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1. Introduction

This article will examine whether settlement efforts and techniques used by arbitrators and mediators differ, to what extent and in which respects. In doing so it will discuss various techniques available in mediation and arbitration in order to encourage parties to settle their dispute. We will examine arbitration and mediation, and explore possibilities of settling the dispute at an earlier stage, particularly under the laws of the Czech Republic. The article will focus in particular on various techniques that are present in both proceedings and will discuss the pros and cons of using particular methods in arbitration and mediation.

2. Mediation under Czech Laws

Mediation, practised by registered mediators, is officially recognised in the Czech Republic and governed by Act No.202/2012 Coll., on mediation (Czech Mediation Act). The purpose of mediation is for the parties to reach a settlement with the assistance of a neutral and trusted person—a mediator. He or she supports communication between the parties and leads them in the course of mediation in order to help them to reach an amicable settlement to their dispute.

Mediation is perceived very positively by its users because it is consensual. In contrast to arbitration, and indeed court litigation, the mediator has no authority to impose any duties or solutions on the parties. Putting it simply, the mediator cannot decide the dispute. It is up to the parties alone to agree on a mutually favourable settlement.

There are, in general, three types of mediation: facilitative, evaluative and transformative. Despite their being well known to the readers of this journal, it is worth briefly introducing them. In facilitative mediation a mediator helps parties in settling their dispute and facilitates a discussion between them. In evaluative mediation mediators express their views and give an opinion on the subject matter. Finally, transformative mediation is based on the "empowerment" of each of the parties to the extent that this is possible, and the "recognition" by each of the parties of the other party's needs, interests, values and points of view.[1]

Which type of mediation is the most suitable? Unfortunately, there is no single or correct answer to this question. The suitability of a particular type of mediation would depend on many aspects—cultural, regional, mediator's background, etc. Many of the mediators in the Czech Republic are lawyers who are more likely to use evaluative mediation, within which they express their legal opinions on the case, than to use other types. On the other hand, some mediators believe that they should not influence the parties by disclosing their own proposals and recommendations; instead mediators should encourage the parties to come up with their own. Evaluative mediation is in some respects very close to the phase of arbitration when arbitrators encourage the parties to settle their dispute amicably.

[1] See *http://www.mediate.com/articles/zumeta.cfm* [Accessed 24 June 2016].

3. Arbitration under Czech Laws

Arbitration is also an alternative form of dispute resolution, but it leads to an authoritative determination of parties' rights and obligations. The primary role of the arbitrator is to be a judge, not a facilitator.

Arbitration in the Czech Republic is governed by Act No.216/1994 Coll., on arbitral proceedings and recognition of arbitral awards (Czech Arbitration Act). In contrast to mediation, arbitration is a voluntary process only at the very outset, when parties are free to agree (or not to agree) on an arbitration agreement (arbitration clause). Later on, arbitration proceedings can proceed even without one party's (further) consent or co-operation (provided certain conditions are met).

Arbitration and mediation are ADR methods, nowadays described also as "appropriate dispute resolution", as opposed to the traditional description of "alternative" dispute resolution. This illustrates the trend that arbitration and mediation (and their various combinations) tend to be the most popular ways of dispute resolution (at least for international commercial disputes).[2]

4. Encouraging the Parties to Settle: Different Ways to Reach the Same Objective?

Despite their differences, both arbitration and mediation have the potential to settle parties' disputes at an early stage of the proceedings. We now focus on this potential, mostly under Czech laws.

The Czech Arbitration Act s.24(1) provides that in the course of the arbitral proceedings, the arbitrator shall encourage the parties to settle their dispute amicably. The Rules of the Czech Arbitration Court are even more specific in this regard. Section 32 of the Rules states that, depending on the circumstances of the case, in each phase of the proceedings the arbitral tribunal is authorised to invite the parties to conclude an amicable settlement and to make proposals, recommendations and instigations that may, in the tribunal's view, contribute to such a settlement.

Settlement itself is an aim of mediation, so the existence of a specific provision is even less surprising. The Czech Mediation Act s.2(a), (f) states that mediation is a procedure for settling a dispute in the presence of one or more mediators who support communication between disputing parties in order to help them to reach an amicable settlement to their dispute through the conclusion of a mediation agreement (which governs parties' rights and obligations and settles the dispute).

Despite the fact that encouragement to reach a settlement is common to both mediation and arbitration, there are a number of differences which we now examine further.

Prejudice

The arbitrator's duty is to authoritatively decide the dispute. Thus, arbitrators form their preliminary views during the proceedings. An arbitrator might guide the parties to a settlement, during the course of which (in our view), the arbitrator is very likely to be prejudiced by his or her own view on what is right, what is in accordance with applicable law, and what is more generally fair in the current matter.

