vehicles insurances and property disputes (since March 2012).

Mandatory mediation in employment disputes is not legitimate for the reasons we have exposed. First of all, it could endanger the right to defence before a judiciary authority, as established by Article 27 of the Italian Constitution. Second, it risks to be the Troian horse, that could put into question one of the pillars of labour law, that is the necessity to protect the weaker party of the employment relationship, through a set of rights that cannot be waived.

4.3 Assisted negotiation

Assisted negotiation is another form of ADR, which is very close to mediation, and it was introduced in the Italian legal system by Law No. 162/2014. Assisted negotiation is the activity aimed at a friendly settlement of the dispute committed to a third and impartial person, through the involvement of the parties' respective lawyers. It can be voluntary (Article 2 of the Law No. 162/2014) or mandatory (Article 3 of the Law No. 162/2014). It is mandatory in case of dispute concerning: (i) the request for compensation of damages arising from service of vehicles and boats, regardless of the value of the dispute; (ii) the payment, for any reason, of amounts below 50,000 euros. In these cases the assisted negotiation proceeding is a condition of the action. The impossibility of the judicial action to continue has to be raised by the defendant or noticed by the judge no later than the first hearing.

Employment disputes are explicitly excluded from the scope of the Law 162/2014. The reason is again very simple: labour law norms are in many cases imperative norms that cannot be derogated by the parties of the contract of employment, through individual agreements.

4.4 Arbitration clauses in contracts of employment

Law No. 183 of 2010[12] has been one of the most controversial laws in recent times, which contains different provisions to reduce judicial workload in employment disputes. The most controversial provision is contained in Article 31, saying that the parties of an employment contract may include an arbitration clause in the contract, by which they are obliged to have recourse to arbitration to settle any future disputes. The original draft of the law stated that arbitration could be based on equity, however, the approved version, after a strong debate and the opposition of the President of the Republic on this point, states that arbitration cannot be based on equity and the arbitration clause cannot be included at the moment of signing the contract of employment; rather, it should be agreed and signed after probationary period or, failing this, 30 days after the beginning of the employment relationship. The arbitration clause can be included in the employment contract only if a collective agreement expressly allows it.

This provision is an example of the ideological context in which this law has been enacted. Through arbitration clauses it is possible to undermine the regulatory power of the law and this way the major protection of the worker, who cannot count on a judgement with a judge subject to the law, but only on an arbiter subject to the general principles of labour law.

5. Some concluding remarks

What is at stake, when a legislator introduces ADR procedures like mediation, conciliation or arbitration in employment disputes, especially when some of them are mandatory? In most of the cases, the declared objective is the reduction of the judicial workload and the reduction of the length of legal proceedings. The objective of reducing the judicial workload is a myth on the sake of which the need of justice can be sacrificed?

We should think about very carefully on the pros and cons of each policy and, most of all, evaluate who gets the more advantages from certain choices: workers or enterprises? The displacement of employment disputes from tribunals to private institutions in most cases is a way of reducing the judicial control over employment disputes in which employers' only need is to have certainty about costs. It is not a matter of justice in theoretical terms, but rather a question of predictable times and costs. We must admit that, at least in the Italian judiciary system, neither the first nor the second are guaranteed.

That is why, for example, a new legislation on dismissal has been recently introduced by the Renzi Government (see the so called Jobs Act, Law No. 183 of 2014 and the following legislative Decree No.

12 See M. Tiraboschi: Collegato lavoro. *Commento alla legge 4 Novembre* 2010, n. 183, I libri del Sole 24 Ore, Ed. Gruppo 24 ore, 2011.

23 of 2015) with the aim to anticipate the cost of dismissal disputes and guarantee the calculability of the firing costs. The employer knows from the start, that if a dismissal is invalid, except for some special cases (like discriminatory dismissals), he/she will have to pay an allowance calculated on the basis of the seniority of the employee. The judge is transformed into a mere calculator of the damages due to the employee, and no judge's evaluation on the proportionality of the dismissal and the infringement of the contract obligations, deemed violated by the employee, is possible.

We can identify the same aim of limiting the judiciary role in another very controversial rule in the area of dismissal disputes. Article 6 of Legislative Decree No. 23 of 2015 provides, in fact, that in case of unfair dismissal, the employer can offer the employee a conciliation, before the conciliation board of the Territorial Employment Office or before the certification Commission, which consists in the payment of a sum calculated on the monthly salary for each year of seniority in the enterprise. The payment of the amount is due through a cheque on which the employee will not pay taxes. Accepting to this proposal of conciliation, the employee gives up to sue before a court his/her employer for unfair dismissal. What appears is, basically, that the will of the employee to seek for justice is overtly bought by a sum of money with the incentive of not paying taxes.

The same rationale, in attempting to push into an angle the judge's role in employment disputes, could be seen, when the law introduces ADR procedures as mandatory. Certainly, it is the economic and social context that could clarify what the real aims of the legislator are. Each legal system is free, of course, to choose the models of labour law that should be implemented, but it is clear that declaring of having a protective model of labour law, based on the fundamental protection of the weaker party of the contract of employment, is in contradiction with a choice of implementing a mandatory mediation, whereby the worker could be in the position of accepting to derogate rights and protections recognised by the law, when is lacking a real counterbalance of powers guaranteed either by a trade union or a judge. It is perfectly acceptable, that the excessive length of processes could endanger the needs of enterprises and that calculability of employment disputes' costs is essential for employers, who make their market choices counting on the certainty of law, but this should not go over certain limits. We should ask then, how much can we sacrifice justice, especially in dismissal laws[13], following the myth of certainty.

[13] See the still fundamental ideas expressed by H. Collins: *Justice in Dismissals. The law of termination of employment*. Oxford, OUP, 1992.