By contrast, the mediator does not decide anything; he only leads the parties in their efforts to settle their dispute. The mediator will be less likely than an arbitrator to be biased by his own views during the process. Therefore, the mediator's recommendation could be perceived as more neutral and genuine by the parties.

[2] See also *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (London: White & Case and Queen Mary University of London, 2015), p.5, *http://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015.pdf* [Accessed 24 June 2016].

Scope of issues

Another difference is that whereas an arbitrator aims to narrow the issues to be ruled on, the mediator widens the topics for discussion; the mediator encourages the parties to discover yet another layer of their dispute (past injustice and wrong, hurt feelings, etc.). The mediator can obtain a broader picture than an arbitrator who is, in fact, limited by the parties' submissions.

The arbitrator has jurisdiction to decide only the particular matter which was brought by the parties in front of him; he cannot decide either more or less than asked for by the parties. This does not apply to a mediator, who is more flexible in conducting mediation.

Tools

The arbitrator's tools for encouraging parties to reach a settlement are typically procedural. The arbitrator can present the parties with his view on the length of the arbitral proceedings and related costs. He or she can also, for example, indicate the need to hire an independent expert—which leads to further costs. So the indication of the likely time and costs of the proceedings is usually a significant factor in the parties' evaluation of the pros and cons of a possible settlement.

Moreover, arbitrators can indicate which questions and issues they are able to decide and which points of contention are still open and, typically, need to be evidenced. Mediators use different techniques in their efforts to encourage parties to reach a settlement, including active listening, paraphrasing, summarising, clarifying and reflecting. Mediators, unlike arbitrators, focus on parties' interests rather than their positions. Mediators tend to explore future potential co-operation, rather than trying just to solve the current dispute.

In mediation, expressing emotions can help in discovering what underlies a dispute, and what might not be visible at first sight. For example, an apology instead of the substantial damages originally claimed may suffice. However, expressing emotions is generally not encouraged in arbitration.

For various reasons, not all of the techniques available in mediation, or at least not in their full range, are readily available to an arbitrator. The most typical is a caucus, that is a separate session with each of the parties, which is a technique frequently used in mediation. However, if an arbitrator held a caucus, it would be considered as a breach of a fair trial and it might lead to questions about his impartiality.[3] Furthermore, an arbitrator should not use active listening to the same extent as a mediator, as it might be viewed as an attempt to help one party.

5. Right to be Instructed

One of the ways in which arbitrators can emphasise the need for settlement is by exercising their duty to provide parties with instruction and/or information[4] under Czech law, i.e. to state their legal opinion on the issues in question. The obligation is not far reaching—it does not apply in situations where there are enough facts and sufficient evidence in place to decide the case.[5] At the end of the proceedings (it should be avoided during the course of the proceedings), an arbitrator can summarise the case and inform the parties that he or she is ready to deliver a decision but emphasise that due to the differences between the parties' legal views and the arbitrator's own views, at least one (if not both) parties might

[3] With the potential negative consequences of endangering the arbitral award because of the possibility that it might be set aside by the court, or that there might be a refusal to enforce it if a party did not comply voluntarily.

[4] Czech Arbitration Act s.30 in connection with the Czech Procedural Code (Act No.99/1963 Coll.) s.118a.

[5] M. Olík, M. Maisner, R. Pokorný, P. Málek and M. Janoušek, *Commentary on the Czech Arbitration Act* (Prague: Wolters Kluwer, 2015), p.132.

find the award disappointing. This can give a clear message to the parties that a mutually agreed settlement can still be a win-win solution for both parties.[6]

Views vary as to the extent to which an arbitral tribunal should be active in settlement talks and to what extent it should be passive. However, it is clear that a tribunal should at least provide the parties with an opportunity to discuss a settlement in accordance with the Czech Arbitration Act s.24(1). Not providing this opportunity could also potentially lead to the setting aside[7] of the award by the court.[8]

6. Conclusion

To conclude, techniques used in arbitration and mediation for persuading parties to settle a dispute at an earlier stage of proceedings can overlap to a certain extent, but cannot be automatically used during both processes without further consideration. There are necessary adjustments to be adopted for each method, and particular legal provisions also have to be taken into account.

If a (legal) practitioner is active in both arbitration and mediation, he or she can benefit from having knowledge of all the techniques mentioned above. The downside is that the practitioner needs to be extremely careful in selecting which technique to use and to be aware of the capacity in which he or she is using it. Ideally, the practitioner would be able to find the right balance between the techniques and utilise most of them for the benefit of the parties, i.e. the users of the dispute resolution system.

[6] Olík et al., *Commentary on the Czech Arbitration Act* (2015), p.133.
[7] Czech Arbitration Act s.27.
[8] A. Belohlávek, *Commentary on the Czech Arbitration Act* (Prague: C.H. Beck, 2004), p.192.